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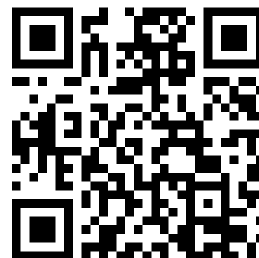

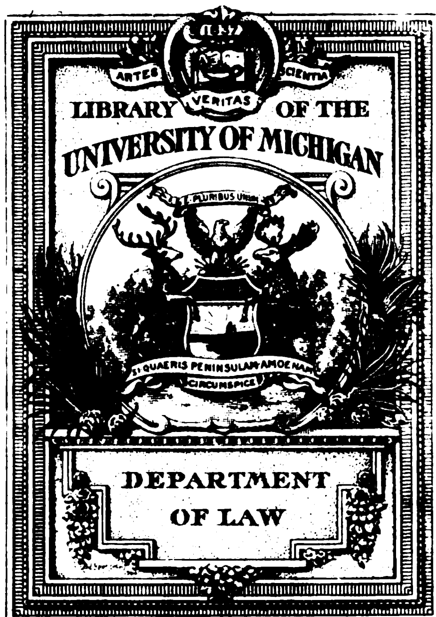

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C. P. COOP
LINCOLN'S

THE CIVIL LAW IN ITS Natural ORDER:

Together with the

PUBLICK LAW.

Written in FRENCH by

MONSIEUR *DOMAT*,

The late *French* King's Advocate in the Presidial Court of CLERMONT in FRANCE:

And Translated into ENGLISH by

WILLIAM STRAHAN, LL.D.

Advocate in DOCTORS COMMONS.

With Additional REMARKS on some Material Differences between the CIVIL LAW and the LAW OF *ENGLAND*.

VOL. II.

Turpe esse Patricio, & Nobili, & Causas oranti, Jus, in quo versaretur, ignorare. L. 2. §. 43. Dig. de Origine Juris.

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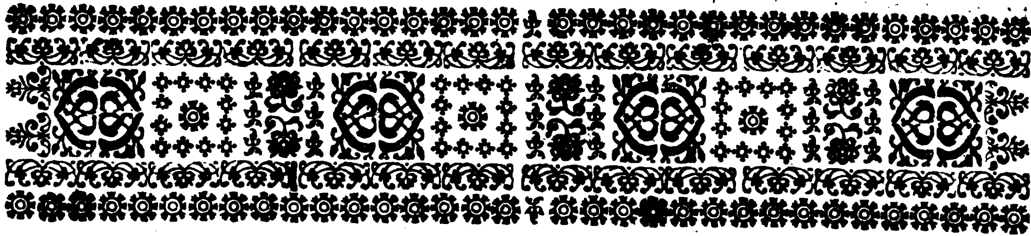
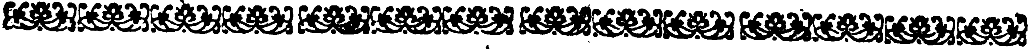


THE CIVIL LAW, IN ITS NATURAL ORDER.



PART II. Of SUCCESSIONS.

BOOK III. *Of Testamentary Successions.*

THE general Reflections which might be made here on the Subject-Matter of Testamentary Successions, before we enter on the particular Detail thereof, having been necessary, and more properly set down in another Place, it is not proper to repeat any of them here; and it is sufficient to advertise the Reader, that he may see on this Subject what has been said of it in the foregoing Preface *a*.

Neither is it proper to repeat here what has been said in the Preamble of the Second Book, to give an account why we have thought it fitting to treat of the Succession to Intestates before the Testamentary Successions, although these are explained in the first place in the *Roman* Law.

TIT. I. *Of Testaments.*

IN the *Roman* Law, and in the Provinces of *France*, which are govern'd by the written Law, the Name of Testament, in the proper

a See the said Preface, n. 5. and the following.

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Signification of it, is applied only to Dispositions, which contain the Institution and Appointment of an Heir or Executor; and all the other Dispositions, in which there is no Heir or Executor named, are call'd *Codicils*, or *Donations* made in prospect of Death.

According to this Distinction of Testaments and Codicils, or Donations in prospect of Death, there ought to be no Testaments at all in the Provinces which are governed by their Customs, but only Codicils, or Donations in prospect of Death; because in the Customs there can be no other Heirs but those of Blood, and they give only the Name of universal Legataries to the Persons who succeed to all the Goods which one has power to dispose of by Will. But nevertheless, they do give the Name of Testaments to Dispositions made in view of Death, which contain only particular Legacies: And with much more reason may we give the Name of Testaments to the Dispositions which name universal Legataries, seeing they are bound for the Charges in proportion to the Share which they have of the Goods, in the same manner as if they were Heirs or Executors, and that they may even have all the Goods in the Customs where the Testator is at Liberty to dispose of all his Acquests, and of all his Moveables, if the Testator were a Person whose Estate consisted wholly of Goods of these two kinds, and who had no Estate of Inheritance which came to him by Descent from his Ancestors.

We make here this Remark, to advertise the Reader, that we shall in the Sequel of this Work use the word Testament both in the one and the other of these two Senses, which comprehend all the Dispositions that are made in view of Death; but we shall do it in such a manner, that it will be easy to distinguish in each Place whether it ought to be understood either barely of Dispositions which contain the Institution of an Executor, or only of the others.

We have not inserted in this Title that Rule of the *Roman* Law, That the Power of making a Testament, is part of the publick Law *a*. For besides that in all the Customs it is on the contrary receiv'd as the universal, and as it were publick Law, that no one can make a Testament, that is, an Institution of an Heir or Executor; we ascribe, properly speaking, this Character of publick Law only to what relates to Matters in which the Publick has an Interest, such as Matters belonging to the Exchequer, Matters criminal, and others of the like nature *b*. And altho it be true, that the Power of making a Testament being established and regulated by the Laws which make one of the principal Parts of the universal Order of human Society, it may be said in this Sense that the Power of making a Testament is part of the publick Law; yet the Nature of Testaments is not thereby distinguished from that of many other Matters, which are as much or more necessary in this Order of Society than Testaments; such as several sorts of Covenants, Guardianships, and others, the Use of which is established and regulated by the Laws. Thus Testaments are no more a part of the publick Law, than Guardianships and other Matters; unless that any one should think that it might be said that Testaments were in another Sense part of the publick Law under the *Roman* Law, because at first People were allowed to make their Testaments in the publick Assemblies *c*. But it does not seem as if this were the Reason why it is said in the *Roman* Law, that Testaments are part of the publick Law, because there were other Ways of making one's Testament in private, even whilst that other Way was in use.

a Testamenti factio non privati, sed publici juris est. *l. 3. ff. qui test. fac. poss.*

b *See the* xivth *Chap. of the Treatise of Laws.* n. 27.

c Calatis comitiis. §. 1. *Inst. de test. ord.*

SECT. I.

Of the Nature of Testaments, and their Kinds.

Testaments wholly written with the Testator's Hand.

IT is fit to acquaint the Reader, that he will find nothing in this Section concerning that Kind of Testaments which are called *Holographe*, that is, entirely written and signed with the Testator's Hand, without any Witnesses. For altho they have been approved by a Novel of *Theodosius* and *Valentinian a*, and that the Proof of the Testator's Will may be fully as authentick, or rather more, by his Writing, than by his Declaration before Witnesses; yet since the Testaments written with the Testator's own Hand, without Witnesses, are not of universal Usage, and that they are not received in the *Roman* Law but

a Nov. 2. §. 1. de Testam.

with

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with the Testimony of seven Witnesses, the Testator being dispensed with there only from signing it with his own hand *b*, we have not thought proper to set down here a Rule concerning the use of these Testaments without Witnesses, contrary to the express Provision of the *Roman* Law received in many Places.

Testaments of poor Country People.

Neither shall we make any mention in this Section of the Testaments of poor Country People, which are called *Testamenta Rusticorum*, in which the Laws dispense with the exact Observance of the Formalities, as appears by the last Law *Cod. de Testam.* For as the Privilege which that Law gives for these sorts of Testaments, is only to dispense with the number of seven Witnesses, in the Places where so many Persons cannot be found, who know how to write their Names, and to make the number of five Witnesses sufficient in this case; so this Privilege seems altogether useless according to our Usage in *France*, which requires the Presence of a Publick Notary with Witnesses, and where it is not necessary that the Witnesses be Persons who can write. But there is seldom want of such Witnesses in a Place where there are Publick Notaries.

Testaments among Children.

There is likewise another kind of Testaments, which we have thought fit to leave out in this Section, which is that of Testaments among Children, that is to say, Dispositions which a Father makes among his Children, whether by way of Testament, or by way of Partition. This kind of Testaments is distinguished from all the others for this reason, because such Wills were so favourable in the *Roman* Law, that in whatever manner a Father explained his Intention of dividing his Estate among his Children, whether by a Testament begun and not finished, *sive cœptum, neque impletum Testamentum*, or by a Letter, *sive per epistolam*, or by any other Writing whatsoever, *sive quocunque alio modo scripturæ, quibuscunque verbis vel indiciis inveniantur relicta*; this Will, altho ever so imperfect and void of Form, was nevertheless to be executed *c*. This seems to proceed from the same Spirit of the *Roman* Law which gave Fathers such an absolute Authority over their Children, that at first they had power to disinherit them without any cause, as has been observed in another Place *d*. This Licence given to Fathers in making their Wills among their Children, does not seem to be founded on the Favour of the Childrens Interest, since on the contrary it is the common Interest of the Children, that their Fathers should preserve the natural Equality among them. Thus the Consideration of the Children is not a Motive that renders the Wills of Parents favourable, when they give greater Advantages to some of their Children than to the others. And if this Favour of the Children were to be considered in the Difficulties that arise concerning Wills made by Fathers among their Children, it would help rather to annul them if they are defective in point of Form, than to supply the want of Formalities, in order to make them valid, when they destroy that Equality which is to preserve Union among Brothers.

This excessive Licence in the imperfect Wills of Fathers among their Children was restrained by *Justinian*, who by his 18th *Novel*, *c.* 7. ordains, That they should be signed either by the Father, or by the Children. And by his 107th *Novel* he added, That the Father should write with his own Hand the Date, the Names of his Children; and that he should likewise set down with his own Hand, at length, and not in Numbers, or Cyphers, the Portions which he should regulate for every one. But altho it seems that all these Precautions ought to suffice to make these Testaments valid, even without Witnesses; yet many Interpreters have been of opinion that none of these Laws dispense with the Necessity of Witnesses. And he that is reckoned the most able of the said Interpreters, being consulted in a Question concerning the Validity of a Father's Testament among his Children, was of opinion, that the Number of Witnesses was necessary; and that all Testaments of Fathers among their Children without this Formality, are null; and gives particular Answers to all the Laws above-mention'd, to shew that none of them dispense with this Formality.

It is upon these Considerations, that altho the Use of these Testaments, or Partitions, among Children, is receiv'd in some Provinces, and that they are there approved of, altho they want the Formalities, yet seeing this is not an universal Usage, we have not thought proper to lay it down here as a general Rule, that the imperfect and unformed Will of a Father among his Children ought to subsist: For this would be a Law too uncertain and undetermin'd, since

b l. 28. §. 1. C. de Testam.

c V. l. 16. 21. & l. ult. C. fam. ercisc. l. 21. §. 1. C. de Testam.

d See the Preface to this Second Part, num. 7.

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ſince it would leave Fathers at liberty to diſpenſe with all ſorts of Formalities in their Teſtaments, ſo as that there could be no Teſtament ſo imperfect, but what would be made valid in this manner, if we ſhould give to the Words of theſe Laws the indefinite Extent which they ſeem to have, and which does no ways agree with the Character of Plainneſs and Clearneſs, that is neceſſary to make Rules certain and fixed as they ought to be. So that it is to be wiſhed that there were, in relation to this Matter, ſome fixed Rules, which might either ſubject theſe Teſtaments to the Formalities of others, or regulate the Formalities that cannot be diſpenſed with in them; as has been done in the Cuſtoms of ſome Provinces, which have regulated the Formalities of Partitions made by Fathers among their Children. In ſome Cuſtoms theſe Partitions are not received unleſs the Children have conſented to them; others require in ſuch Partitions the Preſence of a Publick Notary, and two Witneſſes, as in all other Teſtaments; it having been judg'd neceſſary, that an Act ſo ſerious, and of ſuch Importance, as a Teſtament among Children, ſhould be made with as much Application and Exactneſs as a Teſtament which calls Strangers to be Heirs or Executors; but eſpecially when a Father will make unequal Partitions among his Children, and when there is leſs Inconvenience in favouring the Equality among Children, and in requiring in the Wills of Fathers Formalities that are eaſy, than to approve without diſtinction the imperfect and undigeſted Wills of Parents, which perhaps are only rude Draughts of what they project in their Imaginations, without coming to a final Reſolution therein, and which give occaſion of Strife and Contention among the Children.

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I.

A Teſtament is an Inſtitution or Appointment of an Heir or Executor, made according to the Formalities preſcribed by Law; whether that together with the ſaid Inſtitution there be any other Diſpoſition, or that there be nothing in it beſides the bare Inſtitution *a*.

1. *Definition of a Teſtament.*

a Quinque verbis poteſt (quis) facere teſtamentum; ut dicat Lucius Titius mihi hæres eſto. *l.* 1. §. 3. *ff. de hared. inſt.*

Teſtamentum eſt voluntatis noſtræ juſta ſententia de eo quod quis poſt mortem ſuam fieri velit. *l.* 1. *ff. qui teſt. fac. poſſ.*

It follows from the firſt of theſe Texts, that the eſſential part of a Teſtament is the Inſtitution of an Heir or Executor, ſeeing theſe Words, I will that ſuch a one be my Heir or Executor, *make a Teſtament.*

[The word *Heir* hath not altogether the ſame Signification in the Law of *England*, that it hath in the Civil Law. For by the Common Law of *England*, he is only *Heir* which ſucceedeth by Right of Blood; and a Man cannot, properly ſpeaking, be Heir to Goods and Chattels, but only to ſome Eſtate of Inheritance. *Coke* 1 *Inſt. fol.* 7. *b.* 237. *b.* However, ſeeing the Civil Law uſes the Word *Heir* promiſcuouſly in Teſtaments, as well as Deſcents, we are obliged, in ſpeaking of Teſtaments, to make uſe of the Word *Heir*, as well as that of *Executor*, for the better underſtanding of the Texts of the Civil Law, which are quoted in the Notes upon the ſeveral Articles. But the *Engliſh* Reader will obſerve, that whenever the Word *Heir* is uſed in the matter of Teſtaments, it is to be underſtood only of the *Teſtamentary Heir*, not of the *Heir of Blood*.]

The Interpreters are divided among themſelves upon this Queſtion, whether the Definition of a Teſtament, as it is ſet down in the ſecond Text here quoted, be ſo juſt and exact as a Definition ought to be. And many, even of thoſe of the greateſt Learning among them, undertake the Defence of it againſt thoſe who ſay it is not exact. As to which we may ſay, that if the Authors of the Laws have not always in their Definitions, and in their Expreſſions, that Juſtneſs and Exactneſs which Logicians and Mathematicians have; it is but juſt that that Defect ſhould be ſupplied, in order to give to the Laws the natural Senſe which one clearly ſees their Intention does demand. But ſeeing we endeavour

in

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in this Book to render every thing intelligible to every Reader, and to observe throughout the whole, as much as we are able, that Exactness; we have judged that, in order to give the just Idea of a Testament, and such as may distinguish it from other Dispositions made in prospect of Death, we ought to form the Definition of a Testament in the manner in which it is conceived in this Article. For whereas the other Dispositions are only of a part of the Goods, it is essential to a Testament, that there be named in it an Heir or Executor, who is the universal Successor. See the first Article of the first Sect. Of Heirs and Executors in general.

It is to be remarked on this Definition, that it does not agree with the Dispositions which People may make of their Estates in the Customs. For, as has been observed in the Preamble of this Title, one cannot have other Heirs in the Customs but the Heirs of Blood.

II.

2. The bare naming of an Executor makes a Testament.

It follows from this Definition of a Testament, that it comprehends two essential Characters necessary to be distinguish'd. One is, that it contains the Disposal of all the Testator's Goods; and the other is, that it is a Disposition made in view of Death, which may be revoked *b*. We shall explain in the two following Articles the Effects of these two Characters, and in what manner they are comprehended in the Definition explained in the first Article.

b This is a Consequence of the Definition of a Testament. See the two Articles which follow.

III.

3. The Testament implies the Disposal of all the Goods.

Since it is essential to a Testament, that it contain the Institution of an Heir or Executor, and that the Heir or Executor is universal Successor of all the Goods that are not particularly bequeathed, every Testament implies the Disposal of all the Goods; whether it be that the whole is left to the Heirs or Executors, or that others are to have a share with them: Which makes no Alteration in the Nature of a Testament; and all the different Dispositions that may happen to be in it, make only one Act, which contains a Declaration of the Testator's Will, as to the Disposal of all the Goods which he shall happen to leave behind him *c*.

c This is also a Consequence of the Definition. See the 1st Art. of the 1st Sect. Of Heirs and Executors in general.

IV.

4. The Testament hath its Effect only by the Death of the Testator.

The Testament is a Disposition made on occasion of Death, that is, made in the view that the Person who disposes of his Goods by Testament has of his own Death, and with design that his Disposition shall not have its Effect till after his Death: for it is only by this Death that the Heir or Executor has his right. From whence it follows, that the Testament having no effect till the Death of the Testator, he is always at liberty to revoke it, and either to change it by making another, or to destroy it quite by suppressing it, without making another. Thus, when there happen to be several Testaments of one and the same Person, it is always the last that ought to subsist, except in so far as this last Testament should ratify and confirm the Dispositions of the former *d*.

d De eo quod quis post mortem suam fieri velit. *l. 1. ff. qui test. fac. poss.*
Prius testamentum rumpitur cum posterius rite perfectum est. *l. 2. ff. de inj. rupt. irr. fact. test.*
Ambulatoria enim est voluntas defuncti usque ad vitæ supremum exitum, *l. 17. ff. de adim. vel transf. leg.*
Altho this last Text does not, strictly speaking, relate to what is said in this Article; yet nevertheless it may be applied to it.
See, touching the Nature of Dispositions because of Death, what has been said of that Matter in the Preamble of the Title of Donations, that have their effect in the Life-time of the Donor.

V.

5. The Heir of Blood is Testamentary Heir, if he is instituted.

Altho the Testator name no other Heir or Executor, but the Person who ought to succeed to him, if he died intestate; yet if he accepts the Inheritance or Succession, he shall be Testamentary Heir, and bound in this Quality to discharge the Legacies, and all the other Charges imposed by the Testament *e*; for it is only by this Title that he enjoys a Succession which the Testator might have left to others if he had pleased.

e See the 17th Article of the 5th Section, and the Texts which are there quoted.

VI.

6. The Testament ought to contain the Institution of an Heir or Executor.

Dispositions made in view of Death, which do not contain the Institution of an Heir or Executor, are not properly Testaments, but Codicils or Donations because of Death *f*.

f Codicillis hæreditas neque dari, neque adimi potest; ne confundatur jus testamentorum & codicillorum. *§. 2. inst. de codicill.*

VII.

7. The Will of the Testator is in place of a Law.

It follows from the Liberty which the Laws give to Persons to dispose of their Effects by a Testament, that all the Wills of a Testator, whether it be in what relates to the Appointment of an Heir or Executor, or the other particular Dispositions which he may have made, are in the place of Laws both to the

Executor,

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Executor, if he accepts of the Succession, and also to the Legataries, if they accept their Legacies *g*; but this is to be understood with this Reserve, that the Testator has ordained nothing contrary to Law or good Manners *h*. For with respect to the Testator, his Dispositions have the Authority of the Law, which permits him to make them; and as to those who receive any Benefit by a Testament, their Acceptance of it engages them to the Charges, which it may contain, in the same manner as if they had treated with the Testator, he leaving to them his Estate upon the Conditions, and with the Charges, which he has explained, and they accepting the Estate with those Charges; and in the same manner likewise as if they had treated with the Persons to whom the Testator engages them *i*.

g Verbis legis duodecim tabularum his, *uti legassit sua rei ita jus esto*, latissima potestas tributa videtur, & hæredes instituendi, & legata, & libertates dandi, tutelas quoque constituendi. Sed id, interpretatione coangustatum est, vel legum, vel auctoritate jura constituentium. *l.* 120. *ff. de verb. signif. inst. de leg. falcid.*

Disponat unusquisque super suis, ut dignum est, & sit lex ejus voluntas. *Nov.* 22. *c.* 2.

h Nemo potest in suo testamento cavere, ne leges in suo testamento locum habeant. *l.* 55. *ff. de legat.* 1.

Testandi causa de pecunia sua legibus certis facultas est permissa: non autem jurisdictionis mutare formam vel juri publico derogare, cuiquam permissum est. *l.* 13. *ff. de testam.*

Quæ facta lædunt pietatem, existimationem, verecundiam nostram, & ut generaliter dixerim contra bonos mores fiunt, nec facere nos posse credendum est. *l.* 15. *ff. de condit. instit.*

This indefinite Liberty of Testators is naturally restrained within the Bounds of what is not contrary to Law, as is said in the Article: And a Testator can ordain nothing that is contrary to the Disposition and Spirit of any Law. Thus, he cannot prohibit his Heirs or Executors to make Partition of his Estate. Thus, he cannot direct that a Substitution which he has made in his Testament, should not be published and inrolled. Thus, he cannot deprive his Children of their Legitime, or Child's Part.

i Quasi ex contractu debere intelligitur. §. 5. *in fin. Inst. de oblig. qua quasi ex contr. nasc.* Videtur impubes contrahere cum adiit hæreditatem. *L.* 3. *in fin. ff. quibus ex caus. in poss. eatur.*

See, touching the Engagement of the Heir, or Executor, the 8th Art. of the first Sect. of Heirs and Executors in general.

VIII.

8. The Testament ought to depend on the Will of no other Person but the Testator.

Since the Dispositions of a Testament have their effect by the Will of the Testator, which is in place of a Law; it is only from this Will that they have their Force. And if a Testator, instead of chusing and naming his Heir or Executor himself, had said in his Testament, that his Will was, that such a one should be his Heir or Executor, whom a certain Person, whom he should name, should chuse and call to his Succession; this Institution would be lame, and have no effect. For it would want the Character that is essential to a Testament, of containing the proper Will of the Testator, and not that of another Person. And it would be even contrary to Equity, that the Choice of an Heir or Executor should depend on any other Person than him who has the Right to dispose of his Estate: seeing on one hand the Testator may be deceived by that Person who after his Death may abuse in several respects the Confidence which the Testator has put in him; and on the other hand, he who should happen to be chose Heir, or Executor, would owe this Benefit less to the indefinite Will of the Testator, than to the Choice of him who had the Right to name the Heir or Executor *l*.

Swinb. 11. Blk. 309.

l Illa Institutio quos *Titius voluerit*, ideo vitiosa est quod alieno arbitrio permissa est. Nam satis constanter veteres decreverunt, testamentorum jura ipsa per se firma esse oportere: non ex alieno arbitrio pendere. *l.* 32. *ff. de hæred. instit.* See the 25th Art. of the 5th Sect. of this Title, and the Remark that is there made on it.

¶ Altho we have endeavour'd throout the whole of this Book to confine our selves to the Rules and Remarks that seemed necessary, and to abstain from every thing that is only matter of Curiosity; yet we cannot forbear to remark here, that there is among the Laws of *Spain* a Rule directly contrary to that which is explained in this Article. For there it is permitted to every one to name a Person to whom he gives power to make his Testament for him, and to dispose of his Goods after his Death, and to chuse for him such Heirs or Executors as he shall think fit. And whatsoever is ordered by this Person who is commissioned to make the Testament, whom they call *Cometido a fazer testamento*, is observed in the same manner as if the Deceased had ordained it; excepting only that he cannot name himself Heir or Executor, nor disinherit the Children or other Descendants of that Person whose Testament he makes, nor substitute to them by any manner of Substitution, nor name a Testator to them, unless he has express Power from the Deceased so to do. *V. la ley* 31. *de Toro, and the Additions to the Laws of* Alphonsus IX. *Part the 6th, Title of Testaments.*

IX. It

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IX.

9. Two sorts of Questions concerning Testaments: What the Testator had power to do, and what he had a mind to do.

It follows from the Rules explained in the foregoing Articles, that there are only two sorts of Questions that can arise from the Dispositions of a Testament, when it is made according to Form, and ought to subsist. One is of those where the Question is to know whether the Disposition of the Testator has nothing in it that is contrary to Law; and the other is of those where the Matter in question is to know what has been the Testator's Intention. For it is his Intention that ought to serve as a Rule, if it is not contrary to Law *m*.

m. Toties secundùm voluntatem testatoris facere compellitur (hæres) quoties contrà legem nihil sit futurum. *l. 37. ff. de cond. & dem.*

See, touching the Difficulties in the Interpretation of Testaments, the viith Section, and the others which follow.

X.

10. One cannot institute an Heir or Executor so, as that his Institution shall begin, or cease to be, after a certain time.

Since the Heir or Executor, that is named in a Testament, ought to be universal Successor to all the Goods, and all the Charges of the Deceased, a Testator cannot institute an Heir or Executor in Terms which limit the Institution, either not to take place but within a certain time after the Testator's Death, or to cease to have effect after a certain time which he has prescribed; so as that in the first Case the Succession should be without any Heir or Executor during all that time; and that in the second Case there should be no Heir or Executor after the time limited is expired. For it is essential to the Quality of Heir or Executor, that he take the place of the Deceased after his Death; and that the Succession do not remain vacant, and without a Master, who may prosecute the Rights, and acquit the Charges of it. But altho this Disposition should have no effect, yet the Testament which contains it would not be null for this single Defect, and the Heir or Executor would be reputed such from the time of the Testator's Death, and for all the time to come, as much as if the Institution had not been limited in this manner *n*.

n Hæreditas ex die, vel ad diem, non rectè datur: sed vitio temporis sublato, manet institutio, *l. 34. ff. de hæred. inst.*

It is not the same thing with respect to bare Legacies and Legacies in Trust, which may begin to be due, or cease, at a certain Day. For in this there is no manner of Inconvenience; the Right to the Thing bequeathed remaining with the Heir or Executor, whilst the Legatary has it not, and reverting to him when the Legatary ceases to have it.

This Rule is not contrary to that other, which permits the Testator to charge an Heir or Executor to deliver over the Succession after a certain Time to another Person, who succeeds in his place by a fiduciary Bequest, which we shall treat of in its proper place. For the Succession does not by this means remain vacant: And besides, this Heir or Executor, who restores the Inheritance, continues nevertheless to be Heir or Executor, and to be bound for the Charges, against which the Successor ought to indemnify him. See the viiith Article of the the first Section of Substitutions.

XI.

11. The Testament hath its effect by the Acceptance of the Heir or Executor.

Altho the Nature of the Testament, and its Validity, consists in this, that it contains the Will of the Testator, and that it is by this Will that it ought to have its effect; yet it hath its effect only when the Heir or Executor, accepting of this Quality, engages himself thereby to all the Dispositions of the Testator, and to all the Charges of the Inheritance *o*.

o Cùm semel adita est hæreditas, omnis defuncti voluntas rata constituitur. *l. 55. §. ad Senat. Trebell.* See the viith Article.

XII.

12. Divers kinds of Testaments.

There are Testaments of divers kinds, and which are distinguished, not by that which is essential to their Nature, which is the Institution of an Heir or Executor common to all Testaments, but by the different Formalities which the Laws have established for the Use of Persons, who have a mind to dispose of their Estates, according as these Formalities may agree either to the Quality of the Person, or to the Circumstances of the Condition in which he is, as will appear by the following Articles *p*.

p See the following Articles.

XIII.

13. Testaments of those who are blind, deaf, or dumb.

As to what concerns the Persons of the Testators, we may make one prime Distinction of Testaments, which may be made by those whom some Infirmities render incapable of certain Ways in which others may make their Testaments. Thus, Persons who are blind, deaf, or dumb, can make their Testaments only with such Formalities as they are capable of, as shall be explained in the following Section *q*.

q See the viith, viiith, ixth, xth, *and* xith *Articles of the following Section, and the Remarks on them.*

XIV.

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XIV.

14. Military Testaments.

The same Consideration of the Difference in Testators, furnishes us with another Distinction of Testaments that are made by Officers in the Army, and Soldiers, that are actually engaged in their military Functions, and taken up in such a manner that it were not possible for them to observe the Formalities which the Law prescribes in Testaments. For the Law dispenses with these Formalities in Persons who are in this Condition, that it is impossible for them to observe them, and facilitate their Dispositions, as shall be explained in the third Section *r*.

r See the xvth Article of the third Section.

XV.

15. Testaments in time of a Plague.

The same Consideration of the Conjunctures in which Testators cannot observe the Formalities necessary to a Testament, has induced the Lawgivers to dispense with those that are obliged to make their Testaments in a time of Plague, from observing therein rigorously all the Formalities which they have prescribed. We shall explain in the third Section the Temperament which they allow of whenever this Case happens *s*.

s See the xvith Article of the third Section.

XVI.

16. Secret Testaments.

Seeing a Testator may reasonably wish that his Will may be kept secret till after his Death, he may make a private and secret Testament in the manner that shall be explained in the third Section *t*.

t See the xviith Article of the third Section.

XVII.

17. Several Originals of one and the same Testament.

In what manner soever a Testament is made, the Testator may, if he pleases, make only one original Testament, or make two or more Originals, for the surer Preservation of his Will, depositing them in different Places, or keeping one Original in his own Custody, and depositing another in the hands of some other Person *u*.

u Unum testamentum pluribus exemplis consignare quis potest. Idque interdum necessarium est. Fortè si navigaturus & secum ferre, & relinquere judiciorum suorum testationem velit. *l. 24. ff. qui test. fac. poss.* See the ixth Article of the seventh Section.

XVIII.

18. The Testament is common to all Parties that have an Interest under it.

Seeing a Testament is a Title that belongs in common to the Heirs or Executors, to the Legatees, to the Persons who are substituted, or other Persons who have Interest in any of the Dispositions thereof; every one of those who may have any Interest under it, has a Right to have this Title in his Custody. But since they all cannot have the original Testament, every Person that has an Interest in it, may get a Copy of it written in due Form, and signed by the publick Officer that has the Custody of the Original; and such a Copy will serve in place of the Original *x*.

x Tabularum testamenti instrumentum non est unius hominis, hoc est hæredis, sed universorum quibus quid illic adscriptum est. *l. 2. ff. testam. quem aper. inspic. & descr.*

SECT. II.

Who may make a Testament, and who is capable of being Heir or Executor, or a Legatary.

THERE are two Things to be considered in a Testament, in order to know its Validity, and what Effect it may have. One is, to know whether the Person that has made the Testament had power to make one; and whether the Persons, in favour of whom the Testator has disposed of his Goods, are capable of receiving what is given them: And this shall be the Subject-matter of this Section. The other is, to know if the Testament is made according to Form; which shall be explained in the following Section *a*.

It is to be observed on the Subject-matter of this Section, that besides the Causes of Incapacity of receiving a Benefit by a Testament, which are here explained, we have in *France* two Rules which annul the Dispositions of some Persons made in favour of others, to whom it is prohibited to give any thing. One is of the Ordinance of *Francis* I. in the Year 1539. *Art.* 131. and of *Henry* II. in the Year 1549, *Art.* 2. which annuls all Donations, whether by Testament, or otherwise, that may be made by

a Si quæramus an valeat testamentum, imprimis animadvertere debemus, an is qui fecerit testamentum, habuerit testamenti factionem: deinde, si habuerit, requiremus an secundùm regulas juris testatus sit. *l. 4. ff. qui test. fac. poss.*

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by Minors to their Tutors, Curators, Guardians, and other Administrators, during their Administration, or to other Persons for their behoof. And the other is that of some Customs which forbid the Dispositions made by the Wife in favour of her Husband, or by the Husband in favour of his Wife; which some Customs restrain to the Dispositions of the Wife in favour of her Husband, and do not prohibit those of the Husband in favour of his Wife.

It may also be proper to observe, in relation to the Capacity of making a Will, that there are some Customs where a married Woman is not allowed to make her Will, unless it be with the Permission of her Husband, or that she had this Power given her by the Contract of Marriage.

We must remark here, with respect to the Incapacity of making a Will, that we have not set down in this Section a Rule of the *Roman* Law; which some Reader perhaps may find fault with, and therefore we have thought fit to give the reason why we have omitted it. It is that Rule which directs, that Persons who doubt of their State and Condition may not make a Will *b*: From which Rule Soldiers were excepted *c*, who had power to make their Will notwithstanding this Doubt. Thus he who was uncertain whether he was under his Father's Power, or emancipated, could not make a Testament *d*, because a Son that was still in his Father's Family could not make a Will.

We have judg'd it proper not to insert this Rule here: For in all appearance there can never happen any Case where it can be put in practice; and whenever there is a Testament, it is natural to presume that he who made it, did not doubt of his having power to make it; and one would not start the Question to know whether he was in this Doubt, or not. But even altho we should suppose that a Testator had some Reason to doubt of his Condition, and that he was really uncertain of it; would this Reason alone be sufficient to hinder him from making his Will? Thus, for example, if we suppose that a young Man of the Age of fourteen Years compleat, being out of his own Country, and not knowing precisely the Day of his Birth, should happen to fall sick, and should make a Testament, being uncertain whether he was of sufficient Age to make a Will, or not; but still thinking it better to make a Testament, that may be valid, if it should appear that he had the Age that was necessary, than to omit making one, because that the Testament which he should make, would be null, if it appeared that he was not of the Age that is required; would it be said of such a Testament, that it ought to be annulled, because the Testator was ignorant of a Fact, which, if he had known it, would have added nothing either to his Age, or to his Experience? But would ever any one think of demanding whether this young Man knew his own Age? And if any one should start this Doubt, which would appear very odd, would it not be sufficient, that this Testator had really the Age and Power requisite for making a Testament, to make it valid in these Circumstances? To which we may add, that since this Rule did not take in the Case of Soldiers, we may infer from thence that even the Authors of it did not look upon it to be a Rule of the Law of Nature: For in that Case it would not have been just to dispense with the Observance of it, even in Soldiers. But the Law of Nature demands that Truth should always have its Effect, and that he who has acquired a Right should not be deprived of it, under pretext that he doubts whether his Right be secure. This Effect of Truth has been found so just, even by the Authors of the Niceties in the *Roman* Law, that we see in a Law, that he who being his own Master, and free from his Father's Authority, and by that means capable of inheriting an Estate that had fallen to him, might inherit it, altho he not only doubted of his being his own Master, but was falsly persuaded of the contrary, thinking himself still to be under his Father's Power *e*. Thus they were convinced that Truth ought to supply not only a Doubt, but even an Error of this kind.

b *l.* 15. *ff. de test. mil.*
c *l.* 11. §. 1. *ff. eod.*
d *l.* 9. *ff. de jur. codicil.*

e *See l.* 21. *ff. de cond. & dem.*

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I.

1. Those who are under no Incapacity may make a Will.

TO know who are the Persons that have the power of making a Testament, or receiving any Benefit by one, it is necessary to know whom the Law has render'd incapable thereof: For whoever is under no Incapacity, is capable both of the one and the other *a*.

a Si quæramus an valeat testamentum, imprimis animadvertere debemus an is qui fecerit testamentum habuerit testamenti factionem. *l.* 4. *ff. qui test. fac. poss.*

II.

2. Males under 14, and Females under 12 Years of Age, cannot make a Will.

The Causes which render Persons incapable of making a Will, proceed from some one of those Qualities which have been explained in the Title of Persons; such as the Qualities of Unripeness of Age, of being a Foreigner, being under Sentence of Death, and others. Thus we may reckon, as the first Cause of Incapacity of making a Testament, the want of that Age which is called in the *Roman* Law *Pubertas*, that is, 14 Years compleat in Males, and 12 Years compleat in Females: For those that have not accomplished this Age cannot make a Will *b*. And altho even one that had made his Testament before he had attained fourteen Years of Age, should not die till a long time after, so that it might be said, that being of Age sufficient, and capable of making a Testament, he had approved of that which he had made when he was under Age by not altering it; yet this Testament being null in its Origin, would not be made valid by this Circumstance *c*.

b Testamentum facere non possunt impuberes quia nullum eorum animi judicium est. §. 1. *inst. quib. non est perm. fac. testam.*

It seems to have been a Doubt heretofore in the Roman *Law, whether Eunuchs could make a Will, because they could never attain to a true Puberty: And they were allowed to make a Will only at the Age of eighteen Years.* Spadones eo tempore testamentum facere possunt quo plerique pubescunt; id est, anno decimo octavo. *Paulus* 3. *Sent.* 4. 2. *But the Emperor* Constantine *allowed them to make their Wills at the same time that others did.* Eunuchis liceat facere testamentum, componere postremas exemplo omnium voluntates, conscribere codicillos, salva testamentorum observantia. *l.* 5. *Cod. qui test. fac. poss.*

A qua ætate testamentum vel masculi vel fœminæ facere possunt, videamus. Verius in masculis quidem quartum decimum annum spectandum: in fœminis verò duodecimum completum. Utrum autem excessisse debeat quis quartum decimum annum ut testamentum facere possit, an sufficit complesse? propone aliquem Kalendis Januariis natum, testamentum ipso natali suo fecisse, quarto decimo anno, an valeat testamentum? Dico valere. Plus arbitror, etiam si pridie Kalendarum fecerit, post sextam horam noctis, valere testamentum. Jam enim complessè videtur annum quartum decimum, ut Marciano videtur. *l.* 5. *ff. qui test. fac. poss. v. l.* 1. *ff. de manumiss.*

c Si filius familias aut pupillus tabulas testamenti fecerit, signaverit, secundum eas bonorum possessio dari non potest. Licet filius familias sui juris, aut pupillus pubes factus decesserit. Quia nullæ sunt tabulæ testamenti, quas is fecerit, qui testamenti faciendi facultatem non habuerit. *l.* 19. *ff. qui testam. fac. poss.*

¶ We have said in the Article, that it is necessary to have this Age complete, *annum completum*, as is said in the second of the Texts quoted here: But the Words following raise a Difficulty which we ought not to pass over in silence: For altho the natural Sense of these Words, *fourteen Years complete*, seems to require that the last Moment of the fourteenth Year should be expired, since it is only at that Moment that it is accomplished, yet what follows in the said Law

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Law appears to be contrary to it. For these Words, *utrum excessisse debeat, an sufficit complesse*, and the rest that follows, purporting that the Testament is good, if it is made on the Birth-Day, or even on the Eve thereof, intimate sufficiently that the Year is held for accomplished before the last Moment of it is expired, in what manner soever we understand the Eve of the Birth. For that may be understood two Ways: The one is, in counting the Eve of the Birth-Day according to the Computation of the Days of the Year; so that in the Case of one born the 1st Day of *January*, which is the Case of this Law, the Eve of the Birth-Day would be the last Day of *December*. The other Way is, in taking for the Eve of the Birth-Day the four and twenty Hours which precede the Moment of the said Birth.

It seems to be the first of these two Ways, to which this Law determines the Eve of the Birth-Day, since it supposes a Testament made in the Morning of the said Eve, without distinguishing at what Hour the Testator was born. So that since, according to the *Roman* Usage, the Day begins at Midnight *a*, it seems, that according to this Rule, a Testament might be good, altho it should precede the Moment of the Testator's Birth more than four and twenty Hours. For if we suppose, according to this Law, that the Birth-Day is the First of *January*, and that the Eve of the said Day begins from the Midnight of the foregoing Day, that is, at Midnight between the 30th and 31st of *December*; and that the Testator, born in the Afternoon of the First of *January*, makes his Will in the Morning of the 31st of *December*; it would seem that, according to the Terms of this Law, this Testament ought to be good, altho it preceded more than a whole Day the Moment of the Testator's Birth, since it would be true that it had been made on the Eve of the said Birth. But this seems neither to be regular, nor conformable to our Usage; as shall be shewn hereafter.

It may be observed, with respect to this way of holding the Year for accomplished in the beginning of the last Day, that it was not so in all sorts of Cases: For not only Prescriptions require the entire Accomplishment of the Year, as has been said in its Place; but even as to the Age which excuses one from being Tutor, it is necessary that the last Moment of the last Year should be expired *b*. In relation to which it may be said, that there would be as much or more Reason for excusing one from being Tutor in the last Day of his seventieth Year, as for granting leave to one to make a Testament on the last Day of his fourteenth Year. And as to what concerns the full Age for making a Testament, it seems that the Sense of this Word, of a *Year complete*, is understood according to our Usage of a Year expired, especially in the Customs: For those which fix the Age for making a Will, require the Years to be accomplished, altho those which mention any thing of the Matter, do none of them almost allow of the making of a Will before the Age of twenty Years in Sons, and eighteen in Daughters, even as to what other Estate they may have besides what has come to them by Descent; and as to what Estate they have inherited by Descent, they require five and twenty Years. So that the Spirit of these Customs is not to favour a Dispensation in point of Time: And likewise they do not insinuate, as this Law does, that the Year should be held for accomplished at the beginning of the last Day, and much less the Eve of it. Therefore we have restrained our selves in the Article, saying that it is necessary that the Age should be accomplish'd, that is, that they should have the Age which the Law requires: For this Expression might be accommodated even to those Usages, which should only demand that the last Day should be begun, taking it in the Sense of these Words of the second of the Texts quoted on this Article, *Utrum excessisse debeat, an sufficit complesse*. The Difficulty which has engaged us to make this Remark might be placed among the Number of those which may require some Regulation.

a V. l. 8. ff. de feriis.

b Excessisse oportet 70 annos. l. 2. ff. de excus. l. un. Cod. qui ætat.

[*Altho by the Law of* England *Males after* 14 *Years compleat, and Females after* 12, *may make a Testament of their Goods and Chattels; yet it is provided by the Statutes of the Realm, that no Person, whether Male or Female, shall have power to make a Testament of any Mannors, Lands, Tenements, or other Hereditaments, within the Age of* 21 *Years.* Stat. 34 Hen. 8. cap. 5. §. 14.]

III.

3. Sons who are still under their Fathers Authority cannot make a Will.

Sons who are still under their Fathers Power and Authority, not having been emancipated, cannot make a Testament *d*, unless it be to dispose of those sorts

d Qui in potestate parentis est, testamenti faciendi jus non habet. l. 6. ff. qui test. fac. poss.

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sorts of *Peculiar* Goods of which they are wholly and solely Masters, and which we have spoke of in its proper place *e*.

Nemo ex lege quam nuper promulgavimus in rebus quæ parentibus acquiri non possunt, existimet aliquid esse innovandum, aut permissum esse filiis familias cujuscumque gradus vel sexus testamenta facere, sive sine patris consensu bona possideant secundum nostræ legis distinctionem, sive cum eorum voluntate. *l. penult. C. qui test. fac. poss.*

e Omnes omnino quibus quasi castrensia peculia habere ex legibus concessum est, habeant licentiam in ea tantummodo ultima voluntate condere. *l. ult. C. eod.*

This Rule, with the Exception for these Peculiar Goods, is observed in some Customs.

See, touching these Peculiar Goods, and touching Emancipation, what has been said thereof in the Preamble of the iid *Section,* How Fathers succeed, *and in the* iiid *Article of the same Section.*

Altho it may seem that this Rule, which renders Sons who are still under the Paternal Power, uncapable of making a Testament, was in the Roman *Law a Consequence of this, that the Son who was still under his Father's Jurisdiction could acquire nothing but what belonged immediately to his Father, excepting those Peculiar Goods which are mentioned in the Article* *; *yet it appears by the second Text cited on this Article, that* Justinian, *who gave to Sons living still under the Fathers Power, the Property of the Goods which they might happen to acquire, leaving only to the Fathers the Usufruct of them, did not grant to them however the Power to dispose of any other Goods by Testament, besides those* Peculiums: *Which shews us that the Emperor* Justinian *was of opinion, that the Liberty of disposing of the said Peculiar Goods was not so much an Effect of the Right of Property, as of the Merit of the Son, who having rendered himself worthy of such an Acquisition, had likewise the Privilege to dispose thereof. And as for the other Goods, he could not become capable of disposing of them, but by Emancipation.*

* Filius familias testamentum facere non potest, quia nihil suum habet, ut de eo testari possit. Sed Divus Augustus Marcus constituit ut filius familias miles, de eo peculio quod in castris acquisivit testamentum facere possit. *Ulpian. tit.* 20. §. 10.

[*In* England, *a Son, altho still living under his Father's Power and Jurisdiction, may make a Will, and thereby dispose of his Personal Estate, if he is past fourteen Years of age.* Swinburn of Testaments, Part. 2. Sect. 23.]

IV.

4. Madmen cannot make a Testament, except in a lucid Interval.

Those who are in a State of Madness cannot make a Testament, unless it be that they have Intervals of Reason, which may suffice for such a Disposition, and that the Testament be begun and accomplished, in all its Formalities, in an Interval where the use of Reason has been perfectly free *f*.

f In eo qui testatur, ejus temporis quo testamentum facit, Integritas mentis, non corporis sanitas exigenda est. *l.* 2. *ff. qui test. fac. poss.*

Furiosum in suis judiciis ultimum condere elogium posse, licet ab antiquis dubitabatur, tamen & retro principibus, & nobis placuit. Nunc autem hoc decidendum est, quod simili modo antiquos animos movit: Si cœpto testamento furor eum invasit. Sancimus itaque tale testamentum hominis qui in ipso actu testamenti adversa valetudine tentus est, pro nihilo esse: Si vero voluerit in dilucidis intervallis aliquod condere testamentum, vel ultimam voluntatem, & hoc sana mente inceperit facere & consummaverit, nullo tali morbo interveniente, stare testamentum, sive quamcunque ultimam voluntatem censemus: si & alia omnia accesserint quæ in hujusmodi actibus legitima observatio requirit. *l.* 9. *C. qui test. fac. poss.* §. 1. *inst. quib. non est perm. fac. test.*

V.

5. Old Men, sick and infirm Persons, may make a Will.

The Infirmities of old Age, and Diseases which do not take away the Use of Reason, are no hinderance to those who are in that Condition to make their Will *g*.

g Senium quidem ætatis, vel ægritudinem corporis sinceritatem mentis tenentibus testamenti factionem certum est non auferre. *l.* 3. *C. qui test. fac. poss.*

In eo qui testatur, ejus temporis quo testamentum facit, integritas mentis non corporis sanitas exigenda est. *l.* 2. *ff. eod.*

There are some Customs where Dispositions made in view of Death are null, if the Persons who have made them have not survived three Months after making the said Dispositions. See the Preface to this second Part, num. vii.

VI.

6. A Prodigal cannot make a Testament.

Prodigals who are interdicted, being incapable of administring their Goods during their Life, are likewise incapable of disposing of them in view of Death. For the same Cause which deserves the Punishment of Interdiction, deserves likewise that of the Incapacity of making a Testament. And whether we consider the bad use that a Prodigal who is interdicted, may make of the Liberty to make a Will, or the Consequence of punishing him for his bad Conduct by depriving him of this Liberty, altho he might even make a good use of it, it is for the Interest of private Families, and also of the Publick, that a Person of so bad a Conduct as a Prodigal that is interdicted, should not have power to make a Will *h*.

h Is cui lege bonis interdictum est, testamentum facere non potest. Et si fecerit, ipso jure non valet. Quod tamen interdictione vetustius habuerit testamentum, hoc valebit. *l.* 18. *ff. qui test. fac. poss.* §. 2. *inst. quib. non est perm. fac. test.*

[*As the Interdiction of Prodigals is not in use in* England, *so we have no such Incapacity of making a Testament, as this of a Prodigal.* Swinburn of Testaments, Part. 2. §. 23.]

¶ With respect to this Matter of a Prodigal's Testament, we may distinguish between that which he makes after his Interdiction, and that which he may have made before. And the Emperor *Leon*, in his 39th *Novel*, makes even a Distinction of the Testaments which Prodi-

Prodigals make after their Interdiction, approving those which are reasonable, and rejecting the others. But besides that the *Novels* of the Emperor *Leon* are not receiv'd in *France*, this Distinction serves only to raise Law-Suits: And it is easier and more equitable to annul without distinction every Testament made by a Prodigal after his Interdiction. But as to the Testament made before the Interdiction, there is greater difficulty to know if it ought to subsist. And altho the Question be decided by the Texts cited on this Article, which determine that this Testament should have its Effect; yet it will not be amiss to consider some Inconveniencies that may follow from this Rule. For as it is certain that Prodigals are interdicted only for their bad Conduct, which has preceded the Interdiction, and that it is because of this bad Conduct that they are incapable of making a Testament; so the same Reason which requires that the Testament made after the Interdiction should be annulled, seems likewise to demand that the Testament made before the Interdiction should also be annulled. For it is natural to presume, that since a Prodigal never thinks of making a Testament, unless he is put upon it by other Persons; so he would not have made his Will but by the Influence of his Accomplices in his Debaucheries, and in their Favour. And it might likewise happen, that a Testament which ought to be altered because of the Changes that may have happened in the Family of the Prodigal after his Interdiction, could not nevertheless be reformed, because the Prodigal after his Interdiction being incapable of making a Will, he could not make any new Dispositions.

VII.

7. He who is both deaf and dumb cannot make a Will.

He who is both deaf and dumb, whether from his Birth or otherwise, and who can neither write or read, being incapable of giving any Sign of his Will, is incapable of making a Testament. But if one, who during the time that he was neither deaf nor dumb, had made a Testament in due Form, happens afterwards to fall under these two Infirmities, altho this Accident renders him incapable of confirming his Will, or altering it if he would, yet the Testament which he had made in the time that he was capable of doing it, would still subsist *i*.

i Surdus, mutus testamentum facere non possunt. Sed si quis post testamentum factum valetudine, aut quolibet alio casu mutus, aut surdus esse coeperit, ratum nihilominus permanet testamentum. *l. 6. §. 1. ff. qui test. fac. poss.*

Sancimus si quis utroque morbo simul laboret, id est, ut neque audire, neque loqui possit, & hoc ex ipsa natura habeat, neque testamentum facere, neque codicillos, neque fidei commissum relinquere, neque mortis causa donationem celebrare concedatur. *l. 10. C. qui test. fac. poss.*

It appears from the first of these two Texts, that by the antient Law he who was only deaf without being dumb, and he who was only dumb without being deaf, could not make a Testament. Because he that was deaf could not hear the Persons whose Presence was necessary to the making of his Testament, and he that was dumb could not explain his Intention to the Witnesses. But they might make a Testament if they obtained leave from the Prince. V. l. 7. eod. *See the three following Articles.*

VIII.

8. If he knows how to write, he may make a Testament.

He who not having been born both deaf and dumb, should become so by some Accident after having learned to write, might make his Testament: For he might explain his Will, by writing it himself, and observing in it the Formalities which shall be explained in the third Section *l*.

l Surdus, mutus testamentum facere non possunt. *l. 6. §. 1. ff. qui test. fac. poss.* Ubi autem & hujusmodi vitii non naturalis sive masculo sive foeminæ accidet calamitas, sed morbus postea superveniens & vocem abstulit, & aurem conclusit: si ponamus hujusmodi personam literas scientem, omnia quæ priori interdiximus, hæc ei sua manu scribenti permittimus. *l. 10. C. qui test. fac. poss.* See the xviith and xxth Articles of the iiid Section, and the Remark on the xviith Article.

IX.

9. The deaf Man who can speak may make a Will.

Those who are only deaf without being dumb, as if their Deafness happened only after they had acquired the Use of Speech, may make a Testament: For they are capable of explaining their Intentions; and much more, if they know how to write *m*.

m In eo cui morbus postea superveniens auditum tantummodo abstulit, nec dubitari potest quin possit omnia sine aliquo obstaculo facere. *l. 10. C. qui test. fac. poss.* See the xxth Article of the iiid Section, and the Remark on the xviith Article of the same Section.

X.

10. Dumb Persons who are not deaf may make a Will, if they know how to write.

Dumb Persons, altho they are so from their Birth, yet if they are not deaf, and know how to write, since they are able to explain their Will, they are capable of making a Testament. But if they cannot write, not being able to explain themselves but very imperfectly and by Signs, they have not the liberty of making a Testament *n*.

n Sin vero aures quidem apertæ sint, & vocem recipientes, lingua autem ejus penitus prepedita, licet a veteribus auctoribus sæpius de hoc variatum est, attamen

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attamen si hunc peritum litterarum esse proponamus, nihil prohibet eum scribentem, hæc omnia facere, sive naturaliter, sive per interventum morbi hujus infortunium ei accesserit. Nullo discrimine neque in masculis, neque in fœminis in omni ista constitutione servando. *l.* 10. *C. qui test. fac. poss.* See the xviith and xxth Articles of the iiid Section.

XI.

11. Blind Persons may make a Testament.

Persons that are blind, whether they be such from their Birth or otherwise, may make their Testament, observing therein the Formalities which shall be explained in the third Section *o*.

o See the xxth Article of the iiid Section.

XII.

12. Strangers cannot make a Testament.

Strangers, who are called Aliens and Foreigners, cannot make a Testament, or other Disposition in view of Death *p*.

p See the xith Article of the iid Section of Persons, the ixth Article of the iid Section of Heirs and Executors in general, and the other Articles which are there cited.

We must except from this Rule the Case which has been observed on the iiid Article of the ivth Section of Heirs and Executors in general.

[By the Law of *England*, an *Alien* that is a Subject to a Prince who is in league and Amity with the King of *Great Britain*, may trade and traffick, buy and sell, maintain personal Actions, and may dispose of his Goods and Chattels by Will. But no Man can have any Property of Lands in *England* before he be a free Denizen; for whatsoever is purchased by an *Alien*, is forfeited to the King. *Coke* 1. *Inst. fol.* 129. *Cowel's Inst. Book* 2. *tit.* 1. *Sect. ult.*]

XIII.

13. A Monk may make a Will before his Profession.

Professed Monks are incapable of making a Testament after they have taken upon'em the Vows. But they may make their Will at any time before they take the Vows, even altho they wear the religious Habit, during the time of their Probation or Noviciat; and their Testament will have its Effect as soon as they have made their solemn Profession. For it is considered as a civil Death; which stripping them of all their Goods, has the same effect, with respect to their Testament, as a natural Death *q*.

q See the xiiith Article of the iid Section of Persons, the xth Article of the iid Section of Heirs and Executors in general, and the other Articles which are there cited.

[By the antient Law of *England*, the Profession of Religion, or Entry into a religious Order, was accounted a Civil Death, and did work a Disability in the Person that was professed, to acquire the Property in any temporal Goods, or to dispose of them, as much as if he had been naturally dead. But my Lord *Coke*, in his 1*st Inst. fol.* 132. *b.* says, that this Profession must be made in some House of Religion within the Realm, which may be certified by the Ordinary; because of foreign Professions the common Law taketh no Knowledge. So that according to this Doctrine, we can have no such Incapacity now in *England*, there being no religious Houses within the Realm where a Profession can be made. And yet it cannot but seem strange, that in *England* we should allow a Capacity in Persons to inherit, and make Wills, who have by a most solemn Vow renounced and divested themselves of all Right and Property in temporal Goods; and who, by the Laws of all other Countries, are deemed incapable, by reason of their said Profession, of making Wills, or inheriting to others.]

XIV.

14. Persons condemned to Death cannot make a Testament.

Persons condemned to Death, or to other Punishments which import Civil Death, and Confiscation of Goods, cannot make a Testament. And this State annulls even the Testament which they may have made before their Condemnation, and before they committed the Crime *r*. But if he who having appealed from his Condemnation, and having made afterwards his Testament, happens to die before the Appeal has been determined, this Testament, or any other which he had made before his Condemnation, would have its effect. For in Criminal Matters the Appeal extinguishes the Sentence. And seeing after the Death of the Party accused there can be no further Condemnation, his Condition remains the same that it was before he was condemned *s*. But we must except from this Rule those who are condemned for, or accused of those sorts of Crimes which may be prosecuted after the Death of the Criminal: For in these Cases the Validity of the Testament depends on the Event of the Accusation *t*.

r Si cui aqua & igni interdictum sit, ejus nec illud testamentum valet quod ante fecit, nec id quod postea fecerit. *l.* 8. §. 1. *ff. qui test. fac. poss. l.* 1. §. 2. *ff. de leg.* 3. *l.* 6. §. 8. *ff. de inj. rupt.*

s Si quis post accusationem in custodia fuerit defunctus indemnatus, testamentum ejus valebit. *l.* 9. *ff. qui test. fac. poss. l.* 1. §. 3. *ff. de leg.* 3.

Si quis in capitali crimine damnatus appellaverit, & medio tempore, pendente appellatione, fecerit testamentum, & ita decesserit, valet ejus testamentum. *l.* 13. §. 2. *ff. qui test. fac. poss.*

Provocationis remedio condemnationis extinguitur pronunciatio. *l.* 1. §. *ul. ff. ad Senat. Turpill.*

t Ex judiciorum publicorum admissis non alias transeunt adversus hæredes pœnæ bonorum ademptionis, quam si lis contestata & condemnatio fuerit secuta, *excepto repetendarum & majestatis judicio, qua etiam mortuis reis cum quibus nihil actum est adhuc exerceri placuit, ut bona eorum fisco vindicentur.* Ex quo quis aliquod ex his causis crimen contraxit, nihil ex bonis suis alienare, aut manumittere eum posse. *l.* 20. *ff. de accus. & inscript.* See the xith Article of the iid Section of Heirs and Executors in general, and the other Articles which are there quoted.

XV.

15. Bastards may make a Testament.

The Incapacity of Bastards is limited to exclude them only from succeeding to

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to Intestates; and does not hinder them from disposing of their Effects by a Testament *u*.

u See the viiith Article of the iid Section of Heirs and Executors in general, and the Articles there cited.

XVI.

16. Difference between the Incapacity of Foreigners, of condemned Persons, and that of others.

There is this Difference to be remarked among the several Incapacities which we have just now explained, that the Incapacity under which Foreigners are, and that of Persons condemned to Death, do not only annull the Testaments of those who are under either of these two Incapacities at the time that they make their Testament; but if they shall happen to him who had made his Testament when he was under no Incapacity, and if he chances to be under either the one or the other of these two Incapacities at the time of his Death, his Testament will be annulled. For all those who die in this State can have no Heirs or Executors. But the other Incapacities which may happen to a Testator after that he has made his Testament, altho they should continue to the moment of his Death; yet they make no change in his Testament. Thus Profession in Religion, after a Testament, is a kind of Civil Death; but which is so far from annulling the Testament, as the Incapacity of a condemned Person does, that it has the quite contrary effect, to confirm it, and to lay the Succession open, and to call thereto the Person that is named Heir or Executor. Thus Madness, and the other Infirmities which happen to a Testator after his Testament, and which render him incapable of making a new one, fix his Will to what it was at the last moment that he had the free use of it *x*.

x Si cui aqua & igni interdictum sit, nec illud testamentum valet quod ante fecit, nec id quod postea fecerit. *l.* 8. §. 1. *ff. qui test. fac. poss. l.* 1. §. 2. *ff. de legat.* 3. *l.* 6. §. 8. *ff. de injust. rupt. irr.*

¶ It is in the Sense of the Rule explained in the Beginning of this Article, that we ought to understand that other vulgar Rule, which says, that a Testament which was valid in the beginning, becomes null, if afterwards things happen to be in such a condition, that if the Testament were then made, it would be of no force. *Quæ in eam causam pervenerunt, a qua incipere non poterant, pro non scriptis habentur, l.* 3. §. *ult. ff. de his quæ pro non script. Quia in eum casum res pervenit a quo incipere non potest. l.* 19. *ff. ad leg. Aquil.* But this last Rule, if it were applied without distinction, would mislead us often: For it frequently happens, that an Act subsists, altho he who made it afterwards falls into a State in which he could not make it. Thus a Marriage is not annull'd by the Husband or Wife's becoming mad; nor a Contract of Sale, altho the Seller is afterwards interdicted as a Prodigal. And it is the same thing with respect to Testaments in the other Cases explain'd in this Article. And it is likewise said in another Rule, that it is no new thing for that which has once been valid not to cease to be so, altho the Case happens that one is in such a Condition, that if he did it at that time it would be invalid. *Non est novum, ut quæ semel utiliter constituta sunt, durent, licet ille casus extiterit a quo initium capere non potuerunt. l.* 85. §. 1. *ff. de reg. jur.*

XVII.

17. The subject Matter of the following Articles.

We have explained in the foregoing Articles what relates to the Capacity or Incapacity of making a Will; and it now remains that we should enquire who are the Persons that may be named Heirs or Executors, or receive any Benefit by a Testament: Which depends on knowing who are the Persons that have not this Right; for besides them, all others have it. And there are two sorts of Persons who have it not; those who are incapable, and those who are unworthy of it *y*.

y See the Articles which follow.

XVIII.

18. Difference between the Incapacity of making a Will, and that of receiving Benefit by one.

The Incapacities of making a Will, and those of receiving Benefit by one, are not the same; for there are Persons incapable of making a Testament, who are not incapable of receiving Benefit by one. But there is no Person who is capable of making a Will, who is not likewise capable of receiving Benefit by a Will. And there are some who are incapable both of the one and the other, as we shall see by the following Articles *z*.

z See the following Articles.

We may remark on what is said in this Article, that all those who are incapable of making a Testament, are likewise incapable of receiving any Benefit under a Testament, that altho all Strangers are incapable of receiving any Benefit by a Testament, yet it may happen that a Stranger may be capable of making a Testament in the case that has been observed on the iiid Article of the ivth Section of Heirs and Executors in general. But this Case does not hinder the Rule from being true in general;

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ral; for that Stranger cannot make a Testament but by virtue of a Dispensation which suspends his Incapacity, but does not make it to cease totally.

XIX.

19. Persons incapable of making a Testament, but capable of receiving Benefit by one.

Persons who have not the Age required for making a Will, Madmen, those who are both deaf and dumb from their Birth, Prodigals that are interdicted, and those whom some Infirmity renders uncapable of making a Testament, are not for that incapable of being named Heirs, or Executors, or of receiving any other Advantage by a Testament. For altho they may be incapable of alienating their Goods, and disposing of them, yet nothing hinders them from being capable of acquiring and possessing Goods *a*.

a See the viith *Article of the* iid *Section of Heirs and Executors in general.*

XX.

20. Persons uncapable both of the one and the other.

Foreigners, professed Monks, and Persons condemned to Death, are incapable of receiving Benefit by a Testament, whilst they remain under these Incapacities, as has been explained in its Place *b*.

b See the ixth, xth, *and* xith *Articles of the* iid *Section of Heirs and Executors in general, and the other Articles there cited.*

XXI.

21. Bastards capable of receiving Benefit by a Testament.

Altho Bastards are incapable of succeeding to Intestates, yet they may be instituted Heirs or Executors, and may receive any other Benefit by a Testament, except in some Cases which are explained in their proper Places *c*.

c See the viiith *Article of the* iid *Section of Heirs and Executors in general, and the Articles there quoted, and the Remarks on that* viiith *Article.*

XXII.

22. Children which are not born.

Children who are not yet born may be instituted Heirs or Executors, in a Testament, not only by their Fathers and Mothers, but by any other Person, and even by Strangers. They are likewise capable of receiving Legacies, or any other Benefit by a Testament *d*.

d See the xiiith *Article of the* iid *Section of Heirs and Executors in general.*

XXIII.

23. Children which are not conceiv'd.

We must reckon among the number of those who are capable of receiving Benefit by a Testament, Children which are not as yet conceived, and who shall be born. For not only may the Parents of those Children institute them Heirs or Executors, or substitute them to others; but every other Person that is capable of making a Will, may name for his Successor a Child which shall be born of the Marriage of such Persons whom he is desirous to gratify in this manner, altho he is no ways related to the said Persons. And this Institution will have its effect, if at the time of the Testator's Death there is a Child conceived of this Marriage, altho it is born only after the said Death *e*. And one may likewise substitute Children which shall be born only a great many Years after the Death of the Person who makes the said Disposition *f*.

e Posthumus alienus recte hæres instituitur. *Inst. de bonor. poss.* See the xiiith Article of the iid Section of Heirs and Executors in general.

Such an Institution would be as it were conditional, in case the said Child should be conceiv'd at the time of the Testator's Death.

It is very usual in favour of Contracts of Marriage, to make such Institutions of Children which shall be born of the said Marriage, or to give some Advantages to the Males, or to the eldest Children, who shall be born of the said Marriages.

f See the iiid *Title of the* vth *Book.*

XXIV.

24. One may institute an Heir or Executor, without naming him expresly, designing him only by some distinguishing Quality.

It is not necessary for the instituting of an Heir or Executor, that he be named by his Name in the Testament; for the Institution will have its effect, if he is designed by his Quality, or with such Circumstances as may distinguish him, and make him so well known, that there can be no doubt of the Institution's being in his Favour. As if the Testator had named for his Heir or Executor, a Bishop, a First President, an Attorney General, the Dean of a Chapter, or some other Person who may be distinguished, and marked out precisely by some particular Quality in a certain Place *g*.

g Si quis nomen hæredis quidem non dixerit, sed indubitabili signo eum demonstraverit, quod pene nihil a nomine distat, non tamen eo quod contumeliæ causa solet addi, valet institutio. *l.* 9. §. 8. *ff. de hæred. instit.*

¶ What is said in this Text of an Institution which should be made in Terms reproachful to the Heir or Executor, to describe him by that Distinction, has not been set down in the Article. For besides that in all appearance it never happens, at least among us, that a Testator should be willing to affront his Heir, or Executor, at the same time that he leaves him his Estate; it might so fall out, that a Father justly irritated against his Son because of his disorderly Life, and yet not being willing, or even

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even not able, to diſinherit him, but being only deſirous to ſhew the juſt occaſion he has had in his Life-time to be diſſatisfied with this Son, and to make him ſenſible of his Anger in order to bring him back to his Duty, ſhould declare in his Teſtament, that altho his Son had render'd himſelf unworthy of his Succeſſion by his diſorderly Life, yet for all that he names him his Heir or Executor: And this Diſpoſition would not be null *. But if the Heir or Executor, not being Son to the Teſtator, was inſtituted with ſome reproachful or injurious Expreſſion or Deſcription, it is by the Circumſtances, that we ought to judge whether ſuch an Inſtitution may have any Cauſe which ought to make it to ſubſiſt, the Heir or Executor being willing to accept of the Succeſſion, or whether the Inſtitution is ſo far contrary to Reaſon and good Manners, that it ought to be annulled.

* Illa inſtitutio valet, filius meus impiiſſimus male de me meritus hæres eſto. Pure enim hæres inſtituitur cum maledicto, & omnes ejuſmodi inſtitutiones receptæ ſunt. *l.* 48. *Sect.* 1. *ff. de hæred. inſt.*

XXV.

25. The Heir or Executor may be a Perſon unknown to the Teſtator.

One may likewiſe name for his Heir or Executor an unknown Perſon, provided that the Teſtator, who perhaps has never ſeen the ſaid Heir or Executor, points out his Perſon by ſuch Circumſtances as may make him eaſily known: As, if it is the Son of one of his Brothers, or other near Relation, whom he had never ſeen becauſe of a long Abſence; or even a Stranger diſtinguiſhed by ſome Mark, ſuch as ſome particular Favour which the Teſtator may have received from him, and which he explains in ſuch a manner, that altho the Author of this Kindneſs was unknown to him, yet this Circumſtance may afterwards make him eaſily known *h*.

h Extraneum, etiam penitus ignotum, hæredem quis inſtituere poteſt. *l.* 11. *C. de hæred. inſt.* ii quos numquam teſtator vidit hæredes inſtitui poſſunt. Veluti ſi fratris filios peregrinantes, ignorans qui eſſent, hæredes inſtituerit. Ignorantia enim teſtantis inutilem inſtitutionem non facit. §. *ult. inſt. eod. v. l.* 46. *ff. eod.*

See the following Article.

XXVI.

26. The Inſtitution null, by reaſon of the Uncertainty of the Heir or Executor.

If the Teſtator in naming of his Heir or Executor, ſhould expreſs himſelf in ſuch an obſcure and equivocal manner, that it were not poſſible to know whom he intended to name for his Heir or Executor, it being impoſſible that ſuch an Inſtitution can have its effect, it would remain null. Thus, for example, if there were two Perſons of the ſame Name, who were equally Friends to the Teſtator, and he ſhould name one of them to be his Heir or Executor, but in ſuch a manner that it were not poſſible to diſtinguiſh which of the two he meant, this Uncertainty would exclude both the one and the other from the Succeſſion *i*: For it could not be ſaid that both thoſe Perſons ſhould be Heirs or Executors, ſince the Teſtator intended only one of them; and it could not be ſaid of any one of the two that he was the Perſon whom the Teſtator had made choice of. Thus, in this Caſe, if it were poſſible that it could happen, it would be juſter to leave the Succeſſion to the next of kin, than to hazard the giving of it to one of the two whom the Teſtator was not willing to have for his Succeſſor; and this Event ought to be imputed to the Teſtator's want of Exactneſs.

i Quoties non apparet quis hæres inſtitutus ſit, inſtitutio non valet. Quippe evenire poteſt, ſi teſtator complures amicos eodem nomine habeat; & ad deſignationem nominis ſingulari nomine utatur: niſi ex aliis apertiſſimis probationibus fuerit revelatum pro qua perſona teſtator ſenſerit. *l.* 62. §. 1. *ff. de hæred. inſt.* See the xxvth Article of the xith Section of Legacies.

¶ If the Caſe of this Article could fall out, and the two Perſons of the ſame Name ſhould agree among themſelves to divide the Succeſſion, could the next of kin hinder the ſame by reaſon of the Nullity ariſing from the Uncertainty, which makes it impoſſible to diſcover which of the two is the Heir or Executor? Or, might they ſay that one of them is certainly the Perſon whom the Teſtator had called to his Succeſſion, and that therefore they both yielding to one another reciprocally the Right that each of them might have to it, their Agreement among themſelves would have the Effect of rendring the Succeſſion common to them? ſince one of the two is certainly called to the Succeſſion, and gives a Share of it to the other, and that it ought to be indifferent to the next of Kin, who is deprived of the Succeſſion by the Teſtament, whether it remain entire to one alone, or whether it be divided among two. But ſince the Quality of Executor, or teſtamentary Heir cannot be acquired but by the Will of the Teſtator, the Agreement of theſe two Perſons cannot make them both Heirs, or Executors: For beſides that the Perſon whom the Teſtator had a mind ſhould be his Heir or Executor, cannot be ſure him-

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ſelf that he has this Quality; it is moſt certain as to the other, that not only he cannot be Heir or Executor, but likewiſe that he cannot be Co-Heir or Co-Executor, ſince altho the Perſon from whom he derives his Right ſhould be acknowledged for the true Heir or Executor, yet he cannot make a Co-Heir or Co-Executor, who ſhall immediately ſucceed to the Teſtator in one Half of the Succeſſion. And the ſaid Conveyance or Aſſignment would only make him a Purchaſer of that Moiety of the Succeſſion, and not an Heir or Executor choſen by the Teſtator. Thus, ſince neither of the two can be certainly Heir or Executor, nor by any means Co-Heir or Co-Executor, ſuch a Diſpoſition, which is impoſſible to be executed, ought to remain null.

XXVII.

27. Perſons unworthy cannot receive any benefit by a Teſtament.

We may reckon in the Number of Perſons who cannot receive any benefit by a Teſtament, thoſe who have render'd themſelves unworthy of it. And ſince the Cauſes, which may have this Effect, have been explained in their proper Place *l*, and that there is nothing neceſſary to be repeated here, it is ſufficient for the Order of the Subject-matter of this Section, that we have here taken notice of it.

l See the iiid Sect. of Heirs and Executors in general.

SECT. III.

Of the Forms and Formalities neceſſary in Teſtaments.

WE call thoſe Things Forms or Formalities of an Act, which the Laws have eſtabliſhed to be Proofs of its Verity, and thereby to eſtabliſh its Validity. Thus, to make a Sale, an Exchange, a Leaſe, a Loan, or other Covenant, which may have its Effect, it is neceſſary to make an Act of it, that is, a Writing which may explain the Intention of the Parties, to be ſigned by them; or if one or other of them cannot write their Names, that it be made in the Preſence of a Notary Publick and two Witneſſes, or of two Notaries without Witneſſes *a*. Thus, to have a Right of Mortgage according to our Uſage, a Covenant ſigned only by the Parties would not be ſufficient; but it is neceſſary that the Act, which is to give the Mortgage, ſhould be paſt either in a Court of Juſtice, or before two Notaries, or before one Notary and two Witneſſes. Thus, for the Validity of a Donation that is to have its Effect in the Life-time of the Donor, it is not enough that the Act thereof be writ and executed in the Preſence of Notaries Publick, but it is moreover neceſſary that it be inrolled *b*.

We ſee, in all theſe ſorts of Acts, that theſe Formalities have been invented in order to make them valid, that is, to make them have their Effect by the Proof which they make of their Truth. But if it is neceſſary in all ſorts of Acts, that they ſhould have ſome Formality to prove their Truth, in order to give them the Effect which they ought to have, there is as much or more Neceſſity that an Act ſo ſerious, and of ſo great Importance, as is a Teſtament, ſhould be accompanied with Proofs of the Will of the Teſtator, which may not only remove all Suſpicion of the forging of another Will than his, but which may give alſo his Teſtament the Character of a Will well concerted, by the Firmneſs and Authority of which the Peace and Quiet of the Families that are intereſted in it, may be eſtabliſhed.

It was upon theſe Conſiderations, that in the *Roman* Law, which allowed the making of a Teſtament by Word of Mouth, and without Writing, it was ordained, that it could not be made without the Preſence of ſeven Witneſſes above fourteen Years of Age, and Citizens of *Rome*. And the ſame Number of Witneſſes was likewiſe made neceſſary for written Teſtaments.

This Uſage, as to the Number of 7 Witneſſes, is preſerv'd in the Provinces of *France* which are governed by the written Law: but in the other Provinces, no more Witneſſes are required to Teſtaments than to Contracts; and 2 Witneſſes ſuffice, with a Notary Publick, or 2 Notaries without other Witneſſes. And there are even ſome Places, where they are governed by the written Law, where the ſame Formality ſuffices for Teſtaments. But inſtead of this great Number of Witneſſes, ſome Cuſtoms have preſcribed other Forms; ſuch as, That the Teſtators ſhall read over and over the Teſtaments which they have dictated to the Notaries Publick; and that expreſs mention be therein made that this Formality hath been obſerved. We may

a See, touching the Neceſſity of making Acts in Writing, the Remark that has been made on the xiith Article of the Firſt Section of Covenants, and the Preamble of the Second Section of Proofs.

b See the xvth Article of the Firſt Section of Donations.

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may add, as to what concerns the Formalities of Testaments, that by the Ordinances of *Orleans*, *Art.* 27. and of *Blois*, *Art.* 63. one may make a Testament before a Curate, or a Vicar, instead of a Notary Publick, observing therein the usual Formalities.

We have thought fit not to set down among the Rules of this Section, that Rule of the *Roman* Law, which requires that the Witnesses should be called expresly for that end. This Formality was judged necessary for Testaments that were not written c: But according to the Usage in *France*, which requires that the Testament be in Writing, it suffices if the Witnesses are present at the reading and signing of the Testament. And altho the Notaries usually make mention in the Testaments, that the Witnesses have been expresly called for that purpose, yet it seems that the Testament ought not to be null, altho this Formality were omitted: For it is always certain that the Witnesses have been desired to do this Office: And this Truth is sufficiently proved by their Presence and Signing. And we see even in the *Roman* Law, that altho the Witnesses had not been called expresly for the Testament, yet it was sufficient to acquaint them that their Testimony was desired in that Affair. *Licet ad aliam rem sint rogati, vel collecti, si tamen ante testimonium certiorentur ad testamentum se adhibitos, posse eos testimonium suum recte perhibere.* l. 21. §. 2. ff. qui test. fac. poss.

c See the Remarks on the only Article of the Fourth Section.

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I.

1. Seven Witnesses are necessary to a Testament.

IT is necessary, for the Validity of a Testament, that the Testator make it to be read in the Presence of a publick Notary, and of seven Witnesses that sign it with him. And if the Testator or Witnesses know not, or are not able to write, it is necessary that mention be made thereof in the Testament.

a Septem testibus adhibitis, & subscriptione testium. §. 3. *inst. de test. ord.* Si unus de septem testibus defuerit, vel coram testatore omnes eodem loco testes suo, vel alieno annulo non signaverint, jure deficit testamentum. *l.* 12. *C. de testam.* Septem testium præsentia in testamentis requiratur, & subscriptio à testatore fiat. *l.* 28. §. 1. *eod.* See the following Article.

Instead of sealing by the Witnesses, which is mentioned in this Law, and which is not in use with us, except in some Places, it is only the Signing of the Witness that is required, who is to write his Name, if he can, and is able to sign; and if not, the Notary ought to make mention of it, according as it has been directed by the Ordinance of Orleans, *Art.* 84. *and that of* Blois, *Art.* 165. *See another Form of a Testament in the* xviith *Article.*

The Rule explained in this Article, is to be understood according to the Usage of the Provinces which are governed by the written Law. For in the Customs, so great a Number of Witnesses is not required, as has been explained in the Preamble of this Section. As to which, it is to be observed in general on the Formalities of Testaments, that we ought to observe those that are in use in the Place where the Testament is made: For the Formalities being different in divers Places, every Place keeps to its own; and one ought not to set them aside in order to make use of those of other Places, which perhaps may not be known there, and may be such that the Notaries Publick either would not, or could not substitute in the room of those they had been accustomed to. Thus, every Place having a Right to keep to its own approved Usage, and which has past into a Law, it is sufficient, for the Validity of a Testament, to observe therein the Formalities that are used in the Place where it is made. V. l. 9. Cod. de testam.

[In *England*, the Number of Witnesses required to a Testament, is only two, when it contains the Disposition only of Personal Estate. But all Devises and Bequests of any Lands or Tenements, must be in Writing, and signed by the Party so devising the same, or by some other Person in his Presence, and by his express Directions, and must be attested and subscribed in the Presence of the said

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said Devisor by three or four credible Witnesses, or else they are utterly void, and of none effect. Swinb. *of Testaments*, p. 1. §. 10. *Stat.* 29 *Car.* 2. *cap.* 3. §. 5.]

II.

2. The Witnesses ought to be present, and sign, if they can.

All the Witnesses ought to be present at the same Time, and in the same Place where the Testament is made, so as to hear the whole Tenour of the Testament. And altho the Testament had been writ before, and in their Absence, yet it is sufficient that they all be present to hear the Testament read in presence of the Testator; and that he declare to them that the said Testament contains his Will, of which the said Writing, together with their uniform Testimony, is to make the Proof; and that at the same time, without being interrupted by other Business, the Witnesses see the Testator sign the Testament, and they sign it with him *b*. For it is by the signing that the Testament is to be accomplished, and to have its Form *c*.

b In omnibus autem testamentis, quæ præsentibus vel absentibus testibus dictantur, superfluum est uno eodemque tempore exigere testatorem & testes adhibere, & dictare suum arbitrium, & finire testamentum. Sed licet alio tempore dictatum, scriptumve proferatur testamentum, sufficit uno tempore, eodemque die, nullo actu extraneo interveniente, testes omnes videlicet simul, nec diversis temporibus scribere signareque testamentum. *l.* 21. *C. de testam.*

c Finem autem testamenti subscriptiones, & signacula testium esse decernimus. *d. l. See, as to the signing by the Testator and Witnesses, what has been said thereof in the first Article.*

III.

3. The Witnesses ought to be above fourteen Years of Age.

The Witnesses ought to be above fourteen Years of Age, and to have none of the Defects, or other Causes, which may make their Testimony null *d*; as shall be explained by the following Rules.

d Rogatis testibus septem numero, civibus Romanis, *puberibus omnibus. l.* 21. *C. de testam.* §. 6. *inst. de test. ord.*

IV.

4. Women cannot be Witnesses.

Altho Women may bear Witness in Matters of Fact, of which the Proofs depend on the Declarations of Persons who may happen to have any Knowledge of them, even in Crimes, yet they cannot be Witnesses to a Testament *e*. For there is this Difference between voluntary Acts where it is necessary to have Witnesses, and the other Cases of the Proofs of Facts; that in these we are not at liberty to chuse whom we will to be Witnesses, whereas in Testaments and other Acts, the Choice of the Witnesses is altogether voluntary; and therefore the Function of bearing witness in these Matters being more natural to Men, it is not so proper to take in Women among them.

e Neque mulier. §. 6. *inst. de testam. ord.* Mulier testimonium dicere in testamento quidem non poterit: alias autem posse testem esse mulierem, argumento est lex Julia de adulteriis, quæ adulterii damnatam testem produci, vel dicere testimonium vetat. *l.* 20. §. 6. *ff. qui testam. fac. poss.*

[*In* England *Women are allowed to be good Witnesses to a Will.* Swinb. of Testaments, part 4. §. 21.]

V.

5. Mad Men, Deaf and Dumb Persons, and Prodigals, cannot be Witnesses.

Mad Men, Deaf and Dumb Persons, and Prodigals who are interdicted, cannot be Witnesses in a Testament *f*.

f Neque furiosus, neque mutus, neque surdus, neque is cui bonis interdictum est..... possunt in numerum testium adhiberi. §. 6. *inst. de test. ord.* Merito (qui bonis interdictus est) nec testis ad testamentum adhiberi potest, cùm neque testamenti factionem habeat. *l.* 18. *ff. qui testam. fac. poss.*

VI.

6. Nor Persons noted with Infamy.

Persons noted with Infamy cannot be Witnesses in a Testament, no more than in other Acts *g*. Thus all those who have been condemned to any Punishment that renders them infamous, whether it be that the Sentence of Condemnation expresses the Note of Infamy, or that this Note is a Consequence of it, cannot be Witnesses. And those whose Profession may render them infamous are under the same Incapacity *h*.

g Neque ii quos leges jubent improbos intestabilésque esse, possunt in numerum testium adhiberi. §. 6. *inst. de testam. ord.* Cum lege quis jubetur improbus intestabilisque esse eo pertinet ne ejus testimonium recipiatur. *l.* 26. *ff. qui test. fac. poss.*

h See the iiid *and* vth *Articles of the* iiid *Section of Proofs.*

VII.

7. Nor Strangers who are called Aliens.

Strangers who are called Aliens, cannot be Witnesses in a Testament *i*. For the Laws extend the Incapacity of making a Testament, and of receiving benefit by a Testament, to that of being Witness to one. And it might happen that the Stranger, who is taken to be a Witness, might be under some Incapacity which was not known.

i Rogatis testibus septem numero, *Civibus Romanis. l.* 21. *de testam.* Testes adhiberi possunt ii cum quibus testamenti factio est. §. 6. *inst. de test. ord.*

By the reason of the Rule explained in this last Text, Persons condemned to any Punishment which imports Civil Death, cannot be Witnesses; which is likewise extended, by the Usage in France, *to professed Monks.*

[As

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[As to Witnesses to a Testament, the Law in *England* makes no Distinction between Foreigners and Natives.]

VIII.

8. The Capacity of the Witness is considered at the Time of making the Testament.

The Quality of the Witness, by which we are to judge if his Testimony ought to be received, is considered only at the time of making the Testament; for it is sufficient that he was then capable of being a Witness: And the Incapacity, which had preceded the Testament, but which had then ceased, or which happened only after the making of the Testament, would be no Hinderance why his Testimony ought not to subsist; for it was only at the time that the Testament was made that he performed the Function of a Witness *l*.

l Conditionem testium tunc inspicere debemus, cùm signarent, non mortis tempore. Si igitur tunc cùm signarent tales fuerint, ut adhiberi possint, nihil nocet, si quid postea eis contigerit. *l.* 22. §. 1. *ff. qui testam. fac. poss.*

IX.

9. The Heir or Executor cannot be a Witness.

The Heir or Executor named in a Testament, cannot be Witness to it: For it is his own Affair; and he is the principal Person interested in the Validity of the said Testament *m*.

m Qui testamento hæres instituitur, in eodem testamento testis esse non potest: quod in legatario contra habetur. *l.* 20. *ff. qui testam. fac. poss. l.* 14. *ff. de reb. dub. l.* 22. *C. de testam.* §. 11. *instit. de test. ord.*

¶ If it were a private and secret Testament, made in the Manner which shall be explained in the xviith Article, and if the Testator had caused it to be signed by the Person whom he had named in it his Heir or Executor, taking him for one of the Witnesses, the better to conceal the Contents of his Will; would this Testimony be rejected? and would the Testament upon this account be null? The ground of doubting of it is, because that in these Kinds of Testaments the Witnesses do not bear Testimony to the Dispositions made by the Testator, which are unknown to them, but only to the Declaration which he made to them that they were contained in the Writing or Paper sealed up, which he only shewed them, without reading it to them. Thus the Heir or Executor, who should know nothing of his being instituted by this Testament, to which he was called to be a Witness, would not bear Testimony to his being named therein Heir or Executor, for that he could not know; but only to the bare Declaration of the Testator, that his Will was contained in that secret Writing or Paper sealed up; and which he might bear witness to, without being suspected of Partiality in his Testimony by reason of his Interest under the Will. So that it would seem that the Motive of the Law, which rejects the Testimony of the Heir or Executor, would cease in such a Case as this, unless there were some particular Circumstances which might make some Alteration; and that therefore this Institution might upon these Considerations have its Effect.

We have not inserted in the Article, that the Legataries may be Witnesses to a Testament, as the Text bears from whence it is taken. For besides that it seems that this Law, among the *Romans*, was a Consequence of the Custom which they had, to give always something to the Witnesses of a Testament, as a Recompence for the Favour they did in bearing Witness, which nevertheless would extend only to very small Legacies *a*; the Liberty of taking indifferently for Witnesses Legataries in considerable Sums, seems contrary to the general Rule, that no one can be a Witness in a Case where his Interest is concerned, as has been explained in its proper Place *b*; neither would our Usage approve the procuring of Witnesses with Money: For altho the Integrity of Witnesses to a Testament would not be liable to Suspicion for having received some Acknowledgement, as would be the Integrity of Witnesses that bear Testimony in other Matters, for which Testimony it is prohibited by the *Roman* Law, as well as by ours, to take or give any thing *c*; yet it is not decent that we should purchase with Money Witnesses to a Testament. It is because of these Considerations, and of the Rule which requires that no Man bear witness in his own Affair, that in many Customs we find it expresly ordained, that Legataries, and others interested in the Testament, cannot be Witnesses to it. And altho there be this Difference between the Customs and the written Law, that in the greatest part of the Customs there is required only the Presence of two Witnesses, with a Notary Publick, to make a Testament valid, whereas seven Witnesses are required by the written Law; it is so easy a matter every where to find Witnesses, that there is no occasion to engage

a V. d. *l.* 14. *ff. de reb. dub. l.* 22. *C. de. test.*
b *See* vith *Article of the* iiid *Section of Proofs.*
c *l.* 1. §. 1. *ff. de leg. Cornel. de fals. & de Senat. Libon.*

gage them to it by Legacies, or other Advantages. And it might even happen more readily in the Provinces which are governed by the written Law, than in the Customs, that a Testator should exhaust his Estate, whether by a Testament, or even by a Codicil, in giving many considerable Legacies; and therefore it would seem to be of too great a Consequence to admit the Testimony of Legataries indifferently. And since the Validity or Nullity of the Testimony of Legataries ought not to depend on particular Circumstances, so as to leave it to the Discretion of the Judge to admit or reject it; and that it would be necessary to have a fixed Rule, which should either admit or reject without Distinction the Testimony of all Legataries; it would seem more just to reject their Testimony, since there can be no Inconvenience in it, and that there might be some in admitting it; and that besides, it is just, that if the Testator will deprive the Heirs of Blood of what they have a natural Right to, he ought to take proper Measures for doing it.

X.

10. Nor his Children, Father, or Brothers.

The same Reason which makes the Testimony of the Heir or Executor to be rejected, is the Cause likewise why we do not receive the Testimony of his Children, his Father, nor his Brothers; for the Testament being the Affair of the Heir or Executor, it is necessary to have other Witnesses to it than Persons who are so nearly related to him, and who of themselves may be interested in the Validity of an Institution, which may in several ways turn to their Advantage *n*.

n Sed neque hæres scriptus, neque is qui in potestate ejus est, neque pater ejus qui eum habet in potestate, neque fratres qui in ejusdem patris potestate sunt, testes adhiberi possunt. Quia hoc totum negotium quod agitur testamenti ordinandi gratia, creditur hodie inter testatorem & hæredem agi. §. 10. *inst. de testam. ordin.*

¶ Altho this Text is restrained to Children that are not emancipated, who are still under the Authority of the same Father; yet it seems that this Distinction would not be agreeable to our Usage. And if the Rule did not extend to Children that are emancipated, as well as to those who are not, it might very easily happen, that since by the Rule which shall be explained in the xiith Article, several Witnesses may be taken out of the same Family, all the Witnesses, or the greatest part of them, should be the Father, the Children, or Brothers of the Heir or Executor.

If the Witnesses were Uncles, first Cousins, or other near Relations of the Heir or Executor, would their Testimony be received? It seems that the Law having made mention only of Brothers, and of Brothers only who are not emancipated, that it has not rejected the Testimony of other near Relations. As to which Matter, we may take notice of a Difference between the Effect of the Proof by Witnesses in an Inquest, or in an Information, and the Effect of the Proof by Witnesses in a Testament, in a Donation, in a Sale, in a Transaction, or other Contract. In Inquests and Informations there is often only the bare Faith of the Witnesses which makes the Proof; and therefore they reject in them the Witnesses who are Relations, as has been explained in the viiith Article of the iiid Section of *Proofs*. But in Testaments, and in Contracts, the principal Proof consists in the Writing signed by the Persons who make the said Acts, if they can write, and by the Notary: So that the Proximity, which in Inquests and Informations makes the Testimony of Relations to be rejected, seems not to be of the same Consequence in Testaments, nor in Contracts. But if all the Witnesses to a Testament were Uncles, or Cousin-Germans of the Heir or Executor to a Testator, who could neither read nor write, would the Validity of the said Testament be without Dispute? It would seem to be so by this Law which rejects only the Testimony of Brothers: And on the contrary, it would seem to be otherwise by the general Rule which rejects the Testimony of near Relations; and that in this Case the Will of the Testator not being proved by his Sign manual, it is the more necessary that the Fidelity of the Witnesses should be unexceptionable. So that this is a Difficulty which deserves to be adjusted by some Rules, unless we might extend to it that of the Ordinance which rejects the Testimony of Relations *. But this Ordinance relates only to Inquests, and excludes from giving their Testimony in them, even Children of second Cousins.

We may likewise remark on the same Subject another Difference between Testaments and Contracts, which consists in this, That in Contracts the Parties are present; and that their mutual Con-

* *See the Ordinance of 1667. Tit. 22. Art. 11.*

sent

sent is sufficiently proved by their Presence and Signature, if they are Persons that know how to write, or by the signing of the Notaries; so that the Witnesses are not very necessary, unless the Truth of the Contract be called in question. But in Testaments the Heirs of Blood, who are the Parties concerned, are not present, and the Testator disposes of his Effects by himself as he thinks good; which the Law does not allow him to do, unless he observes much greater Formalities than those which are sufficient for the Proof of Contracts. Thus it seems to be agreeable to the Spirit and Intention of the Law, that the Fidelity of Witnesses to a Testament should be without all manner of Suspicion; and that the Motive of the Law which requires a greater number of Witnesses in Testaments, than what is necessary for any other Proof, seems likewise to demand, that the Fidelity of the Witnesses should not be liable to Suspicion by reason of their being too near of kin to the Heir or Executor; as to which Matter it is to be wished that there were some fixed and certain Rule.

XI.

11. The Father, Children, and Brothers of the Testator cannot be Witnesses.

Seeing the Testament is the Affair of the Testator as well as of the Heir, or Executor, the Father, the Children, and the Brothers of the Testator cannot serve as Witnesses to his Testament. And in this matter, is rejected the domestick Testimony of those Persons, who compose all of them together only one Family *o*.

o Hoc totum negotium quod agitur testamenti ordinandi gratia creditur hodie inter testatorem & hæredem agi. §. 10. *inst. de test. ordin.*

In testibus autem non debet esse is qui in potestate testatoris est. Sed si filius familias de castrensi peculio, post missionem, faciat testamentum, nec pater ejus recte adhibetur testis, nec is qui in potestate ejusdem patris est: reprobatum est enim in ea re domesticum testimonium. §. 9. *inst. de testam. ord.*

Since all the Dispositions of Testaments are to the prejudice of the lawful Heirs, it is not very natural that a Testator should call to be Witnesses to his Testament those Persons whom he designs to exclude from his Succession. But if it should happen that a Son should complain of the Testament of his Father, to which his Brothers, who had great Advantage by the said Testament, had been called to be Witnesses, the Rule with respect to him would be just. But if the next Heirs were Brothers to the Testator, and had been Witnesses to a Testament of their Brother, made after the Death of their Father, it would seem that they ought not to complain of a Testament which they had approved of in this manner.

XII.

12. Many Persons of the same Family may be Witnesses.

Several Persons of one and the same Family may be Witnesses to a Testament. Thus the Father and several of his Children may render this Office to a Testator *p*: For if they are all equally capable of this Function, their Relation among themselves is no Obstacle to it.

p Pater, nec non is qui in potestate ejus est, item duo fratres qui in ejusdem patris potestate sunt, utique testes in uno testamento fieri possunt: Quia nihil nocet ex una domo plures testes alieno negotio adhiberi. §. 8. *inst. de test. ordinand.* Ad testium numerum simul adhiberi possumus ego & pater, & plures qui fuimus in ejusdem potestate. *l.* 22. *ff. qui test. fac. poss.*

XIII.

13. A Testament may be made at any Hour.

There is no Hour unseasonable for making a Testament, and it may be made at all Hours either of the Day or Night *q*.

q Posse & nocte signari testamentum nulla dubitatio est. *l.* 22. §. 6. *ff. qui test. fac. poss.*

XIV.

14. Different Formalities for divers sorts of Testaments.

Of all the Rules which we have just now explained, the two first belong to Testaments that are made in the ordinary way, where the Testator declares his Will in presence of all the Witnesses: And all the other Rules are common to all the kinds of Testaments. We shall now in the next place explain the Formalities peculiar to each of them *r*.

r In order to know the Validity of the several sorts of Testaments, it is necessary to examine each kind of Testament according to the Formalities that are peculiar to it.

XV.

15. Military Testaments.

Officers of the Army, and Soldiers who are actually in an Expedition, and not in a Condition to observe all the Formalities which the Law requires in Testaments, are dispensed with from observing those which their present State does not allow them to do. And they may declare their Will in such manner as the Conjuncture in which they happen to be makes it possible for them to do it, provided that their Intention appear by good Proofs. And it is this kind of Disposition which we call military Testaments; which subsist, or do not subsist, according as the Circumstances of the Time, and of the Place, give them occasion or not to use this Privilege, and according as the Formalities

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lities which are there observed may be sufficient to establish their Validity, by the Proof which results from them of the Intention of the Persons to whom these kinds of Testaments are permitted *s*.

s Secutus animi mei integritudinem erga optimos fidelissimosque commilitones, simplicitati eorum consulendum existimavi: ut quoquo modo testati fuissent, rata esset eorum voluntas. Faciant igitur testamenta quomodo potuerint: sufficiatque ad bonorum suorum divisionem faciendam nuda voluntas testatoris. *l.* 1. *ff. de testam. milit. l. un. ff. de bon. poss. ex test. mil.*

Id Privilegium quod militantibus datum est, ut quoquo modo facta ab his testamenta rata sint, sic intelligi debet, *ut utique prius constare debeat testamentum factum esse.* Si ergo miles de cujus bonis apud te quæritur, convocatis ab hoc hominibus ut voluntatem suam testaretur, ita locutus est, ut declararet quem vellet sibi esse hæredem, & cui libertatem tribuere, potest videri sine scripto hoc modo esse testatus: & voluntas ejus rata habenda est. Cæterum, si, ut plerumque sermonibus fieri solet, dixi alicui, *Ego te heredem facio*, aut *tibi bona mea relinquo*, non oportet hoc pro testamento observari. Nec ullorum magis interest quam ipsorum quibus id privilegium datum est, ejusmodi exemplum non admitti: Alioquin non difficulter post mortem alicujus militis testes existent, qui affirmarent se audisse dicentem aliquem relinquere se bona cui visum sit: & per hoc judicia vera subvertuntur. *l.* 24. *ff. de testam. milit.*

Lucius Titius miles Notario (suo) testamentum scribendum notis dictavit, & antequam litteris perscriberetur, vita defunctus est. Quæro, an hæc dictatio valere possit? Respondit, militibus quoquo modo velint, & quoquo modo possint testamentum facere concessum esse: ita tamen ut hoc ita subsecutum esse legitimis probationibus ostendatur. *l.* 40. *eod.*

Ne quidam putarent in omni tempore licere militibus testamentum quoquo modo voluerint componere, sancimus, his solis qui in expeditionibus occupati sunt memoratum indulgeri circa ultimas voluntates conficiendas beneficium. *l.* 17. *C. eod.*

Supradicta diligens observatio in ordinandis testamentis militibus, propter nimiam imperitiam eorum, constitutionibus principalibus remissa est. Nam quamvis ii neque legitimum numerum testium adhibuerint, neque aliam testamentorum solemnitatem observaverint, recte nihilominus testantur: videlicet cum in expeditionibus occupati sunt: quod merito nostra constitutio introduxit. *inst. de milit. test.*

Illis autem temporibus per quæ citra expeditionum necessitatem in aliis locis vel suis ædibus degunt, minime ad vindicandum tale privilegium adjuvantur. *ibid.*

The Reader will be able to judge by the following Remark, why we have thought it proper to quote all these Texts here.

¶ The Favour of Military Testaments is agreeable to our Usage, confirmed by the Edicts of 1576. Art. 31. and that of 1577. Art. 32. which being made for the Pacification of the Troubles, did confirm the Military Testaments which had been made on one side or other pursuant to the Disposition of the Law. These are the Terms which are used, that is to say, after the manner in which it was allowed to make these Testaments by the *Roman* Law.

We could have wished to have been able to set down more distinct and exact the Rule explained in this Article, and to mark how far the dispensing with the Formalities in Military Testaments ought to extend: But it was not possible to fix a certain Form to be observed in them, and without which these kinds of Testaments should have no effect: For we have no Rules in this matter, which determine what ought to be the Form of Military Testaments. And the Rules of the *Roman* Law arising from the Texts quoted on this Article, and from some others, are so indefinite, that it may be said that our Usage would not receive them without distinction. Thus, for example, it would seem that we should hardly confirm a Testament which a Soldier had writ upon the Sand with his Sword, altho such a Testament is approved in the 15th Law, *Cod. de Test. milit.*

In this Uncertainty of the Law concerning this Matter, we may reduce all sorts of Military Testaments to three kinds. The first is of those that are not in Writing, and which he who is instituted Heir or Executor, or the Legataries, should pretend to prove by Witnesses to whom the Testator had declared his Will. The second kind is of a Testament written and signed with the Testator's hand, whether it be in the Form of a Testament, or of a Memorandum containing his Intentions, or written by another hand, and signed by the Testator. And the third sort is of a Testament reduced into Writing, in the Presence of Witnesses.

As to the first of these three kinds of Testaments, which was used under the *Roman* Law by all sorts of Persons, as has been remarked in the Preamble of this Section, it would seem that it ought not to be received, because of the Inconveniencies arising from the Facility of forging a Testament of this kind; and that it would be contrary to our Usage, founded upon the Ordinances that have been taken notice of in the Preamble.

The second kind of a Testament written and signed by the Testator, or written by another hand, and only signed by him, has not the same Inconveniencies in it. For the Writing is a sort of an authentick Proof in its own nature, and which would be sufficient to oblige a Person even beyond his Estate. So that if a Military Testament ought to be dispensed with as to the Forms, it

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would seem to follow from this Principle, that it may be sufficient to observe therein a Formality which of its own nature is a perfect Proof, that he who writes and signs any Act, wills and approves that which he has signed; and this is such a Proof as suffices in many Places for ordinary Testaments.

As to the third manner of a Military Testament reduced into Writing in the Presence of Witnesses, there may happen two kinds of Difficulties in it. One is, to know what number of Witnesses may be sufficient in this Testament; and the other is, whether the Witnesses alone are sufficient, without a Publick Notary, Vicar, or Curate, or any other publick Officer.

As to the ordinary number of Witnesses, the Law dispenses therewith, but does not determine how many are absolutely necessary. *Quamvis si neque legitimum numerum testium adhibuerint a.* Ought there to be five Witnesses in the Places where seven are required in any other Testament besides a Military one? or would two be sufficient in all Places, as they are in many? The same Reason which we have remarked on written Testaments, seems to prove that two would be sufficient, seeing that number suffices regularly to make a Proof *b*.

As for the other Difficulty, whether the Presence of a Notary, or any other publick Person, be necessary; it would seem that since in Proofs by Witnesses, whether it be in Inquests for Civil Matters, or in Informations for Crimes, it is necessary that the Witnesses do give their Testimony in the Presence of the Judge, so likewise it should be necessary that the Testimony of those who are called to be Witnesses to a Testament, should be in the Presence of a Publick Notary, Curate, or Vicar, or some other Person exercising these Functions, unless that the Testament were signed by the Testator: For otherwise it would be as easy to find out two Witnesses to sign a Writing which might be easily forged, as to find Witnesses to depose to a Will that is not written.

We do not pretend to give here these Remarks for Rules, but only as Reflections upon the Principles on which the Law touching this matter seems to depend, and to give a reason why we have conceiv'd this Article in general Terms, without marking precisely what are the Formalities required in Military Testaments. For on one side, seeing these Testaments are in use with us, it was necessary to take notice of the Rule concerning them; and on the other side, we could not pretend to fix the Formalities required in them, since that cannot be done but by a Law: and it were to be wished that some Provision were made therein.

a Instit. de milit. testam.

b See the xiiith Article of the iiid Section of Proofs.

XVI.

16. *Of a Testament made in the time of a Plague.*

The particular Hinderances which may happen to Testators, and which may make it impossible for them to observe the Formalities required in Testaments, are not sufficient to dispense with the Observance of them, and to make the Testaments valid where they are wanting; for this Pretext would have two mischievous Consequences. But in case of the common Calamity of a Plague, where the just Fear of Danger is an invincible Obstacle to the Formality of bringing together the Witnesses and the Testator, the Law dispenses therewith: And it is sufficient, without assembling the Witnesses together, to communicate to them separately the Will of the Testator, and to make them sign it likewise apart. But as to the number of Witnesses, the time of a Plague does not dispense therewith *c*.

c Casus majoris ac novi contingentis ratione adversus timorem contagionis, quæ testes deterret, licet aliquid jure laxatum est, non tamen prorsus reliqua testamentorum solemnitas perempta est. Testes enim hujusmodi morbo oppressos, eo tempore jungi atque sociari remissum est: non etiam conveniendi numeri eorum observatio sublata est. l. 8. C. de Testam.

¶ Altho this Text marks precisely enough that those who make their Testament in a time of Plague are dispensed with only as to the Formality of assembling the Witnesses together, and not as to their number; yet several Interpreters have been of opinion that five Witnesses were sufficient in these sorts of Testaments, and that some other Formalities might be dispensed with therein; which has occasioned several Law-Suits. But we have thought proper to fix this Rule in the Sense of the Law; for when the Disposition of a Law appears to be certain and precise, it wants no Interpretation: And it is not to interpret a Law, but to make a new one, to dispense with the number of Witnesses which the Law has not dispensed with; altho nothing would have been more natural and more necessary than to have expressed therein the Li-

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Liberty of making a Testament with five Witnesses, if it had not been judged necessary to have seven. The giving way to such Interpretations, according as every one might imagine to be just, would take away all Force from the Rules, and would throw every thing into the greatest Uncertainty. It is enough to give unto Equity that Extent which the Sense and Spirit of the Law might require; especially when it concerns arbitrary Laws, and those which have regulated the precise Formalities which are to be observed in Testaments *. For there is much less Inconvenience in not favouring Testaments contrary to the Rules which prescribe the Formalities of them, than in slighting these Forms; seeing in general the Nullities of Testaments have no other Inconvenience in them, than to leave things in the natural Order, which calls the Heirs of Blood to the Successions, and to oblige the Testators to take their Measures aright, when they shall have a mind to change the said Order.

* *See the ivth Article of the iid Section of the Rules of Law.*

XVII.

17. *Secret Testaments.*

The great Consequence it is of to Testators, and to their Families, that the Dispositions which they may make by their Testaments should remain secret and unknown to every body besides themselves, till after their Death, if they desire it, has given occasion to the inventing of a sort of Testament which has this Effect, and where the Witnesses give a certain Testimony to the Will of the Testator, altho the Contents of the Will are unknown to them. And it is this sort of Testament that is called private or secret; the Form of which is after this manner, That the Testator who knows how to read and write, or only to read, writes his Testament himself, or gets it writ by another, and he reads it over, and finding all the Contents thereof to be conformable to his Intentions, he presents this Writing folded up, and sealed, to a Publick Notary, and to seven Witnesses assembled together at the same time, declaring to them that that is his Testament, but without suffering them to read it, or telling them what are the Contents of it; and having signed it in their Presence upon the Back, or upon the Cover, if he knows how or is able to sign, he gets the Witnesses, or the Notary, to sign it; observing what has been said in the first Article with respect to the Testator and Witnesses who cannot, or are not able to sign *u*.

u Hac consultissima lege sancimus, licere per scripturam conficientibus testamentum, si nullum scire volunt ea quæ in eo scripta sunt, consignatam, vel ligatam, vel tantum clausam involutamque proferre scripturam, vel ipsius testatoris, vel cujuslibet alterius manu conscriptam, eamque rogatis testibus septem numero civibus Romanis, puberibus omnibus, simul offerre signandam & subscribendam: dum tamen testibus præsentibus testator suum esse testamentum dixerit, quod offertur, eique ipse coram testibus sua manu in reliqua parte testamenti subscripserit, quo facto, & testibus uno eodemque die ac tempore subscribentibus & consignantibus, testamentum valere. Nec ideo infirmari quod testes nesciant quæ in eo scripta sunt testamento. Quod si literas testator ignoret, vel subscribere nequeat, octavo subscriptore pro eo adhibito eadem servari decernimus. *l.* 21. *C. de testam.*

In this Article we have made use of the Words folded and sealed, *which are the same with those in the Text. For altho it would seem by the following Words of the Text, that it is enough if the Testament is folded up, or put under a Cover, yet it is usual to seal it. And it is necessary so to do, when the Testament is put into a Cover sign'd by the Notary and the Witnesses; for otherwise it would be easy to put another Testament under the same Cover.*

¶ Altho the last Words of this Text seem to include the Testators who cannot read, yet we have not thought fit to give them this Sense; and that upon two Considerations: The first is, that these Words, *Si literas Testator ignoret*, being followed by these, *vel subscribere nequeat*, they may be naturally understood of him who cannot write, altho he can read. And taking them in this Sense, this Text may be applied to two Cases; one where the Testator does not know how to write, altho he knows how to read; and the other, where the Testator can write, but is hindered from signing by some Indisposition, which is pointed at by these Words, *vel subscribere nequeat*. And since it is said in the Text, that the Testator may get his Testament writ by some other Person, this Clause shews clearly enough that it is not necessary for the Testator to know how to write, provided he can read. The second Consideration is, that there would be too many Inconveniencies in confirming the secret Testaments of Persons who cannot read; since it may happen that the Person who writes their Testament for them may abuse the Trust that is put in him, and write things quite different from their Will; and it might be said that such a Testament would be without any Proof. For the Testator himself

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himself would not be perfectly sure that it were his Will which had been written, and the Witnesses would have no manner of Knowledge of it. Thus, such a Testament would be contrary to the Spirit and Intention of the Laws. For they require Formalities in Testaments for no other Reason, but to give a perfect Assurance, that what they contain is the Will of those who make them. It is true, that a Testator who knows neither how to write nor read, might chuse for the writing of his Testament a Person of such Integrity, that there might be no manner of Doubt but his Will was writ very faithfully; but there would still remain the Consequence of the Inconveniencies for those Persons who could not make, or had not made so good a Choice: and in general, such a Testament as this would be without any manner of Proof, since it would depend on the Fidelity of one only Witness, that is, of the Person who had writ it.

Seeing there are Deaf and Dumb Persons who know how to write, there is nothing hinders why they may not make their Testament after the Manner explained in this Article.

XVIII.

18. The Manner of opening of a secret Testament.

Since the Proof of a Testament made in the Manner explained in the foregoing Article, is drawn from the Declaration that the Testator has made to the Witnesses, that his Will is contained in the Writing, which he produced to them; it is necessary for this Proof, that after the Death of the Testator the secret Writing, in which the Testament ought to be contained, should be put into the hands of the Judge, that he may open it, after the Witnesses and Notary have been summoned before him to acknowledge their Hand-writing, and to bear Testimony that it is the same Writing which the Testator declared to them to be his Testament. And after it has been verified in this manner, it is then opened *x*.

x Cùm ab initio aperiendæ sint tabulæ, prætoris id officium est. Cogat signatores convenire, & sigilla sua recognoscere, vel negare se signasse. Publicè enim expedit, suprema hominum judicia exitum habere. *l. 4. & 5. ff. testam. quemad. aper.*

XIX.

19. Verification of the Signatures before the Opening.

If any of the Witnesses had not signed, or if some of those who did sign, are either dead or absent, the Testament ought to be verified and opened in the Presence of such of the Witnesses as are to be found, and who have signed it, and of the Notary, if he is not dead or absent. And if either the Notary, or some of the Witnesses, could not appear before the Judge, because of some lawful Impediment, such as Sickness, the Verification, with respect to them, would be made on the Place where they are. But if all of them were either dead or absent, and it were necessary to open the Testament without delay, the Judge might call before him some Persons of Probity, who were well acquainted with the Hand-writing of the Notary and Witnesses; and after Proof made of their Hand-writing, he might open the Testament. And this Verification might afterwards be confirmed, by getting the Notary and Witnesses, who had been absent when the Testament was opened, to own and acknowledge their own Hands *y*.

y Sed si major pars signatorum fuerit inventa, poterit ipsis intervenientibus resignari testamentum, & recitari. *l. 6. ff. testam. quemadmod. aper.*

Si forte omnibus absentibus causa aliquá aperire tabulas urgeat, debet Proconsul curare ut intervenientibus optimæ opinionis viris aperiantur. *l. 7. eod.* Tunc deinde eò mittantur ubi ipsi signatores sint, ad inspicienda sigilla sua. *d. l. 7. in f.*

We have taken no more of this seventh Law than what agrees with our Usage, which does not easily dispense with the Appearance of the Witnesses; and this last Text is to be understood only of the Case, where the Witness can by no means appear before the Judge.

XX.

20. Testament of a Blind Man.

Altho Blind Men can neither write nor read, nor see the Persons who are present at the making of their Testament, they may notwithstanding make a Will, as well as other Persons who can neither write nor read. For they may signify their Will, and get it put down in Writing, and declare in presence of seven Witnesses and a Notary, that what they have got reduced into Writing, and which shall be read in presence of the Witnesses and Notary, is their Testament; which shall have its effect, being signed by the Witnesses who are able to sign, and by the Notary. And if there are Witnesses who cannot or are not able to sign, the Notary shall make mention of it, as has been said in the first Article *z*.

z Hac consultissima lege sancimus, ut carentes oculis, seu morbo vitiove, seu ita nati, per nuncupationem suæ condant moderamina voluntatis. Scilicet præsentibus testibus septem, quos aliis quoque testamentis interesse juris est; tabulario etiam: ut cunctis ibidem collectis, primùm ad se convocatos omnes, ut sine scriptis testentur, edoceant. *l. 8. C. qui test. fac. poss.* At cùm humana fragilitas,

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mortis præcipuè cogitatione perturbata, minus memoria possit res plures consequi; patebit eis licentia voluntatem suam, sive in testamenti, sive in codicilli tenore compositam, cui velint scribendam credere, ut in eodem loco postea convocatis testibus & tabulario, &c. *d. l.*

We see in this Text the two Ways of making a Testament, in Writing, or without Writing. But seeing by the Usage in France, *all Testaments ought to be in Writing, and in presence of a Notary, Blind Men may with much more Reason make their Testament after the Manner explained in this Article.*

XXI.

21. A sort of Testament fit for all Persons.

All Persons who are capable of making a Testament, may make it by writing it themselves, or getting it writ by whom they will, and declaring in the presence of a Notary and seven Witnesses, who are under no Incapacity of performing this Function, that the Writing which shall be read in their Presence, and in Presence of the Testator, is his Testament, and signing it himself, and getting it to be signed; as has been said in the two first Articles. And it is this sort of Testament that is the most common, and which may suit the Blind, the Deaf, and the Dumb, and those who know neither how to write nor read *a*.

a See the Texts cited on the ist and iid Articles.

XXII.

22. The Testament is null, if it wants any of the Formalities.

We may discern, by the Rules explained in this Section, what are the Formalities necessary in the several sorts of Testaments, and consequently what are the Defects which may render them null. And there remains only to observe, as a last Rule concerning these Formalities, that every Testament, in which any of the Formalities prescribed by the Laws is wanting, ought to be annulled; since otherwise it would be to no purpose to ordain them *b*. Thus, a Testament would be null, if it had only six Witnesses, in Places where seven are required, or if it was not signed by the Testator, or by the Witnesses who could sign. And the Favour of the Persons who are called to the Succession, or to a Legacy, is of no consideration at all to dispense with the Formalities: For it would be necessary in this Case to have an express Dispensation from the Laws; and they have on the contrary expresly declared, that the Prince himself can receive no Benefit by a Testament that is not made in due Form of Law *c*.

b Testamentum non jure factum dicitur, ubi solemnia juris defuerunt. *l.* 1. *ff. de injust. rupt. irr. fact. test.*

c Cum hæredes instituuntur Imperator seu Augusta, jus commune cum cæteris habeant. Quod & in codicillis, & fideicommissariis epistolis jure scriptis observandum erit. *l.* 7. *C. qui test. fac. poss.*

Ex imperfecto testamento, nec Imperatorem hæreditatem vindicare posse, sæpè constitutum est. Licèt enim lex imperii solennibus juris imperatorem solverit, nihil tamen tam proprium imperii est, quàm legibus vivere. *l.* 3. *C. de testam.*

Ex imperfecto testemento legata vel fideicommissa Imperatorem vindicare, inverecundum est. Decet enim tantæ majestatis eas servare leges, quibus ipse solutus esse videtur. *l.* 23. *ff. de legat.* 3.

¶ Some Interpreters have been of opinion, that the Rule explained in this Article, ought to be dispensed with in Legacies left to pious Uses, and that they ought to subsist even in a Testament that has only two Witnesses, and even altho one of the two Witnesses was only a Woman. And they have likewise extended the Favour of these Kinds of Legacies so far, as to make valid Testaments, that are null by reason of other Defects, much more essential than Formalities. But how great soever the Favour of Legacies for pious Uses may be, yet the Laws not having excepted them from this Rule, they are necessarily subject to it, as well as other Legacies that are as favourable, such as Legacies to Servants, to poor Relations, or to other indigent Persons, or Legacies left in consideration of Restitutions, which the Testator thought himself bound to make. The Liberty of making such Exceptions to Rules, exceeds the Bounds of Interpretation; and there would arise too many Inconveniencies from this Licence, which serves only to multiply Law-Suits, of which we have store enough from other Sources. So that it seems more just and more natural to keep to the Law, and to prefer to the Liberty of breaking in upon it, the Necessity of having fixed Rules, and to wait till a Provision is made by some other Law in favour of Legacies to pious Uses, if it is necessary; and the rather, because Testators, if they are afraid lest some Nullities should destroy the Legacies which they have left in their Testaments to pious Uses, have two Ways to provide against it; one, which is the surest Way, is, for themselves to execute their good Intentions, and to give their Charity in their Life-time, rather than to leave it to be taken after their Death out of an Estate which will be no longer theirs; and the other Way is, to take good Advice in making their Testaments.

† SECT.

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SECT. IV.

Of the Codicillary Clause.

1. Definition and Use of the Codicillary Clause.

SEEING the most skilful Testators may sometimes doubt, and have Reason to fear lest there be Nullities in their Testaments; as, if any one of the Witnesses should happen to be under any Incapacity of bearing Testimony, which the Testator was ignorant of, or for other Causes; many Testators therefore use this Precaution, for the greater Security of having their Wills executed, to add to their Testaments this Clause, which is called *Codicillary*, whereby they ordain, *That if their Will cannot be valid as a Testament, it may be valid as a Codicil, or otherwise in the best Form that it can be valid a.* And this Clause, expressed in a Testament, hath this Effect, That whereas, were it wanting and there should happen to be in the Testament some Nullity, it would not be valid even as a Codicil *b*; this Clause being added to the Testament, gives it the Nature and Validity of a Codicil, provided that it have all the Formalities necessary in Codicils, and that, for example, if there were some Witnesses, whose Testimony ought to be rejected, there should remain five, at least, whose Testimony ought to be received; because, as shall be said in its proper Place, five Witnesses are necessary to a Codicil *c*.

a Plerique pagani solent cum testamenta faciunt per scripturam adjicere; *velle, hoc etiam vice codicillorum valere.* l. 3. ff. de testam. mil.

Si non valuit testamentum, ea scriptura, quam testamentum esse voluit, codicillos non facit, nisi hoc expressum est, *l.* 41. §. 3. *ff. de vulg. & pupill. subst. l.* 8. §. 1. *C. de codicill.*

b Sæpissime rescriptum & constitutum est, eum qui facere testamentum opinatus est, nec voluit quasi codicillos id valere, videri nec codicillos fecisse. Ideoque quod in illo testamento scriptum est, licet quasi in codicillis poterit valere, tamen non debetur. *l.* 1. *ff. de jure codicill. l.* 8. §. 1. *C. de codicill.*

c See the xivth Article of the 1st Section of Codicils.

¶ Altho it is not said in the Laws, cited on this Article, that to make a Testament valid as a Codicil, it ought to have the Formalities requisite to a Codicil; yet it cannot be doubted, that if the Formalities requisite to a Testament are wanting, it ought to have those that are necessary to a Codicil; because otherwise it would not be as a Codicil, that would be valid: But it might be said, that however defective the Testament might be, it ought to subsist; which is neither equitable nor conformable to the Spirit and Intention of the Laws, which have received this way of supplying the want of Formalities in a Testament; for these Laws are not made to give Testators the Liberty of making their Testaments valid, altho they be defective in the Forms, by saying only that they will have them to have their Effect such as they are. But the principle of these Laws is, that since it is free for every Person that can make a Will, to make it either in the Form of a Testament, or of a Codicil, it is consequently free for them to give to an Act which cannot be valid as a Testament, the Validity of a Codicil, if it can have the Effect of one. But this must agree with that other general Principle in the Matter of Testaments and Codicils, that in these two sorts of Dispositions it is necessary to observe the Formalities prescribed by the Laws. From whence it follows, that no Act can be valid as a Codicil, unless it has the Formalities of one. Thus, since the Use of the Codicillary Clause, presupposes on one side the Liberty of making either a Testament or a Codicil, and on the other side the Necessity of making a Disposition in due form, the said Clause implies two Intentions that the Person has, who puts it into his Testament. The first, which is pure and simple, is the Intention to make a Testament; the other is conditional, that if this Act, which he makes as a Testament, cannot have the Effect of one, it may be a Codicil. And it is by this second Will that the Act, which without this Clause would be a null Testament, for want of the Formalities necessary to a Testament, will subsist as a Codicil, provided that it have the Nature of one, that is, that it have the Formalites requisite to one: Because these Formalities, joined to this second Will of the Testator, make this Act to be in effect a true Codicil; whereas if a Testator, having a mind to make a Testament without this Clause, had called only five Witnesses to it, or having a mind to make a Codicil, had called only four, he would have made neither Testament nor Codicil. For in the first Case, having a mind to make only a Testament, he would have made it null; and having no mind to make a Codicil, it could not be said that he had made what he had no Intention to make. And in the second Case, the Act which should be attested only by four Witnesses, would be neither Testament nor Codicil.

It

It is upon these Considerations that the Invention of the Codicillary Clauses has been founded. And if their Use were now-a-days limited to the giving the Validity of Codicils to Testaments, in which these Clauses are express'd, this Matter would be plain and easy. But the different Provisions that we see concerning this Matter in the *Roman* Law, and the Comments of Interpreters, have occasioned a great deal of Confusion and Uncertainty in it, and have given rise to many Difficulties, which for many Ages past have occasioned many Law-Suits in the Provinces which are governed by the written Law. And since it is impossible to understand aright these Difficulties without an exact Explication of all that is essential in this Matter of the Codicillary Clauses, we shall endeavour, for the giving some Light to it, to explain here the Rise and Progress of the Use of these Clauses, in order to discover in these Sources the Causes of the Difficulties which perplex this Matter, and the Principles which may put an end to them.

The Origin of the Codicillary Clauses has been a natural Consequence of the intricate Formalities which the *Roman* Law required in the making of Testaments; and these Formalities proceeded from the Liberty they had at *Rome* to make a Testament without Writing *a*. For since it was necessary that the Remembrance of the Testator's Will should be preserv'd without Writing, and only by the Fidelity of the Witnesses whom he had called to be present at his declaring it; it was but reasonable not to suffer such a serious Act to be made cursorily in the Presence of two Witnesses, met with by chance; and it was for this Reason that it was ordained, that there should be seven Witnesses, Citizens of *Rome*, called on purpose, and that they should be present at the making of the Testament, and during the whole Time of the Act, and without Interruption. And to make the Testament more authentick, they had added to these Formalites, that the Testator could not institute an Heir or Executor, nor leave Legacies, but by using certain Expressions, and that the said Dispositions in other Terms should be null *b*. And altho these Formalities were less necessary in written Testaments, yet they were observed likewise in them by a kind of Tradition or Custom, as well as in those which were made by Word of Mouth, and without Writing, and which were called *Nuncupative Testaments*; for they kept the Use of these two sorts of Testaments, written and unwritten.

Seeing therefore the Number of Witnesses, and these other Formalities, made the Way of making a Testament very difficult, and that those who made their Testaments with the greatest Exactness, might be easily deceived in them; an Expedient was thought of to supply the want of Formalities, by adding to the Testamant a Codicillary Clause. And the Effect of this Clause was given even to some Testaments, where it was judged that the Expressions of the Testators might supply the want of it; and this gave occasion to several Rules. For on one side we see, in some Laws, that the defective Testament cannot be valid as a Codicil, but in the Cases where the Testator declares expresly that that is his Intention. *Si non valuit (testamentum) ea scriptura quam testamentum esse voluit, Codicillos non faciet, nisi hoc expressum est, l. 41. §. 3. ff. de vulg. & pupill. subst. Nisi id ille complexus sit, ut vim etiam Codicillorum scriptura debeat obtinere. l. 8. §. 1. C. de Codic.* And this Expression was so necessary, that it is said in one Law, that the Legacy even of Liberty to a Slave was null, if the Nullity of the Testament was not repaired by the Expression of the Codicillary Clause. *Si pure non subsistit testamentum, in hoc nec Libertates (cum non fuisse adjectum, ut pro Codicillis scriptum valeret, proponas) recte datas constabit. l. 11. C. de test. manum.* But on the other side, there are other Laws which give the Effect of Codicils to Testaments defective in point of Form, altho the Codicillary Clause was not therein inserted. Thus we see in a Law, that a Testator having declared in his Testament, that he had written it without the Help of any Lawyer, to assist him in observing the Formalities, chusing rather to follow what his Reason dictated to him, than to subject himself to the Trouble of a nice Observation of all these Formalities, and judging that if he erred in any one of them, yet the Will of a Person in his right Senses ought to be held for just and lawful; it was decided that these Expressions should have the same Effect as an express Codicillary Clause: *Lucius Titius hoc meum testamentum scripsi sine ullo Jurisperito, rationem animi mei potius secutus, quam nimiam & miseram diligentiam. Et si minus aliquid* † *legitime,*

a *§. ult. inst. de testam. ord. l. 21. §. 2. C. de testam.*

b *V. Ulp. Tit. 1. l. 15. C. de test. l. 26. eod. l. 21. C. de legat. l. 2. C. commun. de leg.*

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legitime, minusve perite fecero, pro jure legitimo haberi debet hominis sani voluntas; deinde heredes instituit. Quæsitum est, intestati ejus bonorum possessione petita, an portiones adscriptæ ex causa fideicommissi peti possint? respondi, secundum ea quæ proponerentur, posse. l. 88. §. ult. ff. de legat. 2. Thus we see, that other Laws give the Effect of Codicillary Clauses to Expressions that mark the Testator's Desire that his Will should be executed: As, for example, if it was said in a Testament, that the Testator desired it might subsist in whatever manner it could have its Effect. *Ex his verbis, quæ scriptura pater familias addidit,* ταύτην τὴν διαθήκην βούλομαι εἶναι κυρίαν ἐπὶ πάσης ἐξουσίας. *Hoc testamentum volo esse ratum quacunque ratione poterit; videri eum voluisse omnimodo valere ea quæ reliquit, etiamsi intestatus decessisset. l. 29. §. 1. ff. qui test. fac. poss.* Or if a Testator had said, that in case his Dispositions could not be valid as a Testament, he entreated those who should succeed to him as dying intestate to execute his Intention. *Ex testamento quod jure non valet, nec fidei commissum quidem, si non ab intestato quoque succedentes rogati probentur, peti potest. l. 29. C. de fidei com.* It may be further added on the same Subject, that we see in another Law, that the bare Consideration of the singular Affection of the Testator towards a Legatary, and of the Quality of a Legacy that is favourable in its own Nature, makes the Codicillary Clause to be supplied in a Testament that is null, in order to oblige the Children of the Testator, his Heirs, to acquit this Legacy. *In testamentum quod perfectum non erat, alumnæ suæ libertatem & fidei commissa dedit: cum omnia ut ab intestato egissent, quæsiit imperator, an ut ex causa fidei commissi manumissa fuisset? & interlocutus est. Etiamsi nihil ab intestato pater petiisset, pios tamen filios debuisse manumittere eam quam pater dilexisset. Pronunciavit igitur recte eam manumissam: & ideo fidei commissa etiam ei præstanda. l. 38. ff. de fidei comm. libert.*

All these Examples, and some others that are to be met with in other Laws, have given occasion to the Interpreters to supply in many Cases the Codicillary Clause; and some of them, even those of the first Rank, have been of opinion, that this Codicillary Clause may be supplied in all Testaments, as being implied in them, because it is inserted in the greatest part of them, and it is the Intention of all Testators, that their Wills should have their effect as much as is possible.

These first Remarks are sufficient to let us see from whence the use of the Codicillary Clauses has sprung, what has been the Progress thereof, and that this Progress was not made without having many Law-Suits upon the bare Questions, whether Testaments, in which are found some Nullities, may subsist; whether by the effect of any Expression which may serve as a Codicillary Clause, or in consideration of the Quality of the Legacies, or other Circumstances. But besides these kinds of Difficulties or Questions, there are others of another sort, which relate to the Effect that Codicillary Clauses ought to have when there are any in Testaments. And for the right understanding of the Nature of these Questions, we must in the first Place remark what has been said in the Preamble of the Title of Testaments, concerning the Difference which is made in the *Roman* Law between Testaments and Codicils; which consists in this, that in a Testament one may institute an Heir or Executor, and give Legacies, and that in a Codicil one can only bequeath Legacies, but not institute an Heir or Executor *c*. And we must likewise observe a second Use of Codicils in the *Roman* Law, which consists in this, that altho one cannot institute an Heir or Executor by a Codicil, yet in it the Testator may dispose indirectly of the Succession, by entreating or requiring his next of kin, who has right to succeed *ab intestato*, to restore it to the Person whom he names in the Codicil; which hath this effect, that the next of kin, who are desired or required by a Codicil to restore the Succession to another Person, are obliged to restore it to him, reserving to himself a fourth part of the Estate which the Law gives to Heirs or Executors, who are overburden'd with Legacies and Fiduciary Bequests *d*. So that according to the *Roman* Law one may, and may not make an Heir or Executor by a Codicil, which depends on the manner in which he expresses himself therein. For if the Testator should make use of those Terms which the *Roman* Laws call *direct and imperative*, as when one says, *Titius hæres esto, That such a one be my Heir or Executor*, this kind of Expression, which was proper only in Testaments, would be of no use in a Codi-

c V. §. 2. inst. de codicill. l. 2. C. eod.

d l. 2. §. ult. ff. de Jur. codicill. §. 2. inst. de codicill idem. v. l. 12. §. 1. ff. de injust. rupt. irr. fact. test. l. 2. C. de codic.

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cil. But if the Testator in his Codicil should make use of those Expressions which the same Laws call *oblique* or *indirect*, which are in Terms of Intreaty or Request *e*, as if one should say, *I entreat my Heir to restore my Inheritance to such a one*; this Turn of Expression which does not institute directly for Heir or Executor, the Person to whom the Testator is desirous to leave his Estate, but which is addressed to the Heir to entreat him to restore it, makes a Fiduciary Bequest, that is, a Disposition which he who expresses himself in this manner, recommends to the Faith and Integrity of his Heir at Law, or next of kin, and which obliges him to execute this Will.

By the opening of this Gap, which gave to these *oblique* or *indirect* Words, the Virtue of making an Heir or Executor in a Codicil, there remained no other Difference between an Institution in *direct* Terms by a Testament, and this Institution in *indirect* Terms by a Codicil, except that the Heir or Executor named in the Codicil being to receive the Succession from the Hands of the Heir at Law, who is desired to restore it to him, he had only three fourth Parts of the Estate *f*; whereas he that was instituted Heir or Executor directly by the Testament, had the whole. Thus there might arise from all these Principles a Doubt whether the Codicillary Clause being in a Testament that is null, and which calls to the Succession another than the Heir of Blood, it could have the Effect of making this Testament to be consider'd as a Codicil which should contain a Fiduciary Bequest of the Inheritance: That is, whether this Clause would give to the said Testament the same Effect that a Codicil would have had, in which the Testator had intreated his Heir at Law to restore the Inheritance to the Person that is instituted Heir or Executor in this Testament that is null; or whether this Clause ought to have no other Effect than to make the Testament valid as a bare Codicil, which should contain no manner of Fiduciary Bequest of the Inheritance, and whether it would make the Testament valid only as to the Legacies, and other particular Dispositions that may be made by a Codicil, since with respect to the Inheritance, there was wanting in this Testament the Expression of the Intreaty to the Heir at Law to restore it to him that was instituted, in case the Testament should be found null: But it was judged that the Codicillary Clause supplied the want of this Expression. And we see in many Laws, that this Clause had the Effect of making the Testament that was null to be considered as a Codicil which should contain the Fiduciary Bequest of the Inheritanee, and that the Heir at Law was obliged to restore it to him who was named Heir or Executor by the Testament that was null, but which subsisted by virtue of the Codicillary Clause. And the said Heir at Law had only his fourth part of the Inheritance, together with that other Advantage regulated by the Emperor *Theodosius*, that the Person who was instituted Heir or Executor by the Testament which contained the Codicillary Clause, was obliged to take his choice of one of the two Ways in which he might demand the Inheritance; the one by founding his Demand on the Codicillary Clause, and the other, by insisting on the Institution contained in the Testament. For if he had begun by making his choice of this second way, and the Testament should appear to be null, he could not afterwards have recourse to the Codicillary Clause *g*, unless that the Person instituted in the Testament was a Descendant or Ascendant of the Testator's, the Law giving to the Heirs of this Quality the Right of having recourse to the Codicillary Clause, if the Testament were annulled, provided that the said Person instituted, who was in the Line either of Descendants or Ascendants, was in the Rank established by the said Law *h*.

In fine, we must observe on the Principles of the *Roman* Law touching this Matter of the Formalities of Testaments, which were become so difficult and perplexed, and in which they had confined the Expressions of the Testators to certain Terms, as has been already remarked; that the Distinction of *direct* Words, and of Words *indirect* for the Institution of an Heir or Executor was abolished by the Emperor *Constantine i*, in the same manner as he had abolish'd the set Forms for Actions *l*, that is, certain Words which those who were to make any demand in a Court of Justice, were obliged to make use of,

e Verba directa, §. 2. *inst. de codic.* verba inflexa. *l.* 15. *C. de testam.* verba precaria. *l.* 41. §. 3. *ff. de vulg. & pup. l.* 2. *C. comm. de legat.*

f See the ivth Title of the vth Book.

g *l. ult. C. de codic.*

h *d. l. ult.* §. 2. *C. de codic.*

i *l.* 15. *C. de testam.*

l *l.* 1. *C. de formul.*

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upon the Penalty of losing what they had to demand. And the Emperor *Justinian* did likewise afterwards abolish the same Distinction of *direct* and *indirect* Words in Legacies and Fiduciary Bequests, giving to these two sorts of Dispositions, the same Nature and the same Form *m*. From whence it follows, that these Emperors had abolish'd that which formerly made the Difference between a Testament and a Codicil, as to the manner of instituting an Heir or Executor in the one and the other. For that which made this Difference was, that direct Words were useful for instituting an Heir or Executor in a Testament, and that the same Words were altogether useless for making an Heir or Executor in a Codicil. Thus, seeing the antient Law had permitted the Institution of an Heir or Executor in a Codicil by oblique and indirect Words, it would seem that if after these Laws there had happen'd a Law-Suit, in which the Question had been, to know whether the Institution of an Heir or Executor in direct Words in a Codicil could be valid; he who being instituted Heir or Executor in this manner, should have pretended that this Institution ought to subsist, would not have argued amiss, if he had said, that truly according to the antient Law, his Institution was null, because it was in direct Terms in a Codicil; but that since by the same antient Law it would have been valid if it had been in indirect Words, it ought now to have its effect after these Laws that had abolished the Difference between these direct and oblique Expressions, without reserving the Use of indirect Words for Codicils. And if this Cause had been argued before the Emperor *Constantine*, in all appearance he would have either given it in favour of the Person that was instituted in this manner; or if he had had a mind to preserve the Distinction between Testaments and Codicils, as to the Institution of an Heir or Executor, he would have abolished the Institution of an Heir or Executor by a Codicil, in whatsoever Terms it had been made; or, in fine, he would have made a Restriction to his Law, and have declared the Use of indirect Words to be necessary in the Institution of an Heir or Executor by a Codicil: which does not seem to be very agreeable to the Spirit and Intention of his Law, seeing it abolished the Difference between the two sorts of Expressions direct and oblique.

m l. 2. C. comm. de legat.

It is true, that it does seem that this Sense has not been given to that Law of *Constantine*, seeing the Compilers of the Digest and Code have inserted therein several Laws which preserve this antient Law of the Necessity of indirect Words to make an Heir or Executor in a Codicil. But it is known that they have inserted there a great many other Laws, which ought to have been left out, if care had been taken not to insert any thing that had been changed. And whatever Sense we give to this Law, there remains always in the Laws relating to this Matter as well as others, a great deal of Confusion, Uncertainty and Obscurity.

We could have wished to have been able to abstain from making here all these Remarks, and to have excused our selves from explaining all these particular Niceties of the *Roman* Law, since they seem not to agree with our Usage, which demands Rules that are more simple and more natural. But seeing these Niceties are the Sources of the Matter of Codicillary Clauses, which are in use in many Provinces, and that they contain the Principles of the Law concerning these Clauses; it was necessary to explain all these Particulars, in order to discover perfectly the Nature and the Difficulties of the Questions that arise in this Matter.

These Questions, as has been already said, are of two sorts; some of them relate to the Effect that Codicillary Clauses ought to have; and the others concern the Distinction of Dispositions which may or may not have the Effect of a Codicillary Clause. Thus, for a first Example of the Difficulties which concern the Effect of Codicillary Clauses, there are some Interpreters who have made it a question, whether one who is instituted Heir or Executor by a former Testament made in due form, would be obliged to restore the Inheritance to one that should be instituted by a second Testament that is null, but having in it a Codicillary Clause, in the same manner as the Heir at Law would be obliged to do it; and in case that he should be obliged to restore it, whether he should retain the fourth Part, as the Heir at Law has right to do, or whether he should have nothing at all. Thus, for a second Example, some Interpreters have started the Question, whether a Codicillary Clause in an undutiful Testament would have the Effect to oblige the Son that is disinherited, and who had got the Testament to be annulled, to

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to restore the Inheritance to the Person who is instituted Heir or Executor, reserving to himself his Legitime, or Child's Part. And they have been of opinion as to the first of these two Cases, that the Codicillary Clause ought to make the Testament that is null for want of Formalities, to subsist, leaving the fourth part of the Estate to the Person instituted by the first Testament; and that in the second Case, the Codicillary Clause ought to make even the undutiful Testament to subsist; and that altho it were annulled, yet the Codicillary Clause obliged the Son who was unjustly disinherited to restore the Succession to the Person instituted Heir or Executor by the said Testament. And they have founded their Decision of the first Case upon the Virtue of the Codicillary Clause, which they have judged to be of equal force to take away the Succession from the Testamentary Heir instituted in a former Testament made in due Form, as well as from the Heir at Law. And as to the Decision of the second Case, they have founded it on the 115th Novel of *Justinian*, chap. 3. because it is there said, that if in a Testament that is null by reason of the disinheriting, or making no mention therein, of the Testator's Children, there were some Legacies, or some Fiduciary Bequests, *quædam legata vel fideicommissa*, they would nevertheless subsist, and must be paid, *dari illis quibus fuerint derelicta*. From whence these Commentators infer, that a general Fiduciary Bequest being more favourable than a particular one, this Word of Fiduciary Bequest in this Novel ought to comprehend the universal Fiduciary Bequest of the whole Inheritance; as if this Testator disinheriting his Son, had charged him, in case his Testament should be annulled, to restore the Succession to the Person instituted Heir or Executor therein: And that therefore if this Son procures the Testament to be annulled, he shall be bound to restore the Inheritance to the said Heir or Executor, retaining only his Legitime, or Child's Part, out of it.

We see in these Questions, and in the Decisions of them by the said Doctors, the Use and the Consequences of these Niceties; and that in the second of these Questions their Interpretation goes on one side to an extreme Hardship against a Son that is unjustly disinherited, and that on the other side it is contrary to the very Letter of the said Novel of *Justinian*, the natural Meaning of which is in relation to Legacies and particular Fiduciary Bequests, which are of the same Nature with Legacies; but has no relation to an universal Fiduciary Bequest of the whole Inheritance, which he could not mean in that Place.

As to the other sort of Difficulties, where the Point in question is, whether the Expression of the Testator ought to have the effect of a Codicillary Clause, or whether it ought to have no such Effect; as we have seen that some of the Laws which have been remarked on this Subject, have given the Effect of Codicillary Clauses to Expressions which shewed a strong Desire in the Testator that his Testament should be executed, and that other Laws have even confirmed Legacies, in consideration of the Persons of the Legataries, which might render the Bequests of the Testator favourable: These Examples have been the cause that there remains an indefinite Liberty of giving the Effect of Codicillary Clauses to Dispositions that have nothing in them which expresly carries the Sense of these Clauses.

It is easy to imagine that according to these Principles there ought to happen many Questions concerning Wills, which may be pretended either to have Expressions in them that are equivalent to Codicillary Clauses, or that they ought to be excepted from the Rules of Formalities for particular Reasons. And if the bare Conjecture of a strong Desire in the Testator to have his Will executed, may have the effect of a Codicillary Clause, it is easy to supply the Want of it for this reason in every Testament, as the most able Interpreters have been of opinion ought to be done, as has been already remarked. For it may be said with Assurance, that every Testator desires as earnestly as he can, that his Will should be executed. And besides, there would be no Inconvenience if the Testaments, which for want of some Formality are null, should have the Effect of Codicils, if they have the Formalities necessary thereto.

Neither does it seem to be any ways inconvenient, if the Forms of Testaments were the same in all Places, whether they be to be made in the Presence of one Notary Publick, and two Witnesses, or of two Notaries; which would make the use of Codicillary Clauses to be quite laid aside, as we see by Experience in the Customs which require no other Formalities. For seeing no more are required than these few, and that they are essential, none of them ought to be omitted: And if there

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were only one single Witness instead of two which are necessary, or only one Notary instead of two, without any Witness; these Nullities would not be substantiated by a Codicillary Clause. So that of all the Law-Suits which might arise on account of Defects in point of Form, and of these Subtilties and various Effects of the Codicillary Clauses, there is scarcely one ever heard of in the Customs, and that thro the bare Effect of this Plainness and Simplicity in the Formalities of Dispositions made in prospect of Death, and without any manner of Inconveniency attending it.

Some Persons may imagine, that seeing the Customs do not permit the Institution of an Heir or Executor; and that they knowing no other Heirs besides those of Blood, one ought not to give the Name of Testament, but only that of Codicil, to Dispositions in prospect of Death that may be made in the Customs; and that therefore the Liberty of disposing of one's Goods by a Testament, being less in the Customs than in the Provinces which are governed by the written Law, where Heirs may be made by a Testament, fewer Formalities are there required. But it may be said on the contrary, that there is more Reason to multiply these Formalities in the Customs, than in the Places which are governed by the written Law. For besides that in general the Dispositions which transmit the Goods to others than the Heirs of Blood, are odious in the Customs, seeing one may in some of them dispose by Will of all the Acquests, and of all the Moveables, the Person instituted Heir or Executor, who is called universal Legatee, carries away all the Goods, if there be only these two sorts. So that there would be as much, or rather more Reason to require many more Formalities for Testaments in the Customs, than in the Provinces which are governed by the written Law. And we see likewise that some Customs have invented another kind of Formality more troublesome in one respect than those of the *Roman* Law, but however more proper to prevent more essential Defects in Testaments than that of the Formalities. For in order to guard against Importunities and other evil Practices on the Weakness of Testators, who make their Testaments in their last Sicknesses, those Customs declare the Testaments null which have not been made before the Death of the Testator a certain Time limited by the said Customs, as has been observed in other Places *n*. And this Precaution hath this Effect, that whereas those who do not make their Testaments till they are sick, and in fear of Death, have not all of them that Freedom of mind, nor the Firmness that is necessary to make Dispositions that are well concerted, and are exposed to the Flatteries and Importunities of Persons who besiege them, and who often hinder those from Admittance to them who might give wholesome Advice, but contrary to their Interest; those who make their Testaments when they are in full Strength of Body and Mind, are not exposed to any one of all these Inconveniencies: And no body can complain, that if he will make a Testament, the Law obliges him, for his own proper Interest, to take Precautions which are both prudent and easy.

It is not therefore the greater or the lesser Liberty to dispose of one's Goods by Testament, that distinguishes the Usage of the Customs from that of the written Law, in what relates to the Formalities of Testaments. And we know likewise, that in some Places, where the *Roman* Law is observed with the greatest Exactness, only two Witnesses are required to a Testament, and that by the Canon Law a greater Number is not necessary *o*. But seeing in all Places it is necessary that Testaments, as well as all other Acts, should be made with such Formalities as may make a Proof of the Verity, and that that Proof may be made many Ways by several sorts of Formalities, it was free for those who made the Laws to make Choice of the said Formalities. Therefore in the *Roman* Law they had Reason to require that great Number of Witnesses, and the other Formalities which have been mentioned, to make Proof of a Testament which might be made without any Writing, and the Remembrance of which could not consequently be preserv'd but by the Help of such Precautions. Thus, on the contrary, in all the Provinces of this Kingdom, it being required that every Testament should be in Writing, this great Number of Witnesses is the less necessary; and we do not find any Inconveniencies in the Places where two Witnesses suffice for Testaments, as well as for all other Acts. But altho it should be necessary that there should be seven Witnesses to a Testament, yet at least

n See the Preface to this Second Part, Numb. 7. See the vth Article of the second Section of this Title, and the Remark that is there made on it.

o C. 10. de testam.

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we might be without that Distinction of the different Ways of making Heirs or Executors, either by a Testament in direct Words, or by a Codicil in Terms of a Fiduciary Bequest. Thus it would be an easy Matter to remove all these Difficulties by plain and simple Rules, which should substitute in the place of these troublesome and useless Subtilties the natural Order of an uniform way of making Dispositions: Which would be agreeable even to the Spirit of the *Roman* Law, where it is owned that Plainness and Simplicity is a Character that is essential to Laws *p*. But if this Truth is common to all Laws, it is more especially peculiar to those which concern Matters, where the multiplying of Rules may multiply Inconveniencies.

We have made here all these Remarks, and all these Reflections on the Codicillary Clause, and on the different Ways of making an Heir or Executor by a Testament, or by a Codicil, in order to explain what it is that makes the Difficulties in this Matter, and to give a Reason why we have inserted in this Section one only Rule of the Nature and Use of the Codicillary Clause when it is expressed, and why we have omitted to set down among the Number of Rules those which we meet with in the Body of the *Roman* Law, which do not appear to be so very natural, and which are so little agreeable to that Plainness and Simplicity that is essential to Laws, and which are on the contrary very proper to multiply Difficulties.

But if any Reader should be of opinion that we ought to have inserted here such of the said Rules of the *Roman* Law as are received in some of the Provinces; we think that this may be enough to satisfy them, that in a Matter that is so arbitrary, and where the Rules of it are so full of Difficulties, we have explained what is to be found relating thereto in the *Roman* Law, seeing they have in these Remarks what might have been reduced into Rules, and that this way of treating a Matter of this kind, explaining what are the Principles thereof, and what the Difficulties, may suit with the Usages of all Places, and not break in on any of them; but only shews the great Occasion there is to have Rules that are more plain and simple.

p Nobis in legibus magis simplicitas quam difficultas placet. §. 7. *Inst. de fideicom. hæredit.* Lex duodecim tabularum simplicitatem legibus amicam amplexa. §. 3. *Inst. de legit. agn. succ.* *To which we may add these Words of* Justinian *in another sort of Difficulties, which did arise from the Subtilty of the Laws relating to a Matter of much less Importance than this is.* Tales itaque ambiguitates veterum imo magis quod melius dicendum est ambages, nobis decidentibus in tanta rerum difficultate simplicior sententia placuit. *l.* 22. §. 1. *C. de furt. & serv. corr.*

[*In* England, *this Codicillary Clause is not used in Testaments, neither is there any occasion for it: For the Law is so favourable to support the last Wills and Testaments of dying Persons, that it always presumes an earnest Desire in the Testator to have his Will to take effect in some manner or other, if not as a Testament, yet as a Codicil, or Testamentary Schedule, altho such his Desire be not expresly mentioned in the Will; that all Wills relating to Personal Estates, altho destitute of the usual Formalities, are adjudged to be good and valid, if there be sufficient Proof of the Testator's Intention to have the same stand as his last Will and Testament. But in Devises of Lands and Tenements, unless the Formalities prescribed by Law be strictly observed therein, the same are null and void to all Intents and Purposes.*]

SECT. V.

Of the several Causes which may annul a Testament in whole, or in part, altho it be made in due Form; and of the Derogatory Clauses.

ALTHO the Use of Derogatory Clauses is a Matter which comes within the Order of those of this Section, and that Mention is made thereof in the Title of the Section, yet we have not thought fit to put down among the Rules of this Section any Rule concerning these Clauses; and that it would be sufficient to mark here their Order, and to give the Reasons that have obliged us to speak of them no where else but in this Preamble.

We call those Derogatory Clauses, which Testators put in their Testaments, when they fear lest they should be obliged afterwards to make other Dispositions against their Will, upon Considerations that may oblige them thereto, and are willing to annul the said Dispositions before-hand, and to make those to subsist which they had made in the first Testament. It is with this View that those Testators, who are desirous that their first Testament should not be revoked by a second, put into the first Testament a Clause, by which they ordain, that if afterwards they should happen to make another Testament, it may have no Effect, unless it contain certain Words which they express in the first, and which they put there for a Mark, that if they are repeated in the second, it shall subsist, and that it shall be null if it does not contain them. These Clauses are called *Derogatory*, because they

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they derogate from the Validity of the second Testament, if they are not express'd in it. And it is no matter what these Words are, nor whether they have any Sense, or not, no more than the Watch-word.

We have thought fit not to insert among the Rules of this Section any thing concerning these Derogatory Clauses; because altho they are very much in use, yet they are altogether unknown in the *Roman* Law; and those who first invented them have built only upon Consequences drawn from some Laws, which have nothing in them that expresly countenances these sorts of Clauses; and on the contrary, the Effect that is given them is altogether opposite to the Principles and Dispositions of the *Roman* Law, which do not allow that we should deprive our selves of the Liberty of making new Dispositions, and of changing or revoking the first whenever we please.

The Authors of the Derogatory Clauses have gone upon this, that it is said in one Law *a*, that if a Testator had declared in the beginning of his Testament, that he does not give to such a one, that which he shall give him in the latter part of his Testament, *Quod Titio infra legavero, id neque do, neque lego*; the Legacy left to such a Person in the latter part of this Testament would be null by the Effect of this first Will. From whence these Doctors have drawn this Consequence, That a Testator may annul a second Testament by such a Clause as this in a former. They add upon the same Subject what is said in another Law *b*, that if a Testator had said in his Testament, *That if there were found therein two Legacies to one and the same Person, his Will was, that there should be only one of them due*, and that in the same Testament he had left two Legacies to one Legatary, there would be only one of them that should subsist. And they likewise make use of an Addition of *Tribonian's* to another Text *c*. It is in the Case where the Testator having said in the beginning of his Testament, *That if in the Sequel of it he should leave two Legacies to one and the same Person, there should be due only one of them*, and he had left several Legacies to the same Legatary, the Law decides that they should be all due; because this Testator could not put himself under the Necessity of not being able to change his former Disposition. But by this Addition it is said, that this Legatary shall not have all those Legacies, unless the Testator has ordered it so by a second Disposition in express Terms, which derogates from the former. From whence these Doctors have drawn this Consequence, That when the Testator annuls the second Testament by a former, as by a Derogatory Clause, this second Disposition remains null, unless the Testator should declare, that his Will and Intention is, that notwithstanding the Derogatory Clause his second Will should be executed. But since the Exception added to this Law is an Addition of *Tribonian's*, easy to be known by the Style, it may be said that this Law proves rather that the second Disposition revokes the former. And this is likewise a certain Principle in the Matter of Testaments, as shall be explained in its proper Place *d*. And besides, this Addition of *Tribonian's* has no relation to two Testaments, to have the Effect of annulling the second by a Derogatory Clause in the former; but it is limited to the making valid the first Disposition of a Testament which annuls other Dispositions of the same Testament, or of a Codicil, which in the *Roman* Law makes a part of the Testament, and draws from it all its Force *e*. Thus this Law, as well as the others, which we have just now remarked, is in the Case of one only Testament which contains two opposite Dispositions, one of which ought necessarily to hinder the Effect of the other; which has no precise relation to the Dispositions of two Testaments made at different Times. So that none of these Laws prove that we may, by the *Roman* Law, make a Disposition in a former Testament, which shall annul those of a second. And on the contrary, those very Laws, and all the others that may have any relation to this Matter, prove two Truths quite opposite to the Use of Derogatory Clauses in a former Testament, to annul those which the Testator might happen afterwards to make. One is, that it is always the last Will which annuls the former, when it is contrary to them *f*. And the other is, that no Man can deprive himself of the Liberty to dispose, and to revoke former Dispositions *g*.

a *l.* 12. §. 3. *ff. de legat.* 1.
b *l.* 14. *ff. eod.*
c *l.* 22. *ff. de legat.* 3.

d *See the first Article, and the following Articles of the vth Section.*
e *l.* 2. §. 2. *l.* 3. §. 2. *ff. de jure Codicill.*
f Suprema voluntas potior habetur. *d. l.* 22. *ff. de leg.* 3.
g Nemo enim eam sibi potest legem dicere, ut à priore ei recedere non liceat. *d. l.*

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It is in Conformity to these two Principles, that it is decided in the sixth Law, §. 2. *ff. de jure Codicill.* That if a Testator, having declared that he desired that no regard might be had to any Codicil he should make, unless it was written and signed with his own Hand, should happen afterwards to make a Codicil, which he had neither written nor signed with his Hand, this Codicil would nevertheless be confirmed, because, as it is said in that Law, the last Wills of Testators derogate from the former, *Quæ postea geruntur prioribus derogant h.* Thus it may be said, that the Use of Derogatory Clauses is not agreeable to the Spirit of the *Roman* Law, nay that it is directly contrary to it. And it has been so determined by one of the Interpreters, who best understood the Law relating to this Matter.

As for other Reasons besides the Authority of the Laws, we see on one hand, that the Use of the Derogatory Clauses consists in giving to Testators the Means of making a second Testament, which they would have to serve for nothing, after that they have made a former which they are desirous may be executed; that this second Testament may serve to amuse the Persons in whose Favour it has been made, the Testator thinking within himself at the same time, that nothing is more remote from his Intention than this second Testament, which is already annulled before-hand in his Mind. We know that there have been Pagans that would not have had the Conscience to make use of an Expedient of this Nature. But even altho this Expedient could be of any good Use, yet it is not without a great many Inconveniencies: For it may happen that he who has a mind to engage a Testator to make a Testament in his Favour, may take his Measures, accordingly before any other Testament has been made, and may get the Testator to make a secret Testament, sealed up, and put into his Custody, and in which he may have procured a Derogatory Clause to be inserted, of which the Testator perhaps is not capable to comprehend the Consequence, or which he may have forgot; so that any second Testament which he should make might be of no effect. And it might likewise so fall out, that the Persons who should engage the Testator to make a second Testament, having already made a former with a Derogatory Clause in it, might get him to add in the second a Clause which might derogate from the Derogatory Clause of the former, getting the Testator to declare that he had forgot the Terms of the said Clause, or to make use of other Expressions which might render ineffectual the Precaution of the Derogatory Clause in the former Testament. It may likewise so happen, that a Testator who is desirous, and that for good Reasons, to change a former Testament, may have forgot that he had put in it a Derogatory Clause, as if the Testament had been made many Years before, or he had even forgot that he had made any at all; and thus the second Testament he should have a mind to make, would be useless. It might likewise happen, that a Testator had made a former Testament out of some Passion that had disgusted him with his Relations, and had moved him to leave his Estate to some Stranger, who had taken the Precaution to get a Derogatory Clause put into the Testament; and that this Testator should afterwards repent himself of it, and being desirous to leave his Estate to his nearest Relations, Brothers, or others, he should make a second Testament with this Intention; but that he had omitted, either through Forgetfulness or Ignorance, to make mention of the Derogatory Clause of the former Testament; so that the Effect of the said Clause would be in this Case, to prefer an unjust and angry Will, to a Disposition that is most just and equitable. Thus, it may be said that this Precaution of the Derogatory Clauses is much more inconvenient than it is useful, without reckoning that of the many Law-Suits which the Invention of these Clauses has added to the great Number of others, which are already more than the Judges can well decide, and disturb the Peace and Quiet of Families.

All these Considerations have induced us to think, that altho it be true that the Derogatory Clauses are generally used, yet that we might, without transgressing the Authority of the said Usage, forbear setting down here any Rule concerning this Matter. And altho there were no Inconvenience in the Use of the said Derogatory Clauses, yet this Matter has two Characters which exclude it from coming within the Design of this Book. One is, that it is no part of the *Roman* Law; and that not only it is not a part thereof, but is directly contrary to it: And the other is, that it is no more a part of the Law of Nature.

h *See the like Decision, l. ult. ff. de legat.* 2.

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ture. And besides, the Remarks which we have just now made, contain all the Principles of this Matter.

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I.

1. A first Testament is annulled by a second.

BEsides the Want of Formalities which may annul a Testament, there are other Causes which may have the same Effect. And we may reckon as the first of them a second Will of the Testator who makes another Testament. For as every Testament implies the Disposal of the whole Estate, two different Testaments cannot subsist together, but the second annuls the first *a*; as shall be explained in the following Articles.

a Posteriori testamento quod jure perfectum est, superius rumpitur. §. 2. *inst. quib. mod. test. infirm.* Testamentum rumpitur alio testamento. *l.* 1. *ff. de inj. rupt.* See the ivth Article of the ist Section of Codicils.

II.

2. Altho the second make no mention of the first.

Altho the second Testament make no mention of the first, yet nevertheless it revokes it by the bare Effect of the Will of the Testator, who being at liberty to change his Dispositions to the Moment of his Death, declares sufficiently by those which he makes in his second Testament, that his Will is, that the first should remain without effect *b*. But if in the second Testament, the Testator makes only some Additions, some Deductions, and some Alterations in the former, whether it be in the naming of the Heir or Executor, or in the Legacies; whatever he confirms of the first Testament shall have its effect as making a part of the second.

b Ambulatoria enim est voluntas defuncti, usque ad vitae supremnm exitum. *l.* 4. *ff. de adim. vel transfer. legat.* Non omnes tabulas prætor sequitur hac parte edicti; sed supremas, hoc est, quæ novissime ita factæ sunt, post quas nullæ factæ sunt *l.* 1. §. 1. *ff. de bon. poss. sec. tab.* See the xiiith and xivth Articles.

III.

3. Provided that the second be in due Form, altho it remain without Execution.

A first Testament made in due Form cannot be annulled by a second, unless the same be likewise in due Form: For otherwise this second Will having for its Proof only an Act that is null, would be null likewise, and would not have so much

much as the Effect to revoke the former Dispositions which should still be in being *c*. But if the second Testament has all the necessary Formalities, it is no matter altho it remain without Execution, whether it be that the Heir or Executor, and Legataries, if there are any, renounce the Right they have by it, or that they die before the Testator, or that they are become uncapable, so that this Testament has no effect. For this second Will being in due form, does nevertheless annul the former. Thus the Testator dies without a Testament, the first being annulled by the second, and the second failing to have its effect *d*.

c Tunc autem prius testamentum rumpitur, cum posterius rite perfectum est. *l.* 2. *ff. de injust. rup. irr. fact. test.*

d Posteriore quoque testamento, quod jure perfectum est, superius rumpitur. Nec interest extiterit aliquis hæres ex eo, an non. Hoc enim solum spectatur, an aliquo casu existere potuerit. Ideoque, si quis aut noluerit hæres esse, aut vivo testatore, aut post mortem ejus antequam hæreditatem adiret, decesserit, aut conditione sub qua hæres institutus est, defectus sit: in his casibus pater familias intestatus moritur. Nam & prius testamentum non valet ruptum a posteriore: & posterius æque nullas habet vires, cum ex eo nemo hæres extiterit. §. 2. *inst. quib. mod. test. infirm.*

IV.

4. A Testament which may subsist with fewer Formalities, revokes a former.

We must not reckon in the number of Testaments that would not be sufficient to revoke a former Testament, those in which the Laws dispense with a part of the Formalities, such as Military Testaments, and those which are made in a time of Plague. For if these Testaments which want some Formalities, have those which are sufficient to render them valid, they revoke the former Testaments *e*

e Tunc prius testamentum rumpitur cum posterius rite perfectum est. Nisi forte posterius jure militari sit factum——Tunc enim & posteriore non perfecto superius rumpitur. *l.* 2. *ff. de injust. rupt. irr. fact. testam.*

Altho this Text speaks only of the Military Testament, yet a Testament made in a time of Plague, according to the Rule explained in the xvith Article of the iiid *Section, will have the same Effect, since it will subsist.*

V.

5. A Testament in favour of the Heir of Blood, attested by five Witnesses, revokes the former which called a Stranger to the Succession.

It must likewise be remarked on this Rule, that we ought to except from it the Case where the Testator having by a former Testament named for his Heir or Executor another Person than him who had right to succeed to him if he had died intestate, had instituted for his Testamentary Heir or Executor, his Heir at Law by the second Testament: For in this case this second Testament, altho null, revokes the former, provided only that it have five Witnesses, and the Favour of the Heir of Blood makes it to subsist *f*.

f Tunc prius testamentum rumpitur, cum posterius rite perfectum est. Nisi forte posterius vel jure militari sit factum, vel in eo scriptus est qui ab intestato venire potest. Tunc enim & posteriore non perfecto superius rumpitur, *l.* 2. *ff. de injust. rupt. irr. fac. testam.*

Si quis testamento jure perfecto postea ad aliud venerit testamentum, non alias quod ante factum est infirmare decernimus quam si id quod secundo facere testator instituit, jure fuerit consummatum: nisi forte in priori testamento scriptis his qui ab intestato ad testatoris hæreditatem vel successionem venire non poterant, in secunda voluntate testator eos scribere instituit, qui ab intestato ad ejus hæreditatem vocantur. Eo enim casu, licet imperfecta videatur scriptura posterior, infirmato priore testamento secundam ejus voluntatem, non quasi testamentum, sed quasi voluntatem ultimam intestati valere sancimus. In qua voluntate quinque testium juratorum depositiones sufficiunt. Quo non facto valebit primum testamentum, licet in eo scripti videantur extranei. *l.* 21. §. 3. *C. de test.* See in the Preface to this second Part, num. viii. and the iiid Article of the viith Section of this Title.

VI.

6. The Birth of a Child annuls the Testament.

A Testament made with all the Formalities is nevertheless annulled by the Birth of a Child whom the Testator had not instituted his Heir or Executor *g*: For since the Inheritance is due to the Children both by Law and by Nature, if they have not deserved to be disinherited *h*, the Child which is born to the Testator after the making of his Testament, is his Heir. And it is presum'd that the reason why he did not revoke this Testament, was because he was prevented by Death.

g Testamentum rumpitur agnatione sui hæredis. *l.* 1. *ff. de inj. rupt. irr. fac. test.* *l. un. C. de ordin. judic.* See the xvith Article touching Legacies in this Testament.

h Ratio naturalis, quasi lex quædam tacita, liberis parentium hæreditatem addicit, velut ad debitam successionem eos vocando. Propter quod & in jure civili suorum hæredum nomen eis indictum est. Ac ne judicio quidem parentis, nisi ex meritis de causis, summoveri ab ea successione possunt. *l.* 7. *ff. de bon. damn.* See the Preface to this iid Part, num. iii.

VII.

7. Unless the said Child dies before the Testator.

If in the Case of the preceding Article, the Child born after the Testament should happen to die before the Death of the Testator its Father, the said Testament would have its effect: For since it is the Death of the Testator that gives the Testament its effect, and that at the time of the said Death the Cause which ought to annul the Testament of this

this Father would not be any more in being, nothing would hinder its Validity. And all the Dispositions thereof would be executed upon this just Presumption, that the Testator not having revoked them after the Death of the said Child, had confirmed them *i*.

i Postumus præteritus vivo testatore natus, decessit: licet juris scrupulositate nimiaque subtilitate testamentum ruptum videatur: attamen si signatum fuerit testamentum bonorum possessionem secundum tabulas accipere hæres scriptus potest, remque obtinebit, ut & Hadrianus, & Imperator noster rescripserunt. Idcircoque legatarii & fideicommissarii habebunt eaquæ sibi relicta sunt, securi. *l.* 12. *ff. de inj. rup. irr. f. test.*

VIII.

8. The Testament in which the Children are omitted is null.

The Testament of him who having Children, or Parents if he has no Children, makes no mention of them therein, is annulled with respect to the Institution of the Heir or Executor: For he ought to have named them his Heirs or Executors; or if he had a mind to disinherit them, he ought to have mentioned the Reasons for which he did it *l*, as shall be explained in the Second Title.

l Testamentum aut non jure factum dicitur, ubi solennia juris defuerunt, aut nullius esse momenti, cum filius qui fuit in patris potestate præteritus est. *l.* 1. *ff. de injust. rupt. irrit. fac. test. Nov.* 115. *c.* 3. & 4. See the following Article, and the xvith Article, with the Remark that is there made on it.

This Omission of the Father or Mother who make no mention of their Children in their Testaments, is called in the Roman *Law* Preterition, *distinguished from* Disherison, *for in this the Children are named and disinherited.*

IX.

9. The unjust disinheriting of Children annuls the Testament.

If the Testator who has Children disinherits any of them without just Cause, his Testament will be annulled as to the Institution of the Heir or Executor. And it would be the same thing if the Testator who had no Children had disinherited without just Cause his Father, or Mother, or other Ascendants *m*, as shall be shewn in the iid Title of this Book.

m Si ex causa de inofficiosi cognoverit judex, & pronuntiaverit contra testamentum, nec fuerit provocatum; ipso jure rescissum est. Et suus hæres erit secundum quem judicatum est. *l.* 8. §. *penult. ff. de inoff. test. l.* 30. *ff. de liber. & post hered. inst.* V. Nov. 115. c. 3 and 4. and the xvith Article of this Section.

X.

10. The Institution is of no effect, if the Testamentary Heir renounces.

When the Person who is instituted Heir or Executor by a Testament renounces the Inheritance, the Institution of the Testamentary Heir having no effect, the next of kin is called in the place of him who was named by the Testament *n*.

n In irritum constituitur testamentum non adita hæreditate, *l.* 1. *ff. de inj. rupt. irr. fact. test.* Si nemo subiit hæreditatem, omnis vis testamenti solvitur. *l.* 181. *ff. de reg. jur.*

We have not said in the Article, that the Testament will be null without Distinction as to all the Dispositions it may contain, concerning which it will be necessary to see the xixth Article, with the Remark made on it.

[In *England* the Usage is, in the Case mentioned in this Article, when the Executor renounces the Execution of the Will, if the Residue be therein disposed of, to grant Administration with the Will annexed to the Residuary Legatee, preferable to the next of kin. *Swinb. of Testaments, Part* vi. §. 3.]

XI.

11. The Testament is annulled, if the Testator dies incapable of making one.

If he who had made a Testament happens afterwards to fall into a State that renders him incapable of having Heirs or Executors; as if he happens to lose his Right of Naturalization, or is condemned to some Punishment that carries with it a Civil Death, as has been explained in its Place, and that he remains in that Condition till his Death, the Testament which he had made before will be annulled. For since every Testament hath its effect only at the moment of the Death of the Testator, he who at the time of his Death cannot leave his Goods to Heirs or Executors, cannot by consequence leave any use of a Testament from which no body can reap any Profit *o*.

o Irritum fit testamentum quoties ipsi testatori aliquid contigit: puta, si civitatem amittat. *l.* 6. §. 5. *ff. de inj. rupt. irr. f. test.*

Sed & si quis fuerit capite damnatus, vel ad bestias, vel ad gladium, vel alia pœna, quæ vitam adimit, testamentum ejus irritum fiet. *d. l.* §. 6. See the xvith Article of the iid Section of this Title, the Texts which are there cited, and the Remarks made thereon, and the xxth Article of this Section.

This Article is to be understood only of the Case mentioned in it, where the Testator is at the time of his Death incapable of having Heirs or Executors; for if he was only incapable of making a Will, as if after having made his Testament he had professed himself a Monk, or was fallen into a State of Madness, or under some other Infirmity which render'd him incapable of making a Testament, yet his Testament would nevertheless have its effect, because he would not be incapable of having for his Heirs or Executors those whom he had made choice of when he was capable of doing it.

XII.

12. The other Changes, or the length of time do not annul a Testament.

All the other Changes that might happen between the time of making the Testament, and the Death of the Testator, even those which might make us presume some Change of his Will, would not annul it. And altho there may have past a great number of Years in the said Interval, and that during that long time the Testator's Estate had been much

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much augmented or diminiſhed, that ſome of the Legataries were dead, that the Perſon whom he had choſen to be his Heir or Executor, becauſe he was poor, and had many Children, ſhould happen to be rich, and to have no Children, or that there had happened other Changes of the like Nature; his Teſtament would nevertheleſs be executed, unleſs that he had revoked it either by ſome contrary Diſpoſition made in due form, or in the manner explained in the 21ſt Article. For it ought to be preſumed that he had perſevered in the ſame Will, having made no Change in his Teſtament, being able to have done it, and that his Intention was that this Teſtament ſhould be executed in what manner it could, according to the Condition that Matters ſhould be in at the time of his Death *p*.

p Sancimus ſi quis legitimo modo condidit teſtamentum & poſt ejus confectionem decennium profluxerit, ſi quidem nulla innovatio, vel contraria voluntas teſtatoris apparuerit, hoc eſſe firmum. Quod enim non mutatur, quare ſtare prohibetur? Quemadmodum enim qui teſtamentum facit, & nihil voluit contrarium, inteſtatus efficitur? *l.* 27. *C. de teſtam.*

¶ We have not ſet down in this Article the Words that follow in this Text, that if the Teſtator revoke his Teſtament, either in the Preſence of three Witneſſes, or by an Act in a publick Regiſtery, this Revocation, together with the Duration of ten Years after the Teſtament, will make it to be null. *Sin autem teſtator tantummodo dixerit*, non voluiſſe prius ſtare teſtamentum, *vel aliis verbis utendo contrariam aperuit voluntatem, & hoc vel per teſtes idoneos non minus tribus, vel inter acta manifeſtaverit, & decennium fuerit emenſum; tunc irritum eſt teſtamentum, tam ex contraria voluntate, quam ex curſu temporali.* And inſtead of this way of revoking a Teſtament, we have put down only in the Article, that the Teſtator may revoke it, either by an Act made in due form, or in the manner explained in the 21ſt Article, that is, by tearing, raſing, or defacing it. For it ſeems that that which in the *Roman* Law made the uſe of thoſe other Ways of revoking a Teſtament neceſſary, either by an Act in the Publick Regiſtery, or by a Declaration in preſence of Witneſſes, was, that Teſtaments, as well as all other Acts, might be made without any Writing *a*; and that therefore as Teſtaments made after this manner did ſubſiſt in the Memory of the Witneſſes, a contrary Act was neceſſary to annul thoſe that were not written. And it was perhaps for the ſame reaſon, in that Teſtaments did ſubſiſt without Writing, that before *Juſtinian*'s Reign the Laws which that Emperor aboliſhed by the Law quoted on this Article, had regulated that a Teſtament ſhould be null after ten Years from the Day of its date *b*. Which may have been founded upon this, that the Memory of a Teſtament which was not written, could not be ſo eaſily preſerved after ſo long a time, whether becauſe of the Death of all the Witneſſes, or ſome of them, or their Forgetfulneſs. And this Revocation of Teſtaments by the courſe of ten Years, may have been extended to thoſe that were written, in the ſame manner as they extended the Formalities of Teſtaments that were not written; as has been remarked in other Places *c*. But *Juſtinian* did not content himſelf with the bare effect of the ſpace of ten Years, to revoke even Teſtaments that were not written; and he ordained, without making any diſtinction by this Law, that to revoke a Teſtament there ſhould be neceſſary both the Courſe of ten Years, and likewiſe a Declaration of the Teſtator in the preſence of three Witneſſes, or an Act in the publick Regiſtery: From whence it follows, that without the Circumſtance of this time, an Act before three Witneſſes would not be ſufficient, and that it would be neceſſary to have an Act more authentick to revoke the Teſtament; ſo that it would ſeem that *Juſtinian* looked upon the Revocation of a Teſtament as an Act of the ſame nature with the making of a Teſtament, becauſe it implies a Diſpoſition of the Inheritance: So that one might conjecture from this Law, that to revoke a Teſtament within the ten Years from its date, the ſame number of Witneſſes ſhould be neceſſary as in making a Teſtament. And as to the manner of revoking a Teſtament by the effect of time, as by this Law of *Juſtinian* the Time alone is not ſufficient to annul it, ſo it is ſtill leſs ſufficient with us, where every Teſtament ought to be in writing. But altho every Teſtament ought to be in writing, yet a contrary Act is not always neceſſary to revoke it, for the Teſtator needs only to tear or cancel his Teſtament, ſo that the uſe of an expreſs Revocation cannot be neceſ-

a See the xiith *Article of the* 1*ſt Section of Covenants, l.* 9. *l.* 10. *Cod. de fide inſtr. l.* 21. §. 2. *Cod. de teſtam. l.* 26. *eod.*

b V. l. 6. *Cod. Theodoſ. de teſtam. & codicill.*

c See the Preamble of the iiid *and* ivth *Sections.*

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sary, except in the Case where a Testator cannot have the Original Testament in his power, either by reason of Absence, or for other Causes: And in this Case the Difficulty would remain, to know, whether it would be necessary to have an Act with the same number of Witnesses that are required to a Testament, as it seems to follow from this Law of *Justinian*, who is not contented with three Witnesses, except in the Case where the ten Years are elapsed after the Date of the Testament. But as we have seen in the fifth Article, that a Testament with five Witnesses in favour of the Heir at Law, annuls a former Testament in which a Stranger was instituted Heir or Executor; and that he who has a mind to revoke his Testament without making another, cannot but know, that if he die without a Testament he leaves his Estate to his next of Kin; so therefore five Witnesses ought to suffice to make the Revocation of his Testament valid. And this Revocation ought to have the same Effect, as if he instituted his Heir at Law by a second Testament. For one may say of him who revokes his Testament without making another, that he institutes for his Heir or Executor him who ought to succeed to him if he died intestate, not by an Institution in express Terms, but which is tacit in the Expression, and express in the Intention; and likewise with this Advantage in favour of the said Heir at Law, that he is willing to leave him the Estate without any Diminution by Legacies, or other Bequests. And if this Revocation were made in a Place where only two Witnesses are required to a Testament, the same Number would be sufficient; since in Testaments, and other Acts, we ought to observe the Formalities that are used in the Places where they are made; as has been remarked on the first Article of the third Section.

But if there were only two Witnesses to such a Revocation, in a Place where a greater Number of Witnesses is necessary to a Testament, and the Testator had persevered in the said Will to his Death, altho he had not survived ten Years after the making of it, the Proof which would result from an Act of this Nature, joined with the Favour of the Heir at Law; would it not be sufficient to annull the Testament, as well as in all other Acts, and even in a Donation of one's whole Estate to take effect in the Life-time of the Donor, two Witnesses are sufficient with a Notary, or two Notaries without any Witness? This Question might be ranked in the Number of those which demand Rules for deciding them. And without deciding it, it seems reasonable to believe, that since *Justinian* required only three Witnesses with the Space of ten Years, and judged in this Case the Revocation of the Testament just and favourable, altho without the Formality required in a Testament, an Act made before two Publick Notaries, or one Notary and two Witnesses, setting forth in an authentick Manner the Will of the Testator to revoke his Testament, might have this Effect; especially since it would seem that fewer Formalities are necessary to leave the Inheritance in the natural Order to the Heir at Law, than what the Law requires to deprive him of it, and that it does not seem necessary that he who, after having made a Testament, changes his Mind, and is willing to die intestate, should make a second Testament in the same Form and Manner.

[*As to Revocation of Wills in* England, *it is particularly directed by Act of Parliament, that no Will in Writing concerning any Goods or Chattels, or Personal Estate, shall be repealed, nor any Clause, Devise, or Bequest therein be altered or changed by any Words, or Will by Word of Mouth only, except the same be in the Life of the Testator committed to Writing, and after the Writing thereof read unto the Testator, and allowed by him, and proved to be so done by three Witnesses at the least.* Stat. 29 Car. 2. cap. 3. §. 22.]

XIII.

13. The Testament may be either entirely annulled, or only as to the Institution, or as to some other Clause.

Among the different Causes which annul the Wills of Testators, and which have been explained in the foregoing Articles, we must distinguish between those which destroy entirely the whole Testament, so that there does not subsist so much as any one Disposition in it, neither for the Institution of the Heir or Executor, nor for the Legacies; and those which annul only either the Institution of the Heir or Executor, or some other Disposition, without touching the rest; which depends on the Rules that follow q.

q *See the following Rules.*

XIV.

14. The second Testament annuls or changes the first, according to the Dispositions it contains.

In the Case of a second Testament, the first is either entirely annulled in all its Parts, or only in that which the second may have changed in it, as has been said in the second Article. Thus the Effect of the Will of the Testator in his first Testament, depends on the Effect

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Effect which his Will explained in the second Testament ought to have *r*. And by the second Testament we are always to understand that which is the last, how many soever the former Testaments are *s*.

r This is a Consequence of the first and second Articles.

s Hoc est (eas tabulas) quæ novissime ita factæ sunt: post quas nullæ factæ sunt. *l.* 1. §. 1. *ff. de bon. poss. sec. tab.*

XV.

15. The Birth of a Child annuls the whole Testament that made no mention of it.

In the Case of the Birth of a Child, which the Testator did not foresee, and of which he had made no mention in the Testament, it is entirely annulled, and nothing of it subsists, even altho the Testator had instituted by the said Testament his other Children, which he had at that time *t*. For it may be said, with respect to the Dispositions of that Testament, that if the Testator had foreseen the Birth of this Child, he would have burdened the Succession with fewer Legacies, or perhaps would have left none at all. And it might likewise happen, that if this Testament ought to subsist, this Child would be reduced to its Legitime or Child's Part, contrary to the Intention of the Testator: So that we ought to presume of such a Testament, that the Dispositions thereof are contrary to those which the Birth of this Child would have obliged the Testator to make, if he had foreseen it.

t Si pater duos filios hæredes instituerit, & agnatione posthumi ruptum testamentum fuerit, quamvis hæreditas pro duabus partibus ad eos pertineat, tamen fideicommissæ libertates præstari non debent, sicut nec legata quidem aut fideicommissa præstare coguntur. *l.* 47. *ff. de fideicom. libert. l.* 24. §. 11. *eod.* See the sixth Article.

We may gather this Consequence from this Text, that even the most favourable Legacies would be revoked in this Case, since it annuls the Legacies of Liberty given to Slaves. But if there were in the said Testament a Legacy left to Servants, in lieu of Wages due to them, it would not be so much a Legacy as an Acknowledgment of a Debt which ought to be acquitted; and it would be the same thing, if the Testator had charged his Heirs or Executors with some Restitution, which he was obliged to make. For the Cause which would annul this Testament, would not annul the Proof that it would make of a Truth of this Nature.

XVI.

16. The Legacies of undutiful Testaments subsist.

If a Testator, having Children, or, if he is without Children, having Parents, makes no mention of them in his Testament, or if he disinherits them without just Cause, the Testament will be null only with respect to the Institution of other Heirs or Executors in the Place of his Children or Parents, and all the other Dispositions of the said Testament will have their Effect *u*.

u Si vero contigerit in quibusdam talibus testamentis quædam legata, vel fideicommissa, aut libertates, aut tutorum dationes relinqui, vel quælibet alia capitula concessa legibus nominari, ea omnia jubemus adimpleri, & dari illis quibus fuerint derelicta: & tanquam in hoc non rescissum obtineat testamentum. *Nov.* 115. *c.* 3.

This Text relates to the Testaments of Fathers and Mothers, and other Ascendants; and the same thing is ordained at the End of the ivth Chapter of the same Novel, with respect to the Testaments of Children who forget or disinherit their Fathers, Mothers, or other Ascendants.

By the antient Law, the Legacies and other Bequests of undutiful Testaments were annulled, as well as the Institution of the Heir or Executor. See the Remark on the fifth Article of the ivth Section of undutiful Testaments.

XVII.

17. The next of Kin being instituted, cannot renounce the Execution of the Testament, that he may succeed to the Testator as dying intestate.

In the Case where the Heir at Law, or next of Kin, is instituted Heir or Executor by a Testament, if to avoid Payment of the Legacies he should pretend to renounce the Testamentary Succession, and keep to his Right of succeeding to the Deceased, as dying intestate, he would nevertheless be bound to acquit the Legacies, and the other Charges regulated by the Testament *x*.

x Prætor voluntates defunctorum tuetur, & eorum calliditati occurrit, qui omissa causa testamenti, ab intestato hæreditatem partemve ejus possident, ad hoc, ut eos circumveniant, quibus quid ex judicio defuncti deberi potuit, si non ab intestato possideretur hæreditas: & in eos actionem pollicetur. *l.* 1. *ff. si quis omiss. causa testam.*

Quocumque enim modo hæreditatem lucri facturus quis sit legata præstabit. *d. l.* §. 9. *in f.* See the following Article, and the fourth Article of the first Section.

[*The Practice in* England *in this Case is, that when the Executor of a Will declines the Execution of it, the Legatees are at Liberty to propound it for the Support of their Legacies, and may have Administration with the Will annexed. For the Law does not put it into the Power of an Executor, to make the Testament subsist or not subsist, by his Acceptance or Non-Acceptance of the Execution thereof.*]

XVIII.

18. If he that is instituted Heir or Executor in the Testament, renounces by Collusion with the next of Kin, the Testamnet shall sub-

If he that is instituted Heir or Executor in a Testament renounces the Succession on purpose that it may go to the Heir at Law, or next of Kin, the Heir at Law will be obliged to pay the Legacies, and the other Charges of the Testament, altho he had given nothing to the Person named Heir or Executor in the Testament, to induce him to leave the Inheritance to him, and the said Executor had done it out of mere Favour

fist with respect to all the other Dispositions.

Favour and Courtesy to the Heir at Law y.

y Si quis per fraudem omiserit hæreditatem, ut ad legitimum perveniat, legatorum petitione tenebitur. *l.* 1. §. *ult. ff. si quis omiss. caus. testam.*

Si quis pecuniam non accepit, simpliciter autem omisit causam testamenti, dum vult præstitum ei qui substitutus est, vel legitimo, numquid locus non sit edicto? Plane indignandum est circumventam voluntatem defuncti. Et ideo, si liquido constiterit, in necem legatariorum hoc factum, quamvis non pecunia accepta, sed nimia gratia collata: dicendum erit, locum esse utili actioni adversus eum qui possidet hæreditatem. Et recte dicitur, ubicumque quis dum vult præstitum ei, qui se repudiante venturus est, non repudiaturus nisi præstitum vellet: & maxime si ob evertenda judicia id fecit, ibi dicendum est, adversus possessorem competere actionem. *l.* 4. *eod.*

See the eighteenth Article of the first Section of Heirs and Executors in general.

¶ *We have not put down in this Article, that it is necessary that the Design of defeating the Legataries should appear clearly, as is said in the first Part of this last Text. For besides that in the Sequel thereof it is said, that this Rule shall take place chiefly, if there were any Design to destroy the Dispositions of the Testament; which seems to intimate that even without this Design, the Heir at Law would be bound for the Legacies; another Consideration arising from what shall be remarked on the following Article, has induced us not to add this Restriction to the Rule explained in this Article.*

XIX.

19. If he renounces without this Collusion, what will be the Effect of this Renunciation.

If in the same Case, where another Person is instituted Heir or Executor in the Testament than the Heir at Law, he should renounce the Inheritance, not out of any Consideration for the Interest of the Heir at Law, but because he did not find his Account in accepting the Inheritance, this Institution would be of no effect, as has been said in the tenth Article. Thus, the Inheritance passing to the Heir of Blood, the Testament would remain without effect in its most essential Part, which is the Institution of an Heir or Executor z.

z In irritum constituitur testamentum non adita hæreditate. *l.* 1. *in f. ff. de injust. rup. irr. fact. test.*

Si nemo hæreditatem adierit nihil valet ex iis quæ testamento scripta sunt. *l.* 9. *ff. de testam. tut.*

Testamentum per omnia irritum. *l.* 20. *ff. de bon. poss. contr. tab.*

Si jure facto testamento, cessante hærede scripto, alter ab intestato adiit hæreditatem, neque libertates, neque legata ex testamento præstari, manifestum est. *l.* 2. *in f. C. si omiss. sit caus. test.*

¶ We have mentioned in this Article only the bare Nullity of the Institution of the Testamentary Heir or Executor, and not the absolute Nullity of the whole Testament, and of all the other Dispositions that it might contain, altho it was the Rule of the *Roman* Law, explained in the Texts cited upon this Article, that all the Dispositions should remain null, if he that was instituted Executor, or Testamentary Heir, did not accept of the Succession. This Rule was founded upon this, that the Institution of the Heir or Executor was considered as the most essential Part of the Testament, and the Foundation of all the other Dispositions. Which went so far in the antient *Roman* Law, that it was necessary to begin the Testament by the Institution of the Heir or Executor, and that all the Legacies which preceded the said Institution were null, even those which gave Liberty to Slaves *a*, altho there were no other Nullity in the Testament. It was upon the same Principle, that they made likewise the Validity of the Legacies to depend on the Executor's Acceptance of the Inheritance. So that it depended altogether on the Executor to make the Legacies valid by his accepting the Inheritance, or to annul them by renouncing it.

It appears clearly, from these Principles of the *Roman* Law, that this Rule, which annuls the Legacies for want of a Testamentary Heir or Executor, cannot have place in the Customs of *France*, seeing they do not acknowledge any Testamentary Heir, and that Testaments in the said Customs are, according to the Spirit of the *Roman* Law, nothing else but Codicils. And as for the Provinces which are governed by the written Law, the Case is so rare, since the Invention of the Benefit of an Inventary, for Legacies to be lost by the Testamentary Heir's renouncing the Inheritance, that it has never perhaps once happened. For what person is there who is instituted by a Testament, who having Hopes to reap some Advantage from the Succession, and being at liberty to accept it with the Benefit of an Inventary, will readily renounce it? And if he refuses it only because it is really burdensome, the Legataries lose nothing thereby; seeing Legacies are paid only after the Debts.

It is true, that in the antient *Roman* Law, it might very well happen, that a Testamentary Heir might renounce an Inheritance which would have proved advantageous. For before the Invention of the Benefit of an Inventary, as there was no Medium between accepting purely and simply the Inheritance, or renouncing it, it might easily fall out that a Testamentary Heir might renounce a Succession, which the apparent

a V. §. 34. *inst. de legat.*

Charges

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Charges might render suspicious, altho the Goods of the Succession might be more than the Charges: And it was in that Time that this Law was established. But after the Invention of the Benefit of an Inventary, it cannot well be supposed that this Case should happen, that a Succession, in which there may remain Goods to the Heir or Executor, should be abandoned. And in fine, altho it should happen that a Testamentary Heir should renounce a Succession, of which the Goods are sufficient to clear all the Charges, and to pay off either the whole Legacies, or a part of them; it does not seem to be just, nor agreeable to our Usage, that the Legataries should lose their Legacies because the Heir or Executor would not accept of the Inheritance. For as this Rule of the *Roman* Law, which annuls the Legacies when he that is instituted Heir or Executor abandons the Succession, has had for its Foundation only these Niceties, which we have just now explained; so likewise it may be considered as a pure Nicety, and may be said to be contrary to the first and most essential Principle of the *Roman* Law it self in the Matter of Testaments, which is, that the Will of the Testator ought to serve as a Law, as has been remarked in its proper Place *b*; since this Will is not limited to the Institution of an Heir or Executor, but respects likewise the Legacies, and sometimes Legacies that are more favourable than the Institution it self, and which the Testator will have acquitted independently of the Will of his Heir or Executor, and even against his Will, if he should oppose it.

It may be said further, that it is contrary to Equity to make Bequests that are just and reasonable, to depend on the whimsical Humour of an Heir or Executor; and to make Legataries lose the Recompences of their Services and other good Deeds, on which may depend the Subsistence of their Families; and that for no other Reason, but that of a bare Nicety, which can be of no Advantage to any Person besides the Heir at Law, who could not expect the Succession but with the Condition of acquitting the Legacies, if he had been called to it by the Testament; and who not being called to succeed by the Testament, ought to content himself with taking the Place of him that is instituted by the Testament, with the Charges which the Testator had imposed upon him. So that we might in this Case, more than in any other, put in practice the Sentiment of the most learned Commentators, who will have the Codicillary Clause to be supplied in every Testament, as has been said in the fourth Section; which would have this Effect, that this Heir at Law would be obliged to acquit the Legacies, in default of him that is instituted Heir or Executor by the Testament; and that altho he were Heir by another Title than the Testament, yet he ought not to have the Benefit of the Succession without acquitting the Charges of it, according to these Words of one of the Laws concerning this Matter, *Quocunque enim modo hæreditatem lucrifacturus quis sit, legata præstabit. l. 1. §. 9. in f. ff. si quis om. caus. test.* For altho these Words do not precisely relate to the Case in question, yet the Sense and Meaning of them is applicable to it.

Altho all these Considerations seem sufficient to make the Legacies subsist, when the Testamentary Heir renounces the Succession, yet the Validity of the Legacies in this Case may likewise be founded on another Principle of Equity; and which is also of the *Roman* Law; That in the Cases where the Question is concerning the Validity of an Act, in which are contained two Things that have some Connexion with one another; if one of the two cannot subsist, yet the Act is nevertheless valid for that which may subsist without the other. Thus, for example, when by one and the same Act two Persons have bound themselves as Sureties for another, if one of the said Persons could not bind himself, as if it was either a Minor, or a Woman, who by the *Roman* Law could not oblige her self for other Persons, the Act which would be null with respect to the said Woman, or Minor, would subsist for the other, who would remain obliged solely for the whole Debt *c*. It is only the Acts, of which no one Part can subsist but by the Validity of the Whole together, that are annulled in the Whole by the Nullity of any Part; as, if two Arbitrators being named by a Compromise, one of them either could not, or would not accept thereof, the Nomination would be altogether fruitless, with respect to them both; for one of them cannot judge without the other *d*; so that

b See the seventh Article of the first Section of this Title, and the fifth Article of the following Section.

c l. 48. ff. de fidej. l. 8. C. ad Senat. Vell.

d l. 7. §. 1. ff. de recept.

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that the Nomination of one alone would subsist to no purpose. But even in the Cases which relate to one only Thing, which can admit of no Division, the Laws suppose a Division therein, in order to make the Acts subsist so far as is possible. For it is the Spirit and Intention of the Laws, to give to all sorts of Acts all the Effect that they can reasonably have. Thus we see, even in the *Roman* Law, that *Justinian* having dispensed with the registring of Donations that should be under a Sum which he had regulated, he ordained that the Donations exceeding the said Sum, which were not register'd, and which for want of being register'd ought to be null, should subsist for the Sum that might be given without being register'd. So that that Donation was partly null, and partly had its Effect *e*. Thus, by our Usage, a Donation of all one's Goods, present and to come, may be divided by the Donee, who may restrain it to the Goods which the Donor had at the Time of the Donation, as has been remarked on the sixth Article of the thirteenth Section of Heirs and Executors in general.

It is from these Principles that the Rule of the Canon Law has been taken, which says, that that which may be valid ought not to be annulled because of its Connexion with that which is invalid: *Utile non debet per inutile vitiari*, C. 37. de reg. Jur. in. *6*. Which is to be understood of the Cases where this Connexion is not such that one of the two things cannot subsist without the other. Thus we may say, that according to the same Principles it is equitable that a Testament which is without effect as to the Institution of an Heir or Executor, should nevertheless subsist as to the other Dispositions, since they have no necessary Connexion with the said Institution, each of them having its Cause in the Intention of the Testator, which makes them independant one of another. For as his Will is in general with respect to them all together that they should have their effect, so his Will is in particular with respect to every one of them, that it should be executed, even altho the others could not have their effect.

Upon the same Subject we may remark a Decision of the Emperor *Antoninus*, in a Cause which was argued before him: The Question was, to know whether a Testator having blotted out in his Testament the Names of his Executors, the Legacies with which his Executors were charged in the said Testament ought to subsist. The Emperor's Advocate, who was of Counsel against the Legataries, pretended that the said Legacies were escheated, that is of no effect for the Legataries, and that they did belong to the Exchequer, according to the Law which was then in being *f*: And he quoted the Rule, that for want of a Testamentary Heir, all the Dispositions of the Testament were null, *Non potest ullum testamentum valere quod hæredem non habet*. But the Emperor, who knowing this Rule, had said before of himself that these Legacies could not be valid, having ordered the Parties and their Advocates to withdraw, that he might reflect at more leisure upon the matter, made them be called in again, and told them that it was just that the said Legacies should be confirmed *g*. But if it is equitable to make the Legacies subsist in a Case where the Testator seemed to annull his Testament by blotting out the Names of his Executors; there is much more reason to confirm the Legacies of a Testament, in which the Testator has made no manner of Change or Alteration, and where nothing has happened but the unjust Caprice of the Testamentary Heir, who notwithstanding he may, without any Injury to himself, enter Heir with the Benefit of an Inventary, takes a Course which can be of no use but to destroy the Legacies, without reaping any Advantage thereby himself. It is true, that in the Case of this Law it was the Cause of the Exchequer against the Legataries, and that this Emperor preferred the Interest of the Legataries to that of the Exchequer; but he might have given up the Right of the Exchequer, without making the Legacies to subsist, and might have left to the Heir at Law the whole Inheritance. Thus the Principle of Equity, which was the Foundation of the Emperor's Decision, might likewise very justly decide in favour of the Legataries, in the Case where their Right is called in question only by the Deed of the Executor, and not by any Change of Will in the Testator; for in this Case, the Condition of the Legataries is more favourable, than in that where the Testator by blot-

e *l.* 34. C. *de donat. l.* 36. *in f. eod. Nov.* 162. *c.* 1. §. 2.

According to our Usage in France, *every Donation that is not enrolled is intirely null.* See the xvth Article of the ist Section of Donations.

f *V. l. un.* §. 1. *& seq. C. de caduc. toll.*

g *l.* 3. *ff. de his quæ in test. del. ind. vel inscrib.*

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blotting out the Names of his Executors, did himself give a mortal Wound to his Testament.

It is upon account of all these Considerations, that we have been induced to be of opinion, that this Rule of the *Roman* Law, which annulled the Legacies when the Testamentary Heir did not enter to the Inheritance, is not conformable to our Practice; which might likewise be founded on a Rule of the *Roman* Law, which says, that the Legacies belong to the Legataries from the moment of the Testator's Death, without waiting till the Testamentary Heir accepts the Inheritance, and that if he happens to die before he takes upon him the Execution of the Will, they transmit their Right to their Legacies to their Heirs *b*. It would seem to be a consequence natural enough from this Principle, that since the Legatary has acquired his Right before the Testamentary Heir accepts of the Succession, that he should not lose it by his Non-Acceptance of it; and especially in our Usage, which prefers always natural Equity to Niceties. To which may be applied the Words of the same Law, which contains this Decision of the Emperor *Antoninus* which we have just now explained; *In re dubia benigniorem Interpretationem sequi non minus justius est, quam tutius:* That is to say, that in doubtful Cases the safest and best way is to follow that which is most equitable.

We must in the last Place observe concerning the Validity of the Legacies in the Cases where the Testamentary Heir renounces the Inheritance, that by the first Novel of *Justinian*, Chap. 1. if any one of the Heirs or Executors, being charged with Legacies, did delay to acquit them for a whole Year, he was deprived of his Right to the Inheritance which went to the Heir or Executor substituted in his Place, if there was any; and in default of him to his Coexecutor, and in default of Executors, or Testamentary Heirs, to the the Heirs at Law, but still with the Charge of acquitting the Legacies. And if there was neither Substitute, nor Coexecutor, or that they would not accept the Inheritance, and that the Person whose Right it was to succeed in case there had been no Testament, had likewise refused, then the Goods went to the Legataries. It would seem to be very conformable to the same Spirit which moved the Lawgivers to take such a multitude of Precautions for having the Legacies acquitted, that they should not be annulled in the Case where the Testamentary Heir renounces the Inheritance, no more than in the Case of this Novel, where the Heirs who are called in default of the Executor that delays to acquit the Legacies do renounce likewise, and where the Law uses all possible means to prevent the Legacies from perishing.

b See the 1st Article of the ixth Section of Legacies.

XX.

20. The Incapacity happen'd to the Testator annuls all the Dispositions of the Testament.

When the Testament is annulled by reason of a Change in the State of the Testator, which has put him under an Incapacity of having Heirs or Executors, as has been said in the xith Article, this Testament will not only be null as to the Institution of the Heir or Executor, the Testator not being capable of having any; but likewise as to all the other Dispositions of the Testament, even the most favourable; for his Incapacity renders them all null *a*.

a Irritum fit testamentum quoties ipsi testatori aliquid contigit, puta, si civitatem amittat. *l. 6. §. 5. ff. de inj. rupt. irr. fact. test.* See the xith Article.

XXI.

21. The Testator may annul his Testament by tearing or rasing it.

If the Testator tears the Original of his Testament, or if he rases or crosses the Subscriptions, or by any other Means puts his Testament into such a condition by Rasures or Dashes, that it appears that his Intention was to annul it; it will remain null, altho there has been no other Testament made *b*.

b Si signa turbata sint ab ipso testatore, non videtur signatum. *l. 22. §. 3. ff. qui testam. fac. poss.* Siquidem testator linum vel signacula inciderit, utpote ejus voluntate mutata, testamentum non valere. *l. 30. C. de testam.*

XXII.

22. The Blots and Dashes made by chance, or against the Will of the Testator, do not annul the Testament.

If the Testament had been tore, or blotted only, by some Chance, or some Imprudence, or out of Malice, contrary to the Intention of the Testator, and that the Truth of the said Fact appear'd to be well proved; it would nevertheless have its effect, if what remained entire of the Testament should sufficiently explain the Dispositions of the Testator *c*. But if there was any Clause de-

c Si quidem testator linum vel signacula inciderit, vel abstulerit, utpote ejus voluntate mutata testamentum non valere. Sin autem ex alia quacumque causa hoc contigerit, durante testamento, scriptos hæredes ad hæreditatem vocari. *l. 30. C. de testam.*

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defaced in such a manner, that it were not possible to read so much of it as would be necessary to make it be understood, in the Impossibility of knowing justly what the Testator had writ, or caused to be writ therein, would hinder the Execution of it *d*.

Quæ in testamento legi possunt, ea inconsulto deleta & inducta, nihilominus valent. *l.* 1. *ff. de his qui in testam. del.*

Quod igitur incaute factum est, pro non facto est, si legi potuit. *d. l.* §. 1.

d Sed si legi non possunt quæ inconsulto deleta sunt, dicendum est non deberi. *d. l.* 1. §. 2.

Sed consulto quidem deleta exceptione petentes repelluntur: inconsulto vero non repelluntur, sive legi possunt, sive non possunt: quoniam si totum testamentum non extet, constat valere omnia quæ in eo scripta sunt. *d. l.* 1. §. 3.

If the Notaries or Witnesses knew the Contents of the Place that is defaced contrary to the Intention of the Testator, and that the Circumstances should render favourable the Proof that their Declaration might make, it seems reasonable that in this Case their Testimony should be received: which would be conformable to this last Text, where it is said, that that which is defaced without any Design of the Testator, and which cannot be read, ought to be executed: For it cannot be executed unless it be known: and unless it can be read, it cannot be known but by the Declaration of the Notary and Witnesses who may know it. And this Proof would have nothing in it contrary to the Ordinances, and our Usage.

XXIII.

23. The Additions made to explain the Testament do not annul it.

If after the Testament is entirely written and signed, and the Witnesses are withdrawn, the Testator had a mind to make some change in it, he could not do it but by a new Disposition made according to form: But if without an Intention to alter any thing material in the Will, he had a mind only to add some Words to explain a dark and equivocal Expression; as if having bequeathed a Set of Horses, having more than one Set; or a Suit of Hangings, without naming which Suit, he having many; or having left a Legacy to a Person whom he had not described clearly enough; he should explain, either in the Margin, or at the Bottom of the Testament, what Set of Horses, or what Suit of Hangings, he meant to give, or should mark more precisely the Qualities that may distinguish this Legatary; Additions of this kind, or others of the like nature, would not annul the Testament: For they would make no Alteration in the Will of the Testator, and would not contain any new Bequest; but would explain only some Obscurity in those which he had already made, and which without this Explication would have raised after his Death Difficulties how to judge by Interpretations, and Reflections on the Circumstances, what had been his Intention *e*.

e Si quid post factum testamentum mutari placuit, omnia ex integro facienda sunt. Quod vero quis obscurius vel nuncupat, vel scribit, an post solennia explanare possit, quæritur, ut puta Stichum legaverat, cum plures haberet, nec declaravit de quo sentiret: Titio legavit, cum multos Titios amicos haberet: erraverat in nomine, vel prænomine, vel cognomine, cum in corpore non errasset: poteritne postea declarare de quo senserit? & puto posse. Nihil enim nunc dat: sed datum significat. Sed etsi notam postea adjecerit legato, vel sua voce, vel literis, vel summam, vel nomen legatarii, quod non scripserat, vel nummorum qualitatem: an recte fecerit? & puto etiam qualitatem nummorum posse postea addi. Nam etsi adjecta non fuisset, utique placere conjectionem fieri ejus quod dereliquit, vel ex vicinis scripturis, vel ex consuetudine patris familias, vel regionis. *l.* 21. §. 1. *ff. qui testam. fac. poss.*

XXIV.

24. We ought to judge of Rasures and Additions according to the Circumstances.

In the Questions which concern the Regard we ought to have to Rasures, Dashes, Additions, or other Changes which may happen in a Testament, and wherein we are to judge of the Effect they ought to have, we must distinguish between what was done at the time of making the Testament, and was approved of in presence of the Notary and Witnesses, and what was done afterwards, after that the Testament was perfected. In the first Case, whatever is approved of in the presence of the Notary and Witnesses makes a part of the Testament. And in the second Case we ought to distinguish what has been done after making the Testament, by the Testator himself, whether it were to explain any thing in the Testament, as in the Cases of the foregoing Article, or thro Inadvertency, or with a Design to annul the Testament by Rasures that might have this effect, or with other Views, from that which is done by other Persons, either without any design, or out of malice, or to forge something into the Will. And it is by these several Views, and the foregoing Rules that we are to judge, according to the Circumstances, what ought to be the effect of these Changes *f*.

f De his quæ interleta sive suprascripta dicis, non ad juris solennitatem, sed ad fidei pertinet quæstionem, ut appareat, utrum testatoris voluntate emendationem meruerint, vel ab altero inconsulto deleta sint, an ab aliquo falso hæc fuerint commissa. *l.* 12. *C. de testam.*

XXV.

25. A Testament made by force is null.

Seeing the Testament ought to contain only the Will of the Testator, which ought

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ought to be free; if it were proved that a Testator had been obliged by some Violence, or other unlawful way, to make a Testament, or other Dispositions in view of Death, not only would they be null, but the Author of this Attempt would be punished for it as for a Crime, according to the Quality and Circumstances of the Fact *g*.

g Civili disceptationi crimen adjungitur, si testator non sua sponte testamentum fecit, sed compulsus ab eo qui hæres est institutus, vel a quolibet alio, quos noluerit, scripsit hæredes. *l. 1. C. si quis aliq. test. prohib. vel coeg.*

See the xth Article of the iiid Section of Heirs and Executors in general.

¶ We must not confound with the unlawful Ways spoken of in this Article, certain ways which a great many Persons make use of to engage the Testator to make his Will in their favour, such as Services, good Offices, Caresses, Flatteries, Presents, the Interposition of Persons who cultivate for them the good Will of the Testator, and engage him to make some Bequest in their favour: For altho these kinds of ways may be inconsistent either with Decency or good Conscience, or even contrary to both; yet the Laws of Men have not inflicted any Penalties on those who practise them. And when these sorts of Impressions have had the Success to engage the Testator to make voluntarily the Dispositions he was intreated to do, yet they become his Will; and the Motive of the Ways which have engaged him thereto does not render them null; since it suffices that he has made them voluntarily and freely. Thus this common Place of all those who complaining of the Dispositions of a Testament, say, that it was put upon the Testator against his Will, is only an uncertain and fruitless Argument, unless it be founded upon Circumstances of some unlawful Way; and if the Testament has not been really and truly suggested in such a manner that the Testator himself had not explained his own Intentions; but that, for example Persons taking advantage of the Weakness of a sick Man at his last Gasp, had contrived a Testament which they presented to him, and after having read it over to him, asked him whether he was not willing to approve all the Clauses of it, and he had answer'd, Yes; this would be a Suggestion really and truly unlawful, and which being proved would annul Dispositions made after this manner. *See the 27th Article of this Section; and the 8th Article of the 11th Section of Testaments.*

XXVI.

26. The Testament is null with respect to him who forcibly hinders the revoking of it.

We ought to reckon among the number of Dispositions that ought to be annulled, that which a Testator being desirous to revoke, had been hinder'd from doing it by Violence, or some other unlawful way, on the part of those who were to reap Advantage from the said Dispositions: For with respect to them, they by rendering themselves unworthy of the said Dispositions, would render them null according to the Rule that has been explained in its Place *h*.

h See the xth Article of the iiid Section of Testaments.

XXVII.

27. The Dispositions procured by some good Office or Service are not null.

We must not count among the unlawful Ways which may annul a Testament, the Civilities, the good Offices, the Services which one Relation may render to another, a Friend to his Friend, a Wife to her Husband, or a Husband to his Wife, in order to deserve by that means some Kindness, or to prevent the making of Dispositions to their prejudice, which might be the Effect of some bad Impression made upon the Testator by false Reports or other Causes, and which they might be desirous to remove, and to induce the Testator to have more favourable Thoughts of them by these kinds of good Offices *i*.

i Virum, qui non per vim, nec dolum quo minus uxor contra eum mutata voluntate codicillos faceret, intercesserat, sed (ut fieri adsolet) offensam ægræ mulieris maritali sermone placaverat, in crimen non incidisse, respondi. Nec ei quod testamento fuerat datum, auferendum. *l. ult. ff. si quis aliq. test. prohib. vel. coeg.*

Judicium uxoris postremum in se provocare maritali sermone non est criminosum. *l. ult. C. eod.*

See the Remark on the xxvth Article.

SECT. VI.

Of the Rules of interpreting Obscurities, Ambiguities, and other Defects of Expression in Testaments.

HAVING explained the Nature and Forms of Testaments, and the several Causes which may annul them, it is proper in the next place to explain the Rules that are necessary to give to Testaments, that do subsist, their just effect, by the Interpretation of the Clauses, which may give occasion to any Difficulty or Doubt, either as to what may concern the Institution of the

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the Heir or Executor, or the other Dispositions.

The Difficulties which may demand some Interpretation in Testaments are of two sorts. One is of those which arise from some Obscurity, from some Ambiguity, or some other Defect of Expression; and the other is of those which may proceed from something else than a Defect of Expression, and which render it necessary to find out the Intention of the Testator by some other ways than by the Knowledge of the Sense of the Words. The Difficulties of the first kind shall be the Subject-matter of this Section; and those of the second shall be explained in the following Section.

We may apply to these two sorts of Difficulties some of the Rules which relate to the Interpretation of Covenants, and likewise some of those which concern the Interpretation of Laws. And it will be easy to discover which of those Rules may be applied here by the bare reading of the iid Section of Covenants, and of the iid Section of the Rules of Law.

All the Rules explained in this and the following Section, are to be understood not only of Testaments, but of all Dispositions made in prospect of Death, altho there is mention made only of Testaments.

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I.

1. Three sorts of Expressions.

THERE are three sorts of Expressions to be distinguished in Testaments: The first is of those that are perfectly clear; the second, of those that are so obscure, that it is impossible to give them any Meaning; and the third, is of those in which there is some Obscurity, some Ambiguity, or some other Defect that may render the Sense of them uncertain. And each of these kinds of Expressions hath its proper Rules, which shall be explained in this Section *a*.

a See the following Articles.

II.

2. First sort of Expressions, those that are clear.

The Expressions which are perfectly clear, do not admit of any Interpretation to make their Sense known, since their Clearness makes it evident enough. And if the Disposition of the Testator appears to be clearly and distinctly explained thereby, we ought to keep to the Sense that appears by the Expression *b*.

b Cum in verbis nulla ambiguitas est, non debet admitti voluntatis quæstio. *l.* 25. §. 1. *ff. de leg.* 3.

Cum enim manifestissimus est sensus testatoris, verborum interpretatio nusquam tantum valeat, ut melior sensu existat. *l.* 3. *in f. C. de lib. præter. vel exhæred.* See the fifteenth Article, and the last Article.

III.

3. Second sort of Expressions, those that have no Meaning at all.

The Expressions which cannot have any Meaning, are rejected as if they had not been written, and do not hinder the others from having their Effect *c*.

c Quæ in testamento scripta essent, neque intelligerentur quid significarent, ea perinde sunt ac si scripta non essent: reliqua autem per seipsa valent. *l.* 2. *ff. de his quæ pro non script.*

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IV.

4. Third sort of Expressions, those which are obscure.

The Expressions in which there is some Obscurity, some Ambiguity, some double Meaning, or other Defect which may render their Sense uncertain, ought to be interpreted by the Rules which follow *d*.

d See the Articles which follow.

V.

5. The first Rule of the Interpretation of Testaments, the Will of the Testator.

Since the Laws permit Testators to dispose of their Goods by a Testament, it follows that the Will of the Testator holds therein the Place of a Law *e*. Thus, the first Rule of all Interpretations of Testaments, is, that the Difficulties in them ought to be explained by the said Will of the Testator, as far as it can be known from the whole Tenor of the Testament, and the other Proofs that may be had of it, and that it is just and reasonable, and has nothing contrary to Law or good Manners *f*. And it is to this first Rule, that all the others which concern the Interpretation of Testaments are reduced *g*; as will appear throughout the rest of this Section, and in the following.

e See the first and seventh Articles of the first Section.

f Testamentum est voluntatis nostræ justa sententia *l.* 1. *ff. qui test. fac. poss.* Quæ facta lædunt pietatem, existimationem, verecundiam nostram, & ut generaliter dicam contra bonos mores fiunt, nec facere nos posse credendum est. *l.* 15. *ff. de condit. instit.*

g Semper vestigia voluntatis sequimur testatorum. *l.* 5. *C. de necess. serv. hæred. instit.*

There is this Difference between Covenants and Testaments, as to the manner of interpreting them; That in Covenants we must consider differently either the common Will of those who treat together, or the bare Will of one of the two, without regard to the Will of the other, according to the Principles which have been explained in the second Section of Covenants. But in Testaments, where the Testator alone explains his Will, that Will alone is always the only Rule. See the Texts cited on the seventh Article of the first Section.

VI.

6. The Uncertainty of the Expression is explained by the Intention of the Testator.

If there is in a Testament any Ambiguity, or other Defect of Expression, which may have a Meaning different from the Will of the Testator, which is otherwise well known, we ought to prefer the Intention of the Testator to that other Meaning. Thus, for example, if he who had a mind to institute an Heir or Executor, contents himself with naming him by his Sirname, without adding either his Quality or other Circumstances, which may distinguish him from other Persons that have the same Name; it is by the Ties of Friendship, or Relation, that the Testator may have had with one of the two, or more, of the same Name, that we are to judge which of them he intended to name for his Heir or Executor. Thus, for another example, if the Testator had erred in the Name of his Executor, calling him *James* instead of *John*, and that there were another Person of the same Name and Sirname which the Testator had made use of, but to whom the Qualities which he had considered in the Choice of his Executor did not agree; the same Circumstances of Friendship, Kindred, or others, which might serve to distinguish the Person whom the Testator had a mind to name for his Executor, would make him to be preferred to the Person who was named only by mistake, contrary to the Intention of the said Testator. And it would be the same thing in a Mistake of the like Nature, concerning any of the Legataries *h*.

h Si quidem in nomine, cognomine, prænomine, agnomine legatarii testator erraverit, cum de persona constat, nihilominus valet legatum. Idemque in hæredibus servatur, & recte. Nomina enim significandorum hominum gratia reperta sunt: qui si alio quolibet modo intelligantur, nihil interest. §. 29. *instit. de legat.* Error hujusmodi nihil officit veritati. *l.* 4. *C. de testam.* Si in persona legatarii designandi aliquid erratum fuerit, constat autem cui legare voluerit; perinde valet legatum, ac si nullus error intervenerit. *l.* 17. §. 1. *ff. de condit. & demonstr.* See the twenty sixth Article of the second Section.

VII.

7. A false Description does no Prejudice to a Bequest that is otherwise sufficiently clear.

If the Testator, having sufficiently explained himself, either as to the Person of his Executor, or of a Legatary, or as to the Thing bequeathed, had added, the better to specify either the Persons or the Things, some Quality, or other Mark, which should appear to be false; as, if having named the Executor, or Legatary, he had added these Words, *Who is Son of such an one, or of such a Country*; or that having devised some Land or Tenement described by its Name, or by its Situation, or otherwise, he had added, *That he had bought the said Land or Tenement of such a Person*; all these Additions, altho they should be found to be false, would make no Alteration in the Dispositions, which otherwise are clear enough. For if the Persons or Things are sufficiently described by the first Expression, what is added

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added to describe them more plainly being superfluous, will only be a Mistake which can do no prejudice *i*.

i Falsa demonstratio non perimit legatum. *l.* 75. §. 1. *ff. de leg.* 1. Placuit falsam demonstrationem legatario non obesse: nec in totum falsum videri, quod veritatis primordio adjuvaretur. *l.* 76. §. 3. *ff. de leg.* 2.

Si in patre vel patria, vel alia simili assumptione falsum scriptum est, dum de eo qui demonstratus sit constet, institutio valet. *l.* 48. §. *ult. ff. de hæred. instit.* Huic proxima est illa juris regula, falsa demonstratione legatum non perimi. Veluti si quis ita legaverit: *Stichum servum meum vernam do, lego.* Licet enim non verna, sed emptus sit, si tamen de servo constat, utile est legatum. Et convenienter, si ita demonstraverit, *Stichum servum quem à Seio emi*, sitque ab alio emptus, utile est legatum, si de servo constat. §. 30. *inst. de legat.* Demonstratio falsa est, veluti si ita scriptum sit, *Stichum quem de Titio emi, fundum Tusculanum qui mihi à Seio donatus est.* Nam si constat de quo homine, de quo fundo senserit testator, ad rem non pertinet, si is quem emisse significaverit donatus esset: aut quem donatum sibi significaverat, emerit. *l.* 17. *ff. de condit. & demonstr. l.* 10. *ff. de aur. arg.* See the fifth Article, and the eleventh Article of the eighth Section.

VIII.

8. The Obscurities and Ambiguities are explained by the Circumstances.

If there are in a Testament any Expressions which are not determined to a certain Meaning by the natural Signification of the Words, and that there is in them some Obscurity, some Ambiguity, or other Defect, which makes it uncertain what it was the Testator had a mind to express; these sorts of Expressions will be interpreted by the Proofs that may be gathered of his Will from the different Circumstances that may serve to that end, and from discerning the Effect of these Circumstances by the Use of the Rules that follow *l*.

l Cum in testamento ambigue, aut etiam perperam scriptum est, benigne interpretari, & secundum id quod credibile est cogitatum, credendum est. *l.* 24. *ff. de reb. dub.*

In ambiguo sermone non utrumque dicimus, sed id dumtaxat quod volumus. *l.* 3. *ff. de reb. dub.* See the following Articles.

IX.

9. Interpretation of a Legacy that has relation to two Things, and must be fixed to one.

If the Testator had expressed himself in a Legacy in a such a manner, that his Expression seems to have relation to two Things, one of which alone he had in view, and he has not sufficiently determined which of the two he had a mind to bequeath, we shall judge of his Intention by the Circumstances which may give any light thereto. Thus, for example, if a Testator, who had two Pictures, one of a St. *John* by *Raphael*, the other of a Battle by *Rubens*, having only these two Pieces of the said two Painters, had bequeathed his Battle of *Raphael*, the Expression of the Name of the Painter would mark the St. *John*, and that of the History of the Picture would point out the Battle. Thus, this Expression would have some relation to both the Pictures; and it would seem that the Legatary might demand a Picture of *Raphael's*. But because the History of the Picture of the Battle would denote it more sensibly, than the Name of *Raphael* would do that of the St. *John*, and that these Pictures would be more distinguished by their Subjects that are so different, than by the different Names and Merits of the Painters, the Legatary would have the Battle, altho it were of another Hand than of *Raphael m*.

m Qui habebat Flaccum fullonem, & Philonicum pistorem, uxori Flaccum pistorem legaverat: qui eorum, & num uterque deberetur? Placuit primo eum legatum esse quem testator legare sensisset. Quod si non appareret, primum inspiciendum esse, an nomina servorum dominus nota habuisset: quod si habuisset, eum deberi, qui nominatus esset: tametsi in artificio erratum esset. Sin autem ignorata nomina servorum essent, pistorem legatum videri, perinde ac si nomen ei adjectum non esset. *l. penult. ff. de reb. dub.*

¶ If we suppose, for another example, that a Testator, who had a black *Spanish* Horse, and a white *Barbary* Horse, had bequeathed his white *Spanish* Horse; would the Legatary have the *Spanish* Horse, or the *Barb*? The Kind would denote the *Spanish* Horse, and the Colour the *Barb*; which might be a Foundation for two opposite Interpretations. For if the Testator was ignorant of the Difference between a *Barb* and a *Spanish* Horse, it might be presumed that it were the *Barb* which he had bequeathed, having distinguish'd him by the Colour, which he could not but know. But if we suppose that the Testator knew perfectly well the Difference between a *Spanish* Horse and a *Barb*, will not his making mention of the *Spanish* Horse induce us to think that he did not err in the Kind, and that he had really a mind to give a *Spanish* Horse. And that thus the Error being only in the Colour, and not in the Kind, it would be a Mistake either of the Person who writ the Testament, or of the Testator himself, who by having added the Colour, had render'd his Expression uncertain: Or will it be said, that the Colour making a greater Distinction than the Kind,

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Kind, the Testator hath bequeathed the *Barb*? Or lastly, will one chuse rather to decide the Doubt in favour of the Executor, and give him his Choice, by the Rule explained in the sixth and following Articles of the seventh Section; or in favour of the Legatary, and give him the Choice, pursuant to the Rule explained in the tenth and following Articles of the same Section? Which would depend on the Circumstances which might make the Presumption to be in favour of the Legatary: For if the Circumstances did not decide it for him, and if the Question were in an equal Ballance, and really doubtful, it would be the Heir or Executor that ought to have the Choice.

X.

10. A Mistake in the Name of the Thing bequeated, does no harm to the Legacy.

If he who has a mind to devise some Land or Tenement errs in the Name, whether it be thro Forgetfulness, or because he had a Design to change the Name thereof, or thro some Mistake, and gives to the said Land or Tenement the Name of some other, but so as that this Mistake appears otherwise by the Circumstances, and that his Will be sufficiently known, the Legacy shall have its effect for the Land or Tenement which he had a mind to give, altho he has mistaken its true Name *n*.

n Si quis in fundi vocabulo erraverit & Cornelianum pro Semproniano nominavit debebitur Sempronianus. *l.* 4. *ff. de legat.* 1.

XI.

11. The Words which are necessary to make the Sense perfect may be supplied.

If it happens that thro some Forgetfulness or Mistake, whether it be of the Testator himself, if he writes his own Testament, or of the Person whom he employs to write it, there are wanting in some Expressions necessary Words, so that it cannot have any Meaning without adding them, and that by such Addition the Sense is perfect; this Omission will be supplied by supposing the Words that are wanting to be there inserted. Thus, for instance, if a Testator had said, *I institute such a one*, without adding the Word *Heir*, or *Executor*, it would be supplied. Thus, in a Legacy, where it should be said only, *To such a one the Sum of so much*, it would be reasonable to suppose the Words, *I give and bequeath*. Thus, in all sorts of imperfect Expressions, where one may judge by the Expression it self, or by the Sequel of the Testament, what are the Words omitted, which would naturally make up the Sense which the Testator had in his Mind, it would be just to supply them *o*.

o Si omissa fideicommissi verba sunt, & cætera quæ leguntur cum his quæ scribi debuerant congruant, recte datum, & minus scriptum exemplo institutionis legatorumque intelligitur: quam sententiam optimus quoque Imperator noster Severus secutus est. *l.* 67. §. 9. *ff. de legat.* 2.

Verbum *volo* licet desit, tamen quia additum perfectum sensum facit, pro adjecto habendum est. *l.* 10. *C. de fideicom.*

Item Divus Pius rescripsit, *illa uxor mea esto*, institutionem valere, licet deesset *hæres*. *l.* 1. §. *penult. ff. de hæred. instit.*

Errore scribentis testamentum Juris solennitas mutilari nequaquam potest: quando minus scriptum, plus nuncupatum videtur. Et ideo recte testamento condito, quamquam desit *hæres esto*, consequens est, existente hærede legata seu fideicommissa, juxta voluntatem testatoris, oportere dari. *l.* 7. *C. de test.* See the following Articles.

XII.

12. Example of a Conjecture for discovering the Uncertain Intention of the Testator.

If the Expression is defective, not because of the Omission of a Word that is necessary to be supplied for making the Sense perfect, as in the Case of the foregoing Article, but because of some Uncertainty, or Obscurity, that could not be cleared up by any other Expression in the Testament; and that the Explanation thereof should depend on the Knowledge of the Intention of the Testator, which he had not sufficiently made known; it would be necessary in this Case to have recourse to the other Proofs or Presumptions which might discover the said Intention. Thus, for example, if a Testator had left to ome Person a yearly Pension, without explaining the Sum; as it would be certain on one side that this Legacy ought to subsist, and uncertain on the other to what Sum the Testator had a mind to fix it, it would be necessary to regulate this Pension in the manner that it might be reasonable to suppose the Testator would regulate it himself, if he were alive. Which would depend on the Circumstances of the Quality of the Testator, and Largeness of his Estate; on the Quality of the Legatary, and Greatness of his Wants; on the Quality of the Heirs or Executors, whether they were Descendants or Ascendants to the Testator, or collateral Relations, or nothing of kin to him; and if they were Children, in what Number they were. But if this Testator was wont to give every Year to the said Legatary something for his Maintenance, or Alimony, the Legacy might be regulated on

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on the same foot with what the Testator was wont to give him in his Lifetime p.

p Si cui annuum fuerit relictum sine adjectione summæ, nihil videri huic adscriptum, Mela ait. Sed est verior, sententia quod testator præstare solitus fuerat, id videri relictum: si minus, ex dignitate personæ statui oportebit. *l.* 14. *ff. de an. leg.* See the xiith Article of the vth Section of Legacies.

XIII.

13. Another Example of the Interpretation of a defective Expression.

We may add for another Example of a defective Expression which it would be necessary to interpret by the Intention of the Testator, a Legacy left in these Terms; *I give and bequeath unto such a one the Sum of so much, until she is married*, without mentioning that this Sum should be paid her every Year to the time of her Marriage: which would give rise to the Question, whether it would not be only a Legacy of this Sum to be paid once for all, or whether it would be an annual Legacy to the time of the Marriage. And it is this last Sense that these Words ought to have, *until she is married*; for they ought to have their Meaning and their Effect, and they can have no other: so that these last Words prove that the Testator who has made use of this Expression had a mind that this Sum should be paid every Year until the Marriage of this Legatary q, unless there were particular Circumstances in the Case, and such as might require that another Interpretation should be given to the Words.

q Legatum ita est: *Attia, donec nubat, quinquaginta damnas esto hæres meus dare:* neque adscriptum est *in annos singulos.* Labeo, Trebatius, *præsens* legatum deberi putat: sed rectius dicitur, id legatum in annos singulos deberi. *l.* 17. *ff. de ann. leg.*

XIV.

14. The Legacy of a House takes in the Garden, which is a part of it.

If a Testator who had a House buys a Garden that is adjoining to it, and afterwards devises the said House, without making mention of the Garden, it will be judged by the Circumstances whether the Garden ought to be comprehended under the Legacy, or whether it ought not: For if the Testator had bought this Garden to join it to another House than that which he had devised by his Will, or to build a separate House upon it, or for any other use than that of accommodating the House devised, it might not be comprehended in the Legacy. But if the Testator had bought this Garden only for the Conveniency of the said House, and to make it more healthy and more agreeable, and that having made a Passage from the House to the Garden, he had looked upon it as one of its Dependancies; the Legatary would have the Garden, together with the House r. For the Testator would have made of these two distinct things only one Messuage contained under the Name of the House devised. And it is likewise the usual Custom to understand by a House not barely that which is designed for Lodging, but likewise the Courts, the Stables, the Garden and the other Dependancies and Conveniencies that happen to be joined to it s.

r Qui domum possidebat, hortum vicinum ædibus comparavit; ac postea domum legavit. Si hortum domus causa comparavit; aut amæniorem domum ac salubriorem possideret aditumque in eum per domum habuit, & ædium hortus additamentum fuit, domus legato continebitur. *l.* 9. §. 5. *ff. de leg.* 3.

See the vth Article, and the viiith Article of the ivth Section of Legacies.

s Ex communi usu nomina exaudiri debere. *l.* 7. §. 2. *ff. de supellect. leg.*

See the following Article.

XV.

15. That which is evident from the Terms is not interpreted.

If a Testator, being ignorant of the true Use of the Words, had left a Legacy in Terms which he believed did comprehend certain things that he had a mind to bequeath, but which the natural Meaning of the said Terms would not comprehend, and that there was nothing in the Sequel of his Testament that discovered this Intention, but that the Legatary pretended only to prove that the Testator understood the said Words in the Sense that he had a mind to give to his Legacy, such a Proof would not be received for giving to the Expression of a Testament another Meaning than that which the Words bear being taken in the Sense they would have in the common Acceptation of 'em. Thus, for instance, if a Testator designing to give all his Moveables to a Legatary, had made use of the Word Utensils, thinking that the said Word comprehended them all; this Legacy would be restrain'd to the Moveables that are commonly comprehended under this Name. For altho it is true that the Intention ought to be preferred to the Expression; yet that is only when the Sequel of the Testament discovers clearly the said Intention: but not in Cases where there is no doubt to be made of the Meaning of the Expression: For in that case the only Presumption that can be admitted, is, that the Testator has said what

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what he had a mind to say, and that he had no mind to say what he has not said *t*.

t Non aliter a significatione verborum recedi oportet, quam cum manifestum est aliud sensisse testatorem. *l.* 69. *ff. de leg.* 3.

Quod si quis cum vellet vestem legare, supellectilem adscripsit, dum putat supellectilis appellatione vestem contineri. Pomponius scripsit, vestem non deberi. Quemadmodum si quis putet auri appellatione electrum, vel auricalcum contineri; vel quod est stultius, vestis appellatione etiam argentum contineri. Rerum enim vocabula immutabilia sunt, nominum mutabilia. *l.* 4. *ff. de leg.* 1.

Servius fatetur sententiam ejus qui legaverit aspici oportere, in quam rationem ea solitus sit referre. Verum, si ea de quibus non ambigeretur, quin in alieno genere essent (ut puta escarium, argentum, aut penulas & togas suppellectile quis adscribere solitus sit) non idcirco existimari oportere supellectile legata; ea quoque contineri. Non enim ex opinionibus singulorum, sed ex communi usu nomina exaudiri debere. *l.* 7. §. 2. *ff. de supell. leg.*

Non videri quemquam dixisse cujus non suo nomine usus sit. Nam etsi prior atque potentior est quam vox, mens dicentis; tamen nemo sine voce dixisse existimatur. *d.* §. *in f.*

See the iid Article.

XVI.

16. The Word Children is understood only of those that are lawfully begotten.

It follows from the Rule explained in the preceding Article, that the Expressions ought to be taken in the Sense which common Usage gives to the Words *u*. Which is not to be always understood of the general and indefinite Sense that all Words may have; but of the Sense which has relation to the Subject-matter of the Expression of the Testator; and to the Intention which he may have had. Thus, for example, the Word *Son* indefinitely and in general comprehends a Bastard and a Son lawfully begotten; but if a Testator who had Children lawfully begotten, having likewise a Bastard, had made some Dispositions in which he had named his Children, or his Sons without Distinction, either instituting them his Executors, or leaving them some Legacy; or that a Testator who had no Children of his own, had named for his Executors the Children of another Person, or had given them any Legacy, these Names of Sons, or Children, which may be applied to Bastards, would not comprehend them *x*. For besides that we ought not to presume that this was the Intention of the said Testators, the Names of Sons and Children are not applied to Bastards in the indefinite Expressions, but when they are certainly comprehended under the Subject-matter of the Expression. And this Case being excepted, the indefinite Signification of the Words *Sons* and *Children* do not agree to them, except when the Words are qualified with the Addition of Bastards to distinguish them.

u Ex communi usu nomina exaudiri deberi. *l.* 7. §. 2. *ff. de supell. leg.*

x Filium eum definimus qui ex viro & uxore ejus nascitur. *l.* 6. *ff. de statu hom.* Justi liberi. *l.* 5. *in f. ff. de in jus voc.*

XVII.

17. The Regard that ought to be had to the Destination of the Testator.

If in the Expression of things bequeathed either to the Heirs or Executors, or to the Legataries, there were any Uncertainty as to what ought to be comprehended under it, and what ought to be excepted from it, it would be necessary to regulate the Extent, and to fix the Bounds thereof, according as we might be able to judge what the Testator himself comprehended under it, if his Intention appeared either by some Destination that he had made of the things bequeathed, or by some other way. Thus, for example, if a Merchant who carried on different Commerces in several Provinces, and had divers Warehouses for selling his Goods, as at *Rouan* and *Bourdeaux*, and in other Towns, had left in his Testament to one of his Heirs or Executors, or to a Legatary, all the Stock of his Trade at *Rouan*, and to another all the Stock of his Trade at *Bourdeaux*, and there should happen to be at *Bourdeaux* at the time of his Death, Merchandize which he had bought for *Rouan*, where he designed to sell them; the said Goods would belong to him who was to have the Stock of the Trade at *Rouan*: For altho the Goods being at *Bourdeaux* at the time of the Testator's Death, might seem to be part of the Stock at *Bourdeaux*; yet the Testator, by having destinated them for the Stock of his Trade at *Rouan* has made them part of that Stock, and they would belong to him who ought to have that Stock. Thus, in the same manner, if there were other Goods bought at *Rouan* to be transported to *Bourdeaux*, they would belong to him who was to have that Stock at *Bourdeaux*. And if the Goods not being as yet bought, the Money designed for buying them were sent, and were still extant, either in Specie or Bills of Exchange, this Money, wherever it were, being part of the Stock of the Trade of that Place where the Goods were designed to be sold, would belong to the Executor or Legatary,

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tary, who ought to have the said Goods *y*.

y Ex facto proponebatur, quidam duos hæredes scripsisse: unum rerum provincialium, alterum rerum italicarum: & cum merces in Italia devehere soleret, pecuniam misisse in provinciam ad merces comparandas, quæ comparatæ sunt, vel vivo eo, vel post mortem, nondum tamen in Italiam devectæ. Quærebatur, merces utrum ad eum pertineant qui rerum italicarum hæres scriptus erat, an vero ad eum qui provincialium—— Rerum autem italicarum vel provincialium significatione, quæ res accipiendæ sint videndum est: & facit quidem totum voluntas defuncti. Nam quid senserit spectandum est. Veruntamen hoc intelligendum erit, *rerum italicarum* significatione, eas contineri, quas perpetuo quis ibi habuerit, atque ita dispoſuit ut perpetuo haberet. Cœteroquin, si tempore in quo transtulit in alium locum, non ut ibi haberet, sed ut denuo ad pristinum locum revocaret, neque augebit quo transtulit, neque minuet unde transtulit.—— Quæ res in proposito suggerit, ut italicarum rerum esse credantur hæ res, quas in Italia esse testator voluit. Proinde & si pecuniam misit in provinciam ad merces comparandas, & necdum comparatæ sint: Dico pecuniam quæ idcirco missa est ut per eam merces in Italiam adveherentur (in) Italico patrimonio injungendam. Nam & si dedisset in provincia de pecuniis quas in Italia exercebat, ituras & redituras, dicendum est, hanc quoque Italici patrimonii esse rationem. Igitur efficere dici, ut merces quoque istæ quæ comparatæ sunt ut Romam veherentur, sive profectæ sunt eo vivo, sive nondum, & sive scit, sive ignoravit, ad eum hæredem pertinere cui Italicæ res sunt adscriptæ. *l.* 35. *d. l.* §. 3. *in princip. & in f. &* §. *penult. & ult. ff. de hæred. inst.*

Si tempore in quo transtulit in alium locum, non ut ibi haberet: sed ut denuo ad pristinum locum revocaret, neque augebit quo transtulit, neque minuet unde transtulit. *d. l.* 35. §. 3. *ff. de hæred. instit.* See the following Article.

XVIII.

18. Other Examples of the same Rule.

We may give for another Example of the Rule explained in the foregoing Article, the Case where a Testator having devised a Country-House, with the Moveables, Horses and Cattel which he used to keep there, it should happen that at the time of the Testator's Death there should be a Set of Horses which he commonly used in Town, at the said Country-House, whether it was because he died suddenly, or that they had been sent thither to be put out to Grass for some time, or for some other Reason; for by this Rule these Horses would not be comprehended in the said Legacy, which ought to be understood only of the Cattle and other things destined to be always in the said Place. And for the same Reason this Legacy would include the Plough-Horses designed for the Service of the said House, which should happen to be elsewhere at the time of the Testator's Death: For the different Destinations of the Testator would explain his Intention, and shew what should be reckoned to belong to the said House, and what not *z*. And the Chance which in this Case, as in that of the foregoing Article, makes that a thing destined for one Place happens to be in another, does not change its Destination. Thus, for another Example of the same Rule explained in the preceding Article, if a Testator having bought by one and the same Contract, and for one and the same Price, two Estates of different Names, but which joined to one another, and having confounded the two together in his possession, by letting them both to farm by the same Lease, under one of the two Names only, or by inserting them in the same manner in his Book or Memorandum of his Affairs, makes afterwards a Devise in which he names only one Estate by the same Name under which he had confounded the two, declaring that he devises it such as he had purchased it, and without making any reserve or mention of the other Estate; this Devise under these Circumstances will comprehend both the Estates, which it would not do, if there were only the bare Circumstance of the purchasing both the one and the other by one and the same Contract, and for one and the same Price *a*.

z Si fundus legatus sit *cum his quæ ibi erunt*: quæ ad tempus ibi sunt non videntur legata. *l.* 44. *ff. de legat.* 3.

Qui saltum æstivum legavit, & hoc amplius etiam *eas res legaverit quæ ibi esse solent*, non videtur de illis pecoribus sensisse quæ hyeme in hibernis, aut æstate in æstivis esse solent: sed de illis sensit quæ perpetuo ibi sunt. *l.* 67. *eod.*

Nec quod casu abesset, minus esset legatum: nec quod casu ibi sit, magis esse legatum. *l.* 86, *in f. ff. de legat.* 3.

a Titio Seiana prædia sicuti comparata sunt do, lego: cum essent Gabiniana quoque simul uno pretio comparata, non sufficere solum argumentum emptionis respondi, sed inspiciendum, an literis & rationibus appellatione Seianorum Gabiniana quoque continentur, & utriusque possessionis confusi reditus titulo Seianorum accepto lati essent. *l.* 91. §. 3. *ff. de legat.* 3.

We have put down in the Article on the Case of this last Text, that the two Estates were adjoining to one another; for if they were situated in different Places, one single Name could not agree both to the one and the other, and their Separation would make two different Estates which could not be comprehended under one proper Name.

XIX.

19. Divers Views for discovering the Intention of the Testator.

It follows from the Rules explained in the foregoing Articles, that in all the Cases where the Question is how to interpret the Expressions of a Testator, it is by the Proofs or Presumptions, which may discover his Intention, that we are to judge of them; and this depends on the different Circumstances that may have any relation to the Difficulty

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culty that is to be adjusted. Thus we consider the Qualities of the Persons, and those of the Things, if those Qualities can be of any use to discover the said Intention. Thus we distinguish the several Usages of the Places, either for the Sense of the Words, or for the other Difficulties which the said Usages may help to explain, and especially the particular Usages of the Testators in the OEconomy and Management of their Affairs; and we take what we can have from their Memorandums and Journals of their Affairs, and other such like Circumstances *b*. But the Regard that is usually had to all these Views is of no use, unless it be directed by two other general Views, which ought to be the first in all Interpretations. One is, not to expose an Expression that is clear in itself to Interpretations contrary to the natural Sense *c*; and the other is, not to prefer to reasonable Presumptions of the Intention of the Testator, a Sense altogether opposite, under Pretext of adhering slavishly to the literal Sense of an Expression, which the Sequel of the Testament, and the Circumstances, would oblige us to understand otherwise, in order to reconcile it with the said Intention *d*. Thus in general it depends on the Prudence of the Judge, to examine whether an Expression ought to be taken precisely in the literal Sense, or if it is necessary, or equitable, to interpret it: And he ought to be careful in applying the proper Rules by which it is to be interpreted *e*.

b Si numerus nummorum legatus sit, neque apparet quales sunt legati: ante omnia ipsius patrisfamilias consuetudo, deinde regionis in qua versatus est, exquirenda est: sed & mens patrisfamilias & legatarii dignitas, vel caritas & necessitudo, item earum quæ præcedunt, vel sequuntur summarum scripta sunt spectanda. *l.* 50. §. *ult. ff. de legat.* 1.

Optimum esse Pedius ait, non propriam verborum significationem scrutari: sed imprimis quid testator demonstrare voluerit: deinde in qua præsumptione sunt, qui in quaque regione commorantur. *l.* 18. §. 3. *in f. ff. de instruc. vel. instr. legat.*

c Cum in verbis nulla ambiguitas est, non debet admitti voluntatis quæstio. *l.* 25. §. 1. *ff. de legat.* 3. See the iid and xvth Articles.

d Non enim in causa testamentorum ad definitionem utique descendendum est: cum plerumque abusive loquantur, nec propriis nominibus ac vocabulis semper utantur. *l.* 69. §. 1. *ff. de legat.* 3.

e Voluntatis defuncti quæstio in æstimatione judicis est. *l.* 7. *C. de fideicomm.*

If besides the Ways explained in this Article for discovering the Intention of the Testator, there should be found other Testaments, altho revoked, we might explain by the former Testaments that which is obscure and uncertain in the Testament which subsists; if the Difficulty happens to be more clearly explain'd in any of the other Testaments, provided that this is done without making valid any part of the said Testament which has been revoked.

As to the use of the Rule explained in this Article, we must understand it in the Sense which results from all the Rules that have been explained in the foregoing Articles of this Section, for it has relation to them. See the last Article of the following Section.

SECT. VII.

Of the Rules for interpreting the other sorts of Difficulties besides those of the Expressions.

Besides the Difficulties that may arise from the Defects of the Expressions in Testaments; there are others which have other Causes, and which cannot be prevented by Dispositions expressed in the clearest Terms. Some of them proceed from the Change that is made by unforeseen Accidents, and which oblige us to conjecture, by Presumptions which may be grounded on the known Intentions of the Testator, what he himself would have order'd, if he had foreseen these Accidents. Others are occasioned by some Error the Testator was under in a matter of Fact that was unknown to him, and where it appears clearly enough by his Dispositions what he would have order'd if the Truth which he was ignorant of had been known to him. And others have other Causes altogether different.

Altho it is very difficult, and even impossible for those who begin the Study of the Law to comprehend these several kinds of Difficulties without some Examples, yet it is not proper to give any here, because each sort of Difficulty is to be explain'd in its proper Place in this Section; and we shall there set down the Examples that are necessary for understanding them aright. But we have been oblig'd to mark in general these kinds of Difficulties, and to give here this Idea of 'em, in order to shew the Difference which distinguishes 'em from the Difficulties which have been the Subject-matter of the foregoing Section.

It is necessary to remember here the last Remark which has been made in the Preamble of the foregoing Section, concerning the Rules of some other Titles, which may have some relation to the Interpretation of Testaments.

We shall not make here, nor in the Sequel of this Section, any Division or Distinction of the several sorts of Cases, in which the Interpretations that shall be spoken of here are necessary, in order to reduce the said Cases to certain kinds. For besides that the greatest

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part of them are such; that it is not possible to comprehend them under peculiar Ideas that have precise Characters to distinguish them from all the others, and that there are even some of them of which every one by it self would demand a proper kind; this Exactness would not only be useless, but would produce, under the Appearance of some Order, a real Confusion; and it is enough that all these Cases are contained under the general Idea that the Title of this Section gives of them; and that under this Title the Reader shall have the Rules that are necessary for this Matter, and the Examples which shew the Application of them, and the Use that may be made of them in all the Cases that may arise from all sorts of Events.

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I.

1. The first Rule of this Interpretation, is the Will of the Testator.

THE first Rule for the Interpretation of the Difficulties which are the Subject-matter of this Section, as well as of those which have been explained in the preceding Section, is the Will of the Testator. And whether this Will appears by the Dispositions themselves, or by clear and certain Consequences that may be drawn from them, or even by Conjectures only; it is always by the Knowledge that can be had thereof, that we are to decide the Matter, by adjusting the Difficulty in the manner that we judge the Testator himself would have done it, according to the Views and Sentiments which his Dispositions shew him to have had *a*.

a Semper vestigia voluntatis sequimur testatorum. *l. 5. C. de necess. serv. hered. instit.*
See the fifth Article of the preceding Section.

II.

2. Interpretation by the Esteem which the Testator had for the Persons.

If the Difficulty which makes it necessary to interpret the Testament, depends barely on the Consideration that the Testator may have had for one of the Persons interested in the said Interpretation, more than for the other; the Question will be decided in favour of that Person for whom the Testator is judged to have had the greatest Esteem: Which will depend either on the particular Proofs that may be had of it from his Dispositions, or on the Rules which follow *b*.

b See the Articles which follow.

III.

3. Interpretation in favour of the Heir of Blood against a Stranger.

Between two Heirs or Executors, whom a Testator had called to his Succession; the one, who was not of his Family, by a former Testament, made in due Form; and the other, who had Right to succeed to him if he died intestate, and whom he had instituted by a second Testament, in which there was wanting some Formality; the Consideration of the Heir of Blood, or next of Kin, would render his Cause so favourable above the other, that, as it has been explained in another Place, the Law would give him in this Case

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the Succession *c*, contrary to the Rule which prefers a former Testament made in due Form, to a second, in which some Formality is wanting: Which we repeat here only to shew the Spirit of the Law, which in doubtful Cases favours the Heir of Blood. From whence it follows, that in the Cases where it is necessary to interpret some Disposition of a Testator, which concerns some Person of his Family, and another no ways related to it, if all other Circumstances were equal, the Tie of Kindred would decide the Matter, by the Presumption that the Testator had had a greater Consideration for his Relation, than for a Stranger.

c See the fifth Article of the fifth Section, where it is explained what are the Formalities which are required in this second Testament.

IV.

4. Institution of a first Executor, preferred to a second Institution made in due Form.

If he who had already made a Testament, hearing afterwards, by a false Report, that the Executor whom he had instituted was dead in a foreign Country, made a second Testament, in which he had declared, that not being able to have for his Executor the Person whom he had named by his first Testament, he named such a one; and if after the Death of the said Testator, the Executor instituted by the first Testament should happen to appear, he would be preferr'd to him that had been instituted by the second, only because of this Error. For the Expression of the Motive which had induced the Testator to name another Executor, would be a sufficient Reason to convince us that he would not have done it, if he had known the Truth. Thus, his Expression shewing his Error, would have the same Effect as if he had instituted this second Executor upon this Condition, that he should be Executor only in case the first were really dead, and that if the first Executor were alive, he should succeed, and exclude the other *d*.

d Pactumeius Androsthenes Pactumeiam Magnam filiam Pactumeii Magni ex asse hæredem instituerat, eique patrem ejus substituerat. Pactumeio Magno occiso, & rumore perlato quasi filia quoque ejus mortua, mutavit testamentum, Noviumque Rufum hæredem instituit, hac præfatione: *Quia hæredes quos volui habere mihi continere non potui, Novius Rufus hæres esto.* Pactumeia Magna supplicavit imperatores nostros, & cognitione suscepta licet modus institutione contineretur, quia falsus non solet obesse, tamen ex voluntate testantis, putavit Imperator ei subveniendum. Igitur pronuntiavit hæreditatem ad Magnam pertinere. *l. ult. ff. de hæred. inst.*

See, as to what is said in this Text, that Falsus modus non solet obesse, *that which is said in the twenty first Article.*

If in this second Testament the Testator had not explained the Motive that had induced him to name another Executor, the bare Error in which he was as to the Death of this first Executor, would not have been a sufficient Reason for annulling the Institution of the second. For altho he had had no Thought of the Death of the first, he might have had other Motives for this Change, whether it had been that he had ceased to have the same Consideration for him that he had before, or that the second Executor had by his Civilities engaged the Testator to make this second Disposition, or for other Causes. See the following Article.

V.

5. In the Case of the preceding Article, the Legacies of the second Testament would subsist.

If in the Case of the foregoing Article the second Testament contained Legacies, the first Executor would be bound to acquit them, in the same manner as if he had been named Executor in this second Testament *e*.

e Sed legata ex posteriore testamento eam præstare debere perinde atque si in posterioribus tabulis ipsa fuisset hæres instituta. *d. l. ult. in f. ff. de hæred. inst.*

¶ If the Case of the preceding Article had happened, and there were likewise Legacies in the first Testament different from those of the second, this first Executor, who, as it is said in the present Article, would be obliged to acquit the Legacies of this second Testament, would not be bound to pay those of the first: For altho his Institution, which was the most essential part of the first Testament, ought to subsist, and it was burdened with the Legacies of the said first Testament; yet they would be annulled by the Rule which determines that the second Testament annuls the first. And this Executor might likewise say, that it is not by the Validity of this first Testament that his Institution, which it contains, ought to subsist, but by the Effect of the Intention of the Testator explained in the second; which marked expresly, that he named another Executor besides him for no other Reason, but because, believing him to be dead, he supposed that he could not succeed to him; which implied the tacit Condition, explained in the preceding Article, and the Will of the Testator, that if the first Executor were alive, he should succeed to him: But that this tacit Condition, and this Will of the Testator, which had the Effect to annul the Institution of the Executor in the second Testament, and to confirm that of the first, did no ways concern the Legacies of this first Testament which the second did not confirm; and that therefore the Revocation of those Legacies in

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in the first Testament, which had been made by the second, ought to subsist, altho the Revocation of the Institution of the Executor of the first Testament did not subsist.

We see by this Event a pretty odd Effect which deserves our Consideration: It is, that the Condition of this second Executor, for whom the Testator had a much greater Consideration, than for the Legataries of the same Testament by which he was instituted, is much more disadvantageous than that of the said Legataries; since they are to have all that the Testator had a mind to give them, and that he who was to have had the whole Bulk of the Estate will have nothing at all: so that the Intention of this Testator happens to be frustrated, in that the Condition of the Legataries will be better than that of this Executor.

We may make here a last Reflexion on this Difference between the Condition of this Executor and that of these Legataries, that it is impossible for human Laws to be so exact, as to regulate all the Cases that may possibly happen, in such a manner, as that by observing always these Laws, whether according to the Letter, or according to the Spirit of them, there shall arise no Inconvenience from them; and that such Provision shall be always made for all sorts of Events, that nothing in any one of them shall be contrary to that which Equity may demand; but we see frequently those sorts of Inconveniencies which cannot be redressed: And there would be no other Remedy for this Inconvenience besides the Civility of the first Executor, who, considering the Condition of him in whose Place he succeeds, and the Good-will that his Benefactor had towards the said Person, should be disposed upon this Consideration to give him a Share of the Goods which he takes away from him. This is what Equity and Humanity would seem to oblige this first Executor to do, especially if he stood less in need of the Goods of the Succession than the second Executor. We know by History, that there have been several good moral Heathens, who would not have failed to do so in the present Case; and the Spirit of the divine Law, the first Principles of which were unknown to them, does inspire much more strongly these Sentiments into such Persons as make it the Rule of their Actions. And it is only by the Spirit of these Principles that a full and perfect Provision is made for every thing, and in such a manner, that whatever Event happens, there cannot follow from it any Consequences that may deserve the Name of Inconveniencies.

VI.

6. The Executor is in general more favoured than the Legatary.

If the Difficulty, which may depend on the Consideration of the Persons, happens to be between the Executor and a Legatary, so that all other Considerations happen to be equal, and that nothing deciding either for one or the other, the Doubt is reduced to this single Point, to know which of the two ought to be the most favoured, it will be the Executor. For besides that the Testator has without doubt had a greater Consideration for him than for the Legatary, he is in the place of a Debtor, and the Legatary in place of the Creditor; and in doubtful Cases the Condition of the Debtor is always favoured *f*. But if any Circumstances render the Condition of the Legatary more favourable, they will make the Preference of the Executor to cease; which cannot be well understood but by Examples, such as these that follow.

f See the thirteenth and fifteenth Articles of the second Section of Covenants. See the Articles which follow.

VII.

7. First Example of the Preference of the Executor.

If a Testator, who had two Lands or Tenements of the same Name, but of different Value, had devised one of them, without distinguishing it from the other, naming it only by the Name that was common to both, and without marking in any thing which of the two he had a mind to devise; the Executor in this Case would have the Choice of them, and might retain the most precious to himself, and give that which is of least Value to the Legatary. For the Question would be altogether independent of all other Consideration besides that of knowing who should have the Choice, whether the Executor, or the Legatary. Thus in this precise Doubt, which would depend barely upon knowing which of the two the Testator had the greatest Consideration for, the Rule explained in the preceding Article would decide it in favour of this Executor *g*.

g Scio ex facto tractatum, cum quidam duos fundos ejusdem nominis habens, legasset *fundum Cornelianum*: & esset alter pretii majoris, alter minoris, & hæres diceret minorem legatum, legatarius majorem. Vulgo fatebitur utique minorem eum legasse,

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legasse, si majorem non potuerit docere legatarius. *l.* 39. §. 6. *ff. de legat.* 1.

Si de certo fundo sensit testator, nec appareat de quo cogitavit, electio hæredis erit quem velit dare. *l.* 17. §. 1. *eod.*

Si quis plures Stichos habens, Stichum legaverit: si non appareat de quo Sticho sensit, quem elegerit debet præstare. *l.* 32. §. 1. *eod.*

See the seventh Section of the Title of Legacies.

VIII.

8. *Second Example.*

If a Testator, having two or more Silver Basons of different Values, had bequeathed one of them, without specifying which, the Executor might give only that of the least Value; and by this he will have satisfied the Legacy. And it would be the same thing, if a Testator, having two Horses of the same Name, as two Coursers, or called by other proper Names, had bequeathed a Horse, calling him by his Name *h*.

h Sed etsi lancem legaverit, nec appareat quam, æque electio est hæredis quam velit dare. *l.* 37. §. 1. *ff. de legat.* 1.

Si quis plures Stichos habens Stichum legaverit: si non apparet de quo Sticho sensit, quem elegerit debet præstare. *l.* 32. §. 1. *eod. V. l.* 4. *ff. de trit. vin. vel. ol. leg.* See the seventh Section of the Title of Legacies.

IX.

9. *Third Example.*

If it happened that of one and the same Testament there were two Originals, which the Testator had made at the same time, one to be deposited either in the hands of a Notary Publick, or of some other Person, and the other to be kept by himself; or that there were two ingrossed Copies of one and the same Testament, the Minute or Instructions of which had been lost by Fire, or some other Accident, and that in one of the Copies, or in one of the Originals, the same Legacy to one and the same Person was of a lesser Sum, and of a greater Sum in the other Original or Copy, and that there appeared no Rasure in the Writing, nor any Suspicion of Alteration or Forgery; the Legatary could demand only one of the two Sums, and that even the least. For this Accident making it impossible to know the Intention of the Testator, thereby to decide which of the two Sums the Legatary might demand, and there being nothing to determine that the Legatary ought to have the Choice, the Executor would have it, and would be bound only to give the lesser Sum *i*.

i Sempronius Proculus nepoti suo salutem. Binæ tabulæ testamenti, eodem tempore exemplarii causa scriptæ, ut vulgo fieri solet, ejusdem patris familias proferebantur: in alteris centum, in alteris quinquaginta aurei legati sunt Titio. Quæris utrum (centum) & quinquaginta aureos, an centum dumtaxat habiturus sit? Proculus respondit, in hoc casu magis hæredi parcendum est: ideoque utrumque legatum nullo modo debetur, sed tantummodo quinquaginta aurei. *l.* 47. *ff. eod. de leg.* 2. See the seventeenth Article of the first Section.

X.

10. *First Example where the Legatary is favoured.*

We must not extend the Rule explained in the vith, viith, viiith, and ixth Articles beyond the Cases of the said Articles, or other Cases of the like nature: For if other Considerations may require an Interpretation favourable for the Legatary, or some other Temperament between his Interest and that of the Executor, the Disposition of the Testator might be interpreted by these other Considerations according to the Circumstances. Thus, for Example, if a Testator had bequeathed a Horse indefinitely and in general, or a Watch, or a Suit of Hangings, since in all these things there are Qualities altogether different, good and bad, the Legacies of this kind being Favours proportioned to the Qualities of the Testator and of the Legatary, and to the other Circumstances which may discover the Intention of the Testator, it would be contrary to the good Will that the Testator bore towards the Legatary, to leave it to the choice of the Executor to give the worst of the said things to the Legatary; and it would be likewise contrary to the good Intention which the Testator had for the Executor, to give the Legatary Power to chuse the most precious Individual of that kind of things that was bequeathed: Which makes it necessary to regulate a Legacy of this kind by a Temperament that fixes between these Extremities, equally unjust and opposite to the Intention of the Testator, a Medium which may not be contrary either to the Interest of the Executor, nor to the Consideration which the Testator had for the Legatary. Thus, such a Legacy would be moderated to a reasonable Choice between the Extremities of the best and the worst, to give to the Legatary either a Watch, or a Horse, or a Suit of Hangings, or any other thing among several of the same kind, such as might be conformable to his Circumstances, to those of the Testator, to the Goods of the Succession, and to the other Circumstances that might come into consideration for the regulating of the said Temperament; whether it be that there were many of these sorts of things in the Inheritance, to chuse out of, or that there being no such things among the Goods

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Goods of the Succession, the Executor were obliged to procure them elsewhere *l*.

l Legato generaliter relicto veluti hominis, Caius Cassius scribit, id esse observandum, ne optimus vel pessimus accipiatur. Quæ sententia rescripto imperatoris nostri, & Divi Severi juvatur, qui rescripserunt homine legato, actorem non posse eligi. *l.* 37. *ff. de legat. l.* 1. See the following Article.

The Rule explained in this Article demands Reflections that are not set down here, they being reserved for a more proper Place. See the Preamble of the viith Section of Legacies, and the first Articles of this viith Section.

XI.

11. *Second Example.*

The Temperament which has been just now explained in the preceding Article, for regulating these sorts of indefinite Legacies, by some Medium between the opposite Interests of the Executor and Legatary is so natural and so reasonable, that it ought to be used likewise in the Case of a Legacy, where the Executor is left at liberty to give out of several Horses any one he pleases, or to give any one thing he thinks fit out of many of the same kind, which may be not only of different Prices, but also of different Qualities, good or bad: For this Liberty would not extend so far as to give the Executor power to give the worst of them all; but would leave him only the Right to keep the best, and to give out of the middle sort one which the Legatary could not reasonably refuse *m*.

m Si hæres generaliter servum quem ipse voluerit dare jussus, sciens furem dederit, isque furtum legatario fecerit: de dolo malo agi posse, ait. Sed quoniam illud verum est *hæredem in hoc teneri ut non pessimum det*, ad hoc tenetur ut alium hominem præstet, & hunc pro noxæ deditione relinquat. *l.* 100. *ff. de legat.* 1.

XII.

12. *Third Example.*

If a Testator had bequeath'd a yearly Pension, or Alimony, to a Legatary, to engage him to remain in company with another Person that was dear to the said Testator, whether it be that the Legacy was conceived in Terms that imposed that Condition, or that it was said that the Alimony or Pension should be paid as long as the Legatary tarried with the said Person, and that the said Person should happen to die before the Legatary who had lived with him until the time of his Death; the Pension or Alimony would be continued, unless the Expression of the Testator shewed clearly that it was his Intention that the Pension or Alimony should cease after the said Death. For besides the Favourableness of a Legacy of this kind, which is regularly understood to be during the whole Life, it might be said that this Legatary had performed that which the Testator had in his view as the Motive of the Legacy. And it would be justly presumed even of the Legacy of Alimony, to be paid so long as the Legatary should live with the said Person, that the Intention of the Testator was only to oblige the Legatary to continue with him as long as the said Person should live *n*.

n Annua his verbis legavit, si morentur cum matre mea, quam hæredem ex parte institui. Quæsitum est an mortua matre conditio apposita defecisse videatur: ac per hoc neque cibaria, neque vestiaria his debeantur? Respondit, secundum ea quæ proponerentur, deberi. *l.* 20. *ff. de ann. leg. & fideicomm.*

Imperator Antoninus Pius, libertis Sextiæ Basiliæ: quamvis verba testamenti ita se habeant, *ut quoad cum Claudio Justo morati essetis, alimenta vobis & vestiarium legatum sit:* Tamen hanc fuisse defuncti cogitationem interpretor, ut & post mortem Justi Claudii, eadem vobis præstari voluerit, respondit. Ejusmodi scripturam ita accipi ut necessitas alimentis præstandis perpetuo maneat. *l.* 13 §. 1. *ff. de alim. vel cib. legat. l.* 1. *C. de legat.* See the xiith Article of the vth Section of Legacies.

XIII.

13. *Fourth Example.*

If he who had devised a Land makes some Addition to it, whether it be that he builds a House upon it, or that he adds to it some other Piece of Ground for the use of a Service, or some other Conveniency, these and other such-like Changes which may increase either the Value or Extent of the thing devised, will not have Effect to revoke the Legacy; but will shew on the contrary that the Testator had a mind to augment it. Thus the Expression of the Testament which did not comprehend this Augmentation that is made afterwards, will be interpreted against the Executor. Thus on the contrary, if the Testator had diminished the thing devised, as if he had alienated a Part of the Land devised, or pulled down a Building in whole or in part, the Legacy thereof would be diminished in so much *o*.

o Si ex toto fundo legato testator partem alienasset, reliquam duntaxat partem deberi placet: quia etiam si adjecisset aliquid ei fundo, augmentum legatario cederet. *l.* 8. *ff. de legat.* 1. *l.* 24. §. 3. & 4. *eod. l.* 10. *ff. de legat* 2. See the xivth Article of the vth Section. See the vth, vith, viith, and viiith Articles of the ivth Section of Legacies.

XIV.

14. *Fifth Example.*

If a Testator had left a Legacy to a Woman in case the first Child she should have were a Son, and it happened that she

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she had at one Birth a Son and a Daughter, and that by some chance it could not be known if the Son had been born before or after the Daughter, it would be presumed in favour of the Legatary, that the Condition had come to pass *p*.

p Si ita libertatem acceperit, ancilla, *si primum marem pepererit libera esto*: Et hæc uno utero marem & fœminam peperisset: si quidem certum est quid prius edidisset, non debet de ipsius statu ambigi, utrum libera esset necne: sed nec filiæ, nam si postea edita est, erit ingenua: sin autem hoc incertum est, nec potest, nec per subtilitatem judicialem manifestari, in ambiguis rebus humaniorem sententiam sequi oportet, ut tam ipsa libertatem consequatur, quam filia ejus ingenuitatem, quasi per præsumptionem priore masculo edito. *l.* 10. §. 1. *ff. de reb. dub.*

¶ Altho this Text be in the Case of a Legacy of Liberty left to a Slave, which made this Disposition favourable; yet it seems that the Decision ought to be the same in any other Legacy that should depend on such a Condition. For it would seem, moreover, that in the Case of this Text, altho it should be certain that the Son was born the last, yet it might be presumed that the Testator not foreseeing that the Woman should have two Children at one Birth, had meant that if she had a Male Child at her first Delivery, the Legacy should be due And the literal Interpretation which would decide, that the Son being born the last, the Condition of the Legacy had not happen'd, would appear a Nicety opposite to the Sense which might be naturally gather'd from the Intention of this Testator, who had consider'd as the first Child, not him that should be the first of two Children at one and the same Birth, but a Male Child that should be born at the Woman's first Delivery. This seems to be the manner in which Reason and Equity would interpret the Intention of the Testator in this Doubt, if there should be any. *In re dubia benigniorem Interpretationem sequi non minus justius est, quam tutius. l.* 3. *ff. de his quæ in test. del.*

XV.

15. Sixth Example.

When a Testator bequeaths to a Servant, or other Person, the Sum that shall be necessary to instruct him in a Trade, it does not depend on the Executor to limit the Legacy to the Trade that this Legatary might learn at the cheapest rate: But it ought to be understood of the Trade that will suit best with the Quality, the Age, the Inclination, and the Disposition of this Legatary; unless it be that these Circumstances should demand a Trade wherein the Apprenticeship would be so very expensive, that it might be judged by the Quality of the Testator, and Quantity of his Estate, that his Intention restrain'd the Legacy to an Apprenticeship that should cost less *q*.

q Titius liber esto; & ut eum heres artificium doceat unde se tueri possit, peto. Pegasus inutile fideicommissum esse ait, quia genus artificii adjectum non esset. Sed prætor aut arbiter ex voluntate defuncti, & ætate & conditione, & natura ingenioque ejus, cui relictum erit, statuet quod potissimum artificium hæres docere eum sumptibus suis debeat. *l.* 12. *ff. de legat* 3.

XVI.

16. Example of a Case where the Event changes the Disposition of the Testator.

We have seen in the ixth Article, that it may happen by some Chance that it is not possible to know the Intention of the Testator; and it happens likewise by other sorts of Events, that altho this Intention is perfectly known, and that we discover clearly all that the Testator had in view, the Event which instead of the Case which he did foresee, produces another which his Disposition did not comprehend, requires that it be regulated in a manner different from what the Testator had order'd for the Case that he did foresee. But here we ought to take his Intention for our Rule, and to order in the Case that has happened what we judge the Testator himself would have order'd, considering his Intention in the Case explained in his Testament. Thus, for Example, if a Testator had order'd, that if at the time of his Death he had one Son, he should be his sole Heir or Executor, but that if he had two Sons, they should share equally his Succession; that if there were two Daughters, they should likewise divide his Inheritance between them in two equal Portions; and that if he had a Son and a Daughter, the Son should have two Thirds of his Estate, and the Daughter one Third; and that it happens that this Testator leaves behind him two Sons and one Daughter, this unforeseen Case ought to be regulated by the Proportion that the Testator had settled between the Condition of the Sons and that of the Daughters, in the Case where there should be one Son and one Daughter. And since his Intention was, that a Son should have twice as much as a Daughter, and that the Condition of the Sons should be equal, we ought to presume that in the case of this Event he would have given according to the same Proportion two Fifths to each of his two Sons, and one Fifth

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Fifth to his Daughter. And it is in this manner that the Succession ought to be divided in this Case *r*.

r Clemens Patronus testamento caverat, ut *si sibi filius natus fuisset, hæres esset: si duo filii, ex æquis partibus hæredes essent: si duæ filiæ, similiter: si filius & filia, filio duas partes, filiæ tertiam dederat.* Duobus filiis & filia natis, quærebatur quemadmodum in proposita specie faciemus, cum filii debeant pares, vel etiam singuli duplo plus quam soror accipere. Quinque igitur partes fieri oportet, ut ex his binas masculi, unam fœmina accipiat. *l.* 81. *ff. de hæred. inst.*

This manner of Interpretation will agree to all the different Combinations of other numbers of Sons and Daughters, which a Testator might leave behind him at his Death; and the Equity thereof is founded on the Proportion which the Testator himself had regulated. And altho it is not certain to suppose that a Testator will always observe the same Proportion in all the possible Combinations of the number of Sons and Daughters; and altho he might augment or diminish the Portions of the Sons and Daughters upon another foot, according to the Differences of their number, and alter the said Portions, yet we cannot enter into the Conjectures of these Changes, because they would have no certain Foundation: So that this Rule will be always just in the like Cases. See the following Article.

XVII.

17. Another Example of the same kind.

If a Testator, not having as yet any Children, had left his Wife big with Child, and had instituted her Executrix together with the Child that should be born, giving one Third of his Estate to the Mother if it should be a Son, and the Half if it should be a Daughter; and that the Wife was deliver'd both of a Son and a Daughter, the Son would have one Half, and the Daughter and the Mother would share the other Half between them. And by this means the Intention of this Testator would be accomplished; for his Will was that the Son should have the double of what the Mother had, and that the Mother should have as much as the Daughter *s*.

s See the same Case explained for another use in the vth Article of the iid Section of the Rules of Law.

XVIII.

18. Another Example of the Interpretation of a Disposition in a Case unforeseen.

If a Testator who had two Sons and a Grand-Daughter by another Son, having substituted his Sons one to the other, in case the first who died should have no Issue; and having substituted his Grand-Daughter to them both, in case both the one and the other should die without Children; it happened that one of the Brothers died, leaving Children behind him, and that the other Brother having outlived his Nephews, died without Children, the Substitution of the Grand-Daughter would have its Effect with respect to him that died last. For altho she was not called to the Substitution except in case the two Brothers should die without Children, and that this Case had not happened; yet seeing in these sorts of Dispositions it is the Intention of the Testator which ought to serve as the Rule, we ought to presume that the Testator, who had called his Grand-Daughter to the Succession of his two Sons, after him who should die last, if they both died without Children, would have much rather directed in the Case that has happened, if he had foreseen it, that she should succeed to this Brother who died last. And it would be equally unreasonable and unjust, that she who by the Disposition of the Grandfather was to have both the Portions, if her Uncle who died last without Children had succeeded to the Uncle who died first, in case he had left no Children, should be deprived of the Portion of her Uncle who died in the last Place, to whom she was substituted, as well as to the other *t*.

t Cum ita fuerat scriptum, *Fidei filiorum meorum committo, ut si quis eorum sine liberis prior diem suum obierit, partem suam superstiti fratri restituat: quod si uterque sine liberis diem suum obierit, omnem hæreditatem, ad neptem meam Claudiam pertinere volo.* Defuncto altero superstite filio, novissimo autem sine liberis, neptis prima quidem facie, propter conditionis verba, non admitti videbatur: sed cum in fideicommissis voluntatem spectari conveniat, absurdum esse respondi, cessante prima substitutione, partis nepti petitionem denegari, quam totum habere voluit avus, si novissimus fratris quoque portionem suscepisset. *l.* 57. §. 1. *ff. ad Senat. Trebell.*

We have set down in the Case of this Article, that the Children of the Brother who died first, died before their Uncle: For if they had survived their Uncle, it might be said according to the Sentiments of one of the most learned Interpreters who has commented on this Text, that it would be very hard they should be excluded from the Succession of their Uncle by a Cousin who was substituted to her Uncles, only in case both the one and the other should die without Children. V. l. pen. C. de impub. et al. subst.

XIX.

19. Another Example in an unforeseen Case.

If a Testator had instituted for his Heir or Executor, the Child who should be born of his Daughter then big with Child, and that before this Testator had made his Will, his Daughter was already brought to bed without his knowing any thing thereof; they not happening to meet together in the same Place; this Institution of a Child to be born would have its effect for this Child altho already born: For it was the same Child on

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which this Testator had a mind to settle his Estate *u*.

u Lucius Titius, cum suprema sua ordinaret in civitate, & haberet neptem ex filia prægnantem, rure agentem: scripsit, id quod in utero haberet, ex parte hæredem. Quæro, cum ipsa die qua Titius ordinaret testamentum in civitate, hora diei sexta (eodem die) albescente cœlo, rure sit enixa Mævia masculum, an institutio hæredis valeat, cum, quo tempore scriberetur testamentum, jam editus esset partus. Paulus respondit, verba quidem testamenti ad eum pronepotem directa videri, qui post testamentum factum nasceretur: sed si (ut proponitur) eadem die qua testamentum factum est neptis testatoris antequam testamentum scriberetur, enixa esset, licet ignorante testatore, tamen institutionem jure factam videri (recte) responderi. *l.* 25. §. 1. *ff. de lib. & post. hæred. inst.*

This Example appears to be superfluous, for it is not possible it should enter into the Mind of any one to doubt of the Decision. But seeing it is consonant to the Law, and that it may be of use for the Application of this Rule to other Cases that are less evident, we have thought fit to add it to the others.

XX.

20. Another Example in another Case unforeseen.

We may add to the Case explained in the preceding Article, another like to it, in that the Terms in which the Testator expresses himself do not agree with the Event, but where his Intention does nevertheless serve as a Rule. It is the Case where a Father who had only two Children under Age, had substituted one of his Relations or Friends to the Child that should die the last, not having attained the Age of Puberty, that is fourteen Years compleat in the Male Sex, and twelve in the Female; which is done by that kind of Substitution called Pupillary, which shall be treated of in its place *x*; if it happened in this Case that these two Children died together, so that it could not be known if they died both at the same instant, or if one of the two had survived the other, this Substitution would seem to cease, by the Expression which called the Person substituted to succeed only to him who should die the last, since it cannot be said of any one of the two that he died first or last. But because the Intention of the Testator was, that the Survivor of the Brothers should succeed to the other, and that the Person substituted should inherit both the Successions, in that which should fall last of all; the Substitution to the longest Liver includes the Case where the two dying together, neither of them outlives the other: For neither of them remains to exclude the Person substituted; and with regard to him both the one and the other may be considered as dead in the first Place, and as dead in the last Place, since neither of them died before the other, nor after the other *y*.

x *See the second Title of the fifth Book.*

y Ex duobus impuberibus ei, qui supremus morietur, hæredem substituit. Si simul morerentur: utrique hæredem esse respondit: quia supremus non is demum, qui post aliquem, sed etiam post quem nemo sit intelligatur. Sicut & e contrario proximus non solum is, qui ante aliquem, sed etiam is, ante quem nemo sit, intelligitur. *l.* 34. *ff. de vulg. & pup. subst.*

Qui ex liberis meis impubes supremus morietur, ei Titius hæres esto. Duobus peregre defunctis, si substitutus ignoret, uter novissimus decesserit: admittenda est Juliani sententia, qui propter incertum conditionis, etiam prioris posse peti possessionem bonorum respondit. *l.* 11. *ff. de bon. poss. sec. tabul.*

Qui duos impuberes filios habebat: ei, qui supremus moritur, Titium substituit: duo impuberes simul in nave perierunt. Quæsitum est, an substituto, & cujus hæreditas deferatur. Dixi: si ordine vita decessissent: priori mortuo frater ab intestato hæres erit. Posteriori substitutus: in ea tamen hæreditate etiam ante defuncti filii habebit hæreditatem. In proposita autem quæstione, ubi simul perierunt: quia cum neutri frater superstes fuit, quasi utrique ultimi decessisse (sibi) videantur? an vero neutri quia comparatio posterioris decedentis ex facto prioris mortui sumitur? Sed superior sententia magis admittenda est, ut utrique hæres sit. Nam & qui unicum filium habet, si supremum morienti substituit, non videtur inutiliter substituisse. Et proximus adgnatus intelligitur etiam, qui solus est, quique neminem antecedit. Et hic utrique, quia neutri eorum alter superstes fuit, ultimi primique obierunt. *l.* 9. *ff. de reb. dub.*

XXI.

21. Another Example.

If a Testator, who had no Child, had instituted him that should be born of his Marriage, or had made some other Disposition in favour of the said Child; as if he had added to the said Institution, that if he had several Children, they should all be his Heirs or Executors, and that the eldest should have something over and above his equal Share with the others, which he should explain; and it happened that the Wife of the said Testator being dead, without leaving him any Children, he had married another, by whom he had Children; these Bequests would have with respect to them the Effect which they would have had for the Children of the first Marriage, if there had been any. For the Intention of this Testator had in view the Children which he might have afterwards *z*.

z Placet, omnem masculum posse postumum hæredem scribere, sive jam maritus sit, sive nondum uxorem duxerit. Nam & maritus uxorem repudiare potest: & qui non duxit uxorem, postea maritus effici. Nam & cum maritus postumum hæredem scribit: non utique is solus postumus scriptus videtur, qui ex ea quam habet uxorem, ei natus est, vel is

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is qui tunc in utero est: verum is quoque, qui ex quacunque uxore nascatur. Ideoque qui postumum hæredem instituit, si post testamentum factum mutavit matrimonium: is institutus videtur, qui ex posteriore matrimonio natus est. *l.* 4. & *l.* 5. *ff. de lib. & post. hæred. inst.*

¶ We have added to the Case explained in this Text, which relates only to the simple Institution of the Heir or Executor, the Case of some Advantage left to the eldest Son over and above his equal Share with the other Children. For if there were only a bare Institution of a Child, or of several Children, it would be the same thing for making them succeed as Heirs to their Father, whether there were any Testament or not. So that what is remarkable in this Text consists in this, To shew that the Disposition of the Father, of which it might be doubted whether, the same being made with a View to Children of a first Marriage, it should have its Effect with regard to those of a second, ought to be executed in favour of the Children of this second Marriage, as it would have been for those of the first Marriage, if there had been any Issue by it. And as to the Liberty of instituting a posthumous Child, which seems to be the principal Subject of this Text, we have inserted nothing thereof in this Article; because we have spoke of it in its proper Place in the twenty second Article of the second Section of Testaments; and in the thirteenth Article of the second Section of Heirs and Executors in general.

XXII.

22. The Validity of a Bequest is independent of the Motive explained by the Testator.

When a Testator has fully explained himself, either as to the Institution of the Executor, or Devise of a Legacy, and that he adds thereto some Motive of his Disposition, the said Disposition will nevertheless have its Effect, altho it should be found that the Fact explained by the Testator as his Motive were not true. Thus, for Example, if the Testator had said, I give to such a one, because he has done me such a piece of Service; altho this Service had not been done, yet the Will of the Testator, which would be sufficient alone, altho he should give no Reason for it, would make this Bequest valid; and the Motive that is added thereto, marks only either that the Testator has been deceived, or that he had a mind to make his Bequest more favourable. But if he had explained his Motive in such a manner, that it appeared that his Intention was to make it a Condition on which the Effect of his Bequest should depend; as if he had said, My Will is that there be paid to such a one the Sum of so much, in case it shall appear that he has done such a Business, or on Condition that he do it; these Bequests, and others of the like kind, would be conditional, and would depend on the Execution of that which the Testator had explained *a*.

a Quod juris est in falsa demonstratione, hoc vel magis est in falsa causa. Veluti ita. *Titio fundum do, quia negotia mea curavit.* Item *fundum Titius filius meus præcipito, quia frater ejus (ipse) ex arca tot aureos sumpsit.* Licet enim frater hujus pecuniam ex arca non sumpsit, utile legatum. *l.* 17. §. 2. *ff. de condit. & demonst.*

Falsam causam legato non obesse, verius est: quia ratio legandi legato non cohæret. Sed plerumque doli exceptio locum habebit, si probetur alias legaturus non fuisse. *l.* 72. §. 6. *eod.*

At si conditionaliter concepta sit causa, veluti hoc modo: *Titio, si negotia mea curavit, fundum do: Titius filius meus, si frater ejus centum ex arca sumpsit, fundum præcipito:* Ita utile erit legatum, si & ille negotia curavit, & hujus frater centum ex arca sumpsit. *d. l.* 17. §. 3. See the tenth and eleventh Articles of the eighth Section.

XXIII.

23. Dispositions of Testators which are not to be executed.

Sometimes it is necessary not to follow the Dispositions of the Testator, altho he has clearly enough explained his Intention; whether it be that there was ground to presume that he was ignorant of some Fact, the Knowledge of which would have obliged him to make another Disposition, or because what he had ordered was really unjust or unreasonable. Thus, for Example, if the Testator had named one to be Tutor to his Children, or to have the Care of their Education, whom the Relations and the Judge knew to be so unfit for it, that this Choice ought not to be confirmed; or if a Testator had directed extravagant Expences for his Burying, or if he had made any Dispositions contrary to good Manners, or even to good Sense, by some Folly; all such sorts of Dispositions would not be executed. And a proper Provision would be made for the Guardianship of the Children, the Funeral Expences, or other Things necessary to be regulated, either by the Testator's Relations, or the Judge, according to the Quality and Circumstances of the Fact *b*.

b Utilitatem pupillorum prætor sequitur, non scripturam testamenti, vel codicillorum. Nam patris voluntatem prætor ita accipere debet, si non fuit ignarus scilicet eorum, quæ ipse prætor de tutore comperto habet. *l.* 10. *ff. de confirm. tut.*

Nec tamen semper voluntas aut jussum (testatoris) conservari debet: veluti, si prætor doctus sit, non expedire pupillum eo morari, ubi pater jusserit, propter

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ter vitium, quod pater forte ignoravit in eis personis esse, apud quas morari jussit. Si autem pro cibariis eorum in annos singulos aurei decem relicti sunt, sive hoc sermone significantur, apud quos morari mater pupillos voluerit: sive ita acceperimus hunc sermonem, ut ipsis filiis id legatum debeatur, utile erit. Et magis enim est ut providentia filiorum suorum hoc fecisse videatur. Et in omnibus ubi auctoritas sola testatoris est, neque omnimodo spernenda, neque omnimodo observanda est: sed interventu judicis hæc omnia debent, si non ad turpem causam feruntur, ad effectum perduci. *l. 7. in f. ff. de ann. legat. & fid.*

Quid ergo si ex voluntate testatoris impensum est, sciendum est nec voluntatem sequendam, si res egrediatur justam sumptus rationem. Pro modo autem facultatum sumptum fieri. *l. 14. §. 6. in f. ff. de relig.*

Ineptas voluntates defunctorum circa sepulturam, veluti vestes aut si qua alia supervacua ut in funus impendantur, non valere Papinianus scribit. *l. 113. §. ult. ff. de legat.*

XXIV.

24. In what Sense Testators may, or may not, derogate from the Laws.

The Rules which declare that Testators cannot, by any Clause in their Testaments, exempt their Dispositions from being subject to the Law, nor order any thing therein contrary to Law *c*, ought to be understood only of Dispositions which some Law had rendered illegal, and which should be contrary to the Spirit of the Law. Thus, for example, it would be to no purpose for a Testator to ordain that his Testament should not be null, altho he had called only three Witnesses to attest it. Thus, it would signify nothing to impose either upon his Executor, or a Legatary, a Condition which the Law would not allow him to perform; as, if he should bequeath any thing to an Infant, on condition that he should marry before he were fourteen Years of Age. Thus, a Testator cannot forbid his Heir or Executor to take that Quality upon him with the Benefit of an Inventary. For all these Dispositions would be directly contrary both to the Letter and Spirit of the Law, and of no other Use but to gratify a fantastick Humour. But if a Disposition of a Testator should derogate from the Provision of any Law only in a Case where the Spirit of the Law would not be transgressed, and upon a Motive which the Laws would not disapprove of, such sorts of Dispositions would have nothing in them contrary to Law, and therefore would subsist. Thus, for example, altho the Laws ordain that the Father shall have the Usufruct of the Goods acquired by his Son that is not emancipated, yet they permit a Testator, who has a mind to leave a Legacy to a Son that is under his Father's Power, to deprive the Father of the Legatary of his Right to the Usufruct of the Thing bequeathed *d*. Thus, altho the Law does not allow Minors to oblige themselves, nor alienate their Goods during their Minority, yet if a Testator had left to a Minor either a Sum of Money, or other Thing, on condition that he should become bound to one of the Creditors of this Testator, or that he should sell one of his Lands or Tenements for a certain Price to a Person named in the Testament; these Conditions would have their Effect, and the Infant-Legatary, who should accept of this Legacy, would be bound to perform them, without being able to free himself from them under pretext of his Minority, except by renouncing the Legacy, in case the said Conditions should make it disadvantageous. Thus in general, in all the Cases where the Point in question is to know whether the Clause of a Testament which seems opposite to some Law, or to derogate from it, ought to subsist, we ought to judge thereof by the Spirit of the said Rule, by distinguishing that which of it self is illegal, or contrary to the Provision of some Law, understood according to its Intention, according to its Spirit, and according to its Motive, from that which may have its Effect without transgressing the Spirit of the Law, altho it may be in Appearance contrary to the Terms thereof.

c Nemo potest in testamento suo cavere, ne leges in suo testamento locum habeant. *l. 55. ff. de legat. 1.*

d Hoc itaque non solum parentibus, sed etiam omni personæ licere præcipimus, donare, aut etiam per ultimam relinquere voluntatem, sub hac definitione atque conditione si voluerint, ut pater aut qui omnino eos (quibus donatur vel relinquitur) habent in potestate, in his rebus neque usumfructum, neque quodlibet penitus habeant participium. *Nov. 117. c. 1.*

XXV.

25. Two different Testaments that subsist.

If there should be found two different Testaments of one and the same Person, of the same Date, and both in due Form, and that in the one the Testator had named other Executors than those named in the other; these two Testaments would only make one which should subsist; and all these several Executors would divide the Succession among them. For these Testaments being made at the same time, neither of the two would be revoked by the other. And it would be presumed either that the Testator had a mind to keep secret the Dispositions of one of these Testaments,

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ments, shewing only the other, or that some other Motive had engaged him to divide them *e*.

e Sed etsi in duobus codicibus simul signatis alios atque alios hæredes scripserit, & utrumque extet: ex utroque quasi ex uno competit bonorum possessio, quia pro unis tabulis habendum est, & supremum utrumque accipiemus. *l. 1. §. 6. ff. de bonor. poss. sec. tab.*

XXVI.

26. Divers Views for the Interpretation of Testaments.

It follows from the Rules explained in this and the foregoing Section, that the Doubts which may arise in Testaments, are decided differently, according to the different Causes from whence they may proceed; according to the different Presumptions whereby we may judge of the Intention of the Testator, either by discovering what he had in his view, or even supplying that in the Cases where any of the Rules that have been just now explained may oblige us to do it; according as the Dispositions of the Testaments are conformable to the Laws, or are contrary thereto; and according to the other Views that the several Rules may give, and the Circumstances demand. Thus, sometimes it is necessary to observe literally the Terms of the Expressions; and sometimes they ought to be interpreted either by a Temperament of Equity when they will admit thereof, and when it is necessary *f*; or by the Consideration of one of the Persons interested, if the Case is such, that this Consideration ought to be of any weight *g*. Thus, when the Difficulty arises from the very Words of the Testator, it ought to be resolved by the Rules explained in the foregoing Section. And if it proceeds from any where else besides the Testament, and that some unforeseen Accident has given occasion to it, it ought to be decided in the manner that Equity tells us the Testator himself would have decided it *h*, pursuant to the Rules which have been just now explained. And in general, it is the Duty of the Judge, and his Wisdom will direct him, to apply in every Case the Rules that are most suitable to it *i*.

f In re dubia benigniorem interpretationem sequi non minus justius est quam tutius. *l. 3. ff. de his quæ in testam. delent.*

In ambiguis rebus humaniorem sententiam sequi oportet. *l. 10. in f. ff. de reb. dub.*

g *See the second Article, and those which follow.*

h In his quæ extra testamentum occurrerent, possunt res ex bono & æquo interpretationem capere. Ea vero quæ ex ipso testamento orirentur, necesse est secundum scripti juris rationem expediri. *l. 16. ff. de condit. & demonstr.*

i Voluntatis defuncti quæstio in æstimatione judicis est. *l. 7. C. de fideic.*

See the last Article of the preceding Section.

SECT. VIII.

Of the Conditions, Charges, Destinations, Motives, Descriptions, and Terms of Time, which Testators may add to their Dispositions.

SINCE the Dispositions of Testators ought to be proportioned to their Intentions, which they ought to explain, and the said Intentions are diversified according to the different Views which they may have from the Conjunctures in which they happen to be, and the different Regards which they ought to have to the Circumstances which they are to consider, and to the Events which they are to foresee; this Diversity obliges them to take different Precautions for the Execution of their Wills. And it is this that has naturally given Rise to the Use of Conditions, Charges, and other Additions to Bequests in Testaments, which shall be the Subject-matter of this Section. Thus, the Rules which are here explained, as well as those of the foregoing Sections, relate to all sorts of Dispositions in prospect of Death, Institutions of Executors, Substitutions, Legacies, and others, according as each Rule may be applied either to all these sorts of Dispositions, or to some of them.

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I.

1. Definition of Conditions in Testaments.

Conditions in Testaments are particular Dispositions, which are part of the other Dispositions of the Testator, and which he adds to them, in order to regulate the Effect which he is willing they should have, if a Case which he foresees does or does not happen; whether it be that he makes the Validity of what he orders in this Manner to depend on this Event, or that he is only willing to make some Change therein, according to the Case that shall happen. Thus, for example, a Testator may bequeath a Marriage-Portion to his Daughter in Case she marries, and this Legacy will depend on the Event of her Marriage, and will not have its Effect till she does marry. Thus, a Testator may devise a Land or Tenement on condition, that if the Legatary leaves Children behind him, he shall have the Property thereof, and transmit it to them; and that if he has no Children, he shall only have the bare Usufruct of it; and that after his Death the Property shall go to another: Which will make this Legacy to have different Effects, according as it happens that the Legatary has Children, or has none *a*.

a Si navis ex Asia venerit: si decem dederit: si capitolium ascenderit. *l. 2. ff. de condit. & dem.*
See what has been said of Conditions in Covenants, in the fourth Section of Covenants.

II.

2. Definition of Charges.

Charges are Engagements which the Testator imposes on his Executor, or other Person to whom he leaves any thing by his Will; as if he charges his Executor, or a Legatary, with the Usufruct of some Land or Tenement, with a Service, with

with an Annuity, in favour of a third Person *b*.

b Damnas esto hæres Titium sinere in illa domo habitare, quoad vivet. *l.* 15. *ff. de usu. & usufr. leg.* Uti dent Gaio Seio sororis meæ filio in honorem Consulatus quadraginta. *l.* 36. *ff. de condit. & dem.*

III.

3. Definition of Destinations.

Destinations are Directions given by the Testator, whereby he appropriates to certain Uses the things which he bequeaths. Thus, for instance, if a Testator leaves a Sum of Money to an Hospital, to be laid out on a Building, or on Moveables, or some other thing, this is a Destination which he makes of this Legacy *c*.

c Quod si cui in hoc legatum sit, ut ex eo aliquid faceret, veluti monumentum testatori, vel opus, aut epulum municipibus, sub modo legatum videtur. *l.* 17. §. *ult. ff. de condit. & dem.*

IV.

4. Definition of Motives.

Motives are the Causes which Testators sometimes express as the Reason that has induced them to make certain Bequests; and they are of two kinds. One is of the Motives which relate to the time past, and which precede the Disposition of the Testator: And the other is of the Motives which regard a Fact that is to come, the Hopes and Expectation of which engages the Testator to make some Disposition. Thus, for the time past, the Considerations of Affection, Esteem, and Gratitude for good Offices and Services done, are Motives which engage one to name an Executor, or to leave a Legacy *d*. Thus, for the time to come, the Hopes or Expectation that a Relation and Friend of the Testator's will be willing to take upon him the Guardianship of his Children, is a Motive which engages the Testator to leave him a Legacy. And these Motives, whether for the time past, or the time to come, may make the Dispositions conditional, or may not have that effect, according as the Testator shall have declared his Intention; as shall be explained hereafter *e*.

d Titio, quia me absente negotia mea curavit, Stichum do, lego. §. 31. *Inst. de leg.*

e See the tenth Article.

V.

5. Definition of Description.

Description is an Expression which the Testator makes use of instead of the Name of the Person, or Thing, which he means, or which he adds to specify it more expresly, and to distinguish it. As if instead of naming an Executor, or a Legatary, he describes him by his Quality; if he gives to the eldest Son of such a one; if having devised an Estate, he adds its Situation and its Bounds; if having bequeathed a Picture of such a History, he adds the Name of the Painter, or mentions from whom he had the Picture *f*.

f Demonstratio plerumque vice nominis fungitur. *l.* 34. *ff. de cond. & dem.*

Servum Stichum, quem de Titio emi, fundum Tusculanum, qui mihi a Seio donatus est. *l.* 17. *ff. de condit. & dem.* See the eleventh Article.

VI.

6. Definition of the Terms of Time.

The Terms of Time are the Delays which the Testator adds to his Dispositions, whether it be to defer the Execution of them, or to make their Validity to depend thereon, as shall be explained in the twelfth Article. And these Terms or Delays are of two sorts: One is of a certain Time, as to the first Day of such a Year, or within so many Years to be reckoned from such a Day *g*: The other of an uncertain Time, as at the Time of the Death of some Person, or at the Time of his Marriage *h*.

g Annua bina trina die dato. *l.* 30. *ff. de legat.* 1.

h Dies autem incertus est, cum ita scribitur: hæres meus cum morietur, decem dato. *l.* 1. §. 2. *ff. de cond. & dem.* See the twelfth and thirteenth Articles

VII.

7. The Charges, Destinations, and Conditions are often confounded together.

Altho the Conditions, the Charges, and Destinations are distinguished in the manner that has been just now explained, yet as the Word Condition is commonly used in our Language, it comprehends often the Charges and Destinations; and the Word Charge takes in likewise the Conditions. Thus, it is said of a Legacy or Devise, that charges the Devisee of a Land or Tenement with a Service, that this Devise is left on condition that the said Devisee should suffer such a Service: Thus it is said of the Legacy of a Sum of Money destin'd for a Building, that the said Legacy is left on condition that the Legatary should build. Thus we say of a Legacy left on condition that the Legatary should restore to the Executor a certain Writing, a Moveable, or other thing, that this Legacy is left with the Charge of restoring the said Writing or Moveable. And in fine it is said of a Legacy destined for some Purchase, or for some Work,

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Work, that it is left with this Charge, or upon this Condition, that the said Purchase or Work be made or done by him who is charged with it. But we must take care with respect to this Usage which confounds these Words in one and the same Sense, that we do not for all that, confound Charges, Destinations and Conditions together: For altho they have often the same effect, yet their Natures are different; which it is necessary to distinguish for the right use of the Rules *i*, as will appear by the following Articles.

i See the following Articles. The Usage of these Words, Charges and Conditions, are commonly confounded in our Language.

VIII.

8. The Charges may be conceiv'd either as Conditions, or simply as Charges.

The Charges may be conceived two ways: One, in such a manner that they may make in reality Conditions on which the Effect of the Testator's Dispositions may depend; and the other, so as not to have the use of Conditions. Thus, for Example, if a Testator bequeaths to a Creditor of one of his Friends a Sum of Money, or some other thing, with Charge to the said Legatary to restore to the said Friend the Bond or Obligation of what he owes him, or with Charge to desist from a Law-Suit which he has commenced against him; these Charges make the said Legacy conditional, and are in effect Conditions, without the Performance of which the Legatary shall have no part of the Legacy. But if a Testator devises an Estate of a thousand Livres yearly Income, with the Charge of paying out of it every Year a Rent of two hundred Livres for a Foundation; this Charge will not be a Condition upon which the Effect of the said Devise will depend, but will only give to those to whom this Rent ought to be paid, a Right to distrain the Fruits of the said Estate, and the other Goods of the Legatary, if having accepted the Legacy, he does not acquit the Charge *l*.

l This is a Consequence of the preceding Articles.

IX.

9. The Destinations may, or may not, have the Effect of Conditions.

The Destinations as well as the Charges, may be conceived either in Terms which make them to be a Condition, or to have the Effect thereof; or in other Terms, and without this Effect. Thus, for instance, if a Testator charges his Executors to give a Sum of Money to a young Woman when she marries, to be to her instead of a Marriage Portion, this Destination will have the Effect of a Condition; and if this young Woman does not marry, or if she dies before she is of Age to marry, this Legacy will be null *m*. Thus on the contrary, if a Testator leaves a Sum of Money to an Hospital, to be laid out there on some Edifice; altho this Edifice should happen to be built by some other means, or should not be necessary to the said Hospital, yet this Destination would be no Obstacle why the Sum should not be due, that it may be laid out upon some other Work, of an equal or greater Advantage for the said House: For the Intention of the Testator was not, that this Destination should have the Effect to make the Legacy conditional *n*.

m In legatis & fideicommissis etiam modus adscriptus pro conditione observatur. *l. 1. C. de his quæ sub. mod.*

n Pecuniam eo legatam, in id quod maxime necessarium videretur, conferre permittitur. *l. 4. ff. de adm. rer. ad civit. pert.*

X.

10. The Motives may either be in the stead of Conditions, or not have the Effect thereof.

The Motives, as well as the Charges and Destinations, may be conceived either in Terms which make them to have the Effect of a Condition, or in such Terms that make them not to be consider'd as a Condition; whether it be that the said Motives respect the time past, or the time to come. Thus, for Example, for the time past, if a Testator bequeaths a Sum of Money to one of his Friends, because he has taken care of his Affairs, this Legacy will not be conditional: And altho this Legatary may not have taken this Care, yet the Legacy will nevertheless be due *o*, according to the Rule explained in the xxiid Article of the viith Section. But if the Testator has explained this Motive in the Terms of a Condition, the Legacy will not be due unless it appear that the Legatary has satisfied it; as if the Testator had said, I bequeath to such a one, if it shall appear that he has done such a Business *p*. And it is by the Expression of the Testator, and by the Circumstances, that

o Falsa causa adjecta non nocet: veluti cum quis ita dixerit, *Titio quia me absente negotia mea curavit, Stichum do, lego*: vel ita, *Titio quia patrocinio ejus capitali crimine liberatus sum do, lego.* Licet enim neque negotia testatoris unquam gesserit Titius, neque patrocinio ejus liberatus sit, legatum tamen valet. §. 31. *inst. de legat.*

p Sed si conditionaliter enuntiata fuerit causa, aliud juris est. Veluti, hoc modo, *Titio si negotia mea curavit, fundum meum do, lego*. d. §. 31. in f. l. 17. §. 3. ff. de cond. & dem.

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that we are to judge whether these sorts of Legacies are pure and simple, or whether they are conditional *q*. Thus with respect to the time to come, if a Testator bequeaths to one of his Relations, or Friends, a Sum of Money to be paid after his Death, adding to the Legacy, that he hopes the Legatary will assist the Testator's Children with his Counsel and good Offices when there shall be occasion; this Motive will oblige the Legatary only in point of Honour, and this Legacy, which is payable before the said good Offices, will not be revoked, altho they are not performed. But if a Testator leaves a Sum of Money to an Attorney or Sollicitor, that he may take care of instructing and sollicitiug a Law-Suit, that is either already commenced or to be commenced, this Motive will be instead of a Condition; and this Legatary will not be entitled to the Legacy, unless he perform the Condition according to the Will of the Testator, and the State of things. Thus, for another Example, if a Testator leaves a Sum of Money to one of his Relations or Friends, to engage him to accept the Guardianship of his Children, and the Legatary refuses it, he shall have no right to the Legacy *r*.

q Falsam causam legato non obesse verius est. Quia ratio legandi legato non cohaeret. Sed plerumque doli exceptio locum habebit, si probatur alias legaturus non fuisse. *l.* 72. §. 6. *ff. de condit. & dem.*

r Etiam si partis bonorum se excusaverit tutor, (puta Italicarum vel Provincialium rerum) totum quod testamento datum est ei auferetur. *l.* 111. *ff. de legat.* 1.

XI.

11. The Descriptions may sometimes imply a Condition.

Descriptions do not usually imply a Condition, but are distinguished from Conditions in this, that they for the most part have regard to the past and present time, whereas the greatest part of Conditions respect the time to come *s*. But there may be Descriptions conceived in Terms which give them the Nature of Conditions. Thus there is no Condition, when a Testator, the better to describe a Land or Tenement that is devised, and sufficiently specified, adds that it is the Land or Tenement which he purchased of such a one, or that such a one gave him; and this Legacy is independent of the Truth of this Description, so that altho it were false, yet the Legacy would nevertheless have its effect: For the Testator may have been deceived as to these Circumstances; and it is sufficient that what he had a mind to give is well enough known otherwise *t*. Thus on the contrary, if a Testator had bequeathed that which was due to him by a Debtor whom he named, this Legacy would imply the Condition that there was a Debt owing, and if nothing was due, the Legacy would be null. Thus, in like manner, if a Testator had bequeathed the Fruits that should be gather'd in such a Ground the Year of his Death, this Description would imply the Condition that there should be some Crop, and if there were none, the Legacy would be without any effect *u*. But if the Testator having bequeathed a Sum of Money, should add afterwards that the said Sum should be paid to the Legatary out of the Produce of such a Crop, or out of the Moneys which should be found in such a Place; these Descriptions being added only to shew his Heirs or Executors whence they might easily pay the said Legacy, would not make it conditional, unless they were expressed in such Terms as might make one judge that the Testator had a mind to bequeath only what could be made of such a Crop, or other thing, which he had thus specified *x*.

s Inter demonstrationem & conditionem hoc interest, quod demonstratio plerumque factam rem ostendit, conditio futuram. *l.* 34. §. 1. *ff. de condit. & dem.*

t Demonstratio plerumque vice nominis fungitur, nec interest falsa an vera sit, si certum sit quem testator demonstraverit. *d. l.* 34. *ff. de condit. & dem.*

Demonstratio falsa est, veluti si ita scriptum sit: *Servum Stichum quem de Titio emi: fundum Tusculanum qui mihi a Seio donatus est.* Nam si constat de quo homine, de quo fundo senserit testator, si ad rem non pertinet, is quem emisse significavit, donatus esset: aut, quem donatum sibi esse significaverat, emerit. *l.* 17. *eod.*

u Si mihi, *quod Titius debet*, fuerit legatum, neque Titius debeat, sciendum est nullum esse legatum. *l.* 75. §. 1. *de leg.* 1. Inest conditio legati veluti cum ita legamus, fructus qui ex fundo percepti fuerint haeres dato. *l.* 1. §. *ult. ff. de condit. & dem.*

x Quidam testamento, vel codicillis, ita legavit, *aureos quadringentos Pamphilae dari volo ita, ut infra scriptum est: ab Julio auctore aureos tot, & in castris quos habet, tot, & in numerato quos habeo, tot.* Post multos annos eadem voluntate manente, decessit: cum omnes summae in alios usus essent translatae. Quaero an debeatur fideicommissum? Respondi, verisimilius est, patrem familias demonstrare potius haeredibus voluisse, unde aureos quadringentos sine incommodo rei familiaris contrahere possint, quam conditionem fideicommisso injecisse, quod initio pure datum esset: & ideo quadringenti Pamphilae debebuntur. *l.* 96. *ff. de leg.* 1.

Firmio Heliodoro fratri meo dari volo quinquaginta ex reditu pradiorum meorum futuri anni. Postea non videri conditionem additam, sed tempus solvendae pecuniae prolatum videri respondit: fructibus fini relictae pecuniae non perceptis, uberta-

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tem esse necessariam anni secundi. *l. 26. ff. quand. dies leg. ced.*

XII.

12. The Term of an uncertain time makes the Legacy conditional.

The Terms of Legacies fixed to a certain Day, such as the first Day of such a Year, or within such a time, do not make a Condition on which the Legacy may depend; and the effect of these Terms is only to defer the Delivery of the Legacy, the Right of which is already acquired to the Legatary, and which, were it not for the Term, would be due instantly *y*; but the Term of an uncertain Day implies a Condition on which the Legacy depends.

Example.

Thus, for example, if a Testator bequeaths any thing to an Infant when he shall have attain'd the Age of fourteen or one and twenty Years compleat, to a Friend when he shall purchase such an Office, to a young Woman when she shall be married; these Legacies imply the Condition that the said time shall happen, that the Legatary shall be of Age, that he shall purchase such an Office, that the young Woman shall be married; and this Condition is the same as if the Testator had left the Legacy in case the Legatary should live to that Term, and that if he died before, the Legacy should be null *z*. Thus we must not confound the Legacies which are made payable at an uncertain time, with the Legacies payable at a certain Term.

y Si dies apposita legato non est, præsens debetur, aut confestim ad eum pertinet, cui datum est. Adjecta, quamvis longa sit, si certa est, veluti *Kalendis Januariis centesimis*, dies quidem statim cedit, sed ante diem peti non potest. *l. 21. ff. quand. dies leg. vel fid. ced.*

z Dies incertus conditionem in testamento facit *l. 75. de cond. & dem.*

Si incerta (dies) (quasi *cum pubes erit, cum in familia nupserit, cum magistratum inierit, cum aliquid demum*, quod scribendo comprehendere sit commodum, *fecerit*) nisi tempus conditiove obtigit, neque res pertinere, neque dies legati cedere potest. *l. 21. ff. quand. dies legat. ced.*

Si Titio *cum is annorum quatuordecim esset factus*, legatum fuerit, & is ante quartumdecimum annum decesserit, verum est ad hæredem ejus legatum non transire: quoniam non solum diem, sed etiam conditionem hoc legatum in se continet, si effectus esset annorum quatuordecim. *l. 22. eod. v. l. un. §. 7. C. de caduc. toll.* See the following Article, with the Remark on it; and the sixteenth Article of the ninth Section of Legacies. See, touching Legacies at the Age of fourteen Years, the same sixteenth Article of the ninth Section of Legacies, and the Remark that is there made on it.

XIII.

13. Another Example.

The Uncertainty of the times on which depend the Legacies explained in the foregoing Article consists in this, that it is uncertain if those times will ever happen; for it may not happen that the Legatary lives to be of Age, or that he has such an Office, or that a young Woman marries. But there are times uncertain in another manner, altho it be certain that they will happen, and which do nevertheless make the Disposition of the Testator to be conditional; as, for instance, if he charges his Heir or Executor to restore at his Death either the whole Inheritance, or a certain Land or Tenement to another Person: For in this case, altho it is certain that the Time of the Death of this Heir or Executor will happen; yet since it is uncertain, if, when it does happen, the Person in whose favour the said Disposition is made, is not dead, this Uncertainty renders the Disposition conditional, and implies the Condition that this Person do survive the said Heir or Executor *a*.

a Hæres meus cum ipse morietur centum Titio dato. Legatum sub conditione relictum est: quamvis enim hæredem moriturum certum sit, tamen incertum est an legatario vivo dies legati non cedat: & non est certum ad eum legatum perventurum. *l. 79. §. 1. ff. de condit. & dem.*

Dies autem incertus est cum ita scribitur, *Hæres meus cum morietur decem dato.* Nam diem incertum mors habet ejus. Et ideo si legatarius ante decesserit, ad hæredem ejus legatum non transit: quia non cessit dies vivo eo, quamvis certum fuerit moriturum hæredem. *l. 1. §. 2. ff. de cond. & dem.*

Si, *cum hæres morietur*, legetur, conditionale legatum est. Denique vivo hærede defunctus legatarius ad hæredem non transfert. Si vero, *cum ipse legatarius morietur*, legetur ei, certum est legatum ad hæredem transmitti. *l. 4. ff. quando dies legat. vel fideic. ced.* See the seventeenth Article of the ninth Section of Legacies.

¶ We have not put down in the Article what is said in the last of these Texts, that the Legacy due at the time of the Legatary's death is not conditional, and that he transmits it to his Heir or Executor. For it does not seem probable, that it will ever come into any one's mind to leave a Legacy so useless to the Legatary, and of which no one could have any Benefit, except the Legatary's Heir or Executor, who perhaps might be no Relation to the Testator, nor so much as known to him. And if the Testator had had a mind to leave only to the Children of this Legatary, and after his Death, he would have expressed himself in another manner. But altho this Case should never happen, yet we make this Remark here on occasion of this Text, that we may add at the same time the Reason why the Uncertainty of the time of the Legatary's Death does not make the Legacy conditional, as the Uncertainty of the time of the Executor's Death does. Which

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Which proceeds from this, That in the Case of a Legacy due at the time of the Executor's Death, it may happen that the Legatary may die before him, in which Case there will be neither Legacy nor Legatary; whereas, in the Case of a Legacy due at the time of the Legatary's Death, it cannot happen that the Legatary should die before the Time in which the Legacy ought to begin to have its Effect, which is the Time in which he dies. Thus it will be in the last Moment that he passes from Life to Death that this Legacy will have its Effect, to pass from the Legatary to his Heir or Executor.

XIV.

14. It is necessary to distinguish the different sorts of Dispositions, to be able to judge aright of them.

It follows from these different Manners in which Testators may diversify their Dispositions, that in all the Cases where the Question is to interpret any one of them, it is necessary to examine its Nature, to know whether it is pure and simple, or conditional, and whether it contains any of the other Characters which have been just now mentioned, in order to discover by the said Characters, and by the Expressions of the Testator, what may have been his Intention, and how his Disposition ought to be executed *b*. Which depends on the preceding Rules, and those that follow, and which relate chiefly to Conditions.

b This is a Consequence of the preceding Rules. See the Articles which follow.

XV.

15. Three sorts of Conditions with respect to the divers sorts of Facts or Events on which they depend.

Conditions are of several sorts, and may be distingnish'd into different Classes, according to the different Views under which they are considered. If we consider them with respect to the divers sorts of Facts, or Events, on which they depend, there are three sorts of them. The first, is of those which depend solely on the Deed of the Person to whom the Condition is enjoined: The second, of those which depend on Events in which the Deed of that Person has no Share: And the third, is of those which depend partly on the Deed of the said Person, and partly on an Event that is independent of his Deed. The Condition, that a Legatary shall give a Sum of Money, do some Work, discharge what is owing him by one of his Debtors, that he shall not raise a Building so high as to prejudice the Light and Prospect of a House belonging to a Friend of the Testator's, and other such like Conditions, are of the first of these three kinds. A Legacy of a Sum of Money, on Condition that there be so much clear got of a Law-Suit that is still depending, or in a Commerce which is not as yet ended, would be of the second kind. And we may give for an Example of the third sort, the Condition imposed on a Legatary to buy a House of a third Person, either in order to give it to some other Person, or to fit up an Apartment in it for an Hospital: For this Condition would depend partly on the Deed of him on whom it was impos'd, and partly on the Will of the Owner of the said House, or perhaps even on a Casualty, which might render it impossible. As, if the Situation of the said House should expose it, together with the Ground on which it stood, to be destroyed by the Over-flowing of a River, or by a Torrent, and that in fact the House and Ground should happen to perish *c*.

c In facto consistentes conditiones varietatem habent: & quasi tripartitam recipiunt divisionem: *Ut quid detur, ut quid fiat, ut quid obtingat.* Vel retro, *ne detur, ne fiat, ne obtingat.* Ex his, dandi faciendique conditiones in personas collocantur, aut ipsorum quibus quid relinquitur, aut aliorum. Tertia species in eventu ponetur. *l.* 60. *ff. de condit. & demon.*

XVI.

16. Three sorts of Conditions with respect to Time.

Conditions may likewise be distinguished into three kinds, according to the Times to which they may have relation. One is of those which respect the Time past: As if a Testator bequeaths a Sum of Money, in case the same shall be found to be due to him from a Business already begun in his Absence by some Friend of his, whom he had intrusted with it, but the Event of which he did not as yet know. The second kind, is of the Conditions which relate to the present Time: As, if a Testator leaves a Legacy to a Stranger, or Alien, in case he be naturalized at the Time of making the Testament, or at the Time of the Testator's Death, which will be the present Time of the Succession's being open. The third is, of Conditions which have respect to the Time to come: As, if the Testator leaves a Legacy in case the Legatary shall happen to purchase an Office. But it is only, properly speaking, this third kind which has the true Character of a Condition, which is to suspend, until the same does happen, the Disposition of the Testator which depended on it: Whereas the Conditions which relate either to the Time past or present, do not suspend any thing; and that at the Moment of making the Testament, or of the Death of the Testator, it

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it is determined either that the Disposition is null, if the Condition has not happened, or if it has happened, that the Legacy shall have its Effect. And there is nothing in suspense but the Knowledge whether it has happened, or not *d*.

d Multum interest qualis conditio posita fuerit. Nam aut in præteritum, aut in præsens, aut in futurum. *l.* 16. *ff. de inj. rupt.*

Si in præteritum collata sit conditio, vel ad præsens, non videtur sub conditione institutus. Aut enim impleta est conditio, & pure institutus est: aut non est, & nec hæres institutus est. *l.* 3. §. 13. *ff. de bon. libert.*

Nulla est conditio quæ in præteritum confertur, vel quæ in præsens: veluti si Rex Parthorum vivit; si navis in portu stat. *l.* 10. *in f. ff. de condit. inst.*

XVII.

17. Two sorts of Conditions, express or tacit.

We must likewise distinguish under another View two sorts of Conditions, which comprehend them all. One is of those which are express, and the other of those which are called tacit. The express Conditions are all those which the Testators express in Terms of Conditions, or other Terms equivalent: And those Conditions are called Tacit, which without being expressed, are tacitly implied in the Clauses of the Testament. Thus, when a Testator bequeaths the Fruits of such a Ground, of such a Year, or the Profits which arise from such an Affair; these sorts of Legacies imply the tacit Condition, that there shall be Fruits gathered in the said Ground, and that some Profit shall be made of the said Affair when it shall be ended *e*. But these sorts of Conditions which are implied, do not make the Legacies of this kind conditional with this Effect, so as to make the Right of the Legatary to depend on them. For before that it be certain, in the Case of the Legacy of a Crop, whether there will be any Fruits, or not; and in the Case of the Legacy of the Profits arising from such a Business, whether there will be Profit or Loss thereby; the Legatary has acquired his Right to what Fruits the Ground may produce, or to what Profit may arise from the said Business. And the Legatary has so fully acquired this Right before the Event gives him the Use of the Legacy, that if he should happen to die in the mean while, he would transmit his Right to his Heir. So that the Effect of this Condition is not such, as that the Validity of the Legacy depends thereon, but it is only such, that the Legacy without being null, may happen to be of no manner of Profit to the Legatary *f*.

e Inest conditio legati, veluti cum ita legamus: *Fructus qui ex fundo percepti fuerint hæres dato.* l. 1. §. ult. ff. de condit. & dem.

f Conditiones extrinsecus non ex testamento venientes, id est, quæ tacite inesse videantur, non faciunt legata conditionalia. *l.* 99. *ff. de condit. & dem.*

XVIII.

18. Impossible Conditions.

Another kind of Conditions is made up of those which are impossible. And we must reckon in this Number not only that which is impossible by Nature, but likewise that which is contrary to Law, good Manners, or Decency. As, for example, if a Testator had bequeathed a Marriage-Portion to a young Woman of ten Years of Age, on condition that she should marry within a Year; or if he had left a Legacy on condition that the Legatary should fix his Domicil in a certain Place. For the Condition of this Marriage would be contrary to Law; and that of fixing his Domicil in a certain Place being contrary to the just and natural Liberty that every one has to chuse his Dwelling-Place, would be in some manner contrary to good Manners and Decency. Thus, these sorts of Conditions oblige to nothing at all, no more than those which are naturally impossible, and they are held to be the same as if they were not written. For that is considered as impossible which cannot be done without Breach of the Law, or of good Manners and Decency. And if there were in a Testament Conditions either naturally impossible, or contrary to Law and good Manners, the Dispositions which the Testator should make to depend on them would nevertheless have their Effect, although these Conditions should have none *g*.

g Obtinuit impossibiles conditiones testamento adscriptas pro nullis habendas. *l.* 3. *ff. de condit. & dem.*

Sub impossibili conditione, vel alio mendo factam institutionem placet non vitiari. *l.* 1. *ff. de condit. inst.*

Conditiones contra edicta Imperatorum, aut contra leges, aut quæ legis vicem obtinent, scriptæ, vel quæ contra bonos mores, vel derisoriæ sunt, aut hujusmodi quas prætores improbaverunt, pro non scriptis habentur. Et perinde, ac si conditio hæreditati, sive legato adjecta non esset, capitur hæreditas legatumve. *l.* 14. *ff. de condit. inst.*

Titio centum relicta sunt ita *ut à monumento meo non recedat, veluti in illa civitate domicilium habeat*: potest dici, non esse locum cautioni per quam jus libertatis infringitur. *l.* 71. §. 2. *ff. de condit. & demonstr.*

Quæ facta lædunt pietatem, existimationem, verecundiam nostram, & (ut generaliter dixerim) contra bonos mores fiunt, nec facere nos posse credendum est. *l.* 15. *ff. de condit. inst.*

See the twelfth Article of the fourth Section of Covenants.

XIX.

XIX.

19. *Another kind of impossible Conditions.*

There may be Conditions which, without being naturally impossible, and without having any thing in them contrary to Law and good Manners, cannot be fulfilled, because of some Event which makes the Performance of them impossible: And in that Case the Disposition which depended on such a Condition will have its Effect, or will not have it, according as the Quality of the Condition may mark what was the Intention of the Testator. Thus, for example, if a Testator had devised a Tenement, or other thing, on condition that the Legatary should give a Sum of Money to some Person before the Legacy should be delivered to him, and that the said Person should happen to die before the Testator; the Non-performance of such a Condition that is become impossible, would be of no prejudice to the Legacy, and the Legatary would have it without paying the Sum of Money: For the Intention of this Testator was to leave two Legacies; one to this Legatary, and the other to that Person. So that the Fruitlesness of the one Legacy does not annul the other, no more than in the Cases of the twenty ninth Article *h*. Thus, on the contrary, if a Testator had left a Legacy to a young Woman, in case she should happen to be married to such a Relation or Friend of the Testator's, and that the said Relation or Friend should chance to die before the said Marriage, the Legacy would be null. For the Intention of this Testator had for its Object only this Marriage *i*.

h See the twenty ninth Article of this Section.

i Legatum sive fideicommissum à patruo tuo relictum tibi, sub conditione *si filio ejus nupsisses*, cum mortuo filio, priusquam matrimonium cum eo contraheres, conditio defecerit, nulla ratione deberi tibi existimas. *l.* 4. *C. de condit. inst. tam legat. quam fid. v. ff. de condit. & dem.*

XX.

20. *Dispositions made with a View to procure others, are unlawful.*

We ought to reckon among the Conditions that are contrary to good Manners, those which a Testator adds to a Disposition in favour of some Person, in order to procure to himself the like Benefit. As, if he should institute such a one for his Heir or Executor, in case the said Person hath on his part named this Testator to be his Heir or Executor. And it would be the same thing in a Legacy left on such a Condition. And in general, in what manner soever those Dispositions are conceived, which tend to the procuring of others from those Persons in whose favour they are made, whether it be that the Testator expects the said Dispositions to be made in his own favour, or in favour of other Persons; or that he gives to one Person, in order to get from another; all these kinds of Dispositions are contrary to good Manners, and are unlawful *l*.

l Captatorias institutiones non eas Senatus improbavit, quæ mutuis affectionibus judicia provocaverunt; sed quarum conditio confertur ad secretum alienæ voluntatis. *l.* 70. *ff. de hæred. instit. l.* 11. *C. de test. mil.* Qua ex parte me Titius hæredem scriptum in tabulis suis recitaverit, ex ea parte hæres esto. *l.* 1. *in f. ff. de his quæ pro non script.*

Captatoriæ scripturæ simili modo neque in hæreditatibus, neque in legatis valent. *l.* 64. *ff. de leg.* 1.

Sed illud quæri potest, an idem servandum sit quod Senatus censuit, etiam si in aliam personam captionem direxerit: veluti, si ita scripserit, *Titius si Mævium tabulis testamenti sui hæredem à se scriptum ostenderit probaveritque, hæres esto.* Quod in sententiam Senatusconsulti incidere non est dubium. *l.* 71. §. 1. *ff. de hæred. instit. v. l.* 2. *eod. l.* 29. *eod.*

¶ These sorts of Dispositions so mean and sordid, which are mentioned in this Article, must needs have been very frequent at *Rome*, seeing it was necessary to have a Law to repress them, which was a Decree of the Senate, of which mention is made in the Texts cited on this Article. This Rule is not very necessary with us; for altho we have other unfair Ways enough practised among us in order to procure favourable Dispositions from Testators, yet we see but few Persons who think of laying such Snares as these, and as few who suffer themselves to be caught in them.

We are not to reckon in the Number of the Dispositions spoke of in this Article, the mutual Testaments of two Persons, who institute reciprocally one another Heir or Executor: For neither of the two anticipates the Will of the other, in order to procure the said Institution in his Favour; but both the one and the other having a reciprocal Affection, which can only proceed from just Causes, there is no reason why the one and the other should not express it by such an Institution as this is. And it is expresly enough approved of by these Words of the first of the Texts quoted on this Article; *Non eas (institutiones) Senatus improbavit quæ mutuis affectionibus judicia provocaverunt.* It is for these Reasons that the reciprocal Testaments have been approved of by the Novel of the Emperor *Valentinian, De Testamentis*, and by our Usage,

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Usage, and likewise between Husband and Wife in some Customs.

XXI.

21. Not those which are made as an Acknowledgment of a former Benefit.

If the Testator did not make his Disposition in favour of a Person, to depend on what he should expect from him; but that having known, for example, that a Person had left him something by his Testament, he on his part, out of a Sense of Gratitude, should leave something to the said Person, or to some of his Children, or Friends, on his account; such a Bequest, not being made with a view to procure the like from the said Person, would have nothing unlawful in it *m*.

m Illæ institutiones captatoriæ non sunt, veluti, si ita hæredem quis instituat, *qua ex parte Titius me hæredem instituit, ex ea parte Mævius hæres esto.* Quia in præteritum non in futurum institutio collata est. *l. 71. ff. de hæred. inst.*

In the Article we have not made use of the Expression instanced in this Text, I institute such a one my Heir or Executor, for the same Share or Portion that another has instituted me his Heir or Executor. *For altho the said Disposition does not seem to be made with a Design to procure another, and that on the contrary it seems to presuppose the other to be already made; yet seeing it may have relation to the Testament of a Person who is still alive, and who may make another: And seeing it implies the Condition, that this Testator shall be Heir or Executor to the other, since he gives only in proportion to what the other shall have left him; such a Disposition as this does not seem to be very decent, and is not agreeable to our Usage. Wherefore we have put down in the Article another Case which may suit with our Usage, and which points out the Character by which we are to distinguish in Dispositions which are relative to others, those which may be reckoned lawful, from those which are not, according to the Principles explained in this and the foregoing Texts.*

XXII.

22. One or more Conditions of the same Disposition.

Since Conditions depend on the Will of the Testator, and are arbitrary, one may make a Disposition to depend not only on one, but on more Conditions, whether they be in relation to a Fact in the Power of the Person whom the said Disposition concerns, or of another Nature. And if there be several Conditions joined together, so as that the Testator imposes them all together, the fulfilling of one of the Conditions will not be sufficient to validate a Bequest which depends on the Accomplishment of them all. But if it depends only upon one or the other, the Accomplishment of the first will give it the Effect which it ought to have *n*.

n Si hæredi plures conditiones conjunctim datæ sint, omnibus parendum est, quia unius loco habentur: si disjunctim sint, cuilibet. *l. 5. ff. de condit. instit.*

XXIII.

23. The Will of the Testator is the first Rule whereby to interpret the Conditions, and other sorts of Dispositions.

In all the Cases where there may arise Difficulties concerning Conditions, Charges, Destinations, Motives, Descriptions, and Terms of Time, the first general Rule, and which is common to all these sorts of Difficulties, is always the Will of the Testator. Thus it is by the Knowledge that we may have of his Intention, that we are to regulate them *o*. And the Use of this general Rule depends in particular on the preceding Rules, and those which follow.

o In conditionibus primum locum voluntas defuncti obtinet, eaque regit conditiones. *l. 19. ff. de condit. & dem.*

XXIV.

24. Conditions which depend on the Deed of the Executor or Legatee.

The Conditions which depend solely on the Fact of the Person to whom the Testator has enjoined them, ought to be fulfilled in the manner that he has regulated, and as soon as they can conveniently be performed. And his Disposition hath its Effect, or ceaseth to have it, according as the said Person accomplisheth, or doth not accomplish the Condition, whether it consist in doing or not doing, in acquitting or giving, or in suffering some Charge, or what other Nature soever it be of; provided only that the Condition have nothing in it that is impossible, or contrary to Law and good Manners *p*.

p Hæc conditio, *Si in capitolium ascenderit,* sic accipienda est, si cum primum potuerit capitolium ascendere. *l. 29. ff. de condit. & dem.* Verbum *facere* omnem omnino faciendi causam complectitur dandi, solvendi, numerandi, judicandi, ambulandi. *l. 218. ff. de verb. sign.*

XXV.

25. Condition of not doing something.

As to the Conditions which oblige not to do something; as, for instance, not to raise a Building so high as to hinder the Light or Prospect of a House, Provision ought to be made for the Security of the Person interested, according to the Nature of the Condition, whether it be by the bare Submission of the Person on whom the Condition is imposed, or otherwise, according to the Circumstances *q*.

q Mutianæ cautionis utilitas consistit in conditionibus quæ in non faciendo sunt conceptæ. *l. 7. ff. de cond. & dem. v. Nov. 22. C. 44.* See the forty sixth Article.

XXVI.

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XXVI.

26. *Conditions which do not depend on the Deed of the Executor, or Legatee.*

The Conditions which depend upon Events in which the Deed of the Heir, or Executor, or Legatee, has no share, have their Effect by the Event it self, whenever the Case happens, or fail to have it, if the Case does not happen *r*. Thus, for example, a Legacy of a Sum of Money upon condition that so much clear Gain shall be made by a Business or Commerce that is not as yet ended, will be in suspense till the Event; and if there be any clear Profit, the Legacy will have its Effect, either in whole, or in part, according to the Quantity of the Profit that is made, or will remain without Effect, if there be no Profit at at all.

r Si navis ex Asia venerit. *l.* 2. *&* *l.* 10. §. 1. *de condit. & dem.*

XXVII.

27. *Conditions which depend on the Deed of third Persons.*

We must reckon in the number of Conditions which depend on Events wherein the Fact of the Heir, or Executor, or Legatee has no share, those which depend upon the Fact of third Persons; as if a Testator had left a Legacy of a Sum of Money to be laid out according to his Intention, in case the same should be approved by a Person whom he should name, such as the Executor of his Testament, or other Person, leaving it to the said Person to execute or not to execute his Intention which he had explained to him; as for example, if it was for making a Restitution which the Testator was in doubt whether he was obliged to make or not, and the Decision of which Doubt he was willing should depend on the said Person *s*.

s In arbitrium alterius conferri legatum, veluti conditio potest. Quid enim interest, si *Titius Capitolium ascenderit mihi legetur, an, si voluerit?* l. 1. ff. de legat. 2. *See the thirty first Article.*

XXVIII.

28. *Conditions which depend on the Combinations of Facts and of Events.*

The Conditions which depend partly on the Deed of the Executor or Legatee, and partly on some Event, whether it be the Fact of third Persons, or a Casualty, have differently their Effect, or have it not, according to the Nature of the Conditions, and the Circumstances, by the Rules which follow *t*.

t See the following Articles.

XXIX.

29. *Example of Conditions which depend partly on the Fact of him who is charged with 'em, and partly on the Fact of other Persons.*

If the Executor or Legatee were charged with a Condition which did not solely depend on his Deed, but which should depend also on the Fact of another Person whom the Disposition of the Testator might concern, and who should refuse to do what was necessary to be done on his part towards accomplishing the Condition, it would be sufficient if the Executor or Legatee did on his part all that depended on him. Thus, for example, if the Condition were, to give a Sum of Money to a Person, or to build something in a publick Place, or for the use of a particular Person, and those whom the said Dispositions did concern, would not accept of the Sum of Money, nor suffer the Work to be done, it would be the same thing as if the Condition were accomplished *u*.

u Si ita hæres institutus sim, si decem dedero, & accipere nolit, cui dare jussus sum: pro impleta conditione habetur. l. 3. *ff. de condit. inst.*

Jure Civili receptum est, quoties per eum, cujus interest conditionem impleri, fit, quominus impleatur, ut perinde habeatur ac si impleta conditio fuisset. Quod plerique & ad legata, & ad hæredum institutiones perduxerunt. Quibus exemplis stipulationes quoque committi quidam recte putaverunt: cum per promissorem factum esset, quominus stipulator conditioni pareret. *l.* 24. *ff. de cond. & dem. l.* 81. §. *eod. l.* 5. §. 5. *ff. quand. dies leg. ced.*

Titius, si statuas in municipio posuerit, heres esto. Si paratus est ponere, sed locus a municipibus ei non datur: Sabinus, Proculus, hæredem eum fore, sed legato idem juris esse dicunt. *l.* 14. *ff. de cond. & dem.* See the following Article.

XXX.

30. *Another Example of the same.*

If the Condition should depend partly on the Fact of him on whom it is imposed, and partly on the Fact of another Person without whom the said Condition could not have its literal Accomplishment; but that it should be possible to supply in another manner that which the Intention of the Testator might seem to demand of the Executor or Legatee, who is charged with the Condition, he might satisfy it by accomplishing the said Intention in the manner that were possible. Thus, for example, if an Executor or Legatee were charged to buy a House or other Tenement for some Person to whom the Testator had a mind to give it, and the Proprietor would not sell the said House or Tenement, or would not sell it but for an extravagant Price; the Executor or Legatee would satisfy the Condition

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dition by paying down the just Value of the said House or Tenement to the Person to whom the Testator had a mind to give it x.

x Non videtur defectus conditione, si parere conditioni non possit: implenda est enim voluntas, si potest. *l.* 8. §. 2. *in f. ff. de condit. inst.*

Si cui legatum est, *ut alienam rem redimat, vel prestet:* si redimere non possit, quod dominus non vendat, vel immodico pretio vendat, justam æstimationem inferat. *l.* 14. §. 2. *ff. de legat.* 3.

XXXI.

31. If the Condition depends intirely on the Fact of a third Person.

If the Condition were entirely dependent on a third Person, as in the Case of the twenty seventh Article, the Disposition of the Testament would have its effect, such as should be regulated by the said third Person, according to the Power given him in that matter by the Testator y.

y *This is a Consequence of the twenty seventh Article.*

XXXII.

32. Example of a Condition which altho depending on the Fact of other Persons, must be accomplished.

It is not always enough that an Executor or a Legatee do all that is in his power towards accomplishing a Condition which depends partly on his Fact, and partly on the Fact of other Persons: For there are Conditions which are of such a nature that no sort of Obstacle can dispense with them, and which must necessarily be accomplished in order to give effect to the Dispositions which depend on them. Thus, for instance, if a Testator had instituted a Foreigner his Executor, or given him a Legacy, on condition that he should be naturalized at the time of the Death of the Testator, and that having used his Endeavours he could not obtain his Naturalization in time, this Institution and this Legacy would be without effect, because the said Executor or the said Legatee would remain still under the Incapacity which the said Condition was to have removed, and which could not be removed by any other way z.

z In tempus capiendæ hæreditatis institui hæredem posse benevolentiæ est. Veluti Lucius Titius cum capere poterit, hæres esto. Idem est in legato. *l* 62. *ff. de hæred. instit.*

XXXIII.

33. Another Example.

We see by the Example explained in the preceding Article, a Case where the Incapacity of the Legatee is joined with the Non-performance of the Condition; but there may be Cases where without the Incapacity of the Legatee the Legacy would be null, altho it should be no ways his fault that a Condition which depended on his Fact and on that of other Persons were not accomplished. Thus, for Example, if a Testator having left a Sum of Money to one of his Friends, on condition that he should accept and exercise the Tuition of his Children, and that in case he did not exercise it, the Legacy should be reduced to a lesser Sum, or be wholly null; it had happened that the Legatee being willing to accept and exercise the Tuition, it was judged to be for the Benefit of the Minors that another Tutor should be assigned them, and accordingly another was actually named, the Condition not being fulfilled, the Legacy would be either wholly null, or diminished, according to the Disposition of the Testator. And altho the Condition depended not only on the Fact of the Legatee, but also on the Fact of other Persons, and that it was the fault of the Legatee that it was not executed, yet his good Will would not be enough to satisfy the Condition. For besides that the Relations and the Judge who were the other Persons whose Fact was necessary for accomplishing the Condition, had no Interest whether the Legacy should subsist or not; this Legacy was given out of a Motive of recompensing a good Office, and upon condition that the same should be effectually performed a.

a Conditionum verba, quæ testamento præscribuntur, pro voluntate considerantur. Et ideo, cum tutores testamento dati, quoniam interea puer adoleverat, id egerit, ut curatores ipsi constituerentur, conditio fideicommissi talis præscripta, *si tutelam in annum octavum decimum gesserint,* defecisse non videbitur. *l.* 101. §. 2. *ff. de cond. & dem.* See the tenth Article.

In order to understand this Text, it is necessary to remark that by the Roman Law, as has been said in the Preamble of the Title of Tutors, the Tuition ended when the Pupil arrived at the Age of Puberty, which was fourteen Years in Males, and twelve in Females; and during the rest of the Minority to the Age of five and twenty Years compleat, Curators were assigned them. So that in the case of this Text the Legatees having exercised the Tuition to the Age of fourteen Years, and the Curatorship to the Age of eighteen Years, the Question was, to know, if the Testator having put down for a Condition, that the Legatees should act as Tutors till the Pupil should attain the Age of eighteen Years, they had satisfy'd the Condition, having been Tutors only to the Age of fourteen, and Curators to the Age of eighteen Years. But the Intention of the Testator being that they should take care of all the Concerns of the Children till they

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they should be full eighteen Years old, the Condition is fulfilled, altho the Expression be not in the literal Sense. Seeing the Case of this Text does not agree with our Usage, where the Tutorship lasts to the Age of twenty five Years compleat, we have put another Case to serve for the Rule explained in this Article. This Rule results from this Text by the Reason of Contraries.

[In *England* we do not observe this Distinction between Tutor and Curator, which was in use among the *Romans*: For we call him a *Guardian*, whom the *Romans* termed Tutor and Curator. And the Guardianship with us takes in both the Tutorship and Curatorship, that is, the whole Space of time that the Infant is in Minority, or under the Age of one and twenty Years compleat. Which Word of *Guardian* we have from the *Normans*, from whose Customs many Parts of the Common Law of *England* are derived. *Cowel's Instit. of the Laws of* England, *Book* 1. *Tit.* 13.

But in *Scotland* they still observe the Distinction of the *Roman* Law between Tutor and Curator. The Administration of the Tutor expires, whenever the Pupil attains the Age of Puberty, that is fourteen Years compleat in Males and twelve in Females; after which time the Minor chuses his Curators, who are approved of by the Judge, in the manner which the Laws there prescribe. *Mackenzie's Instit. of the Laws of* Scotland, *Book* 1. *Tit.* 7.]

XXXIV.

34. A Rule for Conditions which depend partly on the Fact of those to whom they are enjoined, and partly on the Fact of others.

It follows from the Rules explained in the foregoing Articles, that in the Cases where Testators charge their Executors or Legatees with Conditions which depend partly on their own Fact, and partly on the Fact of other Persons, it cannot be laid down as a fixed and general Rule, either that those Bequests are all null, if the Condition is not effectually accomplished, or that they all have their effect, and are held to be accomplished, if it is not the fault of the Executor or Legatee that the Condition is not fulfilled: For there are some Cases where the Conditions are held to be accomplished, altho they be not so in effect, provided that the Person who was to satisfy the Condition has done all that was in his power towards it; and there are others where it is absolutely necessary that the Conditions be accomplished. But the only general Rule, and which is common to all these sorts of Conditions, is, that we must judge of them by their Nature, by the Quality of the Facts on which they depend, by the Interests of the Persons whom the Testator has consider'd, by the Motive which he had in his view; that we must distinguish among the Motives, those where it appears that the Testators have absolutely intended that the Condition should be accomplished, as in the Case of the preceding Article, from those where it may be reasonably presumed that the Testators have required only the Fact of the Person on whom the Condition was imposed, as in the Case of the twenty ninth Article. And it is by all these Views, and others which may help to discover the Intention of the Testator, that we are to judge of Conditions, giving them such an Effect as the Intention of the Testator may seem to demand *b*.

b This is a Consequence of the preceding Rules.

XXXV.

35. A Rule whereby to distinguish conditional Dispositions from those which are not so.

It is not enough as to what concerns Conditions, to discern between those which depend on the Fact of the Persons on whom they are imposed, and those which may depend on something else, and to make the other Distinctions of Conditions explain'd in the fifteenth, sixteenth, and other following Articles; but it is necessary likewise to distinguish among the several sorts of Dispositions which contain Charges, Destinations, Motives, Descriptions, and Terms of Time, those which are conceived in the Nature of Conditions, and which have the Effect thereof, from those which do not make Conditions, according to the Rules and Examples which have been explained in the seventh, eighth, and other following Articles. Thus, for another Example, in the Case of a Motive and a Destination specified in the Testament, if a Testator had bequeathed a Rent, a Pension, or some Usufruct to one of his Friends for his Maintenance, this Motive explained after this manner, would not make a Condition which would give the Executor a Right to require some Security from the Legatee, that he should employ the said Legacy on his Maintenance, or to oblige him to account to him for it. For altho this Disposition implies, with respect to the Legatee, the Intention of the Testator that this Legacy should serve for that use, yet this Motive respecting only the Person of the Legatee, would leave to his Management the use of the Legacy, unless the Testator had directed some Precaution independent on the Will of the Legatee, and that for particular Reasons, such as the Poverty of the Legatee and his want of Conduct. Thus, on the contrary, if a Testator had left to a young Woman a Sum of Money for her Portion when she should marry, this Motive, this Destination, and this Time marked by the Testator would make the Legacy conditional; and

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and if the said young Woman should die before she married, it would remain null *c*.

c See the other Articles quoted in this.

XXXVI.

36. It is necessary to consider in Dispositions whether they contain Conditions, and what is the Effect of them.

There are two things to be consider'd in the Dispositions of Testators as to Conditions: one is to know whether the Disposition be conditional or not, which depends on the preceding Rules; and the second is to know what ought to be the Effect of the Condition when the Disposition is conditional, which depends on the Relation which the Conditions have to the Events. And seeing the Differences of Events are infinite, and that the Examples of some facilitate in all the rest the use of the Rules, and are even given in the Laws for Rules; we shall perceive more and more this use in the Examples and Rules which follow *d*.

d See the following Articles.

XXXVII.

37. The Condition which ought to distinguish two Heirs or Executors not happening, they succeed equally.

If a Testator had instituted his two Brothers his Heirs or Executors, on condition that whichsoever of the two should purchase such an Office he should have two thirds of the Estate, and the other a third, and one of the two should accomplish the Condition, he would have the two thirds: But if neither of the two should buy the Office, whether it were that they were not able or not willing to do it, they would share the Estate equally between them. For both the one and the other were called to the Succession, and they ought not to be distinguished except by the Condition if it should happen *e*.

e Uter ex fratribus meis consobrinam nostram duxerit uxorem, ex dodrante; qui non duxerit, ex quadrante hæres esto. Aut nubit alteri, aut non vult nubere. Consobrinam qui ex his duxit (uxorem) habebit dodrantem, erit alterius quadrans. Si neuter eam duxerit uxorem, non quia ipsi ducere noluerunt, sed quia illa nubere noluerit, ambo in partes æquales admittuntur: plerumque enim hæc conditio: *Si uxorem duxerit; si dederit; si fecerit,* ita accipi oportet; quod per eum non stet, quominus ducat, det, aut faciat. *l. 23. ff. de condit. inst.*

Qui ex fratribus meis Titiam consobrinam uxorem duxerit, ex besse hæres esto. Qui non duxerit ex triente hæres esto. Vivo testatore consobrina defuncta, ambo ad hæreditatem venientes semisses habebunt. Quia verum est eos hæredes institutos, sed emolumento portionum eventu nuptiarum discretos. *l. 24. eod.*

XXXVIII.

38. A Condition may chance to be accomplished in the Testator's Life-time.

The greatest part of Conditions ought to be accomplished only after the Death of the Testator, and in obedience to his Will; but there may be some Conditions which happen to be accomplished in the Testator's Life-time without this view, and which have nevertheless their effect *f*. Thus, for instance, if a Legacy of a Sum of Money is left on condition that the Legatee buy such an Office, or marry the Testator's Daughter, and he have bought the said Office, or married the Daughter before the Testator's Death, he shall have the Legacy: For in these sorts of Conditions it is equal for the Effect of the Disposition of the Testator, whether they come to pass before or after his Death; and it is sufficient that his Will be found to be performed in the manner that it ought to be, if the Condition be such as that it ought to be fulfilled only once for all *g*. But if it can be reiterated, it must be satisfy'd in the manner which shall be explained in the following Article.

f Sciendum est promiscuas conditiones post mortem impleri oportere, si in hoc fiant, ut testamento pareatur: veluti, *Si capitolium ascenderit*, & similia. Non promiscuas, etiam vivo testatore existere posse: veluti, *Si Titius Consul factus fuerit*. l. 11. §. 1. ff. de condit. & dem.

Conditionum quædam sunt, quæ quandoque impleri possunt etiam vivo testatore: ut puta, *si navis ex Asia venerit*. Nam quandoque venerit navis, conditioni paritum videtur. Quædam quæ non nisi post mortem testatoris: *Si decem dederit, si capitolium ascenderit*. l. 2. eod.

g Hæc conditio, filiæ meæ cum nupserit: talis est: ut, qui testatus est, impleri solummodo conditionem voluerit: non satis egerit, quando. Et ideo (&) si vivo testatore nupserit post testamentum factum, impleta conditio videtur. Præsertim cum conditio hæc talis est, ut semel impleri debeat. *l. 10. eod.*

XXXIX.

39. If this Condition is a Fact that may be reiterated, it must be accomplished.

If in the Case of the foregoing Article the Condition did depend on a Fact which might be reiterated; as if it was to give a Sum of Money to an Hospital, and he who was charged with the Condition had already given the like Sum to the same Hospital before he knew any thing of the Testament, he would nevertheless be bound to give such another Sum to fulfil the Condition; especially if the Testator knew of the Gift which the Legatee had already made: For this Liberality may be reiterated *h*. And the Gift which he had made of his own accord, not being an Effect of the Disposition of

h Si jam facta sint quæ conditionis loco ponuntur, & sciat testator: quæ iterum fieri possunt, expectentur, ut fiant. Si vero nesciat, præsenti debeantur. *l. 11. ff. de condit. & dem.*

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of this Testator, who intended that this Gift should proceed from his Bounty, was, with regard to the Intention of this Testator, only a Chance, which not satisfying his Intention, did not accomplish the Condition *i*.

i Ut paruisse quis conditioni videatur, etiam scire debet hanc conditionem incertam: nam si fato fecerit, non videtur obtemperasse voluntati. *l.* 2. *in f. ff. eod.*

XL.

40. If there be a Term joined to the Condition, it is necessary to wait till the Term.

If a Testator requires his Executor, or a Legatee, to give a Sum of Money to some Person, in case that within a certain Time the said Executor or Legatee have no Child, or upon some other Condition, and the said Executor or Legatee happens to die without Children, or the other Condition chances to be accomplished, before the Time specified; the Legacy will not be payable till the Term be expired. For altho it be already certain by the Event that the Legacy is due, seeing the Condition is come to pass, yet the Expression of the Testator implies the Term of Payment to be after the said Time shall be expired *l*.

l Si ita scriptum sit: *Si in quinquennio proximo Titio filius natus non erit, tum decem Seia heres dato*; Si Titius ante mortuus sit; non statim Seiæ decem deberi: quia hic articulus tum extremi quinquennii tempus significat. *l.* 4. §. 1. *ff. de condit. & demit.*

XLI.

41. Conditions do not admit of a Division.

Conditions do not admit of a Division, so as that an Executor, or a Legatee, may pretend to content himself with a part of what is given him, he performing only a part of the Condition that is enjoined him; but he can have nothing at all unless he accomplishes the whole Condition. Thus, for example, if a Tenement is devised on condition that the Legatee pay a Sum of Money to every one of the Executors, or to other Persons, or that he acquit some Debts of the Succession which shall be specified to him; he cannot divide the Legacy by dividing the Condition, in order to have part of the Legacy in proportion to what part of the Debts he has been able or willing to acquit; but he ought to pay and acquit the whole, unless he will renounce the Legacy *m*.

m Cui fundus legatus est, *si decem dederit*, partem fundi consequi non potest, nisi totam pecuniam numerasset. *l.* 56. *ff. de condit. & dem.*

Qui duobus hæredibus decem dare jussus est, & fundum sibi habere, verius est, ut conditionem scindere non possit, ne etiam legatum scindatur. Igitur quamvis alteri quinque dederit, nullam partem fundi vindicabit: nisi alteri quoque adeunti hæreditatem reliqua quinque numeraverit: aut illo omittente hæreditatem, ei qui solus adierit hæreditatem, tota decem dederit. *l.* 23. *eod.*

XLII.

42. The Condition impos'd upon several Persons may be divided among them.

If one only Condition which is imposed on two Legatees be such as that it may be divided, as if a Testator devises a Land or Tenement to two of his Friends, on condition that they acquit a certain Sum of Money, they divide the Condition between them, and pay each his Share of the Sum, in order to share the Legacy between them. And if one of them alone, upon the other's Refusal, acquits the whole Sum, he shall have the whole Legacy. Or if there be only one of them who acquits his Proportion, and the other fails to acquit his, he shall have a part of the Legacy proportionably to what he shall have acquitted, if the Will of the Testator can bear that the Condition and the Legacy be divided. But if the Condition is indivisible, as if the Legacy was given on condition that the Legatees should do some Work; the Legacy cannot be divided, so as to give a Share of it to one of the Legatees in proportion to what he should pretend to do of the Work; but the Legacy would either be divided between them, if both of them together had fulfilled the Condition, or given entirely to one of them who should fulfil it *n*.

n Cui fundus legatus est *si decem dederit*, partem fundi consequi non potest, nisi totam pecuniam numerasset. Dissimilis est causa, cum duobus eadem res sub conditione legata est. In hac enim quæstione statim à testamento, quo pluribus conditio adposita est, divisa quoque in singulas personas videri potest, & ideo singuli cum sua parte & conditioni parere, & legatum capere possunt. Nam quamvis summa universæ conditionis sit adscripta, enumeratione personarum potest videri esse divisa. In eo vero quod uni sub conditione legatum est, scindi ex accidenti conditio non debet: & omnis numerus eorum qui in locum ejus substituuntur, pro singulari persona est habendus. *l.* 56. *ff. de condit. & dem.*

De illo quoque quæritur: fundus quibusdam legatus est, si pecuniam certam in funus, impensamque perferendi corporis in aliam regionem dedissent. Nam, nisi uterque dederit, neutri sit legatum: quoniam conditio, nisi per utrumque expleri non potest. Sed hæc humanius interpretari solemus. Ut cum duobus fundus legatus sit, si decem dedissent: & alteri dando partem, legatum quoque debeatur. *l.* 112. §. 2. *eod.*

Si plures personæ unam conditionem implere fuerint jussæ: apud Ulpianum dubitabatur, utrumne omnes simul eandem facere debeant, an singuli quasi soli implere eam compellantur. Videtur autem nobis unumquemque necessitatem habere conditionem implere, & pro portione sibi contingente accipere quidquid ex hoc sibi commodi est: ut hi quidem, qui compleverint jussa ad lucrum vocentur: qui

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qui autem neglexerint, sibi imputent si ab hujusmodi commodo repellantur. *l. 6. C. de condit. insf. tam leg. q. fid.*

XLIII.

43. A Legacy for a Work is to be regulated according to the Estate of the Testator.

If a Testator had charged his Executor, or a Legatee, to build some Edifice, whether it were for publick Conveniency, or Ornament, or for some pious Use, such as a Church for a Parish, or an Apartment in some Hospital, and had regulated the Sum for defraying the Charges thereof, the Executor would be bound to pay what had been regulated by the Testator. But if he had not declared the Sum, nor specified the Manner in which the Edifice was to be built, the same would be regulated according to the Estate and Quality of the Testator, and the Use for which the said Building was designed *o*.

o In testamento quidam scripserat. *Ut sibi monumentum ad exemplum ejus, quod in via Salaria esset Publii Septimii Demetrii, fieret: nisi factum esset, hæredes magna pecunia mulctare.* Et cum id monumentum Publii Septimii Demetrii nullum reperiebatur, sed Publii Septimii Damæ erat, ad quod exemplum suspicabatur eum, qui testamentum fecerat, monumentum sibi fieri voluisse: quærebant hæredes cujusmodi monumentum se facere oporteret, & si ob eam rem nullum monumentum fecissent, quia non reperirent, ad quod exemplum facerent, num pœna tenerentur. Respondit: si intelligeretur, quod monumentum demonstrare voluisset is, qui testamentum fecisset, tametsi in scriptura non tum esset, tamen ad id quod ille se demonstrare animo sensisset, fieri debere. Sin autem voluntas ejus ignoraretur: pœnam quidem nullam vim habere, quoniam ad quod exemplum fieri jussisset, id nusquam extaret: monumentum tamen omnimodo secundum substantiam & dignitatem defuncti extruere debere. *l. 27. ff. de condit. & dem.*

XLIV.

44. The Condition, If the Testator should die without Children, is fulfilled, if the Father and Son die at the same time.

If a Legacy, or a fiduciary Bequest, being left to a Person in case the Executor or Legatee who is burdened with it should die without Children, it had happened that the said Executor or Legatee, having only one Child, perished with him either in a Battle, or in a Shipwrack, or by some other Accident, so that it were impossible to know whether both the one and the other died in the same Instant, or if one of them survived the other, and which of the two; the Intention of the Testator having been, that the fiduciary Legatee should be preferred to all others, except a Child of the Executor's, or Legatee's, and there remaining no Child who has Right to exclude him, the Case of the fiduciary Bequest would be come to pass *p*.

p Si quis susceperit quidem filium, verum vivus amiserit: videbitur sine liberis decessisse. Sed si naufragio, vel ruina, vel adgressu, vel quo alio modo simul cum patre perierit: an conditio defecerit, videamus. Et magis non defecisse arbitror. Quia non est verum, filium ejus supervixisse. Aut igitur filius supervixit patrit, & extinxit conditionem fidei commissi, aut non supervixit, & extitit conditio. Cum autem, quis ante, & quis postea decesserit, non apparet: extitisse conditionem fideicommissi magis dicendum est. *l. 17. §. 7. ff. ad Senat. Trebell.* See the seventh Article of the second Section of Pupillary Substitution, and the eighteenth Article of the Section of direct Substitutions. See the eleventh and twelfth Articles of the second Section, in what manner Children succeed, and the Remarks which are there made.

XLV.

45. The Dispensation of Age does not accomplish the Condition of Majority.

If the Disposition of a Testator, whether it were the Institution of an Executor, or other Disposition, should contain the Condition of Majority in the Executor or Legatee; this Condition would not be accomplished any other way than by the Age of Majority. And the Dispensation of Age, which might be obtained by the Person whom the Testator required to be of full Age, would not satisfy the Condition *q*.

q Si quis aliquid dari vel fieri voluerit, legitimæ ætatis fecerit mentionem: vel si absolute dixerit perfectæ ætatis: illam tantummodo ætatem intellectum esse videri volumus quæ 25 annorum curriculis completur, non quæ ab Imperiali beneficio suppletur. *l. ult. C. de his qui ven. at. imp.*

XLVI.

46. Divers Ways of providing for the Execution of Conditions, and other Dispositions.

The conditional Dispositions of Testators, and the others, which may oblige the Executor or Legatee to some Security or Precaution, are executed according as the Intention of the Testator and the Circumstances may seem to demand. And Provision is made in this matter different ways; either according to what the Testator himself has ordained, if he has explained himself about it, or in the manner which may best suit with the Interest of the Persons who may be concerned in the said Bequests *r*. Thus, a Testator may, for the greater security of his Legacies, and of the other Charges with which he burdens his Succession, name an Executor of his Testament, who shall take pos-

r Inter omnes convenit, hæredem sub conditione pendente conditione possidentem hæreditatem, substituto cavere debere de hæreditate: Et, si defecerit conditio adeuntem hæreditatem substitutum & petere hæreditatem posse: & si obtinuerit committi stipulationem. Et plerumque ipse prætor & ante conditionem existentem, & ante diem petitionis venientem, ex causa jubere solet stipulationem interponi. *l. 12. ff. qui satisd. cod. cog.*

Sed & si plures substituti sint, singulis cavendum est. *l. 13. eod.*

This Word Cavere, *in these Texts, does not signify the giving of Surety, but only to oblige himself, or to promise, or to make, as it is called, his Submission.*

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poſſeſſion of all his Goods, in order to acquit the Legacies and the Debts, and to reſtore to the Heir the Goods which may remain after payment of the Debts and Legacies, as ſhall be explained in the eleventh Section. Thus, the Heir or Executor of a Teſtament may retain the Fund of a Legacy of a Sum of Money which is deſtined for ſome Uſe, until it be applied to the ſaid Uſe. Thus, in a Legacy left on condition that the Legatee ſhall remit to one of his Debtors the Debt which he owes him, the Heir or Executor may oblige him, upon delivering the Legacy, to give up the ſaid Debtor's Bond, or to give an Acquittance of the Debt, if he had no Bond for it: Thus, a Legacy of a Rent to be paid out of a certain Land or Tenement, would have its Security upon the ſaid Land or Tenement, and upon the other Goods of the Succeſſion, and of the Heir or Executor. Thus, in the different Charges and Conditions, whether it be to give, to do, or not to do, it is by the Circumſtances that we ought to regulate what ought to depend ſolely on the Faith and Integrity of the Executor or Legatee, and what may demand ſome other kind of Security *s*. Thus, in general, the Legatees, as well as Creditors, who may have ground to fear that the Executor is not in good Circumſtances, and that he may miſapply the Effects of the Succeſſion, may ſecure them by having them ſealed up by Order of the Judge, unleſs the Executor gives them Satisfaction either by finding Sureties, or by other ways *t*.

s Mutianæ cautionis utilitas conſiſtit in conditionibus, quæ in non faciendo ſunt conceptæ: ut puta *Si in capitolium non aſcenderit, ſi Stichum non manumiſerit*, & in ſimilibus. Et ita Ariſtoni, & Neratio, & Juliano viſum eſt. Quæ ſententia & conſtitutione Divi Pii comprobata eſt. Nec ſolum in legatis placuit: verum in hæreditatibus quoque idem remedium admiſſum eſt. Unde ſi uxor maritum ſuum, cui dotem promiſerat, ita hæredem ſcripſerit ex parte. *Si dotem, quam ei promiſi, neque petierit, neque exegerit.* Denunciare eum poſſe cohæredi, paratum ſe accepto facere dotem, vel cavere: & ita adire poſſe hæreditatem. Sed ſi ex aſſe ſit inſtitutus maritus ſub ea conditione: quoniam non eſt cui caveat: non impediri eum, quominus adeat hæreditatem. Nam jure ipſo videtur impleta conditio, eo quod non eſt, quem poſſit de dote convenire ipſe adeundo hæreditatem. *l.* 7. *d. l.* §. 1. *ff. de condit. & dem.*

Is, cui ſub conditione non faciendi aliquid relictum eſt, ei ſcilicet cavere debet Mutiana cautione, ad quem Jure Civili, deficiente conditione, hoc legatum, eave hæreditas pertinere poteſt. *l.* 18. *eod. v. Nov.* 22. *c.* 44.

t Legatorum nomine ſatiſdari oportere prætor putavit: ut, quibus teſtator dari fierive voluit, his diebus detur vel fiat. *l.* 1. *ff. ut legat. ſeu fideicom. ſerv. cauſ. cav.*

Nec ſine ratione hoc prætori viſum eſt, ſicuti hæres incumbit poſſeſſioni bonorum, ita legatarios quoque carere non debere bonis defuncti: ſed aut ſatiſdabitur eis: aut ſi ſatis non datur, in poſſeſſionem bonorum venire prætor voluit. *d. l.* §. 2.

XLVII.

47. A Legacy which is given on condition that the Executor does approve thereof, is not conditional.

We muſt not reckon in the Number of conditional Bequeſts, a Legacy which the Teſtator has bequeathed in Terms that ſeem to demand the Approbation or Conſent of his Executor. As, if he had bequeathed a Sum of Money, if his Executor ſhould think well of it, or ſhould judge it to be juſt and reaſonable, or that he had added ſome other ſuch like Expreſſion, even although he had left the Legacy on condition that his Executor ſhould be pleaſed with it. For theſe Terms would not make the Legacy to depend on the Will of the ſaid Executor; but they would ſhew only that the Teſtator had conſidered his Executor as a reaſonable Perſon, whom he was willing to engage by this Civility to execute his Intention with Pleaſure and Chearfulneſs *u*.

u Si ſic legatum vel fideicommiſſum ſit relictum, *Si æſtimaverit hæres, ſi comprobaverit, ſi juſtum putaverit:* & legatum & fideicommiſſum debebitur. Quoniam quaſi vivo potius bono ei commiſſum eſt, non in meram voluntatem hæredis collatum. *l.* 75. *ff. de legat.* 1.

SECT. IX.

Of the Right of Accretion.

The Right of Accretion in Legal Succeſſions.

THE Right of Accretion is the Right which each of two Heirs to the ſame Succeſſion, or of two Legatees of the ſame Thing, has to take the Share or Portion of the other, who either cannot or will not take it himſelf.

In order to underſtand well what this Right is, it is neceſſary to conſider it in a Caſe where we may eaſily diſcover what its Nature is, and what its Origin. If we ſuppoſe that a Father leaving behind him two Children, there is one of them who renounces the Succeſſion, or renders himſelf unworthy of it, or is incapable of it by reaſon of ſome Condemnation, or otherwiſe, or who is juſtly diſinherited; his Share or Portion, which he either could not or would not take, remaining in the Maſs of the Inheritance, it will belong entirely to his Brother, who will be the only Perſon left

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left to succeed as Heir. And it would be the same thing in collateral Successions of Brothers, or other more remote Relations, if two or more Coheirs, called together to the same Succession, one of them either would not or could not take his Part therein.

This Right of the Heir, who acquires the Portions of the others, is called Accretion, because the Portion of the Person who does not succeed, accrues to him who succeeds alone; so that he has the whole.

We see in these Cases of Legal Successions, that this Right of Accretion is altogether natural in them, being founded on this, That the Law which calls the Heirs of Blood to Successions, calls them thereto according to their Number, and in such a manner, that if they are two or more in Number, they share among them the Inheritance by equal Portions; and if there be only one, he alone has the whole. For it follows from this Rule, that it is only the Concurrence of several Coheirs together, which divides the Succession among them; and that therefore, as any one of them ceases to take his Share or Portion, it remains in the Inheritance, and is acquired to the others by virtue of the Right which they have to the whole; which will remain entire to one alone, if there be no more Heirs than one.

The Right of Accretion in Testamentary Successions.

As to Testamentary Successions, it may be said, that the Right of Accretion is not so evidently just and natural in them, as it is in the Legal Successions. For, if in the Case of two Testamentary Heirs, who are not Heirs of Blood, one of them not being willing or capable to succeed, it should be necessary to decide to whom his Share or Portion should belong, whether to the Testamentary Coheir, or to the Heir of Blood; the Right of this Testamentary Heir would not be so perfectly evident against the Heir of Blood, as is in the Case of a Succession to an Intestate, the Right of the Heir of Blood, who is found to be sole Heir by the Default of his Coheir, who cannot or will not take any Share or Part in the Inheritance. For in this second Case, the Right of this Heir of Blood cannot be controverted by any Person whatsoever; and in the first Case of the Testamentary Coheirs, the Heir of Blood would have strong Reasons to urge against the Testamentary Heir who should claim the Share or Portion of the other; as shall be remarked hereafter.

This Question is decided by the *Roman* Law in favour of the Testamentary Heirs. And seeing the Right of Accretion is natural to the Heirs at Law, and that the Quality of Heir, which is common to the Testamentary Heir, and to the Heir at Law, makes the Heir universal Successor to all the Goods of the Deceased, the *Roman* Law has regulated, that the Testator having had a mind to exclude his Heirs at Law, or next of Kin, from his Succession, and to dispose of it by Will, the Testamentary Heirs were the only Persons called to the whole Inheritance; and that therefore he who was instituted Heir only for a part, became Heir to the whole, if the Heir to the other part would not or could not accept it. It was probably upon this Principle, which makes the Quality of Heir to give an universal Right, by which the whole Inheritance is acquired to him among the Heirs who proves to be the only one who is willing or capable to accept of it, that this other Rule of the *Roman* Law was founded, to wit, that a Succession cannot be regulated partly by Testament, and partly without it *a*; so as that a Testator should be able to dispose by Testament only of one Part of his Estate, instituting, for example, an Heir or Executor for one Half of it, without disposing also of the other Half. For in this Case the Heir or Executor, who was instituted for one Half, was Heir to the Whole, and excluded from the other Half the Heir at Law, or next of Kin, who was not called by the Testament. And even altho the Heir named by the Testament had been instituted Heir only in a certain Land or Tenement, which is properly speaking no more than a Legacy, yet the Quality of Heir being given him, he was universal Heir to all the Goods of the Succession *b*.

It results from this first Remark on the Right of Accretion among Heirs at Law, and on that which takes place among Testamentary Heirs, that there is this Difference between these two sorts of Accretion, that it may be said of that among Heirs at Law, that it is of the same natural Right as the Law which gives them the Succession. For as it is naturally just and equitable, that if two Heirs of Blood be equally cal-

a *l.* 7. *ff. de reg. Jur.* §. 5. *inst. de hæred. inst.*

b *V. l.* 41. *in fin. de vulg. & pup. subst. l.* 2. §. 2. *ff. de bon. poss. Sect. ab.* §. 5. *inst. de hæred. instit.*

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led by their Proximity, they ought to ſhare the Succeſſion between them; ſo the ſame Equity demands that the Inheritance ſhould remain intire to him who proves to be ſole Heir by the Excluſion of others. But it may be ſaid of the Accretion in teſtamentary Succeſſions, that it derives its Force more from the Poſitive Law than the Law of Nature. For if in the Caſe of a Teſtament which calls to the Inheritance other Heirs than thoſe who are the Heirs of Blood, the Law had ordained that there ſhould be no Right of Accretion among them, unleſs the Teſtator had expreſly order'd it to be ſo; but that the Share or Portion of him who would not or could not be Heir, ſhould go to the Heir at Law, together with the Charges of the Teſtament, and that ſo there ſhould be two Heirs, one by Teſtament and the other by Law, it could not be ſaid of ſuch a Law that it were contrary to the Law of Nature. And it might even be alledg'd in favour of the Heir at Law, that it would be natural enough, ſeeing the Teſtator intended to give to each of the Heirs named by his Teſtament only a Portion of the Inheritance, that each of them ſhould be reduced to his Portion; and that the Share of the Teſtamentary Heir who either could not, or would not ſucceed, ſhould be left to the Heir at Law, in the ſame manner as he would have the whole if none of the Teſtamentary Heirs did ſucceed. And the Right of the Heir at Law to the vacant Portion, would be with much more reaſon juſt and natural, if the Teſtator had inſtituted one only Heir for a Moiety or other Portion of the Inheritance, or even only for one ſingle Tenement; ſeeing in theſe Caſes propoſed in the *Roman* Law, as has been already obſerved, the Preſumption would be natural enough, that the Teſtator had a mind that the reſt of his Goods ſhould go to his Heir at Law. And although it would happen by the Law which in theſe Caſes ſhould call the Heir at Law to ſucceed with the Heir by Teſtament, that he to whom the Teſtator had given the Title of Heir, would not be univerſal Heir, and that the Succeſſion would be regulated, partly by Teſtament, and partly as of one dead inteſtate; yet there would be nothing in theſe two Events contrary to the Law of Nature, and which an arbitrary Law could not ordain. For as to the firſt, altho the Teſtamentary Heir who ſhould remain the only one of the two inſtituted by the Teſtator, would not be univerſal Heir, and that the Heir at Law would ſhare the Inheritance with him, it would nevertheleſs be always true that the Title of Heir would be univerſal, but divided between two Heirs, as it happens as often as there are more Heirs than one, whether they be Heirs by Teſtament, or Heirs at Law. And as to the ſecond, altho one part of the Succeſſion would belong to the Teſtamentary Heir, and the other to the Heir at Law, the Teſtament having its effect only for one of the Heirs whom the Teſtator had named in it, yet this Event would do nothing elſe but give to two different Laws the natural Effect both of the one and of the other: For it would give to the Law of Nature the Effect of making the Heir of Blood to inherit, and to the Law which permits the making of an Heir by a Teſtament, the Effect of giving to the Teſtamentary Heir, who ſhould be found capable of ſucceeding, the Portion of the Inheritance which the Teſtator had a mind to give him. Thus the Intention of the Teſtator being accompliſhed, the Law which permits the uſe of Teſtaments would be ſo likewiſe. To which we may add, that it is ſo far from being contrary to the Law of Nature, for a Teſtamentary Heir to ſhare the Inheritance with the Heir at Law, and for one to ſucceed by Teſtament, and the other by the bare Effect of Conſanguinity, that in our Cuſtoms there can be no Inſtitution of an Heir, who is called univerſal Legatee, where we do not ſee the Succeſſion regulated partly by Law, as of one dead inteſtate, and partly by Teſtament; ſince the univerſal Legatee ſucceeds by the Teſtament, and the Heir at Law ſucceeds by the Law, and that even againſt the Teſtament. Which does not hinder both the one and the other from having an univerſal Title as two Coheirs have, whether they ſucceed as next of kin to an Inteſtate, or by Teſtament, who divide the Succeſſion between them. And we ſee likewiſe in the *Roman* Law, that not only divers ſorts of Goods go to divers ſorts of Heirs *c*, as well as by our Cuoſtms, but that he who had a right to make a Military Teſtament had power to leave his Succeſſion partly regulated by Teſtament, and partly by the Diſpoſition of the Law as dying inteſtate *d*.

c See the ſecond Section of the ſecond Title of the ſecond Book.

d l. 6. ff. de teſt. mil. l. 2. cod. eod.

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And it is known that ſeveral Interpreters have been of opinion, that in divers Caſes every Teſtator, altho he had not the Privilege of making a Military Teſtament, left Part of his Succeſſion to be diſpoſed of by Law, while he diſpoſed of the other Part by Teſtament. And even in the Caſes where the Right of Accretion was to take place by the *Roman* Law, it might happen that the Succeſſion might be divided, and go part of it to one of the Heirs by Teſtament, and part of it to the Exchequer, when by the Fiſcal Laws the Exchequer ſeized on the Share or Portion of the Heir who could not ſucceed, and excluded the Coheir from it, who had it not been for the ſaid Fiſcal Laws, would have had the Right of Accretion *e*. So that we may reaſonably conclude that which has been already advanced to be now ſufficiently proved, that whereas the Right of Accretion in Legal Succeſſions is a part of the Law of Nature, in Teſtamentary Succeſſions it derives its Force only from a Poſitive Law *f*.

The Right of Accretion which hath been mentioned hitherto, reſpects only Coheirs; but it was extended to Legatees, to whom one and the ſame thing is bequeathed in Terms which ought to have that Effect: For this Right doth not always take place among Legatees of the ſame thing, as it does among Coheirs of the ſame Succeſſion. But according to the different Expreſſions made uſe of by the Teſtators, there might or there might not be a Right of Accretion among the Legatees, which depends on the Rules that ſhall be explained hereafter.

Cauſes of the Difficulties in the Matter of the Right of Accretion.

It may be remarked as a Conſequence of the Reflections which have been juſt now made on this Right of Accretion, which takes place among Teſtamentary Heirs as well as Legatees, that whereas this Accretion derives its Force only from the Poſitive Law, and in legal Succeſſions it may be ſaid to be a part of the Law of Nature; this is an Effect of that Difference between theſe two ſorts of Accretion, that as for that Accretion which naturally belongs to the Heirs at Law, there does not ſeem to ariſe any Difficulties from it; whereas there occur many Difficulties in the Accretion which takes place in Teſtamentary Diſpoſitions, as we ſee by Experience in the *Roman* Law. For altho mention be made there of the Right of Accretion in Legal Succeſſions *g*, yet we find no Difficulties or Queſtions ſtarted concerning the Right of Accretion except in Teſtamentary Succeſſions; which proceeds from hence, becauſe the Right of Accretion in legal Succeſſions being a neceſſary Conſequence of a Principle that is ſimple and natural, which is the Right that the Law gives to the Heir of Blood to have the whole Succeſſion, when he happens to be the only Heir; there is nothing more eaſy than to know whether this Right takes place. But on the contrary, the Right of Accretion in the Diſpoſitions of Teſtators depends on two Principles which are arbitrary, and ſubject to different Interpretations. One is the Will of Teſtators, whoſe Diſpoſitions may either give occaſion to the Right of Accretion, or prevent the ſame. And the other is the Law preſcribed by divers Rules which the *Roman* Law hath eſtabliſhed concerning this matter. So that as it may be ſaid that theſe Rules are not there explained with that Order and Clearneſs that is neceſſary for underſtanding them aright, ſo as one may be able to judge thereof by their Connexion, and that the Diſpoſitions of Teſtators, which are oftentimes conceived in obſcure Terms, and the different Combinations of the Circumſtances which ariſe from the Events, make it oftentimes very uncertain how to find out the true Will of the Teſtators, as well as how to apply the Rules which may relate thereto; this Matter of the Right of Accretion has been render'd ſo intricate, that ſome Interpreters have ſaid, that there is not one matter in the Law of ſo great difficulty as this is; altho it be likewiſe true that there is no Matter in the Law of which the uſe is leſs neceſſary; ſince we might have been very well without the Rules of the Right of Accretion, if it had been limited to legal Succeſſions, and to the Caſes where the Teſtator ſhould appoint it to take place. A Law of this Simplicity and Eaſineſs would have prevented the trouble of a great many Rules, and a great many Law-Suits, and would have been attended with no manner of Inconvenience.

e *Ulp. Tit.* 24. §. 12.

f *See concerning all that has been ſaid for the Heir at Law, the Remark on the ſixth Article.*

g Si ex pluribus legitimis hæredibus quidam omiſerint adire hæreditatem, vel morte, vel qua alia ratione impediti fuerint, quominus adeant, reliquis qui adierit adcreſcit illorum portio. *l.* 9. *ff. de ſuis & legit. hæred.*

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nience. For where would be the Inconvenience, if the Share or Portion which one of the testamentary Heirs could not or would not take, should remain to the Heir at Law, the other Testamentary Heir having what the Testator left him; or if that which one of the Legatees refused, or could not take, should go to the Heir, the other Legatee contenting himself with the Share or Portion left him by the Testament; or, in fine, if a Testamentary Heir who should be instituted alone, and only for a Share or Portion of the Inheritance, according to the Examples which we see of such-like Institutions in the *Roman* Law, or for some one Land or Tenement in particular, were reduced to that which the Testator had left him?

It would seem that if any Law had regulated things in this manner, either it would not be said that these Events are Inconveniencies, or if they should be thought so, yet they would still appear less than that of the Difficulties which arise from the Law concerning the Right of Accretion, in the manner that we find it regulated by the *Roman* Law.

We have made here all these Remarks on the Right of Accretion, in order to give an Idea of its Origin, of its Nature, and of the general Principles relating to this matter. And we have thought proper to add here occasionally the Reflections which have been made for distinguishing in the Matter of Accretion that which is of the Law of Nature from that which it has from the Positive Law, established by pure arbitrary Laws, and which might have been otherwise regulated. We have made these Reflections, as also those which shall hereafter be explained, only with a view to unravel the Difficulties of this Matter, which the Interpreters own to be so great in the *Roman* Law. For to understand rightly any Matter whatsoever, and the Difficulties which may arise in it, it is necessary, or at least useful, to distinguish exactly in the common Ideas which are given us of it, between that which is essential to its Nature, and that which is not. And altho this View having engag'd us in an Enquiry into the Principles of the *Roman* Law, which have been the Foundation of the Right of Accretion in Testamentary Successions, we have been obliged to remark on the Nature of these Principles, that the Law of Accretion could have been very well spared, except in Successions of Intestates, and in the Cases where the Testators had particularly directed it to take place in their Dispositions; yet we did not pretend to leave out of this Book the Rules of the *Roman* Law relating to this Matter; since on the contrary they compose this Section, and are even presupposed as the Foundation of the Remarks which are still to be made. But we thought our selves at liberty to make these Reflections, and that even those who should not approve of them, would not however condemn the Liberty of proposing them as bare Speculations, without requiring any Person's Approbation of them.

After these general Remarks on the Right of Accretion, it remains only that we add some other particular Observations on the Detail of this matter, and which are necessary for clearing up the Difficulties in it.

Seeing the Right of Accretion in Legal Successions hath its Foundation in this, that the Co-heirs are joined together by the Tie which is made between them by the Succession that is common to them; the Right of the Heir who is called to inherit the Shares or Portions which become vacant, is in effect a simple and natural Right to take the whole, because none of the other Heirs take any part of it from him. So that one may as well say, and with as much or more reason, that he has the whole, because his Right to the whole suffers no Diminution by the Concurrence of other Heirs; as to say, that he has the whole by the Accretion of the Portions of the others. It is in Imitation of this Right of the Heirs at Law, that the *Roman* Law hath given to Testamentary Heirs the Right of Accretion, as has been already explain'd; so that the Foundation of their Right of Accretion is their Union with one another, because of the Quality of Coheirs or Co-executors of a Succession that is common to them; which is the reason why they are said to be conjoined, that is, jointly called to the Inheritance; as it is also said of two or more Legatees of one and the same thing, that they are jointly called to the Legacy that is common to them. And seeing Testators who institute several Executors, or who give to several Legatees one and the same thing, may express themselves in different manners, and may join them together by divers Expressions which may have different Effects; the *Roman* Law has distinguished three

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Manners in which Executors and Legatees of one and the same thing, may be linked or joined together in a Testament *h*.

The first is that which joins them by the thing itself that is devised to them, altho they be not joined by one common Expression *i*; as, if a Testator institutes in the first place one Executor, and then institutes a second by another Clause, without distinguishing their Shares or Portions; or if he gives a House to a Legatee, and gives afterwards and separately the same House to another Legatee by another Clause. We make choice of this Example, because altho this manner of devising may seem to be whimsical to us, and to be very improper for a Testator who has any Sense, or who is used to be any ways exact in his Affairs, yet the Examples of it are frequent in the *Roman* Law.

The second manner is that which joins together the Executors or Legatees, both by the thing and by the Expression of the Testator *l*; as if he institutes such a one and such a one his Executors; or if he gives to such a one and such a one a House or some Land.

The third is that which joins the Persons together only by Word, and not by the thing; as if a Testator devises a Land or Tenement to such a one and such a one by equal Portions *m*.

We express here these three Manners of devising just as they are explained in the Laws which make mention of them; but we must not take this Distinction of the Manners in which a Testator may join together Executors or Legatees of one and the same thing, to be a Division of a Geometrical or Metaphysical Exactness, so as that it may agree equally to Executors and to Legatees, and as if each of these Manners had always the same Effect indifferently for Legatees as for Executors, in what concerns the Right of Accretion. One should be often mistaken if they always understood it so; and one would find even that an Expression which in some Laws is given for an Example of one of these Manners, is given elsewhere for an Example of another. Thus it is said in one Law, that this Expression, *I institute such and such a one my Heirs, each of them for a half,* makes a Conjunction both by the thing and by Word *n*. And in another Law this Expression, *I give and bequeath to such and to such a one, such a Land or Tenement by equal Portions,* makes only a Conjunction by Words, and not by the thing *o*.

We see that these two Expressions are exactly like to one another; for to institute or bequeath by Moiety, or by equal Portions, is the same thing: and yet nevertheless they are given for an Example of two sorts of Conjunction wholly different from one another, and so vastly different, that in one there is a Right of Accretion, and not in the other; but the Laws in which these Instances are given, do not mark in what manner we ought to reconcile this apparent Contrariety, which proceeds from the Difference between Legacies and an Inheritance. This Difference consists in that which hath been already remarked, that as to what concerns an Inheritance or Succession, in what manner soever one institutes two Heirs or Successors, whether by one and the same Clause, or separately, whether one expresses their Shares or Portions, or makes no mention of them; yet nevertheless they are joined together by the thing, that is, the Inheritance, which one considers as indivisible, and there is always between them a Right of Accretion, for the Reasons which have been explained: And it is for these Reasons that with regard to an Inheritance, this Expression, *I institute such and such a one my Heirs, each for a half,* makes a Conjunction or Union by the thing. But as for Legacies, if a thing is bequeathed to two Persons by Portions, whether equal or unequal, seeing the thing bequeathed may be divided either by its Parts if it is divisible, or by its Estimation, if it is indivisible; this Expression, *I give and devise to such and to such a one, such a Land or Tenement by equal Portions,* makes no Conjunction by the thing. Thus each Legatee hath his Right limited to his Share or Portion; and if one of the Legatees either cannot or will not take his Portion, it will not be therefore vacant and without an Owner, but the Heir will have the Benefit,

h Triplici modo conjunctio intelligitur. Aut enim re per se conjunctio contingit; aut re & verbis, aut verbis tantum. *l.* 142. *ff. de verb. signif.*

i Re conjuncti videntur, non etiam verbis, cum duobus separatim eadem res legatur. *l.* 89. *ff. de legat.* 3.

l Re & verbis. *l.* 142. *ff. de verb. signif.* Qui & re & verbis conjunctus est. *l.* 89. *ff. de legat.* 3.

m Item verbis, non etiam re, *Titio & Seio fundum æquis partibus do, lego.* d. l. 89. de legat. 3.

n Conjuncti sunt quos & nominum & rei complexus jungit: veluti, *Titius & Mævius ex parte dimidia hæredes sunto.* l. 142. ff. de verb. signif.

o Item verbis, non etiam re. *Titio & Seio fundum æquis partibus do, lego.* l. 89. ff. de legat. 3.

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nefit of it, and the other Legatee will have all that the Testator had a mind to give him, that is, the Portion which he left him.

It is according to this Distinction that we must understand the divers Effects of these Expressions, which are perfectly like to one another, and which perplex the Reader if they are not taken differently every one in its proper Sense. But this is not the only Difficulty that we find necessary to be cleared up in this matter; for we meet with other Difficulties in other Laws. Thus, for example, it is said in some Laws, that when two Legatees are joined together, the Thing is given entire to every one of them, and that it is divided only when they concur and meet together; and that therefore there is between them a Right of Accretion. *Conjunctim hæredes institui, aut conjunctim legari, hoc est, totam hæreditatem, & tota legata singulis data esse, partes autem concursu fieri. l.* 80. *ff. de legat.* 3. And we see in other Laws, that if the Legatees of one and the same thing are disjoined, they have each of them the whole, so that if they concur they share the Legacy between them: And if one of the two does not take his part, it accrues to the other. *Si disjunctorum aliqui deficiant, cæteri totum habebunt. l. un.* §. 11. *Cod. de cad. toll. l.* 33. *ff. de leg.* 1. It would seem to follow from these two Texts, that the Conjunction and Disjunction having equally the Effect to give the Right of Accretion to the Legatees, they will always have it in what manner soever they be Legatees of one and the same thing; which does not hold true of those to whom the Legacy divides the thing; for between them there is no Accretion. So that to reconcile these several Rules, it is necessary to understand in the first of these two Texts the Word *conjoined*, of Legatees who are conjoined by the thing; as, if a Testator bequeaths one and the same thing to two Persons without distinction of Portions: And in the second, we must understand the Word *disjoined*, of those who are disjoined only by the Words, and who are conjoined by the thing; as, if a Testator having bequeathed a thing to a Legatee, bequeaths the same thing to another Person by another Clause, as it has been already remarked.

We shall not enlarge here on the Detail of the other particular Difficulties which we meet with in the Laws concerning this Matter; for such a particular Enquiry would only perplex the Reader to no purpose: As, for example, the Differences which the antient *Roman* Law made in the Right of Accretion, between a Legacy which was called *per damnationem*, by which the Heir was required to give a Thing to a Legatee; and the Legacy which they called *per vindicationem*, by which the Thing was given to the Legatee, so as that he himself might take it out of the Inheritance; as, if the Testator had said, I will that such a one take such a Thing *p*. According to these divers manners of bequeathing one and the same Thing to two Legatees, the Right of Accretion might take place, or not take place between them *q*. And it suffices to remark in general on all the Difficulties of this Matter, that they remain such both in the antient and modern Law of the *Romans*; that even the Laws which explain the Principles and general Rules thereof, contain Expressions which the Interpreters explain by Senses quite opposite to one another, to which the said Expressions give just occasion, as appears by some of the Texts which have been taken notice of in this Preamble, and in others, in which they have suffered the antient Difference between these two sorts of Legacies, which have been just now mentioned, to subsist, altho it had been abolished by *Justinian*. Which is one of the Causes of the Difficulties in this Matter; and it has given occasion to one of the ablest of the Interpreters to charge those with Stupidity or Negligence, who were employed to collect out of the Books of the antient Lawyers the Extracts which compose the Digest, for not having taken due care to keep out of the said Extracts that which was abolished of the antient Law, and for having by that means left in several places Texts contrary to others which they have inserted *r*.

One may judge by all these Reflexions, that the Difficulties which arise in this Matter of the Right of Accretion are almost of the same Nature with those of Codicillary Clauses in Testaments. But there is this Difference between these two Matters, that as for Codicillary Clauses, there are no Rules certain enough in the *Roman* Law, from which

p §. 2. *Inst. de leg. Ulpian. Tit.* 24. §. 3, & 4.
q Ulpian. Tit. 24. §. 12, & 13.
r Ut plane jam ex eo appareat, quam hebetes aut indiligentes fuerint hi, quibus studium fuit pandectarum capita ex veterum Jurisconsultorum libris decerpere. *Cujac. ad Titul.* 24. *Ulp.*

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we could gather a fixed and stated Law in relation to them, as has been remarked in the fourth Section; and for that reason we have not been able to give any particular Rules concerning them. But as for the Right of Accretion, seeing the Dispositions of Testators may ofttimes give occasion to it, and seeing we have in the *Roman* Law many Rules concerning it which may be rendred clear and certain, we have compos'd this Section of them; and we have endeavoured to set them in that Light and Order which is necessary to make them easy, as much as we have been able amidst the Difficulties which we have just now explained. For altho *Justinian* did make a Law *s*, one part whereof is in relation to this Matter, and that it is there said, that he had judged it necessary to examine it thoroughly, fully, and with Exactness, in order to make it clear to every one's Understanding, yet this Project seems to be very lamely executed.

After all that has been said of the Right of Accretion in this Preamble, the Reader is sufficiently advertised that this Matter is of the Number of those which are common to Testamentary Institutions and to Legacies, to fiduciary Bequests and Substitutions, and that the Rules which shall be explained in this Section, relate chiefly only to Testamentary Successions. For altho in the beginning of this Preamble we have given for an example of the Right of Accretion, that which hath place among Heirs at Law, yet that was only to make the Nature of this Right more intelligible in testamentary Successions, to which the Use of the Rules concerning this Matter ought to be restrained, since in legal Successions there can happen no Difficulty, every Heir having his natural Right to the whole when he is left all alone. So that as to the Right of Accretion in legal Successions, we shall make no express mention thereof, except in the third Article; which however will be no Hindrance why we may not apply to them whatever is in the other Articles, that may suit with them.

s His ita definitis, cum in superiore parte nostræ sanctionis in pluribus locis conjuncti fecimus mentionem: necessarium esse duximus omnem inspectionem hujus articuli latius & cum subtiliori tractatu dirimere, ut sit omnibus & hoc apertissime constitutum. *l. un.* §. 10. *C. de caduc. toll.*

[*This Right of Accretion in the Civil Law, is the same as the Right of Survivorship in the Common Law of* England; *and* Bracton, de Legibus, lib. 4. fol. 262. b. *speaking of Survivorship, calls it expresly by the Name of* Jus accrescendi. *Which shews that the Law of Survivorship is originally derived from the Civil Law, and therefore the Rules laid down in the Civil Law, touching the Right of Accretion, must be of great Use to decide any Difficulties that may arise in relation to Survivorship. But there is this Difference to be taken notice of between Survivorship at Common Law, and the Right of Accretion in the Civil Law; that Survivorship at Common Law takes place not only in Successions and Inheritances, but likewise in Grants and other Conveyances; whereas the Right of Accretion by the Civil Law takes place only in Successions of Intestates, and all Testamentary Dispositions; but not in Contracts and Deeds of Gift.* Perez. in Cod. lib. 6. tit. 51. numb. 9.]

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I.

1. Use of the Right of Accretion.

When there are two or more Heirs or Executors of one and the same Succession, or two or more Legatees of one and the same thing, and that some one of the said Executors or Legatees takes no part of the Inheritance or Legacy, whether it be that he renounces it, or that he is found to be incapable or unworthy of it, or that he chances to die before the Testator; the Portion which he

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he was to have had, goes to the other Executors, or other Legatees, according as the Disposition of the Testator ought to have this Effect; which depends on the Rules that follow. And it is the same thing among several Persons, to whom an Inheritance or a Legacy is left by Substitution or a fiduciary Bequest *a*.

a See the following Articles.

II.

2. Definition of this Right.

The Right which Executors, Legatees, and the Persons substituted to them, have to reap the Benefit of the Portions of one another, when there are any among them who will not or cannot take the Portions belonging to them, is called Right of Accretion, because the vacant Portion accrues to the Portions of the others *b*.

b See the Articles which follow.

III.

3. Accretion among Coheirs at Law.

Among Coheirs at Law there is always a Right of Accretion: For the Inheritance belongs to the nearest of Kin who is capable of succeeding. Thus, he ought to have it entire, if there be no Coheir, or if those who were called to the Inheritance with him would not or could not take their Part in it *c*. But if one of the Coheirs should die after the Succession was open, when he did not know that it was, or before he had accepted it, he would transmit his Right to his Heirs, and his Coheir would have no part in his Portion by Accretion *d*.

c Si ex pluribus legitimis hæredibus quidam omiserint adire hæreditatem, vel morte, vel qua alia ratione impediti fuerint, quominus adeant, reliquis, qui adierint accrescit illorum portio. *l. 9. ff. de suis & legit. hæred.*

d This is a Consequence of our Rule, that the Dead gives Seisin to the Living. *For this Heir having succeeded before his Death, his Right would be vested in him, and would pass to his Heirs.*

IV.

4. In Testaments, it depends on the manner in which the Executors or Legatees are joined together.

The Right of Accretion in Testamentary Dispositions, depends on the manner in which the Testator hath explained his Intention among several Executors, several Legatees, or several Persons substituted to them, and on the Conjunction which the Words of the Testator make among them. For it is according as they are joined together by one and the same Right, or that their Portions are distinct, that they have the Right of Accretion, or that they have it not; which depends on the Rules that follow *e*.

e See the Articles which follow. See the eighth Article.

V.

5. Three Manners in which Executors or Legatees may be conjoined.

Two or more Executors or Legatees may be joined, or called jointly to the same Inheritance, or to the same Legacy, in three manners. The first is, when they are conjoined only by the Inheritance, or the Thing that is left them, and called to it by different and separate Expressions: as, if a Testator institutes one Executor by a first Clause, and by a second another Executor; or, if he bequeaths a Thing to one Legatee, and afterwards calls another Legatee to the same Thing. The second Manner is, when the Testator joins the Persons both by the Thing and by the Expression; as, if in one and the same Clause he institutes two Executors, or names two Legatees of the same Thing. The third is, when the Testator joins the Persons only by the Words, and distinguishes their Portions; as, if he should institute two Executors, or bequeath the same Thing to two Persons by equal Portions *f*. We shall see in the Articles which follow the Use of these three sorts of Conjunction or Union.

f Triplici modo conjunctio intelligitur. Aut enim re per se conjunctio contingit: aut re & verbis: aut verbis tantum. *l. 142. ff. de reg. jur.*

Re conjuncti videntur non etiam verbis, cum duobus separatim eadem res legatur. Item verbis, non etiam re, *Titio & Seio fundum æquis partibus do, lego.* l. 89. ff. de legat. 3.

Altho this Distinction has been explained in the Preamble, yet it was necessary to repeat it here. For we were obliged to speak of it in the Preamble, in order to help the explaining of the Difficulties mentioned there; and it ought to be placed here, as being a part of the Rules.

We shall see in the three following Articles, the reason why in the third of these Manners, the Example is given only of Legatees, and not of Heirs or Executors.

VI.

6. Among Coheirs or Co-Executors there is always a Right of Accretion.

When the Question is about the Inheritance or Succession, in what manner soever it be that the Heirs or Executors are called to it, whether jointly or separately, and whether their Portions be distinguished or not, there is always among them a Right of Accretion. For as the Right to the Inheritance is an universal Right, which comprehends all the Goods and all the Charges, and that this Right is indivisible, that is, that one cannot be Heir only for a part, so as that the other part remain vacant, and be without Heirs; the Portions

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tions of those who are not willing, or who are not capable to succeed, are acquired to the others. Thus, the Heir who has once accepted his own Portion, will succeed to that which shall be vacant, without having the Liberty to renounce it, and he will be liable to bear the Charges of it. Which is to be understood not only of the Heirs instituted in the first place, but also of those who are substituted to them; whether it be that the several Heirs are substituted one to another, or that other Persons are substituted to the Heirs. For in all these Cases he who hath acquired one Portion of the Inheritance, whether as being instituted in the first place, or as being substituted, cannot renounce the other Portions, which by the Effect of the Institution, or Substitution, may accrue to him *g*.

g Qui semel aliqua ex parte hæres extiterit, deficientium partes etiam invitus excipit: id est, tacite ei deficientium partes etiam invito adcrescunt. *l.* 53. §. 1. *ff. de acq. vel omitt. hæred.*

Si quis hæres institutus ex parte, mox Titio substitutus, antequam ex causa substitutionis ei deferatur hæreditas, pro hærede gesserit, erit hæres ex causa quoque substitutionis: quoniam invito ei adcrescit portio. *l.* 35. *eod.*

Testamento jure facto, multis institutis hæredibus, & invicem substitutis: adeuntibus suam portionem, etiam invitis cohæredum repudiantium accrescit portio. *l.* 6. *C. de impub. & aliis subst.*

Si quidem cohæredes sunt omnes conjunctim, vel omnes disjunctim, vel instituti vel substituti, hoc quod fuerit quoquomodo evacuatum, si in parte hæreditas vel partibus consistat, aliis cohæredibus cum suo gravamine pro hæreditaria parte etiamsi jam defuncti sunt acquiratur: & hoc nolentibus ipso jure accrescat, si suas partes jam agnoverint. Cum sit absurdum ejusdem hæreditatis partem quidem agnoscere, partem vero respuere. *l. un.* §. 10. *C. de caduc. toll. l.* 2. *C. de hæred. inst.*

See, as to what is said in this Article, that the Right of the Heir is universal and indivisible, the eleventh and twelfth Articles of the first Section of Heirs and Executors in general.

¶ What is said in this Article, that a Portion of the Inheritance cannot remain vacant, and that he to whom it ought to accrue cannot refuse it, is not contrary to what hath been said in the Preamble of this Section, That it would have been no ways against the Law of Nature, if the vacant Portion were left to the Heir at Law; altho in that Case it would be true, that this Heir at Law, to whom the vacant Portion ought to belong, might refuse it. For the Rule which ordains that the vacant Portion cannot be refused by him to whom it ought to accrue, presupposes that he has accepted his Portion, either purely and simply, or with the Benefit of an Inventary: And it is only in this Case that he cannot refuse the other Portions, on the same Condition upon which he has accepted his own. And since he would be at liberty to refuse the other Portions, if he had not accepted his own, so it would be equally just that this Heir at Law, who had enter'd into no manner of Engagement on account of the Inheritance, should have it in his power either to accept of the vacant Portion, or to refuse it. There would be in all this nothing contrary to Justice nor Equity: And the same Things may be seen in our Customs; since it is certain, that if it should happen that an Heir at Law having accepted the Inheritance, the universal Legatee should renounce the Legacy, this Heir who could have no share in the Goods comprised in the Legacy, if the Legatee had accepted of it, could not upon the Legatee's Refusal renounce those Goods, in order to get rid of the Charges; but he would be accountable to the Creditors for all the Debts of the Inheritance, and for the particular Legacies, to the Value of what the Testator had power to bequeath.

VII.

7. The Accretion among Coheirs or Coexecutors is regulated according to their Portions in the Inheritance.

When there is a Right of Accretion between several, who are either instituted or substituted Heirs or Executors, those to whom the vacant Portions accrue, have their Share in them in proportion to the Shares which they have in the Inheritance *h*.

h Cum quis ex institutis qui non cum aliquo conjunctim institutus est, hæres non est, pars ejus omnibus pro portionibus hæreditariis accrescit. Neque refert primo loco quis institutus, an alicui substitutus hæres sit. *l.* 59. §. 3. *ff. de hæred. inst.*

It is to be remarked on this Text, that for the right understanding of these Words, non cum aliquo conjunctim, *the Reader needs only to consult the following Article.*

VIII.

8. The Coheirs have this Right differently, according as they are conjoined or disjoined from one another.

The Right of Accretion among Heirs or Executors is not always such, as that they all have this Right reciprocally between them. For if a Testator divides his Succession in Portions, and gives, for instance, one half to two or more Heirs, and the other half to some others; one of these Heirs not succeeding, his Portion will remain in the Mass of that Half of which it was a part, and will accrue to the Coheirs of the said Half, and not to the Coheirs of the other Half. But if there were any one of the Heirs who was instituted singly by himself for a Moiety, or some other Portion of the Inheritance, and that

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that he could not or would not take it, it would accrue entire to all the other Heirs without Distinction, according to their Portions in the Inheritance *i*.

i Hæredes sine partibus utrum conjunctim an separatim scribantur, hoc interest, quod si quis ex conjunctis decessit, hoc non ad omnes, sed ad reliquos qui conjuncti erant pertinet. Si autem ex separatis, ad omnes qui testamento eodem scripti sunt hæredes portio ejus pertinet. *l.* 63. *ff. de hæred. inst.*

Si quidam ex hæredibus institutis vel substitutis permixti sunt, & alii conjunctim, alii disjunctim nuncupati: tunc si quidem ex conjunctis aliquis deficiat: hoc omnimodo ad solos conjunctos cum suo veniat onere, id est, pro parte hæreditatis quæ ad eos pervenit. Sin autem ex his qui disjunctim scripti sunt, aliquid evanescat, hoc non ad solos disjunctos, sed ad omnes tam conjunctos quam etiam disjunctos similiter cum suo onere pro portione hæreditatis perveniat. Hoc ita tam varie, quia conjuncti quidem propter unitatem sermonis quasi in unum corpus redacti sunt, & partem conjunctorum sibi hæredum quasi suam præoccupant: disjuncti vero ab ipso testatoris sermone apertissime sunt discreti, ut suum quidem habeant alienum autem non soli appetant, sed cum omnibus cohæredibus suis accipiant. *l. un.* §. 10. *C. de caduc. toll.* See the following Article.

IX.

9. This Right hath place among Coheirs who are not conjoined.

If in the Case of the preceding Article, all those who were called to a Portion distinct from the others were incapable of succeeding, or should renounce their Portion, the Right of Accretion, which took place only among them for their Parts, as long as any one of them was capable of succeeding, would pass to the other Heirs of the other Portions, and that Portion which should become vacant would accrue to 'em. For in that Case, seeing that Portion could not remain vacant when there is an Heir to the other, he would have the whole; and he could not confine himself to his own Portion, and renounce that which had become vacant, altho it should be found to be burdensome by reason of the Charges laid upon it; because the Inheritance, as has been said in the sixth Article, is indivisible: And the Heir who happens to be left alone, altho he was instituted Heir only for a Portion, ought to accept the whole Inheritance *l*.

l See the sixth Article, and the Texts cited on it.

X.

10. Among Legatees of one and the same thing there may be, or may not be a Right of Accretion.

It is not the same thing, as to the Right of Accretion, between Legatees as between Coheirs or Co-Executors; for the Right to the Inheritance being an universal Right, and indivisible, there is always among Coheirs or Co-Executors a Right of Accretion; but Legacies being restrained to the Things bequeathed, which may be divided at least by Estimation, altho the Things should be indivisible in their own Nature, it is not necessary that there should be always a Right of Accretion among Legatees. But they either have or have not this Right among them, according as the Expression of the Testator may give it them, or exclude them from it, as shall be explained by the Rules which follow *m*.

m See the following Articles.

XI.

11. There is a Right of Accretion among Legatees who are conjoined by the thing.

If a Testator bequeaths one and the same thing to two or more Legatees, without any mention of Portions, as, if he gives and bequeaths a House to such a one, and such a one, these Legatees being conjoined by the thing bequeathed, there will be between them a Right of Accretion, in the same manner as if the Testator had added, that the thing should belong entirely to him of the two Legatees who should be left alone to reap the Benefit of the Legacy. Thus it is only their Concurrence that divides the Legacy between them, and gives to every one his Part of it: And if one of them cannot, or will not receive his Portion, it remains to those who have taken, or shall take theirs *n*.

n Conjunctim hæredes institui, aut conjunctim legari, hoc est, totam hæreditatem & tota legata singulis data esse, partes autem concursu fieri. *l.* 80. *ff. de legat.* 3.

Toties est jus accrescendi (*ususfructus*) quoties in duobus qui in solidum habuerunt, concursu divisus est. *l.* 3. *ff. de usufr. accresc. Ulp. tit.* 24. §. 12. See the fifteenth Article.

XII.

12. If the same thing is bequeathed to two Persons by two Clauses, each has a Right to the whole, but their Concurrence divides it.

If a Testator had bequeath'd the same thing to two Legatees by two different Expressions and separately, as if having bequeathed a House by a first Clause to a first Legatee, he bequeathed it again afterwards to another Legatee by another Clause, such a Legacy might be conceived in three Manners, which would have three different Effects. The first in such a manner, as that in the second Legacy the Intention of the Testator should appear to be to revoke the former; and in this Case the first Legacy would remain null. The second, so as that he would have each of the Legatees to have the whole Legacy, the House going to one, and the Heir being

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being charged to give the Value of it to the other Legatee; which would be executed, provided the said Intention were expreſs and clearly explained. The third is if by the two Clauſes of the Teſtament the Houſe were bequeathed intire to each of the two Legatees; and in this caſe they both accepting the Legacy, their Concurrence would divide it, and each of them would have the half of the thing bequeathed in this manner. But if in this laſt Caſe there ſhould be one of the two Legatees who either could not, or would not have any ſhare in the Legacy, the whole would belong to the other; not ſo much by Right of Accretion, as that becauſe the whole was given him, and that his Right not being diminiſhed by the Concurrence of the other, it would remain intire to him, but with the Charges which ought to paſs to this Legatee, according as the Diſpoſition of the Teſtator ſhould demand it; for there might be ſome of the Charges limited to the Perſon of the other Legatee who would take nothing.

o We make uſe of this Example, which in all appearance will not happen; but it is becauſe it is frequent in the Roman *Law, and that it explains one of the Manners of Union or Conjunction ſpoken of in the fifth Article. It is of this manner that it is ſaid, that one and the ſame thing may be bequeathed to two Perſons ſeparately,* disjunctim, ſeparatim; *and it conjoins the Legatees by the thing. This Conjunction had this Effect in the antient Law of the* Romans, *that each of thoſe Legatees had the whole *, that is, one the Thing, and the other the Value of it. Which was altered by* Juſtinian, *and regulated in the manner as it is expreſſed in this Article, as will be ſeen by the Text which follows.*

Ubi legatarii vel fideicommiſſarii duo forte, vel plures ſunt quibus aliquid relictum ſit———Sin autem disjunctim fuerit relictum: ſi quidem omnes hoc accipere & potuerint & maluerint, ſuam quiſque partem pro virili portione accipiat. Et non ſibi blandiantur ut unus quidem rem, alii autem ſinguli ſolidam ejus rei æſtimationem accipere deſiderent: cum hujuſmodi legatariorum avaritiam antiquitas varia mente ſuſceperit, in uno tantum genere legatorum eam accipiens, in aliis reſpuendam eſſe exiſtimans. Nos autem omnimodo repellimus, unam omnibus naturam legatis & fideicommiſſis imponentes, & antiquam diſſonantiam in unam trahentes concordiam. Hoc autem ita fieri ſancimus, niſi teſtator apertiſſime, & expreſſim diſpoſuerit, ut uni quidem res ſolida, aliis autem exiſtimatio rei ſingulis in ſolidum præſtetur. Sin vero non omnes legatarii, quibus ſeparatim res relicta ſit, in ejus acquiſitionem concurrant: ſed unus forte eam accipiat: hæc ſolida ejus ſit, quia ſermo teſtatoris omnibus prima facie ſolidum aſſignare videtur: aliis ſupervenientibus partes a priore abſtrahentibus, ut ex aliorum quidem concurſu prioris legatum minuatur. Sin vero nemo alius veniat, vel venire potuerit, tunc non vacuatur pars quæ deficit, nec aliis accreſcit, ut ejus qui primus accepit, legatum augere videatur, ſed apud ipſum qui habet ſolida remaneat, nullius concurſu diminuta. Et ideo ſi onus fuerit in perſona ejus apud quem remanet legatum adſcriptum; hoc omnimodo impleat, ut voluntati teſtatoris pareatur. Sin autem ad deficientis perſonam hoc onus fuerit collatum, hoc non ſentiat is qui non alienum, ſed ſuum tantum legatum imminutum habet. Sed & varietatis non in occulto ſit ratio: cum ideo videatur teſtator disjunctim hoc reliquiſſe, ut unuſquiſque ſuum onus, non alienum agnoſcat. Nam ſi contrarium volebat, nulla erit difficultas conjunctim ea diſponere. *l. un.* §. 11. *C. de caduc. toll.*

Si quidem evidentiſſime apparuerit, ademptione a priore legatario facta, ad ſecundum legatum teſtatorem convolaſſe, ſolum poſteriorem ad legatum pervenire placet. Sin autem hoc minime apparere poteſt, pro virili portione ad legatum omnes venire: ſcilicet, niſi ipſe teſtator ex ſcriptura manifeſtiſſimus eſt, utrumque eorum ſolidum accipere voluiſſe. *l.* 33. *ff. de legat.* 1.

Altho this laſt Law be taken out of the Digeſts, yet thoſe who are acquainted with the Stile of the antient Lawyers, the Authors of the Texts which are collected together in the Digeſts, and with that of Tribonian, *will eaſily perceive that theſe Expreſſions are of his Stile; and that he has accommodated this Law to the Change which* Juſtinian *had made by the other Law which has been juſt now quoted, having aboliſhed that antient Law which gave the whole thing to each of the Legatees to whom it was bequeathed ſeparately, in the manner explained in this Article.*

We have ſaid at the end of the Article, that the Legatee who ſhall have the whole Legacy ſhall acquit the Charges which ought to paſs to him according to the Diſpoſition of the Teſtator; and we have not ſaid in general, as it is expreſſed at the end of the firſt of theſe two Texts, that he would not be bound for the Charges which the Teſtator had impoſed on the other Legatees of the ſame thing, and who ſhould take no Share in it. For beſides that it is very difficult, not to ſay impoſſible, for a Legatee to refuſe a Legacy, if the Charge does not exceed the Value of it; yet altho this Caſe ſhould happen, it would be by the Circumſtances, and by the manner in which the Teſtator had expreſſed himſelf, that we ought to judge if his Intention was, that the Charge impoſed on the Legatee, who ſhould take no part of the Legacy, ſhould be limited to his Perſon, or that it ſhould affect the thing bequeathed, and that it ought to paſs to the Legatee who ſhould have the whole Legacy to himſelf.

* *Ulp. Tit.* 24. §. 12. & 31.

XIII.

13. Among Legatees by Portions there is no Accretion.

If the ſame thing is bequeathed to two or more Legatees, but ſo as that the Teſtator divides it among them, as if he bequeaths it to them by equal Portions, or aſſigns to every one his own, there will be no right of Accretion among them: For their Title divides them, and gives to every one his Right to his Legacy ſeperated from that of the others, and reſtrained to his own Portion. So that if any one of the Portions of theſe Legatees ſhould become vacant, the others would have no Right

Frank. R. Hurd. Oct 5th 1859.

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Right to it *p*; but it would go either to the Heir or Executor, if it was he that was charged with the Legacy, or to a Legatee, if the Testator had charged one Legacy with this other; as if he had devised a Land or Tenement to a Legatee, and had charged him to give to others either a Portion of the said Land, or the Usufruct of the whole, or of a part thereof, or a Sum of Money to be divided among them.

p Quoties usufructus legatus est, ita inter fructuarios est jus accrescendi, si conjunctim sit usufructus relictus. Cæterum si separatim unicuique partis rei usufructus sit relictus, sine dubio jus accrescendi cessat. *l.* 1. *ff. de usufr. accresc.*

XIV.

14. Divers Cases of Accretion between Joint Legatees.

If it should happen that one and the same thing being bequeathed jointly, and without distinction of Portions, to several Persons, as has been mentioned in the eleventh Article, one of the Legatees being a posthumous Child, should not come into the World, or that another Legatee should happen to be dead before the making of the Testament, and the Testator knew nothing of it, the Portions which by these Events would become vacant would accrue to the others *q*. And it would be the same thing if one of these Legatees who was alive when the Testament was made, should happen to die before the Testator *r*.

q Si Titio & postumis legatum sit, non nato postumo, totum Titius vindicabit. *l.* 16. §. 2. *ff. de legat.* 1.

In primo itaque ordine, ubi pro non scriptis efficiebantur, ea quæ personis jam ante testamentum mortuis testator donasset, statutum fuerat, ut ea omnia bona manerent apud eos a quibus fuerant derelicta: nisi vacuatis vel substitutus suppositus, vel conjunctus fuerat aggregatus. Tunc enim non deficiebant, sed ad illos perveniebant, nullo gravamine (nisi perrarò) in hoc pro non scripto superveniente. Quod & nostra majestas quasi antiquæ benevolentiæ consentaneum, & naturali ratione subnixum, intactum atque illibatum præcepit custodiri, in omne tempus valiturum. *l. un.* §. 3. *C. de caduc. toll.*

r Pro secundo vero ordine, in quo ea vertebantur, quæ in causa caduci fieri contingebant, scilicet ubi legatarius vivo testatore decedebat: si eo casu superfit conjunctus, ei accrescit legatum cum onere. *d. l. un.* §. 4.

XV.

15. Accretion in Legacies and Successions, is a Consequence of the Conjunction by the thing.

It results from all the Rules which have been here explained, that the Right of Accretion among Heirs or Executors, being an Effect of the Rule which ordains that the Inheritance cannot be divided so as that part thereof shall go to the testamentary Heir, and part thereof to the Heir at Law; the said Right is acquired by the thing it self, that is, by the Inheritance. From whence it follows, that the Inheritance ought to go intire to him who happens to be the only Person who is to succeed, whether he was united to others by the Expression, or was called to the Succession separately, or that he was even restrained to one distinct Portion: For seeing this Portion cannot remain to him single by itself, it draws to him the Portions of the others when they become vacant; so that it is always by the thing that Heirs or Executors are conjoined with one another. And among Legatees the Right of Accretion is likewise an Effect of their being conjoined by the thing, as appears by the Rules explained in the Articles which relate to the Legacies *s*.

s Si totam, an partem ex qua quis hæres institutus est tacite rogatus sit restituere, apparet nihil ei debere accrescere, *quia rem non videtur habere.* l. 83. ff. de acquir. vel omit. hæred.

We do not quote here this Text because of the Rule that is explained in it, that he who is charged with a tacit Trust of the Inheritance, or a part of it, has not the Right of Accretion; for if the Fiduciary Bequest be in favour of a Person to whom the Testator could now give any thing, neither the Person for whom the Trust is created, nor the Heir that is charged with it, will have any share in the Fiduciary Bequest. And if it be in favour of a Person to whom the Testator might lawfully give, it will be very evidently the Person for whom the Trust is, who will have the Benefit of the Right of Accretion, if it is to take place; and it will be his Business to regulate it with the Person who is charged to restore to him the whole Inheritance, or a part of it. But we have put down here this Text only on account of these last Words in it, quia rem non videtur habere, *because they shew that it is to the Thing that the Right of Accretion is annexed; which is a Principle that we thought necessary to be explained in this Article.* See the Texts cited on the eleventh Article.

SECT. X.

Of the Right of Transmission.

WHEN an Heir or Executor has accepted a Succession, if he dies afterwards, it is without doubt that he transmits the said Succession, that is, makes it to pass to his Heirs and Executors with his other Goods: If a Legatee dies after he has acquired his Right to the Legacy, he transmits it in the same manner to his Successor; and it is not of this manner of transmitting that we treat here. But if the Heir or Executor, or Legatee dies before he has known or exercised his Right, it does not appear to be so certain, that they transmit it in this case to their Heirs and Executors. And this Doubt had

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given occasion in the *Roman* Law to many Questions, concerning which several Rules have been made, which mark differently in what Cases Heirs and Legatees transmit, or do not transmit their Right to their Heirs; that is, in what Condition their Right ought to be at the time of their Death, in order to make it pass from them to their Successors.

Altho the Right of Transmission in the *Roman* Law respects Successions of Intestates as well as Testamentary Successions, and that it may seem for this Reason that we ought to have treated of this Matter among those which are common to the two sorts of Successions; yet we have placed it among the Matters relating to Testaments: For in our Usage there can be no difficulty as to the Transmission of Legal Successions, because of our Rule, *That the Dead gives seisin to the Living*, as shall be explained hereafter. Thus the Rules which concern the Difficulties of Transmission are in our Usage limited to testamentary Dispositions, whether it be for Legacies, and Fiduciary Bequests, or for Inheritances.

We may make the same Remark on the Rules of the *Roman* Law which concern the Right of Transmission, as we have made on those relating to the Right of Accretion, That the Origin of Transmission, as well as that of Accretion, is found in the natural Order of Legal Successions. For as the Right of Accretion between two Children, for example, who survive their Father, is founded upon this, that it is natural, when the two concur together, for them to divide the Inheritance between them, and that if one of the two be left alone, he should have the whole; the Right of Transmission is founded upon this, that it is natural also, if a Son who has outlived his Father happens to die before he has entred upon the Succession, or even before he knew of his Father's Death, that he should transmit to his Children the Right which he had, and that his Children taking his Place should use his Right, which becomes theirs. Thus he transmits to them the Right which he had acquired by the Death of his Father, and he would transmit it in the same manner to other Heirs, whether Heirs by Testament or Heirs at Law, because this Succession had passed naturally to him, and was become a part of the Goods of his own Inheritance. It was in this manner that the Use of Transmission began in the *Roman* Law; but it was limited to the Children who were under the Power and Jurisdiction of their Father when he died, and who were called *sui hæredes*. And the Children who were emancipated not being *sui hæredes*, they had not this Right of Transmission, if they died before they knew and had exercised their Right to the Inheritance *a*. And it was the same thing, and that with much more reason, as to the other Heirs of Blood *b*.

As for Testamentary Successions, there was no Transmission in them, unless the Testamentary Heir or Executor had known and exercised his Right *c*; and even Children who were instituted Heirs, or Executors by the Testament of their Parents, were deprived of it as well as Strangers, and they began to have the Right of Transmission of the Testamentary Successions of their Ascendants only by a Law of the Emperors *Theodosius* and *Valentinian*, who gave to Children and other Descendants this Right of Transmission, not indifferently to transmit the Testamentary Successions of their Ascendants to their Executors, whether they were Strangers or Relations, but only in favour of their Children and other Descendants *d*. And seeing this Law speaks only of Testamentary Successions, and not of Successions of Intestates, the most learned of the Interpreters has been of opinion that it made no change in the Successions of Intestates, and that the Children who are not *sui hæredes* have by this new Law the Transmission only of what Goods come to them by virtue of the Testamentary Dispositions of their Ascendants; and that as to the Successions of Intestates the antient Law subsists, which does not give the Transmission to Children who are emancipated, but only to those who being under the Father's Jurisdiction, were *sui hæredes*. Thus we see that by the *Roman* Law the Transmission has place in Testamentary Successions only for Children, and in legal Successions only for such Children as were not emancipated. And as for all other Heirs, whether Heirs by Testament, or Heirs at Law, they had not this Right if they died before they knew that the Succession was fallen to them,

a *L.* 4. *C. qui adm. ad bon. possess. poss. l.* 2. *C. ad Senat. Orph.*

b *L.* 9. *ff. de suis & legit. hæred.*

c Hæreditatem, nisi fuerit adita, transmitti nec veteres concedebant, nec nos patimur. *L. un.* §. 5. *C. de caduc. toll.*

d *L. un. Cod. de his qui ante apert. tab. l. un.* §. 5. *Cod. de caduc. toll.*

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them, or before they had entered upon it *e*. And this Rule was so strictly observed, that altho it were because of Absence that the Child was ignorant of the Death of his Father, he had no Right of Transmission, if he died in that Ignorance of his Right. And it was out of mere favour that the Emperor *Antonin* excepted the Case of Absence on account of the Publick *f*.

There was another Exception in favour of Heirs, whether Heirs by Testament or Heirs to Intestates, who died within the time which the Law gave the Heir to deliberate whether he would accept of the Inheritance or refuse it. And they who died within the said time, without explaining their Intentions therein, transmitted their Right to their Heirs *g*.

As to Legatees, their Condition, in what concerned the Right of Transmission, was more advantageous in the *Roman* Law than that of the Heirs or Executors: For they acquired their Right the Moment that the Testator died, if the Legacy was pure and simple; and if the Legacy was conditional, the Right of the Legatee depended in that case, as it was but just, on the Accomplishment of the Condition, and he did not acquire it till the Condition was accomplished *h*. Thus the Legatee of a Legacy pure and simple happening to die after the Testator, without knowing any thing of the Legacy, transmitted his Right to his Heir; and if the Legacy was conditional, and the Legatee died before the Condition was fulfilled, as he had acquired nothing himself, so he transmitted nothing to others; which was also natural and just.

This Difference between the Condition of Legatees and that of Heirs or Executors, as to what concerns the Right of Transmission, had been established in order to avoid an Inconvenience, which would have happened if the Right of the Legatee had not vested in him at the Moment of the Death of the Testator. For seeing in the *Roman* Law the Validity of the Legacies depended on the Acceptance of the Inheritance, so that if the Heir or Executor renounced the Inheritance, the Legacies remained null, as has been explained in its proper Place *i*, it might have happened that if the Right had not vested in the Legatee but by the Executor's Acceptance of the Succession, which depended on the Executor, and which the Executor might put off, the Legatee who should die in the Interval, between the Death of the Testator and the Executor's Acceptance of the Inheritance, would have lost his Right, and have transmitted nothing to his Heirs. It was for the preventing of this Inconvenience, that it was regulated, in regard to Legatees, that the Right to the Legacy should be vested in them at the Moment of the Death of the Testator, that they might have the Right of transmitting it to their Heirs. Thus it was a Favour which was granted them, to distinguish their Condition from that of the Heirs or Executors, in what concerns Transmission. And as this Favour was granted only to prevent that Inconvenience, so it had not place in the Cases where the Inconvenience was not to be feared. Thus, for Legacies which could not be transmitted, such as a Legacy of the Usufruct of any thing, or a Legacy of Liberty to a Slave, which are Legacies confined to the Persons of the Legatees, the Legatees did not acquire their Right to them but from the Day of the Heir's entring upon the Inheritance *l*.

In our Usage the Transmission of Successions of Intestates takes place indifferently not only for Children, but also for all the next of kin, whether they be Descendants, Ascendants, or Collateral Relations. For according to our

e *L. 7. Cod. de Jure delib. l. un. §. 5. C. de caduc. toll.*

f *L. 86. ff. de acq. vel omitt. hæred.*

g See the eighth Article of this Section.

There was another Case in the Roman *Law, where the testamentary Heir transmitted his Right, if he died before he entered upon the Inheritance. But seeing this Case has no Conformity with our Usage, we do not explain it here; and we only take this notice of it here, to satisfy those who might be apt to find fault with the Omission, and those who may have a mind to consult it in its proper Place.* V. l. 3. §. 30. ff. de Senat. Silan. l. penult. C. de his quib. ut ind.

h *See the tenth, eleventh and twelfth Articles of this Section.*

i *See the nineteenth Article of the fifth Section of this Title, and the Remark that is made upon it.*

l *L. un. §. 2. ff. quando dies ususfr. leg. ced. l. 2. & l. 8. ff. quando dies leg. ced.*

But if this Legatee of an Usufruct having survived the Testator a whole Year, had died before the Heir had accepted the Succession, would it have been just that the Heir of the said Usufructuary should lose the Fruits of that Year? This Difficulty cannot happen in our Usage, where Equity would do justice to the Usufructuary, or to his Heir. And one or other of them would have the Fruits which ought to belong to him from the time that the Succession was open, according to the Disposition of the Testator, and according to the Rules of Usufruct, which have been explained in the Title of that Matter.

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Rule, *The Dead gives Seisin to the Living, his next lineal Heir who is capable of succeeding to him,* of which mention has been made in another place *m*, the Heirs of Blood acquire their Right to the Succession the very Moment that it is open, altho the Death of the Person to whom they succeed be unknown to them, and that they be ignorant of their Right to succeed; and do not so much as know that the Deceased was their Relation. It follows from this Rule, that if the Heir at Law, or next of Kin, who survived but one Moment the Person to whom he had Right to succeed, happens to die immediately after him, without having exercised or known his Right, he transmits it to his Heirs.

As for Legacies, our Usage gives to all Legatees the Right of Transmission of pure and simple Legacies, which may pass to their Heirs; and if the Legatee who has survived the Testator dies before he had knowledge of the Legacy, he transmits it nevertheless to his Heir, in the same manner as the Heir at Law, or next of Kin, transmits to his Heir the Inheritance.

There remains then no other Difficulty, except in the Transmission of Testamentary Successions; and there would remain none even in that, if the Rule which gives the Right of Transmission to Legatees when they have out-lived the Testator, had been extended to Testamentary Heirs or Executors. A Rule so easy, and so plain as this, would have put an end to many Difficulties which still remain in the Principles of the *Roman* Law concerning this Matter, and would have removed Inconveniences therein, which seemed to deserve that some Provision should have been made to guard against them, as well as those relating to Legatees. For if it would be hard for a Legatee who should die before the Executor's accepting of the Inheritance, that he could not transmit his Right to his Heirs, it would not be less hard for Children, or other Successors, of an Executor, that because he was ignorant of his Right to the Inheritance, whether through Absence, or for other Causes, he could not transmit it if he died in this Ignorance; and that thus a mere Chance should distinguish his Condition from that of an Executor who should die after he had known of his Right, altho he had made no Step towards exercising it. For he would nevertheless transmit his Right to his Heirs, if he died within the Time which the Law allowed to Testamentary Heirs or Executors for deliberating, as has been already observed.

It seems very strange that by this Law the Testamentary Heir, who has known his Right, and neglected it, should transmit to his Heirs the Succession that was fallen to him; and that if the same Heir had been ignorant of his Right, he could have transmitted nothing. This Inconvenience might have been sufficient to justify a Rule, which, at the same time that it removed the Inconvenience, would have besides been useful to put an end to all the Difficulties of this matter. And it is without doubt upon this Consideration, that in one of the Provinces of *France*, where the *Roman* Law is most followed, they have established it as a Rule or Custom, *That the Dead gives Seisin to the Living, in what manner soever he succeeds, whether by Testament, or without Testament n.* And if this Rule be just in the *Roman* Law for Legatees, that they should have their Right at the Moment of the Death of the Testator, what Injustice would there be in it, if it should take place likewise for the Testamentary Heirs or Executors? since it is true of the Testamentary Heirs, as well as of Legatees, that they hold their Right by the same Title of the Will of the Testator, and of the Law which authorizes the said Will; and that this Title is still more favourable for the said Heirs or Executors than for Legatees, whom the Testator hath less consider'd than his Heir or Executor; and in a word, that the Testament having its Effect by the Death of the Testator, it is at the Moment of the said Death that the Testamentary Heir ought to take the place of him to whom he succeeds. And it is also the Rule, that at what time soever afterwards the said Heir or Executor accepts of the Inheritance, he is considered as if he had accepted it at the Moment of the said Death, and is bound in the same manner for all the Charges that were fallen due before he accepted the Succession *o*.

Will it be objected against the Transmission of an Inheritance in the Case where the Testamentary Heir died without knowing any thing of the Testament, that one cannot acquire a Right

m *See the Preface to this second Part, numb. 7.*

n *See the Customs of* Bourdeaux *and Country of* Guienne, *Article* 74.

o *See the fifteenth Article of the first Section of Heirs and Executors in general.*

which

which they know nothing of; and that the Quality of Heir or Executor, implying Engagements, it is necessary for acquiring an Inheritance that the Heir or Executor should know the Right which is fallen to him; and that therefore he having been ignorant of it, has had no Share in the Inheritance, and consequently could not transmit it to his Heirs? But these Reasons would prove in the same manner, that there would be no Transmission even in Successions of Intestates; and they would prove likewise, that the Legatees who had known nothing of the Legacies left them, could not transmit them to their Heirs, at least those whose Legacies should be subject to some Charges.

Will it be said, that the Testator has considered only the Persons of his Executors, and not the Persons of their Successors, and that therefore the Executor being dead without having acquired the Inheritance, his Heirs or Executors ought to have no Share in it? But this Reason would prove the same thing as to Legatees; and since it proves nothing with respect to them, neither ought it to prove any thing with respect to Executors. Thus the only natural Effect of this Reason would be to prove, that if he who is instituted Heir or Executor dies before the Testator, the Institution does not pass to his Heirs; but if the said Heir or Executor survives the Testator, it would be against his Intention to deprive him of the Right of Transmission, since every Testator means, that if those whom he institutes his Heirs or Executors do survive him, all the Goods of the Inheritance should be theirs in the Moment that his Death shall divest him of them. To which we may likewise add this Consideration, which is common both to the Executor and to the Legatee, that it is not absolutely true that the Testator hath only consider'd their Persons. For it is very usual for a Friend to institute his Friend his Heir or Executor in consideration of his Children, and to leave a Legacy to a Friend upon the same Motive; so that the Transmission in these Cases is agreeable to the Intention of the Testator. But even in the Cases where the Intention of the Testator is confined to the sole Person of the Executor and Legatee, the Right of Transmission is not therefore the less comprehended in the Disposition of the Testator. For it is for the Interest of the Executor and of the Legatee, that the Goods which come to them by a Testament should pass to the Use of their Affairs, whether it be to acquit their Debts, or for other Uses, which cannot be done except by the Right of Transmission. Thus it may be said, that the Right of Transmission being founded on all these Principles of Equity, it was not so much a Favour done to the Legatees in the *Roman* Law, as an Act of Justice, in giving them the Right of Transmission, although they should happen to die before they knew any thing of the Legacy; and that the same Justice might be likewise extended to Testamentary Heirs or Executors without any Inconvenience.

It seems reasonable to conclude from all these Reflections, that since neither natural Equity nor Reason render the Condition of the Testamentary Heir worse than that of the Legatee, it would have been just to have made it equal as to the Right of Transmission; and that the Rule which should have ordered it so being founded on Principles so natural as these, would have been much more useful than the several Subtilties which one meets with in this Matter, as well as in others of the *Roman* Law. So that it would have been convenient that the Rule, *The Dead gives Seisin to the Living*, had been made common throughout in Successions by Testament, as well as those without Testament, as we have seen that it is in one of the Provinces of *France*, where the *Roman* Law is most in use, and where they have very prudently judged, that it is much more useful to establish Transmission without distinction in all sorts of Successions, whether it be an Heir that succeeds by Testament, or without Testament, whether he knew of his Right, or died before he knew any thing of it, than to introduce Distinctions full of Inconveniences without any Advantage, and serving for no other Use than to give occasion to many Law-Suits. It is without doubt upon these Considerations, that altho this particular Custom in one Province, which is governed by the written Law, seems to insinuate that in the others they follow the *Roman* Law, yet some Authors have thought that the Maxim, *That the Dead gives Seisin to the Living*, is become universal throughout the whole Kingdom in Testamentary Successions, as well as in Successions of Intestates.

It is to be remarked on this Matter of Transmission, that it contains some particular Rules which would be of necessary Use, even altho Transmission should take

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take place in Testamentary Successions; as, for example, that which concerns the Transmission of conditional Dispositions: And that there are also other Rules which relate to the Transmission of legal Successions, such as those which are explained in the first Articles, which regard in general the Nature of Transmission.

All these several sorts of Rules shall be explained in this Section, and shall take in every thing that belongs to this Matter of Transmission. But seeing the Use of Rules and Principles is much facilitated by the Application of them to the particular Cases to which they may agree; and that we have been obliged to explain many of these Cases in the ninth Section of the Title of Legacies; the Reader may be pleas'd to have recourse to that Section at the same time that he reads this.

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I.

1. Definition of Transmission.

Transmission is the Right which Heirs, or Executors, or Legatees, may have to convey down to their Successors the Inheritance or Legacy which belonged to them, in case they die before they have exercised their Right *a*.

a Successionem ad hæredes suos transmittere. *l.* 7. *in f. C. de jure delib.* See the Preamble of this Section.

II.

2. To what Transmission is limited.

It results from the Definition explained in the preceding Article, that when the Heir or Executor has enter'd upon the Inheritance, and the Legatee has received the Legacy, it is not any longer by the Transmission that their Right passes to their Heirs, but barely by Succession, in the same manner as their other Goods *b*. For Transmission is understood only of the Right which the Heir, or Executor, or Legatee, may have to convey to his Heirs a Right which he himself had never exercised, and which may have been altogether unknown to him, as will be seen in the Sequel of this Section.

b This is a Consequence of the Definition of the Right of Transmission.

III.

3. Transmission takes place when the Right is acquired.

The Heir or Executor, and the Legatee have this in common, that both the one and the other have the Right of Transmission, at the same time that the Right to the Inheritance, or to the Legacy, vests in them. For having at that time their Right in their own Persons, it is a Consequence thereof, that they should transmit it to their Heirs, even although they themselves should die before they had received any thing, the one of the Inheritance, and the other of the Legacy: As, on the contrary, if when they die they had no manner of Right in their own Persons, they could transmit nothing to their Successors *c*.

c See the following Article, as also the eighth and tenth Articles.

See in relation to this Article and those that follow, the sixth and the other following Articles of the ninth Section of Legacies.

IV.

4. The Transmission depends on the Condition in which the Right is at the Time of the Death.

It follows from the preceding Articles, that when the Question is about the Right of Transmission, it is necessary to consider in what Condition the Right of the Heir or Executor, and that of the Legatee, was at the time of their Death. And this depends on the Rules which shall be explained hereafter *d*.

d This is a Consequence of the preceding Articles.

V.

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V.

5. There is no Transmission, if the Testamentary Heir or Legatee dies before the Testator.

There is likewise this common to the Testamentary Heir, and to the Legatee, that altho their Rights have the Testament for their Title, yet nevertheless if it happens that they die before the Testator, altho after the making of the Testament, there is in that Case no Transmission; for the Testament was not to have its Effect but by the Death of the Testator. So that when their Death precedes that of the Testator, they have no Right, and consequently do not transmit any thing *e*. And there would be still less ground for Transmission, if the Testamentary Heir or Legatee were already dead before the Testament was made, it being possible that the Testator knew nothing of their Death *f*.

e Pro non scriptis sunt iis relicta qui vivo testatore decedunt. *ex* §. 2, & 3. *l. un. C. de caduc. toll.*

f Si eo tempore quo alicui legatum adscribebatur in rebus humanis non erat, pro non scripto hoc habebitur. *l.* 4. *ff. de his quæ pro non script.*

VI.

6. The Institution and the Legacy may be conceived in Terms which make them to pass to the Heirs.

We may add, as another Rule that is common to Testamentary Heirs, and to Legatees, that if the Testator had conceived his Dispositions in such Terms as to shew that it was his Will, that in case his Heir, or Executor, or his Legatees, should chance to die before their Right fell to them, the said Right should pass to their Children, or in general to their Heirs; such a Disposition would have its Effect not so much by the Right of Transmission, as by the proper Right of the said Children or Heirs of the Testamentary Heir or Legatee, who would in this Case be called by the Testator by way of Substitution to the others *g*.

g Since the Will of the Testator holds the Place of a Law, nothing would hinder such a Disposition from having its effect. And we have set down this Rule here, because it is a Precaution used by many for preventing the Events which make the Transmission to cease, by taking care to have added to the Dispositions of Testators, when it is their Will that it should be so, some Expression that may have this Effect to make the Inheritance or the Legacy to pass to the Successors of the Testamentary Heir or Legatee in default of them; as is, for example, this Expression, That the Testator gives to such a one and his.

VII.

7. The Acceptance of the Inheritance gives the Right of Transmission.

If he who is instituted Heir by a Testament, having accepted of the Inheritance, should chance to die before he touched any thing thereof, he would transmit to his Heirs the Right to gather in the Effects belonging to it. For by his Acceptance of it, he had acquired the Quality of Heir, and the Right to the Inheritance *h*. Thus this Right, as well as all the others which he might have, would pass to his Heirs *i*, and that with much more reason than in the Case of the Rule that follows.

h See the first Article of the third Section, how one acquires an Inheritance.

i Hæres in omne jus mortui non tantum singularum rerum dominium succedit. *l.* 37. *ff. de acq. vel om. hæred.*

VIII.

8. The Testamentary Heir who dies within the time allowed for deliberating, transmits his Right.

If during the Time that the Law gives the Testamentary Heir to deliberate in, whether he will accept or refuse the Succession, he happens to die without having done any one Act as Heir, he knowing of the Testament, whether it be that he was really deliberating about it, or that he had not in any manner explained his Mind therein, but only that he had not renounced the Inheritance; the Law presumes from his Silence that he was deliberating, and he transmits his Right to his Heirs, who may in their own Right accept the Inheritance, or renounce it *l*.

l Sancimus si quis vel ex testamento, vel ab intestato, vocatus deliberationem meruerit: vel, siquidem hoc non fecerit, non tamen successioni renuntiaverit, ut ex hac causa deliberare videatur: sed nec aliquid gesserit, quod aditionem, vel pro hærede gestionem inducat: prædictum arbitrium in successionem suam transmittat. ... Et si quidem ipse qui sciens hæreditatem vel ab intestato, vel ex testamento sibi esse delatam, deliberatione minime petita, intra annale tempus decesserit, hoc jus ad suam successionem intra annale tempus extendat. *l.* 19. *C. de jure delib.* Sin autem instante tempore decesserit, reliquum tempus pro adeunda hæreditate suis successoribus sine aliqua dubietate relinquat: quo completo, nec hæredibus ejus alius regressus in hæreditatem habendam servabitur. *d. l.* 19.

¶ We have not set down in the Article that which is said in the Text, That the Heirs of the Heir have no more Time for deliberating, than what remained to the Deceased. For if there remained only two or three Days, or so little Time that it was not possible for them to exercise their Rights, Equity would require that they should have a longer Delay. And as it is not agreeable to our Usage to be so very rigorous in such like Cases, it would seem just to grant unto them the same Delay that the Ordinance of 1667. *Tit.* 7. *Art.* 1. gives to Heirs to deliberate in, seeing that Delay is only forty Days after the Inventary.

We

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We have mentioned in this Article only the Case where the Testamentary Heir knew of the Testament, and died within the Time allowed by the Law for deliberating; and have said nothing of the Case where the Heir who knew of the Testament had let the Time for deliberating slip, without making any Declaration, and died after the said Time was expired. For although by the *Roman* Law, that Heir did not transmit his Right to his Heirs *a*, yet our Usage seems to be opposite to that Rigour.

And seeing by the Ordinance of 1667, the Delay for deliberating is only, as has been already mentioned, of forty Days after the Inventary, whereas by the *Roman* Law they had whole Years to deliberate in, and that this Time of forty Days would be too short a time to take away the Right of Transmission, it does not suit with our Usage; as has been likewise already taken notice of, to observe this Rigour in the Cases of Non-performance of that which ought to be done within a certain space of Time, unless there were some Equity in the strict Observance of the said Rigour: as, for example, to exclude one who had a Right to dissolve a Sale by virtue of a Power or Equity of Redemption, and who should not come within the Time fixed for bringing the Action for that purpose. Thus the Heir and his Successor would be always received to exercise their Right, and would not be refused all such Delays as should appear to be just and necessary *b*.

But if the Testamentary Heir should chance to die before he knew of his Right, would he transmit it to his Successor, whether he died within the Time allowed for deliberating, or after the said Time? It might be urged in favour of the Transmission, that as in the *Roman* Law the Heir who knew of his Right did not transmit it, if he died without declaring his Mind, having let the Time pass which the Law allowed him for deliberating, as has been just now observed; so it would seem to follow by the Rule of Contraries, that this Time ought not to run against the Heir who should die without knowledge of his Right; in the same manner as in the *Roman* Law, the Time given to the Heir at Law to demand the Possession of the Goods that were fallen to him, did not run against the Heir who was ignorant that the Succession was fallen to him *c*. And if it is just to grant a Delay to the living Heir who was ignorant of his Right, altho the Time regulated by the Law be expired, as that Delay is granted by an express Rule of the Ordinance of 1667, *Tit.* 7. *Art.* 4. is it not as equitable to grant to the Successor of this Heir, who begins to know the Right of the Deceased, the same Delay which would have been granted to the Deceased, had he been in a Condition to demand it? And as it has been found just in the *Roman* Law, that the Heir who knew of his Right, and died within the Time allowed for deliberating, should transmit it to his Successors, altho he had done nothing to shew his Acceptance of the Inheritance, provided only that he had not renounced it; may it not be said of the Heir who dies in Ignorance of his Right, that the Time for deliberating ought not to run against him? And it having been impossible for him to deliberate, some Time for deliberating ought not to be refused to his Successor. From whence it follows, that the Transmission to this Successor is as just as that to the Heir of him, who having known his Right had neglected it to the Time of his Death, which happened within the Time allowed for deliberating, and who did nevertheless transmit the Succession to his Heirs, according to the Rule explained in this Article.

The Reader may join to these Considerations the Reflexions which have been made on this Subject in the Preamble of this Section, and particularly that which has been remarked touching the Sentiment of those who think that it is at present the general Usage of the Kingdom, that the Rule, *The Dead gives Seisin to the Living*, extends to Testamentary Successions.

a Si ipse (hæres) postquam ei cognitum sit hæredem eum vocatum fuisse, tempore translapso nihil fecerit, ex quo vel adeundam, vel renuntiandam hæreditatem manifestaverit, is cum successione sua, ab hujusmodi beneficio excludatur. *l.* 19. *C. de jure delib.*

b See the Ordinance of 1667, *tit.* 7. *Art.* 4.

c Quacunque die nescierit, aut non potuerit, nulla dubitatio est quin dies ei non cedat. *l.* 2. *ff. quis ordo in bon. poss. servet.* Quicunque res ex parentum, vel proximorum successione jure sibi competere confidit, sciat sibi non obesse si per rusticitatem, vel ignorantiam facti, vel absentiam vel quamcunque aliam rationem, intra præfinitum tempus bonorum possessionem minime petiisse noscatur. Quoniam hæc sanctio hujusmodi consuetudinis necessitatem mutavit. *l.* 8. *C. qui adm. ad bon. possess. poss.*

IX.

9. When the Institution or Substitution of an

If an Institution of a Testamentary Heir, or a Substitution, was conditional, and the Condition not being come to

Heir is conditional, he has no Right to transmit, unless the Condition be come to pass.

to pass at the Time that the Succession fell, or that the Substitution could have taken place, the Heir or the Person substituted to him, should happen to die; as he would have had no Right himself, so he could transmit nothing to his Heir. Thus, for example, if a Testator had instituted or substituted one of his Relations or Friends, on condition that he had Children, or in case he were married, his Death happening before the Condition, whether before or after that the Succession fell, or that the Substitution could take place, would have annulled in his Person all Use of the Right to inherit the Succession, and to transmit it *m*.

m Hæres & pure & sub conditione institui potest. §. 9. *inst. de hæred. inst.*

It is the Nature of Conditions, that what depends on them should have its Effect, or remain null, according as they happen, or not happen. See the first Article of the eighth Section.

X.

10. Transmission of a Legacy that is pure and simple.

As to the Legatee, if the Legacy is pure and simple, that is, without Condition, his Right vests in him at the time of the Testator's Death, as is explained in its place *n*: and if he chances to die before he has demanded, or even known of his Legacy, he transmits his Right to his Heirs *o*.

n See the Preamble of this Section, and the first, second, and third Articles of the ninth Section of Legacies.

o Si purum legatum est, ex die mortis dies ejus cedit. *l.* 5. §. 1. *ff. quand dies legat. vel fideic. ced. l. un.* §. 1. *in. f. C. de cad. toll.* Si post diem legati cedentem legatarius decesserit, ad hæredem suum transfert legatum. *l.* 5. *ff. quando dies legat. vel fid. ced.*

XI.

11. Transmission of a conditional Legacy.

If the Legacy was conditional, that is, if it depended on the Event of a Condition, the Right would not vest in the Legatee till after the Condition had happened; and if the Legatee died before, as he had no Right to the Legacy himself, so he would transmit none to his Heir. And altho the Condition should afterwards come to pass after the Death of this Legatee, yet this Event would be useless to his Heir. Thus, for example, if a Testator had left a Legacy on condition that his Heir should die without Children, and it happened that the Legatee died before the Heir, who afterwards died without Children, this Event would be useless both to the Legatee who was already dead, and to his Heir to whom he had not transmitted any Right, he having had none himself *p*.

p Legata sub conditione relicta non statim, sed cum conditio extiterit, deberi incipiunt: ideoque interim delegari non potuerunt. *l.* 41. *ff. de cond. & dem.*

Intercidit legatum si ea persona decesserit, cui legatum est sub conditione. *l.* 59. *eod.*

See the fourth and eleventh Articles of the ninth Section of Legacies.

It is necessary to remark on this Article the difference which the Laws make between Conditions in Testaments, and those of Covenants. The Difference consists in this, That in the Dispositions of Testators, there is only the Testator himself who regulates the Effect of his Disposition; and if it does not expresly comprehend the Heirs of him in whose Favour the Disposition is made, it is limited to his Person, that is, that if the Right is not acquired to that Person during his Life, he can transmit nothing of it to his Heir. But in Covenants there are two Persons, who treat both for themselves and for their Heirs, if they are not excepted. Thus the Effect of Conditions in Covenants passes to the Heirs. See the thirteenth Article of the fourth Section of Covenants.

XII.

12. Transmission of a Legacy to an uncertain Day.

As there are Legacies which are made to uncertain Days, and which are conditional, as has been explained in its Place *q*; these sorts of Legacies are of the same nature with those which depend on other sorts of Conditions: And as to what concerns the Right of Transmission, they are regulated in the same manner as other conditional Legacies *r*.

q See the twelfth and thirteenth Articles of the eighth Section.

r It is a Consequence of the Nature of these Legacies, which being conditional, are not transmitted, except in the Case that the Condition be come to pass before the Death of the Legatee, as has been said in the preceding Article.

XIII.

13. The Rules of Transmission may be applied to Substitutions and to fiduciary Bequests.

The Rules which concern the Right of Transmission for Testamentary Heirs and Legatees, may be applied to those who are substituted to them, and to those for whose Account any thing is devised in trust to others, whether it be the whole Inheritance, or some particular thing, which the Heir or a Legatee had been charged to restore to them, according as these Rules may be applicable to them. Which it is easy to discern, and therefore no ways necessary to repeat the same Rules with regard to them. Thus, when a Testator hath substituted to his Heir another Heir, to succeed to him in case the first either could not or would not accept the Succession; or that he has obliged his Heir to restore the Inheritance to another Person when the said Heir shall die; or that a Testator hath charged his

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Heir, or a Legatee, with a Sum of Money in trust, or with other Things which ought to pass after their Death, or within a certain Time, to other Persons: In all these Cases the Persons substituted, and the Persons for whose account the fiduciary Bequest is made, surviving those after whom they are called, and happening to die afterwards before they knew and exercised their Right, or before the Event of the Conditions, if there were any, transmit or do not transmit their Right in the same manner, and according to the same Rules, which have been just now explained for Heirs and Legatees s.

s Si fideicommissarius antè (*conditionis eventum*) decesserit, ad hæredem suum nihil transtulisse videtur. *l.* 11. §. 6. *ff. de legat.* 3.

Toties videtur hæres institutus etiam in causa substitutionis adisse, quoties acquirere sibi possit: nam si mortuus esset, ad hæredem non transferret substitutionem. *l.* 81. *ff. de acquir. vel om. hæred.*

SECT. XI.

Of the Execution of Testaments.

THE Execution of Testaments is naturally the Duty of the Testamentary Heirs, who remaining Masters of the Goods, are bound for all the Charges. And the Legatees on their part, and all the other Persons interested in the Execution of the Testaments, have the liberty to look after it, and to procure the Execution of what concerns themselves. But seeing there are some Dispositions of Testators, the Execution of which depends solely on the Integrity of the Testamentary Heir, and that those very Dispositions of which the Parties concerned may sue for the Execution, may remain without effect, either by reason of their Death, or by their Absence, or by the Knavery of the Heir, or for other Causes; care has been taken, by the Use of Executors of Testaments, to have the Wills of Testators accomplished without any regard to the Honesty or Knavery of their Testamentary Heirs.

In the *Roman* Law we see very few Examples of the Case where the Testator commits to other Persons than to the Testamentary Heir himself the Execution of his Dispositions; and we do not find there any Rule which hath established in general the Use of Executors of Testaments, who are charged with the entire Execution of the Testaments; whereas the Use of Executors of Testaments is so much approved and favoured by our Customs in *France*, that they ordain all the Moveable Goods of the Succession to be put in the hands of those to whom the Testator commits this Function; and for this reason the Executors are obliged to make an Inventary of the Goods, and the Heir ought to be called to assist at the making of it: Or the Testator may, if he pleases, when he names an Executor, order a certain Sum of Money to be put into his hands for executing the Dispositions which he shall commit to his Care.

Although these Dispositions be not common to all the Customs, and that in many of them, as well as in divers Places which are governed by the written Law, there is little or no Use of Executors of Testaments; yet seeing it is every where free for Testators to name them, and that in general due Care ought to be taken for the Execution of Testaments, we shall explain in this Section what is essential to this Matter, and what may be gathered from the *Roman* Law concerning it.

[*The Law of* England *takes notice of three kinds of Executors, or Persons, who have to deal with the Execution of dead Mens Wills, and Disposition of their Goods, every one of whom have their several Offices. The first hath his Authority from the* Law, *and that is the Bishop or Ordinary of every Diocese, to whom the Execution of Testaments and last Wills doth belong, when no Executor is appointed by the Testator: and these have had the Approbation of Testaments within this Realm of* England *for Time immemorial* a. *And he is therefore called* Executor Legitimus, *Legal Executor, because he only is appointed by the Law, where no Executor is appointed by the Testator.*

The second kind is, the Executor who deriveth his Authority from the Bishop or Ordinary, and is he whom we call Administrator. For when the Executor named in the Testament doth refuse to be, or cannot be Executor, and when no Executor is named in the Will, it is lawful for the Bishop or Ordinary to commit Administration, and to annex the Will to the Letters of Administration b. *And this Administrator is called* Executor Dativus, *because he is given or assigned by the Ordinary, to whom originally, and by Law, this Execution doth appertain.*

The third kind of Executors deriveth his Authority from the Testator, and is he that is named Executor in the Testament, or to whom the Execution of the Testament is committed by the dead Man. This Executor is termed Executor Testamentarius, *a Testamentary Executor, and hath his Authority immediately from the Testator, representing the Person of the dead Man, and doth not much differ*

a Lyndwood Prov. lib. 3. tit. 13. de testamentis, cap. Statutum, verb. *approbatis*, verb. *Laicis*, pag. 174. Doct. and Stud. Dial. 2. chap. 28.

b Stat. 31 Edw. 3. cap. 11. 21 Hen. 8. cap. 5. Brook's Abridgment, tit. Testament, n. 20.

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differ in Nature from him who is called in the Civil Law Hæres c.

c Executores universales, qui loco Hæredis sunt. *Lyndwood de Testam. cap. Statutum, verb. Intestatis, pag.* 172. Swinburn of Testaments, part 6. §. 1.

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I.

1. The first Security for the Execution of Testaments, is, that they be known, and deposited in some publick Place.

The first Precaution necessary for the Security of the Execution of the Wills of Testators, is, that the Testaments, or other Acts, which contain their Dispositions, be known to all Persons who have any Interest under them, and that they be deposited in some safe Place, where the Parties concerned may have free Access to them as occasion requires. And it is for this Reason that the Testaments which are sealed up, and kept secret, are opened in the manner which has been explained in its Place *a*, and that the others remain in the hands of publick Notaries who took down the Minutes or Instructions thereof, that they may give out attested Copies thereof to such Persons whom the said Dispositions of the Testators may any way concern *b*. And there are even some Dispositions which for the greater Security ought to be made publick in a Court of Justice, and enrolled, that is, entred in the publick Register, that the Memory of them may be preserved *c*.

a See the eighteenth and nineteenth Articles of the third Section.

b See the fifteenth Article of the first Section of Partitions among Co-heirs, or Co-executors.

c When Testaments contain Substitutions, they ought to be made publick, as shall be said in its proper Place. See the End of the Preamble to the third Title of the fifth Book.

II.

2. The Use of Executors of Testaments.

Seeing there are often Dispositions in Testaments, the Execution of which depends wholly on the Integrity of the Testamentary Heirs, and that many Heirs fail in the Performance thereof, it is free for Testators to commit to other Persons the Execution of their Dispositions which they are not willing should depend altogether on their Testamentary Heirs; and the Persons to whom the Testators give this Power, are called Executors of Testaments *d*.

d In testamentis quædam scribuntur, quæ ad auctoritatem duntaxat scribentis referuntur, nec obligationem pariunt. Hæc autem talia sunt, si te hæredem solum instituam & scribam; *Uti monumentum mihi certa pecunia facias.* Nullam enim obligationem ea scriptura recipit: sed auctoritatem meam servandam poteris si velis facere. Aliter atque si, cohærede tibi dato item scripsero. Nam sive te solum damnavero, *Uti monumentum facias,* cohæres tuus agere tecum poterit familiæ erciscundæ, uti facias: quoniam interest illius. Quin etiamsi utrique jussi estis hoc facere, invicem actionem habebitis. *l. 7. ff. de ann. legat. & fideic.* Si quis Titio decem legaverit, & rogaverit ut ea restituat Mævio: Mæviusque fuerit mortuus, Titii commodo cedit, non hæredis nisi duntaxat ut *ministrum* Titium elegit. *l. 17. ff. de legat.* 2.

Si testator designaverit per quem desiderat redemptionem fieri captivorum, is qui specialiter designatus est legati vel fideicommissi habeat exigendi licentiam: & pro sua conscientia votum adimpleat testatoris: sin autem persona non designata, testator absolute tantummodo summam legati vel fideicommissi taxaverit, quæ debeat memoratæ causæ proficere, vir reverendissimus Episcopus illius civitatis, ex qua testator oritur, habeat facultatem exigendi quod hujus rei gratia fuerit derelictum, pium defuncti propositum, sine ulla cunctatione, ut convenit, impleturus. *l. 28. §. 1. C. de Episc. & Cler.*

We see in the first of these Texts, that for want of a Person who might oblige the Testamentary Heir to execute the Will of the Testator, the Heir is left at liberty to do it or not, as he pleases; which shews the use and necessity of Executors of Testaments.

It may be remarked on the second of these Texts, that a Sum of Money might be put into the Hands of a Legatee, that he might dispose thereof as Executor of the Will of the Testator, which was known to him, ut ministrum.

As for the third Text, it is necessary to see the sixth Article, and the Remark upon it.

We see in the 68th Novel of the Emperor Leon *the Use of Executors of Testaments,* quibus testatores bona illorum existimatione moti, testamentarias de rebus suis præscriptiones committunt.

[*The Character of Executor, as described in this Article, is more applicable, with us in* England, *to what we call an* Overseer *of a Will, than to the Executor. For some Testators having named Executors of their Wills, do also appoint some Persons whom they have a more special Trust and Confidence in, to be Overseers of their Wills, that is, to see to the due Performance and Execution of all the several Dispositions in their Wills. But altho there should be no such Overseers appointed, yet it is not much to be questioned, that due Care will be taken to oblige the Executors to a strict Performance of all the Dispositions in the Will, by the Persons who shall have an Interest in the said Dispositions, and who will have the Aid of the Law to compel the Executors to perform the Will of the Deceased.*]

III.

3. Execution of a Disposition committed

The Testator who names several Testamentary Heirs, and who confides more

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to the Testamentary Heir, or to another Person.

more in one of them than in the others, may charge him in particular with the Execution of some Dispositions of his Testament, impowering him to take out of the Estate the Fund which may be necessary for the Execution of the said Dispositions: and he may likewise commit this Care to a Legatee, or appoint some other Person for it, altho he should give him nothing for his trouble, in consideration of the Quality of the Testator, and of that of the Executor, or that he should leave him a Legacy for his pains, as it is lawful for him to do *e*.

e Si a pluribus hæredibus legata sint, eaque unus ex his præcipere jubeatur, & præstare: In potestate eorum quibus sit legatum, debere esse ait, utrumne a singulis hæredibus petere velint, an ab eo qui præcipere sit jussus. Itaque eum qui præcipere jussus est, cavere debere cohæredibus, indemnes eos præstari. *l.* 107. *ff. de legat.* 1.

Si scriptus ex parte hæres rogatus sit *præcipere pecuniam, & eis, quibus testamento legatum erat, distribuere*: id quod sub conditione legatum est, tunc præcipere debebit, cum conditio extiterit: interim aut ei, aut his, quibus legatum est, satisdari oportet. *l.* 96. §. 3. *eod.*

See the Texts cited on the foregoing Article.

IV.

4. Security for conditional Legacies.

If among the Legacies there were any of them conditional, whether it be that the Execution of the Testament were committed to one of the Testamentary Heirs, or to a particular Executor of the Testament; the Fund for paying these conditional Legacies would remain with the Testamentary Heirs *f*, they giving to the Legatees Security for their Legacies according to the Circumstances, as has been explained in its Place *g*.

f See the 17th Law, ff. de leg. 2. *cited on the second Article.*

g See the 46th Article of the eighth Section, and the seventh Article of the tenth Section of Legacies.

V.

5. Execution of indefinite Dispositions.

The Execution of a Testament consists not only in the Payment of the Legacies, and Acquittance of the other Charges, which are committed to the Executor of the Testament, according as they are regulated in the Testament; but there may be some Dispositions whereof the Destination may depend on the Will of the Executor, or other Person to whom the Testator shall have referred it: as for example, if he had left a Sum of Money to be distributed to poor Families, or to redeem Captives, or to be laid out on other charitable Works, without determining any thing in particular; leaving it to the Person whom he shall have named in his Testament to apply the Charity where he shall think it most proper *h*.

h See the twenty eighth Law, Cod. de Episc. & Cler. *cited on the second Article.*

See the following Article, and the Remark upon it.

VI.

6. Execution of Dispositions which are neglected.

If the Testator having named no body for the Execution of his Testament, the Testamentary Heir should fail to acquit the charitable Legacies left to some Church or Hospital, the Officers of Justice might take care to see the Will of the Deceased executed. But if the Legacy were indefinite, such as that of a Sum of Money to be distributed to poor People, the Testator leaving the Disposal thereof to his Testamentary Heir, he could not be sued at Law for Legacies of this kind; for he may have acquitted them very honestly; and nothing would oblige him to give an account thereof, seeing the Testator had excused him from doing it *i*.

i Si persona non designata testator absolute tantummodo summam legati vel fideicommissi taxaverit quæ debeat memoratæ causæ proficere: vir reverendissimus Episcopus illius civitatis, ex qua testator oritur, habeat facultatem exigendi quod hujus rei gratia fuerit derelictum, pium defuncti propositum, sine ulla cunctatione, ut convenit, impleturus. *l.* 28. §. 1. *C. de Episc. & Cleric.*

According to the Usage in France, it is the Duty of the King's Councel at Law to apply to the Courts of Justice for their Assistance towards the Execution of these sorts of Dispositions, if they are neglected by the Testamentary Heirs, and by the Persons who ought to take care of the said Dispositions, such as the Governors and Administrators of Hospitals, the Ecclesiasticks who are entrusted with the Administration of the Goods belonging to the Churches, and other Persons who may have any Interest in the said Legacies.

[In *England* it belongs most properly to the Bishops of the respective Dioceses, to see that the Legacies left by Testators to charitable Uses be duly applied according to the Intention of the Testators. *Swinburn, Part* 6. §. 1. *Lyndwood de testam. cap. statutum.* And not only in *England*, but in all Christian Countries, ever since the Foundation of Christianity, it has been the peculiar Province of the Bishops to take care of the due Application of Legacies to charitable Uses. *l.* 28. *Cod. de Episcopis & Clericis.*]

VII.

7. The Executor is to give an account.

Seeing the Executor of the Testament is to discharge that Function out of the Stock of Goods which shall be put into his hands either by the Testamentary Heir, or by Decree of a Court of Justice, he is obliged to give an account

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count how he has difpofed of the Goods which have been put into his hands, to produce Acquittances of the Legacies, and of the other Charges, except as to what the Teftator had a mind to truft to his own Integrity, as in the Cafe of the fifth Article; and he may likewife put down in his Account the Charges which he has been at in executing the Teftament *l*.

l This is the Confequence of the Function of the Executor of a Teftament.

TITLE II.

Of an Undutiful Teftament, and of Difherifon.

THE Liberty which the antient *Roman* Law gave to Parents to difinherit their Children without any Caufe, as has been obferved in the Preface to this fecond Part *a*, was followed by fo great a number of Difherifons *b*, that it was found neceffary to fet bounds to it, by giving to the Children who fhould pretend to be unjuftly difinherited, whether by their Fathers, or Mothers, or other Afcendants, the Right of complaining of thofe Difpofitions which were called undutiful, becaufe they were contrary to the Duty of Parents, which ties them to leave their Goods to their Children, who have done nothing to deferve the being deprived of them. And at laft *Juftinian* regulated by an exprefs Law the Caufes which might deferve difinheriting.

They called the Action, which the Law gave to Children againft the Teftaments in which they were difinherited, the *Querele*, that is, the Complaint of Undutifulnefs; and it was permitted likewife to make fuch a Complaint againft exceffive Donations and Marriage-Portions given to fome of the Children or to other Perfons, if the faid Difpofitions were undutiful, that is, if they did not leave to all the Children their Legitime or Child's Part.

Befides the difinheriting, which may be either juft or unjuft, there is another manner of depriving Children of the Inheritance, and that is by not naming them, or making no mention of them in the Teftament, which is called in the *Roman* Law *Preterition*, and is diftinguifhed from an exprefs Difherifon by this Difference, that whereas a Difherifon may be juft if there are juft Caufes for it, Preterition cannot but be unjuft, there being no Caufe affigned.

To foften what a Complaint of Undutifulnefs might contain in it, that might be injurious to the Memory of the Teftator, they gave to this Complaint in the *Roman* Law the Pretext of a Prefumption that the Teftator had not the free ufe of his Reafon, and that it was for want of his right Senfes that he made fuch a Difpofition *c*. But in our Ufage we do not obferve this Precaution, and we charge the Teftator very freely with Inhumanity, Injuftice, and Hardfhip, or with having been influenced by Paffion, and the Inftigations of a Mother-in-Law, or of fome other Perfons.

The fame Equity which made the Complaint of Children to be received againft the undutiful Teftaments of their Parents, made likewife the Complaints of Fathers, and Mothers, and other Afcendants, to be received againft the Teftaments of their Children, who deprived them of their Succeffions without juft caufe, whether by exprefly difinheriting them, or paffing them by without taking any manner of notice of them in their Teftaments.

a See the Preface, n. 7.

b Sciendum eft frequentes effe inofficiofi querelas. *l.* 1. *ff. de inoff. teft.*

c Hoc colore inofficiofo teftamento agitur quafi non fanæ mentis fuerunt ut teftamentum ordinarent. Et hoc dicitur, non quafi vere furiofus vel demens teftatus fit: fed recte quidem fecit teftamentum, fed non ex officio pietatis. Nam fi vere furiofus effet, vel demens nullum eft teftamentum. *l.* 2. *ff. de inoff. teft.*

[*The Plaint, or Action, in the Cafe of an undutiful Teftament, which the Civilians call* Teftamentum inofficiofum, *is not in ufe with us in* England: *For by the Common Law, the Teftator had always a free Will of difpofing of his Goods and Chattels in fuch manner as he thought beft; and it was only by the particular Cuftoms of fome Places that this Power was reftrained. So that the Writ which is called* Breve de rationabili parte bonorum, *which the Wife or Children had againft the Executors for the Recovery of part of the Goods, was not general throughout the whole Kingdom, but peculiar to certain Countries, where the Cuftom was, that Debts being paid, the Remainder fhould be divided into three equal Parts; to wit, one part to the Wife, the other to the Children, and the third to be left at the Will of the Teftator.* Cowel's Inftit. Book 2. Tit. 18.

This Cuftom of referving a reafonable Part of the Goods to the Widows and Children of Teftators, is ftill in force in the City of London, *as to the Widows and Children of Freemen. But in other Parts of the Kingdom where this Cuftom did formerly take place, it has been abolifhed by Act of Parliament; as by* Stat. 4, 5 Gul. & Mar. cap. 6. *The Inhabitants*

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tants of the Province of York *are impowered to dispose of their personal Estates by their Wills, notwithstanding the Custom of that Province as to the reasonable Part claimed by the Widows and Children. But this Act excepts the Cities of* York *and* Chester. *However the same was afterwards extended to the Freemen of the City of* York *by* Stat. 2° & 3° Annæ, cap. 5. *And by Statute* 7° & 8° Gul. 3. cap. 38. *the same Custom of the Reasonable Part was abolished in the Principality of* Wales.

By the Law of Scotland, *the Testator cannot by his Testament deprive his Wife or Children of their Legitime or Reasonable Part.* Stair's Instit. of the *Law of Scotland*, lib. 3. tit. 8. num. 32. Mackenzie's Instit. book 3. tit. 9.]

SECT. I.

Of the Persons who may complain of a Testament or other undutiful Disposition.

WE shall not insert in this Section that Law of the *Romans* which allowed Bastard Children to complain of the Undutifulness of the Testament of their Mothers *a*. For in *France* Bastards are incapable of all legal Successions, as has been observed in its Place *b*.

It is to be remarked, that we ought not to reckon among the Children who are allowed to complain of their not being inserted in the Testaments of their Fathers and other Ascendants, Daughters who have renounced their Right to the Successions: For seeing they cannot succeed to one who dies intestate while there are Male Children, or any descended of Males, there is no Obligation to call them to the Succession by Testament *c*.

a *l.* 29. §. 1. *ff. de inoff. testam.*

b *See the eighth Article of the second Section of Heirs and Executors in general.*

c *See the Remark on the first Article of the second Section, in what manner Children succeed.*

[By the Law of *England* likewise, Bastard Children are incapable of all legal Successions by Proximity of Blood, and cannot so much as succeed to their own Mothers dying Intestate: Because a Bastard in Judgment of Law is *quasi nullius filius*, and so cannot be Heir to any Person. And for the same reason it is, that where the Statute of 32 *H.* 8. *chap.* 1. of Wills, speaketh of Children, Bastard Children are not reckoned to be within that Statute; and the Bastard of a Woman is no Child within that Statute. *Coke* 1. *Instit. fol.* 123. *a.*]

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I.

1. Children cannot be disinherited without a just Cause.

Testators who have Children, or other Descendants, whom the Law calls to succeed to them if they die intestate, according to the Rules which have been explain'd in their place *a*, cannot disinherit them, unless they have some one of the Causes which shall be explained in this Title *b*.

a *See the second Section, in what manner Children succeed.*

b Primum itaque illud est cogitandum, quia testantibus aliis quidem necessitatem imponit lex distribuere quandam partem personis quibusdam, tanquam hoc secundum ipsam naturam eis debeatur, quale est filiis & nepotibus, & patribus atque matribus. *Nov.* 1. *in præf.* §. 2.

Liberis de inofficioso licet disputare. *l.* 1. *ff. de inof. testam.*

Sancimus igitur non licere penitus patri vel matri, aut avo vel aviæ, proavo vel proaviæ, suum filium vel filiam, vel cæteros liberos præterire, aut exhæredes in suo testamento facere, nisi forsan probabuntur ingrati. *Nov.* 115. *c.* 3.

See the first, second and third Articles of the second Section.

II.

2. Neither Fathers, nor Mothers, nor other Ascendants.

The Testators who have no Children, and who are survived by their Fathers, or Mothers, or other Ascendants, cannot disinherit them, unless for some one of

of the Causes which shall be likewise explained in this Title *c*.

c Omnibus tam parentibus quam liberis de inofficioso licet disputare. *l.* 1. *ff. de inoff. testam.* Nam etsi parentibus non debetur filiorum hæreditas, propter votum parentum, & naturalem erga filios caritatem; turbato tamen ordine mortalitatis, non minus parentibus quam liberis pie relinqui debet. *l.* 15. *ff. de inoff. testam.*

Sancimus non licere liberis parentes suos præterire, aut quolibet modo a rebus propriis, in quibus habent testandi licentiam, eos omnino alienare: nisi causas quas enumeravimus in suis testamentis specialiter nominaverint. *Nov.* 115. *c.* 14. See the fourth Article of the second Section.

III.

3. Preterition of Children hath the same Effect as Disherison without cause.

If a Father, or other Ascendant, without expresly disinheriting one of his Children, makes no mention of him in his Testament; this Silence, which is called *Preterition*, is considered in the same manner as Disherison which has no Cause *d*.

d Hujus verbi *de inofficioso testamento* vis illa est, docere immerentem se, & ideo indigne *præteritum*, vel etiam exhæreditatione summotum. *l.* 5. *ff. de inoff. testam. l.* 3. *eod. Nov.* 115. *c.* 3. See the Texts quoted on the first Article.

IV.

4. And also the Preterition of Parents.

The *Preterition* of Parents in the Testaments of their Children, to whom they have a Right to succeed if they die intestate, if there were no Descendants to exclude them from the Succession, hath the same Effect as the *Preterition* of Children in the Testaments of their Fathers. For altho by the Order of Nature, Parents are not called to succeed to their Children, and that they ought not to expect this sorrowful Succession; yet it is just, that if contrary to this Order the Parents survive their Children, they should not be deprived of their Inheritance *e*.

e See the Texts cited upon the first Article, as also upon the third Article.

V.

5. Parents cannot disinherit their Children, altho they leave them their Child's Part by other Dispositions.

Altho a Testator who has Children had left them their Legitime or Child's Part by some Donation, Legacy, or other Disposition; yet he may not disinherit them by his Testament, or pass them by without taking any notice of them therein. But he ought to institute them Heirs or Executors in his Testament, unless he mentions therein some just Causes for disinheriting them *f*.

f Sancimus non licere penitus patri vel matri, aut avo vel aviæ, proavo vel proaviæ, suum filium vel filiam, vel cæteros liberos præterire aut exhæredes in suo facere testamento: nec si per quamlibet donationem, vel legatum, vel fideicommissum, vel alium quemcunque modum eis dederit legibus debitam portionem: nisi forsan probabuntur ingrati: & ipsas nominatim ingratitudinis causas parentes suo inseruerint testamento. *Nov.* 115. *c.* 3.

¶ It may be remarked on this Text, that the Interpreters, even the most skilful among them, have been of opinion, that the Meaning thereof is, That to make the Testament of a Father valid, it is necessary that what he leaves to his Children, should be given them by way of Institution; and that otherwise the Testament in which their filial Portion, or Child's Part, is left them without the Quality of Heir, would be null. And this Opinion is so universal, that it passes for a Rule; altho it be certain that the Author of those Extracts which are commonly called Authenticks, taken out of the Novels of *Justinian*, and which are inserted in the Places of the Code to which they have relation, seems not to have understood this Text in that Sense. For in the Authentick, *non licet C. de lib. præter.* which is taken from thence, he has made no mention of the Necessity of leaving the filial Portion to the Children by way of Institution: which he ought not to have failed to do, if it had been his Opinion, seeing in the authentick *Novissima C. de inoff. testam.* taken out of the eighteenth Novel, *chap.* 1. he had been careful to insert in it what was ordained by the said Novel, that the filial Portion might be left to them not only by way of Institution, but also by a bare Legacy, or a fiduciary Bequest. *Sive quis illud Institutionis modo, sive per legati, idem est dicere, & si per fideicommissi relinquat occasionem.* These are the Terms of that eighteenth Novel, which he has contracted in that authentick *Novissima*, in these words, *quoquo relicti titulo*; which is directly contrary to what this Opinion will have to have been regulated by the hundred and fifteenth Novel. So that this Author having conceived in these Terms the authentick *Novissima*, and having in the authentick *Non licet* made no mention of the Necessity of this Institution, it seems plain enough that he did not believe that this hundred and fifteenth Novel ought to be taken in this Sense. And if we examine carefully the Terms of this hundred and fifteenth Novel, either in the original *Greek*, or in the *Latin*, we shall not find that it is said there that the legitime or filial Portion ought to be left by way of Institution; but only that it is

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is there said, that Fathers and Mothers, and other Ascendants, cannot disinherit their Children, nor pass them over in silence in their Testaments, even altho they had left them their filial Portion some by Donation, Legacy, or fiduciary Bequest, or in some other manner whatsoever, unless there were just Causes for disinheriting them, and that the same were expressed in the Testament. *Sancimus non licere liberos præterire, aut exhæredes in suo facere testamento; nec, si per quamlibet donationem, vel legatum, vel fideicommissum, vel alium quemcunque modum, eis dederit legibus debitam portionem: Nisi forsan probabuntur ingrati, & ipsas nominatim ingratitudinis causas parentes suo inseruerint testamento.* Which Words seem only to imply, that it is not lawful to disinherit Children, or pass them over in silence in a Testament, altho by other Dispositions, of what nature soever they may be, the Parent had given them their filial Portion, as by Donations or Codicils; and that if after these Dispositions a Father, or other Ascendant, makes a Testament, he is obliged to make mention therein of his Children, and cannot disinherit them without just Cause. And to shew that this Sense is altogether natural, we might add, that seeing *Justinian* speaks in this place only of a Testament which should contain a Disherison or Preterition of Children, as appears evidently from the Words which have been just now quoted, it seems to follow from thence, that when he says that disinheriting was not allowed by a Testament, altho the Children had their Child's Part left them by Donations, Legacies, or fiduciary Bequests, he meant only other Dispositionss, and not the Testament it self, in which he supposes them to be disinherited or omitted. For can any one say that a Father, who disinherits his Son, could ever think of leaving him his filial Portion by a Legacy or fiduciary Bequest, in the same Testament by which he disinherits him? And much less can this be said of a Testament wherein the Son is passed over in silence by a *Preterition*. So that we may say, that *Justinian* having said that one cannot disinherit, nor pass over in silence, Children in a Testament, even altho their filial Portion had been left them by a Donation, a Legacy, or a fiduciary Bequest, or in any other manner whatsoever, he did not mean that this other manner of giving the filial Portion should be in the Testament it self by which the Child is disinherited or omitted; but that he meant only to ordain thereby, that a Father, or other Ascendant, should not only not have power to disinherit his Children without Cause, but even not to pass them over in silence in a Testament; and that such a Testament should be null, altho the Testator had given to his Children by some other Title their Child's Part. But even altho that other Title should be a Testament, by which the Children had been instituted Heirs or Executors, whether for their Child's Part, or otherwise, that Institution would not hinder the Nullity of a second Testament, in which they should be passed over in silence, or disinherited; which is the Subject-Matter of *Justinian*'s Rule, explained in the Words above cited, and which regard only the Nullity of a Preterition, or unjust Disherison, and which he judges to be such independently of all other Dispositions, by which the legal Portion due to the Children may have been left them.

We may likewise add on the same Subject, that *Justinian* has been careful to observe in several Places, that he had not suffered any thing to be put into his Code, which was contrary to other Dispositions therein contained; and that he has renewed the same Observation on the Matter concerning the Successions of Children in one of his Novels *a*, where he proves that he has not abrogated a Law of the Emperor *Theodosius*; and that it cannot be pretended to be contrary to one of his, for this reason, because that Law of *Theodosius* is in his Code. From whence one might gather, if this Declaration of *Justinian*'s were perfectly sure, that it was not his Intention in this hundred and fifteenth Novel to make it necessary that the Children should be instituted Heirs, in order to prevent a Complaint of Undutifulness; since, besides the eighteenth Novel, we find in the Code of this Emperor many Laws, and even some of his own, which forbid the Complaint of Undutifulness, when the Testator has left any thing to his Children by what Title soever, whether of Legacy or fiduciary Bequest *b*; and which in this Case give the Children only a Right to demand a Supplement of the Portion due to them by Law.

We have not made this Remark in opposition to the ordinary Sense every

a *Nov.* 158. *c.* 1.

b *l.* 29, 30, 31, 32. *C. de inoff. test.* *v.* *l.* 8. §. 6. *ff. eod.*

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body gives to this hundred and fifteenth Novel; nor to condemn the Usage of this Sense thereof, which has passed into a Rule, since it may be said otherwise that this Rule is altogether equitable, and that it is just, that the Children being called by their Birth to the Inheritance of their Parents, it should be left to them with the Title of Heirs, which Nature and the Laws give them. And this Rule would be particularly just in the Cases where Parents should call to their Succession other Heirs together with their Children. But if a Father, having many Children under Age, had instituted for his universal Heiress their Mother his Wife, of whom there was no reason to fear that she would have other Children by a second Husband, and that he had failed to make use of the Name of Heirs with relation to his Children, fixing only their filial Portion or Child's Part at certain Sums; there would be some Inconvenience in annulling a Testament of this nature for that Defect: As there would be likewise an Inconvenience to annul a Testament, wherein a Father had made a Partition of his Goods among his Children, without giving them in the Testament the Name of Heirs, if no other Fault were found in it. And seeing it happens often in some Provinces which are governed by the written Law, that Fathers make such Dispositions for the Good of their Children who are under Age, instituting their Widows Heiresses, and regulating at certain Sums the Portions due to their Children by Law, in order to avoid the Charges and Trouble of Seals, Inventaries, and Partitions, and upon other reasonable Considerations; we have thought it proper to make this Observation; and we have been likewise induced thereto by the Fidelity that is due to the true Sense of the Laws.

VI.

6. Undutiful Testaments are annulled as to the undutiful Institution.

The Testaments which are found to be undutiful, either because Children or Parents are omitted in it, or because they are unjustly disinherited, are annulled as to the undutiful Institution *g*.

g Si ex causa de inofficiosi cognoverit judex, & pronuntiaverit contra testamentum, nec fuerit provocatum, ipso jure rescissum est, & suus hæres erit secundum quem judicatum est. *l.* 8. §. 16. *ff. de inoff. testam.* *V. Nov.* 115. *c.* 3. *in f. & cap.* 4. *in f.*

See hereafter the fifth Article of the fourth Section, and the sixteenth Article of the fifth Section of Testaments.

VII.

7. How the Complaint of Undutifulness passes to the Heirs of the Person disinherited.

If the Person who had a Right to complain of an undutiful Testament had Children, and chanced to die before he had exercised his Right, and made his Demand; the Children might complain of the said Testament in the Right of the Deceased, unless he had approved the Testament before his Death *h*. But if there were other Heirs, they could not exercise the Complaint of Undutifulness, unless the Deceased had enter'd the Complaint in his own Life-time *i*.

h Jubemus in tali specie eadem jura nepoti dari quæ filius habebat, et si præparatio facta non est ad inofficiosi querelam instituendam, tamen posse nepotem eandem causam proponere. *l.* 34. *C. de inoff. testam.* Nisi pater, adhuc superstes, repudiavit querelam. *d. l. in f.*

Si quis instituta accusatione inofficiosi decesserit, an ad hæredem suum querelam transferat? Papinianus respondit, (quod & quibusdam rescriptis significatur) si post agnitam bonorum possessionem decesserit, esse successionem accusationis. Et si non sit petita bonorum possessio, jam tamen cœpta controversia, vel præparata: vel si cum venit ad movendam inofficiosi querelam decessit, puto ad hæredem transire. *l.* 6. §. *ult. ff. eod.*

i Ad extraneos hæredes tunc tantummodo (*transmittet querelam*) quando antiquis libris incertam faciet præparationem. *l.* 36. *in f. C. eod.*

¶ It may be remarked on this Article, that it follows from the first of the Texts that are cited on it, that the Children of the Person disinherited are excluded as well as he from the Inheritance, and that therefore when a Father disinherits his Son who has Children, the Disherison which deprives the Son of the Goods of the Testator, cuts off likewise his Children, and all that are descended of him, from having any share or benefit therein. For if it were the Intention of the Law to exclude from the Succession only the Person of the Son disinherited, and not his Children, and if they might succeed in their own Right, in default of their Father who is disinherited, it would not be necessary to give them the Right of complaining of the Undutifulness of the Testament after the Death of their Father, unless it were only to vindicate the Honour of his Memory, which is not the Case of this Text; the Sequel of which shews, that the Son who is disinherited transmits to his Children the same Right which he had to complain of the Testament. From whence it follows, that the Law giving this Right to the Children, it supposes that in their own Persons they have no share in the Inheritance

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tance from which their Father has been excluded, unless they justify his Memory, and get the Disherison annulled. And altho it be said in another Law, that the Son who is disinherited is considered as being dead, and that his Children succeed in his place, *Debent nepotes admitti nam exhæredatus pater eorum pro mortuo habetur. l. 1. §. 5. ff. de conjung. cum emanc. lib. ejus*, yet this Text has relation to a sort of disinheriting which was frequent in the antient *Roman* Law, and had nothing odious in it, not being founded on the Ingratitude of the Children; but it turned sometimes to their Advantage. *Multi non notæ causa exhæredant filios, nec ut eis obsint, sed ut eis consulant (ut puta impuberibus) eisque fideicommissam hæreditatem dant. l. 18. ff. de liber. & post.* But the Disherison which a Son may have deserved by his bad Conduct, is a Punishment which ought to extend to his Children; for otherwise it would be useless, and would not even affect the Son who is disinherited, since he would have by means of his Children the Use of the Goods which he could not have himself.

VIII.

8. An involuntary Preterition.

If a Father or Mother, who had two or more Children, having disposed of their Goods among them by a Testament, happen'd afterwards to have another Child, of which no mention was made in the Testament, and died without altering it; this Testament would do no prejudice to the Rights of the said Child. For if it was thro Negligence that the said Testament was not reformed, it would be an undutiful one: And if it was a pure Effect of a sudden and unforeseen Death; as if it was a Mother who died in Child-bed of the said Child, whose Birth she perhaps waited for, in order to settle her Will; the Presumption that she could not have for the said Child any other than the tender Sentiments of a Mother, would supply the want of a Testament, which this unforeseen Accident had put her out of a Condition to make. So that this Child would still have the same Portion of the Inheritance which he ought to have had, if there had been no Testament at all *l*. But if the said Father or Mother, having no Children at the Time of making their Testament, had instituted other Heirs or Executors, it would be annulled by the Birth of this Child, either as being an undutiful Testament, or as being vacated by the said Birth *m*.

l Si mater filiis duobus hæredibus institutis, tertio post testamentum suscepto, cum mutare idem testamentum potuisset, hoc facere neglexisset: merito, utpote non justis rationibus neglectus de inofficioso querelam instituere poterit. Sed cum eam in puerperio vita decessisse proponas, repentini casus iniquitas per conjecturam maternæ pietatis emendanda est. Quare filio tuo cui nihil præter maternum fatum imputari potest, perinde virilem portionem tribuendam esse censemus, ac si omnes filios hæredes instituisset. Sin autem hæredes scripti extranei erant, tunc de inofficioso testamento actionem instituere non prohibetur. *l. 3. C. de inoff. test.*

See the sixth Article of the fifth Section of Testaments.

IX.

9. If of two or more Children, one alone is disinherited, without being particularly named, the Disherison is null.

If a Father, who had two or more Children, having a mind to disinherit one of them, did express himself in such a manner as not to distinguish him from the other Children, saying only that he disinherited his Son, without specifying him by Name, or describing him by some other Mark; this Disherison, which would not fall upon one Son more than the others, would be without effect, even as to him whom it might be reasonable to presume that the Father intended to deprive of his Succession *n*.

n Nominatim exhæredatus filius & ita videtur, filius meus exhæres esto, si nec nomen ejus expressum sit: si modo unicus sit. Nam si plures sunt filii, benigna interpretatione potius à plerisque respondetur, nullum exhæredatum esse. *l. 2. ff. de lib. & post.*

X.

10. Provision for the Son who is disinherited, pending the Appeal from the Sentence given in his favour.

If the Son who is disinherited having procured the Testament to be declared undutiful by a Sentence, he who was instituted Heir or Executor therein had appealed from the Sentence, and that pending the Appeal, the Son should demand a Provision of Alimony out of the Estate; this Provision would be decreed him according to the Value of the Estate, and his Quality *o*.

o De inofficioso testamento nepos contra patruum suum, vel alium scriptum hæredem, pro portione egerat & obtinuerat. Sed scriptus hæres appellaverat. Placuit, interim, propter inopiam pupilli, alimenta pro modo facultatum, quæ per inofficiosi testamenti accusationem pro parte ei vindicabantur decerni: eaque adversarium ei subministrare necesse habere, usque ad finem litis. *l. 27. §. 3. ff. de inoff. testam.*

XI.

11. The Portion of a Child whose Disherison

If of two Children whom a Father had disinherited, one of them enters no Complaint against it, he renouncing the Inheritance for his part; or that having

subsists, accrues to the other Children.

having entered his Complaint, he has been declared to be duly and justly disinherited, and the other disinherited Child on his part gets the Testament to be annulled, and comes in for his share of the Inheritance with the other Children; every one of them will have in the Partition of the Estate his Portion according to their Number, without taking him in who is found to be justly disinherited, or who has renounced. For he having no share in the Inheritance, the Portion which he ought to have had remains in the Mass of the Estate, and accrues to him who was unjustly disinherited in conjunction with the other Children. And if this Child should happen to be the only one remaining, he would have the whole Estate *p*.

p Qui repudiantis animo non venit ad accusationem inofficiosi testamenti, partem non facit his qui eandem querelam movere volunt. Unde si de inofficioso testamento patris, alter ex liberis exhæredatis ageret, quia rescisso testamento alter quoque successionem ab intestato vocatur: & ideo universam hæreditatem non recte vindicasset, hic si obtinuerit, uteretur rei judicatæ auctoritate: quasi centum viri hunc solum filium in rebus humanis esse nunc, cum facerent intestatum crediderint. *l. 17. ff. de inoff. test. V. l. 16. eod.* Exhæredatus pro mortuo habetur. *l. 1. §. 5. ff. de conjung. cum emanc. lib. ej.*

If one of the Sons disinherited had only delayed to bring his Action, without approving of his being disinherited, or renouncing the Inheritance, his Portion would not accrue to the other Children by this Silence. But the others might oblige him to explain himself; and it would be necessary to have the Question about his Disherison judicially discussed, in case he should not acquiesce under it. V. l. 8. §. 8. ff. de inoffic. testam.

XII.

12. Children to whom their Parents leave less than their Legitime or Child's Part, have the Supplement of it.

If the Children have no other ground of Complaint against the Testaments of their Parents, but that the Portion left them therein is not so large as what they have a Right to by Law, or that the Testator hath made his Disposition which relates to them to depend on some Condition, or on a Time which suspends the Effect thereof; these would not be sufficient Grounds for having the Will declared void, on account of its being undutiful, but they could only demand the Supplement of the Portion due to them by Law; and the Conditions, or other Causes of Delay, would be without effect, so as that they might have their whole Right at the time of the Death by which they acquire it *q*.

q Quoniam in prioribus sanctionibus illud statuimus, ut, si quid minus legitima portione his derelictum sit, qui ex antiquis legibus de inofficioso testamento actionem movere poterant, hoc repleatur, ne occasione minoris quantitatis testamentum rescindatur: hoc in præsenti addendum esse censemus, ut, si conditionibus quibusdam vel dilationibus, aut aliqua dispositione moram, vel modum vel aliud gravamen introducente eorum jura, qui ad memoratam actionem vocabantur, immunita esse videantur, ipsa conditio, vel dilatio, vel alia dispositio moram vel quodcumque onus introducens, tollatur: & ita res procedat quasi nihil eorum testamento additum esset. *l. 32. C. de inoff. testam. l. 29, 30, & 31. eod.*

See the fifth Article, and the Remark that is there made on it.

XIII.

13. The Favour of the Person who is instituted Heir or Executor, will not make the Disherison to subsist.

Whatever may be urged, either on the score of Piety, Duty, or other Consideration whatsoever, in favour of the Disposition of a Testator who had unjustly disinherited one of his Sons, the Testament would nevertheless be annulled. For the Institution of Children is the first Duty of Parents in their Testaments *r*.

r Si Imperator sit hæres institutus, posse inofficiosum dici testamentum, sæpissime rescriptum est. *l. 8. §. 2. ff. de inoff. testam.*

The Case of this Text appears to be so different from our Usage, that we did not think it proper to give such an Instance. For who with us, to make the Disherison of his Children to subsist, would ever think of instituting the King his Heir? And yet this Case must needs have been very frequent at Rome, *seeing it is said in the Text that it has been often decided, that altho the Prince were instituted Heir by an undutiful Testament, yet that should be no hindrance why a Complaint against it, as being undutiful, should not be received.*

XIV.

14. Brothers and Sisters cannot complain of a Testament, as being undutiful, unless the Person instituted Heir or Executor be an infamous Person.

Of all the Persons whom the Law calls to the Successions of Persons dying intestate, it is only those who are in the Line of Ascendants and Descendants from the Testator who may complain of the Testament as being undutiful. And this Right does not pass to any of the Collaterals, not even to Brothers and Sisters: And they cannot complain of the Testaments of their Brothers or Sisters who institute other Heirs or Executors, unless the Institution were such as were contrary to good Manners and Decency, because of the Quality of the Person who is instituted Heir or Executor, as if it were an infamous Person *s*.

s Cognati proprie qui sunt ultra fratrem, melius facerent si se sumptibus inanibus non vexarent; cum obtinere spem non haberent. *l. 1. ff. de inoff. test.*

Nemo eorum qui ex transversa linea veniunt, exceptis fratre & sorore, ad inofficiosi querelam admittatur. *l. 21. C. eod.*

Fratres vel sorores uterini ab inofficiosi actione contra testamentum fratris vel sororis penitus arceantur. Consanguinei autem, durante agnatione (vel non) contra testamentum fratris sui vel sororis de inofficioso quæstionem movere possunt, si scripti

heredes

hæredes infamiæ, vel turpitudinis, vel levis notæ macula aspergantur. *l.* 27. *C. eod.*

Justinian *having abolished the Difference between the* Agnati *and* Cognati *by his hundred and eighteenth Novel, why should not the Brothers by the Mother's side have the same Right as Brothers by the Father's side? And would it not also be equitable, that the other near Relations beyond the Degree of Brothers, should have a Right to annul an infamous Institution, since it would be nevertheless contrary to Decency and good Manners, and against the Spirit of the Law, altho the Testator should have neither Brothers nor Sisters?*

SECT. II.

Of the Causes which render a Disherison just.

The CONTENTS.

1. *Children cannot be disinherited without a just Cause.*
2. *Two sorts of Causes of disinheriting.*
3. *Divers Causes of disinheriting Children.*
4. *Divers Causes of disinheriting Parents.*
5. *The Causes of disinheriting ought to be proved.*
6. *The Husband is not deprived of his Wife's Dowry, for the Ingratitude of his Wife towards the Parents who gave it.*

I.

1. Children cannot be disinherited without a just Cause.

SEEING Nature and the Laws which call Children to the Succession of their Parents, look upon the Goods of the Parents as belonging already to the Children, even in the Life-time of their Parents; they cannot be deprived of them, if they have not deserved such a Punishment, which taking from them the Goods, does at the same time stain their Honour, and exposes them to yet greater Evils. Thus the Laws have restrained the Liberty of disinheriting, of which Fathers might be apt to make a bad Use *a*, either thro an unjust Passion, or by the Impressions of a Mother-in-Law, or of other Persons *b*: And they have regulated the Causes which may deserve disinheriting *c*.

a Institutiones benigne accipiuntur, exhæredationes autem non adjuvandæ. *l.* 19. *in f. ff. de liber. & post hæred. inst. vel exhæred.*

Hujus verbi *de inofficioso*, vis illa est, docere immerentem se, & ideo indigne præteritum, vel exhæredatum. *l.* 5. *ff. de inoff. test.*

b Inofficiosum testamentum dicere, hoc est, allegare quare exhæredari vel præteriri debuerit. Quod plerumque accidit, cum falso parentes instimulati, liberos suos vel exhæredant, vel præterennt. *l.* 3. *eod.*

Non est enim consentiendum parentibus qui injuriam adversus liberos suos testamento inducunt. Quod plerumque faciunt maligne circa sanguinem suum inferentes judicium, novercalibus delinimentis instigationibusque corrupti. *l.* 4. *eod.*

Cum te pietatis religionem non violasse, sed mariti coniugium quod fueras sortita distrahere noluisse, ac propterea offensum atque iratum patrem ad exhæredationis notam prolapsum esse dicas, inofficiosi testamenti querelam inferre non vetaberis. *l.* 18. *C. eod.*

c See the Articles which follow.

II.

2. Two sorts of Causes of disinheriting.

The Causes of disinheriting Children may be distinguished into two sorts: One, of those which concern the Person of the Parents, as if a Son has attempted any thing against the Life of his Father: And the other is of such as, without attempting any thing directly against the Persons of the Parents, may deserve their Displeasure; as, if a Son engages himself in an infamous Profession, as shall be mentioned in the following Article. But altho these Causes be different, according to these two Views, yet the Laws give the Name of Causes of Ingratitude to all those which may deserve disinheriting *d*; qualifying with this Name every thing that is contrary to the Duty which Children owe to their Parents. For this Duty implies the abstaining from every thing that may justly draw upon the Children the Wrath of their Fathers.

d Causas autem ingratitudinis has esse decernimus. Si quis, &c. *Nov.* 115. *C.* 3.

III.

3. Divers Causes of disinheriting Children.

Fathers and Mothers, and other Ascendants, may disinherit their Children if they have attempted to take away their Life, either by Poison, or by other ways *e*: If they have struck them *f*, or abused them, or committed any grievous Offence against them *g*: If they have not relieved them out of Prison, by engaging to present them in Judgment, or to pay the Debt for them as far as their own Circumstances will allow them *h*: If they have suffered them to remain in Captivity, while they were able to redeem them *i*: If the Father having been mad, they had neg-

e Si vitæ parentum suorum per venenum, aut alio modo insidiari tentaverit. *Nov.* 115. *c.* 3. §. 5. See on this Article the third Section of Heirs and Executors in general.

f Si quis parentibus suis manus intulerit. *d. c.* 3. §. 1.

g Si gravem & inhonestam injuriam eis injecerit. *d. c.* §. 2.

h Si quemlibet de prædictis parentibus inclusum esse contigerit, &c. *d. c.* §. 8.

i Si unum de prædictis parentibus in captivitate detineri contigerit, &c. *d. c.* §. 13.

lected

lected to perform those Offices towards him which that Condition may have required *l*: If by any Violence, or other unlawful way, they had hindred him from disposing of his Estate by Will: And if the Father had died without being able to make his Will, and to disinherit the Son who had been guilty of this Violence, this Son would nevertheless be deprived of the Inheritance *m*: If they have accused their Parents of other Crimes besides Treason against the King, or the State *n*: If a Son has committed Incest with his Mother-in-Law *o*: If he had contracted any Familiarity with Scelerates, and led the same kind of Life with them *p*: If he has taken up an infamous Profession which his Father did not follow *q*: If a Daughter prefers an infamous Life to a married State *r*.

l Si quis de prædictis parentibus furiosus fuerit, &c. *d. c.* §. 12.

m Si convictus fuerit aliquis liberorum ex eo quia prohibuerit parentes suos condere testamentum, &c. *d. c.* §. 9. See the tenth Article of the third Section of Heirs and Executors in general.

n Si eos in criminalibus causis accusaverit, quæ non sunt adversus principem, sive rempublicam. *d. c.* §. 3.

Si delator contra parentes filius extiterit, & per suam delationem gravia eos dispendia fecerit sustinere. *d. c.* §. 7.

o Si novercæ suæ filius sese immiscuerit. *d. c.* §. 6.

p Si cum maleficis hominibus ut maleficus versatur. *d. c.* §. 4.

It is in the Greek μετὰ φαρμακῶν cum veneficis. *But whatever Sense we give to this Word, it would seem that this Cause of disinheriting ought not to be confined to the frequenting of the Company, and imitating the Example of one kind only of wicked Persons.*

q Si præter voluntatem parentum inter arenarios, vel mimos sese filius sociaverit; & in hac professione permanserit: nisi forsitan etiam parentes ejusdem professionis fuerint. *d. c.* §. 10.

r Si aliqui ex prædictis parentibus volenti suæ filiæ, vel nepti maritum dare, & dotem secundum vires substantiæ suæ pro ea præstare, illa non consenserit, sed luxuriosam degere vitam elegerit. *d. c.* §. 11. *v. l.* 19. *C. de inoff. test.*

We have not inserted in this Article the last of the Causes of disinheriting, which Justinian *has collected in this hundred and fifteenth Novel, which is that of Heresy. For the Usage of this Cause having ceased for a long time in* France, *whilst the Protestants had the free Exercise of their Religion, it hath ceased in the present Situation of Affairs for the contrary Reason, in that the late Edict and Declarations have taken away from them that Liberty of Conscience which they formerly enjoyed.*

Altho Justinian *had restrained the Causes for disinheriting Children to those which we have just now explained, and had rejected all others, yet we have in* France *another Cause of disinheriting brought into use by the Ordinances, which have given Permission to Fathers to disinherit their Children who marry against their Consent, allowing only Sons after they have accomplished thirty Years of Age, and Daughters after they are past Five and twenty, to marry themselves, after they have in a dutiful manner desired the Counsel and Advice of their Fathers and Mothers a. And might not there be other just Causes of disinheriting? As, for instance, if a Son had attempted to murder his Mother-in-Law, his Father's Wife: If on any occasion he had failed in any essential Duty towards his Parents, such as to furnish them with necessaries in their Wants.*

a Edict of *Henry* II. in the Year 1556. Ordinance of *Blois*, Art. 41.

IV.

4. Divers Causes of disinheriting Parents.

Children cannot disinherit their Parents, except where they have a just Cause for it; as, if they have attempted any thing against their Life *s*: If they have put them in danger of losing it by some Accusation, except it be in the Case of Treason, mentioned in the foregoing Article *t*: If the Father has been guilty of Incest with the Wife of his Son *u*: If the Parents have imployed unlawful means to hinder their Children from making their Testaments *x*: If they have abandoned them in their Madness *y*, or in their Captivity *z*: And if the Father or Mother have attempted to take away the Life or Senses, the one of the other, by Poison, or otherwise, their common Child may disinherit the Author of such a Crime *a*.

s Si venenis, aut maleficiis, aut alio modo parentes filiorum vitæ insidiati probabuntur. *Nov.* 115. *c.* 4. §. 2.

t Si parentes ad interitum vitæ liberos suos tradiderint; citra tamen causam quæ ad majestatem pertinere cognoscitur. *d. c.* 4. §. 1.

u Si pater nurui suæ sese immiscuerit. *d. c.* 4. §. 3.

x Si parentes filios suos testamentum condere prohibuerint, in rebus in quibus habent testandi licentiam. *d. c.* §. 4.

y Si liberis vel uno ex his in furore constituto, parentes eos curare neglexerint. *d. c.* 4. §. 6.

z His casibus etiam cladem captivitatis adjungimus, &c. *d. c.* 4. §. 7.

a Si contigerit autem virum uxori suæ ad interitum, aut alienationem mentis, dare venenum: aut uxorem marito, vel alio modo alterum vitæ alterius insidiari; tale quidem, utpote publicum crimen constitutum, secundum leges examinari, & vindictam legitimam promereri decernimus: liberis autem esse licentiam nihil in suis testamentis de facultatibus suis illi personæ relinquere quæ tale scelus noscitur commisisse. *d. c.* 4. §. 5.

V.

5. The Causes of disinheriting ought to be proved.

It is not enough to justify the disinheriting, that the Parents, or the Children, mention the Causes of it in their Testaments; but the Persons who are instituted Heirs or Executors ought to prove the Facts upon which the disinheriting is grounded: And if they prove them not, it will be null *b*.

b By the antient Roman *Law, the Son who was disinherited, and who had a mind to bring his Complaint against it, was obliged to make it appear that*

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that he was unjustly disinherited. Hujus verbi *de inofficioso* vis illa est, docere immerentem se & ideo indigne præteritum, vel etiam exhæredatione summotum. *l.* 5. *ff. de inoff. test.* Liberi de inofficioso querelam contra testamentum paternum moventes, probationem debent præstare, quod obsequium debitum jugiter prout ipsius naturæ religio flagitabat, parentibus adhibuerint: nisi scripti hæredes ostendere maluerint ingratos liberos contra parentes extitisse. *l.* 28. *C. de inoff. test. But* Justinian *ordered that the Causes of disinheriting should be proved,* nisi forsan probabuntur ingrati. *Nov.* 115. *c.* 3. *And it is also the general Rule, that no Accusation is regarded unless it be proved.*

VI.

6. The Husband is not deprived of his Wife's Dowry, for the Ingratitude of his Wife towards the Parents who gave it.

Altho Parents may deprive their ungrateful Children of their Estate, and even revoke Donations which they may have made in their favour, as has been said in its place *c*; yet if a Daughter who was endowed by her Father or Mother, or any other Ascendant, had fallen into the Crime of Ingratitude, the Marriage Portion that was given or promised to the Husband would nevertheless be due to him. For as to him, the Charges of the Marriage which he is bound to bear, are a just Title for him to keep the said Marriage Portion, or to demand it, without any regard to the Fact of his Wife *d*.

c See the second Article of the Section of Donations.

d Patrona dotem pro liberta jure promissam, quod extiterit ingrata, non retinebit. *l.* 69. §. 6. *ff. de jure dot. v. l.* 24. *C. eod.*

SECT. III.

Of other Causes which make the Complaint against a Testament, as being undutiful, to cease.

1. *The Complaint against a Testament, as being undutiful, ceases by the Approbation of the Testament.*
2. *If the Person disinherited, being a Legatee, receives the Legacy, he approves of the Disherison.*
3. *What a Guardian does for his Minor ought not to hurt himself, nor what he does for himself to be of any Prejudice to his Minor.*
4. *He who approves of the Testament by any Act, is excluded from entring a Complaint against it, as being undutiful.*
5. *This Complaint prescribes in five Years time, if there be no just Cause of Excuse for the Delay.*
6. *If the Action of Complaint is let drop for want of Prosecution, it is not afterwards received.*
7. *The Complaint on the score of Undutifulness, does not exclude the Action on the Head of Forgery, nor the Action of Forgery, the Complaint of Undutifulness.*
8. *One may plead the Nullities of the Testament, or the Undutifulness of it, successively one after the other.*

I.

1. The Complaint against a Testament, as being undutiful, ceases by the Approbation of the Testament.

If the Person who is disinherited, altho without just Cause, had once approved of the Testament, the Disherison would have its Effect, whether it was by an express Act that the Testament had been approved, or by Acts which did imply the said Approbation, as shall be explained by the Rules which follow *a*.

a Quid ergo si alias voluntatem testatoris probaverim? Puta in testamento adscripserim post mortem patris, consentire me? Repellendus sum ab accusatione. *l.* 31. *in f. ff. de inoff. test.* See the following Articles.

II.

2. If the Person disinherited, being a Legatee, receives the Legacy, he approves of the Disherison.

If in the same Testament which contains the Disherison, there were a Legacy left to the Person disinherited, as, if a Father having disinherited his Son, had left him a Legacy, saying, That altho he were unworthy to have any share at all in his Succession, yet he left him out of Commiseration a certain Sum, or a Pension for Alimony; and this Son had received the Legacy, he would thereby have approved the Testament, and could not any more complain of his being disinherited. But if this Son who is disinherited, chanced to discover some Flaw in the Testament that would be sufficient to annul it, as if it was forged, or null, thro some Nullity which had been hid; the Legacy which he had received would not bar him from the Right of impugning such a Testament *b*.

b Illud notissimum est eum qui legatum perceperit, non recte de inofficioso testamento dicturum. *l.* 10. §. 1. *ff. de inoff. test.*

Post legatum acceptum non tantum licebit falsum arguere testamentum, sed & non jure factum contendere: inofficiosum autem dicere non permittitur. *l.* 5. *ff. de his quæ ut indig. aufer.* See the seventh and eighth Articles.

III.

3. What a Guardian does for his Minor, ought not to hurt himself, nor what he does for

If it should happen that the Person who is disinherited is Guardian to one to whom the Testator has left a Legacy by the same Testament which contains the Disherison, and that by virtue of his Office of Guardian he had received the Legacy left to his Minor; this would not

nself to be of any prejudice to his Minor.

not be an Approbation of the Testament with respect to himself; and what the Interest of his Minor had obliged him to do, would be no Hindrance to his bringing his Complaint in his own Name against the said Testament, as being undutiful. And if on the contrary, a Father having disinherited his Son who is a Minor, had by the same Testament left a Legacy to one who happens afterwards to be appointed Guardian to the said Son that is disinherited; the Complaint which the Function of this Guardian would oblige him to enter against the said Testament, as being undutiful, would not render him unworthy of this Legacy. And likewise the Demand of the Legacy would not exclude him from bringing a Complaint against the Testament, as being undutiful, on the behalf of his Minor, if it be well grounded *c*. And it would be the same thing if a Guardian were bound, as such, to impeach the Testament of the Father of his Minor, as being forged, if in the said Testament, which by the Event was declared to be genuine, there were a Legacy left to the said Guardian *d*. For in all these Cases the Guardian exercises the Rights of two Persons who are distinguished in him, that of the Guardian and that of his own; so that he does himself no prejudice by any thing which his Duty of Guardian requires of him.

c Si tutor nomine pupilli, cujus tutelam gerebat, ex testamento patris sui legatum acceperat, cum nihil erat ipsi tutori relictum à patre suo: nihilominus poterit nomine suo de inofficioso patris testamento agere. §. 4. *inst. de inoff. testam.*

Sed si è contrario pupilli nomine, cui nihil relictum fuerat de inofficioso egerit, & superatus est, ipse (tutor) quod sibi in testamento eodem legatum relictum est non amittit. §. 5. *eod.*

Tutorem qui pupilli sui nomine, falsum vel inofficiosum testamentum dixit, non perdere sua legata, si non obtinuerit optima ratione defenditur. *l.* 22. *ff. de his quæ ut ind.* Quia officii necessitas, & tutoris fides excusata esse debet. *d. l.*

d Tutoribus pupilli nomine, sine periculo ejus quod testamento datum est agere (posse) de inofficioso, vel falso testamento, divi Severus & Antoninus rescripserunt. *l.* 30. §. 1. *eod.* See the fifth Article of the second Section of Legacies, and the seventh and eighth Articles of this Section. *The said Tutors would be very ill advised, if they should omit to make the Protestations which are usually made in the like Cases.*

IV.

4. He who approves of the Testament by any Act, is excluded from entring a Complaint against it as being undutiful.

If he who would complain of a Disherison, or of some other undutiful Disposition, had treated with the Person instituted Heir or Executor, either for the whole Inheritance, or a Part of it; if he had bought any of the Effects thereof from him, knowing him to be Heir or Executor; if he had hired of him some House belonging to the Succession; if he had paid him a Sum of Money which he was indebted to the Testator, or had received Payment of a Sum which the said Executor, or a Legatee, had been charged by the Testator to pay to him: These kinds of Acts, and others of the like nature, would be Approbations of the Testament, which would bar him from bringing a Complaint against the same, as being undutiful *e*.

e Si hæreditatem ab hæredibus institutis exhæredati emerunt, vel res singulas scientes eos hæredes (esse) aut conduxerunt prædia, aliudve quid simile fecerunt: vel solverunt hæredi quod testatori debebant: judicium defuncti agnoscere videntur, & à querela excluduntur. *l.* 23. §. 1. *ff. de inoff. test.*

Si conditioni parere testator hæredem jussit in persona filii, vel alterius qui eandem querelam movere potest: & sciens is accepit videndum ne ab inofficiosi querela excludatur: adgnovit enim judicium. Idem est, & si legatarius ei, vel statu liber dedit: & potest dici excludi eum, maxime si hæredem ei jusserat dare. *l.* 8. §. 10. *eod.*

Qui autem agnovit judicium defuncti, eo quod debitum paternum pro hæreditaria parte persolvit, vel alio legitimo modo satisfecit: etiam si minus quam ei debebatur, relictum est: si is major viginti quinque annis est, accusare ut inofficiosam voluntatem patris, quam probavit, non potest. *l.* 8. §. 1. *C. eod.*

V.

5. This Complaint prescribes in five Years time, if there be no just Cause for the Delay.

If the Son that is disinherited being of full Age, had let five Years pass without entring his Complaint, after he knew he was disinherited, and that being present on the Place, he had suffered the Person who was instituted Heir or Executor, whether it was his Brother or any other Person, to continue in peaceable Possession of the Goods of which the Disherison had stript him, without being able to alledge any Excuse which had hindered him from bringing his Action; this voluntary Silence, being joined to the Presumption that the Disposition of his Father was just, would make it be presumed, under these Circumstances, that he had approved of it, and therefore his Complaint ought not after that to be received *f*.

f Adolescentiæ tempus non imputari in id quinquennium liberis, cujus præscriptio seram inofficiosi quæstionem moventibus opponi solet, manifestè ante descripsimus. *l.* 2. *C. in quib. caus. in integr. rest. nec n. est.*

Nisi pater adhuc superstes, vel repudiavit querelam, vel quinquennio tacuit. *l.* 14. *in f. C. de inoff. test.* Plane si post quinquennium inofficiosum dici cœptum est, ex magna & justa causa, &c. *l.* 8. §. *ult. ff. eod.*

¶ Altho

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5 Altho this Prescription of five Years may seem to be too short a time to extinguish a Demand of an Inheritance, and that an Heir may bring his Action for an Inheritance at any time within thirty years, yet we ought to make a great Difference between the Silence of a disinherited Son who forbears to commence his Action under the Circumstances explained in this Article, and the Silence of an Heir who is not deprived of the Inheritance by an Act of Disherison: for whereas he who is not disinherited has only the ordinary Prescription to be afraid of, and that his Right remains intire whilst the time of that Prescription is not expired; the Son who is disinherited is excluded from the Succession by an express Title which deprives him of it, and makes it to pass to another. So that it is both his Duty and his Interest, and for his Honour, to annul the said Title, if it is possible for him: and if he lets the five Years run, having no Excuse to plead, it may be alledged against him, either that he has suffered this time to pass, that the Proofs of the Causes of the Disherison might perish, or that his Silence was only the Effect of his Consciousness that he was justly disinherited. It is because of these Considerations that we have judged the Rule of the *Roman* Law, which makes the Complaint against an undutiful Testament to cease after five Years Silence, when there appears no just Cause for the Delay, to be just and equitable, especially under the Circumstances which we have added, and that thus our Usage might approve of it.

VI.

6. If the Action of Complaint is let drop for want of Prosecution, it is not afterwards received.

If a Son who is disinherited having enter'd his Complaint against the Testament, lets his Action drop for want of prosecuting it within the time limited by Law, this Silence, or Non-prosecution of the Suit, would be instead of an Approbation of the Testament, against which he had brought his Complaint *g*.

g Si quis post rem inofficiosi ordinatam, litem dereliquerit, postea non audietur. *l.* 8. §. 1. *ff. de inoff. test.*

VII.

7. The Complaint on the score of Undutifulness does not exclude the Action on the head of Forgery, nor the Action of Forgery, the Complaint of Undutifulness.

If he who is disinherited by a Testament which he pretends to be forged, having first entred his Action on the score of Forgery, had been cast in it; that would not bar him from bringing his Complaint against the Testament, as being undutiful. For altho the Testament were not forged, yet the Disherison might be unjust. And if on the contrary, having begun with his Complaint against his being disinherited, he had been declared to have been duly disinherited, he might nevertheless impugn the Testament, as being forged. For if the Testament is forg'd, the Disherison cannot subsist, even altho it had been ratified in Judgment *h*.

h Eum qui inofficiosi querelam delatam non tenuit, à falsi accusatione non submoveri placuit. Idem observatur, & si e contrario falsi crimine instituto victus, postea de inofficioso actionem exercere maluerit. *l.* 14. *C. de inoff. test.*

VIII.

8. One may plead the Nullities of the Testament, or the Undutifulness of it, successively one after the other.

If he who had right to complain of a Testament as being undutiful, should likewise pretend that there was some Nullity in the Form of the Testament, and that for the quicker Dispatch, and to avoid a Suit about the Undutifulness, he should desire that the Question touching the Nullity might be discussed in the first place; it would be just and equitable to begin first with that Question; and if he should be cast in that, to admit him afterwards to his Complaint against the Testament, as being undutiful. Or if having begun with this Complaint, he had discovered afterwards some Nullity in the Testament, as if some of the Witnesses were under some Incapacities which had not been known, and which came afterwards to be discovered, it would be just to admit that Allegation *i*. But if the Circumstances do not require that these two Causes should be divided, it would be proper to join them together in one and the same Action *l*.

i Contra majores viginti quinque annis duplicem actionem inferentes, primam quasi testamentum non sit jure perfectum, alteram quasi inofficiosum licet jure perfectum, præscriptio ex prioris judicii mora quinquennalis temporis non nascitur. Quæ officere non cessantibus non potest. *l.* 16. *C. de inoff. testam.*

l Si quis irritum dicat testamentum, vel ruptum & inofficiosum, conditio ei deferri debet utrum prius movere volet. *l.* 8. §. 12. *ff. eod.*

We have added these last Words to the Article, because it is our Usage not to divide Actions that may be joined in one.

SECT.

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SECT. IV.

Of the Effects of the Complaint against a Testament, as being undutiful.

The CONTENTS.

1. *If the Testator has left less than the Legitime or Portion due by Law, it ought to be made up.*
2. *The Testament being declared undutiful, all the Children succeed as if there had been no Testament at all.*
3. *A Case where the Complaint of Undutifulness augments the Portion of the Son who is instituted.*
4. *Extravagant Donations and Dowries are diminished, to make up the Legitime or Portions due by Law to Children or Parents.*
5. *The Legacies of an undutiful Testament subsist.*

I.

1. If the Testator has left less than the Legitime or Portion due by Law, it ought to be made up.

IF the Complaint of Undutifulness were against a Testament in which no other Wrong were done to the Person who complains of it, except that he was thereby reduced to a Portion less than what was due to him by Law, without branding him with any Accusation, the Effect of the Complaint would only be to procure him a Supplement of his Legitime, or Portion due by Law, such as it ought to be, according to the Rules which shall be explained in the following Title *a*.

a Si quid minus legitima portione his derelictum sit, qui ex antiquis legibus de inofficioso testamento actionem movere poterant, hoc repleatur. Ne occasione minoris quantitatis testamentum rescindatur. *l.* 32. *C. de inoff. test. l.* 30. *eod.* See the fifth Article of the first Section, and the Remark upon it.

II.

2. The Testament being declared undutiful, all the Children succeed as if there had been no Testament at all.

If the Testament is declared to be undutiful, the Institution of the Heirs or Executors whom the Testator had put into the Place of the Complainant, will be vacated, if the said Heirs or Executors were others than the Children of the Testator. And if they were his Children, who ought to share the Inheritance with him who was unjustly disinherited, their Portions would be diminished, by taking from them not barely the Legitime or Portion due by Law to the Person disinherited, but the intire Portion which he would have had in the Inheritance, if there had been no Testament at all *b*.

b Quantum ad institutionem hæredum pertinet, testamento evacuato, ad parentum hæreditatem liberos tamquam ab intestato ex æqua parte pervenire. *Nov.* 115. *c.* 3. *in f.*

It would seem as if this Text related only to the Nullity of the Institution of Heirs that were Strangers, in the room of the Children disinherited; and that as the undutiful Testament is annulled only as to what concerns the disinheriting, and that the Legacies bequeathed therein do subsist, as shall be shewn in the fifth Article, if the Testator having disinherited only one of his Children, had instituted his other Children in unequal Portions, it would seem not to be agreeable either to Equity or to our Usage, that the Nullity of the Disherison should render the Condition of the Children equal, which the Father had distinguished by his Will. For which reason some have been of opinion, that this Rule ought only to comprehend the bare Nullity of the Disherison. See the following Article, and the Remark made on it.

III.

3. A Case where the Complaint of Undutifulness augments the Portion of the Son who is instituted.

If a Testator having two Sons, had instituted one of them his Heir or Executor for a less Portion than that which would have come to his share if his Father had died intestate; and making no mention of the other Son, or disinheriting him, had instituted a Stranger his Heir or Executor for the Surplus of his Estate; the said Institution being made void because of the Preterition or Disherison, the Complaint of Undutifulness would have this Effect, that the Inheritance would be divided between the two Sons, as if there had been no Testament made. By which means it would happen that the Son who was instituted, profiting by the Complaint of the other Son who was excluded, and thereby getting a Moiety of the Estate, would have more to his share than was left him by the Testament *c*.

c Mater decedens extraneum ex dodrante hæredem instituit, filiam unam ex quadrante, alteram præteriit: hæc de inofficioso egit & obtinuit. Quæro, scriptæ filiæ quomodo succurrendum sit? Respondi, filia præterita id vindicare debet quod intestata matre habitura esset. *l.* 19. *ff. de inoff. testam.*

There is this Difference between the Case of this Article, and that of the Remark which has been made on the foregoing Article, That in this it is because of the Exclusion of the Stranger Heir, that the Portion of the Son who was not disinherited happens to be augmented.

IV.

4. Extravagant Donations and Dowries are diminished, to

If a Father, or other Ascendant, had made Donations either to some of his Children, or to other Persons, or settled Dowries or Marriage Portions, so as to

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make up the Legitime, or Portions due by Law to Children or Parents.

to diminish his Estate in such a manner as that there would not remain Effects enough to satisfy the Legitime, or Portions due by Law to the other Children, reckoning into the Estate the Value of the things given away; these extravagant Donations and Dowries would be liable to be complained of, as being contrary to the Duty of Parents towards their Children, were there a Testament or not; and so much would be cut off from the said Donations and Dowries, as would be necessary to make up the legal Portions of the Children, even altho the Donees, and the Daughters who had been endowed, should be willing to abstain from the Inheritance. And if the Donor having no Children, his Succession were to go to his Father or other Ascendants, they might demand in the same manner their Legitime or Legal Portion of the Inheritance out of the said excessive Donations *d*.

d V. Toto Titulo Cod. de inoff. don. l. un. Cod. de inoff. dot. & Nov. 92. *To avoid the Length of many Citations, we refer the Reader to those Titles, the Substance of which is comprehended in this Article.* See the third Article of the third Section of the following Title.

V.

5. The Legacies of an undutiful Testament subsist.

The Testament which is undutiful because of an unjust Disherison, or a Preterition, is made void only in so far as concerns the Institution of another Heir or Executor in the place of him who is disinherited. Thus when he who is instituted Heir or Executor is some other Person, and not one of the Children, the Institution remains without any Effect at all: and if they be Children who are instituted by the undutiful Testament, their Institution is reduced in such a manner, that he who was unjustly disinherited has as much as he would have had if there had been no Testament at all, as has been said in the second Article. But the Legacies, the Fiduciary Bequests, and all the other Dispositions of the undutiful Testament subsist, and have their Effect, whether the Person disinherited were a Descendant or an Ascendant *e*, as has been remarked in another Place *f*.

e Si vero contigerit in quibusdam talibus testamentis quædam legata, vel fideicommissa, aut libertates, aut tutorum dationes relinqui, vel quælibet alia capitula concessa legibus nominari, ea omnia jubemus adimpleri, & dari illis quibus fuerint derelicta, & tanquam in hoc non rescissum obtineat testamentum. *Nov.* 115. *cap.* 3. *in fine.*

This Text relates to the Testaments of Children, and the same thing is ordained at the end of the following Chapter with respect to the Testaments of Parents.

Si quid autem pro legatis, sive fideicommissis, & libertatibus, & tutorum dationibus, aut quibuslibet aliis capitulis, in aliis legibus inventum fuerit huic constitutioni contrarium, hoc nullo modo volumus obtinere. *d. Nov. cap.* 4. *in fine.*

f See the sixteenth Article of the fifth Section of Testaments.

¶ By the antient *Roman* Law the Legacies of a Testament which was declared to be undutiful, whether because of a Disherison or Preterition, were annulled as well as the Institution, and that for this reason, because the Testament was considered as having been made by a Man out of his Senses. *Filio præterito, qui fuit in patria potestate, neque libertates competunt, neque legata præstantur.* l. 17. ff. de injust. rup. irr. fact. test. *Cum inofficiosum testamentum arguitur, nihil ex eo testamento valet* l. 28. ff. de inoff. testam. And if the Legacies had been paid, the Legatees were bound to restore them. *Nec legata debentur, sed soluta repetuntur.* l. 8. §. pen. eod. This Rule had its Justice, supposing a Disherison or Preterition to be altogether unjust. But seeing it is very rare, and hard to be imagined, that Parents will be moved to disinherit their Children, or Children their Parents, without great Cause; it has been thought equitable on this Consideration, to ratify and confirm the Legacies and other Dispositions of Testaments which contain Disherisons that are annulled. And altho it does happen from hence, that the Condition of the Legatees proves to be more favourable than that of the Person who is instituted Heir or Executor, whom the Testator nevertheless valued more than the Legatees, as it may fall out on other occasions, as has been already remarked in another Place *; yet this Event in such a Case would cause no Inconvenience. For the Condition of an Heir or Executor, who possessed unjustly the Place of the Person disinherited, and who perhaps contributed to the getting him disinherited, ought not to be so favourable as that of the Legatees, seeing the Dispositions in which they are concerned, do not the same Injury to the Person disinherited.

* *See the fifth Article of the seventh Section of Testaments, and the Remark made there upon it.*

TITLE

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TITLE III.

Of the Legitime or Legal Portion due to Children or Parents.

WE have seen in the foregoing Title, that Parents ought to leave to their Children, and Children to their Parents, a certain Portion of their Estate. It is this Portion that is called the *Legitime*, or *Legal Portion*, which shall be the subject Matter of this Title.

The Legal Portion of Children was by the antient *Roman* Law only a fourth part of the Portion which they would have had if the Parent had died intestate *a*. Thus an only Son had for his legal Portion the fourth part of the whole Estate; and if there were two Sons, they had each of them the fourth part of one half of the Estate, that is to say, an eighth part of the whole; and so in proportion according to their Number.

This legal Portion was fixed to this small Proportion of the Estate, at a time when they began to set some bounds to the Liberty that every one had to dispose of his Goods as he thought best *b*, and even to deprive their Children of them. And whereas it seems natural that the Children should have either the whole Estate, or the greatest part of it, and that the Liberty of bequeathing should be limited to some small Portion of the Estate, as it is regulated by our Customs; the *Romans* left the greatest Share of the Estate to the free disposal of the Testators, and restrained the Right of the Children to a small Portion. So that what is said of Legacies in a Law, which calls them a small Diminution of the Inheritance, which ought to belong wholly to the Heir or Executor *c*, would be more applicable to this legal Portion of the Children, which is in effect only a small Retrenchment of the Inheritance, the whole of which may be left to one sole Legatee, of whom one would be very much in the wrong to say that his Legacy were only a small Diminution of the Inheritance.

Justinian was sensible that this Portion allotted to the Children by Law was not sufficient; and he augmented it, but with Moderation, distinguishing the legal Portion according to the number of the Children, and giving to them all, if they were four in number, or under, a third part of the whole Estate, and the half of the Estate if the Children were five or more in number: So that this third, or this half, is equally divided among the Children, and the two thirds, or the other half, remain for the Legacies. Thus, what number soever there be of Children, the legal Portions of them all together, when they are reduced to it, are at most but equal to the Share of the Legatees; and if the Children be fewer in number than five, the Legatees have double the Portion which is reserved by Law for the Children.

Our Customs in *France* have almost all of them distinguished between the several sorts of Estates and Goods, between Estates of Inheritance and Estates of Purchase, between Goods Moveable and Immoveable; and according to these different sorts of Estates and Goods, they have regulated differently the Liberty of Testators, not only with respect to the Children, but even in favour of the Heirs of Blood the most remote, whom they can only deprive of a certain Portion of Estates of Inheritance. And some Customs have made no manner of Distinction of Goods, but have restrained the Liberty of disposing by Testament to a small Portion, such as one fourth part of all the Goods in general; and reserved three fourth Parts of the whole to the Heirs of Blood, whether they be Children or others. Thus these Customs give a great deal more to the most distant Relations, than they allow to be given to Legataries; and the Portion of the Estate which they appropriate to the Heirs of Blood, and which they cannot be deprived of by a Testament, is much greater than the Legitime, or Legal Portion, of the Children, in the Provinces which are governed by the written Law.

It is not our business to examine here, which of these two Laws is most just and

a Quarta debitæ portionis. *l.* 8. §. 8. *ff. de inoff. test.*

b Uti quisque legassit de re sua ita jus esto. *Inst. de lege Falc. ex l.* 12. *tabb. Nov.* 22. *cap.* 2.

c Legatum est delibatio hæreditatis, qua testator ex eo, quod universum hæredis foret, alicui quid collatum velit. *l.* 116. *ff. de legat.* 1.

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and equitable, whether the *Roman* Law, or the Law of our Customs *d*: Both the one and the other may be useful in their different ways. For if on one hand it be just that Estates should be appropriated to the Families, and that the great Liberty that is taken in making Dispositions very often unjust, should not strip the Children and the other Heirs of Blood; so on the other hand it may be of service, if the said Heirs, and especially the Children who are incapable of being wrought upon by better Motives, be kept to their Duty out of fear of seeing themselves reduced to a very small Portion reserved to them by the Law.

All the Rules relating to this Matter of the Legitime, or legal Portion, respect either the Persons to whom a Portion is due by Law, or the Quantity of the said Portion, or the Goods out of which it is taken, and the Manner in which it is regulated; which shall be the subject Matter of three Sections.

d See what has been said on this Subject in the Preface to this second Part, num. 7.

[What the Civilians call the Legitime, is the same with the Reasonable Part that was formerly due to Widows and Children by the particular Customs of some Parts in *England*, as particularly in the Province of *York*, and Principality of *Wales*. Which Custom remains still in force in the City of *London*, as to the Widows and Children of Freemen; but has been abolished in other Parts of *England* by several late Acts of Parliament. *Stat.* 4° *&* 5° *Gul. & Mar. cap.* 6. *Stat.* 7° *&* 8° *Gul.* 3. *cap.* 38. *Stat.* 2° *&* 3° *Annæ, cap.* 5. But there is this Difference between the Legitime of the Civil Law, and the Reasonable Part due by some Customs in *England*, that the Legitime was due to Parents as well as Children, but not to Widows; whereas the reasonable Part reserved by the Customs in *England*, was due to Widows and Children, but not to Parents. *See the Remark on the Preamble of the foregoing Title.*]

SECT. I.

Of the Nature of the Legitime or Legal Portion, and to whom it is due.

IT is necessary to make the same Remark here, as has been made in the foregoing Title, that we are to except out of the number of Children to whom a Legitime, or Legal Portion, is due, Daughters who by their Contract of Marriage have renounced their Right and Pretensions to their Parents Inheritance, in consideration of a Marriage-Portion. For altho this Marriage-Portion may prove to be less than the Legitime which would accrue to them by Law out of the Goods of their Fathers who have endowed them; yet the Uncertainty of the Events which may diminish the said Goods, is one of the Motives which justify the Renunciation of a future and uncertain Profit, for a certain and present Portion *a*.

We must likewise take notice in relation to this Matter of the Legitime, of the Regulation that was made for the Legitime of Mothers out of the Successions of their Children, by that Ordinance which is called the Edict of Mothers, of which mention has been made in the Preamble of the first Section, in what manner Fathers and Mothers succeed.

a See concerning these Renunciations, what has been said in the Preamble to the 2d Section of Heirs and Executors in general.

The CONTENTS.

1. *Definition of the Legitime.*
2. *The Legitime is due to Descendants and Ascendants.*
3. *All Children who are capable of inheriting, have a right to a Legitime.*
4. *The Legitime of the Children of the first degree is regulated according to their number.*
5. *And that of Children of remoter Degrees is regulated by their Stocks of whom they are descended.*
6. *Among Ascendants the Legitime is due only to the nearest.*
7. *If the Ascendants are many in the same degree, one half of the Legitime goes to those of the Father's side, and the other half to those of the Mother's side.*
8. *Brothers have no Legitime.*

I.

1. Definition of the Legitime.

The Legitime, or Legal Portion, is a certain Share of the Inheritance which the Laws appropriate to those Persons who cannot be deprived of the Quality of Heir, and to whom they give a Right to complain of undutiful Wills. And this has occasioned the Liberty of devising by Will to their prejudice to be restrained, so as that there may remain for them a share of the Inheritance, of which they cannot be deprived by any Disposition *a*.

a Debita portio. *l.* 8. §. 11. *ff. de inoff. test.*

Debitum bonorum subsidium. *l.* 5. *C. de inoff. don.*

Quod ad submovendam inofficiosi testamenti querelam, non ingratis liberis relinqui necesse est. *d. l.* 5.

Hoc

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Hoc observandum in omnibus personis in quibus ab initio antiquæ quartæ ratio de inofficioso lege decreta est. *Nov.* 18. *cap.* 1. *in f.* See the following Article.

II.

2. The Legitime is due to Descendants and Ascendants. There are two Orders of Persons to whom the Laws give a Legitime; to Children out of the Estates of their Parents, and to Parents out of the Estates of their Children. But if in the same Succession there are both Children of the Deceased and also Parents, there will be only a Legitime for the Children: For they exclude the Parents from Successions *b*.

b See the Articles which follow, and the first Title of the second Book.

III.

3. All Children who are capable of inheriting, have a right to a Legitime. All the Children of both Sexes have without distinction the Right to demand a Legitime, or Legal Portion, whether they be in the first degree of Sons or Daughters, or whether they be descended one or more Degrees lower, provided only that they be called to the Inheritance, whether it be in their ow Name, or by Representation, as has been explained in its proper place *c*.

c Children are called to the Legitime in the same order as to the Succession of one who dies intestate, according to their Rank explained in the 2d Book, Title 1. Section 2.

IV.

4. The Legitime of the Children of the first degree is regulated according to their number. When there are only Children of the first Degree, they have each of them their Legitime by equal Shares. And if there are at the same time Children of the first degree alive, and Grand-Children descended from others deceased, the Succession is divided according to the number of the Children of the first degree who are still alive, and of those who being dead have left Children who represent them; and these Grand Children have only among them the legal Portion which the Person whom they represent would have had: For it is that legal Portion which falls to their Share *d*.

d This is a Consequence of the foregoing Article, and of the Order of the Succession of Children.

V.

5. And that of Children of remoter Degrees is regulated by their Stocks of whom they are descended. If there were no Child of the first Degree alive, but several Grand-Children of the second Degree, or other Degree more remote; they would have all of them their legal Portions, not according to their number, but the Descendants of each Son would have among them the Legitime which their Father would have had. And every one of these Descendants would have their Share in the said Legitime, greater or lesser, according as they are more or fewer in number *e*.

e This is a Consequence of the same Order.

VI.

6. Among Ascendants the Legitime is due only to the nearest. The second Order of Persons to whom a Legitime or Legal Portion is due, is that of Parents, that is, of Fathers, and Mothers, and other Ascendants *f*. But there is this Difference between them and Children as to what concerns the Legitime, that seeing the nearest Ascendants exclude the remotest from the Successions of Descendants, and that in the Order of Ascendants there is no Right of Representation, as there is in the Order of Descendants, it is only the nearest Ascendants to whom a Legitime is due *g*.

f Primum itaque illud est cogitandum, quia testantibus aliis quidem, necessitatem imponit lex distribuere quandam partem personis quibusdam, tanquam hoc secundum ipsam naturam eis debeatur. Quale est filiis, & nepotibus, & patribus atque matribus. *Nov.* 1. *in Præf.* §. 2.

g See the 2d Book, Title 2d, Section 1st, Article 5th.

We must take this Article in the same Sense as what has been said of the Succession of Ascendants, so as that they may preserve the Right of Reversion of Estates that are subject to it. See the 3d Section of the same 2d Title.

VII.

7. If the Ascendants are many in the same degree, one half of the Legitime goes to those of the Father's Side, and the other half to those of the Mother's Side. If the nearest Ascendants happen to be many in the same degree, some paternal and some maternal, the Total of their Legitime will be divided, not by the Head according to their number, but in two Parts, one for the Ascendants of the Father's side, and the other for the Ascendants of the Mother's side; altho the Number of those of one side be greater than the number of those of the other. And if there be Ascendants only of one side in the same degree, their Legitime is divided by Heads *h*.

h See the 2d Book, Title 2. Sect. 1. Art. 6.

VIII.

8. Brothers have no Legitime. Altho Brothers may complain of an undutiful Testament of their Brother, in the Case of the last Article of the first Section of the foregoing Title, yet they have not for all that a right to a Legitime. For in that case it is the whole

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whole Inheritance that the Law gives them, and in all other Cases they may be deprived by Testament of all Share in the Inheritance *i*.

i See the last Article of the first Section of the preceding Title.

SECT. II.

What is the Quota *or* Quantity *of the Legitime or legal Portion.*

The CONTENTS.

1. *Different* Quota's *of the Legitime.*
2. *The Legitime of Children differs according to their Number.*
3. *If there be four Children, or under that Number, they have a third Part of the Estate.*
4. *If there be five or more Children, they have a Moiety of the Estate.*
5. *Those who come by Representation, have only one Share among them.*
6. *The Legitime of the Ascendants, is the third Part of the Estate.*

I.

1. *Different* Quota's *of the Legitime.*

THE *Quota* of the Legitime is the Portion of the whole Goods of the Inheritance, which is appropriated to him to whom a Legitime is due. And the said Portion is differently regulated, as shall be explained by the following Articles *a*.

a Substantiæ pars. *Nov.* 18. *cap.* 1. Definita mensura. *d. c.*

II.

2. *The Legitime of Children differs according to their Number.*

With respect to Children, the Law hath differently regulated their Legitime according to their Number *b*, by the Rules which follow.

b See the following Articles.

III.

3. *If there be four Children, or under that Number, they have a third Part of the Estate.*

If there are four Children, or a lesser Number, they have all of them together for their Legitime a third Part of the Estate; so that this Third remains entire to one only Child, if there be no more than one, or is divided among them all, according to their Number, each of them having for his Legitime his Share of this third Part *c*.

c Si quidem unius est filii pater aut mater, aut duorum, vel trium, vel quatuor, non triuncium eis relinqui solum, sed etiam tertiam propriæ substantiæ partem: hoc est uncias quatuor. *Nov.* 18. *cap.* 1. Singulis ex æquo quadriuncium dividendo. *d. c.*

IV.

4. *If there be five, or more Children, they have a Moiety of the Estate.*

If there are five Children, or a greater Number, they have all of them among them for their Legitime the half of the Estate; so as that the said half be divided among them all according to their Number, each of them having for his Legitime his Share of the said Moiety; and that it remain entire to one only Child, if there is but one *d*.

d Si vero ultra quatuor habuerint filios, mediam eis totius substantiæ relinqui partem, ut sexuncium sit omnino quod debetur singulis ex æquo quadriuncium vel sexuncium dividendo, *Nov.* 18. *c.* 1.

V.

5. *Those who come by Representation have only one Share among them.*

We must understand the two preceding Articles in the Sense explained in the third, fourth, and fifth Articles of the first Section; so as that the Children who come by Representation, of what Number soever they consist, may have among them only the Share of the Person whom they have right to represent *e*.

e See the said Articles, and the second Book, Tit. 1. *Sect.* 2.

VI.

6. *The Legitime of the Ascendants, is the third Part of the Estate.*

Seeing the Legitime or legal Portion of the Ascendants is not more favourable than that of the Children, and that there is for the Legitime of an only Child, and even of four Children, but a third Part of the Estate, there is likewise only a third Part for the Ascendants, to be divided among them if they are more in Number than one *f*.

f Hoc observando in omnibus personis in quibus ab initio antiquæ quartæ ratio de inofficioso lege decreta est. *Nov.* 18. *cap.* 1. *in fine.*

¶ It is certain that a Legitime is due to Ascendants, seeing the Law gives them a Right to complain of the Undutifulness of their Childrens Testaments, which it would not give them, if it did not appropriate to them a part of the Inheritance, which cannot be taken away from them. But when *Justinian* regulated the legal Portions by his eighteenth Novel, the Texts whereof have been cited on the preceding Articles, he confined himself to the Legitime of Children, and did not expresly regulate that of Parents. So that it has been doubted whether the Legitime of Parents ought to be the same with that which has been settled for the Children. And seeing by this Regulation of *Justinian*'s, the Legitime of the Children has been di-

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diversified according to their Number, having been fixed to a third Part of the Inheritance when there are only four Children, or a lesser Number, and to the Moiety when there are five Children, or upwards, as has been said in the third and fourth Articles; there was ground to doubt whether after this Regulation, the Ascendants ought to have either a Third, or a Moiety, or only the antient Legitime, which was the fourth Part of what would have fallen to them, had the Party died intestate, as has been said in the Preamble of this Title. This Question has been decided by Usage, and by the Opinions of Interpreters, who have judged that the Legitime of Parents ought to be a third Part of the Inheritance. And this Opinion may be grounded on the last Words of that eighteenth Novel of *Justinian*; for after having there regulated the Legitime of Children, he says that the same thing shall be observed with respect to all Persons to whom the antient Law gave the Right to complain of a Testament as undutiful, and a fourth Part of the Inheritance for their Legitime. *Hoc observando in omnibus personis in quibus ab initio antiquæ quartæ ratio de inofficioso lege decreta est.* These Words, which are the same that have been quoted on this Article, seem to comprehend clearly enough the Ascendants, and can be understood only of one Legitime, without distinction of their Number, since we ought not to suppose that there are more than four Ascendants concurring together to the Succession. Thus it would seem reasonable on that account, that their Legitime should be regulated to a third Part at least. To which we may add, that *Justinian*, speaking of the Legitime due to Parents in the eighty ninth Novel, Chap. 12. §. 3. says there, That he has already fixed the said Legitime. *Si vero habuerint hi quos prædiximus aliquos Ascendentium, legitimam eis relinquant partem quam lex & nos constituimus.* Which can be applied to nothing else but to the Regulation in his eighteenth Novel.

This first Question concerning the Legitime of Ascendants, has been followed by another, which has divided the same Interpreters into two Parties. It is in the Case of a Testator, who having no Children, leaves behind him one Ascendant and Brothers of the whole Blood, and institutes either his Brothers, or Strangers, his Heirs or Executors, leaving to the Ascendant only a small Portion of the Inheritance, such as does not satisfy him; whether, in this Case, the Ascendant's Legitime be the third Part of the whole Estate, or only a third of the Portion which the said Ascendant would have had if there had been no Testament, the Brothers concurring with him.

Of these two Parties, one pretends that the Legitime of Parents is always the same, *viz.* a third Part of the Estate: and the others will have the Legitime in this Case to be only a Third of the Share that the Ascendant would have had, if there had been no Testament. So that if, for example, there were two Brothers, as the Ascendant's Portion, if there were no Testament, would be a Third, as has been shewn in its place *; his Legitime ought to be a Third of that Third: And this is their Reason, which has given rise to this Question. They establish for a Principle and general Rule in the Matter of the Legitime or legal Portion, That every Legitime is nothing else but a Portion of that Share of the Inheritance which would have accrued to him who demands his Legitime, in case there had been no Testament. From whence they infer, that when the Deceased leaves behind him Brothers by the same Father and Mother, the Legitime of the Ascendant is diminished according to their Number; since when there is no Testament, the hundred and eighteenth Novel, Chap. 2. calls to the Succession the Brothers of the whole Blood, together with the Ascendants, by equal Portions. From whence it follows, according to their Principle, that the Legitime of an Ascendant, when the Deceased leaves behind him Brothers, is only a third Part of the Share which he would have had in conjunction with the Brothers, if the Deceased had died intestate. So that if there were, for instance, seven Brothers, the Legitime of the Ascendant, who would have had, if there had been no Testament, only an eighth Part of the Inheritance, would be only a four and twentieth Part. And to this Reason they add, that if the Legitime of the Ascendants were always a third Part of the whole Estate, it would fall out that their Legitime might be much greater than the Portion which would have fallen to their Share, if there had been no Testament; since in this very Case of the seven Brothers, the Portion that would fall to them in case there were no Tes-

* *See the seventh Article of the first Section of the second Title of the second Book.*

tament

tament would be only an eighth Part, and yet nevertheless their Legitime would be a third; which they say would be a great Inconvenience.

The others, on the contrary, have been of opinion, that the Legitime of Ascendants, in all Cases where it ought to take place, is always a Third of the Inheritance to be divided among all the Ascendants, as that of the Children is always either a Third, or a Half, according to their Number, to be shared among them. Which is founded on the Remarks that have been just now made, and on this, That the Rule of the antient *Roman* Law, which fixed the Legitime at a fourth Part of the Portion that would be due if there were no Testament, has been altered by *Justinian*, who has regulated the Legitime, not at a Portion of the Share that would fall to them if there were no Testament, but at a certain Portion of the Total of the Inheritance, to wit, a Third, or a Moiety. Thus the Legitime is independent of the Portion, greater or less, which one might have in case there were no Testament. To which they add, that the Brothers having no Legitime reserved to them by Law, they cannot come in for any Share of the Legitime of the Ascendants to diminish it.

One sees that these Difficulties are a Consequence of the Law of *Justinian*, which has called the Brothers of the whole Blood to the Succession with the Ascendants, when there is no Testament. For if the Brothers of the whole Blood did not concur in the Succession with the Ascendants, no more than the Brothers by the Mother's side only, there would never have been any doubt concerning the manner of regulating this Legitime of the Ascendants. From whence it seems reasonable to conclude, that seeing the whole Difficulty proceeds barely from the Novelty of that Law which diminishes the Portion of Ascendants succeeding to one who dies intestate, when there are Brothers, and that there is no Proof that *Justinian* intended by that Law to lessen the Legitime of Ascendants, nor to render it uncertain, according as the Brothers should be in a greater or lesser Number; those of the second Party may agree, without any prejudice to their Cause, that the Legitime ought to be a Portion of that Share which one would have if the Deceased had died intestate; adding to it what seems to be agreeable to Reason and Justice, to wit, that this Rule ought to be understood of the Portion which he who demands the Legitime would have, in case he succeeded alone to the Person dying intestate, or that no body concurred in the Succession with him, except Persons to whom a Legitime would be likewise due. For in this Sense it will always hold true, according to the antient Law, that the Legitime will be a Portion of what one would have if the deceased had died intestate, as may be seen in the Legitime of Children regulated by *Justinian*; since it is certain that the Third or Half of the Estate which he gives to the Children, makes a Third or Half of the Succession, which they would have entire, if there were no Disposition that curtailed them of it.

The only Difficulty then that remains, is to know whether *Justinian*, when he granted the Favour to Brothers of the whole Blood to call them to the Succession with the Ascendants, intended thereby to make such a Confusion as to overturn the Order and the Principles of the Legitime or legal Portions, and to make a Rule which, without being any ways explained, should have this Effect, that a Testator leaving behind him a Father and eleven Brothers, might give to his Father only a six and thirtieth Part of his Estate, and nothing at all to his Brothers, leaving the five and thirty Portions to a Stranger. Nothing obliges us to judge that *Justinian*'s Law, which calls the Brothers together with the Ascendants to the Inheritance of their Brothers, ought to make such a Change in the Legitime of the Ascendants; but this Law is limited to the Successions of those who die intestate. And altho it may happen by this Law, that the Legitime of an Ascendant may be much greater than the Portion he would have had in the Inheritance, if the Deceased had died intestate, yet this is no greater Inconvenience than that which happens with respect to the Legitime of Children, that when they are only four in Number, their Legitime, which ought to be greater than if they were five in Number, is nevertheless smaller. For in this Case every one of the four Children has only a fourth Part of a Third, which is only a twelfth Part; whereas among five Children, each of them has a fifth Part of a Moiety, which makes a tenth Part of the whole. These kinds of Consequences are natural to arbitrary Laws, as has been observed in other Places, and are not such Inconveniences

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hiences as ought to make any Change in them.

It seems reasonable to conclude from all these Reflexions, and from the Words of the eighteenth Novel quoted upon this Article, that *Justinian* has fixed the same Legitime for Ascendants as for Children, when they have a Third; and that this Legitime of the Ascendants is always the same, whether there be Brothers, who concur with them in the Succession, or whether there be none. And this Rule can be attended with no Inconvenience, whatever Case may happen. For if we suppose that a Son institutes his Father, or his Mother, and his Brothers of the whole Blood, his Heirs or Executors by equal Portions, the Father and Mother could not complain of a Testament which gives them all they would have had by Law, had there been no Testament. But if this Son had instituted a Stranger his Heir or Executor together with his Father, leaving his Father not so much as what the Law allots him, it would be for the Interest of the Brothers that the Father should have a third Part, seeing this Third would come to them after the Father's Death. And in fine, if the Brothers were instituted with the Father or Mother, but by unequal Portions, so as that the Father or Mother should have less than some of the Brothers, it would not be just, nay it would be a Hardship in the Brothers, to reduce their Father or Mother to a third Part of the Portion, which each of them would have if there were no Testament.

SECT. III.

Out of what Goods the Legitime is taken, and how it is regulated.

The CONTENTS.

1. *The Legitime is regulated according to the Value of the Goods.*
2. *The Demand of the Legitime is a Demand of a Partition.*
3. *Goods given away in the Testator's Life-time, are subject to the Legitime.*
4. *The Children who are Donees, may abstain from the Inheritance; but their Donations are subject to the Legitime.*
5. *Dowries and Gifts are reckoned as a part of the Legitime.*
6. *The Fruits of the Legitime are due from the Time that the Succession is open.*
7. *The Legitime cannot be subject to any Charge, Delay, or Condition.*
8. *The Legitime of Children of different Marriages is not distinguished.*

I.

1. The Legitime is regulated according to the Value of the Goods.

SEeing the Legitime is a Portion of the Inheritance, it is out of all the Goods in gross that it ought to be taken *a*, not by dividing each Land or Tenement, each Right, or other Goods, separately by themselves, in order to give a part of every one thereof to him to whom a Legitime is due; but by estimating the whole Effects belonging to the Inheritance, and so to give him his Share of the said Effects to the Value of his Portion.

a Tertia propriæ substantiæ pars. *Nov.* 18. *c.* 1.

II.

2. The Demand of the Legitime, is a Demand of a Partition.

If he to whom a Legitime is due insists on having his Share of the Inheritance not in Value, but in hereditary Effects, the Heir or Executor cannot refuse it. And if they do not agree among themselves, it is necessary to make a Partition, and to give for the Legitime Goods of the Inheritance which may make it up. For the Legitime being a part of the Inheritance, the Demand of a Legitime is in effect a Demand of a Partition *b*; which ought to be made according to the Rules explained in their place *c*.

b Sancimus repetitionem ex rebus substantiæ patris fieri. *l*, 36. *C. de inoff. test.*
c *See the Title of Partitions.*

III.

3. Goods given away in the Testator's Life-time, are subject to the Legitime.

Seeing the securing of a Legitime to the Persons to whom it is due, is to hinder any Dispositions that might diminish their Share in the Estate of him who ought to leave this Legitime; it must be taken not only out of the Goods which he has left behind him, but also out of the Goods which he may have disposed of by Donations made in his Life-time to his Children, or to other Persons, or by Marriage Portions to Daughters; for otherwise these kinds of Dispositions might quite destroy a Legitime. Thus it is taken out of the Goods alienated in this manner, as well as out of those which remain in the Inheritance *d*.

d Si (ut allegatis) mater vestra ad eludendam inofficiosi querelam, pene universas facultates suas, dum ageret in rebus humanis, factis donationibus, sive in quosdam liberos, sive in extraneos exhausit: ac postea vos ex duabus unciis fecit hæredes: easque legatis & fideicommissis exinanire gestivit, non inju-

ria juxta formam de inofficioso testamento constitutam, subveniri vobis, utpote quartam partem non habentibus, desideratis. *l.* 1. *C. de inoff. donat. v. tot. h. tit. & l. un. C. de inoff. dot. Nov.* 92. See the fourth Article of the fourth Section of the foregoing Title.

IV.

4. The Children who are Donees may abstain from the Inheritance, but their Donations are subject to the Legitime.

If the Children to whom the Parents had made Donations, or given Marriage-Portions, to the prejudice of the other Children, should pretend to content themselves with what had been already given them, and offer to renounce their Share in the Inheritance; they might very well abstain from taking upon them the Quality of Heirs, and by that means free themselves from the Charges of the Succession; but their Donations would be liable to be diminished in order to make up the Legitime of the other Children *e*.

e Non valentibus filiis qui donationibus honorati sunt, dicere, contentos se quidem esse immensis his donationibus, videri autem abstinere paterna hæreditate: sed neque cogendis quidem, si contenti sunt donationibus suscipere hæreditatem: necessitatem autem habentibus omnibus modis complere fratribus quod hæc defert secundum quam scripsimus mensuram. *Nov.* 92.

V.

5. Dowries and Gifts are reckoned as a part of the Legitime.

All the kinds of Goods which may be liable to be brought into Hotch-pot in case of a Partition, such as the Donations mentioned in the foregoing Article, and those which may have been made to the same Persons who demand a Legitime, enter into the Mass of the Goods from whence the Legitime is to be taken, and contribute towards it. Thus when the Legitime is due to him who ought to bring in Goods to the Mass of the Inheritance in case of a Partition, he ought to reckon what he has received as a part of his Legitime; and what may be wanting to make it up, is either taken from the others, or out of the Bulk of the Inheritance. And if he who demands the Legitime has received nothing, he takes it out of the whole Inheritance: and the Donees who have received too much, ought to contribute to it in proportion *f*.

f In quartam partem, ad excludendam inofficiosi querelam, tam dotem datam, quam ante nuptias donationem præfato modo volumus imputari: si ex substantia ejus profecta sit, de cujus hæreditate agitur. *l.* 29. *in f. C. de inoff. test.* See the Title of the Contribution of Goods.

VI.

6. The Fruits of the Legitime are due from the time the Succession is open.

Seeing the Legitime is due at the moment that the Succession is open, the Fruits and other Revenues of it are likewise due from the said moment: And the Testator cannot hinder it by any Disposition *g*.

g Modis omnibus ei hujus legitimæ partis quam nunc deputavimus, & usumfructum, insuper & proprietatem relinquat. *Nov.* 18. *c.* 3.

VII.

7. The Legitime cannot be subject to any Charge, Delay, or Condition.

If the Testator had made some Disposition which he intended should be in lieu of the Legitime of one of his Children, and having settled it either at a certain Sum, or in some particular Goods, or even at a certain Portion of the Inheritance, he had added thereto some Condition, or some Delay for the Delivery or Payment of what he had left, or some other Charge; these Conditions, these Delays, these Charges would be without effect, if what he had given did not exceed the Value of the Legitime. For as it is nothing else but a certain Portion of the Inheritance which cannot be diminished by the Testator, he can neither charge it with any burden, nor retard the Payment or Delivery of a thing which ought to go to his Children at the time of his Death, and that without any diminution *h*.

h Si conditionibus quibusdam, vel dilationibus, aut aliqua dispositione moram, vel modum, vel aliud gravamen introducente, eorum jura qui ad memoratam actionem vocabantur, imminuta esse videantur: ipsa conditio, vel dilatio, vel alia dispositio, moram vel quodcunque onus introducens, tollatur: & ita res procedat, quasi nihil eorum in testamento additum esset. *l.* 32. *C. de inof. test.*

VIII.

8. The Legitime of Children of different Marriages is not distinguished.

If there are two or more Children of the same Father or Mother by different Marriages, their Legitimes will not be distinguished by the Difference of those Marriages; but all he Children of the same Father, or of the same Mother, altho by different Marriages, will have each of them their Legitime, according as the number of them all together shall demand *i*.

i Usque ad quatuor quidem filios, (ex priore & secundo matrimonio) quatuor uncias omnino definienets: si autem ultra quatuor sint, usque ad mediam substantiæ partem. *Nov.* 22. *c. ult.*

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TITLE IV.

Of the Dispositions of those who have married a second time.

EVERY body is sensible of two Truths in relation to second Marriages, and both the one and the other are equally agreeable to Religion and to Nature. One is, that second Marriages are not unlawful; and even the Church condemns those who esteem them such *a*. And the other is, that the Liberty of marrying a second time, howsoever lawful it may be even for such as have Children by a former Marriage, is nevertheless attended with some Mark of Distinction, by which the Laws of the Church and of the State distinguish the Condition of those who marry again, from that of Persons who have not taken the same liberty. As to the Church, the Canon Law forbids the receiving into holy Orders those who have been twice married *b*. And it makes likewise some other Distinctions of second Marriages which are sufficiently known, and which it is not our business to speak of here. As to the Laws of the State, they have set bounds to the Dispositions which Persons, who having Children do marry a second time, may make of their Estates.

The Motives of those Laws, of the Church and of the State, in relation to second Marriages, are different according to their different Views. For the Church considers in them a kind of Incontinency, which it tolerates, but which makes the Persons appear in her Eyes less pure, and by that means less fit to exercise those sacred Functions of which the holiest Persons ought to account themselves unworthy. And the Laws of the State consider in second Marriages the Inconvenience of the Wrong which Persons who marry again do to their Children. And to prevent the Dispositions which Parents, whose Affection for their Children may be alienated by a second Marriage, might make to their prejudice, the Laws have appropriated to the Children the Goods which came from their Fathers or Mothers to the Survivor of the two who marries again. They have likewise restrained the Dispositions which the Survivor who marries again might make of their own proper Goods in favour of the second Husband, if it is the Mother, or of the second Wife, if it is the Father who has married again. And they have given the Name of Punishment of second Marriages to that which they have ordained on this Subject in favour of the Children of those Persons who marry again *c*.

It is these Rules, which restrain in favour of the Children the Dispositions of Fathers and Mothers who marry again, that we are to treat of under this Title, and which our Usage has taken from the *Roman* Law. For even that Ordinance which is called the Edict of second Marriages, made by *Francis* II. in the Year 1560, hath been taken from thence, as we shall observe on the Articles of this Title which have relation to those of the said Ordinance.

By second Marriages, whether it be that of the Husband or of the Wife, is understood every Marriage which is not the first; and whatever number of Marriages there may have been, they are all comprehended under this Name of second Marriages with respect to that Party of the married Couple who had been married before: For as to the other Party who had never been married before, it cannot be said to be a second Marriage.

It may be remarked here, that besides the Punishments of second Marriages which relate to the Dispositions of Goods, there were others in the *Roman* Law against the Intemperance of Women. Thus those who married again within the Year of mourning were noted with Infamy *d*. And there were several other Punishments ordained against them *e*. Thus she who abandoned her self to a Slave, became Slave to the Master of him to whom she prostituted herself, if she persevered in that Amour, after a Denunciation made by the Master of the said Slave; which was abolished by *Justinian f*. Thus *Constantine* declared the Crime of those Women who prostituted themselves to their own Slaves, even in private, to be capital *g*.

a 31. q. 1. c. 11, 12, 13.

b 1 *Tim.* 3. 2. *Dist.* 26. & *tit. de bigam. non ordin. V. Nov.* 6. *c.* 5.

c Pœna contra binubos. *Nov.* 2. *c.* 2. §. 1. Communis mulieris & viri mulcta. *Nov,* 22. *c.* 23.

d l. 1. *C. de sec. Nup.*

e d. l. 1. *l.* 2. *eod. l.* 22. *C. de admin. tut.*

f l. un. C. de Senat. Claud. toll.

g l. un. C. de mulier. quæ se propr. serv. junx.

Of these several sorts of Punishments there is only that which relates to the second Marriage of a Widow within her Year of Mourning that has been received into use with us; but even this Punishment has been abolished, and we observe the Canon-Law which has rejected it *h*. For altho the Incontinency of a Woman who marries again within her Year of Mourning gives her justly a bad Reputation, and that great Inconveniencies may follow from it, because of the Doubt that may arise, which of the two Husbands should be reckoned Father of a Child who should be born, for example, seven or eight Months after the Marriage of a Widow, which she had contracted within two months after the Death of her first Husband; yet the Church tolerating these sorts of Marriages to avoid a greater Evil, it absolves from the legal Infamy the Widows who marry again before the said Term. And as for the other Punishments which do not suit with our Policy, which does not admit of Slaves; those Laws have served as a Pattern with us for the Regulation which was made by one of the Articles of the States of *Blois*, by which it was ordained, that Widows who *married again foolishly to Persons that were unworthy*, should not have power to make any Dispositions in favour of such Husbands, and that they should be even *interdicted the free Administration of their Estates i*.

As to the subject Matter of this Title, it is necessary to distinguish two sorts of Rules which have been made concerning second Marriages, in order to preserve the Rights of the Children whose Father or Mother contract a second Marriage. One is of those Rules which secure to the Children the Goods which their Father or Mother who marries again, inherited from the Father or Mother of these Children who died first. And the other is of such Rules as relate in general to all the other Goods of the Person who has contracted a second Marriage. And these two sorts of Rules shall be the subject Matter of two Sections, which shall be preceded by a first Section, wherein it is necessary to distinguish the several sorts of Goods which a Person who marries again may be possessed of.

h c. penult. & ult. de sec. nup.
i Ordinance of Blois, *Article* 182.

SECT. I.

Of the several sorts of Goods which Persons contracting a second Marriage may be possessed of.

The CONTENTS.

1. *Three sorts of Goods belonging to the Persons who marry a second time.*
2. *Two sorts of Goods which the Husband or Wife may have from one another.*
3. *Goods which the Husband acquires from the Wife, or the Wife from the Husband, by their Marriage.*
4. *Goods which come to the Father or to the Mother, from their Children.*
5. *Goods of the Father or Mother coming by other Titles.*
6. *These several sorts of Goods have their different Rules.*

I.

1. Three sorts of Goods belonging to the Persons who marry a second time.

WE must distinguish three sorts of Goods which a Person who contracts a second Marriage, having Children by a former, may be possessed of. Those which came to her from her first Husband, if it is the Wife, or from the first Wife, if it is the Husband; those which come to the Husband or Wife from some one of their common Children; and those which they may have acquired some other way *a*.

a There can be no Goods which are not comprehended in this Division.

II.

2. Two sorts of Goods which the Husband or Wife may have from one another.

A Wife may have from her first Husband, or a Man from his first Wife, Goods of two sorts; that which any one of them may have acquired by their Contract of Marriage, and that which the Party who dies first may have left to the Survivor by a Testament, or other Disposition *b*.

b These two kinds comprehend all. See the first, second, and following Articles of the second Section.

The second part of this Article is to be understood of Dispositions which are allowed between Husband and Wife. For there are Customs which prohibit differently these Dispositions, as has been observed in the Preamble of the second Section of Heirs and Executors in general.

III.

3. Goods which the Husband acquires from the Wife, or

We must reckon among the Goods which the Husband acquires from the Husband, or the Wife from the Husband, by their Contract of Marriage, all and every thing that is stipulated by the Con-

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the Wife from the Husband, by their Marriage.

tract it self, or given by the Law or by Custom, without Stipulation, in favour of one Party, out of the Goods of the other, whether the said Goods, stipulated or not, have any peculiar Name, such as that of Nuptial Gains, Dower, Augmentation of Dowry, or any other such like Name, or that it be some other Right which has no particular Name *c*.

c See the first and following Articles of the second Section, and the Texts cited on those Articles.

IV.

4. Goods which came to the Father or to the Mother from their Children.

The Goods which may come to the Father or to the Mother from some of their common Children, consist either in the Usufruct they may have of the Goods of their Children, or in the Property of what may fall to them of their Succession, whether by Testament, or when they die intestate *d*.

d See the first and second Sections, in what manner Fathers succeed, &c.

V.

5. Goods of the Father or Mother coming by other Titles.

All the other Goods which Fathers and Mothers who marry a second time may have, are those which they have had either of their own Patrimony, or have acquired by their Industry, or by other Titles besides those which have been just now specified *e*.

e See touching these sorts of Goods the third Section.

VI.

6. These several sorts of Goods have their different Rules.

It has been necessary to distinguish these different kinds of Goods. For there is none of them but what is the subject Matter of some one of the Rules which follow *f*.

f We must compare the Articles of this Section with those of the two following Sections, according as they have relation to one another.

SECT. II.

The Rights which Children have to the Goods which their Father or Mother who marries a second time had acquired from the Party who died first.

The CONTENTS.

1. *The Children have a right to the Goods which came from their Father or Mother to the Person who marries again.*
2. *The Children acquire the Property of the said Goods by the second Marriage of their Father or Mother.*
3. *And the Goods belong to them by equal Portions.*
4. *We do not distinguish the Origin of the Goods, in which the Husband or Wife have their Gains.*
5. *These Gains accrue to the Children, altho they be not Heirs either to the Father or Mother.*
6. *When the Children die intestate, the Father or Mother who marries a second time, has no share in the Goods which the said Children inherited from their deceased Father or Mother.*

I.

1. The Children have a Right to the Goods which came from their Father or Mother to the Person who marries again.

WHEN a Man who survives his Wife, or a Wife who survives her Husband, contracts a second Marriage, having Children by the former, all the Goods which came to them from the Party deceased, whether on the score of Gains acquired by their Contract of Marriage, or by Dispositions, whether the same are to have their effect in the Life-time of the Giver, or after his Death, or in any other manner whatsoever, are appropriated to the common Children from the moment of the second Marriage *a*, as shall be explained by the Rules which follow.

a See the following Articles, and the Texts cited on them.

II.

2. The Children acquire the Property of the said Goods by the second Marriage of their Father or Mother.

Of all the sorts of Goods mention'd in the preceding Article, the Property thereof accrues to the Children from the Moment of the second Marriage of the Father or Mother: and the Person who marries a second time, has only the usufruct of these sorts of Goods during Life; and cannot make any Alienation, Engagement, Donation, or other Disposition of them *b*.

b Fœminæ quæ susceptis ex priore matrimonio filiis, ad secundas (post tempus luctui statutum) transierint nuptias: quidquid ex facultatibus priorum maritorum sponsalium jure, quidquid etiam nuptiarum solennitate perceperint, aut quidquid mortis causa donationibus factis, aut testamento jure directo, aut fideicommissi, vel legati titulo, vel cujuslibet munificæ liberalitatis præmio ex bonis (ut dictum est) priorum maritorum fuerint adsecutæ: id totum, ita ut perceperint, integrum ad filios, quos ex præcedente conjugio habuerint, transmittant. *l.* 3. *C. de sec. nupt.* Habeant potestatem possidendi tantum atque fruendi in diem vitæ, non etiam alienandi facultate concessa. *d. l.* 3. *Nov.* 2. *c.* 2. *Nov.* 22. *c.* 23 *&* 24. *l. ult. C. de bon. mat.*

Generaliter censemus, quocunque casu constitutiones ante hanc legem mulierem liberis communibus, morte mariti matrimonio dissoluto, quæ de bonis mariti ad eam devoluta sunt, servare sanxerunt: iisdem casibus maritum quoque quæ de bonis mulieris

liberis ad eum devoluta sunt morte mulieris matrimonio dissoluto, communibus liberis servare. *l.* 5. *C. de sec. nupt.*

It is from these Laws that the second Head of the Edict of July 1560 *has been taken, which prohibits Widows, who marry a second time, from giving to their new Husbands any share of the Goods which they had by the Gift and Liberality of their deceased Husbands; and directs that the said Goods may be preserved to their common Children; and ordains the same thing with respect to Husbands, as to the Goods which came to them by their Wives.*

III.

3. And the Goods belong to them by equal Portions.

This Property accrues to the said Children by equal Portions. And the Father or Mother who marries again has not the liberty to chuse among their Children, in order to prefer or benefit some of them before the others, neither in the total of these sorts of Goods, nor in a part of them. For the second Marriage is equally prejudicial to them all, and they are all of them equally concerned and interested therein *c.*

c Venient autem talia lucra ad filios omnes ex prioribus nuptiis. Non enim permittimus parentibus non recte introductam electionem in eos: neque alii quidem filiorum dare, alium vero exhonorare. Omnes enim secundis similiter exhonorati sunt nuptiis. *Nov.* 22. *c.* 25.

IV.

4. We do not distinguish the Origin of the Goods in which the Husband or Wife have their Gains.

Whether the Wife's Marriage-Portion was of her own proper Goods, or whether it came from some other hand, and that in consideration of her Marriage, her Father, or some other Persons, had given it her; all the Gains and Advantages which may accrue to the Husband out of these sorts of Goods, are consider'd as come from the Goods of the Wife, and are subject to the Rules which have been just now explained. And likewise the Gains and Advantages which the Wife may have out of the Goods of the Husband, whatever way he came by them, are considered as Goods come from the Husband, and are subject to the same Rules *d.*

d Non discernimus de dote, & ante nuptias donatione utrum ipsi hanc dederint per se contrahentes, an aliqui alii pro eis hoc egerint: sive ex genere, sive etiam extrinsecus. *Nov.* 22. *c.* 23. *in f.*

V.

5. These Gains accrue to the Children, altho they be not Heirs either to the Father or Mother.

Seeing the Right of the Children to these sorts of Goods which have been just now mentioned in the preceding Articles, accrues to them by the bare Effect of the second Marriage of the Father or Mother, as has been said in the second Article; these Goods do belong to them, altho they be not Heirs either to their Father or their Mother. And the Children who are their Heirs, will not exclude those who shall have renounced the Inheritance. But if any one of the said Children, whether he be Heir or not, either to the Father or to the Mother, having once acquired his Right, happens to die, leaving Children behind him; he may dispose of these Gains among them unequally, in the same manner as he may of his other Goods *e.*

e Et super his quoque lucris, quaecunque ad secunda venientibus vota parentibus, percipiunt, non perscrutamur, utrum haeredes existant aut praemorientis parentis, aut secundi morientis, nec si alii quidem haeredes existant, alii vero non. Sed sicut superius diximus, praemium eis damus hoc, sive haeredes fiant, sive etiam non: & hoc ex aequo percipiant ipsi quidem superstites: cum eis autem & defuncti filii, genitoris accipientes partem. *Nov.* 22. *c.* 26. §. 1. *l.* 7. *C. de sec. nupt.* Eligendi quos voluerint ex liberis superstitibus, non adempta licentia. *d. l.* 7. *in f.*

VI.

6. When the Children die intestate, the Father or Mother who marries a second time, has no share in the Goods which the said Children inherited from their deceased Father or Mother.

If one of the Children whose Mother had married a second time, should happen to die, leaving behind him his said Mother and Brothers; he would have the liberty to dispose in favour of his Mother of all his several sorts of Goods, and even of those Goods of his Father's which had come to him by the effect of the Rules which have been just now explained; and his Brothers would have no right to claim either the Usufruct or Property of the things left to their Mother by such Disposition *f.* But if the Son had died without disposing of his Part of the Goods which he had from his Father, the Mother would have no Right of Property in them, the same remaining to the other Children, whether it be that she married again the second time before the Death of her Son, or only after *g.* For seeing the Goods which are appropriated to the Children by the second Marriage of their Mother, do belong to them all equally by the Title which is common

f Matri relinquens sive ex institutione, sive legatum recte derelinquat & dominium & usum, sive ex rebus quae extrinsecus advenerunt, fuerit facultas, sive ex paternis: nihil ex hoc fratribus contradicere valentibus. *Nov.* 22. *c.* 46. §. 1. *in f.* Habeat quod dimissum est aut datum, & secundum proprietatem & secundum usum. *d.* §. 1.

g Si autem intestatus filius moriatur jam ad secundas matre veniente nuptias, aut postea veniente, vocetur quidem & ipsa cum filii aut filiae fratribus secundum nostram constitutionem ab intestato ad ejus successionem. Sed quanta quidem ex paterna substantia ad filium pervenerunt, eorum solummodo habeat usum ad secundas omnino, sive prius, sive postea veniens nuptias. *d. c.* 46. §. 2.

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to them, they have among them the Right of Accretion therein. But as for the Usufruct of that share of the Father's Goods which belonged to the deceased Son, and for all the other Goods which he may have had any other way than by his Father, or that he might have acquired by his own Industry, or by Succession, or otherwise, the Mother would succeed to them, either as to the Property or Usufruct thereof, according to the Rules which have been explained in their Place *h*.

h See the Remark on the Succession of Mothers at the end of the Preamble to the Title, in what manner Fathers succeed, and the fourth Article of the first Section of the same Title.

¶ We have restrained the Rule explained in this Article to the Mother only, without extending it to the Father, because the Novel of *Justinian*, from whence the Rule has been taken, is limited to the Mother; but it would seem that their Condition ought to be equal. And seeing the Rules explained in the preceding Articles, which by the former Laws related only to Mothers, have been extended to Fathers by subsequent Laws, as appears by the last Text cited on the second Article, and that *Justinian* has in other Places made this general Remark, that all the Punishments of second Marriages are common to the Husband and the Wife; it seems that we may justly conclude from this Principle, that this Rule, as well as the others, ought to regard the Men as much as the Women. *Contra binubos pœnæ communes & viri sunt & mulieris. Nov. 2. cap. 2. in fin. Communis mulieris & viri mulcta. Nov. 22. cap. 23.* To which we may add the Example of another Law of the same Emperor, who having enacted much severer Punishments against the Women when they separated from their Husbands without just Cause, than against the Men for the same case, did afterwards make those Punishments equal, and that for this reason, that in a like Offence their Punishment ought to be the same: *In delicto enim æquali, similes eis imminere pœnas justum esse putamus. Nov. 127. cap. 4.* Thus the Spirit of all these Rules seems to require that there should be an Equality between the Man and the Wife for all the Consequences of second Marriages.

SECT. III.

Of the Dispositions which Persons who have married twice may make of their own proper Goods.

The CONTENTS.

1. *The Person who marries twice, cannot give more to the second Husband or Wife, than they leave to such of their Children as has the least Share of their Estate.*
2. *Neither directly nor indirectly by the Interposition of other Persons.*
3. *The Computation of the Goods is made according as they are found at the time of the Death.*
4. *What is cut off from the Gift, belongs in common to the Children of the first Marriage.*
5. *The Children of divers Marriages take each of them the Goods which their Parent had by the Marriage of which they are descended.*
6. *The Usufruct left to the Survivor, is not lost by the second Marriage, unless it was left on that Condition.*

I.

1. The Person who marries twice, cannot give more to the second Husband or Wife, than they leave to such of their Children as has the least share of their Estate.

ALTHO the Father or Mother who has married a second time retain the Property of all their Goods, excepting what is appropriated to their Children of the first Marriage, pursuant to the Rules explained in the preceding Section; and that nothing hinders them from alienating the said Goods, and even giving them to other Persons, provided they do not thereby encroach on the Legitime, or Portion reserved by Law to their Children; yet this Liberty is bounded by one of the Punishments of second Marriages. For it is not allowed to the Wife who, having Children by a former Marriage, has married a second time, to dispose of any sort of her Goods in favour of the second Husband, nor to the Husband to dispose in favour of the second Wife, whether it be by their second Contract of Marriage under the Title of Nuptial Gains, Dower, or other Disposition whatsoever, whether the same be to take effect in the Lifetime of the Giver, or after their Death; unless they reserve to every one of the Children as much as is given away; and the Gift will be limited to the Portion which the Person who has married the second

second time shall have left of their Estate to the Child to whom they have left the least Share *a*.

a Non liceat plus novercæ vel vitrico testamento relinquere vel donare, seu dotis vel ante nuptias donationis titulo conferre, quam filius vel filia habet, cui minor portio ultima voluntate derelicta vel data fuerit. *l. 6. C. de sec. nupt.*

It is from this Law that the first Head of the Edict of July 1560 *is taken, which prohibits Women who have married twice from giving any part of their Goods or Moveables of the Estates which they themselves have purchased, or which have come to them by descent from their Ancestors, to their new Husbands, to the Father, Mother, or Children of their said Husbands, or other Person, who may be presumed to be in trust for them, more than what they have given to such of their Children to whom they have given the least share of their Estates.*

II.

2. Neither directly nor indirectly by the Interposition of other Persons.

If to elude the Rule explained in the foregoing Article, the Person who has married a second time, had made some Disposition in favour of Persons interposed, in order to transmit by them to the second Husband, or to the second Wife, more than what had been left to any Child of the first Marriage who had the least share; the said Disposition would be reduced in the same manner as if it had been made in express Terms to the second Husband, or to the second Wife *b*.

b Omni circumscriptione, si qua per interpositam personam, vel alio quocunque modo fuerit excogitata, cessante. *l. 6. C. de sec. nupt. Nov. 22. c. 27.*

This is so regulated by the Edict of July 1560 *concerning second Marriages, as has been remarked on the foregoing Article.*

III.

3. The Computation of the Goods is made according as they are found at the time of the Death.

We must understand what is said in the first Article, concerning the Reduction of what is left to the second Husband or Wife to the Portion of the Child of the first Marriage who has the least, not of the Portion of the Goods which the Father or Mother who makes the Disposition, may have at the time of making the said Disposition that is liable to be reduced, but of the Portion of the Goods which they shall be found to have at the time of their Death. For the Goods may be either augmented by Acquisitions, or diminished by Alienations and Losses. And it is only at the time of the Death of the Father or Mother, that it can be known what Portions the Children will have in their Goods, that the Gift to the second Husband or Wife may be compared with the Portion of the Child who shall have the least, and be made equal to it *c*.

c Optimum nobis visum est esse, mortis binubi parentis observari tempus. *Nov. 22. cap. 28.* Evenientes fortunæ contrarios eventus sæpius operantur. *d. c.* Aufferre quod transcendit oportet, & filiis applicare. *d. c.*

IV.

4. What is cut off from the Gift, belongs in common to the Children of the first Marriage.

This Diminution of the Gift made to the second Husband or Wife, does not accrue to that Child who has the least Share in the Parent's Estate; but it goes to all the Children together by equal Portions. For it is in favour of them all that the Diminution is ordain'd *d*.

d Quod plus est in eo quod relictum aut datum est omnino aut novercæ aut vitrico, ac si neque scriptum, neque relictum aut datum vel donatum, competit filiis: & inter eos solos ex æquo dividitur ut oportet. *Nov. 22. cap. 27.*

V.

5. The Children of divers Marriages take each of them the Goods which their Parent had by the Marriage of which they are descended.

When there are Children of divers Marriages who come to share the Goods of their Father or Mother, those of each Marriage take out of the Mass of the Inheritance that which came by the Marriage of which they are descended to their Father or Mother whose Succession they divide. And altho the second Marriage have not been followed by a third, yet the Children of this second Marriage have the same Right, and the same Appropriation of what ought to come to them, as those of the first Marriage have in the Goods that belong to them *e*. But the other Goods, which are the proper Goods of the Father or Mother who leave behind them Children of different Marriages, are divided among them all by equal Portions; unless there be some Disposition that distinguishes them, which cannot be set aside as being undutiful, and which does not encroach on the Right of their Legitimes or Legal Portions *f*.

e Ex solido quidem prioris matrimonii filii, illius lucrantur donationem: ex solido quoque ex secundis nati seminibus, ab illo facta fruentur magnificentia: licet non ad tertium illa mulier matrimonium venerit. *Nov. 22. c. 29.* Nos enim hac lege id præcipue custodiendum esse decernimus, ut ex quocunque conjugio suscepti filii, patrum suorum sponsalitias retineant facultates. *l. 4. in f. C. de sec. nupt.*

f Matris intestatæ defunctæ hæreditatem ad omnes ejus liberos pertinere, etiamsi ex diversis matrimoniis fuerint, juris est. *l. 4. ff. ad Senat. Tertull. & Orphit. d. l. 4. C. de sec. nupt.*

VI.

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VI.

6. The Usufruct left to the Survivor is not lost by the second Marriage, unless it was left on that Condition.

If the surviving Father or Mother had an Usufruct which the deceased Husband or Wife had left them by any Disposition whatsoever, they would keep it altho they married a second time, unless it had been left them on condition that their Right to it should cease upon their marrying again *g*. And the Father who marries again retains with much more Reason the Usufruct which he had of the Goods of his Children, and even of those Goods which the said Children had of their Mother *h*.

g Volumus vel si usufructus detur per largitatem, aut mortis causa donationem factam inter vivos, in quibus licet etiam donari, si relinquatur, & accipiens ad secundas veniat nuptias, manere sic quoque usum, donec superfit qui hunc habet usumfructum; nisi expressim ille qui donationem (sicut dictum est) fecit, aut hunc reliquit, sive masculus, sive foemina, dixerit velle, ad secundas veniente nuptias eo qui usumfructum accepit, solvi eum, & ad suam reverti proprietatem. *Nov.* 22. *c.* 32.

h Patres usumfructum maternarum rerum, etiam si ad secundas migraverint nuptias, sine dubio habere debebunt. *l. ult. C. de bon. mat.*

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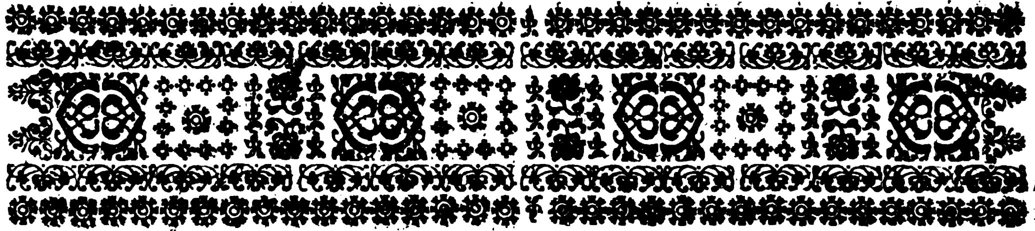
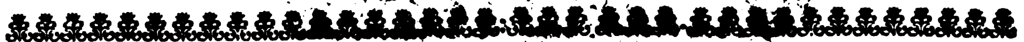
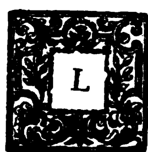


THE CIVIL LAW, IN ITS NATURAL ORDER.



BOOK IV.

Of Legacies, and other Dispositions made in View of Death.



LEGACIES and the other Dispositions made in view of Death, which are to be treated of in this Book, are distinguished from Testaments, which have been discoursed of in the preceding Book, in this, that it is essential to a Testament that it contain an Institution of an Heir or Executor, which is a general Disposition of all the Testator's Goods, altho there were nothing else in the Testament besides this bare Institution, seeing the Heir or Executor is universal Successor; whereas these other Dispositions are only particular Dispositions of certain things. And it is for this reason, that altho one may make these sorts of Dispositions in a Testament, as one may make a Testament without any other Disposition besides the bare Institution of an Heir or Executor, and that one may give Legacies, and make other Dispositions in view of Death by other Acts than a Testament, it has been necessary to distinguish these two Matters, and to give to every one its separate Rank.

TITLE I.

Of Codicils, and of Donations in prospect of Death.

CODICILS are Dispositions made in view of Death, which are distinguished from Testaments by two Characters. One is that of their Formalities, which are fewer than those of Testaments; and the other is that of their Use, which is limited

ted to Legacies and fiduciary Bequests, whereas a Testament ought necessarily to contain an Institution of an Heir or Executor. Thus all Dispositions made in view of Death, in which there is no Heir or Executor named, will only have the Nature of Codicils, or Donations in prospect of Death, and not of a Testament, even altho they should have all the Formalities required to a Testament; which must not be understood in the sense of the *Roman* Law, and of the Provinces where the same is observed. For in the Customs, as they admit of no testamentary Heir, the Distinction between Testaments and Codicils is there altogether useless; and they give there the Name of Testaments to all Dispositions made in prospect of Death.

We shall not repeat here touching the Difference between the use of Testaments and that of Codicils, what has been said thereof in the fourth Section of Testaments, where the matter of the Codicillary Clause, which is often inserted in Testaments, hath been handled. The Reader will be pleased in reading this Title to consult that Section of the Codicillary Clause, where we have been obliged, in order to explain the Effect of the said Clause in Testaments, to explain some Rules which relate to the use of Codicils; and he will find there at the same time the Rules of the *Roman* Law concerning this Matter, which he might expect to meet with here.

We say nothing here of Donations made in prospect of Death, which shall be the subject Matter of the third Section.

SECT. I.

Of the Nature and Use of Codicils, and of their Form.

The CONTENTS.

1. *Definition of a Codicil.*
2. *To make a Codicil, one must have power to make a Testament.*
3. *One may make a Codicil, either with a Testament or without a Testament.*
4. *One may make several Codicils, which may subsist all together.*
5. *The Codicil makes a part of the Testament, when there is one.*
6. *The next of Kin is charged with the Execution of the Codicils, when there is no Testament.*
7. *Difference between the two sorts of Codicils.*
8. *The Codicil hath its effect, altho it be not expresly confirmed by the Testament.*
9. *One cannot impose by a Codicil a Condition on which the Institution of the Heir or Executor shall depend.*
10. *Five Witnesses are required to a Codicil.*
11. *Rules of Testaments which agree to Codicils.*

I.

1. Definition of a Codicil.

A Codicil is an Act which contains Dispositions in prospect of Death, without the Institution of an Heir or Executor *a*.

a Codicillis hæreditas neque dari neque adimi potest, ne confundatur jus testamentorum & codicillorum. §. 2. *inst. de codic. l.* 2. *C. eod.*

II.

2. To make a Codicil, one must have power to make a Testament.

Altho the Codicil do not contain the Institution of an Executor as a Testament, yet no body can make a Codicil if he has not a Right to make a Testament. For the liberty of disposing of a part of one's Goods, supposes the same Qualities as those that are necessary for disposing of the whole *b*. Thus they who are incapable of making a Testament, cannot make a Codicil *c*.

b Codicillos is demum facere potest qui & testamentum facere potest. *l.* 6. §. 3. *ff. de jure cod.*

c See, touching the Causes which make this Incapacity, the second Section of Testaments.

III.

3. One may make a Codicil, either with a Testament or without a Testament.

As it is free for every one who has power to make a Testament, either to make a Testament or a Codicil, one may equally make either the one without the other, or both together *d*, whether in this last Case the Testament precede or follow the Codicil, or that both the one and the other be made at the same time; and whether also the Testament confirm the Codicil that is already made or to be made *e*, or that it make no mention of it at all, provided only that the Testament which is made after the Codicil do not annul it *f*. And the Liberty of all these different Manners of disposing is the effect of that which every one has, who has a Right to make a Will, to dispose either of all his Effects

d Non tantum autem testamento facto potest quis codicillos facere, sed & intestatus quis decedens fideicommittere codicillis potest. §. 1. *inst. de Cod.*

e Codicilli aut in futurum confirmantur, aut in præteritum. *l.* 8. *ff. de jure Cod.* Aut testamento facto, aut sine testamento. *d. l.*

f See the 8th Article.

by

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by a Testament, naming an Heir or Executor, or only of a part of them by Legacies, and other particular Dispositions in a Codicil, if he intends to have no other Heirs besides those of his Blood. And one may likewise make several Codicils, either at the same Time, or at different Times *g*.

g Codicillos autem etiam plures quis facere potest. §. *ult. inst. de codic.*

IV.

4. One may make several Codicils which may subsist all together.

Besides the Difference between a Testament and Codicil, which results from the Rules explained in the first Article, it is necessary to remark a second Difference which is a Consequence of the former, that seeing the Testament contains an universal Disposition of the Totality of the Testator's Goods, there cannot be several Testaments of which all the Dispositions subsist together, and the last Testament annuls the Dispositions of the former, if it does not expressly confirm them *h*. But Codicils containing only particular Dispositions of a part of the Goods, one may make several Codicils, as has been said in the preceding Article, and they subsist all of them *i*, except the Changes which a Testament or the last Codicils may have made *l*.

h Testamentum rumpitur alio testamento. *l.* 1. *de injust. rupt.* Posteriore testamento quod jure perfectum est superius rumpitur. §. 2. *inst. quib. mod. test. infirm.* See the first Article of the fifth Section of Testaments.

i Codicillos & plures quis facere potest. *l.* 6. *ff. de jure codic.*

l See the eighth Article.

V.

5. The Codicil makes a part of the Testament, when there is one.

When there is together both a Testament and a Codicil, whether they be made at one and the same Time, or at different Times, and whether the Testament or Codicil make mention of one another, or make no mention, the Codicil is considered as making a part of the Testament *m*. For the Dispositions both of the one and the other are equally the last Will of the Testator, and the particular Dispositions of the Codicil ought to be considered as contained in the general Disposition which is essential to the Testament. Thus the Dispositions of the Testament, and those of the Codicil, are interpreted the one by the other, and are reconciled with one another in such Things as may subsist both of the one and the other. But if one of them makes any Alteration in the other, the last Disposition, even in the Codicil, will have its effect in that which may be regulated by a Codicil *n*.

m Codicilli pars intelliguntur testamenti. *l. penult. ff. testam. quamad. aper.*

Ad testamentum quod quoquo tempore fecisset pertinent codicilli. *l.* 16. *ff. de jure codic.*

n We have added these last Words, because, as shall be said in the ninth Article, one cannot dispose of the Inheritance in a Codicil.

VI.

6. The next of kin is charged with the Execution of the Codicils, when there is no Testament.

As when there is a Testament, he who is instituted Heir or Executor is bound to execute the Dispositions of the Codicils, so when there is no Testament, it is the Heir at Law, or next of Kin, who is charged with the Execution of them *o*, in the same manner as if he were instituted Heir or Executor by a Testament. For he might have been deprived of the Inheritance; and it was out of free Good-will that the Deceased has left it to him *p*. Thus the Dispositions of a Codicil have, with regard to him, the same effect as if they were ordained by a Testament, in which he were made Heir or Executor *q*.

o Quicumque ab intestato successerit, locum habent codicilli. *l.* 16. *ff. de jure codic.*

p Ideo fideicommissa dari possunt ab intestato succedentibus, quoniam creditur paterfamilias sponte sua his relinquere legitimam hæreditatem. *l.* 8. §. 1. *ff. de jure codic.*

q Codicillorum jus singulare est, ut quæcumque in his scribuntur, perinde habeantur ac si in testamento scripta essent. *l.* 2. §. 2. *eod.*

VII.

7. Difference between the two sorts of Codicils.

It follows from the two foregoing Articles, that there is a Difference between the two sorts of Codicils, that is, those which happen to be accompanied with a Testament, whether the same follow or precede the Codicils, and those of Persons who die without a Testament; that these last are in lieu of a Testament, containing all the Dispositions of the Deceased, in the same manner as if he had made a Testament, and named therein his Heir at Law for his Executor, charging him with what should be contained in the Codicil: Whereas the Codicil of him who has likewise made a Testament, has relation to that Testament *r*, and makes a part of it, as has been said in the fifth Article.

r Intestato patrefamilias mortuo, nihil desiderant codicilli: sed vicem testamenti exhibent. Testamento autem facto, jus sequuntur ejus. *l.* 16. *in f. ff. de jure codic.*

We may give to this Text the Meaning explained in this Article, altho it has another which shall be mentioned in the Remark on the fourth Article of the following Section.

VIII.

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VIII.

8. The Codicil hath its effect, altho it be not expresly confirmed by the Testament.

If he who had made a Codicil, makes afterwards a Testament, in which he makes no mention of the Codicil, the Codicil will nevertheless have its effect. For altho it be not expresly confirmed by the Testament, yet it is confirmed, in so far that it has not been revoked. And it is presumed that the Testator has persevered in the same Mind, since he has ordered nothing to the contrary *s*. But if the Testament contained any Dispositions contrary to those made in the Codicil, or if it made any Alteration in them, the last Will would be the Rule *t*.

s Divi Severus & Antoninus rescripserunt, ex iis codicillis qui testamentum præcedunt, posse fideicommissum peti, si appareat eum qui testamentum fecit, à voluntate quam in codicillis expresserat, non recessisse. §. 1. *in f. inst. de codic.* Testamento facto, etiamsi Codicilli in eo confirmati non essent, vires tamen ex eo capient. *l.* 3. §. 2. *ff. de jure codic.*

t Sed non servabuntur ea de quibus aliter defunctus novissime judicavit. *l.* 5. *in f. ff. de jure codic.*

IX.

9. One cannot impose by a Codicil a Condition on which the Institution of the Heir or Executor shall depend.

As one cannot by a Codicil make an Heir or Executor, so likewise one cannot take away the Inheritance by a Codicil, nor consequently impose on the Heir or Executor a Condition on which it should depend whether he should be Heir or not; nor can he take away a Condition of this Nature imposed by the Testament. For these sorts of Dispositions would have the Effect to take away and give the Inheritance; which cannot be done but by a Testament, to which more Formalities are required than to a Codicil *u*.

u Divi Severus & Antoninus rescripserunt, nihil egisse matrem quæ cum pure liberos suos hæredes instituerit, conditionem emancipationis codicillis adjecit. Quia neque conditionem hæredi instituto codicillis adjicere, neque substituere directe potest. *l.* 6. *ff. de jure codic.* §. 2. *inst. de codic.* Hæredi quem testamento pure instituit, codicillis scripsit conditionem. Quæro an ei parere necesse habeat? Modestinus respondit hæreditas codicillis neque adimi potest. Porro in defectu conditionis de ademptione hæreditatis cogitasse intelligitur. *l.* 27. §. 1. *ff. de condit. inst.*

X.

10. Five Witnesses are required to a Codicil.

For the Validity of a Codicil, it is necessary that it should be attested by five Witnesses of the same Quality with those who are allowed to be Witnesses to a Testament *x*.

x In omni ultima voluntate, excepto testamento, quinque testes vel rogati, vel qui fortuitu venerint in uno eodemque tempore, debent adhiberi. *l. ult.* §. *ult. C. de codic.*

The Formalities of Codicils, as well as those of Testaments, depend on the Usage of the Places, as has been said concerning the Formalities of Testaments. See the first Article of the third Section of Testaments.

[In *England* we make no Distinction between the Number of Witnesses required to a Codicil, and those required to a Testament. Two are sufficient in written Testaments which contain Dispositions of Personal Estate, and the same Number is required in Codicils. But if the Codicils contain any Devises of Lands and Tenements, then three Witnesses are necessary, as has been already observed. *Swinb. of Wills, part* 1. §. 9. *Stat.* 29. *Car.* 2. *cap.* 3. §. 22. See the Remark on the first Article of the third Section of Testaments.]

XI.

11. Rules of Testaments which agree to Codicils.

We may add, as a last Rule of the Nature and Use of Codicils, that we must apply to them, and observe in them all the Rules of Testaments which may have relation to and agree with Codicils. Thus we may apply to Codicils the Rules which relate to the Capacity or Incapacity of Persons, whether to make Dispositions in prospect of Death, or to receive any Liberality by such Dispositions, the Rules touching the Interpretation of the said Dispositions, those of Conditions, and in general all the other Rules of Testaments which may be applied to Codicils *y*.

y One may be able to judge of the Truth and Use of this Rule, by the relation which the Rules concerning Testaments, which have been already explained, have to Codicils.

SECT. II.

Of the Causes which annul Codicils.

The CONTENTS.

1. *The Codicil is null for want of the necessary Formalities.*
2. *Or if it is revoked by a second.*
3. *Or by a Testament.*
4. *The Birth of a Child annuls the Testament, and Codicil.*
5. *Other Causes which annul Codicils.*

I.

1. The Codicil is null for want of the necessary Formalities.

THE Codicil is null, if it wants the Number of five Witnesses, who have the Qualifications necessary for giving Testimony, or if it wants any one of the other Formalities explained in the third Section of Testaments *a*.

a See the Text cited on the tenth Article of the first Section, and the Remark on the same Article, and the third Section of Testaments.

It is necessary to observe, as to the Formalities explained in that third Section of Testaments, that there

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there are some Rules of that Section which do not agree to Codicils; as, for example, those of the ninth and tenth Articles, which say, that the Heir or Executor, his Children, his Father, and his Brothers, cannot be Witnesses to the Testament; for in a Codicil there is no Heir or Executor.

II.

2. Or if it is revoked by a second.

A first Codicil is annulled by a second which revokes it *b*. But if the second makes only some Changes in the first, both the one and the other will subsist in what the second shall not have changed. And if the second makes no Alteration at all in the first, both of them will have their Effect *c*.

b Cum proponatis pupillorum matrem vestrorum diversis temporibus, ac dissonis voluntatibus duos codicillos ordinasse: in dubium non venit, id quod priori codicillo inscripserat, per eum, in quem postea secreta voluntatis suæ contulerat, si à prioris tenore discrepat, & contrariam voluntatem continet, revocatum esse. *l. 3. C. de codic.*

c This is a Consequence of the Power which one has to make several Codicils. See the fourth Article of the first Section.

III.

3. Or by a Testament.

A Testament subsequent to a Codicil may either confirm it, or revoke it, or make some Alteration in it, with much more Reason than a second Codicil may: Which depends on the manner in which the Testator shall have explained himself in the said Testament *d*.

d See the fourth, fifth, and eighth Articles of the first Section.

IV.

4. The Birth of a Child annuls the Testament and Codicil.

If he, who having no Children had made a Codicil and a Testament, happens afterwards to have Children, the Testament and the Codicil will be void *e*.

e Rupto testamento posthumi agnatione, codicillos quoque ad testamentum pertinentes non valere, in dubium non venit. *l. 1. C. de codic.*

¶ This Text relates only to the Case where there is both a Codicil and a Testament: And it is said in another Text, that when there is only a Codicil without a Testament, the Birth of a Child does not annul it. *Agnatione sui hæredis nemo dixerit Codicillos evanuisse. l. pen. ff. de jure Cod. l. 16. eod.* This Difference, which the *Roman* Law makes between a Codicil without a Testament, and the Codicil of him who had also made a Testament, is founded upon this, That he who makes a Codicil, and dies without making any Testament, dies with an Intention to leave his Succession to his Heir at Law, and that therefore his Intention is that his Heir at Law should execute the Codicil; whereas, when there is both a Testament and a Codicil, it is a Rule in the *Roman* Law that the Codicil shall follow the Condition of the Testament, and that it shall subsist if the Testament ought to subsist, or that it be void if the Testament is annulled. *Intestato patrefamilias mortuo nihil desiderant Codicilli, sed vicem testamenti exhibent: testamento autem facto, jus sequuntur ejus. l. 16. in fine ff. de jure Cod.*

This Law, which makes all the Codicils of those who have made no Testament to subsist without distinction, might in certain Cases trespass against Equity. For if we suppose that a Man who was not married, and had no hopes of having any Children, had made a Codicil, in which he had disposed of the greatest Part of his Estate, thinking to leave the Remainder, which would be the least Part of it, to his Heir at Law, a collateral Relation, and one who did not stand in need of it; and that afterwards he should happen to marry, and to have Children, and to die without revoking this Codicil, either thro Forgetfulness, or because he had been surprized by Death; it would seem very hard to make such a Codicil to subsist, in a Case where even a Testament would be annulled, not only as to the Institution of an Heir or Executor, but as to all the other Dispositions thereof, even the most favourable *. And if Equity requires that the Birth of a Child should annul in its favour all the Dispositions of a Testament, the same Equity would seem likewise to require that the Birth of a Child should annul also the Dispositions of a Codicil, altho it be not accompanied with a Testament; seeing this Circumstance is wholly indifferent to the Right of the Child, who is as much or more injured by the Dispositions of such a Codicil, as he can be by a Testament. So that seeing the Motive which has induced us to receive into our Usage the Dispositions of the *Roman* Law, is only the Equity thereof which renders those Dispositions of the *Roman* Law, which we observe, just in all Places, and at all Times, and that we reject such Dispositions thereof as seem to deviate from that Equity, and which favour too much of those Niceties which we see so frequent there; we did not think it proper to set it down as a Rule, That the Birth of a Child does not annul a Codicil, when

* *See the fifteenth Article of the fifth Section of Testaments.*

† there

there is no Testament. Neither have we put down the contrary in this Article; but we have contented our selves with making this Remark here concerning this Difficulty, in which we should be afraid to trespass against Equity, if we should lay it down as a general Rule, either that all Codicils are valid when there is no Testament, or that they are null when there is a Testament which is found to be null. For this first Rule would be attended with the Inconvenience that has been just now taken notice of, if the Birth of a Child should not annul a Codicil that is not accompanied with a Testament. And it may be said of the other Rule of the *Roman* Law, which annuls indifferently all Codicils, when there is a Testament which proves to be null, whether the Testament be made after or before the Codicil, or be made at the same time, that it may also have its Inconveniences, except in the Cases where the Codicils and Testaments have such a Connexion with one another, that the Dispositions which they contain ought all of them either to subsist or perish together; as for example, if a Testator who, having no mind to explain his particular Dispositions by a Testament, had only named his Heirs or Executors in the Testament, requiring them to execute the Dispositions which he should afterwards make by a Codicil, and accordingly made a Codicil which contained Legacies with which he burdened his Heirs or Executors differently and apart, one with some, and the others with others, and that it happened that this Testament proved to be null, either by reason of the Incapacity of the Heirs or Executors, or for want of some Formalities; one might without transgressing against Justice or Equity annul this Codicil so linked and united to this Testament. But if a Testator, who, without any Design of making a Testament, had first made a Codicil, containing some Dispositions in favour of poor Relations or Servants, or for some charitable Uses, should afterwards chance to make a Testament, and institute for his Heir or Executor either his Heir at Law, or even some other Person; would it be necessary, in order to do Justice, that if this Testament should prove null, the Codicil should likewise be annulled, because it is the Rule in the *Roman* Law, that when there is a Testament, all Codicils are to follow the Fate thereof?

All that has been said here touching the Difference of Codicils in the Cases where there is no Testament, and in the Cases where there is, concerns only the Provinces which are governed by the written Law. For as to the Customs, the Reader has already been sufficiently informed, that as all the Dispositions which are made there are only Codicils, seeing they cannot there make an Heir by a Testament, this Difference is of no manner of use in them. And as for the Provinces which are governed by the written Law, we have seen there, and there is still to be seen at this Day, several Law Suits which are occasioned by the Difficulties which arise from certain Cases which are pretended to be excepted from the Rule of the *Roman* Law, which annuls all Codicils when there is a Testament which is found to be null. It is easy to imagine that the Liberty of excepting certain Cases is a Source of many Law Suits. Which makes it to be wished that there were on this Subject some Regulation, which should make the Validity of Codicils either to depend absolutely on that of Testaments, when there are any, or to be wholly independent on them, or which should give some Temperament thereto, if any that is just and necessary can be found.

V.

5. Other Causes which annul Codicils.

We may add, for a last Rule concerning the Causes which may annul a Codicil, that we must join to those Causes which proceed from the want of Formalities, and to the others that have been just now explained, some others of the Number of those which annul also Testaments; such as, if the Person who had made a Codicil, dies under an Incapacity incurred by a Sentence of Condemnation; if the Codicil has been made by Force; if he who made it, did afterwards cancel it *f*.

f See the fifth Section of Testaments.

SECT. III.

Of Donations made in prospect of Death.

IT is necessary to distinguish in this Word of Donation in prospect of Death, two different Ideas of two Things, which it signifies in its common Acceptation with us. For we may understand by this Word the Deed or Writing which contains the Disposition of the Donor, as we understand by

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by the Word Codicil the Writing which contains the Legacies; and we may likewise understand by this Word of Donation in prospect of Death, the very Disposition it self, that is, the Beneficence contained in the Writing, as the Legacy is contained in the Codicil. Thus, whereas with respect to Legacies we make use of two distinct Words, to wit, that of Codicil, which signifies the Writing in which the Legacies are contained, and the Word Legacy, which signifies the Dispositions made in the Codicil; in the Case of Donations made in prospect of Death, we have only this one Word which has both Senses, and which signifies equally the Disposition of the Person who gives, and the Writing which contains the said Disposition; which may proceed from hence, that usually the Word Donation in prospect of Death, is only made use of when there is one only Donation made by a particular Act or Writing; whereas Codicils may contain one or more Legacies, and likewise other Dispositions.

It was necessary to observe the Distinction of these two Meanings which the Word Donation in prospect of Death, may have, in order to prevent the Reader's forming to himself a wrong Idea of what is the Subject-matter of this Section. For he might imagine that this Section should contain all the Rules which may relate to Donations made in prospect of Death, either as to the Formalities of the Acts, or Writings which contain these sorts of Dispositions, or as to their Nature. And he might likewise fancy, that as in the preceding Sections we have explained only what concerns Codicils, without saying any thing of Legacies, which shall be the Subject-matter of the subsequent Title; so we should make the like distinction in Donations because of Death. But since we are to explain the Detail of the Rules relating to Legacies only in the following Title, and that the said Rules are applicable to Donations made in prospect of Death, they being of the nature of Legacies, we shall explain in this Section only such Rules concerning Donations made in prospect of Death as ought to be separated from those of Legacies, whether it be that the said Rules relate to the Donation it self, that is, to the Liberality of the Donor, or to the Writing which contains it; and it will be easy to distinguish in every Article what it relates to.

Before we proceed to the Explanation of the few Rules of which this Section consists, it is proper to observe, that seeing the bare Word Donation comprehends the Donations that are to take effect in the Life-time of the Donor, as also the Donations that are to have their effect only after the Donor's Death, it is necessary to distinguish aright the Nature of these two sorts of Donations, and for that end to consult what has been said of this Matter in the Preamble to the Title of Donations which are to have their effect in the Donor's Life-time, and likewise what is there said of the Maxim, *To give, and to retain, is good for nothing*; which has been explained in the same Place.

The CONTENTS.

1. *Definition of a Donation made in prospect of Death.*
2. *Wherein Donations made in prospect of Death, and Codicils do agree, and wherein they differ.*
3. *Formalities of Donations made on account of Death.*
4. *Who may make Donations in prospect of Death.*
5. *The Rule of Codicils agree to Donations made in prospect of Death.*
6. *And also the Rules of the Legacies.*

I.

1. Definition of a Donation made in prospect of Death.

A Donation made in prospect of Death, is a Disposition made by him, who not being willing to strip himself in his Life-time of the thing which he intends to give away, desires that after his Death it may go to the Person whom he has a mind to favour with it, and that he should have it rather than his Heirs *a*.

a Mortis causa donatio est, cum quis habere se vult quam eum cui donat: magisque eum cui donat, quam hæredem suum. *l.* 1. *ff. de mort. caus. donat.* §. 1. *in f. inst. de donat.*

¶ In the *Roman* Law they distinguished three sorts of Donations because of Death. The first is of those, where, without any present danger of Death, one gives out of a View that he must some time or other die. The second is of those, where the Donor, finding himself in some danger of Death, gives in such a manner, that he strips himself of the thing which he gives away, and conveys it to the Donee, whom he makes Master of it. And the third is of those Donations, where, in the same Case of a danger of Death, one gives in such a manner that the Thing given shall

shall not belong to the Donee till after the Donor's Death. *Julianus libro septimo decimo Digestorum tres esse species mortis causa donationum ait. Unam cum quis nullo præsentis periculi metu conterritus, sed sola cogitatione mortalitatis donat. Aliam esse speciem mortis causa donationum ait, cum quis imminente periculo commotus, ita donat, ut statim fiat accipientis. Tertium esse genus donationum ait, si quis periculo motus non sic det ut statim faciat accipientis, sed tunc demum cum mors fuerit secuta.* L. 2. ff. de mort. caus. donat. §. 1. Instit. de donat.

We shall not set down here as Rules, these three ways of giving in prospect of Death. This Distinction does not agree with our Usage; for it is to be observed that the second of these three sorts of Donations in prospect of Death, has a Character quite opposite to the essential Character we give to Donations made in view of Death, which is that they are revokable, and that they do not put the Donees in possession till after the Death of the Donor. Whence it follows, that this second sort of Donation would be a Donation that takes effect in the Donor's Life-time, since it would put the Donee immediately into possession. And it is to be observed also that by our Usage those who are in imminent danger of Death, thro Sickness or otherwise, cannot make Donations that are to have their effect in the Donor's Lifetime. As to the two other sorts of Donations in prospect of Death, according to our Usage it is indifferent whether the Person who makes the Donation because of Death be in immediate danger of it, or be not. And they must all of them be in Writing, and made in due Form.

What has been just now said, that by our Usage those who are in imminent danger of Death cannot make Donations that are to have effect in the Lifetime of the Donor, is to be understood of Donations of immoveable Goods, or of Sums of Money, or of other things that are not actually delivered to the Donee; for what is actually deliver'd, the Donation thereof is good and valid, unless it be done in fraud of the Law, or of Custom, beyond the bounds of what one may give away in prospect of Death.

It may likewise be remarked concerning that Usage of the *Roman* Law as to Donations in prospect of Death, that they reckoned in the number of such Donations the other ways by which it may happen that one has something because of the Death of another, which they called *mortis causa capio*; as if a Father gave something because of the Death of his Son. It would be needless to instance in more Examples of this kind, there being nothing in this matter that deserves our Observation. *V. l.* 8. 12. 18. *&* 21. *ff. de mort. causa donat. & capion.*

II.

2. Wherein Donations made in prospect of Death, and Codicils do agree, and wherein they differ.

There is this Difference between a Codicil and a Donation in prospect of Death, that the Name of Codicil is given indifferently to all Acts which contain the several Dispositions which one may make in the prospect of Death besides that of the Institution of an Executor, whatever number there be of the said Dispositions, and of what nature soever they may be; but by a Donation in prospect of Death is properly understood, only one single particular Disposition. Thus he who besides making a Testament and Codicils, if he had a mind to make any, or without making either Testament or Codicil, had a mind to dispose of a Sum of Money, or other thing, in favour of some Person, might give to the Act or Writing that should contain the said Disposition, the Name of Donation because of Death, which one does not give to the other Acts which contain several Dispositions: But he might likewise give to this Disposition the Name of Codicil. Thus, it is the same thing for a Donation in prospect of Death, whether it be expressed under this Name in a Writing made expresly for that purpose, or whether it be contained in a Codicil, either under the Name of Legacy, or under that of Donation *b*.

b See the sixth Article of this Section, and the third Article of the first Section of Legacies, and the Texts cited on them. As to this whole Article, the Reader may consult the Preamble of this Section.

III.

3. Formalities of Donations made on account of Death.

Donations made in prospect of Death being of the same Nature with Codicils, the same Formalities ought to be observed in them: And as five Witnesses are required to a Codicil, the same number is likewise necessary to a Donation in prospect of Death *c*.

c See the Text cited on the 10th Article of the first Section of Codicils, and the Remark there made upon it.

Quinque testibus præsentibus. *l. ult. C. de donat. caus. mort.*

IV.

4. Who may make Donations

The same Persons who may or may not make Testaments or Codicils, may also

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Donations in prospect of Death. also, or may not make Donations because of Death. For the same Capacity is required for this sort of Dispositions as for the two others *d*.]

d See the second Section of Testaments.

V.

5. The Rules of Codicils agree to Donations made in prospect of Death. We ought to apply to the Acts or Writings which contain Donations made in prospect of Death, the other Rules which relate to Codicils, as they may agree with them. And it will be easy to discern those Rules, without repeating them in this Place *e*.

e See the two preceding Sections.

VI.

6. And also the Rules of Legacies. As to what concerns the Nature of Donations made in prospect of Death, it being the same with that of Legacies *f*, they have also the same Rules, which shall be explained in the following Title.

f Mortis causa donationes ad exemplum legatorum redactæ sunt per omnia. §. 1. *inst. de donat. V. l. ult. C. de donat. caus. mort.*

TITLE II.

Of LEGACIES.

LEgacies are particular Dispositions on account of Death, which distinguish the Legatees from the Heir or Executor, in that the Legatees succeed only to that which is taken off from the Inheritance to be given to them, and that they are as it were particular Successors; whereas the Heir or Executor is universal Successor to the whole Mass of the Goods.

There is likewise this Difference between Legatees and Executors, that an Executor cannot be made but by a Testament, whereas Legatees may be made not only by a Testament, but also by a Codicil. And it is the same thing for the Legacies, whether they be contained in one or other of these two sorts of Dispositions, which are distinguish'd with regard to Legacies only in this, that the Legacies left by a Testament are due from the Executor, and those left in a Codicil, without a Testament, are due from the Heir at Law, or next of kin.

It is necessary also to remark here, as we have done in other Places, that in the Customs of *France* if a Testator institutes any other Person for his Heir or Executor besides him who has a right to succeed by Law, if there were no Testament, they do not give him the Name of Heir, but only that of universal Legatee. For altho he succeeds to all the Goods, and to all the Rights which the Testator has power to dispose of; yet the Customs give the Name of Heir only to the Heir of Blood, to whom they appropriate the Goods which they do not allow the Testator to dispose of: And this Legatee is distinguished from particular Legatees by this Quality of universal Legatee. Thus the Disposition made in his favour is not called the Inheritance, even altho it should comprehend all the Effects of the Testator, if he had none but what he had power to dispose of; but it is only called an universal Legacy.

Seeing there are some Matters which are common both to Legacies, and to the Institution of an Heir or Executor, and that it was necessary to explain them under the Title of Testaments, we shall not repeat here what has been already explained of these Matters, as that which concerns the Rules of the Interpretation of the Dispositions of the Testator, those relating to Conditions, Descriptions, and other Manners which may diversify the said Dispositions, the Rules concerning the Right of Accretion, of Transmission, and others which have been explained under the Title of Testaments. Neither shall we say any thing here of the Formalities necessary to Legacies, this Matter having been explained in the same Title of Testaments, and in that of Codicils, which are the Dispositions by which Legacies are given. And in general the Reader ought to apply to Legacies all the Rules explained in those other Titles, according as they are capable of being applied thereto. And under this Title we shall treat of the Rules which are peculiar to the Matter of Legacies.

It is further to be remarked, that under the Name of Legacy, it is necessary to comprehend that kind of Dispositions on account of Death which are called particular Fiduciary Bequests, distinguished from Legacies in the antient *Roman* Law both by their Name and their Nature, but confounded with one another by the latter Laws, which have given to the said Fiduciary Bequests the Nature of Legacies, and have made these two sorts of Dispositions equal in every thing *a*. But because there is in

a Per omnia exæquata sunt legata fideicommissis. *l.* 1. *ff. de legat.* 1.

reality

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reality some Difference between Legacies and particular Fiduciary Bequests, and that we shall be obliged to make use of this Word of Fiduciary Bequest, and to quote Laws in which it is mentioned; it is necessary not only to inform the Reader thereof, but to explain here on this Subject that which ought to precede the Rules, in order to make them rightly understood.

A Fiduciary Bequest is a Disposition by which the Testator prays his Heir or Executor to deliver to some Person either the whole Succession, or a part thereof, or something in particular. The first Use of Fiduciary Bequests was such, that it depended wholly on the Heir or Executor, either to comply with this Request of the Testator's, or not to comply with it, as he thought fit: and it was from thence that the *Latin* Word *Fideicommissum* came, because it was committed or remitted to the Faith and Integrity of the Heir or Executor; but afterwards the Heirs or Executors were compelled by Law to execute these sorts of Dispositions *b*.

The Fiduciary Bequests of the whole Inheritance, or of a part of it, are a Matter which shall be explained under the third Title of the fifth Book. And as for particular Fiduciary Bequests, altho, as has been just now remarked, they have been made like unto Legacies, yet it is necessary to distinguish in these Fiduciary Bequests two sorts of Rules: Those which are common to them and to Legacies, which shall be explained under this Title: And some others that are peculiar to them, which shall be explain'd in the second Section of the third Title of the fifth Book.

It is necessary finally to remark on the subject Matter of this Title, that, Donations made in prospect of Death being distinguished from Legacies only by Name, as has been remarked in the third Section of the preceding Title; we must apply to those Donations the Rules which shall be explain'd under this Title. Thus the Reader must remember that what shall be here said only of Legacies, ought likewise to be understood of Fiduciary Bequests, and of Donations because of Death, unless there be some Difference which it will be easy to discern.

It is not needful to explain here the different kinds of Legacies which had been in use in the *Roman* Law. For altho this Knowledge might be of use for the right understanding of the Texts of some Laws, *Justinian* having confounded all these sorts of Legacies together, giving to them all the same Nature and the same Effect *c*, yet the Explanation of this Distinction would be useless. However we may take notice of one way of bequeathing, which had been rejected by the antient Law, and which *Justinian* has allowed, and which with us might either be approved or rejected, according to the Circumstances. It was that Manner of bequeathing which they called by the way of Punishment *Pœnæ nomine d*, when the Testator ordained or forbad something to his Heir or Executor, or imposed some Condition on him, adding thereto a Penalty either of doing or giving something, in case he should fail to execute the Will of the Testator. Thus by our Usage a Testator might legally order the Payment of a Legacy at such a time, and impose the Payment of Interest, as a Punishment for his delay to make Payment. Thus a Testator might require his Heir or Executor to take into Partnership with him in his Commerce a Person to whom he had a mind to procure that Advantage; adding, that in case his said Heir or Executor would not receive such a one for his Partner, he should give him a certain Sum of Money. But our Usage would not approve of a Testator's enjoining his Heir or Executor to marry, or not to marry his Daughter to such a one, or if he should contravene his Order to give to such a one the Sum of so much. And altho such a Legacy seems to be approved by *Justinian*, contrary to the antient Law which condemned it *e*, yet it would seem to be an Encroachment on the Liberty of Marriage, and by that means be contrary to Decency and Good Manners.

b V. tit. inst. de fideicom. hared. & tit. de sing. reb. per fideicom. relict.

c §. 2. inst. de legat. l. 1. C. comm. de legat.

d §. ult. inst. de leg. l. un. C. de his qua pœn. non.

e V. d. §. ult.

SECT. I.

Of the Nature of Legacies, and of particular Fiduciary Bequests.

THE Remark which has been made in the Preamble of this Title on Fiduciary Bequests, explains the Reason why we add to the Title of this Section particular Fiduciary Bequests.

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The CONTENTS.

1. *Definition of a Legacy.*
2. *Definition of a particular Fiduciary Bequest.*
3. *Legacies, particular Fiduciary Bequests, and Donations because of Death, are all of the same Nature.*
4. *Wherein consists the Validity of these Dispositions.*
5. *Their Nature, and the Formalities to be observed in them.*
6. *Essential Characters of these Dispositions.*
7. *A Testator may burden the Legatees with Legacies to other Persons.*
8. *A thing left to several Persons is divided equally among them.*
9. *A Legatee of several Legacies cannot restrain himself to those that are without Burden.*
10. *Legacies are only due after all the Debts are paid.*

I.

1. Definition of a Legacy.

A Legacy is a particular Disposition because of Death in favour of some Person, either by a Testament or Codicil *a*.

a Legatum est donatio testamento relicta. *l.* 36. *ff. de legat.* 2.

Legatum est donatio quædam à defuncto relicta, ab hærede præstanda. §. 1. *instit. de legat.*

Legatum est delibatio hæreditatis, qua testator ex eo quod universum hæredis foret, alicui quid collatum velit. *l.* 116. *ff. de legat.* 1.

II.

2. Definition of a particular Fiduciary Bequest.

A particular Fiduciary Bequest is a Disposition by which the Executor or a Legatee is intreated to restore, or to give to a third Person a certain thing *b*.

b Potest quis etiam singulas res per fideicommissum relinquere: veluti fundum, argentum, hominem, vestem, & pecuniam numeratam. Et vel ipsum hæredem rogare ut alicui restituat, vel legatarium. *inst. de sing. reb. per fideicom. relict.*

III.

3. Legacies, particular Fiduciary Bequests, and Donations because of Death, are all of the same Nature.

It is the same thing for the Validity of the Dispositions of a Testator, whether he express himself in relation thereto in the Words of a Legacy, or of a Fiduciary Bequest, or Donation because of Death; for all these sorts of Dispositions have the same Nature and the same Use *c*: And whether the Testator express himself in Terms of Intreaty to his Executor, or that he commands him, or that without addressing himself to the Executor, he explains his Will, the Executor will be bound to execute it *d*. And it is the same thing if it is a Legatee whom the Testator requires or intreats to give or remit a Sum of Money, or any other thing to a third Person *e*.

c Per omnia exæquata sunt legata fideicommissis. *l.* 1. *ff. de legat.* 1.

Et fideicommissum, & mortis causa donatio appellatione legati continetur. *l.* 87. *ff. de legat.* 3.

Mortis causa donationes ad exemplum legatorum redactæ sunt per omnia. §. 1. *instit. de donat.*

d Omne verbum significans testatoris legitimum sensum legare vel fideicommittere volentis, utile atque validum est sive directis verbis, quale est, *jubeo*, forte, sive precariis utatur testator, quale est *rogo*, *volo*, *mando*, fideicommitto. *l.* 2. *C. com. de legat.*

e Et hæc disposuimus non tantum si ab hærede fuerit legatum derelictum vel fideicommissum, sed & si à legatario, vel fideicommissario, vel alia persona quam gravare fideicommisso possumus, fideicommissum cuidam relinquatur. *l.* 1. *C. comm. de leg.* See the seventh Article.

IV.

4. Wherein consists the Validity of these Dispositions.

The Validity of Legacies, of Fiduciary Bequests, and of Donations on account of Death, implies two things, the Quality of the Disposition, which is that wherein their Nature does consist, and the Formalities of the Acts which contain them, whether they be Testaments, Codicils, or Donations *f*.

f See the following Article.

V.

5. Their Nature, and the Formalities to be observed in them.

The Quality of these Dispositions which constitutes their Nature, consists in the essential Characters which the Laws prescribe, and on which it depends whether they have their Effect, or whether they be null. And the Formalities respect the Acts or Writings which contain these Dispositions, and which are the Proof of their Verity; which is held to be well established when the said Acts are according to the Form regulated by Law. These Formalities have been explained in their proper Places *g*. And as for the Nature and Characters of these Dispositions, we must join to what has been said of that Matter in the three first Articles, all the Rules of this Title, and of the preceding Titles, in so far as we can judge they have any relation to them.

g See the third Section of Testaments, the first Section of Codicils, and the third Article of the third Section of the same Title.

VI.

6. Essential Characters of these Dispositions.

It is essential to the Validity of these three sorts of Dispositions, that the Persons who make them have the power to do it; that those in favour of whom they are made be not incapable of them; and that the things which are disposed of be such as may be disposed of. These three

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three Characters shall be the subject Matter of the two following Sections, where we must understand what shall be said only of Legacies; as if it had been also expressed of Fiduciary Bequests, and of Donations because of Death *h*.

h See the two following Sections.

VII.

7. A Testator may burden the Legatees with Legacies to other Persons.

A Testator may burden with a Legacy, or a Fiduciary Bequest, not only his Executor, but likewise a Legatee, as has been said in the third Article. And if he had made a Testament, or a Codicil, or a Donation because of Death, he might burden by new Dispositions those to whom he had given something by former ones, which having been made only in prospect of Death, may suffer this Diminution *i*.

i Eorum, quibus mortis causâ donatum est, fideicommitti quoquo tempore potest. *L.* 77. §. 1. *ff. de legat.* 2. See the last of the Texts cited on the third Article.

We have added in the Article, that the Testator may charge with Legacies those to whom he has given something by preceding Dispositions made in prospect of Death; for he could not impose new Burdens on those to whom he had made simple Donations, that were to have their Effect in his Lifetime.

VIII.

8. A thing left to several Persons is divided equally among them.

If one and the same thing is bequeathed to two or more Persons, without distinction of Portions, it will be equally divided among them, share and share alike *l*.

l In legato pluribus relicto, si partes adjectæ non sunt, æquæ servantur. *l.* 19. §. *ult. ff. de leg.* 1.

IX.

9. A Legatee of several Legacies cannot restrain himself to those that are without Burden.

As one may bequeath one and the same thing to several Persons, so one may leave to one Person different Legacies, either without a Charge or with a Charge: And the Legatee may accept those which he shall think fit, and reject the others; unless it be that those which he refuses would oblige him to some Charge. For in this Case he could not divide the Legacies, and by accepting one, he would be liable to the Charges of the others *m*.

m Duobus legatis relictis, unum quidem repudiare, alterum vero amplecti posse, respondetur. Sed si unum ex legatis onus habet & hoc repellatur, non idem dicendum est. *l.* 5. *d. l.* §. 1. *ff. de leg.* 2.

X.

10. Legacies are only due after all the Debts are paid.

We may add as a last Rule of the Nature of Legacies, and of other Dispositions on account of Death, that since Testators can dispose only of their Goods, the Debts owing by the Testator, even those that are the least favourable, are preferred before all his Dispositions of what kind soever they be *n*.

n Sicuti legata non debentur, nisi deducto ære alieno aliquid supersit, nec mortis causâ donationes debebuntur, sed infirmantur per æs alienum. Quare si immodicum æs alienum interveniat, ex re mortis causâ sibi donata nihil aliquis consequitur. *l.* 66. §. 1. *ff. de leg. Falc.*

SECT. II.

Who may give Legacies, and who may receive them.

WE must understand what shall be said of Legacies hereafter, in the Sense which comprehends particular Fiduciary Bequests, and Donations because of Death, as has been already sufficiently remarked; and it is for Brevity's sake we insert here only the Word Legacy.

The CONTENTS.

1. *Who may give Legacies.*
2. *At what time are we to consider the Capacity or Incapacity of the Person who leaves the Legacy.*
3. *Who may receive Legacies.*
4. *Persons unworthy of Legacies.*
5. *The same.*
6. *Particular Rules concerning Persons who may receive Legacies.*
7. *One may bequeath Alimony to a Person incapable of other Legacies.*
8. *The Testator may leave a Legacy to his Executors.*
9. *A Legacy left to two Executors how to be divided.*
10. *The Testamentary Heir, who is also a Legatee, may keep to his Legacy, and renounce the Inheritance.*
11. *One may leave a Legacy to unknown Persons, and in what Sense.*
12. *A Legacy to one of many Persons.*
13. *A Legacy to a Town, or other Corporation.*

I.

1. Who may give Legacies.

The same Persons who may make a Testament, may give Legacies. Thus, to know if a Person may give a Legacy, we must examine if he is not under some of the Incapacities which hinder a Man from making a Testament, and which have been explained in their proper Place *a*.

a See the 2d Section of Testaments.

II.

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II.

2. *At what time are we to consider the Capacity or Incapacity of the Person who leaves the Legacy.*

Seeing the Rules touching the Incapacity of bequeathing are the same with those of the Incapacity of making a Will, the Rules concerning the time when we are to consider the Incapacity of the Person who disposes, are the same with respect to Legacies, as with respect to the Institution of an Executor, and they are explained in the same Place *b*.

b See the 14th Article, and those that follow, of the 2d Section of Testaments.

III.

3. *Who may receive Legacies.*

All Persons who are capable of being named Executors of a Will, are also capable of receiving Legacies; and it is only such as are capable of being Executors that are capable of being Legatees. Thus, in order to know who those Persons are, we need only to consult the Rules which are set down in their proper Place *c*.

c See the same 2d Section of Testaments.

IV.

4. *Persons unworthy of Legacies.*

We must not rank in the number of Persons incapable of Legacies those who render themselves unworthy of them. Thus, for example, a Legatee who by collusion with the next of kin, or out of some other Motive, should conceal the Testament in which he had a Legacy left him, would render himself unworthy of it *d*. And every Legatee in whom should be found any one of the Causes which render the Heir or Executor unworthy of the Inheritance, and which have been explained in their Place, would be also unworthy of the Legacy *e*.

d Si legatarius vel fideicommissarius, celaverit testamentum, & postea hoc in lucem emerserit, an possit legatum sibi relictum is qui celaverit ex eo testamento vindicare dubitabatur, quod omnino inhibendum esse censemus, ut non accipiat fructum suae calliditatis, qui voluit haeredem haereditate sua defraudare. Sed hujusmodi legatum illi quidem auferatur. Maneat autem quasi pro non scripto apud haeredem: ut qui alii nocendum esse existimavit, ipse suam sentiat jacturam. *l. 25. C. de legat.*

e See the 3d Section of Heirs and Executors in general.

V.

5. *The same.*

We must not reckon among the Persons unworthy of Legacies, him who being next of kin, had impugned as null the Testament which contained a Legacy in his favour. For altho the Testament were confirmed against his Pretension, yet seeing it did not any ways injure the Honour of the Deceased, and that he only exercised a Right which he ought not to be deprived of by this Legacy, nothing could be imputed to him that should render him unworthy of the Legacy. But if this Legatee, after having received his Legacy, should impeach the Will as being forged, pretending that the Executor had made it, and the Will should be confirmed by Sentence, he would lose the Legacy because of the Injury he had done to this Executor. But if the Legatee who is next of kin, having received the Legacy left him, should afterwards attempt to annul the Testament because of some Flaw therein, which ought to have this effect, such as the Incapacity of the Person instituted Heir or Executor, his Action would be received, and it would be no bar to him that he had approved the Testament by receiving his Legacy. And in general when the Question is, whether a Legatee who receives his Legacy loses the Right which he may have to the Inheritance; it is by the Circumstances of his Person, of his Condition, of his Age, and others, that it ought to be decided *f*.

f Ille qui non jure factum (testamentum) contendit, nec obtinuit, non repellitur ab eo quod meruit. Ergo qui legatum secutus, postea falsum dixit amittere debebit quod consecutus est. De eo vero qui legatum accepit, si neget jure factum esse testamentum, Divus Pius ita rescripsit: *Cognati Sophronis licet ab haerede instituto acceperant legata, tamen si is ejus conditionis fuerit visus, ut obtinere haereditatem non possit, & jure intestati ad eos cognatos pertinet, petere haereditatem ipso jure poterunt.* Prohibendi autem sint an non, ex cujusque persona, conditione, aetate, cognita causa a judice constituendum erit. *l. 7. §. 1. ff. de his quae ut ind. auf.* See the second and following Articles of the third Section of an undutiful Testament.

VI.

6. *Particular Rules concerning Persons who may receive Legacies.*

Altho for understanding who the Persons are to whom Legacies may be left, it be sufficient to know, that whoever is not incapable of being Heir or Executor may be a Legatee; yet there are in relation to this Subject some particular Rules, which it is necessary to distinguish from this general Rule, either because they are Exceptions to it, or for other Considerations, which one will be able to judge of by the Rules which follow *g*.

g See the following Articles.

VII.

7. *One may bequeath Alimony to a Person*

The Incapacity of inheriting or receiving a Benefit by some Disposition made in prospect of Death, does not comprehend Legacies of Alimony. For the

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incapable of other Legacies. the same being of an absolute Necessity to whosoever lives, it is but equitable that all Persons whatsoever should be capable of receiving it. Thus one may bequeath Alimony even to those who are under Sentence of Death, or condemned to other Punishments which imply Civil Death: And whilst they continue in Life, they may enjoy a Legacy limited to this Use *h*.

h Si in metallum damnato quid extra causam alimentorum relictum fuerit, pro non scripto est, nec ad fiscum pertinet. Nam pœnæ servus est, non Cæsaris. Et ita Divus Pius rescripsit. *l.* 3. *ff. de his qua pro non script.*

The same Motives which make a Legacy of Alimony to a Person condemned to Death, or to any other Punishment which implies Civil Death, to subsist, seem to justify the like Legacy in favour of an Alien who should stand in need of this Relief: And his Incapacity of inheriting ought not to exclude him from the benefit of a Legacy of this nature.

VIII.

8. The Testator may leave a Legacy to his Executors. A Testator may leave a Legacy not only to other Persons besides his Executors, but even to the Executors themselves, if they be more in Number than one; for one Executor alone having all the Goods of the Inheritance, he cannot owe himself a Legacy. Thus, where there are two or more Executors, the Testator may bequeath either to any one of them alone, or to every one of them, what he thinks fit, and distinguish them by particular Dispositions of certain Things *i*.

i Si uni ex hæredibus fuerit legatum, hoc deberi ei officio judicis familiæ erciscundæ manifestum est. *l.* 17. §. 2. *ff. de leg.* 1.

IX.

9. A Legacy left to two Executors, how to be divided. If a Testator had left a Legacy in common to two of his Executors or Testamentary Heirs, they would share it by equal Portions, altho their Portions in the Inheritance were unequal, unless the Testator had distinguished the Portions of the Legacy, in the same manner as those of the Inheritance. But not having done it, their Condition, altho different in respect of the Inheritance, is the same in the Legacy *l*.

l Si ex pluribus hæredibus ex disparibus partibus institutis, duobus eadem res legata sit: hæredes, non pro hæreditaria portione, sed pro virili id legatum habere debent. *l.* 67. §. 1. *ff. de leg.* 1.

X.

10. The testamentary Heir, who is also a Legatee, may keep to his Legacy, and renounce the Inheritance. If the Testamentary Heir, who is likewise a Legatee, renounces the Inheritance, he will not be for that depriv'd of his Legacy. For it was free for him to abstain from one of the two Favours, and to keep to the other *m*. And if it was a Son that was instituted Heir in part, and named a Legatee by the Testament of his Father, he might likewise keep to the Legacy, without being charged with contravening the Will of the Testator his Father; since he might very decently excuse himself from medling in the Affairs of the Inheritance, and leave it to those who were called to the Succession with him *n*.

m Sed & si abstinuerit se hæreditate, consequi eum hoc legatum posse constat. *l.* 17. §. 2. *ff. de leg.* 1.

n Filio pater quem in potestate retinuit, hæredi pro parte instituto, legatum quoque relinquit: durissima sententia est existimantium denegandam ei legati petitionem, si patris abstinuerit hæreditate, non enim impugnatur judicium ab eo qui justis rationibus noluit negotiis hæreditariis implicari. *l.* 87. *eod. l.* 12. *C. de leg.*

XI.

11. One may leave a Legacy to unknown Persons, and in what sense. A Testator may leave a Legacy to a Person unknown, and even uncertain, provided that some Circumstances mark his Intention, and the Motive that induced him to it, by which we may come at the knowledge of the Person to whom he has left the Legacy. Thus, for example, if a Testator had bequeathed a Sum of Money to a Person who should do such a Piece of Service either to himself, or some one of his Children, or of his Friends; he who should happen to be the Person who rendered this Service, would be the Legatee, altho the Testator had died without knowing who had done him that good Office *o*.

o Quidam relegatus facto testamento, post hæredis institutionem, & post legata quibusdam data, ita subjecit: *Si quis ex hæredibus, cæterisve amicis, quorum hoc testamento mentionem habui, sive quis alius restitutionem mihi impetraverit ab imperatore, & ante decessero, quam ei gratias agerem; volo dari ei qui id egerit, a cæteris heredibus aureos tot.* Unus ex his quos hæredes scripserat impetravit ei restitutionem, & antequam id sciret decessit. Cum de fideicommisso quæreretur, an deberetur, consultus Julianus respondit deberi. Sed etiam si non hæres vel legatarius, sed alius ex amicis curavit eum restitui, & ei fideicommissum præstari. *l.* 5. *ff. de reb. dub.*

XII.

12. A Legacy to one of many Persons. One may leave a Legacy to one Person among many, as to one of the Children of a Son, or of a Relation, or of a Stranger; whether the Testator explain the Circumstances which might distinguish this Legatee, or that he leaves the Choice of him to his Heir or Executor, or to some other Person. And in the first Case, if the Legatee is sufficiently distinguished, he alone will have the Legacy, or if he is not sufficiently

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ciently distinguished: all the Children will have their Share in it. But in the second Case, he who shall have been named by the Heir or Executor, or other Person, to whom the Testator had given the Power of naming, will be the Legatee. And if he who had the power of naming, dies without having named any one, the Legacy will belong either wholly to one Child alone, if there remains no more than one, or it will belong in common to those who shall remain. Thus, altho the Legacy were destined only for one Child, yet none of them being distinguish'd from the others, it would go to them all *p*.

p Si hæres damnatus esset, decem uni ex libertis dare, & non constituerit cui daret: hæres omnibus eadem decem præstare cogendus est. *l.* 17. §. 1. *ff. de leg.* 2. *v. l.* 24. *eod.*

Si cum forte tres ex familia essent ejus qui (*uni ex familia*) fideicommissum reliquit eodem vel dispari gradu: satis erit uni reliquisse: nam postquam paritum est voluntati, cæteri conditione deficiunt. *l.* 67. §. 2. *ff. de legat.* 2.

Rogo fundum cum morieris restituas, ex libertis cui voles. Quod ad verba attinet, ipsius erit electio. Nec petere quisquam poterit, quamdiu præferri alius potest. Defuncto eo, priusquam eligat, petent omnes. Itaque eveniet, ut quod uni datum est, vivis pluribus unus petere non possit, sed omnes petant quod non omnibus datum est. Et ita demum petere possit unus, si solus moriente eo superfuit. *d. l.* 67. §. 7.

XIII.

13. A Legacy to a Town or other Corporation.

One may leave a Legacy to a Town, or other Corporation whatsoever, whether Spiritual or Secular, and direct that it be applied to some honest and lawful use, such as for publick Buildings, for maintaining the Poor, or for other charitable Uses, or for the publick Good of the said Society *q*. And we must consider as a Legacy left to a Town or other Corporation, that which is left to those who compose the said Body, as to the Inhabitants of such a Town, or other Place, to the Canons of such a Chapter, to the Monks of such a Monastery *r*. But we must not reckon in the number of Corporations capable of Legacies, those which are not duly established and approved. But if the Legacy were left personally to the particular Persons who had a mind to form themselves into a Society, that they might reap the Benefit of the Legacy, either every one for himself in particular, or for the Society in general, when it should be established, the Legacy might subsist according to the Circumstances *s*.

q Si quid relictum sit civitatibus omne valet, sive in distributionem relinquatur, sive in opus, sive in alimenta, vel in eruditionem puerorum, sive quid aliud. *l.* 117. *ff. de leg.* 1.

Quod in alimenta ætatis puta infirmæ (senioribus, vel pueris, puellisque) relictum fuerit, ad honorem civitatis pertinere respondetur. *l.* 122. *eod.*

r Civibus civitatis legatum vel fideicommissum datum civitati relictum videtur. *l.* 2. *ff. de reb. dub.*

s Cum Senatus temporibus Divi Marci permiserit collegiis legare: nulla dubitatio est, quod si corpori cui licet coire legatum sit, debeatur. Cui autem non licet, si legetur, non valebit, nisi singulis legetur. Hi enim, non quasi collegium, sed quasi certi homines admittentur ad legatum. *l.* 20. *ff. de reb. dub.*

SECT. III.

What things may be devised.

As to things that may be devised, it is necessary to observe a Distinction of Legacies of two sorts. One is of the Legacies of things of which the Property passes to the Legatee; and the other is of Legacies which do not convey to the Legatee the Property of any thing, but only an Enjoyment, or the Use and Profits of a thing for some time, or during his Life, such as an Usufruct, a Pension, Alimony, or other Annuity. The Legacies of the first of these two kinds shall be explained in this and the following Section, and those of the second sort shall be the subject Matter of the fifth Section.

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I.

1. One may devise every thing that is in Commerce.

ONE may devise all sorts of things, Moveables or Immoveables, Rights, Services, and things of any other kind that are in Commerce, and that may pass from the use of one Person to that of another *a*.

a Corpora legari omnia & jura, & servitutes possunt. *l.* 41. *ff. de legat.* 1. See the following Article.

II.

2. One cannot devise things that are publick or consecrated.

Since one can devise only what may pass to the Use of the Legatee, the Legacy of a publick thing, or of a consecrated Place, would be without Effect, and the Legatee would not so much as have the Value of these sorts of things, whether the Testator was ignorant of the Quality of the things, or knew it. And in this last Case such a Disposition would be the Act of a Madman *b*.

b Campum martium, aut Forum Romanum, vel Ædem sacram legari non posse constat. Sed & ea prædia Cæsaris quæ in formam patrimonii redacta sub procuratore patrimonii sunt, si legentur, nec æstimatio eorum debet præstari. *l.* 39. §. *penult.* & *ult. ff. de legat.* 1. Furiosi est talia legata testamento adscribere. *dict. l.* §. 8. *in f.*

What is said in this Article of a consecrated Place is to be understood of holy, sacred, or consecrated Places that are set apart for publick use, such as a Church or Church-Yard. For the Legacy of a House in which there were a Chapel for the use of the said House, would comprehend the Chapel, in the same manner as the Legacy by an Ecclesiastick of his Silver Chapel, would take in the consecrated Plate belonging to it.

III.

3. One may bequeath a thing belonging to another Person.

Altho one cannot dispose of what belongs to others, yet a Testator may bequeath a thing which belongs to another *c*. And such a Legacy may have its effect, or not have it, according to the Rules which follow.

c Non solum testatoris vel hæredis res, sed etiam aliena legari potest. §. 4. *inst. de leg.*

¶ Altho it may seem somewhat strange that one can bequeath a thing which he has no right to dispose of, and especially a thing which he knows to be another's, and that it does not seem possible that one in his right Senses should make such a Disposition; however seeing a Testator may oblige his Heir or Executor to purchase an Estate for the use of a Legatee, this would be in effect to bequeath a thing that is another's. Thus we must understand what shall be said in the following Articles, as meant of Dispositions of this Quality, or such that one may judge that the Testator did not intend to make a ridiculous Legacy of a House, for instance, belonging to his Neighbour, without having any Circumstance that may justify such a Disposition from the Imputation of Extravagance. For it ought to have some Foundation and some Motive that may agree with good Sense, and render it just.

It would seem that it is only in this Sense that we are to understand the Rules which we find in the *Roman* Law touching this Matter, and that the Authors of those Rules neither could, nor intended thereby to authorize the impertinent Dispositions of things to which neither the Testator nor his Heir or Executor had any right, and when there was no Circumstance that could make such a Disposition appear to be reasonable; as we ought likewise to believe, that by permitting a Testator to bequeath what did not belong to him, they did not thereby mean that a Testator might in conscience give away, or a Legatee retain a thing bequeathed, which belonged neither to the Testator, nor to his Heir or Executor. We add this last Reflexion, because of the Sentiment of some Authors, who have been of opinion that the Canon Law condemns as unlawful all Legacies of things belonging to other Persons; which they found upon the Decretal of the fifth Chapter *de testamentis*, altho that Decretal be only in a particular Case, where the Legatee being in pos-

session

ſeſſion of the Thing bequeathed, refuſed to give it back, pretending to found his Right to the Thing on the Rule of the Civil Law, which had permitted the Teſtator to bequeath it to him. No Perſon could ever imagine, that in ſuch a Caſe the Legacy ought to diveſt the Proprietor of his Right. Theſe are the Words of that Decretal: *Filius noſter F. conqueſtus eſt, quod quondam P. pater ſuus aliqua Eccleſiæ veſtræ, ſepulturæ ſuæ gratia, juris alieni reliquit. Et quidem leges hujus ſæculi hoc habent, ut hæres ad ſolvendum cogatur ſi auctor ejus rem legavit alienam: ſed quia lege Dei, non autem lege hujus ſæculi vivimus, valde mihi videtur injurius, ut res tibi legata, quæ cujuſdam Eccleſiæ eſſe perhibentur, a te teneantur, qui aliena reſtituere debuiſti.* It is true, that the Terms of this Decretal ſeem to condemn in general the Rule of the Civil Law, as being oppoſite to the Divine Law; but ſeeing it is only with reſpect to the Injuſtice of this Legatee, and that a Legacy conformable to the Remark we have juſt now made, or to the Caſe which ſhall be explained in the ſixth Article, would have nothing in it contrary to the Divine Law, it is neceſſary, in order to give to this Decretal its proper and juſt Meaning, to apply it rather to the bad Uſe that one would make of the Rule of the Civil Law, than to the Rule it ſelf.

IV.

If the Teſtator knew that the Thing which he bequeathed was not his own, the Teſtamentary Heir or Executor will be bound either to give the Thing it ſelf to the Legatee, if he can have it of the Owner at a reaſonable Rate *d*; or if he cannot purchaſe it, or will not *e*, he muſt give the Value of it. For the Intention of the Teſtator was, that the Legatee ſhould reap the Benefit of the Legacy. But it will not be preſumed that the Teſtator knew that what he bequeathed was not his own, unleſs this Fact be proved; and it is the Legatee that is to make proof it; for he who is the Demandant is obliged to eſtabliſh his Right *f*.

4. A Teſtator may bequeath a Thing which he knows is not his own.

d Aliena (res) legari poteſt, ita ut hæres cogatur redimere eam, & præſtare: vel ſi eam non poteſt redimere, æſtimationem ejus dare. §. 4. *inſt. de leg.*

Si ædes alienas ut dares damnatus ſis, neque eas ulla conditione emere poſſis, æſtimare judicem oportere Atteius ſcribit, quanti ædes ſint: ut pretio ſoluto, hæres liberetur. *l.* 30. §. *ultimo ff. de leg.* 3.

e Idem juris eſt, & ſi potuiſſes emere, non emeres. *d.* §. *ult. in f.*

f Et verius eſt ipſum qui agit, id eſt legatarium, probare oportere, ſciviſſe alienam rem legare defunctum: non hæredem probare oportere, ignoraſſe alienam: quia ſemper neceſſitas probandi incumbit illi qui agit. §. 4. *in f. inſt. de leg.* See the following Article.

V.

If it is not proved that the Teſtator knew that the Thing which he bequeathed was not his own, the Legacy will be null. For it is preſumed, that he gave it away only becauſe he thought it was his own, and that otherwiſe he would not have charged his Teſtamentary Heir or Executor with a Legacy of this Nature *g*.

5. The Legacy is null, if the Teſtator thought that the Thing he bequeathed was his own.

g Quod autem diximus alienam rem poſſe legari, ita intelligendum eſt, ſi defunctus ſciebat alienam rem eſſe, non ſi ignorabat. Forſitan enim ſi ſciviſſet alienam rem eſſe non legaſſet. Et ita Divus Pius reſcripſit. §. 4. *inſt. de leg.*

Videri potius quod habere ſe crederet, quam quod onerare hæredes vellet, legaſſe. *l.* 36. *in f. ff. de uſu & uſufr. leg.*

VI.

If the Legacy of a Thing which the Teſtator took to be his own, and which was not ſo, had been given in favour of a near Relation of the Teſtator's, or of a Perſon of that Conſideration that it would make it a Duty in the Teſtator to leave him ſuch a Legacy; it would have the Effect that the Circumſtances might demand Thus, for example, if a Teſtator had bequeathed to his Widow whom he left without an Eſtate, the Uſufruct of ſome Land or Tenement which was not his own, and which he believed was his own, thinking that the ſaid Land or Tenement was part of a Succeſſion that had fallen to him a little before his Death; the Teſtamentary Heir or Executor of this Teſtator would be obliged to pay to the ſaid Widow an Annuity to the Value of that Uſufruct, or the Uſufruct it ſelf, if he could agree for it with the Proprietor at a reaſonable Price *h*.

6. Exception to the foregoing Rule.

h Cum alienam rem quis reliquerit, ſiquidem ſciens: tam ex legato, quam ex fideicommiſſo, ab eo qui legatum ſeu fideicommiſſum meruit, peti poteſt. Quod ſi ſuam eſſe putavit, non aliter valet relictum, niſi proximæ perſonæ vel uxori, vel alii tali perſonæ datum ſit, cui legaturus eſſet, & ſi ſciſſet rem alienam eſſe. *l.* 10. *C. de legat.*

VII.

If the Thing bequeathed did belong to the Teſtamentary Heir or Executor, it would be the ſame thing whether the Teſtator knew or were ignorant of that Fact; and the Teſtamentary Heir would be bound to acquit the Legacy. For even

7. If the Thing belongs to the Teſtamentary Heir or Executor, it is equal

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whether the Testator know or be ignorant of this Fact.

even altho this Testator had believed that the Thing was his own, yet we ought not to presume in this Case, that if he had known that it was not his own, he would not have bequeathed it, and would not have been willing to burden his Testamentary Heir with the procuring it some other way; since he might have very reasonably judged that it would be as easy for his Testamentary Heir to give that which was his own, as that which should be a part of the Inheritance. Thus, we ought to presume on the contrary, that he having a mind to leave this Legacy, would not have been diverted from doing it, altho he had known that the Thing belonged to his Testamentary Heir or Executor *i*.

i Si rem tuam quam existimabam meam, te hærede instituto, Titio legem: non est Neratii Prisci sententiæ, nec constitutioni locus: qua cavetur, non cogendum præstare legatum hæredem. Nam succursum est hæredibus, ne cogerentur redimere, quod testator suum existimans reliquit. Sunt enim magis in legandis suis rebus, quam in alienis comparandis & onerandis hæredibus faciliores voluntates. Quod in hac specie non evenit, cum dominium rei sit apud hæredem. *l.* 67. §. 8. *ff. de legat.* 2.

VIII.

8. If the Thing bequeathed belongs already to the Legatee, the Legacy is useless.

If the Thing bequeathed did belong to the Legatee, the Legacy would be null. For he could not acquire a new Right to what was already entirely his own. And we ought to presume that if the Testator had known it, he would not have made such a Disposition. Thus it would remain always null, altho it should afterwards happen that this Legatee should alienate the Thing that was bequeathed to him: and he could not so much as demand the Value of it *l*.

l Sed si rem legatarii quis ei legaverit, inutile est legatum: quia quod proprium est ipsius, amplius ejus fieri non potest. Et licet alienaverit eam, non debetur nec ipsa res, nec æstimatio ejus. §. 10. *inst. de legat. l.* 13. *C. eod.*

IX.

9. If the Legatee has acquired by a lucrative Title what was bequeathed to him, the Legacy will be null.

If after that a Testator had bequeathed a Thing which was not his own, and which he knew was not his own, the Legatee had acquired the Property of it for a valuable Consideration, as in a Sale, the Legacy would subsist, and the Value of it would be due to the Legatee; for he ought to reap the Profit of the Legacy. But if he had acquired the Thing by a lucrative Title, as by Gift, or by another Legacy from the Proprietor thereof; the Legacy of the Testator, who was not Owner of the Thing bequeathed would remain null, unless it should appear that his Intention was that the Legatee should have in this Case, besides the Thing it self, likewise its Value. But if this Intention was not very evident, it would be sufficient for the Legatee to have without any Charges the very Thing which the Testator intended to give him, altho he came by it another way, since by that the Intention of the Testator would be accomplished *m*.

m Si res aliena legata fuerit, & ejus rei vivo testatore legatarius dominus factus fuerit: si quidem ex causa emptionis, ex testamento actione pretium consequi potest. Si vero ex causa lucrativa, veluti ex donatione, vel ex alia simili causa, agere non potest. Nam traditum est duas lucrativas causas in eundem hominem, & eandem rem concurrere non posse. §. 6. *inst. de legat.*

Fideicommissum relictum, & apud eum, cui relictum est, ex causa lucrativa inventum, extingui placuit: nisi defunctus æstimationem quoque ejus præstari voluit. *l.* 21. §. 1. *ff. de legat.* 3.

Quæro cum corpora legata etiam nunc ex lucrativa causa possideantur, an à substitutis peti possint. Respondi, non posse. *l.* 88. §. 7. *in f. de leg.* 2.

X.

10. A Legacy of the same Thing to the same Person by two Testators.

If it should happen that two Testators had bequeathed the same Thing to one and the same Person, and that by the Effect of one of the two Legacies the Legatary had been made Master of the Thing bequeathed, he could not pretend by the other Legacy to have the Value of it. For the Intention of both the Testators would be fulfilled, since he would have that which both the one and the other had a mind to give him. But if he had received by one of the two Testaments the Value of the Thing before he had the Thing it self, which might afterwards come to him by the other Legacy of the Testator, who was Master of it, he would have the Benefit thereof, and the Testamentary Heir would be obliged to give it him *n*. For the Value which he had already received, would not discharge the Testamentary Heir of him who had bequeathed a Thing which was his own; and it would not be just that this Testamentary Heir should reap the profit of the Thing bequeathed.

n Hac ratione, si ex duobus testamentis eadem res eidem debeatur: interest, utrum rem, an æstimationem ex testamento consecutus sit. Nam si rem habet agere non potest; quia habet eam ex causa lucrativa, si æstimationem, agere potest. §. 6. *in f. inst. de legat.*

XI.

11. Two Legacies of one and

We must not reckon among Legacies of one and the same Thing, those which

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he same um, are not two Legacies of the same thing.

which consist in a like Sum of Money, or in a like Quantity of those sorts of Things that are given by Number, Weight, or Measure; but only those where two Testators happen to devise one and the same Land or Tenement, or other particular Thing which is the same in Substance. Thus, the Legacies of the like Sums of Money to one and the same Legatary in the Testaments of two different Persons, would have their Effect: And if two Testators had bequeathed each of them a Pension, or Alimony, to a Legatee, either of the same or different Sums, both the Legacies would be due; for it was the Intention of each of the two Testators to give to the Legatee a part of his Goods. Thus, the Legacy of the one would not hinder the Effect of the Legacy of the other. And it would be the same thing in the Case of two Annuities, or Rents of another nature, if the Legatee having acquired one of them by a Donation, or by some other Title, the other should be afterwards left him by a Testament *o*.

o Titia Seio tesseram frumentariam comparari voluit post diem trigesimum a morte ipsius. Quæro, cum Seius, viva testatrice tesseram frumentariam ex causa lucrativa habere cœpit, nec possit id, quod habet petere: an ei actio competat. Paulus respondit ei, de quo quæritur, pretium tesseræ præstandum. Quoniam tale fideicommissum magis in quantitate quam in corpore consistit. *l.* 87. *ff. de legat.* 2.

XII.

12. The Devise of a Land or Tenement in which the Testator has only a Share, is reduced to that Share.

If a Testator, having a Land or Tenement in common with another Person, had devised the same, without mentioning his Portion of it, but saying barely, that he devised the said Land or Tenement, the Devise would have its Effect only for the Portion thereof that did belong to the Testator. For it would be presumed that he meant only to give away the Share that he had in the said Land or Tenement *p*.

p Cum fundus communis legatus sit, non adjecta portione, sed *meum* nominaverit, portionem deberi constat. *l.* 5. §. 2. *ff. de leg.* 1.

XIII.

13. A Legacy to a Debtor of what he owes.

A Creditor may bequeath to his Debtor all that he owes him, or a part of it. But this Legacy, as all other Legacies, does no prejudice to the Creditors of the Testator, who are preferred to all the Legataries, as has been mentioned in the last Article of the first Section; and the Debtor who is Legatee for what he owes, will not be discharged from his Debt, unless there be Goods enough in the Inheritance to satisfy all the Creditors of the Testator, and likewise the *Falcidian* Portion due to the Testamentary Heir, as shall be shewn in the following Title *q*.

q Liberationem debitori posse legari jam certum est. *l.* 3. *ff. de liber. leg.*

Omnibus debitoribus ea quæ debent recte legantur; licet domini eorum sint. *l.* 1. *ff. eod.*

¶ It appears from these two Texts, that it was a Doubt in the *Roman* Law, whether a Creditor could bequeath to his Debtor that which he owed him. The Doubt was founded, as appears by these words, *Licet domini eorum sint*, upon this, that one cannot bequeath to a Person what is already his, and that what is due by a Debtor is still the Debtor's, until he strips himself of it by paying it to his Creditor. We make this remark only because of the Difficulty which the Reader might find in these Texts. For as to the Validity of such a Legacy, who can doubt of it? But we must add on this Subject one Reflexion more, which another Text, relating to the Manner in which a Testator might discharge his Debtor, seems to deserve. It is a Law in which it is said, That if a Creditor, being sick, had delivered into the Hands of a third Person the Bond or Obligation of the Sum due to him by one of his Debtors, charging the said Person to give him back the said Bond or Obligation in case he should recover, and to deliver it up to the Debtor in case he should die; and that this last Case happened, the Heir or Executor of the said Creditor could not demand the said Debt of the Debtor *. It is to be remarked on this Decision, that such a Disposition would not be just, and ought not to be executed except with several Precautions, which divers Circumstances might demand. For in the first place, it would be null if it were made to defraud the Creditors of the Person who should give such an Order. And secondly, since this Disposition would be only a Donation in prospect of Death, it would be liable to be curtailed both for the Falcidian Portion of the Testamentary Heir, which shall be treated of under the following Title, and for the Legitime or Legal Portions of the Children. And it would likewise be subject to the

* Si quis decedens Chirographum Seii Titio dederit: *Ut post mortem suam det, aut, si convaluisset, sibi redderet:* Deinde Titius, defuncto donatore, Seio dederit, & hæres ejus petat debitum, Seius doli exceptionem habet. *l.* 3. §. 2. *ff. de liber. leg.*

Dimi-

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Diminution which the Customs make of all Dispositions made in prospect of Death, in favour of the Heirs of Blood. But altho there should be no Cause for diminishing or reducing the same, and that the Question were only about the Validity of such a Disposition, yet the Circumstances thereof might give rise to Difficulties. Thus, for example, if we suppose that a Creditor, to whom a Rent was due, had deposited the engrossed Copy of the Deed, by which the Rent was constituted, into the hands of a third Person, that he might deliver up the same after his Death to his Debtor; seeing there would be no other Proof of this Will of the Deceased besides the Declaration which the Depositary should make of it, and that the Title or Deed by which the Rent was constituted would remain entire, the original Minute thereof being lodged in the hands of the Notary Publick; the bare Declaration of this Depositary would not be sufficient to prove a Disposition made in prospect of Death; and to annul a Debt, the Title whereof would still be subsisting, and of which there would appear no Discharge or Acquittance. But if we suppose that the Title by which this Rent was constituted were an Obligation, of which there were no original Minute, and that the Heir or Executor of this Creditor had caused the same to be seized in the hands of the Depositary before he had delivered it to the Debtor, pretending to dispute the Validity of such a Disposition, or not agreeing that the Deceased ever had such an Intention; the Question in such Case would seem to depend on the Circumstances of the Sum, the Goods of the Deceased, the Quality of the Depositary, and other Circumstances which might help us to judge whether the Declaration of the Depositary ought to supply the want of a Disposition in prospect of Death made according to Form.

XIV.

14. The Legacy of what is due from one of two Persons who are indebted for the same Sum, acquits only him to whom it is left.

If a Testator, to whom two Debtors should be engaged each of them for the whole Debt, bequeaths to one of the two that which he owes him, this Legacy will acquit only that Legatee, and the other will remain obliged for his Portion. For altho the Legatee was bound for the whole Debt, yet the Legacy would have its entire Effect by discharging him of his Share of the Debt, since he will not be any ways accountable for the Portion of his Fellow-Debtor, who will owe that all alone *r*. But if these Debtors were Copartners, and it appeared that the Intention of the Testator was to annul the Debt in favour of the Company, the Legacy would be common both to the one and the other *s*.

r Si cum alio sim debitor, puta duo rei fuimus promittendi, & mihi soli testator consultum voluit: agendo consequar, non ut accepto liberer, ne etiam conreus meus liberetur contra testatoris voluntatem: sed pacto liberator. *l.* 3. §. 3. *ff. de liber. leg.*

s Consequenter quæritur, an & ille socius pro legatario habeatur cujus nomen in testamento scriptum non est: licet commodum ex testamento ad utrumque pertineat, si socii sint. Et est verum non solum eum, cujus nomen in testamento scriptum est legatarium habendum, verum eum quoque qui non est scriptus si & ejus contemplatione liberatio relicta esset. *d. l.* 3. §. 4.

XV.

15. The Legacy of a Delay of Payment to a Debtor, discharges him of the Interest for that Time.

A Testator may bequeath to his Debtor a Respite for the Payment of that which he owes him. And this Legacy will have this Effect, that the Testator's Heir or Executor cannot for the Time of that Forbearance demand any Interest. And much less could he pretend to Costs and Damages, if the Debt were of such a nature as the Default of Payment might give a handle for such a Demand *t*.

t Illud videndum est, an ejus temporis intra quod petere hæres vetitus est, vel usuras vel pœnas petere possit: & Priscus Neratius existimabat, committere eum adversus testamentum, si petisset. Quod verum est. *l.* 8. §. 2. *ff. de liber. leg.* See the third Article of the second Section of Interest, Costs, and Damages.

XVI.

16. In what Sense the Father, who is Guardian to his Son, may be discharged from giving an Account of his Administration.

If a Son, whose Father had been his Guardian, happening to die without Children, before the Father had made up the account of his Guardianship, had ordained by his Testament, that his Executors, if he had named others together with his Father, should not demand of him any account of his Administration, this Disposition would have its intire effect: for it was in his power to give nothing at all to these other Executors. But if this Testator had Children to whom the Grandfather ought to give an account, it would be reasonable to give to such a Disposition the Temperaments that Equity might require according to the Circumstances, so as not to oblige the Grandfather to so strict an account as might be required of another Guardian, and likewise not to do any thing

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thing to the prejudice of the Children, under pretext of the Favour that ought to be shown to the Grandfather *u*.

u Titius testamento facto, & filiis hæredibus institutis, de patre tutore suo quondam facto ita loquutus est: *Seium patrem meum liberatum esse volo ab actione tutelæ.* Quero, hæc verba quatenus accipi debent, id est, an pecunias, quas vel ex venditionibus rerum factis, aut nominibus exactis, in suos usus convertit, vel nomine suo fœneravit, filiis & hæredibus testatoris, nepotibus suis debeat reddere? Respondit, eum, cujus notio est, æstimaturum: præsumptio enim propter naturalem affectum facit, omnia patri videri concessa: nisi aliud sensisse testatorem, ab hæredibus ejus approbetur. *l.* 28. §. 3. *ff. de liber. leg.*

¶ It is to be remarked on the Rule explained in this Article, that we have turned it in such a manner as to accommodate it to our Usage. For we should not observe the Rule, such as it is explained in the Text quoted on this Article. And if a Father, who had had the Tuition of one of his Children, having also other Children, had alienated the Goods of the Child whom he had had under his Tuition, and had gather'd in some of his Debts; he would be bound to give an account of them to his Grandchildren, Heirs to their Father, whose Guardian he was, since it would not be just that his other Children should have the Profit of the Goods of their Brother to the prejudice of his Children their Nephews.

It may be observed in relation to the Accounts of the Administration which Fathers may have of the Estates of their Children, that by the Disposition of some Customs the Fathers are Tutors, Guardians, or Stewards to their Children, and have the Enjoyment of their Revenues without being liable to give an account. But this is to be only of what the Father may consume for his own use, but not of what he may alienate.

XVII.

17. A Legacy of a thing laid in pawn.

If a Testator bequeaths a thing which he had pawned to a Creditor, the Executor will be bound to pay the Debt in order to redeem and deliver to the Legatee the thing bequeathed, unless the Words of the Legacy, or other Proofs, should make it appear that it was the Intention of the Testator to charge the Legatary with the Payment of the Debt. But if the Pledge had been sold for the Debt by the Creditor, the Executor would be bound to give the Value of it to the Legatee, unless he should prove that the Intention of the Testator was that the Legacy should be null in that Case *x*.

x Prædia obligata, per legatum vel fideicommissum relicta, hæres luere debet. Maxime cum testator conditionem eorum non ignoravit, aut si scisset, legaturus tibi aliud quod minus non esset, fuisset. Si verò a creditore distracta sunt, pretium hæres exsolvere cogitur: nisi contraria defuncti voluntas ab hærede ostendatur. *l.* 6. *C. de fideic.*

Quod si testator eo animo fuit, ut quamquam liberandorum prædiorum onus ad hæredes suos pertinere noluerit, non tamen aperte utique de his liberandis senserit: poterit fideicommissarius per doli exceptionem a creditoribus qui hypothecaria secum agerent consequi, ut actiones sibi exhiberentur. Quod quamquam suo tempore non fecerit, tamen per jurisdictionem præsidis Provinciæ id ei præstabitur. *l.* 57. *in f. ff. de legat.* 1. *V. l.* 15. *ff. de dote præleg.* §. 5. *inst. de legat.* See the fifteenth Article of the eleventh Section.

¶ We have not put down in this Article that which is said in the 5*th* §. *inst. de legat.* that the testamentary Heir is not bound to redeem the thing bequeathed, except in the Case when the Testator knew that it was in pawn. For besides that it is always to be presumed, that every Man knows what is of his own Fact and Deed, and that a Debtor is not ignorant that he is indebted, and that his Goods are mortgaged for his Debts, whether he have laid any particular thing in pawn in the hands of his Creditor, or that he has only mortgaged his Goods in general; it may be remarked that in the first Text cited on this Article, and likewise in the beginning of the 57*th Law de legat.* 1. it is said, that the Legatee is not bound to redeem the thing bequeathed, altho the Testator was ignorant that it was in pawn, if we judge that if the Testator had known it he would have left another Legacy of equal Value to that Legatee. Thus this Presumption being always natural enough, it is also natural that the testamentary Heir should redeem the thing that is bequeathed. To which we may add, that by the second Text cited upon this Article it would seem that the Legatee is not bound to acquit the Debt unless he be charged so to do by the Testament; and that if he pays the Debt, he may get himself to be substituted to the Creditor, in order to recover from the testamentary Heir what he shall have paid for redeeming his Legacy. And in a word, it may be said that according to our Usage it can never happen that a Legatee should be bound to redeem the thing bequeathed, unless the Testator has obliged him to do it. For since, according to the Texts that have been quoted, that Burden lies on the testamentary Heir, if the Testator knew that the thing bequeathed was mortgaged, and that by our Usage all Mortgages are founded on Titles or Deeds which

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which affect in general all the Goods of the Debtor, we ought always to suppose that the Mortgage was known to the Debtor. And in the case of a Legacy of Moveables that have been pawned to a Creditor, the Testator can never pretend to be ignorant of that Engagement. Thus it is not likely that in our Usage there should ever be occasion for a Proof of the Knowledge which the Testator might have of the Engagement of the thing bequeathed, these sorts of Proofs being otherwise directly contrary to our Usage. So that excepting the Case of an express Will of the Testator, which should oblige the Legatary to redeem the thing bequeathed, it would seem that the Burden of it ought always to lie on the testamentary Heir.

XVIII.

18. One may bequeath things that are not in being.

One may bequeath things which are not as yet in being, but which are to come; as the Fruits that shall grow on such a Ground, or the Profit that shall be made of a certain Commerce: and these sorts of Legacies imply the Condition that the thing thus bequeathed shall happen in its time, and they have their Effect according to the Event *y*.

y Etiam ea quæ futura sunt legari possunt. *l.* 17. *ff. de leg.* 3.

Quod in rerum natura adhuc non sit, legari posse, veluti quidquid illa ancilla peperisset. *l.* 24. *ff. de legat.* 1.

XIX.

19. A Legacy of a certain Quantity of Corn to be taken out of a Crop, or out of a certain Place.

If a Testator had bequeathed a certain Quantity of Corn to be taken out of such a Crop, or out of a Granary, and the said Quantity is not found there, the Legacy will be restrained to the Quantity that is there found *z*. But if the Legacy were of a certain Quantity of Corn, without determining whence it should be taken, the said Quantity would be due, altho there were no Corn in the Inheritance *a*, in the same manner as a Legacy of a Sum of Money, which would be equally due, whether there were any Money in the Succession, or whether there were none at all *b*.

z Cum certus numerus amphorarum vini legatus esset, ex eo quod in fundo Semproniano natum esset; non amplius deberi, placuit: & quasi taxationis vicem obtinere hæc verba, *quod natum erit. l.* 5. *ff. de trit. vin. vel ol. leg.*

Si quis legaverit ex illo dolio amphoras decem; & si non decem, sed pauciores inveniri possint: non extinguitur legatum, sed hoc tantummodo accipit, quod invenitur. *l.* 8. §. 2. *ff. de leg.* 2.

a Si cui vinum sit legatum centum amphorarum, cum nullum vinum reliquisset: vinum hæredem empturum, & præstaturum. *l.* 3. *ff. de trit. vin. vel de legat.*

b Si pecunia legata in bonis legantis non sit, solvendo tamen hæreditas sit: hæres pecuniam legatam dare compellitur: sive de suo, sive ex venditione rerum hæreditariarum, sive unde voluerit. *l.* 12. *ff. de legat.* 2.

XX.

20. An indefinite Legacy of Moveables.

When a Testator hath bequeathed Moveables, such as his Hangings and other Furniture of his House, or the Moveables of a Country House that serve for the Management of a Farm, this Legacy will have the Bounds or Extent that the Expression and Intention of the Testator may give to it. And if it appears that his Intention was to give only what he had at the time of making the Testament, what he shall happen afterwards to acquire will not be comprehended in the Legacy. As on the contrary, if it appears that the Legacy is meant of the Moveables that shall be found at the time of his Death, it will comprehend every thing that shall be then found, which is of the Nature of the things bequeathed *c*.

c Lucius Titius fundum, uti erat instructus, legaverat. Quæsitum est, fundus instructus quemadmodum dari debeat: utrum sicut instructus fuit mortis patrisfamiliæ tempore, ut quæ medio tempore adgnata, aut in fundum illata sunt, hæredis sint: an vero instructus fundus eo tempore inspici debeat, quo factum est testamentum, an vero eo tempore, quo fundus peti cœperit, ut quidquid eo tempore instrumenti deprehendatur, legatario proficiat. Respondit, ea quibus instructus sit fundus, secundum verba legati, quæ sint in eadem causa, cum dies legati cedat, instrumento contineri. *l.* 28. *ff. de instr. vel instr. legat.*

Si ita esset legatum *vestem meam, argentum meum, damnas esto dare*: id legatum videtur, quod testamenti tempore fuisset. Quia præsens tempus semper intelligeretur, si aliud comprehensum non esset. Nam cum dicit, *vestem meam, argentum meum*, hac demonstratione *meum* præsens non futurum tempus ostendit. *l.* 7. *ff. de aur. arg.* See the 13th and 14th Articles of the following Section.

XXI.

21. The Legacy of a thing specify'd as belonging to the Testator, is null if the thing is not found among his Goods.

When a Testator bequeaths a certain thing which he specifies as being his own, the Legacy will not have its effect unless that thing be found extant in the Succession. Thus, for example, if he had said, *I bequeath to such a one my Watch, or my Diamond-Ring*, and that there were not found in the Succession neither Diamond-Ring, nor Watch, the Legacy would be null *d*. But if he had said, *I bequeath a Diamond-Ring*, or a *Watch*, the Legacy would be due, and would have its Effect, as shall be explained in the following Article.

d Species nominatim legatæ si non reperiantur, nec dolo hæredis deesse probentur: peti ex eodem testamento non possunt. *l.* 32. §. 5. *ff. de leg.* 2.

XXII.

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XXII.

22. A Legacy of a thing indetermined in its kind, how it ought to be understood.

One may bequeath not only a certain thing described in particular, as such a Horse, such a Watch, such a Sute of Hangings; but indefinitely and in general a Horse, a Sute of Hangings, a Watch, or other things of the like nature. And seeing these sorts of things may be of different Qualities in the same kind, if the Legacy does not mark the Price of them, or does not determine in particular what the thing bequeathed ought to be, whether there be several of that thing in the Succession, or whether there be none at all; the Executor or testamentary Heir cannot give the worst, nor the Legatary chuse the best. But this Legacy will be moderated according to the Circumstances of the Quality of the Testator, and of the Legatee, and the other Circumstances which may help to discover the Intention of the Testator *e*, pursuant to the Rule explained in the 10th Article of the 7th Section of Testaments, and the others which shall be explained in the 7th Section of the Title of Legacies.

e Legato generaliter relicto, veluti *homines*, Caius Cassius scribit, id esse observandum, ne optimus vel pessimus accipiatur: quæ sententia rescripto Imperatoris nostri & Divi Severi juvatur: qui rescripserunt, homine legato actorem non posse eligi. *l.* 37. *ff. de legat.* 1.

Illud verum est hæredem in hoc teneri, ut non pessimum det. *l.* 110. *eod.* See the 2d and following Articles of the 7th Section.

We must observe the Difference between the Case in this Article, and that of a Legacy which should give to the Legatee the Right to chuse, which shall be explained in the 5th Article of the 7th Section.

XXIII.

23. A Legacy of a Work to be done.

One may bequeath not only Sums of Money, Rights, Debts, and all other things; but likewise some Work to be done; as if a Testator charges his Executor or testamentary Heir to rebuild the House of some poor Man, or to do some other Work, whether for a publick use, or for some particular Person *f*.

f Si Testator dari quid jussisset, aut opus fieri. *l.* 49. §. *ult. ff. de legat.* 2.

XXIV.

24. An indefinite Devise of a Land or Tenement is null, if the Testator has none.

If a Testator who had two or more Houses, had devised a House without determining by any Circumstance which of his Houses he had a mind to give, the Devise would be good; and the Executor or testamentary Heir would be obliged to give one of the Houses, according to the Rules which shall be explained in the 7th Section. But if this Testator who had devised a House, had none of his own, or if having no Lands, he had devised a Land indefinitely; these Devises would remain without any Effect. For one could not know what the Testator had meant; and it might be said that the Testator himself did not know his own Meaning, and that he jested with him to whom he left such a Legacy *g*.

g Si domus alicui simpliciter sit legata, neque adjectum, quæ domus: cogentur hæredes, quam vellet domum ex his quas testator habebat, legatario dare. Quod si nullas ædes reliquerit, magis derisorium est, quam utile legatum. *l.* 71. *ff. de leg.* 1.

SECT. IV.

Of Accessories to things bequeathed.

The CONTENTS.

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3. *How we distinguish that which is an Accessory to a thing.*
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6. *Another Accessory of the same nature.*
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8. *An Augmentation of the Land devised, which hath the Effect to revoke the Devise.*
9. *The Devise of a Ground comprehends the Service that is necessary to the said Ground, from another Ground that is part of the Inheritance.*
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12. *The Moveables of Houses, whether in Town or Country, are not Accessories to them.*
13. *In what manner the Accessories to a Country House are understood.*
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15. *Papers are not comprehended in a Legacy of all things found in a House.*
16. *The Accessory may be a thing of much greater Value than that whereof it is an Accessory.*

I.

1. Definition of Accessories.

AN Accessory to a thing bequeathed is that which not being part of the thing itself, has nevertheless such a Connexion with it, as that it ought not to

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to be separated from it, and ought to follow it. Thus the Shoes and Halter of a Horse, and the Frame of a Picture are Accessories to them *a*.

a Quæ rebus accedunt. *l.* 1. §. 5. *depos.* Ut vestis homini, equo capistrum. *d.* §.

II.

2. Two sorts of Accessories.

We may distinguish two sorts of Accessories to things bequeathed. Those which follow naturally the thing, and which are comprehended in the Legacy, altho they be not mentioned. And those which are not added to the Legacy except by a particular Disposition of the Testator. Thus the Legacy of a Watch comprehends the Case of it, and the Legacy of a House includes the Keys thereof. Thus on the contrary, the Legacy of a House will not comprehend the Moveables that are in it, unless the Testator have express'd the same *b*.

b See the Articles which follow.

III.

3. How we distinguish that which is an Accessory to a thing.

There are Accessories to certain things which are not separated from them, such as the Trees planted in a Ground: And these sorts of Accessories follow always the thing bequeathed, if they are not excepted in the Legacy. And there are Accessories which altho separated from the things, yet follow them likewise; such as the Harness of a Set of Coach-Horses, and others of the like nature. There may be also a Progression of Accessories to Accessories; such as precious Stones set in the Case of a Watch. And lastly there are certain things, of which it may be doubted whether they be Accessories to others or not. And this may depend on the Disposition of the Testator, and on the Extent or Bounds he gives to his Legacies as he sees good. Thus there is no other general Rule in Doubts concerning what ought to go along with the thing bequeathed as its Accessory, besides the Intention of the Testator, whose Expression, together with the Circumstances and Usages of the Places, if there be any, may help us to judge what ought to be accounted Accessory, and what not *c*. But if the Disposition of the Testator leave the thing in doubt, we may in every particular Case judge of what ought to be comprehended in the Legacy as Accessory, and what not, by the particular Rules on the several Cases explained in the Articles which follow.

c In infinitum primis quibusque proxima copulata procedunt. Optimum ergo esse Pedius ait, non propriam verborum significationem scrutari: sed in primis quid testator demonstrare voluerit: deinde in qua præsumptione sunt qui in quaque regione commorantur. *l.* 18. §. 3. *in f. ff. de instr. vel instrum. leg.*

IV.

4. Accessories to a House.

If a Testator devises a House without specifying any thing as to what he intends should be comprehended in the said Devise, the Legatary or Devisee will have the Ground, the Edifice and its Dependencies, such as a Court, a Garden, and other Appurtenances of the House, with the Paintings in Fresco, and other Ornaments or Conveniences, which, according to the Expression of some Customs, are fixed to the House with Cramp-Irons and Nails, or with Plaister, with intent that they should always remain there; for these sorts of things are of the nature of Immoveables. But there will be no Moveable comprehended in this Legacy, except the Keys, and other things if there were any, which being of the like use, would be equally necessary *d*.

d Quæcunque infixa inædificataque sunt, fundo legato continentur. *l.* 21. *ff. de instr. vel. instrum. leg.* Domo legata neque instrumentum ejus, neque supellex aliter legato cedit, quam si id ipsum nominatim expressum a testatore fuerit. *l. ult. ff. de supell. legat.*

V.

5. The Edifice is an Accessory to the Ground, and likewise what is added to its extent.

If he who had devised by Testament a Land or Tenement, makes afterwards some Addition to it; as if he adds any thing to its Extent, or if he builds some Edifice upon it, these Augmentations become part of the Ground, and go to the Legatee, unless the Testator hath otherways order'd by his Testament *e*.

e Cum fundus legatus sit, si quid (ei) post testamentum factum adjectum est, id quoque legato cedit, etiam si illa verba adjecta non sint, *qui meus erit*, si modo testator eam partem, non separatim possedit, sed universitati prioris fundi adjunxit. *l.* 10. *ff. de legat.* 2.

Si areæ legatæ domus imposita sit, debebitur legatario, nisi testator mutaverit voluntatem *l.* 44. § 4. *ff. de leg.* 1. *l.* 39. *ff. de leg.* 2. See the 7th and 8th Articles. See the 14th Article of the 6th Section of Testaments.

VI.

6. Another Accessory of the same nature.

It would be the same thing in a Devise of a particular Estate in Land, if the Testator after having devised it, had added to it new Buildings, and even new Rights, or if he had purchased Grounds in order to enlarge either a Park, or some other Land or Tenement be-

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belonging to the said Estate. For all these sorts of Augmentation would be Accessories that would follow the Devise, either because of their Nature of Accessories, or because it could not be presumed that the Testator intended to separate these sorts of things, in order to leave them without the Land to his Executor or testamentary Heir *f*.

f This is a Consequence of the preceding Article.

VII.

7. How that which is added to the Land that is devised, belongs or does not belong to the Devisee.

If the Legacy were of one entire Estate in Land, and if after the making of the Testament the Testator had added to it some Lands adjoining, this Augmentation might belong either to the Devisee, or to the testamentary Heir, according as the said new Purchase might be considered as an Accessory to the Legacy, or as being wholly independent on it. For if, for example, it were a Purchase of a parcel of Land made with a view to make a Field square, or to serve as a Place to draw Water from for the use of other Grounds, or for some other Service, or even as an Addition only to the Land devised; these Acquisitions would be Accessories that would go with the Legacy or Devise, in the same manner as that which should be found to be naturally added to it by some Change made by the Course of an adjoining River. But if the Land that is purchased, and which borders on the Land that is devised, were of a different Nature from that which is devised, such as a Meadow joining to a Vineyard which the Testator had devised; or if the Land acquired by the Testator were equally contiguous to the Land devised by him, and to another Land which the Testator had left to his Executor; these sorts of Acquisitions would not be Accessories to the Legacy, unless we should be obliged to judge otherways by the Disposition of the Testator, and the Circumstances which might explain his Intention *g*.

g Si quis post testamentum factum fundo Titiano legato partem aliquam adjecerit, quam fundi Titiani destinaret: id, quod adjectum est, exigi a legatario potest. Et similis est causa alluvionis: (Et) maxime si ex alio agro, qui fuit ejus, cum testamentum faceret, eam partem adjecit. *l. 24. §. 2. ff. de leg. 1.* Si universitati prioris fundi adjunxit. *l. 10. ff. de leg. 2.*

It appears by these Texts, that these Augmentations of the Land are meant of that which is added by the Testator, with intent to make it a part of the Land that is devised.

VIII.

8. An Augmentation of the Land devised, which hath the effect to revoke the Devise.

If a Testator who had devised a Land, builds afterwards upon it, this Accessory to the Land will go with the Land to the Legatary, unless it should appear that the Testator intended to revoke the Legacy, as has been said in the 5th Article. And if, for example, a Testator having devised a Place in a Town to build in, and afterwards builds a House in it, or if having devised a Garden, Orchard, or other Place, he builds in it a Summer-House or Lodge; these Buildings under these Circumstances will belong to the Legatary. But if he had built in a Ground which he had devised, either a House or other Conveniencies necessary for a Farm, to which he had joined the said Ground, giving the said Farm to another Legatary, or leaving it to his Heir or Executor, it would be judged from the use of the said Building, that he had revoked the Legacy *h*.

h Si areæ legatæ domus imposita sit, debebitur legatario: nisi testator mutaverit voluntatem. *l. 44. §. 4. ff. de leg. 1.*

The Circumstances mentioned in the Article shew clearly enough the Change of the Will of the Testator.

IX.

9. The Devise of a Ground comprehends the Service necessary to the said Ground from another Ground that is part of the Inheritance.

If for the Use of a Ground, of which the Testator had devised the Usufruct, the Service of a Passage thro another Ground of the Inheritance were necessary, the Executor or other Legatee, to whom the Ground that ought to be subject to the Service does belong, would be obliged to suffer it. For the Legatee ought to enjoy the Ground subject to the Usufruct in the same manner as it was enjoyed by the Testator who took his Passage thro his own Ground: and this Accessory is such, that it is the Intention of the Testator that it should follow the Legacy *i*.

i Qui duos fundos habebat, unum legavit, & alterius fundi usumfructum alii legavit. Quæro, si fructuarius ad fundum aliunde viam non habeat, quam per illum fundum qui legatus est, an fructuario servitus debeatur. Respondit, quemadmodum si in hæreditate esset fundus per quem fructuario possit præstari via, secundum voluntatem defuncti videtur id exigere ab hærede, ita & in hac specie non aliter concedendum est legatario fundum vindicare, nisi prius jus transeundi usufructuario præstet. Ut hæc forma in agris servetur, quæ vivo testatore obtinuerit: sive donec ususfructus permanet, sive dum ad suam proprietatem redierit. *l. 15. §. 1. ff. de usufr. legat.*

Altho this Text speaks only of the Service that is necessary to the Legatee of an Usufruct; yet the same Equity would require that this Service should be likewise given to the Legatee of the Property. And the Presumption of the Testator's Intention would be the same in this Legacy as in the other; since it cannot be supposed that he intended to make a fruitless Devise, and seeing this Devise could not have its Use without this Service, which changes nothing in the use that the Testator himself made of

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of his own Lands, in making one Ground to serve for the necessary Passage to another.

X.

10. A reciprocal Service between the Legatees of two contiguous Houses.

If a Testator who had two Houses joining to one another, devises one of them to one Legatary, and the other to another, or devises one of them, and leaves the other to his Heir or Executor; the Partition Wall of these two Houses, which had for its sole Owner the Testator, will become common to the two Proprietors of these two Houses. Thus the reciprocal Service on this common Wall will be as an Accessory which will follow the Legacy *l*.

l Si is qui duas ædes habebat, unas mihi, alteras tibi legavit: & medius paries, qui utrasque ædes distinguat, intervenit: eo jure eum communem nobis esse existimo. *l.* 4. *ff. de servit. leg.*

XI.

11. The Legatary ought to have the use of the thing bequeathed.

If of two Houses belonging to a Testator, whereof one is left to the Heir or Executor, and the other given to a Legatee, or both are given to two Legatees, one of them could not be raised higher without taking away the Light of the other, or damaging it very much; the Executor or Legatee who should chance to have the first House, could not raise it but in such a manner as that there should remain for the other House so much Light as should be necessary for the Use of it. For it was not the Testator's Intention that either his Executor or this Legatee should render the Legacy of the other House useless *m*.

m Qui binas ædes habebat, si alteras legavit, non dubium est quin hæres alias possit altius tollendo, obscurare lumina legatarum ædium. Idem dicendum est, si alteri ædes, alteri aliarum usumfructum legaverit. *l.* 10. *ff. de servit. præd. urb.*

Sed ita officere luminibus, & obscurare legatas ædes conceditur, ut non penitus lumen recludatur: sed tantum relinquatur quantum sufficit habitantibus in usus diurni moderatione. *d. l. in f.*

XII.

12. The Moveables of Houses, whether in Town or Country, are not Accessories to them.

The Legacy of a House in the Town does not comprehend the Moveables that are in it, unless they are expresly added by the Testator. Nor does the Legacy of a House in the Country take in what Moveables may be in it that are necessary for cultivating the Lands, and for gathering in the Harvest *n*. But this Legacy comprehends the things that are fixed to the Building, such as in certain Places Presses and Tubs *o*.

n Dotes prædiorum, quæ græco vocabulo ἐνθῆκαι appellantur, cum non instructa legantur, legatario non præstantur. *l.* 2. §. 1. *de instr. vel instrum. legat.*

o Cum fundus sine instrumento legatus sit, dolia, molæ olivariæ & prælum, & quæcunque infixa inædificataque sunt legato continentur. *l.* 21. *eod.*

XIII.

13. In what manner Accessories to a Country-House are understood.

The Legacy of a Country House, together with what shall be found in it necessary for cultivating the Lands, and gathering in the Harvest, comprehends the Moveables which may serve for these Uses *p*. And if there be any doubt as to the Extent which this Legacy ought to have, it must be interpreted by the Presumptions of the Testator's Intention, which may be gathered from the Words of the Testament, and from the Circumstances; and we may likewise make use of what Lights can be had from the Usage of the Places *q*.

p Instrumentum est apparatus rerum diutius mansurarum sine quibus exerceri nequiret possessio. *l.* 12. *ff. de instr. vel instrum. legat.*

q Optimum ergo esse Pedius ait, non propriam verborum significationem scrutari: sed imprimis, quid testator demonstrare voluerit, deinde in qua præsumptione sunt, qui in quaque regione commorantur. *l.* 18. §. 3. *in f. eod.*

XIV.

14. The Legacy of a House with its Moveables.

If a Testator had devised a House with all its Moveables, this Legacy would comprehend all the Moveables that were in it destined for the Furniture of the said House: such as Beds, Hangings, Pictures, Tables, Chairs, and other things of the like nature. But if there should be found in it Hangings or other Moveables, laid up and destined either for Sale, or for the use of another House, the Legatary would have no right to them *r*. And if on the contrary some Moveables of this House should chance to be somewhere else at the time of the Testator's Death, as if a Sute of Hangings had been lent out, or given to be mended, whatever were out of the House upon such an account, would nevertheless be comprehended in the Legacy *s*.

Vid. Swinburn n Edition fol. 484
2. Vern. 512. 638
Prec. in Chan. 25 207.
2. Wil. 303. 3

r Si fundus legatus sit *cum his quæ ibi erant*, quæ ad tempus ibi sunt, non videntur legata. *l.* 44. *ff. de leg.* 3.

s Neque quod casu abesset, minus esse legatum: nec quod casu ibi sit magis esse legatum. *l.* 86. *eod.*

XV.

15. Papers are not comprehended in a Legacy of all

If in the Legacy of a House the Testator had comprehended in general and indefinite Terms every thing that should be found in the said House at the time of his Death, without excepting any thing; this

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things found in a House.

this Legacy, which would comprehend all the moveable things, and even the Money *t*, would not comprehend the Debts owing to the Testator, nor his other Rights, the Deeds or Titles whereof should be found in the said House. For the Debts and Rights do not consist in the Papers which contain the Deeds or Titles of them, and have not their Situation in a certain Place *u*. But their Nature consists in the Power which the Law gives to every one to exercise them. Thus the Deeds or Titles are only the Proofs of the Rights, and not the Rights themselves.

t Si fundus legatus sit *cum his qui ibi erunt*, quæ ad tempus ibi sunt, non videntur legata. Et ideo pecuniæ quæ fœnerandi causa ibi fuerunt, non sunt legatæ. *l.* 44. *ff. de leg.* 3.

Uxori usumfructum domuum & omnium rerum, quæ in his omnibus erant, *excepto argento*, legaverat——Respondit, excepto argento, & his quæ mercis causa comparata sunt, cæterorum omnium usumfructum legatariam habere. *l.* 32. §. 2. *ff. de usu & usuf. & red. leg.*

It follows from these Texts, that this Legacy would comprehend the Money, if it were not excepted.

u Caius Seius pronepos meus hæres mihi esto ex semisse bonorum meorum, excepta domo mea, & paterna, in quibus habito, cum omnibus quæ ibi sunt. Quæ omnia scias ad portionem hæreditatis quam tibi dedi, non pertinere. Quæro, cum sit in his domibus argentum, nomina debitorum, supellex mancipia: an hæc omnia, quæ illic inveniuntur ad alios hæredes institutos debeant pertinere. Paulus respondit: nomina debitorum non contineri, sed omnium esse communia: in cæteris vero nullum pronepoti locum esse. *l.* 86. *ff. de leg.* 2.

Debts and other Rights have not a Situation in a certain Place, and are not comprehended in Places as Things corporeal are. We may remark this Distinction between Rights and other Things in a Law which speaks of it on another occasion. Quod si nec quæ soli sunt sufficiant, vel nulla sint *soli pignora*, tunc pervenietur etiam ad *jura* *. *We see by this Text the Distinction between Rights and Things corporeal.*

* *L.* 15. §. 2. *in fine ff. de re jud.*

XVI.

16. The Accessory may be a thing of much greater Value than that whereof it is an Accessory.

The Accessories which ought to follow the thing bequeathed, are judged to be such only by the Use that is made of them, and not by their Value: So that the Accessory is frequently of a much greater Value than the thing it self to which it is Accessory; and it goes nevertheless to the Person to whom the thing is bequeathed. Thus, for example, precious Stones set in the Case of a Watch, are only an Ornament and an Accessory to it, and yet they follow the Legacy of the Watch *x*.

x Plerumque plus in peculio est quam in servo. Et nonnunquam vicarius, qui accedit, pluris est quam is servus qui venit. *l.* 44. *ff. de ædil. ed.*

Pretiosius fecit additis aliis gemmis & margaritis. *l.* 6. §. 1. *ff. de aur. arg. mund.*

SECT. V.

Of Legacies of an Usufruct, or a Pension, or Alimony, and other things of the like nature.

We have not put down in this Section the Rule of the *Roman* Law, by which it is order'd, that if a Testator had bequeathed an Usufruct to a Town or other Corporation, it should last a hundred Years. And seeing we have explained in another Place *a* the Reason why we have not thought proper to insert this Rule among the others, it is not necessary to repeat it here.

a See the end of the Preamble of the Title of Usufruct.

The CONTENTS.

1. *A Legacy of an Usufruct.*
2. *A Legacy of an Usufruct to several Persons, and of the Property to one of them.*
3. *Usufruct of moveable things.*
4. *How the Legacy of a Portion of the Fruits subsists after the Land is sold.*
5. *The Burden on a Legacy of an Usufruct passes to the Executor, if the Legacy does not take place.*
6. *The Difference between an annual Legacy, and a Legacy of an Usufruct.*
7. *Another Difference.*
8. *Another Difference.*
9. *An annual Legacy is acquired at the beginning of the Year.*
10. *A Legacy that is payable in several Years, is of another Nature than an annual Legacy.*
11. *How we are to judge whether a Legacy of a Sum of Money to be distributed on a certain Day be perpetual, or only for one single time.*
12. *Legacies of Alimony are for Life.*
13. *A Legacy of Alimony to the Years of Puberty is understood to be meant of full Puberty.*
14. *A Legacy of Alimony comprehends Clothing and Lodging.*
15. *Legacys of Alimony are regulated according to the Circumstances.*
16. *How a Legacy of Alimony which the Testator had been used to give in his Lifetime is regulated.*
17. *A Legacy of Alimony is due altho the Legatary have been maintained some other way.*
18. *Legacies of Alimony are favourable.*

I. When

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I.

1. A Legacy of an Usufruct.

When a Testator bequeaths an Usufruct, or the Enjoyment of a House or other Tenement, the Condition of the Legatee will be the same as of other Usufructuaries, and his Enjoyment will have the same Extent and the same Bounds. And he will likewise be liable in the same manner for the Charges of the Houses or Lands of which he has the Usufruct. Thus we may apply to this Legatary the Rules relating to Usufruct, which have been explained in the Title of the said Matter *a*.

a See the Title of Usufruct. See the ninth Article of the preceding Section.

II.

2. A Legacy of an Usufruct to several Persons, and of the Property to one of them.

If a Testator had devised to two or more Legatees the Usufruct of a House or Lands, and the Property thereof to the Survivor of them, this Legacy would regard all the Legataries in two manners; for it would be pure and simple with regard to all of them as to the Usufruct, and conditional likewise in respect of them all as to the Propriety; every one of them being called to the Propriety thereof upon condition of their surviving the others *b*.

b Quoties liberis ususfructus legatur, & ei, qui novissimus supervixerit, proprietas: utile est legatum. Existimo enim omnibus liberis proprietatem sub hac conditione, *si novissimus supervixerit*, dari. *l.* 11. *ff. de reb. dub.*

III.

3. The Usufruct of moveable things.

Since one may bequeath the Usufruct of moveable things *c*; if a Testator had bequeathed to his Wife the Usufruct or Enjoyment of his House, and of all the things that should be found in it at the time of his Death, excepting the Gold and Silver, and that there were in the said House Merchant-Goods in which the Testator traded, and which he kept there for Sale, this Usufruct would not comprehend these sorts of things *d*. For it would be restrained to that which should appear to be destined to be kept in the said House.

c See the third Section of Usufruct.

d Uxori usumfructum domuum, & omnium rerum, quæ in his domibus erant, excepto argento, legaverat: item usumfructum fundorum & salinarum. Quæsitum est, an lanæ cujusque coloris mercis causa paratæ, item purpuræ quæ in domibus erant, ususfructus ei deberetur. Respondit, excepto argento, & his quæ mercis causa comparata sunt, cæterorum omnium usumfructum legatariam habere. *l.* 32. §. 2. *ff. de usu & usufr. leg.*

IV.

4. How the Legacy of a Portion of the Fruits subsists after the Land is sold.

If a Testator had bequeathed a Portion of the Produce or Income of a certain Land or Tenement, and the Executor should afterwards sell the said Land, the Legacy will nevertheless subsist. And it will be regulated not on the foot of the same Portion of the Interest of the Price of the Sale, but according to the Value of that Portion of the Fruits, whether it exceed the said Interest, or fall short of it. For the Legacy was of that which the said Portion might be worth every Year. Thus this Change shall hurt neither the Executor, nor the Legatee *e*.

e Liberto suo ita legavit: *Præstari volo Philoni, usque dum vivet, quinquagesimam omnis reditus, quæ prædiis a colonis vel emptoribus fructus ex consuetudine domus meæ præstantur.* Hæredes prædia vendiderunt ex quorum reditu quinquagesima relicta est. Quæsitum est an pretii usuræ, quæ ex consuetudine in Provincia præstarentur, quinquagesima debeatur? respondit, reditus duntaxat quinquagesimas legatas, licet prædia vendita sunt. *l.* 21. *ff. de ann. legat.*

V.

5. The Burden on a Legacy of an Usufruct passes to the Executor, if the Legacy does not take place.

If the Legatary of an Usufruct had been burdened by the Testator with a Fiduciary Bequest to some other Person, and the said Legatary either could not, or would not accept the Legacy, the Heir or Executor who should reap the Benefit of the Legacy would be obliged to satisfy the said Fiduciary Bequest. For altho this Bequest regarded only the Person of the Legatary because of his Usufruct, and that the said Usufruct does not subsist any longer; yet the Enjoyment of the thing bequeathed, which was burdened with this Fiduciary Bequest does not go to the testamentary Heir or Executor, but with this Charge *f*.

f Si ab eo cui legatus esset ususfructus, fideicommissum fuerit relictum: licet ususfructus ad legatarium non pervenerit, hæres tamen penes quem ususfructus remanet, fideicommissum præstat. *l.* 9. *ff. de usu & usufr. leg.*

VI.

6. The Difference between an annual Legacy, and a Legacy of an Usufruct.

One may bequeath a certain Sum of Money, or a certain Quantity of Corn, or other Things, by way of Pension, to be paid every Year to the Legatary, either during a certain Time, or during his Life. And there is this Difference between a Legacy of this Nature, and a Legacy of an Usufruct, that in this last the Legatee has an uncertain Enjoyment, and may have either more or less, or sometimes nothing at all; and that an annual Legacy of a certain Quantity is always the same. There is also this Difference between these two kinds of Legacies, that whereas the Legacy of an

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an Usufruct is only one Legacy of a Right to enjoy always, as long as it shall last; an annual Legacy contains as many Legacies as it may last Years. For every Year the Legatee ought to receive of the Executor the Revenue which is bequeathed him. Thus this Legacy is, as it were, conditional, and implies the Condition that the Legatary should be living at the beginning of every Year, in order to have Right to the Legacy, and to transmit the Right of that Year to his Heir or Executor *g*.

g Si in singulos annos alicui legatum sit: Sabinus (cujus sententia vera est) plura legata esse ait. Et primi anni purum, sequentium conditionale: videri enim hanc inesse conditionem, *si vivat*: & ideo mortuo eo, ad hæredem legatum non transire. *l.* 4. *ff. de ann. leg.* See the following Articles.

See as to what is said at the end of this Article concerning the Transmission of an annual Legacy, the ninth Article; and as for the Usufruct, there is no Transmission of it, for it perishes by the Death of the Usufructuary. See the first Article of the sixth Section of Usufruct, and the fourth Article of the first Section of the same Title, and the Remark there made upon it.

VII.

7. Another Difference.

There is likewise this Difference between the Legacy of an Usufruct and an annual Legacy, that a Legacy of an Usufruct cannot be perpetual, because it would annul the Right of Property; but an annual Legacy may be perpetual, whether it be in favour of a Corporation, or of the Heirs of some Family *h*.

h In annalibus legatis vel fideicommissis, quæ testator non solum certæ personæ, sed & ejus hæredibus præstari voluit, eorum exactionem omnibus hæredibus & eorum hæredum hæredibus servari pro voluntate testatoris præcipimus. *l.* 22. *C. de leg.*

VIII.

8. Another Difference.

There is also this other Difference between these two kinds of Legacies, that if the Lands which are subject to an Usufruct should produce nothing, the Right of the Usufructuary would be of no use. But the Legacy of a certain Quantity of Corn, Wine, or other Things, is altogether independent of what may be reaped in the Harvest or Vintage. And even altho such a Legacy were assigned to be taken out of the Crop of every Year, it would nevertheless be due in a Year when there were no Crop, provided that the other Years could supply the said Deficiency, and that the Intention of the Testator were not contrary thereto *i*.

i Vini Falerni quod domi nasceretur quotannis in annos singulos binos culeos hæres meus Attio dato: Etiam pro eo anno, quo nihil vini natum est, deberi duos culeos: si modo ex vindemia cæterorum annorum dari possit. *l.* 17. §. 1. *ff. de ann. leg.*

Quæ sententia, *si voluntas non adversetur*, mihi quoque placet. *l.* 13. *ff. de trit. vin. vel. ol. leg.*

IX.

9. An annual Legacy is acquired at the beginning of the Year.

Annual Legacies accrue to the Legatary when the Year begins: And altho he dies as soon as the Year is begun, yet the Legacy for that whole Year is due *l*. For it is natural that a Legacy which is in lieu of a Fund for a Maintenance should be acquired before hand.

l Si competenti judici annua legata vel fideicommissa tibi relicta probaveris, ab initio cujusque anni exigendi ea habebis facultatem. *l.* 1. *C. quando dies leg. vel fid. ced. v. l.* 5. *ff. de ann. leg.* In omnibus quæ in annos singulos relinquuntur hoc probaverunt, ut initio cujusque anni hujus legati dies cederet. *l.* 12. *ff. quando dies leg. ced.* See the sixth Article.

X.

10. A Legacy that is payable in several Years, is of another Nature than an annual Legacy.

We must not reckon in the Number of annual Legacies, a Legacy of a certain Sum that is made payable every Year until a certain Time, for some other Cause than that of a Maintenance or Alimony, no more than a Legacy of a Sum made payable at several Terms of several Years. For these Payments being thus divided only to lessen the Charge of the Executor, these Legacies would be of the same Nature with others, and as one single Legacy, of which the entire Right would accrue to the Legatee at one and the same time. So that this Legatee happening to die before these Years were expired, he would transmit to his Heir or Executor the annual Payments that should remain due *m*.

m Si cum præfinitione annorum legatum fuerit, veluti, *Titio dena usque ad annos decem*: Julianus libro trigesimo digestorum scripsit, interesse. Et si quidem alimentorum nomine legatum fuerit: plura esse legata & futurorum annorum legatum legatarium mortuum ad hæredem non transmittere. Si vero non pro alimentis legavit, sed in plures pensiones divisit exonerandi hæredis gratia, hoc casu ait, omnium annorum unum esse legatum: & intra decennium decedentem legatarium, etiam futurorum annorum legatum ad hæredem suum transmittere. Quæ sententia vera est. *l.* 20. *ff. quand. leg. ced.*

XI.

11. How we are to judge whether a Legacy of a Sum of Money to be distributed on a certain Day, be perpetual, or only for one single time.

If a Testator had left a Legacy of a Charity to be given on a certain Day, or of a Sum of Money to be distributed, either to the Canons of a Chapter, or to the Ecclesiasticks of such a Parish, or to some other such like Use, upon some Festival or Solemnity, which should return every Year, as on a Saint's Day, or on some Festival of some of the Mysteries of Religion, without mentioning expresly that the said Charity or Dole should

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should be reiterated every Year on the said Day; we should judge by the Circumstances, whether the Intention of this Testator was to leave a Legacy of a Sum to be paid only for one single Time, or to be paid yearly at the Return of the said Day. Which would depend on the Quality of the Person, on the Largeness of his Estate, on the Words of the Testament, on the Motive of the Legacy, on the Fund set apart for the said Charity or Dole, and on the other Circumstances which might help us to judge of the Intention of this Testator *n*.

n Cum quidam decurionibus divisiones dari voluisset die natalis sui: Divi Severus & Antoninus rescripserunt, non esse verisimile testatorem de uno anno sensisse, sed de perpetuo legato. *l.* 23. *ff. de ann. leg.*

Attia fideicommissum his verbis reliquit, *quisquis mihi hæres erit, fidei ejus committo, uti det ex reditu cœnaculi mei & horrei, post obitum, sacerdoti, & hierophylaci, & libertis, qui in illo tempore erunt, denaria decem die nundinarum quas ibi posui.* Quæro, utrum his duntaxat qui eo tempore quo legabatur, in rebus humanis, & in eo officio fuerint, debitum sit, an etiam his, qui in locum eorum successerunt? Respondit, secundum ea quæ proponerentur, ministerium nominatorum designatum, ceterum datum templo. Item quæro, utrum uno duntaxat anno decem fideicommissi nomine debeantur, an etiam in perpetuum decem annua præstanda sint? Respondit, in perpetuum. *l.* 20. *eod.*

Altho these Texts seem not to make the Perpetuity of a Legacy of this kind to depend on the Circumstances, yet it appears evidently that the Legacies there mentioned are declared to be perpetual only because of the Circumstances which result from the Quality of the said Legacies, according to the Usage of those Times. And as for the Usage with us, it is hardly possible that such a Doubt should happen; for a Testator who should leave a perpetual Legacy of the nature of these explained in the Article, would not fail to express it, and to assign a Fund for a Charge of this kind.

XII.

12. Legacies of Alimony are for Life.

Legacies of Alimony, or of a Maintenance, last during the Life of a Legatary, unless the Testator has limited the Time. For Alimony, and a Maintenance, left indefinitely, not being restrained to a certain Duration of Time, are for the whole Time that the Legatee shall stand in need of them, which comprehends his whole Life *o*.

o Mela ait, si puero vel puellæ alimenta relinquantur, usque ad pubertatem deberi. Sed hoc verum non est, tamdiu enim debebitur donec testator voluit: aut si non paret quid senserit, per totum tempus vitæ debebuntur. *l.* 14. *ff. de alim. vel cib. leg.*

XIII.

13. A Legacy of Alimony to the Years of Puberty, is understood to be meant of full Puberty.

Seeing a Legacy of Alimony, or of a Maintenance, is altogether favourable, if a Testator had devised such a Legacy to last only until the Legatary should attain the Age of Puberty, it would not end till he had attained the Age of full Puberty, that is, eighteen Years compleat in Males, and fourteen in Females *p*.

p Certè si *usque ad pubertatem* alimenta relinquantur, si quis exemplum alimentorum, quæ dudum pueris & puellis dabantur, velit sequi, sciat Hadrianum constituisse, ut pueri usque ad decimumoctavum, puellæ usque ad quartumdecimum annum alantur, & hanc formam ab Hadriano datam observandam esse Imperator noster rescripsit. Sed etsi generaliter pubertas non sic definiatur, tamen pietatis intuitu in sola specie alimentorum hoc tempus ætatis esse observandum, non est incivile. *l.* 14. §. 1. *ff. de alim. vel cib. leg.*

See touching these two sorts of Puberty, the Remark on the eighth Article of the second Section of Persons.

XIV.

14. A Legacy of Alimony comprehends Clothing and Lodging.

A Legacy of Maintenance, or barely of Alimony, comprehends Food, Raiment, and Lodging, unless the Testator shall have set some Bounds to it; for one cannot live without Clothes and Lodging. But this Legacy does not comprehend that which relates to the Instruction of the Legatee, either for a Trade, or some Profession, or for his Learning at School. For these Wants are of another nature, and are not so necessary as Food, Clothing, and Lodging *q*.

q Legatis alimentis, cibaria & vestitus & habitatio debebitur: quia sine his ali corpus non potest, cetera quæ ad disciplinam pertinent, legato non continentur. *l.* 6. *ff. de alim. vel cib. leg.* Nisi aliud testatorem sensisse probetur. *l.* 7. *eod.*

Rogatus es *ut quendam educes*, ad victum necessaria ei præstare cogendus es. *Paulus:* cur plenius est alimentorum legatum, ubi dictum est & vestiarium, & habitationem contineri? imo ambo exæquanda sunt. *l. ult. eod.*

XV.

15. Legacies of Alimony are regulated according to the Circumstances.

If a Testator had bequeathed Alimony, or a Maintenance, indefinitely, without specifying any thing, and if he had been wont to maintain the Person to whom he had left this Legacy, it would be regulated on the same foot: If not, it would be fixed either at a certain Sum of Money yearly, or a certain Quantity of Necessaries to be paid in Specie, and in proportion to the Quality of the Legatee, the Quality of the Testator and of his Estate, the Consideration which the Testator might have had for the Person of this Legatee, either out of Affection to him, or because of some Duty or other Tie, and according to the other Circumstances which might help us to judge of the Intention

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of the Testator *r*, as has been said in another Place *s*.

r Cum alimenta per fideicommissum relicta sunt non adjecta quantitate, ante omia inspiciendum est quæ defunctus solitus fuerat ei præstare: deinde quid cæteris ejusdem ordinis reliquerit: si neutrum apparuerit, tum ex facultatibus defuncti, & caritate ejus cui fideicommissum datum erit, modus statui debebit. *l. 22. de alim. vel cib. leg.*

s *See the twelfth Article of the sixth Section of Testaments.*

XVI.

16. How a Legacy of Alimony which the Testator had been used to give in his Lifetime is regulated.

If he who gave always Alimony, or a Maintenance, to a Person, leaves him a Legacy of what he was wont to give him, and it does appear that he gave him differently, sometimes more, and sometimes less; the Legacy will be regulated upon the foot of what he gave the last time immediately preceding his Death, whether he had given more before that time, or less *t*.

t Sed si alimenta *quæ vivus præstabat*, reliquerit, ea demum præstabuntur quæ mortis tempore præstare solitus erat. Quare si forte varie præstiterit: ejus tamen temporis præstatio spectabitur quod proximum mortis ejus fuit. Quid ergo si cum testaretur, minus præstabat, plus mortis tempore, vel contra? adhuc erit dicendum, eam præstationem sequendam quæ novissima fuit. *l. 14. §. 2. ff. de alim. vel cib. leg.*

XVII.

17. A Legacy of Alimony is due, altho the Legatary have been maintained some other way.

Although Legacies of Alimony, or Maintenance, be destined for the Diet, Clothing, and Lodging of the Legatee, yet if the Testamentary Heir does not furnish them to the Legatary, and he have them somewhere else, and even gratis, this Testamentary Heir, or his Heirs or Executors, if he were dead, would nevertheless be accountable for the Arrears to the said Legatee. And the Cessation of Payment for several Years would be of no manner of prejudice to him either for the Time past, or the Time to come. For altho the Motive of the Testator was barely that the Legatee should be maintained, and that he has had his Maintenance; yet this was a Charge that the Testator impos'd on his Testamentary Heir: And on his part it would be unjust that he should reap the Benefit of it, as it is just on the part of the Legatary, that he should have the Advantage both of the Bounty of this Testator, and of the Liberality of other Persons who had nourished and maintained him, or of his own Industry, if he had lived by that *u*.

u Præteriti temporis alimenta reddenda sunt. *l. 10. §. 1. ff. de alim. vel cib. leg.*

Manumissis testamento cibaria annua, *si cum matre morabuntur*, per fideicommissum dedit. Mater filio triennio supervixit: neque cibaria, neque vestiaria eis præstitit, cum in petitione fideicommissi liberti cessarent. Sed & filia, posteaquam matri hæres extitit, quoad vixit, annis quatuordecim interpellata de iisdem solvendis non est. Quæsitum est an post mortem filiæ à novissimo hærede petere possint, & tam præteriti temporis, quam futuri, id quod cibariorum nomine & vestiarii relictum est? respondit si conditio extitisset, nihil proponi cur non possent. *l. 18. §. 1. eod.*

XVIII.

18. Legacies of Alimony are favourable.

Legacies of Alimony are distinguished from the greatest part of other Legacies, by the Consideration of the Necessity that renders them so favourable, that one may bequeath Alimony even to Persons that are incapable of other Legacies, as has been said in its Place *x*. And if a Legacy of Alimony or Maintenance, or of a yearly Pension, were made in favour of poor Persons, it might be ranked in the Number of Legacies to pious Uses, which are the Subject-matter of the ensuing Section.

x *See the sixth Article of the second Section.*

SECT. VI.

Of Legacies to pious Uses.

The CONTENTS.

1. *What are Legacies to pious Uses.*
2. *Difference between Legacies to pious Uses and other Legacies by their Motives and their Use.*
3. *Difference between a Legacy to pious Uses, and a Legacy which regards the publick Good.*
4. *A Legacy to a pious Use, without any particular Destination, how to be applied.*
5. *Execution of Legacies to pious Uses.*
6. *Destination of a pious Legacy to another Use than that which the Testator had appointed.*
7. *Privilege of Legacies to pious Uses.*

I.

1. What are Legacies to pious Uses.

Legacies to pious Uses are those Legacies that are destined to some Work of Charity *a*; whether they relate to spiritual or temporal Concerns. Thus, a Legacy of Ornaments for a Church, a Legacy for the Maintenance of a Clergyman to instruct poor Children, and a Legacy for their Sustenance, are Legacies to pious Uses.

a Dispositiones pii testatoris. *l. 28. C. de Episc. & Cler.*

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II.

2. Difference between Legacies to pious Uses, and other Legacies, by their Motives, and their Use.

We may make this a first Difference between Legacies to pious Uses, and the other sorts of Legacies, that the Name of Legacies to pious Uses is properly given only to those Legacies which are destined to some Work of Piety and Charity, and which have their Motives independent of the Consideration which the Merit of the Legatees might procure them *b*; whereas the other Legacies have their Motives confined to the Consideration of some particular Person, or are destined to some other Use than to a Work of Piety or Charity, as shall be shewn in the Article which follows.

b It is in this Motive that the essential Part of Legacies to pious Uses does consist.

III.

3. Difference between a Legacy to pious Uses, and a Legacy which regards the publick Good.

All Legacies which have not for their Motive the particular Consideration of some Person, are not for all that of the Number of Legacies to pious Uses, altho they be destined for a publick Good, if that Good be any other than a Work of Piety or Charity. Thus, a Legacy destined for some publick Ornament, such as the Gate of a City, for the Imbellishment or Conveniency of some publick Place, and others of the like nature, or a Legacy of a Prize to be given to the Person who should excel others in some Art or Science, would be Legacies of another nature than those to pious Uses *c*.

c Si quid relictum sit civitatibus, omne valet, sive in distributionem relinquatur, sive in opus, sive in alimenta, vel in eruditionem puerorum, sive quid aliud. *l.* 117. *ff. de leg.* 1.

Civitatibus legari potest etiam quod ad honorem ornatumque civitatis pertinet. *Ad ornatum* puta quod ad instruendum forum, theatrum, stadium, legatum fuerit. *Ad honorem* puta, quod ad munus, venationemve, ludos scenicos, ludos circenses, relictum fuerit: aut quod ad divisionem singulorum civium, vel epulum relictum fuerit: hoc amplius quod in alimenta infirmæ ætatis, puta senioribus, vel pueris puellisque, relictum fuerit ad honorem civitatis pertinere respondetur. *l.* 122. *eod.*

IV.

4. A Legacy to a pious Use, without any particular Destination, how to be applied.

If a Legacy to pious Uses was not destined to any particular Use, as, if a Testator had left a Legacy in general either to the Church, or to the Poor; the Legacy to the Church would be for the Parish-Church of the Place where the Testator lived; and the Legacy to the Poor would be for the Hospital of that Place, if there were any: If there were no Hospital, the Legacy would go to the Poor of that Parish. And it would be the same thing, if instead of a bare Legacy, the Testator had instituted for his Testamentary Heirs the Church, or the Poor *d*.

d Si quis in nomine magni Dei & Salvatoris nostri Jesu Christi hæreditatem, aut legatum reliquerit, jubemus, Ecclesiam loci illius, in quo testator domicilium habuerit, accipere quod dimissum est. *Nov.* 131. *c.* 9.

It appears by this Text, that it was the Usage of those Times to leave Legacies to God. And if such a Legacy ought to belong to the Church of the Place, with much more Reason ought a Legacy that is left to the Church indefinitely belong to the Testator's Parish-Church.

V.

5. Execution of Legacies to pious Uses.

If the Testator himself had not directed particularly the Application of a Legacy to pious Uses; as, if he had left a Legacy to the Poor indefinitely in a Place where there were no Hospital, or for the Redemption of Captives, without specifying in what Place; the Execution of these Dispositions would depend on the Executor of the Testament, or other Person to whom the Testator had explained and intrusted his Intention. And if there were no Person to whom he had imparted his Will, and that it were not safe to trust to the Integrity of the Testamentary Heir, the ordinary Judge would give Directions therein, at the Instance of the Persons whose Duty it should be to see these Legacies duly applied *e*.

e Si quidem testator designaverit per quem desiderat redemptionem fieri captivorum, is qui specialiter designatus est, legati vel fideicommissi habeat exigendi licentiam: & pro sua conscientia votum adimpleat testatoris. Sin autem persona non designata, testator absolute tantummodo summam legati vel fideicommissi taxaverit, quæ debeat memoratæ causæ proficere: vir reverendissimus Episcopus illius civitatis ex qua testator oritur habeat facultatem exigendi quod hujus rei gratia fuerit derelictum, pium defuncti propositum sine ulla cunctatione, ut convenit, impleturus. *l.* 28. §. 1. *C. de Episc. & Cler.*

¶ What is said in this Text, that if the Testator has named no body for the Execution of his Legacies to pious Uses, the Bishop of the Place may demand the Sum bequeathed, in order to execute the Intention of the Testator, is not altogether conformable to our Usage. For the Bishop may indeed take care that the Legacies left to the Poor be duly applied; but it is not he himself that demands and receives the Sums appropriated to these sorts of Legacies. And if it be necessary to sue the Executor at Law, this Function will belong to the Persons who are charged with this Care, such as the Go-

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vernors of an Hospital, or of an Alms-House, according as these Legacies happen to be destined. And if the Legacy were not appropriated to any particular House, as a Legacy of an Alms to be distributed on a certain Day in a certain Place, which were not applied to any particular Hospital, or a Legacy to the Poor in a Place where there were no House allotted for them, the Officers of Justice would be obliged to give Directions therein at the Instance of the King's Procurators. Which does not hinder the Bishops and Curates from doing their Diligence on their part to procure the Execution of these sorts of Legacies. We may consult on this Subject the Ordinances which have provided for the Recovery, Preservation, and Administration of the Goods belonging to the Poor. *See the Edict of* 1561, *the Ordinance of* Moulins, *Art.* 73. *that of* Blois, *Art.* 65, *&* 66. *and that of* Melun, *Art.* 10.

VI.

6. Destination of a pious Legacy to another Use than that which the Testator had appointed.

If a pious Legacy were destined to some Use which could not have its Effect, as if a Testator had left a Legacy for building a Church for a Parish, or an Apartment in an Hospital, and it happened either that before his Death the said Church, or the said Apartment had been built out of some other Fund, or that it was no ways necessary or useful, the Legacy would not for all that remain without any Use; but it would be laid out on other Works of Piety for that Parish, or for that Hospital, according to the Directions that should be given in this matter by the Persons to whom this Function should belong *f*.

f Legatum civitati relictum est, *Ut ex reditibus quotannis in ea civitate memoria conservandæ defuncti gratia spectaculum celebretur*, quod illic celebrari non licet. Quæro quid de legato existimes? Modestinus respondit: cum testator spectaculum edi voluerit in civitate, sed tale, quod ibi celebrari non licet: iniquum esse hanc quantitatem quam in spectaculum defunctus destinaverit, lucro hæredum cedere. Igitur adhibitis hæredibus, & primoribus civitatis, dispiciendum est, in quam rem converti debeat fideicommissum, ut memoria testatoris alio & licito genere celebretur. *l.* 16. *ff. de usu & usuf. & red. leg.*

Altho this Text relates to another sort of Dispositions, yet the Rule that results from it is with much more Reason very just in Legacies to pious Uses.

VII.

7. Privilege of Legacies to pious Uses.

Since Legacies for Works of Piety and Charity have a double Favour, both that of their Motive for holy and pious Uses, and that of their Utility for the publick Good; they are considered as being privileged in the Intention of the Law *g*.

g See the sixth Article of the eighth Section, and the Remark on the fourth Article of the second Section of Codicils.

The Favour of Legacies to pious Uses may distinguish them from other Legacies in the Cases mentioned in the Places which we have just now quoted; and in general, this Favour may be considered in the Cases relating to the Interpretation of any Disposition for a Legacy to a pious Use.

See concerning this Subject of Privileges of Legacies to pious Uses, the Preamble to the second Section of the Falcidian Portion.

SECT. VII.

Of Legacies of one of several Things, at the Choice of the Executor, or of the Legatee.

We have endeavoured to form the Rules which compose this Section in such a manner, as that they may reconcile some Contrarieties, at least, such in appearance, as we meet with in some Laws relating to this Matter. Thus, for example, it is said in one Law, That if a Testator hath bequeathed in general a Man, that is to say, a Slave, the Legatary shall have the Choice of the Person; *Homine generaliter legato, arbitrium eligendi quem acciperet, ad legatarium pertinet. l.* 2. §. 1. *ff. de opt. vel el. leg.* And it is said in another Law, That if a Testator hath bequeathed in general a Silver Bason, he having several, and not distinguishing which Bason he intends to give; the Testamentary Heir will have it in his Choice to give which Bason he pleases. *Sed etsi lancem legaverit, nec apparuerit quam, æque electio est hæredis quam velit dare. l.* 37. *in fine ff. de leg.* 1.

It would seem by these Texts, that whoever should take both the one and the other in a literal Sense, might think it indifferent in point of Law, whether the Election were given to the Testamentary Heir, or to the Legatee, which certainly cannot be just; but in order to reconcile them together, it is necessary to observe a Distinction of the antient *Roman* Law between Legacies which were called *per vindicationem*, and those that were called *per damnationem*, of which mention hath been made in another Place *a*. In the Legacies of the first sort, the Legacy being conceived in these or the like Terms, *I will that*

a See the Preamble of the ninth Section of Testaments.

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such a one take a Horse out of my Stable, the Legatee had the Choice; for he himself took the Thing that was bequeathed to him: And it is of a Legacy of this kind, that we are to understand the first of the Texts which have been now quoted. And in the Legacies of the second kind, the Legacy being conceived in these Terms, *I will that my Heir give to such a one, one of my Horses,* the Testamentary Heir made the Choice; for it was he that was charged to give the Thing that was bequeathed *b*: And it is of a Legacy of this second kind that we are to understand the second Text. Thus altho the Differences of these two sorts of Legacies, and of some others, of which it would be to no purpose to speak here, have been abolished *c*, yet it is necessary to make use of them for conciliating the Contrarieties of these, and of many other Laws, which have very much perplexed several Interpreters, and that not without reason. And we may likewise say of these two kinds of Legacies, which were thus distinguished in the *Roman* Law, that their different Expressions may point out some Difference in the Intention of the Testator; and that that Expression which gives to the Legatee the Right to take, seems to have a greater relation to the Right of chusing, than that which charges the Testamentary Heir to give to the Legatee.

We have been obliged to make this Reflexion on a Difficulty, which it was necessary to clear up before we should proceed to explain the Rules relating to this Matter. But seeing in our Usage there is only one manner of Expression used by Testators, which has no relation to any one of these two sorts of Legacies that were distinguished in the *Roman* Law, and that almost all Legacies are conceived in these Terms, *I give and bequeath to such a one,* or, if it is in the Name of a third Person, *gives and bequeaths;* these Expressions mark nothing at all of the Intention of the Testator, that favours either the Testamentary Heir or the Legatee. Thus, unless the Legacy be conceived in such a manner as to leave the Choice either to the one or to the other, it must be interpreted according to the Rules that have been explained in the sixth, seventh, eighth, ninth, tenth, and eleventh Articles of the seventh Section of Testaments. And since it is not proper to repeat in this Section what has been said in those Articles, the Reader may have recourse to them, and join them here.

b V. Tit. Ulp. 24. §. 14.
c §. 2. Inst. de legat.

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I.

1. Three Manners of bequeathing one out of several things.

One may bequeath one of two or more things in three manners. For one may leave such a Legacy without making mention of the choice; as if a Testator bequeaths simply a Horse to be taken from among those in his Stable, a Picture to be taken out of those in his Closet; and one may leave the Choice either to the Legatary or to the Executor *a*.

a See the following Articles.

II.

2. Of Legacies where no mention is made who shall have the choice.

If a Testator bequeaths a thing to be taken out of several of the same kind that shall be found in this Succession, or even that are not part of the Succession, and does not express to whom the Choice shall belong, whether to the Executor or to the Legatee, this Legacy will depend on the Rule explained in the

the twenty second Article of the third Section of this Title, and on the Rules which follow *b*.

b See that twenty second Article of the third Section of this Title, and the tenth Article of the seventh Section of Testaments. See the following Rules.

III.

3. If the Expression of the Testator determines the Choice, we must hold to that.

If the Expression of the Testator is conceived in such Terms as to make us judge, that altho he has not given the Choice either to the Executor or to the Legatary, in a Legacy of one out of two or more things, his Intention was to bequeath one of them rather than the other; the Legacy will be understood of that thing to which the Testator's Expression shall have a greater relation than to the other, whether it be of more or less value. Thus, for example, if a Testator had bequeathed his Saddle-Horse, having several of that kind, the Legacy would be understood of the Horse which the Testator himself was wont to ride. Thus, for another example, if he who had two Houses, one in *Paris* in which he himself dwelt, and the other at *St. Denis* occupied by a Tenant, had left a Legacy in these Terms, *I give and bequeath my House to such a one*; this Expression would determine the Legacy to be meant of the House in which the Testator lived, unless it should appear by the Circumstances that his Intention was to bequeath the other. But if the Expression of the Testator should not determine particularly for any one of the two Houses, as if he had barely devised one of his Houses; or if having two Lands called by the same Name, he had devised one of them, the Executor might give only the House or the Land that is of least value *c*, for by that he will have satisfy'd the Legacy. And in general in all Doubts of this nature, where nothing determines to one of the things which are comprehended in a Legacy, the Presumption is for the Executor, as has been explained in another Place *d*.

c Si de certo fundo sensit testator, nec appareat de quo cogitaverit: electio hæredis erit, quem velit dare: aut si appareat, ipse fundus vindicabitur. *l.* 37. §. 1. *ff. de leg.* 1.

Scio ex facto tractatum: cum quidam duos fundos ejusdem nominis habens, legasset fundum Cornelianum: & esset alter pretii majoris, alter minoris: & hæres diceret minorem legatum, legatarius majorem vulgo fatebitur, utique minorem eum legasse, si majorem non potuerit docere legatarius. *l.* 39. §. 6. *ff. de leg.* 1.

d See the sixth, seventh, and other following Articles of the seventh Section of Testaments.

IV.

4. A Legacy left to the choice of the Executor.

If a Testator had bequeathed a Silver Bason, having several of that sort, the Executor would be at liberty to give which Silver Bason he pleased *e*. For the Legatary would have that which was left him; and this is a Consequence of the Rule explained in the third Article. And the Executor would with much more reason have this Liberty, if the Testator had left the Choice to him. But if the Legacy were of things which altho of the same kind might be of different Qualities, good or bad, such as Horses, Hangings, the Liberty of chusing which the Executor would have, would not extend to a Power of chusing a Sute of old Hangings that are falling to pieces, or a Horse that is broken-winded. For it could not be presumed that the Testator had given this Extent to the Right of Election which he had left to his Executor *f*.

e Sed etsi lancem legaverit, nec apparuerit quam, æque electio est hæredis, quam velit dare. *l.* 37. *in f. ff. de leg.* 1.

f Si hæres generaliter servum *quem ipse voluerit*, dare jussus, sciens furem dederit, isque furtum legatario fecerit, de dolo malo agi posse ait. Sed quoniam illud verum est, *hæredem in hoc teneri ut non pessimum det*, ad hoc tenetur ut & alium hominem præstet, & hunc pro noxæ deditione relinquat. *l.* 110. *ff. de leg.* 1. See the twenty second Article of the third Section, and the eighth and tenth Articles of the seventh Section of Testaments.

V.

5. A Legacy left to the choice of the Legatary.

When a Testator gives to the Legatary the Right of chusing out of several things, such as the Horses in his Stable, any of them which he pleases, and in like manner of other things; the Legatary has the Liberty to chuse the most precious of them *g*. And to put the Legatee in a condition to make this Choice, the Executor is obliged to shew all that there is in the Inheritance of that kind of thing of which the Election is bequeathed. And if there should be any which by some Chance, without the Deed of the Executor, had not appear'd, the Legatary who without knowing any thing of them, had made his choice, might chuse anew after he came to the knowledge of them *h*. But if among all these things there

g Quoties servi electio vel optio datur, legatarius optabit quem velit. *l.* 2. *ff. de opt. vel elect. leg.*

h Scyphi electione data, si non omnibus scyphis exhibitis legatarius elegisset, integram ei optionem manere placet. Nisi ex his duntaxat eligere voluisset, cum sciret & alios esse. *l.* 4. *eod.* Nec solum si fraude hæredis, sed etiam si alia qualibet causa id evenerit. *l.* 5. *eod.*

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there should be any one that were singularly necessary to the Executor for matching some other Goods of the Succession, it would be equitable to except it out of the choice of this Legatary, especially if the Executor is willing to make up to the Legatary what this necessary thing should exceed the others in value, if none of the others be found of an equal Value to it. For the Right of the Legatary does not extend so far as to put it in his power to hurt the Executor *i*.

i As the Executor or Testamentary Heir, ought not to abuse the Liberty of Election, as has been said in the preceding Article; so neither ought the Legatary to abuse it when he has it. Homine legato, actorem non posse eligi. *l.* 37. *ff. de leg.* 1. See the tenth Article of the seventh Section of Testaments.

VI.

6. A Legacy left to the choice of a third Person.

If the Testator had left to a third Person the Choice of the thing bequeathed, either because he did not think the Legatary capable of making the said Choice, or because he was willing to make use of that Temperament between the Interests of the Executor and of the Legatee, the Legacy would be fixed by that third Person. And if he should fail, or refuse to determine it, the right of Election would go to the Legatary, who might demand of the Executor such of the things as he should pitch upon, providing it were not the most precious of all, but a thing of middle Value between that which were most precious and that of least Value *l*. And in case they could not agree among themselves, the Election would be determined by the Arbitration of some Person whom they themselves should agree on, or who should be named by the Judge *m*.

l Si quis optionem servi vel alterius rei reliquerit, non ipsi legatario, sed quam Titius forte elegerit: Titius autem vel noluerit eligere, vel non potuerit, vel morte fuerit præventus, & in hac specie dubitabatur apud veteres quid statuendum sit: utrumne legatum expiret, an aliquod ei inducatur adjutorium, ut viri boni arbitratu procedat electio. Censemus itaque, si intra annale tempus ille qui eligere jussus est hoc facere supersederit, vel minime potuerit, vel quandocunque decesserit, ipsi legatario videri esse delatam electionem. Ita tamen, ut non optimum ex servis, vel aliis rebus quidquam eligat, sed mediæ æstimationis. Ne dum legatarium satis esse fovendum existimamus, hæredis commoda defraudentur. *l. ult.* §. 1. *C. comm. de legat.*

m Arbitri officium invocandum est. *l.* 13. *in f. ff. de servit. præd. rust.*

The Delay of a Year, mentioned in the first of these two Texts, would not be agreeable to our Usage nor to Equity. For seeing this third Person who should put off so long the making of this choice, was named only that he might make a reasonable choice, and that others can do it as well as he, it would not be just to wait so long a time till he should be pleased to determine the Matter, especially if the thing bequeathed were of such a nature as to be in hazard of perishing during the Delay.

VII.

7. He who has the choice ought not to defer it.

When the Testator hath given power to chuse, whether it be to the Executor or to the Legatary, he who ought to make the choice cannot put it off any longer time than what the Condition of the things shall make necessary, or what shall have been regulated by the Testator, or by mutual consent of the Parties, or even by the Judge, if the Matter cannot be otherwise settled. And he who has the Choice in his power, if he delays to make it, may be sued by the other, who may cause him to be summoned in order to make his Option; and may protest for his Costs and Damages because of the delay: Which would have the Effect that shall be explained by the following Rules *n*.

n Mancipiorum electio legata est. Ne venditio quandoque eligente legatario interpelletur, decernere debet Prætor, nisi intra tempus ab ipso præfinitum elegisset, actionem legatorum ei non competere. *l.* 6. *ff. de opt. vel elect. leg. l.* 8. *eod.*

What is said in this and the other Articles which follow, concerning the Delay of the Executor or of the Legatee, is to be understood of the Cases where there has been a Citation of the Party to come and make his choice, or where there appears to be some Knavery in the delay; as for example, if an Executor should keep up and conceal for some time a Testament or Codicil in which he was charged with a Legacy left to his own choice.

VIII.

8. Penalty when the Executor defers to make the choice.

If the Executor to whom the Choice was left was in delay, and in the mean while the things, of which one was to be given to the Legatary, should happen to perish, or to suffer damage, he would be liable to make good the Loss or Diminution to which his Delay had given occasion. For the Legatary might have perhaps been able to sell the thing, or prevent its perishing or being damaged; and if the things being still in being, the Legatary had suffered Damages because one of them was not delivered to him, the Executor would be accountable for the same *o*. But if some of the things of which the Choice was to be made were not present, and that too long a Delay would be prejudicial to the Legatary, he might oblige the Exe-

o See the Text cited upon the preceding Article, which may agree as well to the Delay of the Executor, as to that of the Legatary.

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Executor either to chuse for him one of the things that were present, or to give him the Value of one of the things that were absent *p*.

p Si Stichus aut Pamphilus legetur, & alter ex his vel in fuga sit, vel apud hostes: dicendum erit præsentem præstari, aut absentis æstimationem. Toties enim electio est hæredi committenda, quoties moram non est facturus legatario. *l.* 47. §. 3. *ff. de leg.* 1.

IX.

9. Penalty when the Legatary defers to make the choice.

If the Choice belongs to the Legatary, and he puts it off, he will be liable for the Costs and Damages which may have been occasioned by his Delay, in the same manner as the Executor is liable for the Consequences of his Delay. Thus, for Example, if two Horses, one whereof (which soever he should chuse) had been left him by Legacy, should happen to die during his Delay to make his option, and that the said Loss might be imputed to him, because the Executor who had no occasion for any of the Horses might have been able to sell the Horse which the Legatary would have left him, and would not have been obliged to keep both the Horses, might recover against this Legatary Costs and Damages for that Expence and that Loss, according to the Circumstances *q*.

q See the Text cited on the seventh Article, in which these Words are to be remarked: Ne venditio quandoque eligente legatario interpelletur.

X.

10. If there remains only one of the things whereof the choice was bequeathed, it belongs to the Legatary.

If after the Death of the Testator and before the Election, whether it were to be made by the Legatary or by the Executor, the things of which the Election was to be made, should happen to perish, without the Fault either of the one or the other, one of the things is lost to the Legatary, and the others to the Executor *r*. But if there remains only one of them, it belongs to the Legatary. For altho his Legacy was of a Right to chuse, and that there is now no room left for choice; yet the Intention of the Testator was that the Legatary should have one of them; and therefore he ought to have that which is the only one that remains *s*.

r The first part of this Article may have its use in a Case where the testamentary Heir were to deduct the Falcidian *Portion. For one would not reckon to him as part of his* Falcidian *Portion the Value of that thing which the Legatary was to have, but only the other things which were to have been his own.* See the seventh and eighth Articles of the first Section of the *Falcidian* Portion.

s Whether the Choice belongs to the Executor or to the Legatee; if there remains only one, it goes to the Legatee. For this Event determines the thing that remains to be the Legatary's, as much or rather more than the Choice would do that which should be chosen.

XI.

11. If after the choice is made, the thing chosen perishes, the Legatary bears the loss of it.

If after that he who was to chuse, whether it was the Executor or the Legatee, has made and declared his Choice, the thing chosen should happen to perish, the loss of it would fall upon the Legatary, and he would have no right to those things that should remain. For the Choice had distinguished that thing which he was to have, and had made it his own. So that it is he who ought to bear the loss of it *t*.

t Stichum aut Pamphilum, utrum hæres meus volet Titio dare: si dixerit hæres Stichum se velle dare, Sticho mortuo liberabitur. *l.* 84. §. 9. *ff. de leg.* 1.

Altho this Text speaks only of the Case where the Choice belongs to the Heir or Executor, yet the Rule is with much more reason just in the Case where the Legatary has himself made the Choice.

XII.

12. He who has made his choice, cannot change and make another.

The Executor or Legatary who has once made his Option, whether judicially or extrajudicially by mutual Consent, cannot afterwards change or make another Choice. For the right of chusing, which the Testator had given him, is consummated by this first Choice *u*.

u Cum semel dixerit hæres utrum dare velit, mutare sententiam non poterit. *l.* 84. §. 9. *ff. de legat.* 1. Apud Aufidium libro primo rescriptum est: Cum ita legatum est; *Vestimenta, quæ volet, triclinaria sumito, sibique habeto*; si is dixisset, quæ vellet deinde, antequam ea sumeret, alia se velle dixisset; mutare voluntatem eum non posse, ut alia sumeret: quia omne jus legati prima testatione, qua sumere se dixisset, consumpsit: quoniam res continuo ejus fit simul ac si dixerit eam sumere. *l.* 20. *ff. de opt. vel elect. leg.* Electione legata, semel duntaxat optare possumus. *l.* 5. *ff. de legat.* 1. *l.* 11. *in f. ff. de legat.* 2.

XIII.

13. The choice cannot be made before the Executor has accepted the Succession.

The Legatary who has the Right of chusing, cannot make his choice till the Executor has accepted the Succession. For till then there being no Executor, there would be no Party to whom he could intimate his Choice, and who could either contest it or approve it, and deliver the Legacy. So that it would be to no purpose that he had made his choice *x*.

x Optione legata, placet non posse ante aditam hæreditatem optari: & nihil agi si optaverit. *l.* 16. *ff. de opt. vel elect. legat.*

XIV.

14. The Legatary of what shall remain after the choice of

If a Testator had bequeathed one or two things out of many at the choice of one Legatary, and the Remainder of them to another, and that he who had this

another will have all, if no choice is made.

this choice would not make use of his Right, all the things would belong to the second Legatary, and the Executor would have none of them. For the Expression of those things that should remain after the Choice of the first of the two Legataries would comprehend them all, if he took none of them *y*.

y Cum optio duorum servorum Titio data sit, reliqui Mævio legati sint: cessante primo in electione, reliquorum appellatione omnes ad Mævium pertinent. *l.* 17. *ff. de opt. vel elect. leg.*

XV.

15. The Right of Election passes to the Heir or Executor of the Legatee.

If the Legatary who had a right to chuse, dies without having made a choice, he transmits to his Heir or Executor both his Right to the Legacy, and the Right of Election *z*.

z *Illud aut illud, utrum elegerit legatarius,* nullo a legatario electo, decedente eo post diem legati cedentem, ad hæredem transmitti placuit. *l.* 19. *ff. de opt. vel elect. leg.* See the tenth and following Articles of the tenth Section of Testaments, and the seventeenth Article of the ninth Section of this Title of Legacies.

SECT. VIII.

Of the Fruits and Interest of Legacies.

BY Fruits of Legacies we are to understand not only the Product of Lands, but likewise all other sorts of Revenues or Profits that may be made of any other thing. And by Interest is meant the Reparation of Damages which Debtors of Sums of Money, who fail to make Payment, owe from the time of the Demand, as has been explained in the Title of Interest.

As to the Fruits of Lands devised, it is necessary to distinguish between those which are upon the Ground at the time that it is delivered to the Legatary, and which are commonly called the Fruits hanging by the Root, and those which have been separated from the Ground by the Executor before he delivered it, and which were separated only after the Death of the Testator. These are the subject Matter of this Section, as also the Interest and other Revenues that were fallen due before the Delivery of the Legacy; and the Fruits hanging on the Ground at the time of the Delivery are as it were Accessories, which have been treated of in the fourth Section.

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6. *The Fruits and Interest of Legacies to pious Uses are due without any Demand.*

I.

1. Three sorts of things that may be bequeathed.

We may distinguish into three kinds all the things which Testators have the liberty to give away in Legacies. The first is of those which of their own nature produce no Revenue; such as a Watch, a Picture, Silver Plate. The second is of those things which of their own Nature produce a Revenue, as a House, a Meadow, or other Ground, a Herd of Cattle, Hackney-Horses to those who let them out to hire, and other things of the like nature. The third is of Sums of Money, which of their own nature produce nothing, but which making the Price of every thing that is in Commerce, are the Instrument of the Commerce it self: Which is the Reason why the Laws condemn those who are dilatory in paying the Sums which they owe in Damages, which they have fixed to what is called Interest, of which mention has been made in its proper place *a*. And we may place in this third Rank all the Legacies which are reduced to a Valuation, such as a Legacy which a Testator should make of some Work, or other thing that he should oblige his Executor to do for a Legatee, or a Legacy of a thing which the Executor could not give in specie; for in this Case he would owe the Value of it *b*.

a See the Title of the Loan of Money and other things to be restored in kind.

b See the sixth Article of the first Section of the same Title of the Loan of Money and other things to be restored in kind.

Ubi quid fieri stipulemur, si non fuerit factum, pecuniam dari oportere. *l.* 72. *ff. de verb. obl.*

II.

2. If the Testator has regulated the Fruits and Revenues of the Legacy, his Will will serve as a Rule.

If a Testator hath regulated by his Disposition what concerns the Fruits or other Revenues which the thing devised may produce, his Will must serve as a Law, and the Executor will be accountable or not accountable for them, according as the Testator shall have order'd. Thus he who devises a Land, may order it to be delivered either after the Harvest is over, or after some Years,

during

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during which space of time he leaves the Enjoyment of it to his Executor *c*.

c Semper vestigia voluntatis sequimur testatorum. *l.* 5. *C. de necess. serv. hæred. inst.* See touching the Interest of Money the fourth Article.

III.

3. The Fruits of Legacies are due only from the time they are demanded.

If the Testator has ordered nothing about the Fruits and other Revenues which the things devised might produce, they will be due only from the time that they are demanded. But if the Executor had dealt any way knavishly, as if he had concealed the Testament, he would be liable not only for all the Fruits from the time of the Testator's Death, but likewise for Costs and Damages, if there had been any *d*.

d In legatis & fideicommissis fructus post litis contestationem non ex die mortis consequuntur, sive in rem sive in personam agatur. *l. ult. C. de usur. & fructib. legat. seu fideicom. l.* 1. *eod.*

Is qui fideicommissum debet post moram, non tantum fructus, sed etiam omne damnum quo affectus est fideicommissarius, præstare cogitur. *l.* 26. *ff. de leg.* 3. *l.* 23. *de leg.* 1. *l.* 8. *l.* 39. *ff. de usur.* See the tenth Article of the first Section of Substitutions direct and fiduciary; and the fifteenth Article of the second Section of the same Title.

We have not put down in the Article that the Fruits are due from the Contestation of Suit, as it is said in the first of these Texts; but that they are due from the time of the Demand. For by our Usage, and by the Ordinances, a legal Demand hath the Effect of the Contestation of Suit in the Roman *Law. See the Remark on the fifth Article on the first Section of Interest.*

*We have added to the Article the Exception of the Case of Knavery in the Executor. For this Rule cannot be contrary to the general Rule which obliges every knavish Possessor to make restitution of the Fruits *, with much more reason than him who is backward in paying what he owes after it has been demanded of him.*

* *See the fourth Article of the third Section of Interest.*

¶ It is necessary to observe on this Article a Difficulty which ought not to be suppressed. For besides that it has divided the Interpreters, it requires that some necessary Reflections should be made on the Rule explained in this Article. This Rule discharges the Executor not only from the Interest of Money, and of other things which produce no Revenue, but likewise from the Fruits of Lands and Tenements which produce a Revenue, and obliges him to make restitution of these Fruits only after a legal Demand. And seeing it makes no Exception, it comprehends not only the Cases where the Executor and the Legatee should have equally knowledge of the Testament, and where the Legatee should neglect to demand his Legacy; but also the Cases where the Legatary being ignorant of his Legacy, the Executor who should know of it, and see that he was obliged to deliver the thing devised, should nevertheless retain it: Which seemed to those Interpreters to be contrary to Equity. For it cannot be said, especially in the *Roman* Law, that the things devised are a part of the Goods of the Inheritance, and may be considered as belonging to the testamentary Heir until the time of their being delivered; seeing it is a Principle of the *Roman* Law in the matter of Legacies, that the Propriety of the thing bequeathed belongs to the Legatary from the moment of the Testator's Death; and that altho the Legatary know nothing of his Right till a long time after, yet his Acceptance of the Legacy has this effect, that he is accounted to be Master of the thing bequeathed from the moment of the Testator's Death, and that he is so much Master of it, that it is said in a Law, that the thing bequeathed passes to the Legatary in the same manner as the Goods of the Inheritance pass to the testamentary Heir, and that the testamentary Heir never had any right to them *a*.

It would seem to follow from these first Reflections, that since the Fruits belong regularly to the Proprietor of the Ground, those of a Ground devised did belong to the Legatary or Devisee from the Death of the Testator; and that the testamentary Heir who was not ignorant of the Testament, having known that he was in possession of Goods that were not his own, ought to be obliged to restore those Fruits. These Reasons could not be unknown to those who framed the Laws cited on this Article; and what still augments the Difficulty, is that *Justinian* has made an Exception from the Rule explained in this Article in favour of Legacies to pious Uses, having ordained, with respect to these sorts of Legacies, that no Enquiry should be made whether the Legacy had ever been demanded, but that it should suffice that the testamentary Heir not having delivered the Legacy,

a Si legatarius repulerit a se legatum, nunquam ejus fuisse videbitur: si non repulerit, ex die aditæ hæreditatis ejus intellegitur. *l.* 86. §. 2. *de leg.* 1. Quia ea quæ leguntur, recta via ab eo qui legavit ad eum cui legata sunt transeunt. *l.* 64. *in f. ff. de furt.*

Legatum ita dominium rei legatarii facit, ut hæreditas hæredis res singulas. Quod eo pertinet, ut si pure res relicta sit, & legatarius non repudiavit defuncti voluntatem, recta via dominium, quod hæreditatis fuit ad legatarium transeat, *nunquam factum hæredis.* l. 80. ff. de legat. 2.

† he

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he should be reckoned guilty of delay *ipso jure*, that is to say by the Effect of the Law it'self *b*.

To resolve this Difficulty, some of those Interpreters have been of opinion, that it was necessary to restrain the Laws which discharge the testamentary Heir from the Fruits until the time of a legal demand, to the Case of a Legacy of a thing that was not the Testator's own: but these Laws are conceived in too clear Terms to admit of so remote a Sense. Others say that their Meaning is, that the testamentary Heir is not accountable for all the Fruits which the Legatary might have reaped by his Industry, and that he is only liable for those which he has really and truly gather'd: but this Distinction does not suit with these Laws, and does not remove the Difficulty. There are some who think that these Laws are to be understood of the Fruits which had been gather'd before the Death of the Testator, and not of those which have been gathered since his Death: But what Right could the Legatary pretend to the Fruits which accrued to the Testator in his Life-time? Others will have it, that the testamentary Heir is obliged to restore the Fruits reaped after his entering to the Possession of the Inheritance, and not those reaped before; but these Laws discharge the testamentary Heir from the Restitution of the Fruits without any distinction; and his Right of Enjoyment takes in the Fruits preceding his entring to the Inheritance, for they belong to him, and he recovers them from those who had gather'd them. So that his Condition ought to be the same as to the Fruits of both these times. And lastly there are some who have thought it necessary to distinguish between the Legacies which are called *per damnationem*, and the Legacies *per vindicationem*, of which mention has been made in the Preamble to the foregoing Section; that in these the Fruits are due to the Legatary from the time of the testamentary Heir's entring to the Succession; and that in those they are due only from the time that the testamentary Heir has been guilty of delay. But there would be as much or more reason to give to the Legatary the Fruits from the time of the Testator's Death in the Case of a Legacy *per damnationem*, seeing in this case the testamentary Heir who was charged to deliver the thing bequeathed would be more faulty than he would be in the Case where the Legatary himself ought to take the thing bequeathed to him; and besides, the Distinction of these two sorts of Legacies hath been abolish'd, as has been remarked in the same Place. It seems likewise that the first of the Texts cited on this Article relates to both these sorts of Legacies indifferently, and that these two Expressions *sive in rem, sive in personam agatur*, may be understood the one of the Legacy *per damnationem*, which the Legatary demanded by a personal Action, and the other of the Legacy *per vindicationem*, which was demanded by a real Action. Whence it appears to follow, that even when the Distinction of these two sorts of Legacies was in use, the Rule explained in this Article was equally applicable to the one sort and to the other.

We relate here the several Sentiments of those Interpreters to shew, that this Rule which discharges the testamentary Heir or Executor from the Fruits of Legacies until the time of a legal Demand, seemed to them to be unjust, being taken in a literal and general Sense. But seeing none of all these Interpretations appears to agree with the Sense of these Laws, the Terms whereof are so clear and distinct, and that the Exception which *Justinian* has made from this Rule in favour of Legacies to pious Uses, determines for the Sense which discharges in general the testamentary Heirs or Executors from the Fruits of Legacies until the time of Demand; it is but fair and ingenuous freely to own, that *Justinian*'s Intention, and that of the preceding Laws, was to make a general Rule of it, which, after the manner of other general Rules, should be observed in Cases where there were no cause to make any Exception from it. Thus *Justinian* hath excepted from this Rule Legacies to pious Uses. Thus one may except the Cases where the Executor should be guilty of any Roguery. And if, for example, an Executor had concealed a Codicil which contained Legacies, he would be without doubt condemned to make Restitution of the Fruits and Interest of those Legacies, if the said Codicil came to light. But when no unfair Dealing can be imputed to the Executor, and that it was not his fault that the Legataries had no knowledge of the Testament, and had not received their Legacies, the Cir-

b See the last Article.

cumstances might justly discharge the Executor from making Restitution of the Fruits which he had enjoyed. Thus, for example, if a Testament having been opened in a Court of Justice, or deposited with a Notary Publick living in the Place where the Testator had his Abode, and it having by that means been known and made publick, there were some of the Legataries whose Place of Abode was unknown, or even whose Persons were not known, or who were absent in a remote Country, so that it were not possible to acquaint them; the Executor who on one part ought to continue in possession of the Goods, and to take care of them, and who on the other part ought to remain Proprietor of what cannot be acquired by the Legataries, whether it be that they cannot or will not receive their Legacies, or that they are incapable of them, may without injustice remain in possession of all the Goods of the Inheritance, and enjoy those that had been bequeathed as well as the other Goods. So that his Enjoyment of those things not being an Usurpation, and since it may have some other good Foundation, besides the Negligence of the Legatee, it is but just that the Executor under these circumstances should be free from any fear of being afterwards called upon to make restitution of the Fruits which he had enjoy'd without any Fraud or Covin. Thus the Rule which frees him from this Restitution, hath its Equity founded in the Circumstances which may clear him from all Roguery; and it hath likewise its Usefulness for the publick Good, because of the Inconveniences which it removes of an infinite number of Difficulties that would happen if Executors were obliged without distinction to restore all the Fruits which they had gathered since the Death of the Testator. And seeing the delay of Payment of Legacies may happen either thro the Roguery of the Executor, or without any knavish dealing on his part, and that such Knavery ought not to be presumed without Proof, it was but just to presume Uprightness and Integrity in an Executor who should have several Excuses to alledge. But this Law being founded only on the Presumption of the Integrity of the Executor, and on the Consequences of the publick Good, which demands that all Occasions of Law-Suits should be cut off as much as is possible, it would be altogether useless for justifying the Conscience of an Executor, who, altho no body should be able to discover and prove his Roguery, ought to tax himself with it, and if he would do justice upon himself, ought to restore the Fruits which he had unjustly reaped of a Land or Tenement that was devised, and which he might have delivered to the Devisee.

IV.

4. The Interest of Legacies of Money is due only from the time of the Demand.

Legacies of Money, and other things which of their nature produce no Revenue, ought to be paid, as all other Legacies, at the time appointed by the Testament; or if there be no time fixed, they are due after the Death of the Testator. But altho they be not acquitted at the time appointed, yet Interest is only due from the time of the Demand *e*; unless the Testator had order'd that the Legatary should have the Interest *f*.

e Legatorum seu fideicommissorum usuras ex eo tempore quo lis contestata est, exigi posse manifestum est, sed & fructus rerum & mercedes servorum qui ex testamento debentur, similiter præstari solent. *l. 1. C. de usur. & fruct. legat.*

f The Interest in this Case would not be usurious: For it would not be a Loan, but the Liberality of the Testator which would encrease the Legacy.

V.

5. Profit of Legacies, which is of another nature than the Fruits or Interest.

If the thing bequeathed were of such a nature as that it ought to produce to the Legatary Profits of another sort than the Fruits of a Ground, or Interest of Money, as if it were a certain number of Mares, or a Set of Instruments and Machines for some Manufacture, the Executor who is in fault for not delivering the Legacy, will be accountable for the Profits which these sorts of things might yield. But if the Legacy were of a Stud of Mares, the Colts would be a part of the Legacy, and would belong to the Legatary, altho the Executor had not been guilty of any delay in delivering the same *g*.

g Is qui fideicommissum debet, post moram non tantum fructus, sed etiam omne damnum quo affectus est fideicommissarius præstare cogitur. *l. 26. ff. de legat. 3.*

Equis per fideicommissum relictis, post moram fœtus quoque præstabitur ut fructus. *l. 8. ff. de usur.*

Equis per fideicommissum legatis, post moram hæredis fœtus quoque debentur. Equitio autem legato etiam si mora non intercedat, incremento gregis fœtus accedunt. *l. 39. eod.*

VI.

6. The Fruits and Interest of Legacies to pious Uses

The Executor who does not pay the Legacies to pious Uses within the time regulated by the Testator, if he has set

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are due without any Demand.

set any time, or within the Delay that is necessary according to the Quality of the Testator's Disposition, will be accountable for the Fruits, the Interest, and other Revenues, according to the Nature of the thing bequeathed, to reckon from the Term, if there was any set by the Will, or from the Death of the Testator, if there was no Term fixed *h*.

h Supra autem omne tempus quo distulerint facere disposita scripti hæredes: eos cogi solvere & fructus & reditus & omnem legitimam accessionem, a tempore ejus, qui disposuit, mortis sancimus: non inspecta mora a litis contestatione, aut conventione, sed ipso jure intellecta (quod dicitur vulgo) mora præcessisse & locum habente fructuum & aliarum rerum accessione. Hoc eodem obtinente, & si non ab hærede, sed a fideicommissario, aut legatario relictum fuerit hujusmodi pium legatum. *l.* 46. §. 4, & 5. *C. de Episc. & Cler. v. Nov.* 131. *c.* 12.

¶ Altho the Justice of this Rule be founded not only on the Favour of Legacies to pious Uses, but also on this particular Consideration, that these Legacies may be unknown or neglected by the Persons who ought to call for them, such as the Governors of an Hospital, and others who happen to be entrusted with this Care; yet this is not always precisely observed, lest such a Strictness should happen sometimes to degenerate into Rigour. And it is even prudent for Governours of Hospitals not to exact Legacies to pious Uses in such a manner as to make them uneasy and burdensome to Families. For such a rigid Conduct as this might some time or other divert those who were injured by it, from making the like Dispositions in favour of Hospitals, and incline them to dispose to some other Uses of what they had piously designed for the poor.

SECT. IX.

How the Legatary acquires his Right to the Legacy.

IT has been remarked at the end of the Preamble to the tenth Section of Testaments, where the Right of Transmission is treated of, that mention should likewise be made of it in this Place in some Articles relating to this Right. But what shall be said in these Articles ought not to be taken for a Repetition of what has been said in that tenth Section of Testaments. For there we have explained the Rules of Transmission in general, and here we shall only make Application of those Rules to some Cases where it is necessary to shew their Use.

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I.

1. The Legatary acquires his Right

Seeing the Legatee acquires his Right by a Testament, or other Disposition made

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at the instant of the Testator's Death.

made in consideration of Death, and that these sorts of Dispositions are confirmed, and have their Effect at the moment of the Death of the Person who has made the Disposition; the Right to the Legacy is acquired to the Legatee at the same instant *a*, unless it be that the Will of the Testator has made some Change to it; and that depends on the Rules which follow.

a Si purum legatum est, ex die mortis dies ejus cedit. *l.* 5. §. 1. *ff. quand. dies leg. vel fid. ced.*
Hæredis aditio moram legati quidem petitioni facit, cessioni diei non facit. *l.* 7. *eod.* See the tenth Article of the tenth Section of Testaments.

II.

2. Legacies of two sorts, either pure and simple, or conditional.

We must distinguish two sorts of Legacies: Those which are pure and simple, that is to say, whose Validity does not depend on any Condition: And those which are conditional, and which have not their Effect but by the Event of the Condition on which they depend; as if a Testator devises a certain Estate in Land, on condition that the Legatary happens to have Children *b*. And the Right to these several Legacies accrues differently to the Legataries by the following Rules.

b Purum legatum. *l.* 5. §. 1. *ff. quand. dies legat. vel fideic. ced.* Legatum sub conditione relictum. *d. l.* §. 2.

III.

3. The pure and simple Legacy is acquired at the moment of the Death of the Testator.

If the Legacy was pure and simple, the Legatary acquires his Right to it at the moment of the Death of the Testator, whether he knew or was ignorant of the Testament, and the said Death. And if the Thing devised be a House or Lands, or some moveable Thing belonging to the Inheritance, or any other Thing that is actually among the Goods of the Succession, it passes directly from the Deceased to the Legatary, and he is Master of it, and the Executor has no manner of Right to it *c*. Or if it be a Thing that is not part of the Succession, or a Sum of Money, he has a Right to have it delivered to him at the Time that the Executor shall be obliged to deliver it *d*.

c Si purum legatum est, ex die mortis dies ejus cedit. *l.* 5. §. 1. *ff. quand. dies leg. vel fideic. ced.*
Legatum ita dominium rei legatarii facit, ut hæreditas hæredis res singulas. Quod eo pertinet, ut si pure res relicta sit, & legatarius non repudiavit defuncti voluntatem: recta via dominium, quod hæreditatis fuit, ad legatarium transeat nunquam factum hæredis. *l.* 80. *ff. de legat.* 2. *l.* 75. §. 1. *eod. l.* 64. *in f. ff. de furt.*
Si fideicommissum ab intestato fuerit sorori tuæ relictum codicillis, & postea quam dies fideicommissi cessit, rebus humanis, licet ignorans fideicommissum, excesserit, actionem hujusmodi acquiri potuisse, dissimulare non poteris: salva scilicet ab intestato succedenti quarta portione. *l. ult. C. quand. dies leg. vel fideic. ced. l.* 3. *eod.*
d See the tenth Section.

IV.

4. As also the conditional Legacy, the Condition whereof is fulfilled before the Testator's Death.

If a Legacy being conditional, the Condition was come to pass in the Lifetime of the Testator, or at the Time of his Death, this Event would make the conditional Legacy to become pure and simple; so that the Legatary would acquire his Right to it at the Time of the Testator's Death *e*.

e See the sixteenth Article of the eighth Section of Testaments.

V.

5. If the Condition does not happen till after the Testator's Death, the Legacy hath not its Effect till it happens.

If the Condition comes to pass only after the Death of the Testator, the Right of the Legatee will not vest in him at the Time of the said Death, even altho the Condition should depend on his own Fact, and that he should offer to perform it, unless the Executor should accept his Offer. But the Legacy will not be due to him till after he shall have actually fulfilled the Condition, or if it was independent of his Deed, till it shall have come to pass *f*.

f Si sub conditione sit legatum relictum, non prius dies legati cedit quam conditio fuerit impleta: ne quidem si ea sit conditio, quæ in potestate sit legatarii. *l.* 5. §. 2. *ff. quand. dies leg. vel fideic. ced. l. un.* §. 7. *C. de caduc. toll.*

VI.

6. Three sorts of Legacies necessary to be distinguished for the Effect of the Right of the Legatary.

It is necessary to distinguish three sorts of Legacies, with regard to the Time at which the Legatary may have acquired his Right, and to the Time in which he may exercise the said Right: The Legacies that are pure and simple without any Term, the Legacies that have a certain Term, and the Legacies that are conditional. And this Difference hath the Effect that shall be explained by the Rules which follow *g*.

g See the following Articles.

VII.

7. Difference between the Time when the Legacy is acquired, and the Time when it may be demanded.

In all sorts of Legacies it is necessary to distinguish two several Effects of the Right of the Legatee. One, which renders him Master of the Thing bequeathed, whether he may demand immediately the Delivery of it, or may not demand it as yet: And the other, which puts him in a Condition to demand the Delivery of it. It is of this first Effect that it is said, that then the time is come in which the Legatary's Right vests

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vests in him, and the Legacy is due: And it is of the second Effect that it is said, That then the Time is come when the Legatary may demand the Legacy. Thus, when the Legacy is pure and simple, and without any Term, the Moment of the Death of the Testator hath both these Effects; and the Time is then come in which the Right to the Legacy vests in the Legatary, and in which likewise he may demand the Thing bequeathed. Thus, when there is a Term prescribed for the Payment of the Legacy that is pure and simple, the first of these two Effects comes to pass on the Day of the Testator's Death; and the second does not happen till the Day of the Term. Thus, when the Legacy is conditional, and without any other Term, it hath these two Effects at the moment that the Condition comes to pass; or if it has a Term, the second Effect is suspended until the said Term. And if the Condition is not come to pass, the Time is not come in which the Right to the Legacy is acquired, and much less the Time of demanding it *h*.

h Deberi dicimus & quod die certa præstari oportet, licet dies nondum venerit. *l. 9. ff. ut legat. seu fideic. caus. caveat.*

Si dies apposita legato non est, præsens debetur, aut confestim ad eum pertinet cui datum est. Adjecta, quamvis longa sit, si certa est, veluti Kal. Januariis centesimis, dies quidem legati statim cedit: sed ante diem peti non potest. *l. 21. ff. quando dies leg. vel fideic. ced.*

Cedere diem significat incipere deberi pecuniam. *Venire* diem significat eum diem venisse quo pecunia peti possit. Ubi pure quis stipulatus fuerit; & cessit, & venit dies. Ubi in diem: cessit dies sed nondum venit. Ubi sub conditione, neque cessit, neque venit dies, pendente adhuc conditione. *l. 213. ff. de verb. signif.*

VIII.

8. The Legatary transmits, or doth not transmit the Legacy to his Heirs or Executors, according to the Condition in which his Right is when he dies.

It follows from the preceding Articles, that if the Legatary chances to die before he has received the Thing bequeathed, the Legacy may pass, or may not pass to his Heirs or Executors, according to the Condition in which his Right is at the time of his Death. And he transmits the Legacy, if the Right to it was vested in him, or he does not transmit it, if the Time was not come that the Legacy was due to him *i*.

i Si post diem legati cedentem legatarius decesserit, ad hæredem suum transfert legatum. *l. 5. ff. quand. dies leg. vel fideic. eod.*

Ad hæredem ejus legatum non transit, quia non cessit dies vivo eo. *l. 1. §. 2 ff. de condit. & demonstr.*

IX.

9. Two Cases in which there can be no Transmission.

Of what nature soever the Legacy be, if the Legatary was dead at the time of making the Testament, or if he dies before the Testator, his Heir or Executor will have no Right to the Legacy. For the Legatary himself could have no Right to it but at the time of the Testator's Death, which was to give the Effect to his Testament *l*.

l See the fifth Article of the tenth Section of Testaments.

X.

10. The conditional Legacy is not transmitted, if the Condition be not come to pass.

If the Legacy is conditional, and the Legatary dies before the Condition of the Legacy be fulfilled, he dies without having had any manner of Right to the Legacy; so that he transmits no Right to his Heir or Executor *m*.

m See the eleventh Article of the tenth Section of Testaments.

XI.

11. The Legacy is transmitted, altho the Legatary die before the Term of paying the Legacy.

When the Legacy is pure and simple, whether there be a Term fixed for Payment of it, or whether there be no Term fixed, the Legatary who has survived the Testator, having thereby acquired his Right to the Legacy, transmits it to his Heir or Executor, whether he die before or after the Term *n*.

n See the Texts cited on the seventh and eighth Articles of this Section, and the third Article of the tenth Section of Testaments.

XII.

12. Which are the Legacies that are truly conditional.

We must not reckon in the number of conditional Legacies all those in which the Testator may perhaps have made use of the word *Condition*. For as it has already been observed in its proper place, Conditions are often confounded with the Charges which Testators impose on Legacies; which renders this word *Condition* equivocal *o*. But we ought not to call any Legacies conditional, except those whereof the Validity depends on a Condition, so as that until it be accomplished, the Legatary can have no manner of Right *p*. Thus, for example, if a Testator bequeaths a Sum of Money in case the Legatary be married at the time of the Testator's Death, or that he have Children, or that he be provided of an Office,

o See the seventh and following Articles of the eighth Section of Testaments.

p See the same Articles, as also the second Article of this Section.

these

these are conditional Legacies, altho the word *Condition* be not express'd in the Testament. But if the Testator devises a Land or Tenement, on condition that the Legatary suffer therein a Service for the Use of other Lands or Tenements which he devises to some other Person; this Expression will indeed impose upon the Legatary the Charge of this Service, but it will not make the Legacy conditional: And if the Legatary dies before the Right of Service have been put in use, the Legacy will nevertheless be transmitted to the Heir or Executor of the said Legatary.

XIII.

13. The Legatary who leaves his Wife big with Child, transmits the Legacy left him on condition that he have Children.

If the Condition of a Legacy were, That the Legatary should have Children, the Testator having order'd, that when he should have Children the Executor should give him either a Sum of Money, or a certain House or Land, and the said Legatary should die without having Children, but should leave his Wife big of a Child that should afterwards be born; this Legacy would have its Effect; and this Legatary would have transmitted his Right to his Heir. For his Heir would be this Child, whom the Testator had in view when he made his Testament, and whose Birth had accomplished the Condition *q*.

q Is cui ita legatum est, *quando liberos habueris*, si prægnante uxore relicta decesserit, intelligitur expleta conditione (decessisse, & legatum valere, si tamen posthumus natus fuerit. *l.* 18. *ff. quand. dies legat. ced. l.* 20. *ff. ad Senat. Trebell.*

XIV.

14. Indecent or impossible Conditions do not suspend the Legacy.

If the Testator had made the Legacy to depend on a Condition that were either unjust, indecent, or impossible, seeing this Condition would be of no manner of Obligation, as has been shewn in its proper place; this Legacy would be of the Nature of a pure and simple Legacy, and the Legatary happening to die before he received it, would transmit his Right to his Heir or Executor *r*.

r Si ea conditio fuit quam prætor remittit, statim dies cedit. Idemque & in impossibili conditione, quia pro puro hoc legatum habetur. *l.* 5. §. 3, *&* 4. *ff. quand. dies leg. ced.* See the eighteenth Article of the eighth Section of Testaments.

XV.

15. Legacies left to an uncertain Time are conditional.

Legacies, whose Effect depends on an uncertain Time, that is, of which there is no Certainty that it will ever happen, are of the same nature with conditional Legacies. For they imply the Condition, that they shall not have their Effect, unless the said Time comes to pass. So that if the Legatary of a Legacy of this nature should chance to die, the said Time not being as yet come to pass, he would not transmit the Legacy to his Heir or Executor. Thus, for example, if a Testator had left a Sum of Money to a Legatary in case he should arrive at the Age of Majority; this Legatary happening to die before he attained the Age of Majority, his Heir or Executor would have no Right to the Legacy *s*.

Example.

s Si cui legetur *cum quatuordecim annorum erit*: certo jure utimur, ut tunc sit quatuordecim annorum, cum impleverit. *l.* 49. *ff. de legat.* 1.

Non putabam diem fideicommissi venisse, cum sextumdecimum annum ingressus fuisset, cui erat relictum, *cum ad annum sextumdecimum pervenisset.* Et ita etiam Aurelius Imperator Antoninus ad appellationem ex Germania judicavit. *l.* 48. *ff. de condit. & dem. V. l.* 74. §. 1. *ff. ad Senat. Trebell.*

¶ We must take notice that we have added to the Texts quoted on this Article the Citation of the 74*th Law*, §. 1. *ff. ad Senat. Treb.* because it is contrary to them. For whereas it is said in these Texts, that if a Legacy or fiduciary Bequest be left to a Person when he shall have fourteen Years of Age, or, as it is expressed in the second Text, when he shall attain the Age of fourteen, the Legacy will not be due until these Years are compleated; it is said in that other Law, that it suffices that they be begun. It is true, that that is in a Case where the Circumstances made this Decision favourable; but it is, however, the same Expression explained in two different Senses. In our Usage this Expression, *When he shall arrive at such a Year*, or, *When he shall attain to such a Year*, seems to be meant of the Year begun. But this other Expression, *When he shall have attained the Age of Majority*, is not equivocal, and demands Majority, which is not acquired but by the five and twentieth Year being compleat. For which reason we have made use of this Expression in the Article, that we might not say any thing contrary to any one of these Texts, and that we might make it sute with our Usage.

XVI.

16. Another Example.

We may give for another Example of a Legacy which depends on an uncertain Time, that which a Testator should bequeath in such Terms as to make the Legacy to depend on the Death of his Executor;

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Executor; as, if he should charge him to give or deliver when he should die such a House or Land, or other Thing, to a Legatary. For altho this Case be different from that of the preceding Article, in that it is certain that the Time will come when the said Executor will die, whereas the Majority of the Legatary may perhaps never come to pass; yet in this Case, as well as in the other, the Time is uncertain, and it implies the Condition, That when the Time shall come to pass, the Legatary shall be in a condition to reap the Profit of the Legacy, and that he be then alive. So that if this Legatee chance to die before the Executor, he will have acquired no Right to the Legacy, and he will have transmitted nothing to his Successors *t*.

t Si cum hæres morietur, legetur, conditionale legatum est. Denique vivo hærede defunctus legatarius ad hæredem non transfert. *l.* 4. *ff. quand. dies leg. vel fid. ced.*

Tale legatum, *cum morietur hæres dato*: certum est debitum iri, & tamen ad legatarium non transit, si vivo hærede decedat. *l.* 13. *in f. eod.* See the thirteenth Article of the eighth Section of Testaments, and the Remark which is there made on it.

XVII.

17. The Legatary who dies before the Election transmits his Right.

We are not to reckon among conditional Legacies, or those which depend on an uncertain Time, a Legacy left to the Choice of the Legatary, or of the Executor. For altho, if the Legatary should happen to die before the Election had been made, it would remain uncertain which were the Thing bequeathed, and that the Legacy could not have its Effect, in order to be acquitted, till after this Choice had been made; yet the Right of the Legatary was vested in him independently of this Election, which was only to determine which was the Thing bequeathed, and not to vest the Right to it in the Legatary. Thus, altho the Legatary should die before the Election were made, yet he would transmit his Right to his Heir *u*.

u Illud aut illud utrum elegerit legatarius, nullo a legatario electo, decedente eo post diem legati cedentem, ad hæredem transmitti placuit. *l.* 19. *ff. de opt. vel elect. leg.* See the fifteenth Article of the seventh Section.

XVIII.

18. Legacies annexed to Persons are not transmitted.

Legacies which are annexed to the Person of the Legatee, such as an Usufruct, an Annuity, a Legacy of Alimony, and others of the like nature, which the Testator intended only to bestow on the Person of the Legatee, are not transmitted to his Heir. And if, for example, a Testator had given leave to one of his Friends to dig Stones out of a Quarry, or to use a Passage, or other Service, for some Ground, this Right being only for the Use of the said Person, his Death would make it to cease, unless the Expression of the Testator should relate likewise to the Heirs of the Legatee *x*.

x Quoties cohæret personæ id quod legatur, veluti personalis servitus, ad hæredem ejus non transit. *l.* 8. §. 3. *in f. ff. de liber. leg.*

Si quis alicui legaverit, licere lapidem cædere: quæsitum est an etiam ad hæredem hoc legatum transeat. Et Marcellus negat, ad hæredem transmitti, nisi nomen hæredis adjectum legato fuerit. *l.* 39. §. 4. *ff. de leg.* 1. *l.* 6. *ff. de servit. legat.*

XIX.

19. An annual Legacy contains several.

The Legacy of a Sum of Money to be paid every Year to a Legatary during his Life, either by way of Pension, or for Alimony, or otherwise, is considered as containing so many Legacies as there shall be Years in the Life of the said Legatary; and the Legacy of every Year is due to him as soon as it is begun, pursuant to the Rules explained in another Place *y*. Thus his Right to every Legacy is acquired according as he goes out of one Year into the other. And when he dies, he transmits to his Heir not only the Arrears of the Years that were fallen due, but also the Year which he had begun, and which his Death has interrupted *z*.

y See the sixth and ninth Articles of the fifth Section.

z Cum in annos singulos legatur, non unum legatum esse, sed plura constat. *l.* 10. *ff. quand. dies leg. ced.*

Nec semel diem ejus cedere, sed per singulos annos. Sed utrum initio cujusque anni, an vero finito anno cedat, quæstionis fuit. Et Labeo Sabinus, & Celsus, & Cassius, & Julianus in omnibus quæ in annos singulos relinquuntur, hoc probaverunt, ut initio cujusque anni hujus legati dies cederet. *l.* 12. *eod. d. l.* §. 1. *l.* 1. *C. eod.*

Item Celsus scribit, quod & Julianus probat, hujus legati diem ex die mortis cedere, non ex quo adita est hæreditas. Et, si forte post multos annos adeatur hæreditas, omnium annorum legatario deberi. *d. l.* 12. §. 3.

XX.

20. Example of a Legacy annexed to the Person of the Legatary.

If a Father who had two Sons, one of Age, and the other under fourteen Years, had named them both his Executors, and given to the youngest some Lands or Houses, and a Sum of Money to be paid him after his Majority, leaving till that time this Sum, and the Enjoyment of those Lands or Houses, to his eldest Son, on condition that he should acquit the Charges of the Estate, and

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and that he should give every Year to their Mother a certain Pension for the maintenance of the youngest Son; and that the eldest Son should chance to die before this Time were expired, his Death would make this Enjoyment which he had of the said Lands to cease; and it would not go to his Children, or other Heirs whom he should leave behind him. For altho that if he had lived, the Enjoyment would have lasted to the Time regulated by the Testament, yet it was given him only as a personal Bounty annexed to the good Office which he was to render to his Brother, and which the Father had considered as a Function of a Tutor, altho this second Son had other Tutors. Thus, the Death of the eldest Son putting an end to the Motive of the Father, which was limited to the Person of the eldest Son, would likewise put an end to an Enjoyment which the Father had left to him only with this view *a*.

a Pater duos filios æquis ex partibus instituit hæredes; majorem & minorem, qui etiam impubes erat: & in partem ejus certa prædia reliquit: & cum quatuordecim annos impleverit certam pecuniam ei legavit: idque fratris ejus fideicommisit: a quo petit in hæc verba. *A te peto Sei, ut ab annis duodecim ætatis ad studia liberalia fratris tui inferas matri ejus annua tot usque ad annos quatuordecim: eo amplius tributa fratris tui pro censu ejus dependas, donec bona restituas: & ad te reditus prædiorum illorum pertineant quoad perveniat frater tuus ad annos quatuordecim.* Quæsitum est, defuncto majore fratre, hærede alio relicto: utrum omnis conditio percipiendi reditus fundorum, anniversaria præstetur: alia quæ præstaturus esset, si viveret Seius, ad hæredem ejus transierint: an vero id omne protinus ad pupillum & tutores transferri debeat. Respondit: secundum ea quæ proponerentur, intelligitur testator quasi cum tutore locutus: ut tempore quo tutela restituenda est, hæc quæ pro annuis præstari jussisset, percipiendisque fructibus finiantur, sed cum major frater morte præventus est: omnia, quæ relicta sunt, ad pupillum & tutores ejus confestim post mortem fratris transisse. *l. 21. §. ult. ff. de ann. leg.*

It must be observed in this Text, that the Tutorship ended at the Age of fourteen Years according to the Roman *Law, as has been mentioned in the Preamble of the Title of Tutors.*

XXI.

21. The Delay of the Right of the Executor does not suspend that of the Legatee.

When the Succession is open by the Death of the Testator, if it happens that there be not as yet any testamentary Heir or Executor, as if he who was named to be so were a posthumous Child not yet born, or if the Executor should defer accepting of the Succession, or if he could not accept it, by reason that some Condition kept his Right in suspence; the Legacy is nevertheless vested in the Legatary, and he has his Right secure *b*.

b Hæredis aditio moram legati quidem petitioni facit, cessioni diei non facit. Proinde sive pure institutus, tardius adeat, sive sub conditione per conditionem impediatur, legatarius securus est. Sed & si nondum natus sit hæres institutus, aut apud hostes sit, similiter legatario non nocebit, eo quod dies legati cessit. *l. 7. d. l. §. 1, & 2. ff. quand. dies leg. ced.* See the nineteenth Article of the fifth Section of Testaments, and the Remark that is there made on it.

XXII.

22. A Legacy whose effect is suspended, and which is transmitted.

If a Testator had devised to one of his Friends a Land which he had in Marriage with his Wife, and to his Wife instead of the said Land a Sum of Money, and that after the Testator's Death his Widow delaying to make her Election whether she would take the Legacy of the Sum of Money, or her Land, the Legatary should happen to die before she had made her Option, he would transmit his Right to his Heir. And if the Widow should afterwards resolve to take the Legacy of the Money, that of the Land which he had with his Wife in Marriage would go to the Heir of this Legatary. For altho this Legacy did imply the Condition that the Widow should part with the Land; yet seeing she might have determined herself as to the Choice at the moment that the Succession was open, and that this Delay was not within the Intention of the Testator, as the waiting for the Event of another sort of Condition which he had imposed would be; but this Delay arising only from the Fact of a third Person, it is altogether foreign to the Testator's Intention, and ought not to hurt the Legatary *c*.

c Si extrinsecus suspendatur legatum, non ex ipso testamento; licet ante decedat legatarius, ad hæredem transmisisse legatum dicimus: veluti si rem dotalem maritus legaverit extero, & uxori aliquam pro dotali re pecuniam: deinde deliberante uxore de electione dotis, decesserit legatarius, atque legatum elegerit mulier: ad hæredem transire legatum dictum est: idque & Julianus respondit. Magis enim mora, quam conditio legato injecta videtur. *l. 6. §. 1. ff. quand. dies leg. ced.*

¶ It is said in this Text that it was rather a Delay which the Testator had annexed to this Legacy, than a Condition on which he had made it to depend. But this Legacy did in effect imply this Condition, that the Widow should accept the Legacy of the Money, and part with the Land. For if she had taken back the Land, there would have been nothing for the Legatary, unless the Testator had devised to him alternatively either the Land which he had in Marriage with his Wife, or the Sum of Mo-

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Money. But altho the Legacy be in this Sense conditional, yet seeing the Condition consists in the Choice which the Wife is to make, it would not be just that her Delay should make the Legacy to perish. And seeing it was both natural and agreeable to the Intention of the Testator, that this Election should be made immediately after the Testator's Death, this Delay, which proceeds from the Fact of a third Person, and not from the Intention of the Testator, ought not to prejudice the Right of the Legatary. And if the Widow chuses the Sum of Money, this Election is considered as if it had been made, as it ought to have been, at the moment of the Testator's Death.

XXIII.

23. The Legacy with which the Person who is substituted Executor is charged, is acquir'd by the Death of the Testator.

If a Testator having substituted a second Heir or Executor to succeed him in default of the first, by that Form of Substitution which is called vulgar, which shall be explained in the first Title of the fifth Book, had made a Bequest, with which he had charged only the Heir or Executor who was substituted in the second place, and not him who was instituted in the first, and that it so fell out that the Legatary died before the Inheritance passed to the Person substituted to the first Heir or Executor, the Legacy would be transmitted to the Heir of this Legatary. For the Inheritance could not pass to the substituted Heir but with this Burden; and he coming to succeed in the room of the first Heir, is reputed to be Heir from the Moment of the Testator's Death, pursuant to the Rule which hath been explained in its Place *d*: So that he ought not to profit by the Death of the Legatary, which happen'd during this delay of his coming to the Inheritance. And it would be the same thing in the Case of that sort of Substitution which is called pupillary, which shall be consider'd in the second Title of the fifth Book, if the Person substituted to the Pupil were charged with the Legacy *e*. And altho in these two Cases of these two sorts of Substitution the Legacy implies the Condition that the Person who is substituted shall succeed, yet it is not for all that conditional. For with regard to the Person substituted who is charged with the Legacy, it is pure and simple, since it cannot fall out that he should be Heir or Executor without owing the Legacy.

d See the fifteenth Article of the first Section of Heirs and Executors in general.

e Mortuo patre, licet vivo pupillo, dies legatorum a substituto datorum cedit. *l. 1. ff. quand. dies leg. ced.*

Si a substituto legatum sit relictum quamdiu institutus deliberat defuncto legatario non nocebit, si postea hæres institutus repudiavit: nam ad hæredem suum transtulerit petitionem. Tantumdem, etsi ab impuberis substituto legetur; nam ad hæredem suum legatum transfert. *l. 7. §. 3 & 4. ff. eod.*

SECT. X.

Of the Delivery and Warranty of the Thing bequeathed.

The CONTENTS.

1. *The Legatary ought to have the Legacy deliver'd to him, and not to take it by force.*
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13. *When a thing is bequeathed indefinitely, the Executor ought to warrant the thing which he gives.*
14. *Warranty of the Legacy of a thing particularly named.*
15. *If he who evicts the thing from the Legatary is obliged to restore the Price, it will go to the Legatary.*
16. *The Executor cannot be restored against the Payment of a Legacy, altho it be null.*
17. *Nor likewise of a Legacy which he had paid*

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paid before the Condition on which it was left was accomplished.

18. *Exception to the preceding Article as to the Interest of a third Person.*

I.

1. *The Legatary ought to have the Legacy delivered to him, and not to take it by force.*

SINCE the Legacy is to be taken out of the Inheritance, the Possession whereof passes from the Testator to the Executor, it is from his hands that the Legatary ought to have the thing that is bequeathed; and in what Terms soever the Bequest be conceived, even altho the Testator should ordain that the Legatary should take the thing bequeathed, yet he cannot seize upon it, and take it out of the possession of the Executor without his Consent. For it would be an Act of Violence, which is unlawful. But if the Executor should refuse to deliver the thing to him, he ought to apply to Justice for an Order to have it delivered *a*.

a Quod quis legatorum nomine non ex voluntate hæredis occupavit, id restituat hæredi. Etenim æquissimum prætori visum est unumquemque non sibi ipsum jus dicere occupatis legatis, sed ab hærede petere. *l. 1. §. 2. ff. quod leg.*

If the Legacy were of an Immoveable Thing, it would seem to be less necessary to oblige the Legatee to make a Demand of it from the Executor, in case he did not of his own accord offer to deliver it; but it might happen that the Executor should have a mind to contest the Legacy, or that he might have a right to retain the Possession of it for some time, as if it were a House of which he had the Keys, and in which there were Moveables belonging to the Inheritance; or if it were some Lands of which the Crop was to be his. And there might be other just Causes why the Legatary should not put himself in possession of the Legacy. So that the Rule appears to be just for all sorts of Legacies without distinction; and it is so ordered by many Customs. The Legacy ought to be deliver'd either by the Executor of the Testament, or by the Heir.

II.

2. *The Executor ought to take care of the thing bequeathed.*

While the thing bequeathed remains in the custody of the Executor, he is bound to preserve it until he delivers it to the Legatary; and if it perishes, or is damaged, thro his Fault or Negligence, he will be accountable for it: For he is obliged to take exact care of it, and he ought to answer for the Faults that are contrary to this Care *b*.

b Si res aliena vel hæreditaria sine culpa hæredis perierit, vel non compareat; nihil amplius quam cavere eum oportebit. Sed si culpa hæredis res perit, statim damnandus est. Culpa autem qualiter sit æstimanda, videamus: an non solum ea, quæ dolo proxima sit, verum etiam quæ levis est: an numquid & diligentia quoque exigenda est ab hærede, quod verius est. *l. 47. §. 4, & 5. ff. de legat. 1.* See the eleventh Article of the first Section of Substitutions direct and fiduciary. See the eleventh Article of this Section.

III.

3. *Legacies without any Term or Condition, are due from the Acceptance of the Succession.*

The Legacies for the Delivery or Payment of which there is no Term set, and which are not conditional, ought to be paid immediately after the Executor has accepted the Succession *c*.

c Omnia quæ testamentis sine die vel conditione adscribuntur, ex die aditæ hæreditatis præstentur. *l. 32. ff. de leg. 2.*

IV.

4. *The Legacy ought to be deliver'd in the Place where it is at the time of the Testator's Death.*

The thing bequeathed ought to be delivered to the Legatee in the Place where it was at the time of the Testator's Death; unless it should appear that it was his Intention that it should be delivered in another Place; in which Case the Executor must cause it to be transported thither at his own Charges *d*.

d Cum res legata est, siquidem propria fuit testatoris, & copiam ejus habet hæres moram facere non debet, sed eam præstare. Sed si res alibi sit, quam ubi petitur, primum quidem constat, ibi esse præstandam, ubi relicta est, nisi alibi testator voluit. Nam si alibi voluit, ibi præstanda est, ubi testator voluit, vel ubi verisimile eum voluisse. *l. 47. ff. de leg. 1. l. 38. ff. de judic. l. un. C. ubi fideic. pet. op.*

V.

5. *If a Horse that is bequeathed were run away in the Lifetime of the Testator, the Executor is not obliged to make search after him.*

If the Legacy was of a Horse, or of a Herd of Cattle, or of Animals of other kinds, and that before the Death of the Testator the Horse was run away, or some of the Cattle strayed, the Executor would not be bound to make search after it, and to bring it back; and if the Legatee would reap the Benefit of the Legacy, he would be obliged to be at this Expence himself. But if this Case had happen'd after the Death of the Testator, the Executor would be obliged to be at this expence, pursuant to the Rule explained in the second Article *e*.

e Si quis servum hæredis, vel alienum legaverit; & is fugisset, cautiones interponendæ sunt de reducendo eo. Sed siquidem vivo testatore fugerit, expensis legatarii reducitur: si post mortem, sumptibus hæredis. *l. 8. ff. de legat. 2.*

Si servus legatus vivo testatore fugisse dicatur, & impensa & periculo ejus cui legatus sit reddi debet: quoniam rem legatam eo loco præstare hæres debet in quo a testatore sit relicta. *l. 108. ff. de legat. 1.*

VI.

6. *The Legatary is liable to Costs and Damages for not receiving his Legacy.*

If the thing bequeathed were of such a nature as that the Legatary delaying to receive it, the Executors should by his delay suffer some Loss or Damage, the Legatary would be bound to make it good. Thus, for example, if it were a Legacy of Cattle, the Legatee would be

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be liable for the Charges of keeping them, of feeding them, and for the other Costs and Damages which the Executor might chance to be at. Thus, for another example, if thro the Legatary's default of receiving Wine, Corn, or other things which should take up Places, or Moveables necessary for other Uses, the Executor should lose the Occasion of letting out to hire the said Places, or could not himself make use of them and the other things for his own Concerns; the Legatary would be answerable for all these Damages. But the Executor could not pour the Wine out of the Vessels, or throw the Corn out of the Barns, under pretext of the Delay *f*.

f Si hæres damnatus sit dare vinum quod in doliis esset, & per legatarium stetit, quominus accipiat: periculose hæredem facturum, si id vinum effundat. Sed legatarium petentem vinum ab hærede doli mali exceptione placuit summoveri, si non præstet, id quod propter moram ejus damnum passus sit hæres. *l. 8. ff. de trit. vin. vel ol. leg.*

VII.

7. Security for Legacies and fiduciary Bequests.

If the Legatees should be in fear of losing their Legacies, and should be unwilling to leave the Goods of the Inheritance to the Disposal and Management of the Executor, they might provide against such danger, either by obliging him to give caution, or some other Security, or by getting an Order for seizing the Goods, and sealing up the Places in which the Moveables and Papers belonging to the Inheritance should be, in order to have an Inventary of them made, and to have them exposed to sale, if that should be necessary for their Payment. And it would be the same thing for the Security of fiduciary Bequests *g*.

g Legatorum nomine satisdari oportere prætor putavit. Ut quibus testator dari fierive voluit, his diebus detur, vel fiat. *l. 1. ff. ut legat. seu fideic. serv. caus. cav.*

Idemque in fideicommissis quoque probandum est. *d. l. 1. §. 10.*

Nec sine ratione hoc prætori visum est, sicuti hæres incumbit possessioni bonorum, ita legatarios quoque carere non debere bonis defuncti: sed aut satisdabitur eis, aut, si satis non datur, in possessionem bonorum venire prætor voluit. *d. l. §. 2. l. 1. C. ut in poss. legat. vel fid. serv. c. m.*

It is said in the second and seventh Laws of this Title in the Code, that the Testator may discharge the testamentary Heir from giving Security for the Payment of the Legacies and the fiduciary Bequests; and it is very just that a Testator should have this Liberty. But our Usage and Equity would apply some Temperament in this Matter, should the testamentary Heir make a bad use of the Testator's Indulgence to him; and if there were any danger for the Legatees, they might apply for Remedy to a Court of Justice. For it would be presumed, even as to the Testator's Will, that he did not intend to countenance any knavish dealing on the part of his testamentary Heir.

VIII.

8. Two Cases where the Father and Mother being charged with a fiduciary Bequest to their Children, ought to give Security.

If a Father or a Mother instituting their Children or Grand-Children their Executors, had substituted to them their Children or other Descendants, the Persons substituted could not demand Security for the Goods of the fiduciary Bequest from their Father or Mother who should be charged therewith, unless they had married a second time, or that the Testator, out of a mistrust of their Conduct, had expresly order'd some Security to be given *h*.

h Si pater vel mater, filio seu filia institutis hæredibus rogaverit eos easve nepotibus vel neptibus, pronepotibus vel proneptibus, ac deinceps restituere hæreditatem: in supradictis casibus fideicommissorum servandorum satisdationem cessare, si non specialiter eandem satisdationem testator exigi disposuerit: & cum pater vel mater secundis existimant nuptiis non abstinendum. In his enim duobus casibus, id est, cum testator specialiter satisdari voluerit, vel cum secundis se pater vel mater matrimoniis junxerit, necesse est, ut eadem satisdatio pro legum ordine præbeatur. *l. 6. d. l. §. 1. C. ad Senat. Trebell.*

Altho the Security mentioned in this Law seems to be meant of a Caution or Bail according to the ordinary meaning of this Word satisdationem, *yet the most learned Interpreters take it in another Sense which this Word may bear, and that is a bare Submission. Which would be but a slender Security, in case there were occasion for any: and it would seem as if the Use of this Rule ought very much to depend on that which Equity may require, according to the Quality of the Goods, that of the Persons, and the other Circumstances that might come into consideration.*

IX.

9. The Executor recovers what he has laid out on the Legacies and fiduciary Bequests.

If the Executor who is charged with a Legacy or a fiduciary Bequest, has been at any charges for the Preservation of the thing bequeathed, he will recover them, unless they are such as ought to be taken out of the Profits or Revenues of the thing. Thus, for example, if an Executor being charged with a fiduciary Bequest of a House which he should restore after his Death, and the said House having perished, or being damaged without any fault of his, he had rebuilt it, or repair'd it, this Expence would be estimated in proportion to the quality and necessity of the Repairs, and the Condition in which the House was at the time of the Testator's Death, the time that it had lasted, and according to the other Circumstances necessary to be considered in making the said Estimate *i*.

i Domus hæreditarias exustas, & hæredis nummis extructas, ex causa fideicommissi post mortem hæredis restituendas, viri boni arbitratu, sumptuum rationibus deductis, & ædificiorum ætatibus examinatis, respondit. *l. 58. ff. de leg. 1.* See the twelfth Article of the first Section of direct Substitutions.

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X.

10. *He ought to acquit the Charges of the Lands devised until the time of Delivery.*

The Executor is also bound to acquit the Taxes, Ground-Rents, and other Charges of the Things devised, whether they fell due in the Time of the Testator, if there remain any Arrears due, or since the Testator's Death during the Time that the Executor had the Enjoyment of them. And if he is obliged to restore the Fruits which he has reaped, these kinds of Charges will be deducted out of them *l*.

l Hæres cogitur legati prædii solvere vectigal præteritum, vel tributum, vel solarium, vel cloacarium, vel pro aquæ forma. *l.* 39. §. 5. *ff. de leg.* 1.

XI.

11. *The Executor bears the Loss, if the Thing perishes after his Delay to deliver it.*

If the Executor being in fault for not delivering the Thing bequeathed, it happens to perish, or to be damaged, even altho it were by an Accident, he will be accountable for it. For if the Thing bequeathed had been delivered, the Legatary might have perhaps either prevented the Loss of it, or might have sold it *m*.

m Ipsius quoque rei interitum post moram debet, sicut in stipulatione, si post moram res interierit æstimatio ejus præstatur. *l.* 39. §. 1. *ff. de leg.* 1.

Item si fundus chasmate perierit: Labeo ait, utique æstimationem non deberi. Quod ita verum est, si non post moram factam id evenerit. Potuit enim eum acceptum legatarius vendere. *l.* 47. §. *ult. eod. l.* 3. *C. de usur. & fruct. leg.*

Si servus legatus sit & moram hæres fecerit, periculo ejus & vivit, & deterior fit: ut, si debilem forte tradat, nihilominus teneatur. *l.* 108. §. 11. *eod.*

If it were Lands or Houses that were devised, and that they perish by the overflowing of a River, as it is said in the second of these Texts, it would require particular Circumstances to make the Testamentary Heir answerable for this Loss; for it is not so easy to sell Lands or Houses as a Moveable Thing.

XII.

12. *All other Loss, whereof nothing can be imputed to the Executor, falls on the Legatee.*

If it was the Legatary who, having it in his power to receive the Thing bequeathed, had delayed to do it, the Loss or Diminution which might happen would fall upon him. And it would be the same thing, if the Thing bequeathed had perished before the Time that it was to be delivered, and that nothing could be imputed to the Executor *n*.

n Si certum corpus hæres dare damnatus sit, nec fecerit, quominus ibi, ubi id esset, traderet: si id postea sine dolo & culpa hæredis perierit, deterior fit legatarii conditio. *l.* 26. §. 1. *ff. de legat.* 1.

XIII.

13. *When a Thing is bequeathed indefinitely, the Executor ought to warrant the Thing which he gives.*

If the Legacy were in general of a Thing indefinitely, such as a Horse, a Sute of Hangings, without specifying any particular Sute, or any particular Horse, the Executor would be bound to warrant the Thing which he had given for acquitting this Legacy, if it should happen that the Legatary were evicted of it. And whether the Thing had been found among the Goods of the Inheritance, or that the Executor had taken it somewhere else, and that he knew or were ignorant whose it was, he would be bound to give another in its place; for the Testator meant to make an useful Bequest *o*.

o Si hæres tibi, servo generaliter legato, Stichum tradiderit, isque à te evictus fuisset: posse te ex testamento agere, Labeo scribit. Quia non videtur hæres dedisse, quod ita dederat, ut habere non possis. Et hoc verum puto. *l.* 29. §. 3. *ff de leg.* 3.

Hæres servum non nominatim legatum tradidit, & de dolo postea repromisit, servus evictus est. Agere cum hærede legatarius ex testamento poterit, quamvis hæres alienum esse servum ignoraverit. *l.* 58. *ff. de evict. V. l.* 71. §. 1. *ff. de leg.* 1. See the following Article.

XIV.

14. *Warranty of the Legacy of a Thing particularly named.*

If the Legacy were of a Thing particularly named by the Testator, as if he had devised such a Ground, or such a Moveable, which he believed to be his own, but which in reality was not his, the Executor would be bound only to deliver the Thing specified in the Testament, and would not be obliged to warrant it. For it would be presumed that the Testator had devised it only because he took himself to be the Owner of it, and that he would not have made such a Devise, if he had known that the Thing was not his own *p*. Thus, in a like Case, if a Father, disposing of his Goods among his Children, had charged one of them with a fiduciary Bequest for another of the Children of some Land or Tenement which the Testator believed to be his own, he who in performance of this Disposition had delivered the said Land or Tenement to his Brother at the Time required by the fiduciary Bequest, would not be bound to warrant the said Land or Tenement, if his Brother should chance to be evicted thereof. But if instead of a fiduciary Bequest, the Father's Disposition were a Partition that he had made among his Children, giving to one of them this Land or Tenement for his

p Si certus homo legatus est, talis dari debet qualis est. *l.* 45. §. 11. *ff. de legat.* 1. Forsitan enim si scivisset alienam rem esse, non legasset. §. 4. *inst. de legat.* See the fifth Article of the third Section.

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his Share, his Coheirs would be bound to warrant the said Land or Tenement *q*, pursuant to the Rules explained in their place *r*.

q Evictis prædiis, quæ pater, qui se dominum esse crediderit, verbis fideicommissi filio reliquit: nulla cum fratribus & cohæredibus actio erit. Si tamen inter filios divisionem fecit, arbiter, conjectura voluntatis, non patietur, eum partes cohæredibus prælegatas restituere, nisi parati fuerint & ipsi patris judicium fratri conservari. *l.* 77. §. 8. *ff. de legat.* 2.

r See the sixth Article of the first Section, and the first Article of the third Section of Partitions.

XV.

15. If he who evicts the Thing from the Legatary is obliged to restore the Price, it will go to the Legatary.

If the Legatee of Lands or Houses be evicted of them, and that he who evicts them is obliged to restore the Price of them, this Price which is restored will belong to the Legatee, and not to the Executor. For the Intention of the Testator in devising to him the said Lands or Houses, implies his Intention that the Legatee should at least have the benefit of the Price. Thus, for example, if the Devise were of Lands purchased by the Testator with a Reservation of Power to the Seller to redeem them, whether the said Lands were part of the King's Demesnes, or belonging to some particular Person, the Money that should be for redeeming the Lands, would belong to this Legatee *s*.

s Cum post mortem emptoris, venditionem reipublicæ prædiorum optimus maximusque princeps noster Severus Augustus rescindi, hæredibus pretio restituto, jussisset: de pecunia legatario, cui prædium emptor ex ea possessione legaverat, conjectura voluntatis, pro modo æstimationis, partem solvendam esse, respondi. *l.* 78. §. 1. *ff. de legat.* 2.

XVI.

16. The Executor cannot be restored against the Payment of a Legacy, altho it be null.

If an Executor had voluntarily executed a Disposition of the Testator by acquitting a Legacy or fiduciary Bequest which should be found to be null, he could not afterwards dispute the Validity thereof. For having accomplished a Disposition which his Reason and Conscience had obliged him to approve and execute, he could not revoke what he had done out of Motives which made this Payment a Duty incumbent on him *t*.

t Et si inutiliter fideicommissum relictum sit, tamen si hæredes comperta voluntate defuncti, prædia ex causa fideicommissi avo tuo præstiterunt, frustra ab hæredibus ejus de ea re quæstio tibi movetur. Cum non ex ea sola scriptura, sed ex conscientia relicti fideicommissi defuncti voluntati satisfactum esse videatur. *l.* 2. *C. de fideicomm.*

XVII.

17. Nor likewise of a Legacy which he had paid before the Condition on which it was left was accomplished.

Since the Executor may acquit a Legacy which he cannot be compelled by Law to pay, he may with much more Reason deliver sooner than he is obliged either a Legacy or a fiduciary Bequest, whether it be universal of the whole Inheritance, or particular of a Sum of Money, or of some other Thing, for the Delivery of which a Term was set which would delay the Execution thereof, or even to which a Condition were annexed which would suspend the Validity of it. And altho after the Delivery of the Thing the Condition on which it was left not happening, the Disposition should be found to be null, yet this Event would not have the Effect to make this Payment not to subsist. For the Executor might discharge the Legatee of the Condition, and acquit the Legacy or fiduciary Bequest as pure and simple, since he might acquit a Legacy that was null from the beginning, as has been shewn in the sixteenth Article *u*.

u Post mortem suam rogatam restituere hæreditatem, defuncti judicio, & antequam fati munus impleat, posse satisfacere, id est restituere hæreditatem, quarta parte vel retenta, vel omissa, si voluerit, explorati juris est. *l.* 12. *C. de fideic.*

Altho no mention be made in this Text of a Legacy or fiduciary Bequest that is left upon a Condition, yet it cannot be doubted that the Executor, who should know of the Condition, and who without waiting for the Accomplishment of it should execute the Disposition of the Testator, could not revoke his Approbation of the said Disposition. And this Approbation ought to subsist with much more Reason than that of a Disposition which is void from the beginning, of which notice hath been taken in the preceding Article.

XVIII.

18. Exception to the preceding Article, as to the Interest of a third Person.

The Rule explained in the preceding Article is to be understood of the Cases, where a Payment made before it falls due would be of no prejudice to third Persons. For if, for example, an Executor were charged to restore after his Death, either the whole Inheritance, or a part of it, or a Sum of Money, to some Person, and that in case the Person who is substituted should die before the Executor, the Testator had called another Person to succeed to the same fiduciary Devise, the Executor, who, having a mind to favour the Person substituted in the first place, had delivered up to him the Thing which was devised in Trust, would not be discharged of it, if the Person substituted in the first

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first place should die before him; and the Right of the Person substituted in the second place would remain entire for him to exercise it, the Case happening that he out-lived the Executor *x*.

x Seium maritum scripsit hæredem, eique substituit Appiam alumnam, fideique hæredis commisit ut, post mortem suam hæreditatem eidem alumnæ restitueret: aut si quid ante contigisset alumnæ, tunc Valeriano fratris filio restitueret eandem hæreditatem; quæsitum est, si Seius vivus quidquid ad eum ex hæreditate pervenisset alumnæ restituisset, an secundum voluntatem defunctæ id fecisse videretur, præsertim cum hæc eidem substituta esset? Respondit, si vivo Seio Appia decessisset, non esse liberatum a fideicommisso Valeriano relicto. *l.* 41. §. 12. *ff. de legat.* 3.

If the Case explained in this Article should happen, the Person substituted in the second place might, without waiting for the Death of the Executor, take care that the Goods should not go the Person substituted in the first place unless with the Burden of his Right, if the Case on which the same is founded should happen, and unless sufficient Security were given that the Goods should be preserved.

SECT. XI.

How Legacies may be null, revoked, diminished, or transferred to other Persons.

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I.

1. A Legacy may be either null at first, or become so afterwards.

A Legacy may be null two ways, either by reason of a Nullity which is in the Legacy from its beginning, or by reason of some Cause which happens afterwards, and annuls it. Thus, a Legacy is null from its beginning, if the Testament which contains it be null *a*; if the Testator was incapable to dispose of his Goods at the time that he made his Will *b*; if the Thing bequeathed could not be given away, as if it was a Thing belonging to the Publick *c*. Thus, a Legacy which was not null at first, is afterwards annulled, if the Testator falls under an Incapacity which lasts till his Death *d*; if the Legatary happens to be at the same time under a like Incapacity *e*; if he dies before the Testator *f*; and if the Thing bequeathed should happen to perish *g*.

a See the third Section of Testaments.
b See the second Section of Testaments.
c See the second Article of the third Section of Legacies.
d See the twenty seventh and twenty eighth Articles of the second Section of Heirs and Executors in general.
e See the third Article of the second Section of Legacies.
f See the seventh Article of this Section.
g See the nineteenth Article of this Section.

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II.

2. *A Legacy may be either revoked, or diminish'd, or transferred from one Legatee to another.*

A Legacy may be revoked *h*, or diminished, by taking something from it *i*; or it may be transferred from one Legatary to another *l*, according as the second Dispositions alter the former, as shall be hereafter explained.

h See the eleventh Article, and those that follow.

i See the twenty second and twenty third Articles.

l See the twenty fourth Article.

III.

3. *A Legacy that is null in its beginning, remains always so.*

If a Legacy is null in its beginning at the time that the Testament is made, and in such a manner, as, that if the Testator should happen to die at the same time, the Legacy would be useless, it will not be afterwards made valid at what time soever the Testator chances to die, and what Change soever may happen. For the Vice which hath annulled this Legacy from its beginning, is not to be repaired, but this is to be understood in the Sense of the Rules which follow *m*.

m Quod initio vitiosum est, non potest tractu temporis convalescere. *l.* 29. *ff. de reg. jur.*

Omnia quæ ex testamento proficiscuntur, ita statum eventus capiunt, si initium quoque sine vitio ceperint. *l.* 201. *eod.*

Catoniana regula sic definitur. *Quod, si testamenti facti tempore decessisset testator, inutile foret id legatum, quandocumque decesserit, non valere.* Quæ definitio in quibusdam falsa est. *l.* 1. *ff. de reg. Caton.*

The Rule explained in this Article is the same with that which is called in the Roman *Law the* Catonian *Rule, of which we have taken notice in the Remark on the thirty first Article of the second Section of Heirs and Executors in general. See that Remark, as also what has been said in that second Section, and in the second Section of Testaments, touching the several sorts of Incapacity, in order to apply to this and the following Articles such of those Rules as may be applicable to this Section.*

IV.

4. *An Example of this Rule.*

If one under the Age of Fourteen having made his Testament, and being afterwards arrived at that Age which rendered him capable of making a Testament, dies without making another, this Testament, which would have been null if the Testator had died immediately after he made it, will remain such, altho at the time of his Death he was capable of making a Testament. For the Incapacity, under which he was at the time of making his Testament, is not removed by the Capacity which he acquires afterwards, and which changes nothing in the preceding time *n*.

n See the second Article of the second Section of Testaments.

V.

5. *Another Example of this Rule.*

If the Legacy was vitious and null in its Origin, by reason of the Nature of the Thing bequeathed, as, if it was a publick Place; this Legacy, which would be null if the Testator had died at the time he made his Testament, would not be valid afterwards, even altho it should happen that before his Death the Thing bequeathed had changed its Nature, and had come into Commerce. For this Change not being followed by a new Disposition of the Testator, would leave the former Disposition in its Nullity *o*. And it would be the same thing, if a Testator having bequeathed a Thing which belonged to the Legatary, it should happen afterwards that this Legatary had alienated it before the Testator died. For altho that the Legacy would have been good if this Change had preceded the Devise; yet seeing it was null at the time when the Thing bequeathed was already the Legatary's own, it remains so for ever after *p*.

o Si talis sit res cujus commercium non sit, vel adipisci non potest, nec æstimatio ejus debetur. §. 4. *inst. de legat.*

Tractari tamen poterit, si quando marmora, vel columnæ fuerint separatæ ab ædibus, an legatum convalescat. Et siquidem ab initio non constitit legatum, ex post facto non convalescet. Quemadmodum nec res mea legata mihi, si post testamentum factum fuerit alienata: quia vires ab initio legatum non habuit. Sed si sub conditione legetur, poterit legatum valere. *Si existentis conditionis tempore mea non sit. l.* 41. §. 2. *ff. de leg.* 1. See in relation to the last Words of this last Text the following Article.

p See the third and eighth Articles of the third Section.

VI.

6. *An Exception to this Rule, as to conditional Legacies.*

The Rule explained in the preceding Articles does not take place in conditional Legacies. Thus, for example, in the same Case of the foregoing Article of a Legacy of a Thing that were not in Commerce, if the Testator had bequeathed it upon condition, in case it should change its Nature, and be capable of being acquired by the Legatary; this Legacy, which without this Condition would remain null if the Testator had died after making such a Disposition, would have its effect, if this Change should afterwards happen before the Death of the Testator. Thus, for example, if a Testator had left a Legacy to a Foreigner on condition that he should be naturalized, this Legacy, which without this Condition

would

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would have been null if the Testator had died immediately after making his Testament, would have its effect if the said Foreigner should happen to be naturalized before the Death of the Testator. For in these Cases, and others of the like nature, the Conditions have this effect, that the Validity or Nullity of the Legacy remains in suspence until the Event either annuls it, or makes it valid *q*.

q Placet Catonis regulam ad conditionales institutiones non pertinere. *l.* 4. *ff. de reg. Caton.*

Purum legatum Catoniana regula impediet: conditionale non, quia ad conditionalia Catoniana non pertinet. *l.* 41. §. 2. *in f. ff. de legat.* 2.

In tempus capiendæ hæreditatis institui hæredes posse benevolentiæ est. Veluti, Lucius Titius, cum capere poterit, hæres esto. Idem & in legato. *l.* 62. *ff. de hæred. inst.*

Hæredem meum ita tibi obligare possum, ut si, quandoque ego moriar, tuus servus Stichus non erit, dare eum tibi damnas sit. *l.* 18. *ff. de leg.* 2. *l.* 1. §. 2. *ff. de reg. Cat. See the Close of the second Text cited on the fifth Article. See the Remark on the thirty first Article of the second Section of Heirs and Executors in general, where notice is taken of the Case of this sixty second Law,* ff. de hæred. inst.

VII.

7. The Legacy is null if the Legatary was dead before the Testament was made, or if he dies before the Testator.

The Legacy becomes null if the Legatary dies before the Testator. For it was only at the moment of the Testator's Death that the Legatary's Right could accrue to him. So that he not being alive at that time, cannot acquire it: For which reason he does not transmit to his Heir a Right which he himself never had. And the Legacy would be null with much more reason, if the Legatary had been dead before the Testament was made, the Testator knowing nothing of his Death *r*.

r Si eo tempore quo alicui legatum adscribebatur, in rebus humanis non erat, pro non scripto hoc habebitur. *l.* 4. *ff. de his quæ pro non scrip. hab.*

Ea etenim vel his relinquebantur qui in rerum natura tunc temporis, cum condebantur ultima elogia, non fuerant, forte hoc ignorantibus testatoribus: & ea *pro non scriptis* esse leges existimabant. Vel vivo testatore, is qui aliquid ex testamento habuit, post testamentum ab hac luce subtrahebatur: vel ipsum relictum expirabat, forte quadam conditione sub qua relictum fuerat deficiente: quod veteres appellabant in causa Caduci. *l. un.* §. 2. *C. de cad. toll.* See the fifth Article of the tenth Section of Testaments.

VIII.

8. The Charge imposed on the Legacy which proves to be null, passes to him who reaps the Benefit thereof.

If in the Case where the Legacy happens to be null because of the Legatary's dying before the Testator, the said Legacy had been accompanied with some Charge, as if the Testator had obliged the Legatary to give a Sum of Money, or something else, to some other Person, the Nullity of the Legacy would not annul the Charge which the Testator had imposed on it in favour of this third Person. For it was as it were another Legacy which ought to subsist. Thus this Charge will go to the Person who reaps the Benefit of the Legacy, whether it be the Executor, or another Legatee who was substituted to him that could not reap the Benefit of the Legacy, or that was joined with him in the Bequest, and who by Right of Accretion or Survivorship ought to have the thing bequeathed *s*.

s Pro secundo vero ordine, in quo ea vertuntur quæ *in causa caduci* fieri contingebant, vetus jus corrigentes, sancimus, ea quæ ita evenerint, simili quidem modo manere apud eos a quibus sunt relicta, hæredes forte vel legatarios, vel alios qui fideicommisso gravari possunt: nisi & in hunc casum vel substitutus, vel conjunctus, eos antecedat. Sed omnes personas quibus lucrum per hunc ordinem defertur, eas etiam gravamen quod ab initio fuerat complexum omnimodo sentire; sive in dando sit constitutum, sive in quibusdam faciendis, vel in modo, vel conditionis implendæ gratia, vel alia quacunque via excogitatum. Neque enim ferendus est is qui lucrum quidem amplectitur, onus autem ei annexum contemnit. *l. un.* §. 4. *C. de caduc. toll.*

¶ It is to be observed on this Article, that we have set down in it only the Case where the Legatary happens to die before the Testator, and not the Case where he was dead at the time of making the Testament, altho both these Cases be comprehended in the preceding Article. For there was this Difference in the *Roman* Law between these two Cases, that in that Case where the Legatary was dead before the Testament was made, not only was the Legacy null, but also the Charge annex'd to the Legacy *a*; whereas in the other case the Charge subsisted *b*. This Difference was founded upon this, that the Legacy left to the Legatary who was already dead was held as not being written, and as a Disposition as null as if it had never been made; whereas the Legacy to the Legatary who was living when the Testament was made, and who died before the Testator, was only confiscated, and fell to the Exchequer before the Change which *Justinian* made by the Law cited on this Article. Which hath no manner of relation to our Usage, since with us the Exchequer never reaps the Profit of Legacies that are null. But it may be remarked touching those Legacies which are held to be not written, that there were Cases in which the Charges imposed on the

a *l. un.* §. 3. *C. de cad. toll.*

b *See the Text cited on this eighth Article.*

the said Legacies were to subsist c. And what was just in those Cases according to the *Roman* Law, would seem in our Usage, and according to the Principles of Equity, to be so in all Cases: And that if a Testator had charged a Legatary who was already dead before the Testament was made, to give a Sum of Money or other Thing out of his Legacy to another Person, the Executor or other Person who reaps the Benefit of the thing bequeathed, ought to be bound to acquit the said Charge; since it would be, as is said in the Article, as it were another Legacy which the Testator had a mind to give, the Validity of which it would seem ought not to depend on that of the Legacy, which was to bear the said Charge.

c *d. §. 3. l. 17. ff. de leg. Corn. de falsf. l. ult. ff. de his quæ pro non script. hab.*

IX.

9. A Legacy that was good at the time of making the Testament, may become null by a change.

A Legacy which would have had its effect if the Testator had died immediately after the making of his Testament, may become null in process of time, if before the Legatary has acquired his Right, there happens a Change, which puts things into such a condition, that if they had been the same at the time that the Testament was made, the Legacy had been void. Thus, for example, if a Legatary who was capable of a Legacy at the time of making the Testament, be incapable thereof at the time of the Testator's Death, as if he was a professed Monk, or condemned to a Punishment which should carry along with it a civil Death; or if the thing bequeathed, which at the time of making the Testament, was in Commerce, be at the time of the Testator's Death destined to a publick Use; these Legacies, which would have been useful if the Testator had died before these Events, are null after they have happened t.

t Item si servo alieno quid legatum fuerit, & postea a testatore redemptus sit, legatum extinguitur. Nam quæ in eam causam pervenerunt, a qua incipere non poterant, pro non scriptis habentur. *l. 3. §. 2. ff. de his quæ pro non script. hab. V. l. 12. ff. de jur. fisc. See the following Article. See the sixteenth Article of the second Section of Testaments, and the Remark that is there made on it.*

X.

10. Remark on the preceding Article.

We have said in the preceding Article, that a Legacy which was useful in its Origin may become null, if after the making of the Testament it happen that things be in such a condition, that if they had been the same at the time the Testament was made, the Legacy would have been null; and we have not said that in general and without distinction every Legacy is annulled by an Event of this nature. For it may happen that such a Change may not have the effect to annul the Legacy. Thus for example, if a Testator who at the time of making his Testament was capable of doing it, happened to be incapable thereof at the time of his Death, because he was fallen into a State of Madness; this kind of Incapacity would not hinder the Validity of the Testament, nor that of the Legacy. So that the Rule of the preceding Article ought not to be literally understood in the Sense of the Words of the Text from which it is drawn. But this Rule, as also that of the third Article, are to be taken in the Sense that hath been given them, and according to the Temperaments which result from the Examples and Exceptions that have been explain'd, every one of which sufficiently explains the Cause which distinguishes it from the Cases to which these Rules ought to be applied u.

u *See the preceding Articles, the fourth Article of the second Section of Testaments, and the sixteenth Article of the same Section, together with the Remark that is there made upon it.*

XI.

11. Divers Ways of revoking Legacies.

A Testator may revoke Legacies either by express Dispositions, such as a second Testament, or a Codicil, or without any express Disposition, as if he disposes otherways of the thing bequeathed. Thus, for example, if a Father who had devised to his Daughter certain Lands, happening afterwards to marry her, gives her the same Lands for her Marriage-Portion, the Legacy will be tacitely revoked by such a Disposition. And this Daughter having these Lands for her Dowry, cannot pretend a second Effect of this Legacy x.

Example.

x Filia legatorum non habet actionem, si ea quæ ei in testamento reliquit vivus pater postea in dotem dederit. *l. 11. C. de legat.*

XII.

12. The Legacy of a Debt is revoked if the Testator procures Payment of it.

If a Testator had bequeathed to his Debtor the Debt which he owed him, and that afterwards he obliged the Debtor to pay it, the Legacy would be revoked y. For it was not a Sum of

y Liberatio autem debitori legata ita demum effectum habet, si non fuerit exactum id a debitore dum vivat testator. Cæterum si exactum est, evanescit legatum. *l. 7. §. 4. ff. de liber. leg.*

 Money

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Money to be received that was bequeathed, but an Acquittance. Thus the Payment annuls the Legacy.

XIII.

13. *The Alienation of the thing bequeathed revokes the Legacy.*

If a Testator sells, or alienates any other way, the thing bequeathed, the Legacy is revoked. For seeing he strips himself of it, much more doth he deprive the Legatary of it who was to have it from him z.

z Si rem suam testator legaverit, eamque necessitate urgente alienaverit, fideicommissum peti posse; nisi probetur, adimere ei testatorem voluisse. Probationem autem mutatæ voluntatis ab hæredibus exigendam. *l.* 11. §. 12. *ff. de leg.* 3.

Si rem suam legaverit testator, posteaque eam alienaverit; Celsus putat, si non adimendi animo vendidit, nihilominus deberi. Idemque Divi Severus & Antoninus rescripserunt. §. 12. *inst. de leg.*

¶ We have thought proper to leave out of this Rule that which is added in the first of these Texts, that if the Testator has sold for an urgent Necessity the thing which he had bequeathed, the Legacy is not revoked unless the testamentary Heir prove that the Testator had an Intention to revoke it. And we have also thought proper to leave out what is said in the second of these Texts, that the Sale of the thing bequeathed is no hindrance why the Legacy should not subsist, if when the Testator sold it, he had not an intention to revoke the Legacy. *Si non adimendi animo vendidit, nihilominus deberi.* And we have set down only the bare Rule, that the Alienation annuls the Legacy, and such as we see it in other Places without these Exceptions. It is in this manner that the Lawyer *Paulus* has quoted this Rule in the fourth Book of his Sentences; Tit. 1. §. 9. *Testator supervivens si eam rem quam reliquerat vendiderit, extinguitur fideicommissum.* And we see in a Law, that the Sale of the thing bequeathed annuls the Legacy in such a manner, that if a Testator having sold a Slave whom he had bequeathed, should afterwards purchase him, this Slave would not be due to the Legatary, altho he belonged to the Testator at the time of his Death, unless the Legatary could prove that the Testator had a new Intention to leave him to him *a*. Seeing therefore the Rule is, that the Alienation annuls the Legacy, and that to make the Legacy subsist it was necessary, by the *Roman* Law, to have Proofs of the Testator's Intention, in order to know whether he intended that the Legacy should subsist or not, it was not proper to add to the Rule these Exceptions which do not suit with our Usage. For we do receive no other Proof of the Will of a Testator than his Testament, together with the known Circumstances which may explain his Intention. And the Inconveniences would be infinite if such Proofs were admitted, as well as Proofs of Covenants prohibited by the Ordinances *b*.

a V. *l.* 15. *ff. de adim. vel transf. leg.*

As to what concerns the Case of a Sale which the Testator may have made out of necessity, it would be necessary likewise in that case to come to Proofs of the Testator's Intention. For it is said in the first of these Texts, that notwithstanding the necessity the Heir or Executor ought to be admitted to prove that it was the Testator's Intention to revoke the Legacy, whence it would follow that the Legatee would be received on his part to prove the contrary; because in the Matter of Proofs of Facts, each Party is at liberty to make his Proof *c*. Thus this Proof, which it would be necessary to make in order to know whether the Testator, having alienated the thing bequeathed out of necessity, had had an intention to revoke the Legacy, would likewise be contrary to our Usage.

b See the Ordinances quoted on the twelfth Article of the first Section of Covenants, and at the end of the Preamble of the second Section of Proofs.

c See the sixth Article of the first Section of Proofs.

XIV.

14. *A Donation has the same effect.*

If he who had bequeathed a thing had afterwards given it away to some other Person than to the Legatary, this Donation would annul the Legacy with much more reason than a Sale. For one may be obliged to sell out of necessity a thing which he had bequeathed, and that without changing the Good-Will which he had for the Legatary; but one cannot be presumed to give it away to another except freely, preferring the Donee to the Legatee *a*.

a Rem legatam si testator vivus alii donaverit, omnimodo extinguitur legatum. Nec distinguimus utrum propter necessitatem rei familiaris, an mera voluntate donaverit: ut si necessitate donaverit, legatum debeatur: si nuda voluntate, non debeatur. Hæc enim distinctio in donantis munificentiam non cadit. Cum nemo in necessitatibus liberalis existat. *l.* 18. *ff. de adim. vel transf. legat.*

¶ It is said in another Law that altho the Donation be found to be null, yet the Legacy nevertheless is revoked;

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voked *; which is founded upon this, that the Donation, altho it be in it self null, yet it marks the express Intention of the Testator to revoke the Legacy. And if, for example, a Testator having made a Deed of Gift of a thing which he had before bequeathed to another Person than the Donee, had continued in the same mind as to that Donation until his Death, it would be certain that his Intention was to revoke the Legacy. And altho the Heir or Executor of the said Donor should afterwards procure the Deed of Gift to be annulled by reason of some Flaw in it, yet he might pursuant to this Law maintain against the Legatary that his Legacy was annulled. But if it was the Donor himself that had procured the Deed of Gift to be vacated, and that he afterwards had made no change in his Testament; and had died without making other Dispositions; that Donation which the Testator himself had revoked, ought it to have the effect of revoking a Legacy which he had suffered to remain in his Testament? And would there not be just ground to presume that this Testator intended that his Legacy should have its effect, not only because of his revoking the Deed of Gift; but because that having made no Alteration in his Testament, he had confirmed all the Dispositions thereof, and had signified his Will to die in the same Intentions, and that they should all of them have the same effect that the Death of Testators gives to their Testaments.

* Pater hortos instructos filiæ legavit: postea quædam ex mancipiis hortorum uxori donavit; sive donationes confirmavit, sive non confirmavit, posterior voluntas filiæ legato potior erit. Sed etsi non valeat donatio, tamen minuisse filiæ legatum pater intelligitur. *l.* 24. §. 1. *ff. de adim. vel transf. legat.* v. *l.* 3. §. *ult. ff. de instr. vel instrum. leg.*

XV.

15. The pawning of the thing bequeathed does not revoke the Legacy.

Altho the Testator pawns after the making of his Testament the thing which he had bequeathed, yet that will be no Revocation of the Legacy. For the making of his Testament doth not debar him of the Use of his Goods, and this Use of them does not annul the Dispositions of his Testament, which will have their effect, or not have it, according to the Condition in which things shall be at the time of his Death. Thus altho it be true that the pawning of the thing may be followed by an Alienation of it, yet nevertheless if the thing that is pawned belong still to the Testator at the time of his Death, it passes to the Legatee; and the Executor will be obliged to redeem it, as has been said in another Place *b*. For it is a general Obligation upon him to acquit all the Debts of the Inheritance.

b See the seventeenth Article of the third Section.
Qui post testamentum factum prædia, quæ legavit, pignori vel hypothecæ dedit, mutasse voluntatem circa legatariorum personam non videtur. Et ideo etiam si in personam actio electa est. Recte placuit ab hærede prædia liberari. *l.* 3. *C. de leg.* §. 12. *inst. de leg.*

XVI.

16. Nor the Changes of the thing which reform and renew it.

If after the making of the Testament some Changes are made in the thing that was bequeathed, altho they be such that, if the Nature of the thing can bear it, all its Parts be renewed, yet all these Changes of the thing bequeathed make no change in the Legacy. Thus the Legacy of a Ship, or of a House, or other Edifice, is not revoked, altho it be wholly repaired piecemeal and by degrees. Thus the Legacy of a Flock of Sheep is not revoked, altho there remain not one of the first that were bequeathed *c*. For these Changes being made on the thing itself, none of them changes it entirely; so that it remains the same after the last Change.

c Si navem legavero, & specialiter meam adscripsero, eamque per partes totam refecero, carina eadem manente, nihilominus recte a legatario vindicaretur. *l.* 24. §. *ult. ff. de leg.* 1.
Si domus fuerit legata, licet particulatim ita refecta sit, ut nihil ex pristina materia supersit; tamen dicemus, utile manere legatum. *l.* 65. §. *ult. ff. de leg.* 1. See the following Article.
The Changes of the Parts that make up a Whole do not hinder the thing from being consider'd as being always the same, altho there remain not one of the first Parts of which it consisted. Thus a House that is often repaired is always the same. Thus a Court of Judicature, a Nation, a Regiment, and even the Bodies of Men and of Animals are always consider'd as being the same, altho it may happen that after a long time there remain not one of the small Parts that composed them. For these things are in one sense always the same, for the Reason explained in the Article. V. l. 76. ff. de judiciis.

XVII.

17. The Legacy of a Flock of Sheep subsists, altho there remain not one Head of those that were in it at first.

The Legacy of a Herd of Cattle may be augmented or diminished by the Changes that may happen to it, and it passes to the Legatary such as it is at the time that it falls due to him, whether it be encreased since the time of making the Testament or lessen'd. And altho there should be left one Mare only of a Stud, or one only Sheep of a Flock, altho it could not be said that this one Sheep was a Flock, or that one Mare a Stud; yet seeing this Rem-

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nant was a part of the Stud or Flock bequeathed, it was comprehended in the Legacy, and would remain as part of it, in the same manner as the Ground on which a House stood that is burnt down would belong to the Legatary of that House *d*.

d Grege legato, & quæ postea accedunt ad legatarium pertinent. *l.* 21. *ff. de legat.* 1.

Si grege legato, aliqua pecora, vivo testatore, mortua essent, in eorumque locum aliqua essent substituta, eundem gregem videri. Et si diminutum ex eo grege pecus esset, & vel unus bos superesset, eum vindicari posse, quamvis grex desisset esse. Quemadmodum insula legata, si combusta esset, area possit vindicari. *l.* 22. *eod.*

XVIII.

18. If the thing bequeathed changes its Nature, the Legacy is revoked.

If the Changes of the thing bequeathed be such as tho the Matter or Substance thereof may remain, yet the thing it self becomes thereby of another Nature, or falls under another Condition, so as that it is not any longer comprehended under the Expression of the thing that was bequeathed, the Legacy is revoked by this Change. Thus, for example, if a Testator who had bequeathed Woollen or Silk Stuffs, had afterwards made Clothes of them, he would have by that revoked the Legacy *e*. Thus, for another example, if a Testator having bequeathed some precious Stones, should afterwards apply them to some other Use, such as for the Ornament of the Hilt of a Sword, of the Case of a Watch, a Case of Instruments, or other Trinket, the Legacy would be revoked by this Change *f*. Thus, for another example, if a Testator having bequeathed Trees either felled or to be felled, had afterwards built a Ship, or done some other Work with the said Trees, the Legacy would be useless *g*. And if on the contrary, a Testator having bequeathed a Ship, should take it to pieces, the Legacy would also be revoked, so as that the Legatary could not lay claim to any of those Pieces *h*: For it was only a Ship that was bequeathed. And it would be the same thing if the thing bequeathed should chance to perish, so as that what should remain of it were of another nature than that which was bequeathed. Thus, for example, if a Herd of Cattle or Flock of Sheep being bequeathed, there should not remain any one of them at the time of the Testator's Death, but only the Hides or the Wool, the Legatary would have no right at all to these Remains *i*.

e Lana legata, vestem quæ ex ea facta sit, deberi non placet. *l.* 88. *ff. de legat.* 3.

f Item quæro: si probari possit, Seiam uniones & hyacintos quosdam in aliam speciem ornamenti, quod postea pretiosius fecit additis aliis gemmis & margaritis convertisse; an hos uniones vel hyacintos petere possit, & hæres compellatur ornamento posteriori eximere, & præstare? Marcellus respondit, petere non posse. Nam quid fieri potest, ut legatum vel fideicommissum durare existimetur, cum id quod testamento dabatur, in sua specie non permanserit? nam quodammodo extinctum sit. *l.* 6. §. 1. *ff. de aur. arg.*

g Sed & materia legata, navis, armariumve ex ea factum non vindicatur. *d. l.* 88. §. 1. *ff. de leg.* 3.

h Nave autem legata dissoluta, neque materia, neque navis debetur. *d. l.* 88. §. 12.

i Mortuo bove qui legatus est, neque corium, neque caro debetur. *l.* 49. *ff. de legat.* 2. See the following Article.

We must understand the Rule explained in this Article, in the Sense which is there given to it by the Examples which are there brought, in order to apply it to the other Cases of the like nature.

It may be observed on the first of the Texts cited on this Article, that it is said in another that the Clothes which have been made of Wool that was bequeathed were due to the Legatary, unless the Testator changed his Will. Si lana legetur & vestimentum ex ea fiat, legatum consistere; si modo non mutaverit testator voluntatem. l. 44. §. 2. ff. de leg. 2. *But seeing that first Text does not put that Condition, that the Testator in making those Clothes had an Intention to revoke the Legacy, and that, as has been observed on the thirteenth Article, it is not agreeable to our Usage to have recourse to these sorts of Proofs; it follows from thence that according to our Usage, and that first Text, the Legacy ought to remain revoked by the said Change, if there be nothing in the Expression of the Testator which may make it to be presumed that the Legacy does subsist.*

XIX.

19. If there remains nothing of the thing bequeath'd besides Accessories, the Legacy is annulled.

If the thing happens to perish, and there remain some Accessories of it, none of them will be due to the Legatary. For he was not to have these Accessories except with the Thing itself, which he cannot have. Thus, for example, if a Horse that had been bequeathed with his Harness should chance to die, the Legatary would have none of the Harness *l*.

l Servo legato cum peculio, & alienato vel manumisso, vel mortuo, legatum etiam peculii extinguitur. Nam quæ accessionum locum obtinent extinguuntur, cum principales res peremptæ fuerint. *l.* 1, & *l.* 2. *ff. de pecul. leg.*

XX.

20. Particular Expressions derogate from general ones. Example.

If a Testator who had bequeathed his House furnished, or his House together with all the Furniture, had added to this Legacy a particular Clause by which he had bequeathed to the same Person his Hangings, this Addition would not diminish the Legacy of all the Furniture, and would not reduce it barely to the Hangings. But if, having

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ving bequeathed the House furnished, or the House with all its Furniture, he had added that he bequeathed likewise such a particular Sute of Hangings, such as those which contain such a History, or that are in such a Hall; the mentioning of these particular Hangings would exclude the others, and would shew that he did not think that the Legacy of the Furniture of the House would take in the Hangings, and that he meant to give only those Hangings which he had particularly mentioned. For in this Case, and others of the like nature, what is particularly specified derogates from the general Expression which comprehended the whole *m*.

m In toto jure generi per speciem derogatur: & illud potissimum habetur, quod ad speciem directum est. *l.* 80. *ff. de reg. jur.*

Si quis fundum, ita ut instructus est, legaverit, & adjecerit cum supellectili, vel mancipiis, vel una aliqua re quæ nominatim expressa non erat: utrum minuit legatum adjiciendo speciem, an vero non, quæritur? & Papinianus respondit, non videri minutum, sed potius ex abundanti adjectum. *l.* 12. §. 46. *ff. de instr. vel instrum. leg.*

Cui fundum instructum legaverat, nominatim mancipia legavit. Quæsitum est, an reliqua mancipia, quæ non nominasset, instrumento cederent? Cassius ait, responsum esse, tametsi mancipia instructi fundi sint, tamen videri eos solos legatos esse qui nominati essent: quod appareret, non intellexisse patremfamilias instrumento quoque servos adnumerandos esse. *l.* 18. §. 11. *eod.*

Legata supellectili cum species ex abundanti, per imperitiam enumerentur, generali legato non derogatur. Si tamen species certi numeri demonstratæ fuerint, modus generi datus in his speciebus intelligitur. *l.* 9. *ff. de supell. leg.*

XXI.

21. Another Example of the Rule explained in the preceding Article.

It follows from this Rule, which declares that the Expression by which a particular Thing is specified derogates from the general Expression which besides that Thing takes in others, that if a Testator had bequeathed to one of his Friends all the Horses in his Stable that were come of his own Stud, and to another all his Saddle-Horses; and that among these there were some that had been taken out of his own Stud; they would be excepted out of the Legacy of the Horses come of the Stud, and comprehended in the Legacy of the Saddle-Horses. For the Quality of Saddle-Horses determines to this particular kind the general Expression of Horses come of the Stud, which may agree to other kinds of Horses *n*. But if a Testator had bequeathed to one the Horses, or other Things, of a certain kind, and to another those of another kind, and it proved that some of them being of both kinds, were comprehended under both the Expressions, there being nothing to fix them to any one of them in particular; those which should be found to be only of one of the two kinds would belong to the Legatee of that kind; and those which should appear to be comprehended under both kinds would belong in common to the two Legatees. Thus, for example, if the Testator had bequeathed to one of them his Coach-Horses, and to the other his Saddle-Horses, and that there were some Horses which served both for the Coach and Saddle; all the other Horses would be divided between the Legatees according to the Uses for which the Horses served, and the Horses common to both Uses would be in common to both the Legataries *o*.

n Si alii vernæ, alii cursores legati sunt: si quidem vernæ & cursores sint, cursoribus cedent. Semper enim species generi derogat. *l.* 99. §. *ult. ff. de legat.* 3. *v. l.* 15. *ff. de pec. leg.*

o Si in specie aut in genere utrique sint, plerumque communicabuntur. *d. l.* 99. *in f.*

XXII.

22. The Legacy is diminished by the Diminution of the Thing bequeathed.

If he who had devised his Jewels, Pictures, or other Things, or even certain Lands, sells a part of them; the Legacy subsists only for what remains. For as the Legacy would be augmented if the Testator had added to the Thing devised, so is it diminished when he takes any thing from it *p*.

p Si ex toto fundo legato testator partem alienasset, reliquam duntaxat partem deberi placet. Quia etiamsi adjecisset aliquid ei fundo, augmentum legatario cederet. *l.* 8. *ff. de leg.* 1. See the fifth and sixth Articles of the fourth Section.

XXIII.

23. By separating a part of the Land or Tenement devised, to join it to another.

If without alienating the Land or Tenement devised, or any part thereof, the Testator separates a Portion of it, in order to join it to another Land or Tenement; as, if in order to enlarge a Meadow, or an Orchard, he takes off a piece of a Ground which he had devised; such a Separation would lessen the Legacy. For what is taken away from it becomes part of another Land or Tenement, to which the Legatary will have no Right *q*.

q Quod si post testamentum factum ex fundo Titiano aliquid detraxit, & alii fundo adjecit: videndum est, utrumne eam quoque partem legatarius petiturus sit, an hoc minus quasi fundi Titiani esse desierit; cum nostra destinatione fundorum nomina & domus, non natura constituerentur. Et magis est, ut quod alii destinatum est, ademptum esse videatur. *l.* 24. §. 3. *ff. de leg.* 1.

XXIV.

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XXIV.

24. The Legacy being transferred, it is taken away from the first Legatary.

When a Testator by a second Disposition transfers to a second Legatee the same Thing which he had before given to another Person, the Legacy of the first Legatary is so far annulled by this Legacy to a second, that altho it should happen that the second Legatary should die before the Testator, yet the first Legatary would have nothing of the Legacy. For the first Disposition, which was in his favour, was revoked by the second *r*. But if the Testator had imposed any Charge or Condition on the Legacy which he transfers in this manner, it would pass with the Legacy to the second Legatary, unless it were annexed to the Person of the first Legatary, or that it was the Intention of the Testator not to charge the second Legatee with that Burden *s*.

r Si vivo testatore mortuus fuerit, is in quem translatum legatum fuerit: nihilomagis ad eum a quo translatum fuerit pertinebit. *l.* 8. *ff. de adim. vel transf. legat.*

s Legatum sub conditione relictum, & ad alium translatum, si non conditio personæ cohæreat, sub eadem conditione translatum videtur. *l.* 95. *ff. de condit. & dem.*

XXV.

25. A Revocation of one of two Legacies, which doth not annul any one of the two.

If a Testator had left two Legacies to two Persons of the same Name, and that by a second Disposition he had revoked the Legacy to one of them without distinguishing which of the two, so that it could not be known which of the two Legacies was revoked, both would subsist. For it would be more just and equitable that the Revocation which is obscurely expressed should be without effect, rather than to give it the effect of annulling two Legacies, one of which ought certainly to subsist according to the Intention of the Testator. But if on the contrary, the Testator had made only one Bequest to one of two Persons bearing the same Name, so that it could not be known by the Circumstances to which of the two he intended to leave the Legacy; the Legacy would be without any effect either to the one or the other. For the Executor would be answerable only for one Legacy, and neither of the two Persons could prove that he was the Legatary *t*.

t Si duobus Titiis separatim legaverit, & uni ademerit, nec appareat cui ademptum sit; utrique legatum debetur. Quemadmodum & in dando, si non appareat, cui datum sit dicemus neutri legatum. *l.* 3. §. 7. *ff. de adim. vel transf. legat.* See the twenty sixth Article of the second Section of Testaments, and the Remark which is there made on it, and which may be applied to the second Case of the present Article.

XXVI.

26. If the Legatary renders himself unworthy of the Legacy, it is revoked.

A Legacy which was good, and made in due Form, might be annulled, altho the Testator should make no manner of Disposition, either express or tacit, to revoke it; if it should happen that the Legatary should render himself unworthy of it by any of the Causes explained in their proper place *u*.

u See the said Causes in the third Section of Heirs and Executors in general.

XXVII.

27. Legacies are diminished without the Deed of the Testator, by the Falcidian Portion.

Altho the Testamentary Heir or Executor should pretend that the Goods were not sufficient to acquit the Legacies, yet he is nevertheless charged with them, if he accepts of the Quality of Heir or Executor, pure and simple. But if he takes upon him this Quality only with the Benefit of an Inventary, he will be accountable for the Legacies only to the Value of the Goods that shall remain after the Debts are paid, and moreover he may deduct from them the Defalcation which shall be spoken of under the following Title *x*.

x See the following Title, and that of Heirs or Executors with the Benefit of an Inventary.

TIT. III.

Of the Falcidian Portion.

BY the Falcidian Portion, which took its Name from the Author or Inventer thereof, is meant the fourth part of the Inheritance which the *Roman* Laws appropriated to the Testamentary Heirs or Executors, reducing the Legacies to three Fourths of the whole Estate; so that the Testamentary Heir or Executor was to have at least one fourth Part entire, and the Legacies could no ways diminish it.

This Law was equally just both for the Interest of the Testators, of the Testamentary Heirs or Executors, and of the Legatees. For seeing the Testators might perhaps over-value their Estates, or believe that they had more Effects than really they had, and under this Persuasion exhaust their whole Succession with Legacies, and so oblige their Testamentary Heirs or Executors to renounce their Succession, rather than

than to acquit the Legacies without some Defalcation. The Interest which the Testamentary Heirs or Executors have therein, is altogether evident: And it is likewise the Interest of the Legatees rather to suffer a Defalcation of their Legacies than to lose them entirely, if upon the Executor's relinquishing the Succession, the Disorder of the Affairs of the Succession were to be attended with this Consequence.

The Use of the Falcidian Portion relates only to the Dispositions of such Testators, whose Estates are situated in the Provinces which are governed by the written Law. For with respect to Estates situated in the Customs, seeing the said Customs do regulate what Share of the Estate ought to remain to the Heirs at Law, and what is left to the Disposition of the Testator, the Reduction of Legacies is differently regulated by the respective Bounds which each Custom has set thereto.

[*As the Deduction of the Falcidian Portion out of Legacies is not received in those Provinces of* France *which are governed by their peculiar Customs, so neither does it take place here in* England. *For the reason why it was introduced under the* Roman *Law ceases with us, seeing, according to our Usage, a Testament subsists, and the Legacies are valid, whether the Executor accept or refuse the Execution of the Testament. Whereas by the* Roman *Law, if the Testamentary Heir or Executor did refuse to accept of the Succession, the Testament was void, and none of the Legacies were due. And therefore to prevent this Inconvenience of having all the Dispositions of the Testator frustrated by the refusal of the Executor, when he thought the Succession to be so incumber'd, that it would not be worth his while to accept of it, the Falcidian Law introduced this Expedient as an Encouragement to Executors to accept of the Office, because by this Deduction of a fourth Part out of the Legacies, they would be sure of having a certain Profit to recompense them for their Trouble in looking after the Affairs of the Succession. And besides, there is a further Reason why this Deduction of the Falcidian Portion does not take place in* England; *and that is, because in* England *all Testamentary Dispositions of personal Estates are upon the foot of Military Testaments, and Military Testaments, even by the* Roman *Law, are exempted from the Falcidian Portion.* l. 7. Cod. ad Leg. Falc. Cowel's Institutes of the Laws of England, Lib. 3. tit. 22.]

SECT. I.

Of the Use of the Falcidian Portion, and wherein it consists.

The CONTENTS.

1. *The Legacies cannot exceed three Fourth Parts of the Goods.*
2. *All the Debts are to be paid before the Legacies, and even preferably to the Falcidian Portion due to the Executor.*
3. *And likewise the Funeral Expences.*
4. *The Executor has not the Falcidian Portion, unless he makes an Inventary.*
5. *The Heir at Law has Right to the Falcidian Portion.*
6. *All Dispositions made in view of Death are subject to the Falcidian Portion.*
7. *The Falcidian Portion is taken out of the Goods which are found in the Succession at the Time of the Testator's Death.*
8. *The Goods are valued according to what they are worth at that time.*
9. *The Losses of the Goods fall upon the Executor, if he accepts purely and simply.*
10. *Difference between the Heir or Executor with the Benefit of an Inventary, and him who hath not that Benefit.*
11. *The Estimate made by the Testator does not regulate the Falcidian Portion.*
12. *The Valuation of the Goods ought to be made with the Knowledge of all the Legataries.*
13. *Precaution for the Falcidian Portion with respect to Goods that are uncertain.*
14. *The Diminutions of the Charges, and the new Funds, diminish the Falcidian Portion.*
15. *Goods discovered after settling the Falcidian Portion, diminish it.*
16. *If the Thing bequeathed cannot be divided, the Falcidian Portion is regulated by Estimation.*

I.

1. The Legacies cannot exceed three fourth Parts of the Goods.

THE Falcidian Portion is the fourth Part which the Executor may retain of the Goods of the Succession, when the Legacies exceed the three fourth Parts *a*.

a Quicumque civis Romanus post hanc legem rogatam testamentum faciet, is quantam cuique civi Romano pecuniam jure publico dare legare volet, jus potestasque esto: dum ita detur legatum, ne minus quam partem quartam hæreditatis eo testamento hæredes capiant. *l.* 1. *ff. ad leg. falc.*

II.

2. All the Debts are to be paid before the Legacies, and even preferably to the Falcidian Portion due to the Executor.

The fourth Part, which the Executor ought to have, is taken out of all the Goods in general; but the Goods are understood to be only such as remain after the Debts are paid. Thus, the Executor retains in the first place the Fund that is necessary for paying the Debts, and in the next place his own fourth Part for the Falcidian Portion out

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out of what remains clear *b*. And we must reckon in the number of Debts, that which appears to be due to the Executor, if he was a Creditor of the deceased, of what nature soever the Debt were, even altho it were a Legacy or a fiduciary Bequest which had been left to the Deceased in trust for him. So that if, for example, a Father to whom a Legacy had been left in trust for his Children, with liberty to him to chuse which of them he would give it to, had left it to them all, instituting them Heirs or Executors in equal Portions, and had bequeathed so many Legacies as to give occasion to deduct the Falcidian Portion, every one of his Children, in computing his own Falcidian Portion, might deduct his Share of the Legacy left in trust to their Father for his Use, as a Debt due to him. For altho their Father had the liberty of chusing any one of them to give it to, yet his failing to make the choice render'd him Debtor to them all for what he was obliged to restore *c*.

b Sicuti legata non debentur, nisi deducto ære alieno, aliquid supersit: nec mortis causa donationes debebuntur, sed infirmantur per æs alienum. *l.* 66. *ff. ad leg. falc.*

Bona intelliguntur cujusque, quæ deducto ære alieno supersunt. *l.* 39. §. 1. *ff. de verb. signif.*

c In imponenda ratione legis Falcidiæ, omne æs alienum deducitur, etiam quod ipsi hæredi mortis tempore debitum fuerit, quamvis aditione hæreditatis confusæ sint actiones. *l.* 6. *C. ad leg. falc.*

Pater filium ex quo habebat tres nepotes, hæredem instituit, fideique ejus commisit, *ne fundum alienaret, & ut in familia eum relinqueret.* Filius decedens tres filios scripsit hæredes. Quærendum est an omnino quasi creditores unusquisque in ratione legis falcidiæ aliquid possit deducere; quia in potestate sua habuit pater cui ex his potius relinqueret. Sed hac ratione nemo in Falcidiæ ratione quicquam deducet: quod videndum ne dure constituatur. Utique enim in alieno ære habuit fundum: necessitate quippe obstrictus fuisset filiis eum relinquendi. *l.* 54. *ff. ad leg. falc.*

III.

3. *And likewise the Funeral Expences.*

It is necessary also to deduct out of the Goods the Funeral Expences, which are preferred not only before Legacies, but even before the Debts, altho there should not be Effects enough in the Succession to satisfy all the Creditors. And this Expence ought to be moderated so as not to exceed what is necessary *d*.

d Item funeris impensa. §. 3. *Inst. de leg. falc.*

Impensa funeris semper ex hæreditate deducitur; quæ etiam omne creditum solet præcedere, cum bona solvendo non sint. *l. penult. ff. de relig.*

Marcellus consultus an funeris monumentique impensa quam testator fieri jussit, in ære alieno deduci debeat, respondit non amplius eo nomine, quam quod funeris causa consumptum est, deducendum. *l.* 1. §. *ult. ff. ad leg. falc.* See the eleventh Section of Heirs and Executors in general.

IV.

4. *The Executor has not the Falcidian Portion, unless he make an Inventary.*

The Executor cannot demand the Falcidian Portion, if he has not claimed the Benefit of an Inventary, and does not make it appear by an Inventary made in due form, that the Goods are not sufficient to satisfy all the Charges. But the Executor who takes upon him that Office, purely and simply, without claiming the benefit of an Inventary, cannot pretend to the Falcidian Portion, altho it were true that the Goods were not sufficient to answer all the Charges *e*.

e Fiat inventarium ab hærede metuente ne forte non habeat post debita & legata falcidiam. *Nov.* 1. *c.* 2.

Si vero non fecerit inventarium, non retinebit falcidiam: sed complebit legatarios & fideicommissarios, licet puræ substantiæ morientis transcendat mensuram legatorum datio. *d. c.* 2. §. 2. See the tenth Article.

V.

5. *The Heir at Law has right to the Falcidian Portion.*

Altho the Falcidian Portion seems only to belong to Executors or testamentary Heirs, yet seeing Legacies may be left by a Codicil without naming any Executor, and that in this Case the Heir at Law is bound to pay the Legacies; he has also Right to the Falcidian Portion. For the Succession is as much due to him as to any other who might be instituted Heir or Executor by a Testament *f*.

f Lex falcidia inducta est a Divo Pio etiam intestatorum successione propter fideicommissa. *l.* 18. *ff. ad leg. falc.*

VI.

6. *All Dispositions made in view of Death are subject to the Falcidian Portion.*

All the kinds of Dispositions that are made in view of Death, such as Legacies, fiduciary Bequests, Gifts in consideration of Death, whether they be made by a Testament or by other Acts, are subject to the Falcidian Portion *g*; unless they be excepted from it, pursuant to the Rules which shall be explained in the two last Sections of this Title.

g Eorum quibus mortis causa donatum est, fideicommitti quoquo tempore potest. Quod fideicommissum hæredes, salva Falcidiæ ratione, quam in his quoque donationibus exemplo legatorum locum habere placuit, præstabunt. *l.* 77. §. 1. *ff. de legat.* 2.

VII.

7. *The Falcidian Portion is taken out of the Goods which are found in the Succession at the*

The fourth Part, which the Heir or Executor ought to have for the Falcidian Portion, is computed according to the Value of the Goods of the Inheritance at the time of the Testator's Death. For as it is at that time that the Succession is open, so the same consists

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time of the Testator's Death. sists in what Effects are found to belong to it at that time *h*; and the Fruits and Revenues of the time subsequent to the Testator's Death cannot augment the Fund for the Legacies, nor be reckoned to the Executor as a part of his Fourth which he ought to have for the Falcidian Portion, the Revenues or Income whereof ought to belong to him *i*.

h Mortis tempus in ratione legis Falcidiæ ineunda placuit observari. *l.* 56. *ff. ad leg. falc.* See the following Article.

i Ex die mortis fructus quadrantis apud hæredem relinqui necesse est. *l.* 15. §. 6. *in f. eod.*

VIII.

8. The Goods are valued according to what they are worth at that time. Seeing the Falcidian Portion falls due to the Heir or Executor at the moment of the Testator's Death, and that it is taken out of all the Goods that are found at that time in the Inheritance, the Goods ought to be estimated on the foot of what they might be worth at that time, whether the Valuation be made by mutual consent of the Executor and the Legataries, or by order of the Judge *l*. And in making the Estimate of the Lands regard ought to be had to what they may be worth the more, because there were Fruits on the Ground ready to be cut down in Harvest-time soon after the Testator's Death *m*.

l See the first of the Texts cited on the preceding Article, and that quoted on the tenth Article.

m In Falcidia placuit, ut fructus postea percepti, qui maturi mortis tempore fuerunt, augeant hæreditatis æstimationem fundi nomine qui videtur illo in tempore fuisse pretiosior. *l.* 9. *ff. ad leg. falc.*

IX.

9. The Losses of the Goods fall upon the Executor, if he accepts purely and simply. When the Executor accepts the Succession purely and simply, all the Losses and Diminutions of the Goods of the Inheritance, and even those which may happen by mere Casualty, will fall upon him, and the Legataries will not thereby suffer any diminution of their Legacies; unless they had given occasion to those Losses by some Fault which might be laid to their charge *n*.

n In ratione legis Falcidiæ mortes servorum cæterorumque animalium, furta, rapinæ, incendia, ruinæ, naufragia, vis hostium, prædonum, latronum, debitorum facta pejora nomina, in summa quodcumque damnum, si modo culpa legatarii careant, hæredi pereunt. *l.* 30. *ff. ad leg. falc.* See the tenth Article of the first Section of Heirs and Executors in general.

X.

10. Difference between the Heir or Executor with the Benefit of an Inventary, and him who hath not that Benefit. Altho the Heir or Executor does not accept the Inheritance simply, but with the Benefit of an Inventary, yet the Losses and Diminutions of the Goods will affect him in that Quality. For by the Goods of the Inheritance are understood those that are found in it at the time of the Testator's Death, which lays the Succession open, as has been said in the seventh Article. But there is this Difference between the Heir or Executor, with the benefit of an Inventary, and him who has taken that Character purely and simply without the said Benefit, that whereas this last has no way to defend himself against the Losses which fall upon him inevitably, the beneficiary Heir or Executor is still at liberty to renounce the Inheritance, he giving an account of what he has received; and if he does renounce, the Changes that have happened since the Death of the Testator will affect only the Creditors and Legatees. But the Disorder of Affairs that would ensue upon his Renunciation, may induce the Legataries to bear a part of the Losses, and to compound with the Heir or Executor; and in this Case the Diminution of the Legacies and the Falcidian Portion are regulated among them by common consent, according as they can agree the Matter *o*.

o In quantitate patrimonii exquirenda visum est, mortis tempus spectari. Qua de causa si qui centum in bonis habuerit, tota ea legaverit, nihil legatariis prodest, si ante aditam hæreditatem per servos hæreditarios, aut ex partu ancillarum hæreditariarum, aut ex fœtu pecorum tantum accesserit hæreditati, ut centum legatorum nomine erogatis, habiturus sit hæres quartam partem: sed necesse est, ut nihilominus quarta pars legatis detrahatur. Et ex diverso, si ex centum, septuaginta quinque legaverit, & ante aditam hæreditatem in tantum decreverint bona (incendiis forte, aut naufragiis, aut morte servorum) ut non plus quam septuaginta quinque, vel etiam minus relinquatur: solida legata debentur. Nec ea res damnosa est hæredi, cui liberum est non adire hæreditatem. Quæ res efficit, ut necesse sit legatariis, ne destituto testamento nihil consequantur, cum hærede in portionem legatorum pacisci. *l.* 73. *ff. ad leg. falc.* *As to what is said in this Text concerning the Profits which augment the Goods of the Inheritance,* see the fifteenth Article.

XI.

11. The Estimate made by the Testator does not regulate the Falcidian Portion. If the Testator had made an estimation either of all his Goods, or of a part of them, either in his Testament, or by some other Disposition, the testamentary Heir on his part, nor the Legatees on their part, would not be obliged to regulate their Rights upon that foot, if the Estimate made by the Testator were either above or under the true Value of the things at the time of the Testator's Death. For as it is Justice that does assign to them their Portions;

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tions; so it is the Truth of the Value of the Goods that ought to regulate them *p*.

p Quarta quæ per legem Falcidiam retinetur, æstimatione quam testator facit, non magis minui potest, quam auferri. *l.* 15. §. *ult. ff. ad leg. falc.*

Corpora, si qua sunt in bonis defuncti, secundum rei veritatem æstimanda erunt, hoc est secundum præsens pretium. *l.* 62. §. *eod.*

XII.

12. The Valuation of the Goods ought to be made with the knowledge of all the Legataries.

If it be necessary to make an Estimate of the Goods in order to regulate the Falcidian Portion between the Executor and the Legatees; the Valuation ought to be made with the knowledge of all the Parties concerned, whether it be made by Order of Court, or by the mutual Consent of Parties; and even at the instance of any one single Legatary who should demand it only for a small Legacy. But if the Estimation were made only with the knowledge of some of them, it would be of no force to bind the others who should refuse to agree to it. And the Executor may likewise call the Creditors, in order to satisfy them how much the Goods are lessened by the Debts owing to them, and also to settle with them the Value of the Goods, in case they are willing to take any of them in payment of what is due to them *q*.

q Cum dicitur lex Falcidia locum habere, arbiter dari solet ad ineundam quantitatem bonorum: tametsi unus aliquid modicum fideicommissum persequatur. Quæ computatio præjudicare non debet cæteris qui ad arbitrum missi non sunt. Solet tamen ab hærede etiam cæteris denunciari fideicommissariis, ut veniant ad arbitrum, ibique causam suam agant. Plerumque & creditoribus, ut de ære alieno probent. *l.* 1. §. 6. *ff. si cui plusq. per leg. falc. lic. leg. esse dic.*

XIII.

13. Precaution for the Falcidian Portion with respect to Goods that are uncertain.

If among the Goods of the Inheritance there were any of such a nature as that it were uncertain whether they ought to be reckoned in settling the Falcidian Portion; as, for example, if there were a Law-Suit depending touching the Property of some Lands, or for a certain Debt, or if it should depend on the Event of some Condition, whether a certain Land or Tenement, or a certain Right, should or should not be Part of the Inheritance; these sorts of Goods would not be reckoned as present Goods, in order to regulate the Fund for the Legacies, and the Proportion of the Falcidian Portion; for these Pretensions might prove vain and fruitless. But the Falcidian Portion would be settled on the foot of the present Goods. And as to those Pretensions, the Executor and the Legatees would adjust among themselves the Security that might be found necessary for doing justice to each other, according as the Expectation of the Event and the Circumstances might require. Thus, the Executor who would not be bound to comprehend these uncertain Goods in the Computation of those of the Inheritance, would oblige himself, in case they should remain in the Inheritance, to augment the Legacies proportionably. And if some particular Considerations had induced him to acquit all the Legacies, or some of them, on the foot of the Augmentation which these Goods in dispute would make to the Legacies, if in the Event they should be found to be part of the Inheritance, the Legataries would oblige themselves to restore, in case these Goods should appear not to belong to the Inheritance, what they may have received on that account. And they might likewise settle among themselves, under some Penalty, an Estimation of the said Rights, such as they are, at a certain Price, balancing the Hazard of the Loss or Profit which might accrue by the Event either to the Executor or to the Legatees *r*.

r Magna dubitatio fuit de his, quorum conditio mortis tempore pendet, id est, an quod sub conditione debetur, in stipulatoris bonis adnumeretur, & promissoris bonis detrahatur. Sed hoc jure utimur, ut quanti ea spes obligationis venire possit, tantum stipulatoris quidem bonis accedere videatur, promissoris vero decedere. Aut cautionibus res explicari potest: ut duorum alterum fiat: aut ita ratio habeatur tanquam pure debeatur: aut ita tanquam nihil debeatur: deinde hæredes & legatarii inter se caveant: ut existente conditione, aut hæres reddat quanto minus solverit: aut legatarii restituant quanto plus consecuti sint. *l.* 73. §. 1. *ff. ad leg. falc.*

Præposterum est ante nos locupletes dici quam acquisierimus. *l.* 63. *eod.* See the fourth Article of the second Section. See the latter end of the tenth Article of this Section.

XIV.

14. The Diminutions of the Charges, and the new Funds, diminish the Falcidian Portion.

If there were Charges of the Inheritance which should happen to cease, such as Debts said to be owing by the Deceased which shall appear to be paid, Legacies which are afterwards annulled, or that by the means of other Causes there were any Fund of Goods of the Inheritance which should come to the Executor, at what time soever the same should accrue to him, whether at the time of the Testator's Death, or a long time after; all these sorts of Profits accruing to him by reason of his Quality of Executor, they would augment the Fund for the Legacies, and would diminish

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minish the Share which he was to have had out of the Legacies for his Falcidian Portion *s*.

s In ratione legis falcidiæ retentiones omnis temporis hæredi in quadrantem imputantur. *l.* 11. *ff. ad leg. falcid.* See the following Article.

Non est dubium, quin ea legata a quibus hæres summovere exceptione petitorem potest, in quartam ei imputentur: nec cæterorum legata minuant. *l.* 50. *ff. ad leg. falc.*

Nec interest, utrum ab initio quasi inutile fuerit, an ex accidenti postea in eum casum pervenisset legatum, ut actio ejus denegaretur. *l.* 51. *eod.*

Quacumque ex causa legata non præstantur, imputantur hæredi in quartam partem, quæ propter legem falcidiam remanere apud eum debet. *l.* 52. §. 1. *eod.*

XV.

15. Goods discovered after setling the Falcidian Portion diminish it.

If after liquidating the Falcidian Portion, and paying off the Legatees, the Executor having retained in his hands what was to be deducted from the Legacies, there happened to be discover'd some Goods of the Inheritance which were unknown to the Legatees, as if there had fallen to the Testator in his Life-time an Inheritance of an absent Person whose Death he knew nothing of; this Event which would augment the Goods, would likewise cause a proportionable Revocation to be made of what had been taken off from the Legacies; and the Legataries might demand from the Executor the Share that ought to come to them of these Goods which have been newly discovered. And this would undoubtedly be still more reasonable, if they were Goods which the Executor had industriously concealed from the knowledge of the Legatees *t*. But we ought not to reckon as an Augmentation of the Goods of the Inheritance, that which may arise from the Fruits and other Profits of the Goods of the Deceased; as if a Herd of Cattle had increased in number: For these Profits, and all the Fruits and Revenues belonging to the Executor *u*, except those which may have proceeded from the things bequeathed, and which for the same reason would belong to the Legataries, according to the Rules explained in the eighth Section.

t This is a Consequence of the preceding Article. For the Inheritance comprehends all the Goods that may accrue to the Executor in that Quality, at what time soever they come to be known, and at what time soever he accepts the Inheritance; because his Acceptance of the Inheritance hath this effect, that it makes him to be considered as if he had succeeded from the moment of the Testator's Death, and as having had from that instant his Right to all the Goods of the Inheritance. See the fifteenth Article of the first Section, and the fifth Article of the second Section of Heirs and Executors in general.

u See the Text cited on the tenth Article.

XVI.

16. If the Thing bequeathed cannot be divided, the Falcidian Portion is regulated by Estimation.

Altho the Falcidian Portion diminishes the Legacies, and takes off something from every one of them, and that if they consist in Sums of Money, Grain, Liquors, and other things, out of which it may be easy to take a part for the Falcidian Portion, one may retain it out of the Thing it self; but if on the contrary, it be of such a nature that it cannot be divided, as a Horse, a Diamond, a Service, the building of some Edifice, and others of the like kind, the Falcidian Portion whereof cannot be taken out of the Things themselves, the Matter is adjusted by Estimation, whether it be that the Executor gives to the Legatary the Value of what his Legacy may amount to, or that the Legatary gives back to the Executor the Value of what he was to have out of the Legacy for his Falcidian Portion. And if several Executors were charged with a Legacy of a Thing that could not be divided, such as that of some Work or Building, altho the nature of the Legacy would make every one of the Executors answerable for the whole Legacy, because of its Indivisibility; yet every one of them might acquit himself by offering his Share of the Price of the Work or Building, deducting only what he ought to retain for his Falcidian Portion *x*.

x Quædam legata divisionem non recipiunt; ut ecce legatum viæ, itineris, actusve. Ad nullum enim ea res pro parte potest pertinere. Sed etsi opus municipibus hæres facere jussus est, individuum videtur legatum. Neque enim ullum balineum, aut (ullum) theatrum, aut stadium fecisse intelligitur qui ei propriam formam, quæ ex consummatione contingit, non dederit. Quorum omnium legatorum nomine & si plures hæredes sint, singuli in solidum tenentur: hæc itaque legata quæ dividuitatem non recipiunt, tota ad legatarium pertinent. Sed potest hæredi hoc remedio succurri, ut, æstimatione facta legati, denuntiet legatario, ut partem æstimationis inferat: si non inferat, utatur adversus eum exceptione doli mali. *l.* 80. §. 1. *ff. ad leg. falcid.* See the ninth Section of Heirs and Executors in general.

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SECT. II.

Of the Dispositions that are subject to the Falcidian Portion.

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1. *The Falcidian Portion ceases in certain Cases.*
2. *The Favour of the Legacy, or of the Legatee, does not hinder the Falcidian Portion.*
3. *How the Falcidian Portion is regulated when there are conditional Legacies.*
4. *A Legacy of a Service is subject to the Falcidian Portion.*
5. *The Legacy of the Payment before-hand of a Debt that is due at a certain Term, or on a certain Condition, is subject to the Falcidian Portion.*
6. *The Legacy of a Debt which the Debtor is not able to pay, is not reckoned in the Computation of the Falcidian Portion.*
7. *Three sorts of Cases to be regulated for the Falcidian Portion.*
8. *The Falcidian Portion is due out of a Legacy of an Usufruct, and in what manner it is regulated.*

I.

1. The Falcidian Portion ceases in certain Cases.

THE Falcidian Portion ceases in divers Cases, whether it be on account of Obstacles that are on the part of him who claims it, which shall be explained in the following Section; or by reason of other Causes which make it to cease, which shall be treated of in the fourth Section. And there are some Dispositions, of which it may be doubted whether the Falcidian Portion be due out of them, or not, which shall be the Subject-matter of the Rules that follow *a*.

a See the Places quoted in this Article.

II.

2. The Favour of the Legacy, or of the Legatee, does not hinder the Falcidian Portion.

The Favourableness of the Legacies doth not exempt them from being subject to the Falcidian Portion; whether it be that the Favour respects the Quality of the Legatary, even altho it were a Legacy left to the Prince *b*, or that it respects the Use of the Legacy it self, as if it were a Legacy for Alimony *c*.

b Et in legatis principi datis legem falcidiam locum habere merito Divo Hadriano placuit. *l.* 4. *C. ad leg. falc.*

c Divi Severus & Antoninus rescripserunt, pecuniam relictam ad alimenta puerorum falcidiæ subjectam esse: & ut idoneis nominibus collocetur pecunia, ad curam suam revocaturum præsidem Provinciæ. *l.* 89. *ff. ad. leg. falcid.*

¶ We have not set down in this Rule the Exception that is made to it, by the greatest part of the Interpreters, in favour of Legacies to pious Uses, which they conceive to be exempted from the Falcidian Portion by the Disposition of the hundred and thirty first Novel of *Justinian*, Chap. 12. for it does not seem to bear that Sense. And the most learned of the Interpreters have been of this Mind; and their Judgment in this matter may be founded on two Considerations which result from the Words of this Novel. One is, that the Words seem to relate only to the Testamentary Heir who is backward in acquitting the Legacies left to pious Uses: And the other is, that there is nothing in this Law which lays it down as a general Rule, that Legacies to pious Uses are not subject to the Falcidian Portion, as it would have been necessary in order to abolish the antient Law which subjected this sort of Legacies to it *a*; which *Justinian* himself seems to have presupposed in a Law *b*, where speaking of the Precaution used by some Testators, who in order to avoid the Deduction of the Falcidian Portion out of their Legacies to Captives, instituted them their Heirs or Executors, he explains himself in these Terms: *Si quis ad declinandam legem Falcidiam, cum desiderat totam suam substantiam pro redemptione captivorum relinquere, eos ipsos captivos scripserit hæredes .... si enim propter hoc à speciali hærede recessum est, ut non Falcidiæ ratio inducatur, &c.* If the Falcidian Portion had not been due out of Legacies to pious Uses, it would have been no ways necessary to institute the Captives Heirs or Executors, in order to avoid it. To which we may add, that the same Emperor, in his first Novel, at the end of the second Chapter, ordaining that the

a Ad municipia quoque legata, vel etiam quæ Deo relinquuntur, lex falcidia pertinet. *l.* 1. §. 5. *ff. ad leg. falcid.*

One of the most learned Interpreters, who is of the Number of those who understand this Novel of the Testamentary Heir who is backward in paying the Legacies to pious Uses, has been of opinion, that in this first Law, §. 5. ad leg. Falcid. *instead of these Words,* vel etiam ea, *we ought to read,* non etiam ea. *It is on the third Section of the third Title of the fourth Book of the Sentences of* Paulus *that he hath made this Remark. But as to this Novel, this Author is of the Sentiment which we have just now explained.*

b l. 49. *C. de Episc. & Cler.*

Fal-

Falcidian Portion shall take place if the Testator hath not expresly forbidden it, adds, for a Reason, that it may so happen that there be in his Testament Legacies to pious Uses, which would make this Prohibition of the Testator's favourable; *Forsan etiam quædam juste & pie relinquenti.* Which would not be a Reason for favouring the express Prohibition of the Falcidian Portion, if it had not taken place in Legacies to pious Uses, seeing in this Case this Prohibition would be superfluous. But if in the hundred and thirty first Novel he had intended to establish it as a Rule, that pious Legacies should not be subject to the Falcidian Portion, he would have explained it in such a manner as to make it to be understood, whereas his Expression marks on the contrary that he restrains his Disposition to the Case of a Testamentary Heir who refuses to acquit the Legacies to pious Uses, and who says that there are not Effects sufficient to do it. *Si autem hæres quæ ad pias causas relicta sunt non impleverit, dicens relictam sibi substantiam non sufficere ad ista; præcipimus, omni Falcidia vacante quidquid invenitur in tali substantia proficere provisione sanctissimi locorum Episcopi ad causas quibus relictum est.* These are the Words of this Novel, which seem to intimate, that the Motive of this Law was not to make a Rule of it for discharging pious Legacies from the Falcidian Portion, but only to repress the Infidelity or Delays of Executors; which would seem to have no manner of relation to the Cases where nothing can be imputed to the Executor. It is true, that if these Words are not express enough to gather from them, that *Justinian* had made a general Rule to exempt Legacies to pious Uses from the Falcidian Portion; so neither are they clear enough, nor express enough, to shew that his Intention was to take away the Benefit of the Falcidian Portion out of pious Legacies only from the Executor, who is backward in acquitting them; seeing he speaks of an Heir or Executor, who alledges only for an Excuse of his Delay, that there were not Goods sufficient to satisfy them; which would be a lawful Excuse enough, if the Heir or Executor could retain the Falcidian Portion out of Legacies to pious Uses; and yet *Justinian* will not allow this Excuse to be received. So that one might think that in his Judgment it was none; and that perhaps he intended, that notwithstanding this Excuse the Legacies to pious Uses should be acquitted without any Defalcation. It is without doubt the Obscurity and Uncertainty that there is in these Words of this Novel, that has divided the Interpreters; and it is likewise that which hath obliged us to make here this Remark, in order to give a Reason why we have set down no Rule for the Falcidian Portion in Legacies to pious Uses; because we had no Right to determine a Difficulty of this nature, and that we ought not to give any thing for a Rule but that which hath the Character of a perfect Certainty, or the Authority of a precise Law. But it were to be wished that some Regulation were made touching this Difficulty.

III.

3. How the Falcidian Portion is regulated when there are conditional Legacies.

If the Effect of a Legacy depends on a Condition, which is not come to pass when the Executor and the Legatees settle the Falcidian Portion; it being then uncertain whether the Legacy will be due, or whether it will be void; this Uncertainty obliges the Executor, and the Legatees whose Legacies are pure and simple, to fall upon some expedient for doing mutual Justice to one another, according to the Event which the conditional Legacy shall have. And since if the Condition being accomplished the Legacy should appear to be due, the other Legacies would be diminished in proportion, and that it would not be just that before this Event these Legacies should be either suspended or diminished; the proper Expedient to be taken is, that the Executor should without delay acquit the Legacies that are pure and simple, and that the Legataries who receive Payment of their Legacies should oblige themselves, and give Security, if it is thought necessary, both to the Executor, and to the Legatee whose Legacy is conditional, that if the Condition shall come to pass, they will restore what ought to be deducted out of their Legacies towards the Payment of this conditional Legacy *d.*

d Is cui fideicommissum solvitur, sicut is cui legatum est, satisdare debet quod amplius ceperit quam per legem falcidiam ei licuerit, reddi: Veluti cum propter conditionem aliorum fideicommissorum vel legatorum legis falcidiæ causa pendebit. *l. 31. ff. ad. leg. falcid.*

Si propter ea quæ sub conditione legata sunt pendet legis falcidiæ ratio, præsenti die data non tota vindicabuntur. *l. 53. eod.*

Sed & si legata quædam pure, quædam sub conditione relicta efficiant, ut, existente conditione, lex falcidia locum habeat: pure legata cum cautione

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tione redduntur. Quo casu magis in usu est, solvi quidem pure legata, perinde ac si nulla alia sub conditione legata fuissent. Cavere autem legatarios debere ex eventu conditionis quod amplius accepissent redditum iri. *l.* 73. §. 2. *eod.*

Cautionibus ergo melius res temperabitur. *l.* 45. §. 1. *eod.*

Interdum omnimodo necessarium est solidum solvi legatario, interposita stipulatione, *quanto amplius quam per legem falcidiam ceperit reddi.* Veluti si quæ a pupillo legata sint non excedant modum legis falcidiæ: veremur autem ne impubere eo mortuo alia legata inveniantur, quæ contributione facta excedant dodrantem. Idem dicitur, & si principali testamento quædam sub conditione legata sunt, quæ an debeantur incertum est: & ideo si hæres sine judice solvere paratus sit, prospiciet sibi per hanc stipulationem. *l.* 1. §. 12. *eod.* See the thirteenth Article of the first Section.

It may be remarked on the second of the Texts cited on this Article, that instead of these words, non tota, *some Authors have thought that we ought to read* tamen tota; *and their Criticism or Conjecture seems to be pretty well grounded. For it would not be just that for a Legacy which may perhaps never be due the Legataries should suffer a Defalcation of their Legacies: but if this is no Error of the Transcribers, and that there were really in the Original the words* non tota; *it would be necessary to understand this Rule of the Cases in which the Condition could not admit of any long delay. For if it were but for a short time that the Event was to be expected, the Executor might retain the Proportions of those Legataries who would not wait for the Event, obliging himself to pay them their whole Legacies in case the conditional Legacies should have no effect.*

IV.

4. A Legacy of a Service is subject to the Falcidian Portion.

The Legacy of a Service which the Testator had appointed to be taken either out of a House, or some other Tenement, belonging to the Inheritance, or to the Executor, is subject to the Falcidian Portion. For the Service is an Inconvenience, which lessens the Value of the House or Tenement that is subjected to it, and which may be estimated at a certain Price. Thus, this Legacy contributes as well as other Legacies, according as it may be estimated: And the Legatary ought to restore to the Executor the Share of the said Estimation that shall be necessary for making up the Falcidian Portion *e*.

e Lege falcidia interveniente legata servitus, quoniam dividi non potest, non aliter in solidum restituetur, nisi partis offeratur æstimatio. *l.* 7. *ff. ad leg. falcid.*

V.

5. The Legacy of the Payment beforehand of a Debt that is due at a certain Term, or on a certain Condition, is subject to the Falcidian Portion.

If a Testator who owed a Sum of Money, or other Thing, the Payment or Delivery of which was to be made only some time after his Death, or which was due only upon a Condition that was not yet come to pass, had ordered by his Testament that the said Delivery or Payment should be made after his Death to this Creditor, without waiting for the Term fixed for the Payment or Delivery, or the Event of the Condition; it would be a Legacy subject to the Falcidian Portion, according to the Estimation of the Advantage which would redound to the Legatary from this Legacy, whether it were on account of the paying beforehand a Debt that was due only at a certain Term, which would consist in the Interest of the Money from the time of the Testator's Death to the time of the Term, or because of the Certainty of a conditional Debt which might happen not to be due by the Event; and this would amount to the Value of the Debt, if the Condition on which it was due should not come to pass *f*.

f Si quis creditori suo quod debet legaverit: aut inutile legatum erit, si nullum commodum in eo versabitur: aut si propter repræsentationis (puta) commodum utile erit, lex quoque falcidia in eo commodo locum habebit. *l.* 1. §. 10. *ff. ad leg. falc.*

VI.

6. The Legacy of a Debt which the Debtor is not able to pay, is not reckoned in the Computation of the Falcidian Portion.

If the Creditor of an insolvent Debtor had bequeathed his Debt to a third Person, this Legacy would not be comprehended in the Number of those which are subject to the Falcidian Portion. For as this desperate Debt would not be reckoned as part of the Goods, so likewise this Legacy would be no Diminution of them. But if the Testator had bequeathed this Debt to the Debtor himself, seeing this Debtor might afterwards become solvent, one would take the Precautions explained in the third Article touching conditional Legacies *g*.

g Si debitori liberatio legata sit, quamvis solvendo non sit, totum legatum computetur: licet nomen hoc non augeat hæreditatem, nisi ex eventu: igitur si falcidia locum habeat, hoc plus videbitur legatum, quod huic legatum esset. Cætera quoque minuentur legata per hoc: & ipsum hoc per alia. Capere enim videtur, eo quod liberatur. Sed si alii hoc nomen legetur, nullum legatum erit: nec cæteris contribuetur. *l.* 22. §. *pen. & ult. ff. ad leg. falcid.*

¶ We have thought proper to give to this Text the Sense that is explained in the Article. For as it would be unjust to reckon this Debt among the Goods of the Inheritance, so it would not be equitable that the other Legataries, who would reap no profit by it, should suffer a Defalcation of their Legacies upon account of this Legacy, which would be no Diminution of the Goods with which the Executor would be

be chargeable for payment of their Legacies; and that the Executor reaping in this manner the Advantage of the Deduction from their Legacies, should have more than his Falcidian Portion of the effective Goods with which he would be charged. And altho it be true that this Legacy would be useful to the Debtor himself, and that, as is mentioned in the Text, he would receive this effect of the Testator's Liberality that he would be acquitted of the Debt, and that thus it would be in reality a Legacy; yet the Falcidian Portion is not granted to the Executor in consideration of the Profit which the Legataries make of their Legacies, but only because of the Diminution which the Inheritance suffers by the Legacies.

VII.

7. Three sorts of Cases to be regulated for the Falcidian Portion.

From all the Rules which have been explained in the preceding Section, and in the present, it follows that there are two ways of regulating the Falcidian Portion, according to two sorts of Cases in which it may have place. The first is simple and common in all the Cases where the Goods and the Legacies have their Value fixed: And the second is for the Cases where there are Goods in expectation which are uncertain, or where there are conditional Legacies, and where these Uncertainties oblige the Parties concerned to take the precaution of having Sureties, as has been said in the third Article of this Section, and in the thirteenth of the preceding Section. But there is a third sort of Legacies of a nature which requires a third manner of regulating the Falcidian Portion; which are the Legacies of Alimony, or of a Pension, or of an Usufruct; and this third manner depends on the Rule which follows *h*.

h See the following Article.

VIII.

8. The Falcidian Portion is due out of a Legacy of an Usufruct, and in what manner it is regulated.

Seeing the Legacies of Alimony, of yearly Pensions, of Annuities, of an Usufruct, and others of the like nature, consist only in a Revenue which is to cease by the Death of the Legatee, one cannot make a just and precise Estimation of the Value of these Legacies in the same manner as one may do of others. But seeing it is necessary to fix the Value of every Legacy, in order to regulate the foot of the Falcidian Portion with regard to all the Legacies, the Value of Legacies of an Usufruct, or of a Pension, or of Alimony, may be regulated at the Price which the Legatary might get for his Legacy, according to his Age, if he had a mind to sell it. But this Estimation, which may serve to regulate the Falcidian Portion of all the Legacies, hath not this Effect with respect to this Legatary, as that he ought to pay on this foot, and from the time of the Testator's Death, the Falcidian Portion of the Price of his Legacy. For he might chance to die the first Year, and in that case, instead of being a Legatary, he might become a Debtor to the Inheritance. And likewise, on the other hand, the Diminution which this Legatary ought to bear of his Legacy on account of the Falcidian Portion ought not to be delayed, and put off, to the end of the Years that the Usufruct or Pension may last. But this Falcidian Portion ought to be regulated, and taken yearly out of the Usufruct or Pension, in proportion to the Diminution that is settled for all the Legacies. And if, for example, the Falcidian Portion cuts off a sixth part of all the Legacies, including the Legacy of the Usufruct or Pension, according to the Valuations that shall have been made of all these Legacies; the said Legatary will owe every Year for the Falcidian Portion a sixth part of what he enjoys; unless they should agree by mutual Consent to settle it on another foot *i*.

i Si usufructus legatus sit, qui & dividi potest, non sicut cæteræ servitutes individuæ sunt: veteres quidem æstimandum totum usumfructum putabant, & ita constituendum quantum sit in legato. Sed Aristo à veterum opinione recessit: Ait enim, posse quartam partem ex eo sicut ex corporibus retineri. Idque Julianus recte probat, sed operis servi legatis, cum neque usus, neque usufructus in eo legato esse videatur, necessaria est veterum sententia, ut sciamus, quantum est in legato: quia necessario ex omnibus, quæ sint facti pars decedere debet: nec pars operæ intelligi potest. Immo & in usufructu, si quæratur quantum hic capiat, cui usufructus datus est, quantum ad cæterorum legatorum æstimationem, aut etiam hujus ipsius, ne dodrantem excedat legatum, necessario ad veterum sententiam revertendum est. *l.* 1. §. 9. *ff. ad leg. falc.*

Si in annos singulos legatum sit Titio: quia multa legata & conditionalia sunt; cautioni locus est quæ in edicto proponitur, *quanto amplius accipit reddi.* d. l. §. 16.

Lex falcidia, si interveniat, in omnibus pensionibus locum habet. Sed hoc ex post facto apparebit. Ut puta, in annos singulos legatum relictum est: quamdiu falcidia nondum locum habet, integræ pensiones annuæ dabuntur. Sed enim si annus venerit, quo fit ut contra legem falcidiam ultra dodrantem aliquid debeatur, eveniet ut retro omnia legata singulorum annorum imminuantur. *l.* 47. *eod.*

Cum Titio in annos singulos dena legata sunt, et

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et judex legis Falcidiæ rationem inter hæredem & alios legatarios habeat: vivo quidem Titio, tanti litem æstimare debeat, quanti venire id legatum potest, in incerto posito quamdiu victurus sit Titius; mortuo autem Titio, non aliud spectari debet, quam quid hæres ex ea causa debuerit. *l.* 55. *eod.*

Hæreditarium computationi in alimentis faciendæ hanc formam esse Ulpianus scribit: ut a prima ætate usque ad annum vicesimum, quantitas alimentorum triginta annorum computetur, ejusque quantitatis falcidia præstetur: ab annis vero viginti usque ad annum vicesimum quintum, annorum viginti octo: ab annis viginti quinque usque ad annos triginta, annorum viginti quinque: ab annis triginta usque ad annos triginta quinque, annorum viginti duo: ab annis triginta quinque usque ad annos quadraginta, annorum viginti: ab annis quadraginta usque ad annos quinquaginta, tot annorum computatio fit, quot ætati ejus ad annum sexagesimum deerit, remisso uno anno: ab anno vero quinquagesimo usque ad annum quinquagesimum quintum, annorum novem: ab annis quinquaginta quinque usque ad annum sexagesimum annorum septem: ab annis sexaginta cujuscunque ætatis sit, annorum quinque: eoque nos jure uti, Ulpianus ait, & circa computationem usufructus faciendam. Solitum est tamen a prima ætate usque ad annum trigesimum computationem annorum triginta fieri: ab annis vero triginta, tot annorum computationem inire, quot ad annum sexagesimum deesse videntur. Nunquam ergo amplius quam triginta annorum computatio initur. *l.* 68. *eod.*

¶ Seeing it was not possible to reconcile all these Texts, and to reduce them to a fixed Sense that might agree to them all; we have endeavoured to form the Rule on what we have been able to gather from the Texts, by the Reflexions which we have been obliged to make on their different Dispositions.

It is said in the first Text, that to regulate the Falcidian Portion of a Legacy of an Usufruct, the Antients had been of opinion, that it was necessary to make an Estimation of the Right of the said Usufruct; but that this Opinion of the Antients is not approved, because one may take the fourth part of a Legacy of an Usufruct, as well as of other Legacies. And afterwards it is there said, that when the Falcidian Portion is to be regulated among all the Legatees, we must of necessity have recourse to this Opinion of the Antients, because that in this Case it is necessary to make an Estimate of all the Legacies: And also in the fourth of these Texts, *which is the fifty fifth Law of the Title of the Falcidian Portion*, it is said, That when the Falcidian Portion is to be regulated among several Legatees, it is necessary to estimate a Legacy of an Usufruct at the Price which the Legatee might get for it, if he had a mind to sell it.]

In the second Text, *which is the sixteenth Section of the first Law*, it is said, that if the Question be about a Legacy of a yearly Pension, seeing this Legacy contains several, that is, one for every Year, and that they are all conditional, every one of them depending on the Life of the Legatary; it is necessary, for this Reason, to provide for the Falcidian Portion by a mutual Security to be given by the Executor and the Legatee, that they will do Justice to one another according as the Falcidian Portion shall afterwards take place; to which may be applied what has been said in the third Article in relation to conditional Legacies.

In the third Text, *which is the forty seventh Law*, it is said, that for a Legacy of a yearly Pension the Falcidian Portion takes place on the Pension of each Year, but that one cannot judge of it till some time after; that in the mean time whilst the Falcidian Portion doth not take place, the whole Pension must be paid, and when the Year shall come, in which the Falcidian Portion shall begin to take place, it will be necessary to diminish the Pension of all the preceding Years.

In the fifth and last Text, *which is the sixty eighth Law*, it is said, that the Falcidian Portion of a Legacy of Alimony, or of an Usufruct, is regulated differently according to the Age of the Legatary. That if he be no more than twenty Years old, one reckons as if he would live thirty Years longer. If he be between twenty and twenty five Years of Age, they reckon that he may yet live twenty eight Years more. Thus this Law runs over and regulates all the other Ages, and directs that in computing the Falcidian Portion one should sum up all the Years that it is reasonable to presume a Legatary may have to live according to his Age, and that the Legatary pay the Falcidian Portion of this Sum total. Thus, for example, if the Legatary of an Usufruct, or of a yearly Pension of a thousand Livres for Alimony, is not as yet twenty Years old, how much soever he wants of it, we must reckon as if he had yet thirty Years to live, which will make thirty thousand Livres; and it is of this Sum that he will owe the Falcidian Portion. *Quantitas alimentorum triginta annorum computetur, ejusque quantitatis Falcidia præstetur.* And after having enumerated the Computations of these several Ages, it is said afterwards, that it was then the Usage to reckon thirty Years of Life, not only for those who were but twenty Years old or under, but also for those who did not exceed thirty Years of Age; and that as for those who were upwards

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upwards of thirty, the Usage was to reckon the number of Years which they wanted of sixty. Thus it was, for example, twenty five Years for a Legatary who was thirty five Years old, and ten for a Legatary who was fifty Years old; so that they never reckoned more than thirty Years.

It is easy to judge by the different Dispositions of all these Laws, what are the Difficulties which result from them, and the Inconveniencies of these several ways of regulating the Falcidian Portion which are there explained. But I cannot forbear remarking on this sixty eighth Law, which is generally looked upon to be the principal Rule of this Matter, that the Years of the Ages are settled there on two different Bottoms, none of which would be taken now for a Rule in estimating an Usufruct, or an Annuity, after the Computations that have been made upon Observation of the number of Persons which die at every Age. For according to these Computations there are but few Children that attain to the Age of thirty Years; few Persons that are past twenty Years, and arrive at fifty. Thus, if a Legatary of an Usufruct were only four or five Years old, one would not estimate his Usufruct at the rate as if he were to live thirty Years; and for this Age, and all others, one would rather follow the Method now used for valuing of Annuities. But even altho it were certain that a Legatary of an Usufruct would live thirty Years, or even altho an Annuity had been given to one and his Successors for the space of thirty Years, this Usufruct or this Annuity would not be worth the Sum to which these thirty Years would amount, seeing a Rent for Perpetuity would not be worth so much. Thus it would be very unjust to regulate the Falcidian Portion upon the foot of such an Estimation, which would make a Legacy of an Usufruct, or of an Annuity of a 1000 Livres a Year, to be estimated at a higher Rate for the Falcidian Portion than a Legacy of a Rent for Perpetuity of the like Sum, which would not be worth above 20000 Livres. But at what time should this Falcidian Portion be taken? Should it be at the time of the Testator's Death, or after the Death of the Legatary; the one would be very soon, and the other very late: and every one of these Ways would be attended with strange Inconveniencies. Should it be every Year that a part of the Total of this Falcidian Portion should be taken? But upon what foot could every Year's Share be regulated? And if it were, for example, a Legatary of a Pension of 1000 Livres, which were computed to last thirty Years, and that a sixth part were to be taken off from it for the Falcidian Portion, which would amount to 5000 Livres, how could one divide this Sum so as not to take more of it one Year than another, since it could not be known how long this Legatary had to live, and that if he should live only five Years, all his Usufruct would be consumed by the Falcidian Portion?

We may add on the Subject of this sixty eighth Law, that it is taken out of a Book which *Æmilius Macer*, who is, the Author of this Law, had composed in relation to the Right to the *twentieth Penny* which the Exchequer claimed out of all Successions and Legacies; so that it seems that the Computations, which we see in this Law for the respective Ages, have been made as it were a Tariff for settling this Right; and altho mention be there made of the Falcidian Portion, as if these Computations had been made to regulate it, yet an able Interpreter has conjectured that in all probability it was *Tribonian* who made that Application of it to the Falcidian Portion: Which would be to suppose that he had made no manner of Reflection on the infinite Difference that was to be made between the Use of the Computations explained in this Law for the several Ages with respect to this Right of the *twentieth Penny*, and the Use of the same Computations with respect to the Falcidian Portion. For as to this Right of the *twentieth Penny*, as it was necessary to pay it out of every Legacy once for all, so it was necessary to fix the Value of a Legacy of an Usufruct in order to know what share of it the Exchequer was to have. And it was for this reason that the said Law fixed by that Regulation the Manner of estimating the Value of the *twentieth Penny*, altho at too high a rate, for the Reasons which have been remarked on the Computations of the several Ages. But for regulating the Falcidian Portion of a Legacy of an Annuity for Life, or of an Usufruct, it would not be just to have recourse to the manner of Computation laid down in that Law, and to take the number of Years which it gives to the Duration of the Usufruct, or of the Annuity, according to the Age of the Legatary, in order

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to make the Legatary pay the Falcidian Portion of that Sum total. This Computation, even altho it were made upon a much lower foot, would be still unjust between the Executor and a Legatee, who not being able to ascertain to himself two Years of Life, ought not to be obliged to pay the Falcidian Portion of the value of thirty Years, nay not even of ten. So that the Manner of estimating a Legacy of an Usufruct by the Age of the Legatary, seems to be of use only between the Executor and all the Legatees, for regulating the common Rate for the Falcidian Portion of all the Legacies; because it is necessary to make an Estimate of them all from the time of the Testator's Death, and that there would be too great Inconveniencies in deferring the Regulation of the Falcidian Portion to another time; whereas without doing wrong either to the Legatary of the Usufruct, or to the other Legatees, or to the Executor, they may all of them by this Method agree among themselves about the Value of a Legacy of an Usufruct, according to the Age of the Legatary, as it were by a kind of Bargain by the great, which it would be a hazard whether the same should prove advantageous to the Executor or to the Legatees. But as to the particular Falcidian Portion of a Legacy of an Usufruct, it seems an easy matter to regulate it upon the same foot with the other Legacies. And if, for example, the Falcidian Portion were fixed at a sixth part of all the Legacies, including that of the Usufruct, there does not seem to be any Injustice or Inconvenience, if the Executor should retain a sixth part every Year of the Usufruct; since this Defalcation would do the same justice to this Legatary, and to the Executor, as a like Defalcation out of a Rent for Perpetuity; with this only Difference, which would be very just, that as to the Rent for Perpetuity, the Capital Stock would likewise be diminished in as much; whereas in the Usufruct, or Annuity for Life, which has no Capital as a perpetual Fund, the Diminution would be limited to the Years of the Life of the Legatee.

SECT. III.

Of those to whom the Falcidian Portion may be due, or not.

The CONTENTS.

1. *The Executor who takes that Character upon him purely and simply, hath no right to the Falcidian Portion.*
2. *The beneficiary Heir or Executor who defrauds, loses the Falcidian Portion of the Goods which he attempted to conceal.*
3. *And also of the Legacy which he attempted to suppress.*
4. *The Heir at Law, or next of Kin, doth not lose the Falcidian Portion for offering to renounce the Right he has by Testament.*
5. *When several Executors are charged with different Legacies, every one retains his own Falcidian Portion out of the Legacy he is charged with.*
6. *Legataries who are charged with Legacies, have not the Falcidian Portion.*
7. *Unless it be that their Legacies suffer this Diminution on account of the Executor.*

I.

1. The Executor who takes that Character upon him purely and simply, hath no right to the Falcidian Portion.

SEEING the Executor who takes that Quality upon him purely and simply, accepts the Inheritance without the Benefit of an Inventary, he cannot pretend to the Falcidian Portion: For this Quality engages him to all the Charges without distinction, and that even beyond the Effects of the Inheritance *a*. And it is only the beneficiary Heir or Executor, who having made an Inventary of the Goods, is no farther accountable for the Legacies, and other Charges, than as there are Goods in the Succession sufficient to acquit them, he deducting out of the Legacies the fourth part of the Goods for the Falcidian Portion.

a See the fourth Article of the first Section of this Title, and the second Article of the first Section of Heirs and Executors in general.

II.

2. The beneficiary Heir or Executor who defrauds, loses the Falcidian Portion of

Altho the Heir or Executor have made an Inventary, yet if it be found that he has defrauded the Legatees, by withdrawing or concealing some Effects of the Inheritance, he will be deprived of the Falcidian Portion of those Effects which he had attempted fraudulently

the Goods which he attempted to conceal. lently to withdraw or conceal *b*. But we must not reckon in the number of Heirs or Executors who have withdrawn or concealed the Effects, him who should pretend that a thing which he claims as his own, ought not to be comprehended among the Goods of the Inheritance, altho it should afterwards appear that the same thing was a part of the Inheritance. For it was a Pretension which he might have had without any knavish Design, and which, altho it should appear to be unjust, yet being intimated to the Legataries, it would not have the Character of a fraudulent diverting the Effects of the Succession *c*.

b Rescriptum est a principe *hæredem rei quam amovisset quartam non retinere*. l. 6. ff. de his quæ ut ind. v. l. 24. ff. ad leg. Falcid. l. 48. ff. ad Senat. Trebell. *See the following Article.*

c Si quis ex hæredibus rem propriam esse contendat, deinde hæreditariam esse, convincatur; quidam putant, ejus quoque Falcidiam non posse retineri, quia nihil intersit subtraxerit an hæreditariam esse negaverit. Quod Ulpianus recte improbat. *l.* 68. §. 1. *ff. ad leg. Falc.*

III.

3. And also of the Legacy which he attempted to suppress. If the Executor has been guilty of any Fraud in endeavouring to make the Legacies or fiduciary Bequests to perish, as if he has suppressed a Codicil which contained them, or by any other way, he will be obliged to acquit those Legacies or fiduciary Bequests whole and entire, without deduction of the Falcidian Portion *d*.

d Beneficio legis Falcidiæ indignus esse videtur, qui id egerit ut fideicommissum intercidat. *l.* 59. *ff. ad leg. Falc.*

IV.

4. The Heir at Law, or next of kin, doth not lose the Falcidian Portion, for offering to renounce the right he has by Testament. If the Heir at Law or next of Kin, being instituted Executor by a Testament, should pretend to renounce his testamentary Institution, that he might succeed to the Deceased as dying intestate, and so free himself from the Burden of the Legacies, seeing he would not be deprived of the Inheritance, as has been said in another Place, and that he would remain under the Obligation of acquitting the Legacies, he would not be deprived of the Falcidian Portion *e*.

e Admonendi sumus huic, in quem ex hac parte edicti legatorum actio datur, beneficium legis Falcidiæ concedendum. *l.* 18. §. 1. *ff. si quis om. caus. test.* See the seventeenth Article of the fifth Section of Testaments.

V.

5. When several Executors are charged with different Legacies, every one retains his own Falcidian Portion out of the Legacy he is charged with. If there be several Heirs or Executors instituted in divers Portions of the Inheritance, and the Portions of some of them be charged with Legacies from which the others are exempted, every one will retain his own Falcidian Portion out of the Legacies with which he is charged; and must not supply the same out of the Portions of the Inheritance which belong to the other Heirs or Executors *f*. Every one likewise will deduct out of his own Portion of the Inheritance the Debts and other Charges which the Testator shall have imposed upon it *g*.

f In singulis hæredibus rationem legis Falcidiæ componendam esse non dubitatur. Et ideo si Titio & Seio hæredibus institutis, semis hæreditatis Titii exhaustus est, Seio autem quadrans totorum bonorum relictus sit: competit Titio beneficium legis Falcidiæ. *l.* 77. *ff. ad leg. Falc.*

See the seventh and following Articles of the fourth Section.

g In legem Falcidiam æris alieni rationem in hæreditate relicti quod unus ex hæredibus solvere damnatus sit, ipse solus habebit. *l.* 8. *f. ad leg. Falc.*

VI.

6. Legataries who are charg'd with Legacies, have not the Falcidian Portion. If a Legatary had his Legacy burdened with some Disposition in favour of a third Person, such as a Sum of Money, or other Charge which should diminish his Legacy, or quite exhaust it, he would not for all that have a right to the Falcidian Portion; but he would be bound either to acquit the whole Charge, or to renounce the Legacy. For the Falcidian Portion is granted only to Heirs or Executors, and the Legataries cannot claim this Benefit in their own Right *h*.

h Nunquam legatarius vel fideicommissarius licet ex Trebelliano Senatus-consulto restituitur ei hæreditas, utitur legis Falcidiæ beneficio. *l.* 47. §. 1. *ff. ad leg. Falcid.* See the following Article.

The Reasons for establishing the Falcidian Portion, which have been explained in the Preamble of this Title, agree only to Heirs or Executors.

VII.

7. Unless it be them their Legacies suffer this Diminution on account of the Executor. If in the Case of the preceding Article the Executor, being overcharged with all the Legacies, the Falcidian Portion were to take place in them, the Abatement which a Legatary who is burdened with other Legacies would sustain thereby of his own Legacy, the same being taken out of his entire Legacy, would diminish proportionably this particular Legacy with which he was charged by the Testator: For it would be on account of the Executor that the said Diminution had happened *i*.

i Si Titio viginti legatis portio per legem Falcidiam detracta esset, cum ipse quoque quinque Seio rogatus esset restituere. Vindius noster tantum Seio

Seio pro portione ex quinque detrahendum ait, quantum Titio ex viginti detractum esset. Quæ sententia & æquitatem & rationem magis habet: quia exemplo hæredis legatarius ad fideicommissa præstanda obligabitur. Nec quia ex sua persona legatarius inducere legem Falcidiam non possit, idcirco, quod passus esset, non imputaturum: nisi forte testator ita fidei ejus commisisset, ut totum quidquid ex testamento cœpisset restitueret. *l. 32. §. 4. ff. ad leg. falc.* See the fifth Article of the following Section.

SECT. IV.

Of the Causes which make the Falcidian Portion to cease, or which diminish it.

The CONTENTS.

1. *The Testator may forbid taking the Falcidian Portion.*
2. *The Legacy of an Immoveable, with a Prohibition to alienate it, is not subject to the Falcidian Portion.*
3. *The Testator who is Debtor to his Executor, may forbid him to reckon his own Debt for the Falcidian Portion.*
4. *The Falcidian Portion doth not take place in Military Testaments.*
5. *The Devisee of a Land or Tenement charged with a Pension to be taken out of the Fruits of the said Land or Tenement, doth not retain the Falcidian Portion, altho he himself bears it.*
6. *What augments the Inheritance diminishes the Falcidian Portion.*
7. *Whatever comes to the Executor in that Quality, diminishes the Falcidian Portion.*
8. *The Fund of the Legataries whose Legacies are assigned them on a Portion of the Inheritance which accrues to the other Heir or Executor, is not augmented by the Portion of the other Heir or Executor.*
9. *The same in the Case of a Pupillary Substitution.*
10. *A Rule which results from the four preceding Articles.*
11. *What is bequeathed to one of the Executors to be taken out of the Share of the Inheritance that is left to the other, does not diminish the Falcidian Portion.*
12. *Falcidian Portion between Co-executors who are Legatees.*
13. *An Executor instituted for several Shares of the Inheritance, ought to confound them together in order to make up the Falcidian Portion of the Legacies that are assigned on all the Shares.*
14. *If the Legatary of a conditional Legacy succeeds to the Executor, if the Legacy takes effect, it will not diminish the Falcidian Portion of the Legacies left by the said Executor.*
15. *The Charge imposed on one of the Executors concerns him alone for the Falcidian Portion.*
16. *The Legacy of which the Delivery or Payment is deferred, is of less Estimation for the Falcidian Portion.*
17. *The Executor who has paid, or promised to pay the whole Legacy, has no claim to the Falcidian Portion.*
18. *Unless he had paid, or promised to pay, by an Error in Fact, and not in Law.*
19. *The Falcidian Portion is not lost by the bare effect of Time.*
20. *The Falcidian Portion of several Legacies due to one and the same Legatary, may be retained out of that which is last paid.*
21. *The Executor, who, under pretext of the Falcidian Portion, delays to acquit the Legacies, will be liable for Interest if the Falcidian Portion is not due.*

I.

1. The Testator may forbid taking the Falcidian Portion.

ALTHO the Falcidian Portion be a Right which by Law accrues to the Executor who is willing to make use of it, and that a Testator cannot hinder his Dispositions from being subject to the Laws *a*; yet it is nevertheless permitted to a Testator to oblige his Executor to acquit the Legacies without deducting the Falcidian Portion. And if he orders it so in express Terms, the Falcidian Portion will not take place. For this is an Exception made by the Law itself, and the Executor is at liberty either to accept the Inheritance on this condition, or to renounce it *b*.

a See the twenty eighth Article of the second Section of the Rules of Law.

b Si debitor, creditore hærede instituto, petisset, ne in ratione legis Falcidiæ ponenda creditum suum legatariis reputaret: sine dubio ratione doli mali exceptionis apud arbitrum Falcidiæ defuncti voluntas servatur. *l. 12. ff. ad leg. Falc.*

Si in testamento ita scriptum sit: *Hæres meus Lucio Titio decem dare damnas esto: Et quanto quidem minus per legem Falcidiam capere poterit, tanto amplius ei dare damnas esto*: sententiæ testatoris standum est. *l. 64. eod.*

*It would seem by these Texts and some others, that by the antient Law the Testator might forbid the Falcidian Portion, and the contrary seems to be established by other Laws *; which has divided the Interpreters. But this Difficulty hath been removed by the first Novel of* Justinian, *who has permitted the Prohibition of the Falcidian Portion in the manner as it is explained in the Article.* Si vero expressim designayerit (*testator*) non velle hæredem retinere Falcidiam, necessarium est testatoris valere sententiam: et aut volentem eum pa-

* *L. 27. ff. ad leg. Falc.*

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rere testatori forsan, etiam quædam juste et pie relinquenti, lucrum non in percipiendo, sed solummodo pie agendo habentem: & non videri sine lucro hujusmodi esse hæreditatem: aut si parere noluerit, eum quidem recedere ab hujusmodi institutione. *Nov.* 1. *c.* 2. *in fine.*

II.

2. The Legacy of an Immoveable, with a Prohibition to alienate it, is not subject to the Falcidian Portion.

If a Testator had devised some immoveable Thing, whether it were to some one of his own Family, or to some other Person, and had directed that the said Immoveable should not be alienated, it being his Intention that the same should always remain with the Legatary and his Successors; the Executor of this Testator could not pretend to have the Falcidian Portion of an Immoveable devised after this manner. For the Prohibition to alienate it implies the Will of the Testator that the same should remain without any Diminution to the Legatary and to his Successors *c*.

c Si quando autem aliquis testamentum faciat, & aliquam rem immobilem suæ familiæ, aut alteri cuicunque personæ nomine legati reliquerit, & specialiter dixerit, nullo tempore hanc rem alienari: sed aut apud heredes, aut apud successores illius cui relicta est permanere: in hoc legato jubemus Falcidiam legem locum penitus non habere: quoniam alienationem ejus testator ipse prohibuit. *Nov.* 119. *c. ult.*

III.

3. The Testator who is Debtor to his Executor, may forbid him to reckon his own Debt for the Falcidian Portion.

If the Person who is instituted Executor being a Creditor to the Testator, it were ordained by the Testament, that the said Executor should not reckon his own Debt for diminishing the Goods of the Inheritance; this Disposition would hinder the Diminution of the Legacies which the said Debt might have occasioned for the Falcidian Portion *d*.

d See the first of the Texts quoted on the first Article.

IV.

4. The Falcidian Portion doth not take place in Military Testaments.

The Dispositions of military Testaments are not subject to the Falcidian Portion *e*.

e In testamento militis jus legis Falcidiæ cessat. *l.* 7. *C. ad leg. Falc. leg.* 12. *C. de test. mil. l.* 92. *&* *l.* 17. *l. ult. ff. eod.*

¶ Is it a great favour to him who by a military Testament names an Heir or Executor, and gives several Legacies, to take away the right of the Falcidian Portion from his Heir or Executor, who might by this means come to have nothing at all, if the Inheritance should be exhausted with Legacies? And will not this Privilege in this Case turn against the Intention of the Testator, who, if he had foreseen this Event, would have without doubt moderated the Legacies in favour of his testamentary Heir, whom he had a greater value for than for the Legatees? Or shall this Rule be reduced to the Case, where the Disposition of the Soldier or Officer of War would amount only to a Codicil, which would respect only the Heir at Law or next of Kin, in favour of whom he had made no manner of Disposition? We have however set down this Rule without any distinction, the Laws relating to it being precise. But it seems that if the Case should happen that there were nothing at all left, or but a small matter for the Heir, whether he succeed as Heir at Law or by Testament, it would be equitable to mitigate the Rigour of the Law; seeing it was not the intention of the Testator to strip him of all the Goods.

V.

5. The Devisee of a Land or Tenement, charged with a Pension to be taken out of the Fruits of the said Land or Tenement, doth not retain the Falcidian Portion, altho he himself bears it.

If a Legatary were charged with a yearly Pension for Alimony to some Person, and that his Legacy were diminished by the Falcidian Portion, but only so far as that there would remain still enough for the said Alimony, this Legatary would nevertheless bear the said Charge intire, without any Deduction. For it would be presumed of such a Disposition, that it was the Testator's pleasure that a Legacy of this nature should not suffer any abatement, and that the Legatary should content himself with what might remain clear after the said Charge were acquitted, unless it should appear that this was not the intention of the Testator; as if, for example, the Legacy charged with the said Alimony were of the same nature, and as favourable as the other.

f A liberto, cui fundum legaverat ferentem annua sexaginta, per fideicommissum dederat Pamphilæ annua dena. Quæsitum est, si lex Falcidia liberto legatum minuerit, an Pamphilæ quoque annuum fideicommissum minutum videatur cum ex reditu legata sint, qui largitur etiam si Falcidia partem dimidiam fundi abstulerit, annuam Pamphilæ præstationem? Respondit, secundum ea quæ proponerentur, non videri minutum: nisi si alia mens testatoris probaretur. *l.* 21. §. 1. *ff. de ann. leg. l.* 25. §. 1. *eod.*
Si pars donationis fideicommisso teneatur, fideicommissum quoque munere Falcidiæ fungetur. Si tamen alimenta præstari voluit, collationis totum onus in residuo donationis esse respondendum erit ex defuncti voluntate, qui de majori pecunia præstari non dubie voluit integra. *l.* 77. §. 1. *ff. de leg.* 2.

¶ It is to be observed on this Article, that it is an Exception to the Rule explained in the seventh Article of the preceding Section: So that it is an Exception

ception from another Exception. For the Rule explained in that seventh Article declares, that the Legatees may retain the Falcidian Portion when they themselves bear it; which made an exception to the general Rule explained in the sixth Article of the same preceding Section, which says that the Legatees cannot retain the Falcidian Portion out of their Legacies, because it was established only for the Benefit of Heirs or Executors. Thus the Rule explained in this present Article is founded on two Principles which it joins together; one whereof is general, that Legatees have no right to the Falcidian Portion; and the other particular, in favour of a Legacy of Alimony specially assigned on the Fund of a Legacy, which the Testator had given to the Legatee only upon this condition. For altho Legacies of Alimony be subject to the Falcidian Portion, when it is the Executor that is charged with them, as has been said in the second Article of the second Section; yet the Laws distinguish the Condition of the Legatee from that of the Executor, and favour the Executor more than the Legatee, as has been said in the sixth Article of the seventh Section of Testaments. Thus they retrench the Legacies of Alimony, when they diminish the Portion of the Inheritance which ought to remain with the Heir or Executor; and they do not retrench a Legacy of that kind when it is only a Legatary that is charged with it, altho his Legacy be thereby diminished, or reduced to nothing.

VI.

6. What augments the Inheritance diminishes the Falcidian Portion.

The Diminution of Legacies on account of the Falcidian Portion may cease altogether or be lessen'd, if it happens that the Executor reaps the Benefit of some Disposition of the Testator's, which accrues to him as Heir or Executor; for he may reap Advantage by other Dispositions which would not have the same effect: and this depends on the Rules which follow *g*.

g See the following Articles.

VII.

7. Whatever comes to the Executor in that quality, diminishes the Falcidian Portion.

If a Testator having instituted two Heirs or Executors, substitutes them mutually to one another in that manner which is called vulgar Substitution, which shall be treated of in its place *h*, ordaining that if one of them either will not or cannot take part in the Succession, the other may have it entire; and that one of the said Executors having his Share of the Inheritance charged with Legacies subject to Diminution on account of the Falcidian Portion, the Case of the Substitution should come to pass, so as that the said Heir or Executor should reap the benefit of the other's Portion coming to him by virtue of the said Substitution; this Profit would diminish the Falcidian Portion which he might have retained out of the Legacies with which his Share of the Inheritance was burdened. For this other Portion of the Inheritance would be Goods that came to him in the quality of Heir or Executor: and one might consider him as being a pure and simple Heir or Executor for his own Portion, and a conditional Heir or Executor for that Portion which the Case of the Substitution was to procure him *i*.

h See the first Title of the fifth Book.

i Id quod ex substitutione cohæredis ad cohæredem pervenit proficit legatariis. Is enim similis est hæres ex parte pure, ex parte sub conditione hæredi instituto. *l. 1. §. 13. ff. ad leg. Falc.*

Quod si alterutro eorum deficiente, alter hæres solus exsisteret: utrum perinde ratio legis Falcidiæ habenda sit, ac si statim ab initio is solus hæres institutus esset: an singularum portionum separatim causæ spectandæ sunt? Et placet si ejus pars legatis exhausta sit, qui hæres extiterit, adjuvari legatarios per deficientem partem, quia ea non est legatis exonerata; quia & legata, quæ apud hæredem remanent, efficiunt ut cæteris legatariis aut nihil, aut minus detrahatur. Si vero defecta pars fuerit exhausta, perinde in ea ponendam rationem legis Falcidiæ, atque si ad eum ipsum pertineret, a quo defecta fieret. *l. 78. eod.*

See the latter part of this Text in the following Article.

VIII.

8. The Fund of the Legataries, whose Legacies are assigned them on a Portion of the Inhetance that accrues to the other Heir or Executor, is not augmented by the Portion of the other Heir or Executor.

If in the Case of the preceding Article one of the Coheirs or Coexecutors substituted to one another, does not succeed, as if he died before the Testator, or was incapable of succeeding, or that he renounced the Inheritance, and that his Portion of the Inheritance, being overcharged with Legacies, that of the other Heir or Executor who should remain alone were not burden'd at all with any Legacies; this Heir or Executor who remains alone would contribute nothing out of his Portion of the Inheritance to the Legatees who have their Assignments on the Portion of the other Heir or Executor: For with regard to them, it would be the same thing as if the Heir or Executor whose Portion is charged with their Legacies had succeeded; in which case these Legataries would be nothing the better

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better for what the other Heir or Executor should have clear of his own Portion: and this Event would not make their Condition the better. For the Testator had limited their Right to that Portion of the Inheritance which was to go to the Heir or Executor who was charged with their Legacies, without burdening the other Heir or Executor with their Legacies *l*.

l See the second of the Texts quoted on the preceding Article.

IX.

9. The same in the Case of a Pupillary Substitution.

If in the Case of a Pupillary Substitution, which shall be treated of under the second Title of the fifth Book, a Testator had instituted his Son under fourteen Years of Age for one Portion, and another Heir or Executor for the rest of the Inheritance, substituting him to his Son who was under the Age of fourteen, by that Substitution which is called Pupillary, and that the Testator had charged both the Heirs or Executors with Legacies, in such a manner as that the Falcidian Portion ought to take place either only in the Legacies assigned upon one Portion of the Inheritance, or in the Legacies both of the one and the other; the Son in this Case happening to die before his Father, and the Person substituted having in that Case in his own Right the two Portions confounded together in one only Inheritance, in the same manner as if he had been instituted sole universal Heir or Executor; all the Legataries would have the advantage thereof, for the reason explained in the seventh Article. But if the Son having succeeded to his Father, and dying before he arrived at the Age of fourteen Years, the Person substituted to him did after his Death enter to the Succession, the Legatees who had their Assignments on the Son, and whose Legacies might be subject to the Falcidian Portion, would not reap any Profit from the Portion of the Inheritance which the substituted Person had in his own right. For as has been said in the eighth Article, their Legacies were assigned only on the Portion of the Inheritance which the Testator had appropriated for the Payment of them, and not on the Portion which was left originally to the substituted Heir or Executor in his own right *m*. But if in the Case of the same Testament, the Portion of the Heir or Executor who was substituted to the Son under fourteen Years of Age, being overburdened with Legacies, so as that the Falcidian Portion ought to take place in it, the said Heir or Executor happened to succeed the Son who died under the Age of fourteen, his Falcidian Portion would be diminished; and the Legataries who had their Assignments on him would reap the Benefit of that which should come to him by virtue of the Substitution. For it would be in the Quality of Heir or Executor that he would succeed to it *n*.

m Qui filium suum impuberem & Titium æquis partibus hæredes instituerat, a filio totum semissem legaverat, a Titio nihil: & Titium filio substituerat. Quæsitum est, dum Titius ex institutione adisset, & impubere filio mortuo, ex substitutione hæres extitisset, quantum legatorum nomine præstare deberet. Et placuit, solida eum legata præstare debere. Nam confusi duo semisses efficerent, ut circa legem Falcidiam totius assis ratio haberetur, & solida legata præstarentur. Sed hoc ita verum est, si filius antequam hæres patri existeret, decessisset: si vero patri hæres fuit, non ampliora legata debet substitutus, quam quibus pupillus obligatus fuerat: quia non suo nomine obligatur, sed defuncti pupilli, qui nihil amplius, quam semissis dodrantem præstare necesse habuit. *l. 87. §. 4. ff. ad leg. Falc.*

n Quod si extranei hæredis semis totus legatus fuerit, isque pupillo a quo nihil legatum erat ex substitutione hæres exstiterit: poterit dici augeri legata, & perinde agendum ac si quilibet cohæredi substitutus fuisset, eoque omittente hæreditatem, ex asse hæres extitisset. Quia semper substitutus rationem legis Falcidiæ ex quantitate bonorum quæ pater reliquerit, ponet. *d. l. §. 5.*

X.

10. A Rule that results from the four preceding Articles.

It follows from the Rules explained in the four preceding Articles, that if Legacies assigned on the Share of the Inheritance left to one of two testamentary Heirs be subject to the Falcidian Portion, it is not diminished by the Change which makes that Share of the Inheritance to pass to the other Heir. For he acquires it such as it is, and with its Charges, and it doth not augment the Charges of his own Share. But if the testamentary Heir whose Share is charged with Legacies acquires another Share of the Inheritance by the effect of a Right of Accretion, or of a Substituion; the Legatees who have their Assignments on his Share of the Inheritance will reap the Benefit of what shall come to him of the Share of the other Heir. For whereas in the first Case the Legataries whose Legacies are subject to the Falcidian Defalcation, cannot say to the Heir who acquires the Share which is charged with their Legacies, that he profits to their prejudice, seeing their Condition remains the same as if there had been no change, and such as it was regulated by the Testator; in the second Case, the Heir who reaps the Benefit of the Share

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Share of the other, cannot ſay to the Legatees who had their Aſſignments on his Portion of the Inheritance that their Legacies were limited to his Portion. For ſeeing they have their Aſſignment on him, they reap the Benefit of whatſoever part of the Inheritance comes to him, as has been ſaid in the ſeventh Article *o*.

o This is a Conſequence of the preceding Articles.

XI.

11. What is bequeathed to one of the Executors to be taken out of the Share of the Inheritance that is left to the other, does not diminiſh the Falcidian Portion.

If one of the Coheirs or Coexecutors has his Share of the Inheritance charged with a Legacy to the other, and that the ſaid Executor who is alſo a Legatee, be on his part charged with Legacies to be paid out of his Share of the Inheritance, ſo that the Falcidian Portion ought to take place in them, the Legacy which he receives out of the Share of the other Executor will not diminiſh the Falcidian Portion that is due from thoſe Legacies which he is charged with. For it is not as Executor that he receives this Legacy; and we do not reckon among the Goods which are liable to ſatisfy the Legacies, any other beſides thoſe that come to the Executor in that quality, and by virtue of his Right to the Inheritance, and not that which may accrue to him by any other Title. Thus, this Legacy coming to him in the ſame manner that it would to another Legatary, he does not reckon it as part of the Falcidian Portion that is due to him *p*.

p Quod autem dicitur, ſi ex judicio defuncti quartam habeat hæres, ſolida præſtanda eſſe legata: ita accipere debemus ſi hæreditario jure habeat, itaque quod quis legatorum nomine a cohærede accepit, in quadrantem ei non imputatur. *l. 74. ff. ad leg. Falc.*

In quartam hæreditatis, quam per legem Falcidiam hæres habere debet, imputantur res quas jure hæreditario capit, non quas jure legati vel fideicommiſſi vel implendæ conditionis cauſa accipit. Nam in quartam non imputantur. *l. 91. eod. l. 22. eod.* See the following Article.

XII.

12. Falcidian Portion between Coexecutors who are Legatees.

If in the Caſe of the preceding Article an Executor being charged with a Legacy to his Coexecutor, the Falcidian Portion ought to take place; this Legacy would be ſubject to it as well as all the other Legacies: for it would diminiſh in the ſame manner the fourth part of the Goods. But if both one and the other Executor were charged with reciprocal Legacies, and that they were in the Caſe that the Falcidian Portion ought to take place, whether on the part of one of them only, or on the part of both; that which one of the ſaid Executors would have to receive of the Legacy which the other were to pay him, would be compenſated with the Falcidian Portion due out of the Legacy which he owed him reciprocally. And ſeeing this Compenſation would make up a part of the Falcidian Portion of the total of the Legacies; he would retain out of the Legacies due to the other Legatees only what ſhould be wanting to make up the Falcidian Portion of all the Legacies in general, Deduction being made of ſo much of it as would be ſatisfy'd by the ſaid Compenſation *q*.

q Neſennius Apollinaris Julio Paulo. Ex facto, *Domine*, ſpecies ejuſmodi incidit, Titia filias ſuas tres numero æquis ex partibus ſcripſit hæredes: & a ſingulis legata invicem dedit: ab una tamen ita legavit tam cohæredibus ejus, quam extraneis, ut Falcidiæ ſit locus. Quæro an adverſus cohæredes ſuas a quibus legata & ipſa accepit, uti poſſit Falcidia, & ſi non poſſit, vel doli exceptione ſummovenda eſt, quemadmodum adverſus extraneos computatio Falcidiæ iniri poſſit? Reſpondi, id quidem quod a cohærede legatorum nomine percipitur, non ſolet legatariis proficere, quominus Falcidiam patiantur. Sed cum is qui legatum præſtaturus eſt ab eodem aliquid ex teſtamento petit, non eſt audiendus deſiderans uti adverſus eum Falcidiæ beneficio, ſi id quod percepturus eſt ex voluntate teſtatoris suppleat quod deducere deſiderat. Plane cæteris legatariis non univerſum quod cohæredi præſtat imputabit, ſed quantum daturus eſſet, ſi nihil ab eo perciperet. *l. 22. ff. ad leg. Falc. v. l. 78. ff. de hæred. inſtit. l. 15. ff. de his quæ ut ind.*

XIII.

13. An Executor instituted for ſeveral Shares of the Inheritance ought to confound them together, in order to make up the Falcidian Portion of the Legacies that are aſſigned on all the Shares.

It follows alſo from the ſame Rules, that if an Executor were inſtituted for two different Shares of the Inheritance, as for a fourth part by way of preference over and above his equal Share with his Coexecutor, and for a Moiety of the three other fourths, and that each of theſe Shares, or only one of them, ſhould chance to be ſo overcharged with Legacies, that there would be room for the Falcidian Portion to take place therein; it would be neceſſary to confound the Shares together, and the Total would be ſubject to all the Legacies that are to be paid out of both Shares. For it would be in quality of Executor that he would reap the Profit both of the one and the other *r*.

r Aliam cauſam eſſe ejus qui ex variis portionibus hæres ſcriberetur. Ibi enim legatorum confundi rationem non minus, quam ſi ſemel fuiſſet nuncupatus ex ea portione quæ conficeretur ex pluribus. *l. 11. §. 7. in f. ff. ad leg. Falc.*

Vel omnia admittantur, vel omnia repudientur. *l. 20. C. de jur. delib.*

XIV.

14. If the Legatary of a

If an Executor who is charged with a conditional Legacy, had inſtituted the

conditional Legacy succeeds to the Executor, if the Legacy takes effect, it will not diminish the Falcidian Portion of the Legacies left by the said Executor.

the Legatary for his Executor, and that the Condition on which the said Legacy depended did afterwards come to pass; since the Benefit which this Legatary would have by the said Legacy would accrue to him by the Title of Legatary, and not by that of Successor to the Executor who was charged with the Legacy, what he gets by it would not augment the Fund for Payment of the Legacies with which he had been charged by the Executor to whom he succeeds, and would not diminish the Falcidian Portion, if it took place *s*.

s Fundo mihi legato sub conditione, pendente legati conditione, hæres me hæredem instituit, ac postea legati conditio extitit: in Falcidiæ ratione fundus non jure hæreditario, sed legati, meus esse intelligitur. *l.* 4. *ff. ad leg. Falc.*

XV.

15. The Charge imposed on one of the Executors, concerns him alone for the Falcidian Portion.

If a Testator had charged one of his Executors to acquit out of his Share of the Inheritance a Debt owing by the Deceased, the Diminution of the Goods which the Payment of the said Debt would occasion, would, in the Computation of the Falcidian Portion regard only that Share of the Inheritance which belongs to that Executor who is charged with the Payment of the Debt *t*, and would augment his Falcidian Portion in proportion.

t In legem Falcidiam æris alieni rationem in hæreditate relicti, quod unus ex hæredibus solvere damnatus sit ipse solus habebit. *l.* 8. *ff. ad leg. Falc.*

XVI.

16. The Legacy of which the Delivery or Payment is deferred, is of less Estimation for the Falcidian Portion.

If there were a Devise of some Land or Tenement which were not to be delivered to the Devisee till after a certain Time, the Profits thereof in the mean while accruing to the Executor; or a Legacy of a Sum of Money, which was not to be paid till after some Time; it would be necessary to deduct out of the Estimation of the said Legacies for the Falcidian Portion, so much as the Delay of the Delivery or Payment would take off from what the Legacies would have been worth, had they been immediately due at the Time that the Succession fell; at which Time an Estimate ought to be made of the Goods of the Succession, and of the Legacies *u*.

u In lege Falcidia non habetur pro puro quod in diem relictum est: medii enim temporis commodum computatur. *l.* 45. *ff. ad leg. Falc.*

Tanto minus erogari ex bonis intelligendum est, quantum interea donec dies obtingit, hæres lucraturus est ex fructibus & usuris. *l.* 73. §. 4. *eod.* See the fourth Article of the second Section of the Trebellianick Portion. See the sixth Article of the second Section.

XVII.

17. The Executor who has paid, or promised to pay, the whole Legacy, has no Claim to the Falcidian Portion.

The Executor who, without retaining the Falcidian Portion, had voluntarily obliged himself to acquit a Legacy entirely, without any Abatement, or had actually paid it, could not afterwards pretend to deduct the Falcidian Portion; for he would have renounced his Pretensions to it by paying in this manner, or by engaging to pay the whole Legacy. And it would be presumed that he had done so with no other view but to satisfy fully and amply the Dispositions of his Benefactor: which Presumption would be sufficient to make the Payment or Delivery of the Thing bequeathed to subsist *x*.

x Scire debes omissâ Falcidia, quo pleniorem fidem restituendæ portionis exhiberes, non videri plus debito solutum esse. *l.* 1. *C. ad leg. Falc.*

Sive solverit, sive super hoc cautionem fecerit, æquitatis ratio similia suadere videtur. *l. ult. in f. C. eod.* See the second Article of the second Section of the Trebellianick Portion.

XVIII.

18. Unless he paid, or had promised to pay, by an Error in Fact, and not in Law.

If it was thro some Error in Fact that the Executor had acquitted an entire Legacy without Deduction of the Falcidian Portion; as, if he had paid it before he knew of a Codicil containing other Legacies which gave occasion to a Defalcation; he might recover what he had paid more than he ought. But if it was thro an Error in Law that he had paid too much, as if he had acquitted a Legacy which he thought was not subject to the Falcidian Portion; or that he was ignorant that he had a Right to retain it; he could not afterwards pretend to make any Defalcation *y*.

y Error facti quartæ ex causa fideicommissi non retentæ repetitionem non impedit. Is autem qui sciens se posse retinere, (universum restituit) condictionem non habet. Quin etiam si jus ignoraverit, cessat repetitio. *l.* 9. *C. ad leg. Falc.* See the second Article of the second Section of the Trebellianick Portion. See the first Section of the Vices of Covenants.

XIX.

19. The Falcidian Portion is not lost by the bare Effect of Time.

The Executor is not deprived of the Falcidian Portion by the effect of Time, whilst Things are still entire, that is to say, that he has done nothing by which he is deprived of it; as he would be if he had voluntarily acquitted, or obliged himself to acquit the Legacy. But whilst he remains Debtor of the Legacy, he preserves his Right of retaining the Falcidian Portion; or if

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if having acquitted the Legacy, he had compounded and taken Security for preserving the Falcidian Portion, he could not lose it but by the Time of Prescription, which would set aside a Debt of another nature z.

z Legis Falcidiæ beneficium hæres etiam post longum tempus mortis testatoris implorare non prohibetur. L. 58. ff. ad leg. Falc.

XX.

20. The Falcidian Portion of several Legacies due to one and the same Legatary, may be retained out of that which is last paid.

If an Executor who is charged with divers Legacies to one and the same Legatary, had acquitted some of them without retaining the Falcidian Portion out of them, he might retain it for all the Legacies out of those which he had not as yet paid: And it would be the same thing, with much more Reason, if in the Case of a Legacy of a Sum of Money, or other Thing, he had paid one part of it without deducting the Falcidian Portion of that part which he had paid. For in all these Cases it would be presumed, that having in his hands Stock enough for the total Sum of the Falcidian Portion, he had reserved the Deduction of it to be made out of what remained to be acquitted either of one sole Legacy, or of many. So that this Remainder would be answerable to him for it, unless the Payments which he had made, should imply some Engagement that ought to deprive him of the Falcidian Portion a.

a Si ex pluribus rebus legatis hæres quasdam solveris, ex reliquis Falcidiam plenam per doli exceptionem retinere potest, etiam pro his quæ jam data sunt. Sed etsi una res sit legata, cujus pars soluta sit, ex reliquo potest plena Falcidia retineri. L. 16. ff. ad leg. Falc. d. l. §. 1.

XXI.

21. The Executor who, under pretext of the Falcidian Portion, delays to acquit the Legacies, will be liable for Interest, if the Falcidian Portion is not due.

The Executor who, under pretext of the Falcidian Portion which he had no Right to pretend to, had deferred to acquit the Legacies, would be obliged to pay Interest for the Time of this Delay, which would have no other Cause than his own knavish Dealing b.

b Divi Severus & Antoninus generaliter rescripserunt Bononio maximo, usuras præstaturum eum, qui frustrationis causa beneficium legis Falcidiæ imploravit. L. 89. §. 1. ff. ad leg. Falc. V. l. 2. C. de usur. & fruct. legat.

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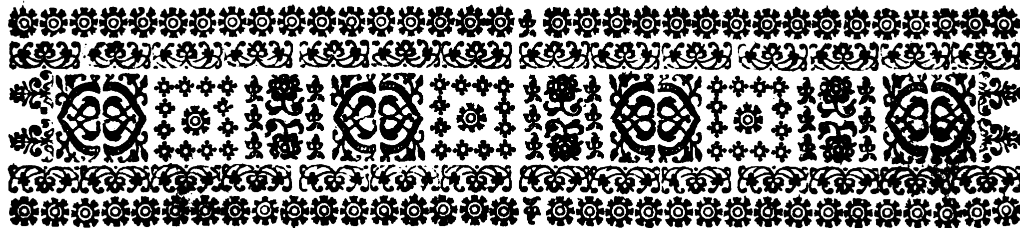

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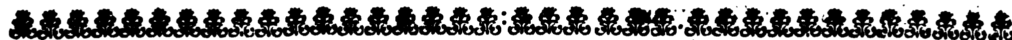

BOOK V.

Of Substitutions and Fiduciary Bequests.

THE word *Substitution*, in general, hath two Significations, which it is necessary to distinguish: The one comprehends the Dispositions of Testators, who having instituted an Executor, and fearing lest he should be either incapable of the Office, or not willing to accept it, name another Person to be their Executor in default of the former. The other comprehends the Dispositions of Testators, who have a mind that their Goods should pass from one Successor to another, so as that he who is called in the first place having succeeded to the Estate, may transmit it after his Death to the second; and if there be several called to the Succession, that the Estate may pass from the one to the other successively and gradually.

The first of these two sorts of Substitutions, is that which is called Vulgar, from the Name which it had in the *Roman* Law, because the Use of it was frequent, in order to prevent the Cases where it might happen that the Executor instituted in the first place might not succeed; as, if he should chance to die before the Testator; if he should renounce the Inheritance; if he was incapable of succeeding; if he render'd himself unworthy of it. And because in these two last Cases, and in many others, the Exchequer seized upon what the Executor or Legatee were incapable of acquiring, the Fear of this Event obliged the Testators to make Vulgar Substitutions *a*. And even the Fear of the Executor's renouncing the Inheritance, might likewise induce many Testators to make use of this kind of Substitution. For before that *Justinian* had established the Benefit of an Inventary,

a Ipsis testamentorum conditoribus sic gravissima caducorum observatio visa est, ut & substitutiones introducerent, ne fiant caduca. *l. un. in pr. C. de cad. toll. V. Ulp. tit.* 17. *l.* 1. *ff. de jur. fisc.*

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Inventary, the Executor having no Medium between accepting the Inheritance purely and simply, and renouncing it, the Difficulty of knowing exactly the State of the Goods, which made it necessary to give to the Executors whole Years to deliberate in, and which was attended with the Inconveniencies that have been remarked in the Preamble of the third Title of the first Book, might oblige many Executors to renounce the Successions.

The other kind of Substitution, which makes the Goods to pass from one Successor to another, is that which was properly called *Fideicommissum* in the *Roman* Law, a Fiduciary Bequest, because the Use of it was frequent by Dispositions in Terms of Intreaty, by which the Testator requested his Executor to restore either the whole Inheritance, or some particular Thing, to the Person whom he named, leaving it wholly to the Conscience of his Executor whether he would fulfil his Will, or not. These Fiduciary Bequests did at first depend on the Integrity of the Executors *b*; but afterwards they had the same Force and Efficacy as the other Dispositions of the Testators *c*: And the Use of them was very frequent, as well as that of Vulgar Substitutions. But the word Substitution, in the *Roman* Law, is more particularly applied to Vulgar Substitutions; and the Fiduciary Substitutions are hardly known there, except under the Name of *Fideicommissum*, or Fiduciary Bequest: for one could not substitute in this manner so as to make the Estate to pass from one Successor to another, unless by Expressions conceived in Terms of Intreaty, or others of the like nature; of which mention has been made in the fourth Section of Testaments, and not in Terms direct and imperative *d*, of which we have also spoke in the same place, and which it is not necessary to repeat here. It sufficeth to remark on this Subject, that by the *Roman* Law it was only Fathers that could substitute in this manner in direct Terms to their Children, who were under the Age required by Law for the making of a Testament, and were under their Father's Authority; which was done by that Substitution which is called Pupillary, of which we shall have occasion to speak hereafter: And Soldiers, who could moreover substitute in the same manner to their Children who were of Age sufficient to make a Will *e*, as also to other Executors besides their Children *f*. And these Substitutions had in these Cases the Effect of Fiduciary Bequests. But by our Usage, it is indifferent whether the Testator express himself in direct and imperative Terms, or in Terms of Intreaty; and in what manner soever a Substitution is conceived, which makes the Estate to pass from one Successor to another, it hath its Effect if the Intention of the Testator is fully explained. And these sorts of Dispositions are called either by the Name of Fiduciary Substitutions, because of the Origin which they had in the *Roman* Law by the Use of Fiduciary Bequests, or by the Name of Gradual Substitutions, because they make the Estate to pass to the substituted Persons one after another in several Degrees. And they are likewise called purely and simply Substitutions; so that in our common Usage the bare Word of Substitutions is understood of those of this last kind, because they are much more frequent than either the Vulgar or Pupillary Substitution; and that in what manner soever they be conceived, whether in Terms of Intreaty, or in Terms direct and imperative, they have, as we have just now said, the same Effect.

It is to be observed in relation to these Substitutions or Fiduciary Bequests, that they may be imposed not only on the Executor, if the Substitution be of the whole Inheritance, or of a part of it, or of a certain Land or Tenement that is left to him, but also on a Legatary, if the Testator intends that the Thing bequeathed should pass to another Successor, as shall be explained in its place *g*.

We see that there is this Difference between these Fiduciary Bequests and Vulgar Substitutions, that in these there is only one Successor who succeeds immediately to the Testator; for if he who is instituted Executor may and will succeed, the Substitution will be without effect: And if the Executor who is called in the first place do not succeed, the Person substituted will be the first Executor, who will succeed immediately to the Testator; and altho there had been several called and substituted,

b §. 1. *inst. de fideicom. hered.*

c *d.* §. 1. *inst. de fideicom. hered.*

d *l.* 7. *ff. de vulg. & pupill. subst.* §. *ult. inst. de pupill. subst.*

e *l.* 15. *ff. de vulg. & pupill. subst.* *l.* 6. *C. de testam. mil.*

f *l.* 41. *ff. de testam. milit.*

g *See the second Section of the third Title of this fifth Book.*

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tuted, the one in default of the others, yet the first to whom the Succession does accrue, excludes all the others, and the Substitution is annulled from the Moment that one of them has been Executor. But in the Fiduciary Bequests, he who is substituted succeeds after the Executor: And if there be several of them called successively, every one of them has the Right to succeed after the other; and the Goods which are subject to the Fiduciary Substitution pass from the one to the other by degrees, according as the Persons are called to the said Substitution. And seeing this sort of Substitution hath the Effect to preserve the Estates in the Families, the Usage of it is frequent in the Provinces of *France* which are governed by the written Law, not only in Families of Quality, but likewise among the inferior sort of People.

We must also take notice of another sort of Substitution which is likewise in Use in the Provinces of *France* which are governed by the written Law, which is called Pupillary Substitution, because it is made by a Father, who having a Child under the Age required for making a Will, and under his Authority, ordains, that if the said Child does not succeed as Executor to him, or if he does succeed, and happens to die before he arrives at the Age necessary for making a Will, the Person substituted should succeed in his place. Thus this Substitution implies the two others; for it hath these two Effects: The first of the Vulgar Substitution, which is to call the substituted Executor to the Succession of the Testator, in case his Son should not be his Executor: and the second of the Substitution which makes the Estate to pass from the one Degree to the other, seeing it makes the Estate to pass from the Person of the Son to that of the Substitute. And the *Roman* Law hath likewise given to this Pupillary Substitution a third Effect, which is to make not only the Goods of the Father's Succession to pass to him who is substituted Executor, but also the Goods of the Son to whom the Father has substituted, if it should happen that he had left other Goods besides those that came to him from his Father. Thus the Testament of the Father, which contains a Pupillary Substitution, is considered as containing two Testaments, that of the Father, and that of his Child; the Law permitting the Father who makes his own Testament, to make at the same time one for his Son, who is incapable of making a Will before he attains the Age of Puberty. Which is the Reason why this Substitution is annulled as soon as he to whom his Father hath substituted in this manner hath attained the Age of Puberty.

It is these several kinds of Substitutions that shall be the Subject-matter of the four Titles of this fifth Book: In the first of which we shall treat of the Vulgar Substitution; in the second, of the Pupillary; in the third, of Substitutions direct and fiduciary; and in the fourth, of a Right which is called the Trebellianick Portion, which is to Executors who are charged with a Substitution, the same thing as the Falcidian Portion is to Executors who are overburdened with Legacies.

TIT. I.

Of Vulgar Substitutions.

IN this Title we shall treat only of the Substitution that is purely Vulgar, and which is not joined to the Pupillary Substitution; and we reserve to the following Title that which relates to these two Substitutions when they are joined together.

[*This kind of Substitution, which is called Ordinary or Vulgar, is of no small Use with us in England; and we do therein, for the most part, follow the Precepts and Rules of the Civil Law. And it is nothing else but the adding of a Condition, which we commonly call Tail in the Case of Lands, namely, a Limitation of Heirs to whom we intend to have the Lands to descend from the Testator.* Cowell's Institutes of the Laws of England, Book 2. Tit. 15.]

SECT. I.

Of the Nature and Use of Vulgar Substitution.

The CONTENTS.

1. *Definition of Vulgar Substitution.*
2. *As soon as the Executor accepts, the Vulgar Substitution ceases.*
3. *One may make several Degrees of a Vulgar Substitution.*
4. *One may substitute either many to one, or one to many, and the Co-executors to one another.*
5. *One may substitute to a Legatary.*

I.

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I.

1. Definition of Vulgar Substitution.

VUlgar Substitution is an Institution of an Executor who is called in default of another, who either cannot or will not take upon him that Quality *a*.

a Lucius Titius hæres esto, si mihi Lucius Titius hæres non erit, tunc Seius hæres mihi esto. *l.* 1. §. 1. *ff. de vulg. & pup. subst.*

II.

2. As soon as the Executor accepts, the Vulgar Substitution ceases.

If the Person who is instituted Executor, and is called in the first place to succeed to the Testator, enters to the Succession, the Vulgar Substitution is annulled. For it ought not to take place, except in the Case where the first Executor does not succeed. Thus, the Right of the substituted Executor becomes useless from the Moment that the Person who is instituted Executor makes use of his Right *b*.

b This is a Consequence of the Definition of this Substitution.

III.

3. One may make several Degrees of a Vulgar Substitution.

One may substitute not only a second Executor in default of a first, but a third in default of a second, and likewise others in several Degrees *c*. And he is said to be instituted Executor who is called in the first place, and the others are the substituted Executors, one in default of the other, every one in his Degree *d*.

c Potest quis in testamento plures gradus hæredum facere, puta si ille hæres non erit, ille hæres esto & deinceps plures. *l.* 36. *ff. de vulg. & pup. subst.*

d Hæredes aut instituti dicuntur, aut substituti. Instituti primo gradu: substituti secundo, vel tertio. *l.* 1. *ff. de vulg. & pup. subst.*

Altho the Rule explained in this Article, which was of frequent Use in the Roman *Law for the Reason remarked in the Preamble of this Book, may seem not to agree with our Usage, it being neither necessary nor usual with us to make such a Provision of Executors; yet it might happen that a Testator who should chance to have for his Next of Kin only Strangers that were not naturaliz'd, might institute them Executors in this manner, that the Succession might go to which soever of them should happen to be naturalized, and capable of succeeding him at the time of his Death.*

IV.

4. One may substitute either many to one, or one to many, and the Co-executors to one another.

As one may institute several Executors, so likewise one may substitute to them in one or more Degrees, and differently, naming either to every one of them a particular Substitute, or one only Substitute to them all, or many Substitutes to one, and diversify the Number of the Degrees, and of the Persons of the Substitues. And one may also substitute the Co-executors reciprocally to one another *e*.

e Et vel plures in unius locum possunt institui, vel unus in plurium, vel singulis singuli, vel invicem ipsi qui hæredes instituti sunt. *l.* 36. §. 1. *ff. de vulg. & pup. subst.*

The same Remark may be made on this Article which has been made on the preceding, that it is a difficult matter in our Usage for one to have occasion for making such like Dispositions.

V.

5. One may substitute to a Legatary.

One may substitute not only to an Executor, but also to a Legatary, so as that if he either cannot or will not acquire the Legacy, the same may go to him whom the Testator shall have substituted in his place *f*.

f Ut hæredibus substitui potest, ita etiam legatariis. *l.* 50. *ff. de legat.* 2.

SECT. II.

Rules peculiar to some Cases of Vulgar Substitutions.

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1. Among Co-executors mutually substituted to one another, the Shares of

IF a Testator, having instituted several Executors in unequal Portions or Shares of the Inheritance, substitutes them reciprocally to one another, every one of the Substitutes, if the Case does happen, will have such part in

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the Substitution are the same with those of the Institution.

in the Substitution as is proportionable to the Share which he had in the Institution, unless the Testator regulates it otherwise. Thus, for example, if an Executor is instituted for a Moiety of the Inheritance, another for a third, and another for a sixth Part, and that the Executor who was to have the Moiety does not succeed, he who was to have the third, having the double of what he who had only a sixth Part was to have, this last Executor will have only a third Part of the Inheritance, and the other will have the two Thirds *a*.

a Si plures sint instituti ex diversis partibus, & omnes invicem substituti: plerumque credendum & ex iisdem partibus substitutos, ex quibus instituti sint: ut si forte unus ex uncia, secundus ex octo, tertius ex quadrante sit institutus: repudiante tertio in novem partes dividatur quadrans, feratque octo partes qui ex besse institutus fuerat; unam partem qui ex uncia scriptus est, nisi forte alia mens fuerit testatoris, quod vix credendum est nisi evidenter fuerit expressum. *l. 24. ff. de vulg. & pup. subst.*

Partes eædem ad substitutos pertinent, quas in ipsius patrisfamiliæ habuerunt hæreditate. *l. 8. in f. eod. l. 5. eod. l. 1. C. de impub. & al. subst.*

II.

2. The reciprocal Substitution among Co-executors is restrained to the Survivors, when the Case happens.

If in the Case of several Executors instituted, and reciprocally substituted to one another, some of them renounce the Inheritance, they will by that means be excluded from the Substitution; and if the Case of the Substitution does happen, it will be only for the Benefit of those who shall have accepted the Executorship. But if it should happen that in the Case of several Executors substituted to one another, some of them having accepted the Succession, one of the Number dies before that another, who renounces the Succession, declares his Intention so to do, his Renunciation, which would make way for the Substitution for the Share of the Inheritance that he was to have, would make it go only to the surviving Executors. And those who should happen to be dead before the said Renunciation, having had no part in the Substitution, which was not open till after their Death, would transmit nothing thereof to their Heirs or Executors *b*.

b Qui plures hæredes instituit, ita scripsit, *eosque omnes invicem substituo*: post aditam a quibusdam ex his hæreditatem, uno eorum defuncto, si conditio substitutionis extitit alio hærede partem suam repudiante, ad superstites tota portio pertinebit. Quoniam invicem in omnem causam singuli substituti videbuntur. Ubi enim quis hæredes instituit. Et ita scribit, *eosque invicem substituo*: hi substitui videbuntur qui hæredes extiterunt. *l. 23. ff. de vulg. & pup.*

Paulus respondit, si omnes instituti hæredes omnibus invicem substituti essent, ejus portionem qui quibusdam defunctis postea portionem suam repudiavit, ad eum solum qui eo tempore supervixit ex substitutione pertinere. *l. 45. §. 1. eod.*

Sed si plures ita sint substituti, *quisquis mihi ex suprascriptis hæres erit*: deinde quidam ex illis posteaquam hæredes extiterint patri, obierunt: soli superstites ex substitutione hæredes existent pro rata partium, ex quibus instituti sint. Nec quicquam valebit ex persona defunctorum. *l. 10. eod.*

We have put down no Example in the Article; it being easy for every Person to frame one to himself, and the Rule may be easily understood without any Example.

III.

3. He who is substituted to the Substitute, is substituted likewise to him who is instituted.

If a Testator institutes two Executors in the first Degree, and substitutes them reciprocally to one another, or only one of them to the other, and that he substitutes a third Person to the Co-executor who is substituted; the Substitution of this third Person will have this Effect, That he will be substituted for the whole, if the Case happens that neither of the two Co-executors succeeds *c*.

c Si Titius cohæredi suo substitutus fuerit, deinde ei Sempronius: verius puto, in utramque partem Sempronium substitutum esse. *l. 27. ff. de vulg. & pup.* See the sixth Article of the ninth Section of Testaments.

IV.

4. The Institution of one of two which soever of them shall survive, implies the Substitution of the Survivor to the Person who dies first.

An Institution of two Executors may be conceived in Terms which imply a reciprocal Substitution to one another, altho the Testator have not expressed the Substitution, nor made any Distinction of first or second Degree; as if he had named two of his Friends, calling to his Inheritance which soever of the two should survive him. For as both the one and the other would succeed if they should happen to be both alive at the time of the Death of this Testator; so the Death of one of them leaves the Succession entire to the other, in the same manner as if he had been expresly substituted. And it would be the same thing between two Legataries, called to a Legacy by a Disposition of the like nature *d*.

d Titius & Seius, uterve eorum vivet, hæres mihi esto. Existimo, si uterque vivat, ambo hæredes esse, altero mortuo eum qui supererit ex asse hæredem fore: quia tacita substitutio inesse videtur institutioni. Idque & in legato eodem modo relicto Senatus censuit. *l. 24, 25, & 26. ff. de hæred. inst.*

V.

5. If the Substitute dies before the Case of the Substitution, he does not

Since the substituted Executor has no Right to the Inheritance, except in the Case where he who is instituted in the first place does not succeed; if it therefore so falls out that the Substitute dies before

transmit his Right to his Heir or Executor.

before the first Executor has declared his mind, whether he will accept the Executorship, or refuse it, he dies without any Right to the Inheritance, and consequently transmits no Right to his Heirs or Executors *e*.

e Toties videtur hæres institutus, etiam in causa substitutionis, adiisse quoties adquirere sibi possit. Nam si mortuus esset, ad hæredem non transferret substitutionem. *l.* 81. *ff. de acq. vel omitt. hæred.*

VI.

6. He who is substituted to one of the Co-executors, is preferr'd before the Co-executor who has the Right of Survivorship.

If in the Case of two or more Executors, there were one of them to whom the Testator had substituted another Person, and he who had a Substitute died without succeeding, his Right would go to the Substitute. For altho the Co-executors have the Right of Accretion or Survivorship, yet this Right gives place to the Substitution, which, by the Choice of the Testator, prefers before them the Person who is substituted *f*.

f Si duo sint hæredes instituti, primus & secundus, secundo tertius substitutus: omittente secundo bonorum possessionem, tertius succedit. Quod si tertius noluerit hæreditatem adire, vel bonorum possessionem accipere: recedit bonorum possessio ad primum: nec erit (ei) necesse petere bonorum possessionem, sed ipso jure ei adcrescet. Hæredi enim scripto, sicut portio hæreditatis ita & bonorum possessio adcrescit. *l.* 2. §. 8. *ff. de bonor. poss. sec. tab.*

VII.

7. Among Co-executors, he who has accepted one Share of the Inheritance, cannot renounce the Shares which fall void.

If several Executors being substituted one to another, some of them accept their Portions of the Inheritance, they will have also the Shares of those who shall renounce; and they cannot refuse them *g*. For the Inheritance cannot be divided, and it passes whole and entire to whosoever has any Portion of it, if he be left all alone *h*.

g Testamento jure facto, multis institutis hæredibus, & invicem substitutis: adeuntibus suam portionem etiam invitis cohæredum repudiantium accrescit portio. *l.* 6. *C. de impub. & al. substit.*

h See the twelfth Article of the first Section of Heirs and Executors in general, and the sixth Article of the ninth Section of Testaments.

VIII.

8. An Executor substituted to himself.

It might so happen that an Executor might be substituted to himself, if in case of his not being able to succeed by a first Institution, he were called to the Succession by a second Institution, which might have effect. Thus, for example, if a Testator had instituted an Executor, in case he were of Age at the time of the Testator's Death, and that he had added, that if this Institution should be without effect because the Condition thereof was not accomplished; the same Executor should succeed to him, provided he were at that time free from the Paternal Authority; this Executor might succeed by this second Institution, if the Condition of the first Institution failing it should happen that at time he was free from the Paternal Authority, altho he were a Minor *i*.

i In plerisque quæritur, an ipse sibi substitui possit: & respondetur, causa institutionis mutata substitui posse. *l. ult.* §. 1. *ff. de vulg. & pup. subst.*

Si sub conditione quis hæres scriptus sit, pure autem substitutus, est causa immutatur. *d.* §.

¶ It was in doubt whether a Decision, which seems to be of so little Use as that which is explained in this Article, ought to be placed among the others; seeing it is in a Case which seems hardly possible to fall out, in the manner as it is explained in the Text cited on this Article. For it is supposed in this Text, that a Testator having instituted an Executor under a Condition, adds afterwards, that he substitutes him purely and simply without a Condition. It would seem that such a Disposition could be nothing else than the Effect of some strange fantastical Humour. For it would be more simple and more natural not to impose on the Executor a Condition with which he dispenses at the same time, than to impose this Condition by a first Clause, and to discharge him of it by a second. This Consideration has induced us to put down in the Article a Case that is different, and that gives the same View as was intended to be given in this Text of a Case where a Person is substituted to himself, that is to say, of a Case where one is called to the Inheritance in two manners, one of which failing, the other may have effect; which may give an Idea of the Distinctions which ought to be made in certain Cases of different Rights which one may have to one and the same thing by divers Views, or by divers Titles, which it may be necessary to distinguish. And it is because of the Use of these sorts of Distinctions that we resolved to add this Article to the others.

It may be remarked on these sorts of Cases, where a Person is, as it were, substituted to himself, that an Institution of this kind implies, as it were, two

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two alternative Conditions, that in default of the first Condition the second may make the Institution to have effect.

TITLE II.

Of Pupillary Substitution.

IT is not necessary to repeat here what has been said of Pupillary Substitution in the Preamble of this fifth Book.

If any one should find fault that we have not inserted in this Title the Rule of the *Roman* Law, which says that the Pupillary Substitution transmits to the Substitute all the Goods of the Child to whom he is substituted, even to the exclusion of the Mother of the said Child from her Legitime or Legal Portion of the same *a*; he may see what has been said on this Subject in the Treatise of Laws, *chap.* 11. *n.* 24. and the Remark on the eleventh Article of the first Section of this Title.

We were of opinion, for the reasons there explained, that the Hardship of that Law was inconsistent with Equity, which is the Spirit of ours; seeing in order to favour the Liberty of Testaments, it gives, in the Case of this Substitution, such a Latitude to them as makes the first Sentiments of the Law of Nature give place to a mere Nicety. For it is agreeable to the Law of Nature, that the Mother who survives her Son, should have a Share of his Goods; and it is inhuman to strip her of them in order to make them go to a Stranger, and that upon no other ground but because it is not the Child himself who does this injustice to his Mother, but that it is his Father, whom the Law hath impower'd to make the Testament of his Child, who is not of Age sufficient to make one for himself: as if the Power of making the Testament of a Child implied a Right to make it such as an Enemy to the Mother of the said Child would make it, and that the Father making a Testament for his Son, might make for him such a Disposition as would have been reckoned inhuman had it been made by the Son himself. Justice may surely be administred without the help of such Rules. However, these sorts of Subtleties were accounted so good Reasons in the Spirit of the *Roman* Law, that they were called *benign Interpretations*; an Example whereof we see in another Case, and against a Mother. It is in the Case likewise of a Pupillary Substitution made by a Father in a Codicil: The Person who was substituted demanded the Goods in opposition to the Mother, who alledged that the Substitution was null, and it was so in Fact; for the Father could not substitute by a Codicil. But the *benign Interpretation* was against the Mother; and this Disposition which could not be valid as a Substitution in a Codicil, was confirmed as a Fiduciary Bequest *b*, by a Nicety which has been explained in the fourth Section of Testaments. One might imagine in these two Cases, that it was as just to prefer in them the Mother to the Substitute, and the Law of Nature to Niceties, as in another Case where the Authors of those very Niceties made them give way to this Natural Law, which ought to give the preference to the Mother before the Substitute. It was in a Case where a Testator leaving his Wife big with child, had instituted her his Executrix for one Moiety of his Estate, and his posthumous Child for the other Moiety; and appointed, in case the posthumous Child should not be born alive, that another Person whom he named should be his Executor. The posthumous Child was born, and died before he was of Age sufficient to make a Will: this Event called the said Substitute by the Terms of the Substitution; but because the Father had instituted his Wife together with this Child, the same Lawyer who had decided that the Pupillary Substitution excludes the Mother from her Legitime or Legal Portion, determined in this Case that the Father having instituted the Mother jointly with his Child, it was to be presumed that it was much more his Intention that the Mother should succeed to the Child. And *Justinian* adds to this Reason, that the Mother having survived her Child, the Substitution ought not to take place, and that the Mother ought to exclude the Substitute *c*. This Reason might very

a *l.* 8. §. 5. *ff. de inoff. testam.*

b *Benigna interpretatione* placet, ut mater quæ ab intestato pupillo successit, substitutis fideicommisso obligetur. *l.* 76. *ff. ad Senat. Trebell.*

c Cum quidam prægnantem habens conjugem, scripsit hæredem ipsam quidem suam uxorem ex parte, ventrem vero ex alia parte, & adjecit, si non postumus natus fuerit, alium sibi hæredem esse: postumus autem natus impubes decessit: dubitabatur quid juris sit, tam Ulpiano quam Papiniano viris disertissimis voluntatis esse quæstionem scribentibus, cum opinabatur Papinianus eundem testatorem voluisse postumo nato, & impubere defuncto, matrem magis

very well have induced them to decide the Case in question in the same manner; and the same Justice required not only that the Mother should not be deprived of her Legitime or Legal Portion, but that she should even be prefer'd for the whole Succession to the Substitute, upon this presumption, which is so natural, that the Father who substituted a Stranger to his Son that was an Infant, presupposed that the Mother would die first, and that if he had foreseen that she would have outlived her Son, he would not have made such a Substitution.

gis ad ejus venire successionem, quam substitutum. Si enim suæ substantiæ partem uxori dereliquit, multo magis & luctuosam hæreditatem ad matrem venire curavit. Nos itaque in hac specie Papiniani dubitationem resecantes, substitutionem quidem in hujusmodi casu ubi postumus natus adhuc impubes viva matre decesserit, respuendam esse censemus. Tunc autem tantummodo substitutionem admittimus, cum postumus minime editus fuerit, vel post ejus partum mater prior decesserit. *l. ult. C. de instit. & substit.*

[*Pupillary Substitution, in so far as it agrees with the Ordinary or Vulgar Substitution, is used in* England; *so that a Testator may make a Pupillary Substitution either to his own Children or to Strangers who are under Age, with respect to the Goods which he himself leaves to them. But that part of the Pupillary Substitution, whereby a Father was impower'd under the* Roman *Law to make a Testament for his Son, and thereby to dispose not only of the Goods which he left to his Son, but of whatever Effects the Son had belonging to him any other manner of way, in case the Son should die before he was of Age sufficient to make a Will for himself, is not received in* England, *our Law not allowing so large an Extent to the Paternal Authority, as to enable Fathers to make Testaments for their Children under Age.* See Cowel's Institutes, Book 2. Tit. 16.]

SECT. I.

Of the Nature and Use of Pupillary Substitution, and of those Substitutions which are commonly called Exemplary, Compendious, and Reciprocal.

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3. *The Pupillary Substitution comprehends the Vulgar.*
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8. *Substitution to a Child in a State of Madness, which is called Exemplary.*
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12. *Compendious Substitution.*
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14. *Difference of the Effects of these three Substitutions.*
15. *Reciprocal Substitution.*

I.

Pupillary Substitution is a Disposition made by a Father, who having a Child under Age, and subject to his Authority, institutes him his Executor, and substitutes to him another Person to succeed to him in default of the said Child, in case he should not be Executor to his Father; or if he were to succeed also to the said Child, in case he should die before he were of Age sufficient to make a Will *a*.

1. Definition of Pupillary Substitution.

a Liberis suis impuberibus, quos in potestate quis habet, non solum ita ut supra diximus, substituere potest: id est ut, si ei hæredes non extiterint, alius sit ei hæres: sed eo amplius ut si hæredes ei extiterint, & adhuc impuberes mortui fuerint, sit eis aliquis hæres. *Inst. de pupill. subst.*

See the Text quoted on the following Article.

II.

One may substitute in this manner not only to a Child who is already born, but also to a posthumous Child, who should be under the power of the Testator if he were born *b*.

2. One may substitute to a posthumous Child.

b Quod sic erit accipiendum si sint in potestate, cæterum emancipatis non possumus, postumis plane possumus. *l. 2. ff. de vulg. & pupill. subst.*

III.

The Pupillary Substitution implies two different Substitutions, and for that reason it is said to be twofold. The first calls the Substitute in case the Child does not succeed to his Father, which is the Case of the Vulgar Substitution. And the second calls the Substitute in case that the Child having succeeded to his Father, he chances to die before he attains the Age of Puberty; which is the Case like to a fiduciary Bequest, which makes the Succession to pass from one Executor to the other. And when a Father makes a Pupillary Substitution, it

3. The Pupillary Substitution comprehends the Vulgar.

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it comprehends both the one and the other Case *c*.

c Hæredis substitutio duplex est, aut simplex, veluti; *Lucius Titius hæres esto. Si mihi Lucius Titius hæres non erit, tunc Seius hæres (mihi) esto; si hæres non erit, sive erit & intra pubertatem decesserit, tunc Gaius Seius mihi hæres esto.* l. 1. §. 1. ff. de vulg. & pup.

Jam hoc jure utimur ex divi Marci & Veri constitutione, *ut cum pater impuberi filio in alterum casum substituisset, in utrumque casum substituisse intelligatur:* sive filius hæres non extiterit, sive extiterit & impubes decesserit. *l.* 4. *eod.*

¶ The Rule explained in this Article is not founded on the Nature of these two sorts of Substitutions; for their Characters and their Use are wholly different; and there is no essential Connexion between the one and the other. But what occasioned in the *Roman* Law that the Expression of the one comprehended both, as is said in the second of these Texts, was the frequent Use of these two sorts of Substitutions that were joined together. And the Constitution of those Emperors, of which mention was made in the second Text, and which was in all probability a Consequence of that Usage, established the same into a fixed Rule.

It may be remarked on this Article, that it is not there said that the Expression of one of these Substitutions comprehends likewise the other, as it is said in the second of the Texts cited on this Article, but only that the Pupillary Substitution comprehends both. For if, for Example, a Testator having instituted his Son that was under fourteen Years of Age, had added that in case the said Child should die before him, such a one should be his Heir or Executor, it would seem that according to Equity one might question whether this Substitution ought to have the Effect of calling this Substitute, in case that the said Child having outlived and succeeded his Father, had died before he arrived at the Age of Puberty, and whether it would not be a slavish Observance of the Niceties of the *Roman* Law, if we should give to the said Substitution this Effect in the like Case. For this Testator having clearly explained himself as to the Case where the Child should die before him, his Expression would seem to have no other Extent than to that single Case which he had expressed, especially if we suppose, as it is natural to suppose almost of all Testators, that he who made such a Disposition was ignorant of the Connexion which the *Roman* Law made between the Vulgar Substitution and the Pupillary. And we see even in a Law, that altho the Vulgar Substitution to a Son under Age comprehends the Pupillary; yet that is to be understood only of the Cases where it does not appear that the Intention of the Testator is contrary. *Si modo non contrariam defuncti voluntatem extitisse probetur* *. But if a Testator had substituted after the Pupillary manner to his Son under Age, without explaining himself any other way, one might think that having made use of that indefinite Expression, his Intention was that it should be taken in the Sense which the Laws give it.

* *L.* 4. *c. de imp. & al. subst.*

IV.

4. The Pupillary Substitution comprehends the Goods of the Child.

Of these two Substitutions, the first, which is the same with the Vulgar, makes the Person who is substituted to be immediate Heir or Executor of the Father, if the Child does not succeed; and the second transmits to the Substitute, not only the Goods of the Father if the Child has succeeded to him, but also all the Goods that may accrue to the Child any other manner of way *d*.

d Quo casu si quidem non extiterit hæres filius, tunc substitutus patri fit hæres: si vero extiterit hæres filius, & ante pubertatem decesserit, ipsi filio fit hæres substitutus. Nam moribus institutum est, ut cum ejus ætatis filii sint in qua ipsi sibi testamentum facere non possunt, parentes eis faciant. *Instit. de pupill. subst.*

¶ This Effect of the Pupillary Substitution, to transmit to the Substitute the proper Goods of the Child, was a Consequence of the Extent which was given by the *Roman* Law to the Paternal Authority, and of the Rule which, as is mentioned in the following Article, makes the Father's Testament to be considered as the Testament of the Son. It may be said of this Rule, that it derives its Authority only from a mere positive Law, which has no essential Connexion with natural Equity, and is even in some measure opposite to the Principle of Equity which calls the Heirs of Blood to Successions, and makes their Condition more favourable than that of the Testamentary Heirs, as hath been remarked in other Places *. So that it seems not to agree with the Spirit of the general Law of this Kingdom, which is far from countenancing these Niceties. And altho the same be observed in many Places, yet we have thought

* *See the eighth Article of the Preface to this Book.*

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thought proper to make this Reflection here for the use of other Provinces which are governed by the written Law, but where these sorts of Dispositions of the *Roman* Law are not observed in so literal a Sense, because of the mixture they have in the said Provinces of their own Customs and the written Law together. And I may venture to say that there would arise no manner of inconvenience from the Non-Observance of this Rule, which strips the Heirs of the Child who dies before he is of Age to make a Will, not only of the Goods which he had by Descent from his Father, but of the Child's own proper Goods, to make them go to the Substitute, and especially in the Cases where a Testator was ignorant of this Effect of a Substitution which he had made to his Son under Age, without any other view than that which he would have had in substituting to a Child that had attained the Age of Puberty.

V.

5. So that it contains two Testaments, that of the Father and that of the Child.

It follows from these Rules, that the Testament of the Father, who makes therein a Pupillary Substitution, disposes of two different Successions, and contains as it were two Testaments, that of the Father, who disposes thereby of all his own Goods, and that of the Child. For the Pupillary Substitution transmitting to the Substitute both the Goods which the Child has had of his Father, and likewise those which he has acquired otherwise, it has the same effect as an Institution would have which the said Child should have made in favour of this Substitute, if he had been capable of making a Testament *e*.

e Duo quodammodo sunt testamenta, alterum patris, alterum filii: tamquam si ipse filius hæredem sibi instituisset: aut certe unum testamentum est duarum causarum, id est, duarum hæreditatum. §. 2. *inst. de pup. subst. l.* 2. *ff. de vulg. & pup. subst.* See the Remark on the preceding Article.

VI.

6. One cannot substitute after the Pupillary manner to a Child that is not in his power.

If the Child under Age were out from under the Jurisdiction of his Father, as if he was emancipated, the Father could not substitute to him after the Pupillary manner *f*. For the Right of making such a Substitution is granted only to the Paternal Authority, and is not a bare Effect of the Incapacity of making a Testament, under which the Child labours who is not arrived at the Age of Puberty.

f See the Text cited on the second Article.

VII.

7. This Substitution ends when the Infant attains the Age of Puberty.

The Pupillary Substitution remains in suspence until the Infant has attained the Age of Puberty, or dies before he arrives at it. But as soon as he attains the Age of Puberty, this Substitution is annulled; so that altho he should die immediately after, even without making a Will, yet the Substitute would have no share in his Goods, nor in those of the Father *g*.

g Masculo igitur usque ad quatuordecim annos substitui potest, fœminæ usque ad duodecim annos: & si hoc tempus excesserint, substitutio evanescit. §. 8. *inst. de pupill. subst.*

VIII.

8. Substition to a Child in a State of Madness, which is called Exemplary.

Those who have Children or Grand-Children that are mad, may substitute to them as to Children under Age, altho they be of Age sufficient to make a Will. And it is this Substitution that is commonly called Exemplary, because it has been invented after the Example of the Pupillary, which it imitates in this, that Madness putting the Children into a Condition like to that of Children under Age, as to what relates to the Incapacity of disposing of their Estates, the Law gives to Fathers the Power of making a Will for them, and of disposing in favour of a Substitute, even of the Legitime or Child's part of their own Inheritance, which they are obliged to leave to those Children who are in a State of Madness, as well as to their other Children *h*.

h Humanitatis intuitu parentibus indulgemus, ut si filium, nepotem vel pronepotem cujuscumque sexus habeant, nec alia proles descendentium eis sit, iste tamen filius vel filia, nepos vel neptis, pronepos vel proneptis mente captus vel mente capta perpetuo sit: vel si duo vel plures isti fuerint, nullus vero eorum sapiat: liceat hisdem parentibus legitima portione ei vel eis relicta, quos voluerint his substituere: ut occasione hujusmodi substitutionis, ad exemplum pupillaris, querela nulla contra testamentum eorum oriatur. *l.* 9. *C. de imp. & al. subst.*

IX.

9. None are called to this Substitution besides the Children or Brothers of the Heir or Executor who is mad.

If those Children who are in a State of Madness had Children who did not labour under the same Infirmity, one could not substitute to them other Persons besides their own Children *i*. And if having no Children they had Brothers, the Substitution could not be made in

i Vel si alii descendentes ex hujusmodi mente capta persona sapientes sint, non liceat parenti qui vel quæ testatur, alios quam ex eo descendentes, unum, vel certos vel omnes substituere. *l.* 9. *C. de impl. & al. subst.*

favour

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favour of other Persons than those very Brothers, or some of them *l*.

l Sin vero etiam liberi testatori vel testatrici sint sapientes, ex his vero personis quæ mente captæ sunt, nullus descendat, ad fratres eorum unum, vel certos, vel omnes eandem fieri substitutionem oportet. *d. l. 9. in f.*

X.

10. If the Madness ceases, the Substitution is at an end.

If the Madness should chance to cease, this Substitution which had no other Foundation would cease also, even altho he to whom the Father had substituted in this manner had made no Testament, but by the bare effect of his Recovery of his Senses. For it would be justly presumed that not having been willing to make a Testament when he could, his Intention was to have no other Heirs but those of his Blood; and it could not be presumed that he had a mind to approve the Testament of his Father which preserved the Memory of his Madness. And much more would the Substitution be annulled, if he had made a Testament in a lucid Interval, altho his Madness did afterwards return upon him *m*.

m Ita tamen ut si postea resipuerit, [vel resipuerint] talis Substitutio cesset. *l. 9. C. de impub. & al. subst.* See the fourth Article of the second Section of Testaments.

XI.

11. A Mother and other Ascendants may make this sort of Substitution.

Seeing Substitutions to Children who are in a State of Madness, are not only a bare Effect of the Authority which the Paternal Power gives, but an Office of Humanity which Parents may exercise towards their Children; all the Ascendants, and even Mothers, may substitute in this manner *n*.

n Humanitatis intuitu parentibus indulgemus, *&c. l. 9. C. de impub. & aliis subst. This Word* parentibus *takes in the Father and the Mother; and these other Words of the same Law,* parenti qui vel quæ testatur, *comprehend expresly the Mother.*

We do not put down here among the Rules of these several sorts of Substitutions that of the Roman *Law, which we see in the forty third Law;* ff. de vulg. & pup. subst. *touching a Substitution, which one could make by Permission from the Prince, to a Child who was dumb. For these sorts of Permissions are not in use with us.*

¶ We have endeavour'd to distinguish and to explain in these eighth, ninth, tenth and eleventh Articles, all that there is in the ninth Law of the Code *de impub. & al. subst.* relating to this Exemplary Substitution, without touching on a Difficulty which has divided some Interpreters, and of which we shall take notice here. It is said in this Law, as it is put down in the Article, that all Ascendants, and even the Mother, may substitute to their Children which are in a State of Madness: And it does not appear that in this Law any Distinction is made between the Effect of such a Substitution made by a Mother, or other Ascendant, who have not under their power the Child to whom they substitute, and that which is made by a Father who has the said Child under his power. This has induced some Interpreters to be of opinion, that as the Substitution made by the Father hath its Effect in both the Cases explained in the third Article, that is to say, in the first if the Child does not succeed, and in the second, if having succeeded it dies before it arrives at the Age of Puberty; so likewise the Substitution of the Mother to her Child which is mad, ought also to have its Effect both in the one and the other of these two Cases. And this Opinion seems on one part to be founded on the Letter of the said Law, which permits all Ascendants, and even the Mother, to make this Substitution after the example of the Pupillary; and on the other part, because it was not necessary to grant them a Permission to make a Substitution in the first of these two Cases, which is a Vulgar Substitution permitted to every Body. So that this Law granting unto them without distinction, in the same manner as to a Father, leave to make this Exemplary Substitution, this Permission would be useless if it respected only the first Case. However, these Interpreters have been censured by another, who charges them with having invented of their own head this Permission for the second Case, to the Mother and to the Ascendants who have not the Child under their power. But we may say that if they have erred, it is the Law itself that has led them into the Error: And there would perhaps be as much reason to find fault with *Justinian*, or those who composed this Law of his, that they have not conceived it in such Terms as might distinguish the Substitution of the Mother from that of the Father, if it had been their Intention so to do; seeing this Distinction was very easy and very necessary to be made. We may add in favour of these Interpreters, that a certain Author has observed that he who has censured them on this occasion has been himself of their opinion in other Places *. But we may do them all that justice,

* *Fabrot. in §. 1. inst. de pup. subst.*

justice, to own that their Difference in opinion has been a natural Consequence enough of the little Exactness that we see in many of the Laws of *Justinian*. And it may be said of this Law in particular, that it would seem that according to the Views which those Persons ought to have had who were imployed to compose it, they have not clearly enough explained their Meaning therein. The Matter in question was, to give to Mothers, and other Ascendants, who have not their Children under their Jurisdiction, a new Power to substitute to their Children who were mad, and to whom even Fathers could not before this Law substitute in this second Case without the Permission of the Prince. So that in order to frame this Law, the Compilers thereof were to give to Fathers the Power of substituting to their Children in a State of Madness without this Permission from the Prince, and to regulate with respect to Mothers, and all other Ascendants, wherein should consist the new Power that was to be given them over and above that of the Substitution for the first Case, which they had already, as all other Persons have. Thus the Matter was to know, first whether this Power should not extend to the Substitution for the second Case as well as for the first. In the second place it was to be considered, whether by granting them this Power of substituting for the second Case, the said Power would comprehend not only the Goods which the Child should inherit of the Person who did substitute, but also the proper Goods of the Child, in the same manner as the Pupillary Substitution made by the Father did, and which served as an Example for the Substitution to Children in a State of Madness. And in a word, seeing this Substitution was permitted to the Mother, and to all the Ascendants, in imitation of the Pupillary Substitution; if it was not the Intention of the Compilers of the Law, that this Imitation should be intire, and that they had a mind to set bounds to it; it had been proper to have expressed them, and not to have left Obscurities and Ambiguities which divide the most able Interpreters.

XII.

12. Compendious Substitution.

As one single Expression comprehends two Substitutions, the Vulgar and the Pupillary, as has been mentioned in the third Article, so we may by one and same Expression add to these two a third sort of Substitution, which is the Fiduciary, of which we shall treat in the following Title. And it is this manner of Substituting that is called Compendious, the same being conceived in Terms which comprehend these three different sorts of Substitution; as if a Testator instituting his Son who is under fourteen Years of Age, substitutes to him another Person in case he should die before the Age of twenty five Years *o*. And these three Substitutions have their Effect, as shall be shewn in the Article which follows.

o Centurio filiis, *si intra quintum & vicesimum annum ætatis sine liberis vita decesserint*, directo substituit. Intra quatuordecim annos etiam propria bona filio substitutus jure communi capiet. Post eam autem ætatem, ex privilegio militum patris duntaxat, cum fructibus inventis in hæreditate. *l. 15. ff. de vulg. & pup. subst.*

Precibus tuis manifestius exprimere debueras, maritus quondam tuus miles defunctus, quem testamento facto hæredem communem filium vestrum instituisse proponis, & secundum hæredem scripsisse: utrumne in primum casum, an in secundum filio suo, quem habuit in potestate mortis tempore, si intra decimum quartum suæ ætatis annum, aut postea decesserit, substituerit. Nam non est incerti juris quod siquidem in patris militis positus potestate, primo tantum casu habuit substitutum, & patri hæres extitit: eo defuncto ad te omnimodo ejus pertineat successio. Si vero substitutio in secundum casum, vel expressa, vel *compendio*, non usque ad certam ætatem facta reperiatur, siquidem intra pubertatem decesserit, eos habeat hæredes, quos pater ei constituit, & adierint hæreditatem. Si vero post pubertatem (tunc) ejus te successionem obtinente, veluti ex causa fideicommissi bona, quæ cum moreretur, patris ejus fuerint, a te peti possunt. *l. 8. C. de impub. & al. subst.*

Altho these Laws speak only of a Compendious Substitution made by a Soldier in direct Terms, and that therefore the Compendious Substitution in the Sense of these Laws be properly a Military Substitution founded upon the Privilege of Soldiers, of which notice has been taken in the Preamble of the fifth Book, which impowered them to make a Substitution in direct Terms to their adult Children; yet we have nevertheless conceived the Rule in Terms which take in all Persons without distinction. For besides that according to our Usage all Persons may in their Dispositions make use of direct Terms or others, as has been remarked in the same Place, and in the Preamble of the fourth Section of Testaments, and that we ought only to consider in the Expressions of Testators the Intention which is explained by the Words they make use of, whatever they be; we give commonly the Name of Compendious Substitutions to such as comprehend the three sorts, whatever Terms they be conceived in; whether the Testator was a Soldier or not, and whether the Fiduciary Substitution were to determine after the Child had attained a certain Age, or that it ought to take place at what Age soever the Child should happen to die.

XIII.

13. Effect of the three Substitutions

Of these three Substitutions comprehended in the said Expression or Compendious Substitution, the first, which is

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stitutions in the Compendious one. is the Vulgar, hath its effect only in case that the Child be not Heir or Executor, and it ends as soon as he has succeeded to the Deceased. The second, which is the Pupillary, hath its effect only in case the Child dies before he arrives at the Age of Puberty, and it ends so soon as he attains that Age. And the third, which is the Fiduciary, begins only to have its use after that the Son being arrived at the Age of Puberty, dies within the time regulated by the said Substitution *p*.

p See the Texts cited on the foregoing Article.

XIV.

14. Difference of the Effects of these three Substitutions. We must observe this Difference between these three Substitutions, that the Vulgar Substitution transmits to the Substitute the Goods of the Testator, if his Son does not succeed to him; that by virtue of the Pupillary the Substitute acquires both the Goods of the Testator and those of his Son, if he has succeeded to him; and that the Fiduciary Substitution is limited to the Goods which the Son by succeeding to his Father inherited of him *q*: which is to be understood according to the Rules which shall be explained in the following Title.

q See the Texts cited on the twelfth Article, and the Remark on the fourth Article.

XV.

15. Reciprocal Substitution. That is called Reciprocal Substitution whereby two or more Heirs or Executors are substituted reciprocally to one another. Thus a Testator may substitute his Heirs or Executors one to another, either by a simple Vulgar Substitution, whether it be that he institutes his Children that are adult, or under Age, or other Persons; or by a Pupillary Substitution, if he institutes his Children who are under the Age of Puberty; or by a fiduciary Substitution, if he institutes two or more Heirs or Executors, whether they be his Children or others, to succeed to him, and ordains that their Shares of the Inheritance should go to those who are substituted, if the Cases of the Substitution fall out. And one may also make a reciprocal Substitution among Legatees *r*.

r Quod jus ad tertium quoque genus substitutionis tractum esse videtur. Nam si pater duos filios impuberes hæredes instituat, eosque invicem substituat, in utrumque casum reciprocam substitutionem factam videri Divus Pius constituit. *l.* 4. §. 1. *ff. de vulg. & pup. subst.*

Hæc verba, *Publius, Marcus, Gaius invicem substituti hæredes mihi sunto*, sic interpretanda sunt, ut breviter videretur testator tres instituisse hæredes, & invicem substituisse. *l.* 37. §. 1. *ff. de hæred. inst.*

Altho these Texts have not relation to the three kinds of Substitution mentioned in the twelfth Article, but only to the Vulgar and the Pupillary, yet nothing can hinder a Testator from making a reciprocal Fiduciary Bequest among his testamentary Heirs or Legatees. But seeing every reciprocal Substitution is only the same with respect to an Executor or Legatee as with respect to other Persons, and that with respect to every Person it is at least of one of the three kinds, the reciprocal Substitution is not so much a kind of Substitution distinguished from the others, as a manner proper to render common to two or more Substitutes the same Substitution, or Substitutions if there be more than one.

SECT. II.

Particular Rules concerning some Cases of Pupillary Substitution.

The CONTENTS.

1. *He who is substituted to an Infant cannot accept one Succession without the other.*
2. *Not even altho he were Coheir or Coexecutor with the Infant.*
3. *The reciprocal Substitution between two Infants comprehends both the Cases.*
4. *The reciprocal Substitution between an Infant under the Age of Puberty, and an adult Person, is only Vulgar.*
5. *He who is substituted to an Infant under the Age of Puberty, and to another Executor, is substituted to both only in the Case of the Vulgar Substitution.*
6. *He who is substituted to two Infants under the Age of Puberty, succeeds only to him who dies last.*
7. *He who is substituted to him who dies last, succeeds to both if they die together.*
8. *The Vulgar Substitution to an Infant under the Age of Puberty, is not ended by his Entry to the Inheritance, if he renounces afterwards.*

I.

1. He who is substituted to an Infant cannot accept one Succession without the other. If in the Case of a Pupillary Substitution, the Son who is under the Age of Puberty having succeeded to his Father, happens to die before he attains the Age of Puberty, leaving behind him other Goods besides those of the Succession of his Father, he who is substituted to the Son cannot divide his Right, and accept one of the two Successions, and renounce the other; but he must either accept both together, or renounce both the one and the other. For the Testator's Intention was, that he should succeed both to his Son and to him, and he has made only one Succession of the two. And altho they be in

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in effect two Successions, yet the Testament being the sole Title both for the one and the other, the Substitute, who cannot divide his Title, cannot likewise take one of the Successions without taking also the other *a*.

a Filio impuberi hærede ex asse instituto substitutus quis est. Extitit patri filius hæres: an possit substitutus separare hæreditates, ut filii habeat, patris non habeat? Non potest: sed aut utriusque debet hæreditatem habere, aut neutrius. Juncta enim hæreditas cæpit esse. *l.* 10. §. 2. *ff. de vulg. & pup. subst.*

Placuit etenim nobis sive in institutione, sive in pupillari substitutione, ut vel omnia admittantur, vel omnia repudientur. *l.* 20. *C. de jur. delib.* See the fourth Article of the first Section, and the Remark that is there made on it.

II.

2. Not even altho he were Coheir or Coexecutor with the Infant.

If he who is substituted to an Infant was likewise instituted Heir or Executor with him for some Portion of the Inheritance, and that both the one and the other had entred to the Succession; the Case of the Pupillary Substitution happening afterwards by the Death of the Son who died under the Age of Puberty, the Substitute could not renounce the Portion of the Inheritance of the Father which had been acquired by the said Son, and which the Substitution would transmit to him *b*.

b Similique modo dubitabatur, si impuberem quis filium suum hæredem ex parte instituit, & quemdam extraneum in aliam partem, quem pupillariter substituit: & postquam testator decessit, pupillus quidem patri (ejus) hæres extitit, extraneus autem hæreditatem adiit: & postea adhuc in prima ætate pupillus constitutus ab hac luce subtractus est, & pupillaris substitutio locum sibi vindicavit: cumque substitutus eandem partem admittere noluit, quæsitum est, si potest jam hæres ex principali testamento factus, pupillarum substitutionem repudiare..... Placuit etenim nobis sive in institutione, sive in pupillari substitutione, ut vel omnia admittantur, vel omnia repudientur. *l.* 20. *C. de jure delib.*

III.

3. The reciprocal Substitution between two Infants comprehends both the Cases.

If a Father who had two infant Children, both under the Age of Puberty, substitutes them one to another by a reciprocal Substitution, without specifying either the Case of Vulgar Substitution, or that of the Pupillary, this Substitution would comprehend both *c*.

c Quod jus ad tertium quoque genus substitutionis tractum esse videtur. Nam si pater duos filios impuberes hæredes instituat, eosque invicem substituat: in utrumque casum reciprocam substitutionem factam videri Divus Pius constituit. *l.* 4. §. 1. *ff. de vulg. & pup. subst.*

IV.

4. The reciprocal Substitution between an Infant under the Age of Puberty, and an adult Person, is only Vulgar.

If the Reciprocal Substitution was made by a Father between two Children, one of whom was past the Age of Puberty, and the other under it, it would be limited to the Case of the Vulgar Substitution; for there would be only this Case common to the two Brothers. And seeing the Pupillary Substitution could not take place with respect to the Succession of him who should be adult, and that their Condition ought to be equal, the Pupillary Substitution, which is fruitless for the one, would likewise be so for the other *d*; unless it were that the Testator had distinguished them by substituting the adult Person to his infant Brother, who was under the Age of Puberty, for both the Cases, and the infant Brother to the adult Brother for the first Case, or by expressing otherways the Intention which he might have therein *e*.

d Sed si alter pubes, alter impubes hoc communi verbo, *eosque invicem substituo*, sibi fuerint substituti: in vulgarem tantummodo casum factam videri substitutionem Severus & Antoninus constituit. Incongruens enim videbatur ut in altero duplex esset substitutio, in altero sola vulgaris. *l.* 4. §. 2. *ff. de vulg. & pup. subst.*

e Hoc itaque casu singulis separatim pater substituere debebit: ut si pubes hæres non extiterit, impubes ei substituatur: si autem impubes hæres extiterit, & intra pubertatem decesserit, pubes frater in portionem cohæredis substituatur. Quo casu in utrumque eventum substitutus videbitur: ne, si singulari modo impuberi quoque substituat, voluntatis quæstionem relinquat, utrum de una vulgari tantummodo substitutione in utriusque persona sensisse intelligatur. Ita enim in altero utraque substitutio intelligitur; si voluntas parentis non refragetur: vel certe evitandæ quæstionis gratia specialiter in utrumque casum impuberi substituat fratrem: *sive hæres non erit, sive erit, & intra pubertatis annos decesserit.* d. §.

V.

5. He who is substituted to an Infant under the Age of Puberty, and to another Executor, is substituted to both only in the Case of the Vulgar Substitution.

If a Testator instituting another Executor with his infant Son, who is under the Age of Puberty, such as his Relict, who is Mother to his Son, substitutes to both of them another Executor, in case it should happen that neither the one nor the other should succeed to him; this Substitute could not pretend that the said Substitution were Pupillary with regard to the Son: For seeing it could not with respect to the Mother have any other Effect than that of a Vulgar Substitution, and it being only the same with respect to both, it would be only Vulgar with regard to the Son *f*.

f Quamvis placuerit substitutionem impuberi qui in potestate testatoris fuerit a parente factam ita, *si hæres non erit*, porrigi ad eum casum, quo postea quam hæres extitit, impubes decessit, si modo non contrariam defuncti voluntatem extitisse probetur: cum tamen proponas substitutionem ita factam esse, si

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si mihi Firmianus filius & Ælia uxor mea (quod abominor) heredes non erunt, in locum eorum Publius Firmianus hæres esto: Manifestum est, in eum casum factam substitutionem quo utrique hæredum substitui potuit. *l. 4. C. de impub. & al. subst.*

We must not look upon the Rule explained in this Article to be an Exception to that which has been explained in the third Article of the first Section: For that of the said third Article is naturally confined to the Case of a Disposition which substitutes only to an Heir or Executor who is under the Age of Puberty, and does not extend to a Substitution which would call another Heir or Executor in conjunction with him who is under the Age of Puberty. Thus the conjunction of another Heir or Executor with one who is under the Age of Puberty, makes that the Substitution, which is only one and the same with respect to both, and is only Vulgar with regard to the other Heir or Executor, cannot be Pupillary with respect to him who is under the Age of Puberty.

VI.

6. He who is substituted to two Infants under the Age of Puberty, succeeds only to him who dies last.

If a Father of two Children, who are under the Age of Puberty, having instituted them his Executors, substitutes to them another Person, in case that both the one and the other should die before they attain the Age of Puberty; this Substitution will not have its Effect, except in the Case that they both die under the Age of Puberty; and the Substitute will have no share in the Succession of him that dies first. For the Intention of the Father has been, that each of his Children should succeed to the other, and that the Substitute should not be called to the Succession, but in the Case where the two Brothers should chance to die before they attained the Age of Puberty *g*.

g Cum quidam, duobus impuberibus filiis suis hæredibus institutis, adjecit, si uterque impubes decesserit, illum sibi hæredem esse, dubitabatur apud antiquos legum auctores, utrumne tunc voluerit substitutum admitti, cum uterque filius ejus in prima ætate decesserit: an alterutro decedente, illico substitutum in ejus partem succedere. (Et) placuit Sabino, substitutionem tunc locum habere cum uterque decesserit. Cogitasse enim patrem primo (filio) decedente, fratrem suum in ejus portionem succedere. Nos ejusdem Sabini veriorem sententiam existimantes, non aliter substitutionem admittendam esse censemus, nisi uterque eorum in prima ætate decesserit. *l. 10. C. de impub. & al. Subst.*

VII.

7. He who is substituted to him who dies last, succeeds to both, if they die together.

If in a like Case of two infant Children, under the Age of Puberty, the Testator had substituted another Person to such of the two as should die last; and that they both happened to die together, as in a Fire, or in a Shipwreck, so that it could not be certainly known which of the two died last, or that, in reality, they both died at the same instant; this Substitute would succeed both to the one and to the other. For besides that we may look upon him to have died last whom the other did not survive, the Intention of the Father, in calling this Substitute to the Succession of him who should die last, and who ought to succeed to the other, was that the two Successions should go to him *h*.

h Ex duobus impuberibus ei, qui supremus moreretur, hæredem substituit. Si simul morerentur, utrique hæredem esse, respondit: quia supremus, non is demum qui post aliquem, sed etiam post quem nemo sit, intelligatur. *l. 34. ff. de vulg. & pup. subst. l. 11. ff. de bon. poss. sec. tab.*

Qui duos impuberes filios habebat ei, qui supremus moritur, Titium substituit. Duo impuberes simul in nave perierunt. Quæsitum est an substituto, & cujus hæreditas deferatur. Dixi, si ordine vita decessissent, priori mortuo frater abintestato hæres erit; posteriori substitutus: in ea tamen hæreditate etiam ante defuncti filii habebit hæreditatem: in proposita autem quæstione, ubi simul perierunt: quia cum neutri frater superstes fuit, quasi utrique ultimi decessisse (sibi) videantur, an vero neutri, quia comparatio posterioris decedentis ex facto prioris mortui sumitur? Sed superior sententia magis admittenda est, ut utrique hæres sit, nam & qui unicum filium habet, si supremum morienti substituit, non videtur inutiliter substituisse. Et proximus adgnatus intelligitur etiam, qui solus est, quique neminem antecedit. Et hic utrique, quia neutri eorum alter superstes fuit, ultimi primique obierunt. *l. 9. ff. de reb. dub.*

See the eighteenth Article of the first Section of the following Title, and the Remark on the twelfth Article of the second Section, How Children succeed.

VIII.

8. The Vulgar Substitution to an Infant under the Age of Puberty, is not ended by his Entry to the Inheritance, if he renounces afterwards.

If a Son under the Age of fourteen Years, to whom his Father had substituted another Person, having enter'd to the Succession, does afterwards renounce it, either he himself by his own Act, or his Tutor for him, the Vulgar Substitution will have its effect. For altho the Son having once taken upon him the Quality of Executor, this Substitution seems to have ceased, yet his Renunciation of the Inheritance puts the Things in the same State and Condition as if he had renounced from the time of his Father's Death *i*.

i Ex contractu paterno actum est cum pupilla tutore auctore: & condemnata est, postea tutores abstinuerunt eam bonis paternis, & ita bona defuncti ad substitutum, vel ad cohæredes pervenerunt, &c. *l. 44. ff. de re judic.*

¶ Altho it be a difficult thing for this Case to fall out, that a Substitute should be willing to accept of a Succession which the Son refuses, yet it is not altogether impossible: And besides, the Rule shews that the Right of the Substitute, which seemed to be extinguished by the Infant's entring to the Inheritance, is not so in reality, and is only in suspence, to revive again in case

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case the Son should happen to renounce the Inheritance; seeing this Case opens the way for the Vulgar Substitution. Thus this Rule seems to decide in express terms a Question which some Interpreters say is one of the most difficult, that is, whether the Substitution revives, when the Infant, who is under the Age of Puberty, having accepted the Succession, gets himself relieved from the said Act, and renounces the Inheritance. And it seems likewise to decide another Question which they propose concerning Pupillary Substitution, which is, whether a Son under the Age of fourteen Years, to whom his Father had made a Pupillary Substitution, having outlived his Father, and happening to die before he accepted the Succession; the same would go to the Substitute, or to the Heir at Law, or next of Kin of the said infant Son; who would pretend that the Case of the Substitution had not happened, because the Son having survived the Father, he would be his Heir, *suus hæres*, and have a Right to the Estate actually vested in him, altho he was ignorant of his Right; and that by this means he would have excluded the Substitute, and transmitted the Inheritance to his Heir. But since by the Rule explained in this Article, the Substitute succeeds, even notwithstanding the Son's Entry to the Inheritance, when he is afterwards relieved from the said Act, and renounces the Inheritance, and that by consequence the Substitute is not absolutely excluded by the Son's Entry; so it may be said, that neither is he excluded by the Son's surviving the Father, when the Son does not enter to the Inheritance, since that before he accepts the Inheritance, his Quality of Son and Heir at Law does not hinder it from being uncertain whether he will be Testamentary Heir, or not, seeing he may renounce his Right; and that moreover, it is certain that when he does renounce, things will be in the same State and Condition as if he had never been Testamentary Heir, for the same Reason which makes the Heir or Executor, who accepts the Succession only a long time after it has been open, to be nevertheless considered as being Heir or Executor from the moment that the Succession was open, as has been said in its place *a*. From whence it follows, that the Renunciation of the Infant, who is under the Age of Puberty, makes the Substitute who accepts the Succession to be reputed Heir or Executor, in the same manner as if the Substitution had been open at the moment of the Testator's Death.

We ought likewise to examine here a third Question which is started by the same Interpreters, which is to know, if the Executor, to whom the Testator hath made a Vulgar Substitution, happening to die whilst he deliberates whether he will accept or not, will transmit the Right of deliberating to his Successor, or if the Inheritance will go to the Substitute. Those who will have the Substitution to take place, found their Opinion on this, That the Law which impowers the Person who deliberates to transmit his Right to his Successor *b*, is a new Law which ought not to be extended to the Case where there is a Substitute. But altho this be a new Law, yet it is a natural and just one; and the Testator did not intend that the Substitution should deprive his Testamentary Heir of the Benefit of this Law, and take from him the Right of deliberating; for if his Intention had been such, he ought to have explained it. Thus it would seem that the Testamentary Heir dying while he was deliberating, it could not be said that the Substitute were called to the Succession in this Case. And it may be said on the contrary, that when the Testamentary Heir dies whilst it is uncertain whether he would accept the Inheritance, or not; this Uncertainty did not strip him of the Succession which he had a Right to take; but having only suspended his Right, and transmitted the Right of deliberating to his Successor, when the Successor accepts the Inheritance, it is the same thing as if his Author had done it; for it is only from him that he derives his Right of succeeding. Thus, whether we consider the Intention of the Testator, who did not design to hinder his Testamentary Heir from transmitting his Right to his Heirs, or the Equity of the Law, which gives unto Heirs the Right of deliberating; it would seem that the Heir who dies whilst he is deliberating ought to transmit his Right to his Heirs, who by consequence ought to exclude the Substitute. From whence it will follow, that every Testamentary Heir who, having a a Substitute, shall die before he has known that he was instituted Heir, or

a *See the fifteenth Article of the first Section of Heirs and Executors in general.*

b *See the eighth Article of the tenth Section of Testaments.*

only

only without renouncing the Inheritance, altho he has done nothing which shews that he was deliberating whether he should accept or refuse, will transmit his Right to his Heirs, who consequently will exclude the Substitute, provided only that the first Heir dies without renouncing the Inheritance. For the same Law of *Justinian* which enables every Testamentary Heir, even altho he be a Stranger to the Deceased, who dies whilst he is deliberating, to transmit his Right to his Heirs, does likewise declare that every Heir who dies within the Year which was allowed for deliberating, should be presumed to have died whilst he was deliberating *c*, although in reality he had no Thoughts of it: which would reduce the Cases which make way for the Vulgar Substitution to two only; one of the Death of the Person who is instituted Heir before that of the Testator; and the other, the Renunciation of the Inheritance by the Person who is instituted. And this would occasion no great Inconvenience in a Matter that is not of a very frequent use, and especially considering that this Rule hath nothing in it that can be said to be odious or unjust.

c V. l. 19. C. de jure delib.

TIT. III.

Of Direct and Fiduciary Substitutions.

THE Substitutions of which we are to treat under this Title, are but little known under this Name in the *Roman* Law, where the word *Substitution* signifies in its genuine and common Acceptation, as has been remarked in the Preamble of this Book, only the Vulgar and the Pupillary Substitution. And as for the Substitutions treated of here, that is, those which transmit the Goods from the first Successor, whether it be Executor or Legatary, to a second who succeeds after the first, they were called Fiduciary Bequests, as has likewise been observed in the same place.

It is not necessary to repeat here what has been said in the Preamble of this Book, concerning the Difference between all these several sorts of Substitutions, and conerning the Distinction that was made in the *Roman* Law between direct and imperative Terms, and Terms of Intreaty and Request to the Testamentary Heir, as to what relates to these Substitutions or Fiduciary Bequests. We presume that the Reader has not forgot the Remarks that have been made in the said Preamble, and in the fourth Section of Testaments. And it remains only in relation to the Subject of this Distinction, that we should give an Account why in this Title we have confounded these Terms of Direct and Fiduciary Substitutions; which depends on the Remark that hath been made in the same Preamble, that according to our Usage all Expressions both direct and others, are indifferent for all sorts of Substitutions, and that with respect to these which are the Subject-matter of this Title, we call them indifferently either Fiduciary Bequests, or Fiduciary Substitutions, or Gradual Substitutions, or barely Substitutions; and that when we mean to speak of Vulgar and Pupillary Substitutions, we distinguish them by these proper Names. So that in our Usage, when we mention barely Substitutions, we mean those which transmit the Goods from one Successor to another; for the Use of these is much more frequent, and more known than that of Vulgar and Pupillary Substitutions. And whether these Gradual or Fiduciary Substitutions be conceived in direct Terms, as if the Testator substitutes such a one, or in Terms of Bequest and Intreaty to his Testamentary Heir, or to a Legatee whom he has a mind to charge with it, they have the same Effect that was given by the *Roman* Law to Terms of Fiduciary Bequests, and of Prayer and Intreaty, in all sorts of Testaments, and to direct Terms in the Testaments of Soldiers, who had the Privilege to make use of these Terms in substituting, as the Father had also in a Pupillary Substitution, when he substituted to his infant Son, who was under the Age of fourteen, and not emancipated from the Paternal Authority. So that these two Words of Direct and Fiduciary Substitutions have in *France* the same Sense, and signify that sort of Substitution which transfers from one Successor to another the Goods which the Testator has made subject to the Substitution. And we have had the more reason to use these two Expressions without distinction, because under the *Roman* Law, as has been observed in the fourth Section of Testaments, the use of di-

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rect Expressions, and of Expressions by way of Prayer and Intreaty, was confounded, and this Difference abolished for the Institution of an Heir, and for Legacies and particular Fiduciary Bequests, by two different Laws, the one of the Emperor *Constantine a*, and the other of *Justinian b*; which led naturally to the confounding in the same manner the Use of these different Expressions in the Substitutions of an Inheritance, or of a part of an Inheritance, and generally in all sorts of Dispositions; seeing there is nothing more true than what is added at the end of that Law of *Justinian's*, That Laws regard Things, and not Words: *Nos enim non verbis, sed ipsis rebus legem imponimus.*

Seeing a Testator may substitute either to all his Estate, or a part of it, or only to particular Things, such as a House, a Fief, or other Thing; we shall explain the Rules of these two sorts of Substitutions in the two first Sections of this Title, and in the third some Rules that are common to both the one and the other.

It is to be observed in relation to Gradual Substitutions, by which Estates are conveyed to many Persons successively, that by the fifty ninth Article of the Ordinance of *Orleans* the Substitutions were restrained to two Degrees, exclusive of the Institution of the first Heir or Executor; and the said Ordinance having occasioned many Law-Suits, on account of the preceding Substitutions which were to extend beyond two Degrees, it was ordained by the fifty seventh Article of the Ordinance of *Moulins*, that the Substitutions which were prior to the Ordinance of *Orleans* might be extended to four Degrees, and that for the future they should be limited to two Degrees. But this Ordinance is not observed in some Places, where they retain the Usage of extending the Substitutions, even to four Degrees besides the first Institution. And this Usage has, in all appearance, taken its Rise from the hundred and fifty ninth Novel of *Justinian*, where, in a particular Case, he extends the Prohibition to alienate the Estate out of the Family to four Generations, altho it is done in a dark ambiguous manner, so as that we cannot clearly collect from thence a general Rule which may restrain all Substitutions to four Degrees. Which may be an Effect of the manner in which it is believed that this Novel has been composed by *Tribonian*, the same which he made use of with respect to other Novels, of which an antient *Greek* Author says, That he sold them for Money to those who stood in need of them, and were willing and able to pay for them *c*.

Besides these Ordinances which have regulated the Degrees of Substitutions, that of the Month of *January*, 1629, has made three other Regulations in relation to this matter of Substitutions and Fiduciary Bequests. The first is by the hundred and twenty fourth Article, that the said Degrees shall be computed by the Number of Persons, and not by the Stocks. The second is by the hundred and twenty fifth Article, that Fiduciary Bequests shall not take place in Moveables, except it be Jewels of a very great Value. And the third is, that they shall not take place in the Testaments of poor Country People. But this Ordinance has not been strictly observed. And in the Provinces which are governed by the written Law, all Persons without distinction make Substitutions of all their Goods. And as to the Number of Degrees, we see that even in the Places where they have retained the Use of substituting even to four Degrees, yet the said Number of Degrees is extended in such a manner, that they are computed not according to the Number of Persons, but according to the Stocks. Thus several

a Quoniam indignum est ob inanem observationem irritas fieri tabulas & judicia mortuorum: placuit ademptis his quorum imaginarius usus est, institutioni hæredis verborum non esse necessariam observantiam: utrum imperativis & directis verbis fiat, aut inflexis. *l.* 15. *C. de testam.*

b Omne verbum significans testatoris legitimum sensum legare vel fideicommittere volentis utile atque validum est: sive directis verbis, quale est *Jubeo* forte, sive precariis, quale est *rogo*, *volo*, *mando*, *fideicommitto*. l. 2. comm. de legat.

c Ὑπηρέτει δὲ τῷ Ἰουστινιανῷ εἰς ἃς εἴπομεν νεαρὰς, ὁ Τριβουνιανὸς ἐκεῖνος, ὃν καὶ εἰς φύσεως δεξιότητα, καὶ εἰς φιλοχρηματίαν, δαιμόνιον περιᾴδουσιν. Ὅστις ἐν τῷ συγγράφειν τὰς νεαρὰς, παρὰ ἐχόντων ὑποθέσεις δεχόμενος χρήματα· τὰ μὲν πρὸς τὸ θέλημα τῶν διδόντων ἐνήλλαττε. τὰ δὲ ἀσαφῆ καὶ δυσνόητα καὶ πρὸς ἐννοίας ῥέποντα διττὰς ἐσχεδίαζεν. ὡς ἂν οἱ ἀναγινώσκοντες ἐμπίπτωσιν εἰς διχόνοιαν. That is to say, *That* Justinian *in composing his Constitutions, which are called Novels, took the Advice and Assistance of* Tribonian: *That famous* Tribonian, *so well known by his Cunning and Dexterity, and by his Avarice; who in composing these new Constitutions, took Money from those whose Interests gave the occasion for making the said Laws; and he worded them, and altered them as they had a mind, making use of Expressions that were dark, difficult, and equivocal, such as were capable of several Meanings.* Harmenopolus, lib. 1. tit. 1, 10.

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Brothers substituted to one another, make but one Degree; whereas, by that Ordinance, each Substitute was to be reckoned one Degree: And this likewise is the Rule in all other Places. For the Degrees of Substitutions are nothing else but the Places of the Persons substituted, who succeed one after another. Thus, a second Son being substituted to his eldest Brother, and happening to succeed to him in the Fiduciary Bequest, makes the first Degree in the said Fiduciary Bequest; and the third Brother, who shall succeed to the second, will make the second Degree therein. And altho it be true, that these Brothers are among themselves in the same Degree of Generation, yet there is this Difference between the Computation of Degrees in Substitutions, and that of Degrees in Generations, that in these the Number of Children who are descended from one and the same Father, is no Obstacle to their being all of them in the same Degree of Generation: And these Degrees are not multiplied but by divers Generations from Father to Son, which descend from one to the other by several Degrees. But in Fiduciary Bequests the Persons substituted coming only one after the other, each in his respective Order, every one of them makes his own Degree independently of the Degree of Generation which the Persons substituted may be in among themselves; and there cannot be two of them in the same Degree except in the Case where several Substitutes are called jointly to succeed together to the fiduciary Bequest at the same time; as if several Children were substituted together to their Father, that they might share among them the fiduciary Bequest after his Death. For as they succeeded all together at the same Instant, there would be in respect of them all only one Change from their Father to them; which would make only one Degree, which they would make up all of them together.

Besides this Regulation which has set bounds to the Degrees of Substitutions, in order to put a stop to the Inconveniencies which attend the Liberty of substituting without restriction, the Ordinances have made another Regulation which is of no less Importance; which directs that all Dispositions, whether they be such as are to have their effect in the Life-time of those who make them, or after their Death which contain fiduciary Bequests or Substitutions, shall be published and enrolled, to the end that Persons who have any thing to transact with the Possessors of the Goods which are substituted, and others who have an Interest therein, may not be imposed upon *d*.

We may add as a last Remark, that in our Language the Word *Substitute* is indifferently made use of, either to signify that one Person is substituted to another, or that an Estate is subject to a Substitution. Thus we say that a Testator has substituted such a one to his Executor, or to a Legatary. And we say likewise that he has substituted or entailed such an Estate, such a Land.

d The Edict of the Month of May 1553. *Ordinance of* Moulins, *Article* 57.

SECT. I.

Of Substitutions or Fiduciary Bequests of an Inheritance, or a part of one.

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15. The

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15. *The Charges pass with the Goods to the Substitute.*
16. *Children charged with a Fiduciary Bequest, retain their Legitime or Child's Part.*
17. *The Wife's Jointure, as also a Woman's Marriage Portion, are taken out of the substituted Goods.*
18. *He who is substituted to the Portion of one of two Persons who shall die last, succeeds to neither of them, if they both die together.*
19. *A Child born to a Son who is charged with a Substitution makes the Substitution to cease.*
20. *The Executor ought to make an Inventary, and to give Security, if it be necessary, for the Preservation of the Fiduciary Bequest.*
21. *Even the Father and Mother are obliged to give Security in two Cases for the Fiduciary Bequest.*

I.

1. Definition of Substitutions or Fiduciary Bequests.

A Substitution or Fiduciary Bequest is a Disposition which transmits a Succession, or a part of one, or certain Goods, from the Person of the Executor or Legatee, to another Successor *a*, after the time regulated by the Testament *b*.

a Ut eam hæreditatem alii restituat. §. 2. *inst. de fideic. hered.* Potest autem quisque & de parte restituenda hæredem rogare, *d.* §. Potest quis etiam singulas res per fideicommissum relinquere. *inst. de sing. reb. per fideic. rel.*

b Rogo te Luci Titi, cum primum poteris hæreditatem meam adire, eam Caio Seio reddas, restituas. *d.* §. Post quinquennium. *l.* 16. §. 7. *ff. ad Senat. Cons. Trebell.* Cum moreretur. *l.* 78. §. 9. *eod.*

II.

2. Who may substitute.

The Liberty of substituting is the same with that of instituting Executors, and bequeathing Legacies: and whoever can name Executors or Legataries, may also substitute to them other Persons to take one after another the Goods which he shall have appropriated to them *c*.

c The same Capacity is required for every Disposition that may be made by a Testament, as for making a Testament. See the second Section of Testaments.

III.

3. Divers Ways of substituting to an Inheritance, or a part of one.

Whether there be only one Executor instituted, or whether there be many, the Testator may substitute either to the whole Inheritance, or a part of it. And if there be several Executors, he may restrain the Substitution to the Portions of some of them whom he shall think fit to charge therewith; leaving the others free to them *d*. And he may likewise either substitute his Executors one to another; or substitute only to one of them, either one of his Coexecutors or other Persons; or charge one of his Executors to restore the Fiduciary Bequest to such of the Coexecutors as the said Executor should think fit to make choice of: and the Liberty of this Choice which the said Executor will have, will be no ways contrary to the Necessity he will be under of restoring the said Fiduciary Bequest to some other Person *e*. But the Effect of this Liberty will be either to restore it to the Coexecutor whom he shall have made choice of, if he makes any choice, or to leave it to all the Coexecutors jointly, if he chuses none of them singly *f*.

d Nihil autem interest utrum aliquis ex asse hæres institutus, aut totam hæreditatem, aut pro parte restituere rogatur. §. 8. *inst. de fideic. har.*

e Cum quidam, pluribus hæredibus institutis, unius fideicommisisset, *ut, cum moreretur uni ex cohæredibus cui ipse vellet, restitueret eam partem hæreditatis, quæ ad eum pervenisset*: verissimum est, utile esse fideicommissum. Nec enim in arbitrio ejus, qui rogatus est, positum est an omnino velit restituere; sed cui potius restituat. Plurimum enim interest, utrum in potestate ejus quem testator obligari cogitat, faciat, si velit dare, an post necessitatem dandi, solius distribuendi liberum arbitrium concedat. *l.* 7. §. 1. *ff. de reb. dub.*

f See the twelfth Article of the second Section of Legacies.

IV.

4. The Substitution is limited to the Goods which the Testator leaves.

In all the Cases where an Executor is charged with a Substitution, he cannot be obliged to give more than he receives *g*. And if, for example, a Testator had requested his Executor to institute by his Testament another Person for his Executor; this Disposition would be restrained to the Goods of the said Testator. And altho his Executor should accept of the Executorship, yet he would be at liberty to dispose of his own proper Goods *h*. For otherwise this Testator would sell his Kindness for more than the Worth of what he had given.

g Placet non plus posse rogari quem restituere, quam quantum ei relictum est. *l.* 114. §. 3. *in f. ff. de leg.* 1.

h Ex facto tractatum est, an per fideicommissum rogari quis possit, ut aliquem hæredem faciat. Et Senatus censuit; rogari quidem quem, ut aliquem hæredem faciat, non posse. Verum videri per hoc rogasse, ut hæreditatem suam ei restituat; id est, quidquid ex hæreditate sua consecutus est, ut ei restitueret. *l.* 17. *ff. ad Senat. Trebell. d. l.* 114. §. 6. *ff. de leg.* 1. See the following Article.

V.

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V.

5. The Executor who is charged with a Substitution, may retain a fourth part of what was left him.

He who is instituted Executor, and charged with a Substitution, whether it be of the whole Inheritance, if he is sole Executor, or of the Portion thereof which is left him by the Testament, if he is only Executor for a part, not only cannot be engaged by a Substitution to restore more than what is left him by the Testator; but he cannot even be obliged to restore the whole. And as the Executor who is charged with a Legacy may retain a fourth part of the Inheritance for the Falcidian Portion; so the Executor charged with a Substitution may retain a fourth part of the Inheritance, if he is universal Heir or Executor, or a fourth part of his Portion if he is only Heir or Executor for a part: and it is this fourth part which is called the Trebellianick Portion *i*; of which we shall treat under the following Title.

i See the fourth Title.

VI.

6. The Fruits of the Goods which are substituted remain to the Executor, if the Testator does not otherwise dispose of them.

The Executor who is charged with a Substitution which would oblige him to restore to the Substitute all the Profit he had made by the Goods of the Testator, would not be bound to restore the Fruits of the Inheritance which he had reaped until the time that the Substitution was to take place. For these Fruits were only a Revenue arising from the Inheritance, which was his until the Case of the Substitution should happen. Thus these Fruits having accrued to him, they ought to remain his, unless the Testator had otherwise disposed of them *l*.

l In fideicommissaria hæreditatis restitutione constat non venire fructus, nisi ex quo mora facta est, aut cum quis specialiter fuerit rogatus & fructus restituere. *l.* 18. *ff. ad Senat. Trebell.*

Quoties quis rogatur hæreditatem restituere, id videtur rogatus reddere quod fuit hæreditatis: fructus autem non hæreditati, sed ipsis rebus accepto feruntur. *d. l.* §. 2.

Hæredes mei quidquid ad eos ex hæreditate bonisve meis pervenerit id omne post mortem suam restituant patriæ meæ Coloniæ Beneventanorum. Nihil de fructibus pendente conditione perceptis petitum videri constitit. *l.* 57. *eod. See the following Article, and the fourth Title. V. l.* 32. *eod.*

VII.

7. The Executor who is charged to restore all that he has had of the Goods of the Deceased, ought to restore that which he has receiv'd, either as a Legacy or otherwise, out of the Inheritance.

If in the Case of the preceding Article the Executor had received not only that which belonged to him as Executor, but also some Legacy which his Coexecutor had been charged to pay him, or some Advantage which was left him by a Disposition of the Testator over and above what his Coexecutors had; these sorts of Advantages would be comprehended in the Substitution, which is conceived in such Terms as would oblige the Executor to restore all that he had received of the Goods of the Testator, unless his Disposition could be interpreted in another Sense *m*.

m Cum virum prudentissimum Papinianum respondisse non ignoremus, etiam legata hujusmodi fideicommisso contineri, id est, ubi hæres rogatus fuerit, *quidquid ex hæreditate ad eum pervenerit, post mortem restituere*: animadvertimus etiam præceptionis compendium testatoris verbis comprehensum esse. Sane, quoniam in fideicommissis voluntas magis quam verba plerumque intuenda est, si quas pro rei veritate præterea probationes habes ad commendandam hanc patris voluntatem, quam fuisse adseveras, apud præsidem Provinciæ experiri non vetaris. *l.* 16. *C. de fideic.*

VIII.

8. The Substitution may be either to a certain time, or upon condition.

The Testator may not only charge his Executor to restore the Inheritance to another Person at the time of the Death of the said Executor, but likewise to restore it after a certain time, as at the time when the Substitute shall be of full Age. And one may also substitute upon condition, as if the Substitute were called only in case that he should have Children *n*.

n Liberum est vel pure, vel sub conditione relinquere fideicommissum, vel ex certo die. §. 2. *in f. inst. de fideic. hæred.* See the Texts cited on the first Article under the Letter *b*.

IX.

9. The Executor ought to restore the Fruits of the Fiduciary Bequest from the time of his Delay, and is also liable to Costs and Damages if there be ground for such a Demand.

If the Executor who is charged with a Fiduciary Bequest, delays to make restitution thereof after the Time or Case of the Substitution is come to pass, and that the Person in whose favour the Substitution was made has made a legal demand thereof, he will be accountable for all the Fruits, the Revenues and Interest, from the time of the Demand, or even from the time that the Substitution was to take place, if he had knavishly detained the Goods which were to have been delivered by virtue of the Substitution, as if he had concealed the Testament. And he would be liable also in this Case for Costs and Damages to the Person to whom the Goods were to be restored, if there were any room for such a Demand *o*.

o Is qui fideicommissum debet, post moram non tantum fructus, sed etiam omne damnum quo adfectus est fideicommissarius, præstare cogitur. *l.* 26. *ff.*

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ff. de legat. 3. See the following Article. See the fourteenth Article.

When a Party is condemned to pay Interest, or to make restitution of the Fruits, the same is in place of Damages; and by our Usage no other Damages are adjudged except in particular Cases where there is notorious Knavery, or that they be due by the nature of the Engagement, as to which the Reader may consult the Preamble of the Title of Interest, and of Costs and Damages.

X.

10. If the Executor is not in delay, he is not bound to make restitution of the Fruits.

If the Substitute to whom the Goods were to be restored, knowing nothing of his Right, had neglected to demand them of the Executor who was charged to restore them, and had suffered him to enjoy them beyond the time at which the Restitution ought to have been made; the said Executor would not be bound to restore the Fruits which he had reaped during that time. For besides that he might look upon the said Goods as his own until the Person for whom he held them in trust had stripped him of them, he might either doubt of the Validity of the Substitution, or not know that the same was open, or presume that the Person who was substituted to the Goods was willing that he should enjoy them *p*.

p Si hæres post multum temporis restituat, cum præsenti die fideicommissum sit, deducta quarta restituet. Fructus enim qui percepti sunt, negligentia petentis, non judicio defuncti percepti videntur. *l.* 22. §. 2. *ff. ad Senatusconf. Trebell.*

Altho this Text relates to another Rule explained in the fourth Article of the second Section of the Trebellianick Portion, yet it implies that which is explained in this Article, and it is a Consequence thereof which it is easy to comprehend. It may be said with respect to this Article, that this Executor ought to be discharged from the Restitution of the Fruits with much more reason than the Executor who is charged with a Legacy. See the third Article of the eighth Section of Legacies, and the Remark that is there made on it.

XI.

11. What care the Executor ought to take of the Goods that are substituted.

The Executor who is charged with a Substitution or Fiduciary Bequest of the Inheritance is bound to take care of it, but the Care which he is obliged to take is only such as that there be no room to charge him with any Fault or Negligence that may border upon Knavery. And the Diligence which he may have used in some Affairs would not render him the more obnoxious, altho he had failed to use the same Diligence in other Affairs of the like nature. Thus, for example, if he had gathered in some Debts of the Inheritance, that would not make him answerable for other Debts *q*.

q Si quis rogetur restituere hæreditatem, & vel servi decesserint, vel aliæ res perierint, placet, non cogi eum reddere quod non habet: culpæ plane reddere rationem, sed ejus quæ dolo proxima est. *l.* 22. §. 3. *ff. ad Senat. Trebell.*

Cum hæreditas ex causa fideicommissi in tempus restituenda est: non idcirco nominum periculum ad hæredem pertinebit, quod hæres a quibusdam pecuniam exegerit. *l.* 58. §. 1. *eod. l.* 108. §. 12. *ff. de leg.* 1. See the second Article of the tenth Section of Legacies.

It is necessary to remark upon this Article, and upon the second Article of the tenth Section of Legacies, the Difference between an Executor charged with a Legacy, and him who is charged with an universal Substitution of an Inheritance, or of part of an Inheritance, in that the Engagement of this last having a larger Extent, and his own Interest being concerned therein, it would seem that he were not bound to take the same care as the Executor who is charged only with one thing, for a less time, and where the Interest of another Person is concerned, which he ought less to neglect than his own.

XII.

12. The Executor recovers the Expences he has laid out on the fiduciary Bequest.

The Executor who restores the Inheritance to the Person who is substituted to him, may not only retain the fourth Part of it for the Trebellianick Portion, but all the Expences he has been at on account of the Inheritance *r*.

r Si quem sumptum fecit hæres in res hæreditarias, detrahet. *l.* 22. §. 3. *ad Senat. Trebell.* See the ninth Article of the tenth Section of Legacies.

XIII.

13. If a Father who is charged with a fiduciary Bequest for his Children dissipates the Effects, they may be taken out of his hands.

If a Father had been charged to restore to his Son an Inheritance, and that he had squander'd away and dissipated the Effects thereof, or commited other Frauds, he might be obliged to restore the said Effects to his Son, altho he were still under his Father's Jurisdiction, and altho the Fiduciary Bequest were upon that condition that it should not take place till after the Son were emancipated, or at some other Term. And if this Son should happen to be in his Minority, the Administration of the Goods would be committed in the mean while to a Curator. For as it would be neither just nor decent to oblige the Father to give Security for the fiduciary Bequest, so on the other hand it would be equitable to prevent the Loss of the Goods by the only means that would be possible, that is, by taking them out of his hands. But if the Father had not whereupon to subsist otherwise, a Maintenance would be allotted him out of the Goods which he held in trust for his Son *s*.

s Imperator Hadrianus, cum Vivius Cerealis filio suo Vivio Simonidi, si in potestate sua esse desiisset, hæreditatem restituere rogatus esset, ac multa in fraudem fideicommissi fieri probaretur, restitui hæreditatem filio jussit, ita ne quid in ea pecunia, quamdiu

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diu filius ejus viveret, juris haberet. Nam quia cautiones non poterant interponi conservata patria potestate, damnum conditionis propter fraudem inflixit. Post decreti autem auctoritatem, in ea hæreditate filio militi comparari debuit, si res a possessoribus peti, vel etiam cum debitoribus agi oporteret. Sed paternæ reverentiæ congruum est, egenti forte patri, officio judicis, ex accessionibus hæreditariis emolumentum præstari. *l.* 50. *ff. ad Senat. Trebell.* See the twentieth and twenty first Articles.

XIV.

14. Punishment of the Executor who detains the Goods of the Fiduciary Bequest.

If after an Executor, who is charged with an Inheritance in trust, has restored it, other Goods belonging to the Inheritance be discovered which he had fraudulently kept back, he would be bound to restore them together with the Fruits or other Revenues of the same, and likewise would be liable to Costs and Damages if there were room for any such Demand. But if the Restitution had been made by virtue of a Transaction or other Agreement executed fairly and honestly, which had discharged him in such a manner from all After-reckoning, as that the Goods which were not restored ought to be comprehended therein, he would retain them *t*.

t Hæres ejus, qui post mortem suam rogatus erat universam hæreditatem restituere, minimam quantitatem, quam solam in bonis fuisse dicebat, his quibus fideicommissum debebatur, restituit. Postea repertis instrumentis, apparuit quadruplo amplius in hæreditate fuisse. Quæsitum est, an in reliquum fideicommissi nomine conveniri possit? Respondit, secundum ea quæ proponerentur, si non transactum esset, posse. *l.* 78. §. *ult. ff. ad Senat. Trebell.*

It is necessary to remark on this Article, as to what relates to Damages, the Difference between the Executor who is guilty of delay, of which mention has been made in the ninth Article, and the Executor who detains the Goods of the fiduciary Bequest. For there is much more reason to condemn this last in Damages. See the ninth Article, and the Remark that is there made on it.

XV.

15. The Charges pass with the Goods to the Substitute.

After the Executor who is charged with a fiduciary Bequest of an Inheritance has made restitution of it, as all the Goods and all the Rights belonging to the said Inheritance pass to the Person for whose Behoof the fiduciary Bequest was made, so he ought also to bear the Charges of the Inheritance, and to warrant the Executor who has restored the Inheritance to him against all the Charges thereof *u*.

u Placet, ut actiones quæ in hæredem hæredibusque dari solent, eas neque in eos, neque his dari qui fidei suæ commissum, sicuti rogati essent, restituissent: sed his, & in eos quibus ex testamento fideicommissum restitutum fuisset. *l.* 1. §. 2. *ff. ad Senat. Trebell.*

XVI.

16. Children charged with a Fiduciary Bequest, retain their Legitime or Child's Part.

If a Father or other Ascendant having instituted one of his Sons for his Executor, had charged him with a fiduciary Bequest of the whole Inheritance, or a part of it, or of some Goods, this Disposition would not diminish the Legitime or filial Portion due to the said Child, and he would retain it. For Children cannot be deprived of their Legitime, and they ought to have the same free of all Charges, as has been said in its place *x*.

x Si quis de cætero restitutionem fecerit suarum rerum, primum quidem servat filio legitimam partem. *Nov.* 39. *c.* 1. *l.* 32. *C. de inoff. testam.* See the Title of the Legitime.

¶ Besides the Legitime or filial Portion which Children who are charged with Substitutions or Fiduciary Bequests may retain, it has passed into a Custom that they may moreover retain the Trebellianick fourth part, of which we have already made mention, and which we shall explain in the last Title. Thus, for example, an only Son charged with a fiduciary Bequest will have for his Legitime or Filial Portion the third part of the Goods, and for his Trebellianick Portion the fourth part of the two other thirds which he is obliged to restore; which makes in all the half of the whole, and hath given occasion to the common Saying, that the Son hath the Deduction of two fourth Parts, altho this Deduction does not always amount to a Half, and that it ought to vary according as the number of Children varies the Quota of their Legitimes or filial Portions, pursuant to the Rules explain'd in the Title of the Legitime or Filial Portion.

Most Authors agree, that this Usage is taken from the Canon Law *in the 16th Chapter de Testamentis*, because that Decretal affirms a Sentence of a Judge who had decreed this double Deduction of the Legitime and also of the Trebellianick Portion. And some have pretended that these two Deductions may be founded on Consequences drawn from some of the *Roman* Laws: but there is not one of them on which this Deduction can be founded; nay, on the contrary, the most able Interpreters look upon this double Deduction to be an Error. But altho it be an Error against the *Roman* Law, yet it is noways an Error against Equity, nor against the

Law of Nature, which appropriates to Children the Goods of their Fathers. And it is on the contrary a Rule which, seeing it renders the Condition of the Children more advantageous than it was under the *Roman* Law, altho only in the Cases where they are burdened with Substitutions or Fiduciary Bequests, ought to be received as favourably in the Provinces which are governed by the written Law, as is in the Provinces which are governed by their Customs, that Custom which appropriates the greatest part of Estates to the Heirs of Blood, and even to collateral Relations of the remotest degree, to whom it gives much more than the *Roman* Law gives to Children, and so as no Disposition made in consideration of Death can lessen the same. And likewise this double Deduction has been accounted so equitable in itself, that it has been received every where.

It is in all probability because of these Considerations that some Interpreters have been of opinion, that this double Deduction ought to be extended to Legacies as well as to Fiduciary Bequests, and that Children overcharged with Legacies ought to have in the first place their Legitime or Child's Part, and next the Falcidian Portion of the Surplus, which would certainly be as equitable in this Case as in the others. And there would likewise be much more reason for granting to Children overcharged with Legacies, the Deduction of the Falcidian Portion over and above their Legitime or Child's Part, than for granting them the Deduction of the Trebellianick Portion in the case of Substitutions; because Children are not commonly charged with Substitutions, unless it be in favour of their own Children, or of the Descendants of the Person who has made the Substitution; whereas Legacies may be in favour of other Persons than those of the Family: and because the Executor who is charged with Fiduciary Bequests has the use and Profits of the Goods until the time of the Restitution comes; but the Executor who is charged with the Legacy, is stripped of it from the time that the Succession is open. But other Authors have on the contrary been of opinion, that this Rule of the two Deductions, which they say has been established only by an Error, ought not to be drawn to Consequences beyond the antient Rules. And this last Opinion has prevailed over the other; and therefore they have only extended in some Places the double Deduction of the Legitime, and of the Trebellianick Portion, in favour of Ascendants who are charged with Fiduciary Bequests by their Descendants.

XVII.

17. The Wife's Jointure, as also a Woman's Marriage-Portion, are taken out of the substituted Goods.

If the Legitime or Child's Part of a Son who is charged with a Substitution is not sufficient to settle a Jointure on his Wife proportionable to what she brought with her in Marriage, and to answer the other Rights and Claims which she may be entitled to by virtue of her Marriage, the other Goods that are substituted would be subject to the same, and so much would be taken from them as should be found necessary to make up the Deficiency in the Legitime or Child's Part for these Purposes. For Fathers and other Ascendants, who charge their Children and other Descendants with Substitutions or Fiduciary Bequests, do not mean thereby to restrain them in their Conduct, and to hinder them from marrying. Thus the Goods which they leave them are first appropriated to the Jointures, and other Rights of their Wives, according as the Quality of the Persons may demand. And if it were a Daughter charged with a Fiduciary Bequest, she would in like manner retain out of the substituted Goods, that which would be necessary for her Marriage-Portion, suitable to her Quality, if her Legitime or Child's Part were not sufficient for it *y*.

y Cum proponeretur quidam filiam suam hæredem instituisse, & rogasse eam, ut, *si sine liberis decessisset, hæreditatem Titio restitueret*, eaque dotem marito dedisse certæ quantitatis, mox decedens sine liberis, hæredem instituisse maritum suum: & quæreretur an dos detrahi posset: dixi non posse dici in eversionem fideicommissi factum, quod & mulieris pudicitiæ, & patris voto congruebat. Quare dicendum est, dotem decedere, ac si, quod superfuisset rogata esset restituere. *l. 22. §. 4. ff. ad Senat. Trebell.*

Si quis de cætero restitutionem fecerit suarum rerum, primum quidem servet filio legitimam partem. ——— Deinde ex reliqua substantiæ parte, si non suffecerit legitima pars ad dotis aut ante nuptias donationis oblationem honeste, & secundum personarum qualitatem & merita, excipere etiam hoc ad restitutionem, secundum quod adjectum legitimæ parti dotem aut ante nuptialem facit donationem. Sancimus enim secundum hunc modum excipi modis omnibus ad restitutionem nuptialia documenta, & super his factas alienationes, aut hypothecas: & vel si gravata sit persona aut viri aut mulieris restitutione tali, liceat ei etiam nuncupatam ante nuptialem seu propter nuptias donationem auferre, nihil quantum in illis rebus restitutione valente. Et si mulier restitutione gravetur, non impedimentum ad dotis oblationem fieri. *Ea enim quæ communiter omnibus prosunt, iis quæ specialiter quibusdam utilia sunt præponimus.* Sitque hoc nuptialibus donationibus, & harum exactionibus privilegium. *Nov. 39. c. 1.*

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¶ We might gather as a Consequence from the last of these Texts, that the double Deduction of the Legitime, and of the Trebellianick Portion, of which mention has been made in the Remark on the preceding Article, is not agreeable to the *Roman* Law. For if *Justinian* had thought that a Son who was burdened with a Fiduciary Bequest was to have both his Legitime or Child's Part, and also the Trebellianick Portion, in all probability he would have expressed it; and that seeing he gave leave to deduct out of the Fiduciary Bequest a Jointure for the Wife of the Heir or Executor who should be charged therewith, and added, as he has done in this Text, that if the Legitime or Child's Part were not sufficient for that purpose, the said Jointure ought to be taken out of the other Goods that were subject to the Fiduciary Bequest, he would not have failed to have added likewise the Trebellianick fourth Part, and to have said, that if the Legitime and the Trebellianick Portion were not sufficient, the Surplus would be taken out of the rest of the substituted Goods. As to which it may be remarked, that seeing by this new Right of the double Deduction, the Son who is charged with a Substitution of the Inheritance retains the half of the Goods for his Legitime and Trebellianick Portion, it would seem that the Fiduciary Bequest ought not likewise to be diminished by taking from thence a Jointure for the Wife of the Heir or Executor who should be charged with the said Fiduciary Bequest: especially if, according to the Sentiment of some, this Deduction on account of Jointures and Marriage-Portions should be extended beyond the first Degree of the Substitution, and that the Persons who are substituted being charged to restore the same Goods to other Substitutes called to the Succession after them, should have the Power of making the same Deduction every one in their order.

XVIII.

18. He who is substituted to the Portion of one of two Persons who shall die last, succeeds to neither of them, if they both die together.

If a Father instituting his Children his Executors, had charged such of them as should die last to restore his Portion of the Inheritance to another Person, and it happened that all these Children died at the same time, their Heirs would succeed to them, and would exclude the Substitute. For he was substituted only to one of them who should die the last, and only for his Portion. Thus the Substitution would be without effect, unless the Person substituted should prove that one of the two survived the other; since if it cannot be known which of the two died last, the Condition of the Substitution is not come to pass; and the Substitute cannot say of any one of them that he has succeeded to him *z*.

z Si ejus qui novissimus ex filiis mortuus est, partem hæreditatis propinquo voluit pater restitui, & simul fratres diem suum obiissent: propinquum, si non ostenderit quis novissimus obiisset, ad partem hæreditatis non admitti, sed matrem ex Tertylliano Senatus-consulto ad utriusque hæreditatem admitti constat. *l. 34. ff. ad Senat. Trebell.* See the Remark on the twelfth Article of the second Section, In what manner Children succeed. See the seventh Article of the second Section of the preceding Article.

It is to be remarked on the seventh Article here quoted, and on this present Article, that in this the Substitution was only of the Portion of one of the two Brothers; so that the Substitute not being able to make appear which of the two Brothers has survived the other, he will have no Portion at all. But in the Case of the seventh Article above-mentioned, the Intention of the Testator called the Substitute to the Succession of both the Brothers, as has been remarked there.

XIX.

19. A Child born to a Son who is charged with a Substitution, makes the Substitution to cease.

If a Testator having instituted one of his Children or Descendants his Heir or Executor, had charged him with a fiduciary Bequest or Substitution of the Inheritance, either in favour of other Descendants of the same Testator, Brothers, Uncles, or Nephews to the said Executor, or in favour of other Persons; the said fiduciary Bequest or Substitution would not have its effect except in the Case that the said Executor should die without Issue; and if he left any Issue, the said fiduciary Bequest or Substitution would be null. For the Intention of this Testator would not have been to prefer the Substitutes to these Children *a*.

a Cum avus filium ac nepotem ex altero filio hæredes instituisset, a nepote petiit, ut, si intra annum trigesimum moreretur, hæreditatem patruo suo restitueret. Nepos, liberis relictis intra ætatem supra scriptam vita decessit, fideicommissi conditionem, conjectura pietatis, respondi defecisse: quod minus scriptum, quam dictum fuerat, inveniretur. *l. 102. ff. de condit. & dem. v. l. jubemus C. ad Senat. Trebell.*

Cum acutissimi ingenii vir, & merito ante alios excellens Papinianus, in suis statuerit responsis, si quis filium suum hæredem instituit, & restitutionis post mortem oneri subegit, non aliter hoc videri dispósuisse, nisi cum filius ejus sine sobole vitam suam reliquerit, nos hujus sensum merito mirati, plenissimum ei donamus eventum, ut si quis hæc disposuerit, non tantum filium hæredem instituens, sed etiam filiam, vel ab initio nepotem vel neptem, pro-

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nepotem vel pronepotem, vel aliam deinceps posteritatem, & eam restitutionis post obitum gravamini subjugaverit: non aliter hoc sensisse videatur, nisi ii qui restitutione onerati sunt, sine filiis vel filiabus, nepotibus vel neptibus, pronepotibus vel proneptibus fuerint defuncti: ne videatur testator alienas successiones propriis anteponere. *l.* 30. *C. de fideic.*

XX.

20. The Executor ought to make an Inventary, and to give Security, if it be necessary for the preservation of the Fiduciary Bequest.

Seeing the Executor, who is charged with a Fiduciary Bequest either of the whole Inheritance, or of a part of it, cannot accept it but with this Charge, he is obliged to make an Inventary of the Goods, in order to preserve the Right of the Substitute. And this Inventary ought to be made either in presence of the Substitute, if he can be there; or if he was not present, or even was not born, the Executor ought to make it in such manner as the Judge shall direct. And both in the one and the other Case, besides the Inventary, the Executor is bound to give Security, if the Circumstances require it, and unless the Testator has discharged him from giving any *b*.

b Legatorum nomine satisdari oportere, prætor putavit: ut quibus testator dari fierive voluit, his diebus detur, vel fiat. *l.* 1. *ff. ut legat. seu fid. serv. caus. cav.*

Idemque in fideicommissis quoque probandum est. *d. l.* §. 10. *l.* 1. *C. ut in poss. legat. vel fid. s. c. m.*

Oportet hujusmodi hæredem qui non creditores solum, sed etiam legatarios & fideicommissarios veretur & metuit, non damnificari solum, sed etiam non lucrari, convocare omnes legatarios & fideicommissarios ad inventarii præsentiam. *Nov.* 1. *c.* 2. §. 1.

Ipsis rerum experimentis cognovimus ad publicam utilitatem pertinere, ut satisdationes quæ voluntatis defunctorum tuendæ gratia in legatis & fideicommissis introductæ sunt, eorumdem voluntate remitti possint. *l.* 2. *C. ut in possess. leg. vel fid. s. c. m.* See the fourth Article of the first Section of the Falcidian Portion.

XXI.

21. Even the Father and Mother are obliged to give Security in two Cases for the Fiduciary Bequest.

If the Executor were a Father, or other A[illegible]endant, charged with a Fiduciary Bequest in behalf of his own Children, he would be excepted from the Rule of giving Security, unless the Testator had obliged him to do it, or that the said Executor had contracted a second Marriage *c*.

c In his duobus casibus, id est, cum testator specialiter satisdari voluerit, vel cum secundis se pater vel mater matrimoniis junxerit, necesse est, ut eadem satisdatio, pro legum ordine, præbeatur. *l.* 6. *C. ad Senat. Trebell.*

SECT. II.

Of Substitutions, or particular Fiduciary Bequests of certain Things.

SEEING particular Fiduciary Bequests of certain Things are of the nature of Legacies, as has been shewn in the Title of Legacies, we must apply to these Fiduciary Bequests the Rules of that Title which are applicable to them.

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5. *Divers manners of Dispositions which have the nature of a Fiduciary Substitution. Example.*
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10. *If the Executor who was to chuse the Fiduciary Substitute out of several did not make the Choice, they will all of them have a Share in the substituted Goods.*
11. *The Fiduciary Substitute who is chosen by the Executor, derives his Right only from the Testator.*
12. *The Prohibition to alienate does not oblige, unless it be made in favour of some Person.*
13. *The Prohibition to alienate certain Lands, and to dispose of them out of the Family, does not take away the Choice of one of the Family.*
14. *The Fiduciary Substitute ought to have either the Thing subject to the Substitution, or its Value.*
15. *The Fruits and Interest of the substituted Goods are due from the time of the Delay.*
16. *The Executor cannot revoke the payment of the Fiduciary Bequest, which proves null if he has once acquitted it.*
17. *The Legatary who is charged with a Fiduciary Bequest which proves to be null, reaps the Benefit of it, and not the Executor.*

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I.

1. *One may substitute Things of all kinds.*

ONE may make a Substitution or Fiduciary Bequest of particular Things of all kinds, such as a Fief, a House, or other Tenement, and of other sorts of Goods, of a Sum of Money, and of every other Thing which one has a mind should go from one Successor to another *a*.

a Potest etiam quis singulas res per fideicommissum relinquere, veluti fundum, argentum, hominem, vestem, & pecuniam numeratam. *Inst. de sing. reb. per fideic. relict.*

II.

2. *One may charge with a Fiduciary Bequest either the Executor, or a Legatee.*

The Testator may charge with a Fiduciary Bequest of a particular Thing, either his own Executor or a Legatee, whether the Thing be a part of the Inheritance, or belong to the Executor or Legatee, or to some other Person *b*.

b Vel ipsum hæredem rogare (potest quis) ut alicui restituat, vel legatarium. *Inst. de sing. reb. per fid. rel.* Potest autem non solum proprias res testator per fideicommissum relinquere, sed & hæredis, aut legatarii, aut fideicommissarii, aut cujuslibet alterius. §. 1. *eod.*

Ut hæredibus substitui potest, ita etiam legatariis. *l.* 50. *ff. de legat.* 2.

III.

3. *Different manners of substituting.*

These Substitutions, or Fiduciary Bequests of particular Things, may be made in several manners; which may be distinguished either by the Differences of the Expressions which the Testators may make use of, or by the Differences which may diversify the Dispositions of this nature, independently of the ways of expressing them *c*.

c See the following Articles.

IV.

4. *All Expressions which explain the Intention of the Testator are sufficient for a Fiduciary Substitution.*

As to the Expressions, in what manner soever the Testator may have explained himself, his known Intention ought to serve as a Rule. And even the Expressions which seem to leave the Fiduciary Bequest to the Discretion of the Executor or Legatee who is charged with it, oblige him as much as those which ordain it in express Terms. Thus, for example, if a Testator had said that he is sure his Executor, or a Legatee, will restore to such a one such a Thing, or that he intreats them to restore it, these Expressions would make a Fiduciary Bequest, which would not depend on the Will of the Person whom the said Disposition might concern *d*.

d In fideicommissis præcipue spectanda servandaque testatoris voluntas. *l.* 11. §. 19. *in f. ff. de legat.* 3.

Etiam hoc modo, cupio des, opto des, credo te daturum, fideicommissum est. *l.* 115. *ff. de leg.* 1. *l.* 118. *eod.*

Omne verbum significans testatoris legitimum sensum legare vel fideicommittere volentis, utile atque validum est: sive directis verbis, quale est *jubeo* forte, sive precariis utatur testator, quale est *rogo*, *volo*, *mando*, *fideicommitto*. *l.* 2. *C. comm. de legat. & fid.* *l.* 67. §. *ult. ff. de legat.* 2. See the forty seventh Article of the eighth Section of Testaments.

V.

5. *Divers manners of Dispositions which have the Nature of a Fiduciary Substitution. Example.*

As to the different manners of Dispositions which have the nature of Fiduciary Substitutions, this Diversity depends on the Will of the Testator *e*; who may, for example, either make a simple Fiduciary Bequest, charging his Executor, or a Legatee, to restore to such a one a Land or Tenement, or other Thing; or forbid the Alienation of a Fief or other Estate out of his own Family, or that of his Executor, or of a Legatee, to whom he had devised it: for this Prohibition to alienate the said Fief or Estate would imply a Substitution in favour of those of that Family to which the same was appropriated *f*.

e See the Articles which follow.
f See the twelfth Article.

VI.

6. *One may make a Fiduciary Substitution in favour of Persons to be born.*

One may make a Fiduciary Substitution of a particular Thing either in favour of certain Persons, naming them, or of Persons that are not as yet born, but who may be born *g*, or even indefinitely in favour of a Person who shall be chosen out of a Family by the Executor, or the Legatee, who is charged with the Fiduciary Substitution *h*.

g See the thirteenth Article of the second Section of Heirs and Executors in general; the twenty second and twenty third Articles of the second Section of Testaments, and the third Article of the second Section of Legacies.

h Peto de te uxor charissima uti cum morieris, hæreditatem meam restituas filiis meis vel uni eorum. *l.* 57. §. 2. *ff. ad Senat. Trebell.*

VII.

7. *Order of the Fiduciary Substitutes, if there be several to succeed successively.*

If the Fiduciary Substitution respects several Persons who are called successively one after another, the Substitutes will succeed in the Order regulated by the Testator, if he has given any Directions about it, or according as they shall be called by the Executor or Legatee, who is charged with the Fiduciary Substitution, if the Testator has left him the Liberty to regulate the Order of their

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their succeeding, which depends on the following Rules *i*.

i See the following Articles.

VIII.

8. Different manners of regulating this Order.

The Testators may regulate differently the Order of the Fiduciary Substitutes according to their different Intentions. Thus, a Testator may name them every one in the Rank which he pleases to give them. Thus, he may without naming them, point them out by some Description, such as the eldest Males of his Descendants. Thus, he may simply substitute those of his Family. And what he may do with respect to his Children and Descendants, or those of his own Family, he may likewise do the same with respect to the Children either of the Family of his Executor, or of that of a Legatary, if he substitutes to him *l*.

l See the Texts cited on the following Article.

IX.

9. A Fiduciary Substitution made indefinitely either to one of a certain Family, or to a certain Family.

If the Fiduciary Substitution be indefinite in favour of some one Person of a Family, whom the Testator had not any other way described, as if he had charged his Executor, or a Legatee, having Children or Grandchildren, to leave to one of them a House, or some other Tenement; this undetermined Fiduciary Substitution would leave it to the Executor or Legatee who is charged with it, to make choice of the Person: And he would fulfil the same by leaving the substituted Goods to any one of the Family *m* whom he should please to pitch on, even altho he should leave it to the remotest of the Family, preferring him to those who were in a nearer Degree *n*. But if the Fiduciary Substitution were not limited to one of the Family; as, if the Testator had substituted indefinitely those of his own Family, or of the Family of the Executor, or of the Legatee, those of the said Family who should happen to be in the nearest Degree, would exclude the most remote, and those who should happen to be in the same Degree, would succeed jointly, unless there should be ground to judge otherways of the Intention of the Testator by Circumstances which might discover the same *o*.

m Unum ex familia, propter fideicommissum à se cum moreretur relictum, hæres eligere debet. *l.* 67. *ff. de legat.* 2.

n Si cum forte tres ex familia essent ejus, qui fideicommissum reliquit, eodem vel dispari gradu, satis erit uni reliquisse. Nam postquam parium est voluntati, cæteri conditione deficiunt. *d. l.* 67. §. 2. Verum est enim in familia reliquisse, licet uni reliquisset. *l.* 114. §. 17. *ff. de legat.* 1.

o In fideicommisso quod familiæ relinquitur, hi ad petitionem ejus admitti possunt, qui nominati sunt: aut post omnes eos extinctos, qui ex nomine defuncti fuerint eo tempore, quo testator moreretur, & qui ex his primo gradu procreati sint, nisi specialiter defunctus ad ulteriores voluntatem suam extenderit. *l.* 32. §. *ult. ff. de legat.* 2.

Quid ergo, si non sint ejusdem gradus? ita res temperari debet, ut proximus quisque primo loco videatur invitatus. *l.* 69. §. 3. *eod.*

¶ We have added at the end of the Article the Temperament of the Intention of the Testator. For if, for example, a Person of great Quality had ordained that a Land which had been erected into a Title of a Dutchy, County, or Barony, should remain in his Family, it would be presumed that his Intention was to appropriate the same to the eldest Heirs Male, and not to leave a Handle for Law-Suits and Wrangling by the Division of an Estate of this kind. As to which it may be observed, that it is very difficult for a Case of such a Substitution to fall out, so indefinite as not to distinguish neither the Degrees, nor the eldest of each Degree, nor the Males from the Females; for those who make Substitutions do not usually fail to make these Distinctions. But if a Testator had failed to do it, the Rule explained in this Article would point out the Order of the Substitutes, and would distinguish those who are called either jointly together, or by preference; and even in Cases where the Testators have explained themselves the most clearly, there may fall out Events in which the Use of this Rule may be necessary.

X.

10. If the Executor who was to chuse the Fiduciary Substitute out of several, did not make the Choice, they will all of them have a Share in the substituted Goods.

If in the Case of the preceding Article the Executor, or the Legatee, who was to chuse the Substitute, should happen to die without having named him, the substituted Goods would belong in common to all those among whom the Choice was to be made. For seeing no one of them would have more Right than the other, and that there would remain no body to distinguish them, the Testator, who was the only Person who could give Direction therein, not having done it, but having considered them all alike, they would be all of them called together; and if there remained only one of them, he would have

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have the whole *p*.

p Rogo fundum, cum morieris, restituas ex libertis cui voles: quod ad verba attinet, ipsius erit electio. Nec petere quisquam poterit quamdiu præferri alius potest, defuncto eo priusquam eligat, petent omnes. Itaque eveniet, ut quod uni datum est, vivis pluribus unus petere non possit, sed omnes petant, quod non omnibus datum est. Et ita demum petere possit unus, si solus moriente eo superfuit. *l. 67. §. 7. ff. de legat. 2.*

XI.

11. The Fiduciary Substitute who is chosen by the Executor, derives his Right only from the Testator.

The Fiduciary Substitute, who has been named by the Executor who had the power of chusing him from among others, derives his Right only from the Testator, and not from the Person who has chosen him, altho it was in his power not to have named him. Which hath this effect, that if, for example, this Executor having declared this Choice by his Testament, had therein bequeathed to the Person whom he then named for the Substitute, the Thing which was subject to the Fiduciary Substitution, it would not be in effect a Legacy. For he would not thereby give any thing that were his own, since he would only leave what he was obliged to restore, having only the liberty of chusing the Person to whom he was to restore it. Thus, he could much less impose on this Fiduciary Substitute any Condition, or any Charge *q*.

q Unum ex familia, propter fideicommissum à se cum moreretur, relictum hæres eligere debet: ei, quem elegit, frustra testamento suo legat, quod, posteaquam electus est, ex alio testamento petere potest. *l. 67. ff. de legat. 2.*

Non enim facultas necessariæ electionis, propriæ liberalitatis beneficium est. Quid est enim quod de suo videatur reliquisse qui quod relinquit, omnimode reddere debuit. *d. l. §. 1. in f.*

Plurimum enim interest, utrum in potestate ejus, quem testator obligari cogitat, faciat, si velit dare, an post necessitatem dandi, solius distribuendi liberum arbitrium concedat. *l. 7. §. 1. ff. de reb. dub.*

XII.

12. The Prohibition to alienate does not oblige, unless it be made in favour of some Person.

What has been said in the fifth Article, that the Prohibition to alienate may imply a Fiduciary Substitution, ought to be understood of a Prohibition that has some Cause, and which is in favour either of a Family, or of a Person to whom the Testator intended that the Thing of which he had prohibited the Alienation should go. For a bare Prohibition to an Executor, or to a Legatee, to alienate certain Lands or Tenements, without having some regard to the Children of the said Executor, or the said Legatee, or to other Persons, would have no manner of effect, and would be no Obstacle why the said Executor or Legatee might not justly alienate Lands that would be his in such a manner, as that no other Person would have any Right, or Expectation, or Interest whatsoever in them by the Will of the Testator *r*.

r Divi Severus & Antoninus rescripserunt, eos, qui testamento vetant quid alienari nec causam exprimunt, propter quam id fieri velint. Nisi invenitur persona cujus respectu hoc à testatore dispositum est, nullius esse momenti scripturam; quasi nudum præceptum reliquerint: quia talem legem testamento non possunt dicere. Quod si liberis, aut posteris, aut libertis, aut hæredibus, aut aliis quibusdam personis consulentes, ejusmodi voluntatem significarent, eam servandam esse. *l. 114. §. 14. ff. de legat. 1.*

XIII.

13. The Prohibition to alienate certain Lands, and to dispose of them out of the Family, does not take away the Choice of one of the Family.

If a Testator, naming for his Executor his Son who had Children, had forbidden him to alienate certain Lands, requiring him to leave them in his Family; this Executor could not give away the said Lands to others than his Children; but he might leave them to any one of his Children whom he should please to name. For by leaving them to one, it would still be in the Family that he had left them. And altho the Persons substituted should be the Descendants of this Testator, and that he had an equal Affection for them all, yet his Expression would mark that he left it to his Son to chuse any one of his own Children, and that what he had in view was only to appropriate the said Lands to his Family, to prevent their going to any other Family, whether it were by an Alienation or other Disposition of the Executor who is charged with the Substitution *s*.

s Cum pater, filio hærede instituto, ex quo tres habuerat nepotes, fideicommisit, ne fundum alienaret, & ut in familia relinqueret: & filius decedens duos hæredes instituit, tertium exhæredavit, eum fundum extraneo legavit: Divi Severus & Antoninus rescripserunt verum esse non paruisse voluntati defuncti filium. *l. 114. §. 15. ff. de legat. 1.*

Verum est in familia reliquisse, licet uni reliquisset. *d. l. 114. §. 17.* See the ninth Article, and the Remark which is made on it.

XIV.

14. The Fiduciary Substitute ought to have either the Thing subject to the Substitution, or its value.

If an Executor or a Legatee were charged with a Fiduciary Bequest, which could not be otherways performed than by giving to the Substitute the Value of that which the Testator intended should be given him; this Value would be due to him from the said Executor or Legatee. Thus, for example, if he were charged to buy a certain House, or certain Lands, for the Fiduciary

ciary Substitute, and the Proprietor of the said House or Lands would not sell them, he would owe the Price of them. Thus, for another example, if he were charged to instruct a young Man in a Trade, of which some accident had render'd him incapable, as if he was fallen lame, or become blind, this Fiduciary Bequest would be estimated in Money *t*.

t Cum per fideicommissum aliquid relinquitur, ipsum præstandum, quod relictum est. Cum vero ipsum præstari non potest, æstimationem esse præstandam. *l.* 11. §. 17. *ff. de legat.* 3.

Si cui legatum relictum est, ut alienam rem redimat, vel præstet: si redimere non possit, quod dominus non vendat, vel immodico pretio vendat, justam æstimationem inferat. *l.* 14. §. 2. *eod.*

XV.

15. The Fruits and Interest of the substituted Goods are due from the time of the delay.

The Executor or Legatee who is charged with a Fiduciary Substitution of a particular thing, owes the Fruits and Interest thereof from the time that he delays to acquit it after it is due, in the same manner as the Executor who is charged with a Fiduciary Substitution of the Inheritance, pursuant to the Rnle explained in the ninth Article of the first Section; and he is also liable to Damages pursuant to the same Rule, if there should be room for such a Demand *u*.

u Is qui fideicommissum debet, post moram non tantum fructus, sed etiam omne damnum quo adfectus est fideicommissarius; præstare cogitur. *l.* 26. *ff. de legat.* 3. *See the third Article of the eighth Section of Legacies, and the Remark there made upon it; as also the ninth Article of the first Section of this Title.*

XVI.

16. The Executor cannot revoke the Payment of the Fiduciary Bequest, which proves null if he has once acquitted it.

If there were some Nullity in the Formalities of the Testament, or some other Defect, which would annul the Fiduciary Bequest, and the Executor who was charged with it had acquitted it; he could not oblige the Fiduciary Substitute to restore back to him that which he had willingly paid; and the Pretext that the Fiduciary Bequest was not due, would be useless. For he would by that Payment only have fulfilled more faithfully the Intention of his Benefactor *x*.

x Et si inutiliter fideicommissum relictum sit, attamen si hæredes comperta voluntate defuncti, prædia ex causa fideicommissi avo tuo præstiterunt: frustra ab hæredibus ejus de ea re quæstio tibi movetur, cum non ex ea sola scriptura, sed ex conscientia relicti fideicommissi, defuncti voluntati satisfactum esse videatur. *l.* 2. *C. de fideic.*

XVII.

17. The Legatary charged with a Fiduciary Bequest which proves to be null, reaps the Benefit of it, and not the Executor.

If a Legatary being charged with a Fiduciary Bequest out of his Legacy, it should happen that the thing substituted could not be restored, as if the Substitute were become incapable of it, or by reason of some other Event; the Executor could not pretend that this Fiduciary Bequest which proves useless ought to return to him, but the Legatary would reap the Benefit of it. For it was a Charge upon his Legacy, which ceases in his favour *y*.

y Fideicommisit ejus cui duo millia legavit, in hæc verba: *a te Petroni peto, uti ea duo (millia) solidorum reddas collegio cujusdam templi.* Quæsitum est, cum id collegium postea dissolutum sit, utrum legatum ad Petronium pertineat, an vero apud hæredem remanere debeat. Respondit, Petronium jure petere; utique si per eum non stetit, parere defuncti voluntati. *l.* 38. §. 6. *ff. de legat.* 3.

SECT. III.

Of some Rules common to Fiduciary Substitutions of an Inheritance, and to those of particular Things, and to tacit Fiduciary Substitutions.

WE must not confine the Rules that are common to these two sorts of fiduciary Substitutions to the Rules which shall be explained in this Section; for it is easy to judge that the Rules for the Interpretation of Testaments, and many others that have been explained in several Places, may be applied to them. But we have put down in this Section some Rules that are not so general, and which agree more particularly to these two sorts of Fiduciary Substitutions.

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9. *A*

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9. *A Donation has the Effect of an Election of a Substitute, whom the Donor was impower'd to chuse.*
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16. *The Substitution to an Executor or Legatee, in case he should die without Issue, remains without any Effect if he leaves Children behind him.*

I.

1. One may substitute either one Person alone, or many.

All Substitutions or fiduciary Bequests, whether they be universal, of the whole Inheritance, or particular, of certain things, may be made either in favour of one Person alone, or of many, whom the Testator calls to the Succession, that they may divide it among them, whether it be in equal or unequal Shares *a*.

a Plures in unius locum possunt substitui. §. 1. *inst. de vulg. subst.*
Altho this Text relates chiefly to the Vulgar Substitution, yet it may be applied to the Fiduciary Substitution, and the Testator has the same Liberty in this as in the other.

II.

2. One may substitute in one or more Degrees.

Whether there be only one Substitute or many, the Substitution may either end with the first Degree, or be extended to several Degrees from one Substitute to another successively. And the Substitution becomes open to every Degree, when the Person who filled the preceding Degree happening to fail, another succeeds in his Place *b*.

b Potest autem quis in testamento suo plures gradus hæredum facere. *Inst. de vulg. subst.*
The same Remark is to be made on this Text, as has been made on the preceding Article.
See concerning the Degrees of Substitutions the Preamble of the first Section.

III.

3. One may substitute the same Persons which may be instituted Executors.

All Persons who are capable of succeeding, are also capable of being substituted. Thus one may substitute as well as institute Children not yet born, Persons unknown to the Testator, but whom he sufficiently describes in order to distinguish them; and in general one may substitute all Persons, who at the time that the Substitution becomes open may be in a Condition to reap the Benefit of it, and in whom there is no manner of Incapacity *c*.

c See the first Article, and the thirteenth Article of the second Section of Heirs and Executors in general; the first, seventeenth, twenty second, twenty third, twenty fourth, and twenty fifth Articles of the second Section of Testaments; and the third Article of the second Section of Legacies.

IV.

4. Persons incapable of Fiduciary Substitutions.

We must reckon in the number of Persons incapable of Fiduciary Substitutions, all those to whom the Laws prohibit the giving of any thing by a Testament: Which takes in not only Strangers who are called Aliens, and those who are civilly dead, whether it be by a Sentence of Condemnation which ought to have this Effect, or by a Profession of some Religious Order; but also all other Persons to whom some Law, or some Custom, forbids us to give any thing *d*.

d See the second Section of Heirs and Executors in general, and the Preamble to the same Section.

V.

5. Tacit Fiduciary Substitutions are forbidden.

Seeing those who intend to make Dispositions that are prohibited, make use of other Persons Names, to whom they give, that they may restore it to those to whom they cannot give, we give the Name of tacit Fiduciary Substitutions to these secret Dispositions, which in outward Appearance regard the Persons whose Names are made use of, and which in reality and in secret are intended for those to whom the Law forbids to give. And these sorts of Fiduciary Bequests or Substitutions are unlawful, as much as a Disposition would be, in which the Persons to whom it is not lawful to give, had been expresly named *e*.

e See the Texts cited on the following Article.

VI.

6. The Crime of those Persons who lend their Names to tacit Fiduciary Substitutions.

The Persons who lend their Names to these tacit Fiduciary Substitutions or Bequests, whether they engage themselves by Writing, or by Word of Mouth, or in whatever manner it be that they receive any thing with design to restore it

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it to the Persons to whom the Testator could not give, are considered in the Eye of the Law as if they had stole that which they may receive by virtue of such a Disposition: And they are so far from being under an Obligation thereby to restore what they have received, to the Persons whom the Testators had in their view, that they contract no other Engagement than to restore to the Executors that which they may have received on that account, together with the Fruits and Interest thereof that were fallen due even before the Demand *f*.

f Prædonis loco intelligendus est qui tacitam fidem interposuerit, ut non capienti restitueret hæreditatem. *l. 46. ff. de hared. petit.*

Eum qui tacitum fideicommissum in fraudem legis suscepit, eos quoque fructus, quos ante litem motam percepit, restituere cogendum, respondit, quod bonæ fidei possessor fuisse non videtur. *l. 18. ff. de his quæ ut ind.*

In tacitis fideicommissis fraus legi fieri videtur, quoties quis neque testamento, neque codicillis rogaretur, sed domestica cautione, vel chirographo obligaret se ad fideicommissum præstandum ei, qui capere non potest. *l. 103. ff. de legat. 1.*

In fraudem juris fidem accommodat, qui vel id quod relinquitur, vel aliud tacite promittit restituturum se personæ quæ legibus ex testamento capere prohibetur: sive chirographum eo nomine dederit, sive nuda pollicitatione repromiserit. *l. 10. ff. de his quæ ut indig.*

VII.

7. How tacit Fiduciary Substitutions are proved.

The tacit Fiduciary Substitutions and Bequests may be proved not only by Writings, if there are any; but likewise by the other sorts of Proofs, according to the Rules which have been explained in the Title relating to this Matter *g*.

g Tacita fideicommissa frequenter sic deteguntur, si proferatur chirographum, quo se cavisset cujus fides eligitur, quod ad eum ex bonis defuncti pervenerit, restituturum: sed & ex aliis probationibus manifestissimis idem fit. *l. 3. §. 5. ff. de jur. fisci.*

¶ It is necessary to observe on this Article, and on the Text that is here quoted, that there is a Difference between our Usage and the *Roman* Law, as to tacit Fiduciary Bequests or Substitutions; which consists in this, that by the *Roman* Law the Exchequer reaped the Benefit of a tacit Fiduciary Bequest which was made in favour of a Person to whom it was not lawful to give, and that by our Usage it is the Heir or Executor who has the Advantage thereof. Thus they were more reserved under the *Roman* Law than we are in *France*, as to the Proofs of tacit Fiduciary Bequests, and in order to avoid the favouring of the Cause of the Exchequer too much, they required a strict Proof of the Fraud, as appears from the Text quoted on the Article; and we see in another Text, that Presumptions, which might serve as Proofs in our Usage, were not sufficient. It was in the Case of a Testament of a Husband, who had instituted for his universal Heir or Executor his Wife's Father. The Question was, whether it was not a Fraud against the Laws which were then in force, and which did not suffer in certain Cases the Husband to make his Wife his universal Heiress or Executrix *a*: and it is decided in that Law, that the bare Consideration of the paternal Affection, which united this Testator's Father-in-Law to his Wife, to whom he could not leave all his Estate, was not a sufficient Presumption that it was a tacit Fiduciary Bequest, made with a view that the Estate should be restored to the Testator's Widow. *Si gener socerum hæredem reliquerit, taciti fideicommissi suspicionem sola ratio paternæ Affectionis non admittit b.* If the like Question should happen in the Provinces, which are governed by their peculiar Customs, where the Husband cannot give any thing to the Wife, nor the Wife to the Husband, they would reject this Presumption, as it might be rejected when the Interest only of the Exchequer was concerned; and on the contrary they would have great regard to the said Presumption, not only in consideration of the Understanding which might be presumed to be between the Father and the Daughter, but likewise for this other Reason, which some Customs have established by an express Law, that Persons who are not allowed to give to one another by their Testaments, such as the Husband to the Wife, the Wife to the Husband, are as much tied up from giving to other Persons to whom the Husband and Wife may succeed. Thus the Prohibition of Dispositions made by Minors in their Testaments in favour of their Tutor or Guardian, is extended to his Children; and this is expresly regulated so by some Customs.

a Ult. Tit. 15. & 16.

b l. 25. ff. de his quæ ut ind.

VIII.

8. One cannot restore the Goods that are substituted before the time of the Substitution

The Executor or Legatary, who is charged with a Fiduciary Substitution, is not tied up to wait for the time in which the Substitution is to take place, and he may restore before-hand to the Substitute the Goods which are subject to the Fiduciary Substitution, provided that

comes, if the too precipitate Restitution turns to the prejudice of the Substitute.

that it be without prejudice to the Interest of other Persons, as has been explained in another place *h*, and provided also that this precipitate Restitution do not turn to the Damage of the Fiduciary Substitute, contrary to the Intention of the Testator. For if, for example, a Testator had charged his Executor, or a Legatary, with a Fiduciary Bequest of a yearly Pension, to be paid to some poor Person for his Maintenance, or of a Sum of Money payable after a certain time, to be laid out to some Use for the benefit of the Person for whom the said Fiduciary Bequest was intended, such as the bringing him up to some Trade, or the giving of a Marriage Portion to a poor young Woman; he who should be charged with these Fiduciary Bequests, could not in the first Case advance in one Payment all the several yearly Sums which were destined for Alimony, unless some Circumstances should render this advancing of the Payment more profitable to the Person for whom the said Alimony was bequeathed: And in the second Case, if the Person for whose benefit the Fiduciary Bequest was made, were not as yet of Age sufficient to learn a Trade, or the said young Woman ripe for Marriage, the advanced Payment, without the Precaution of taking Security that the Money should be applied to the Purposes for which it was designed, would not acquit the Executor who had paid it. But if the Term for the Payment of the Legacy in Trust, were only in favour of the Executor, and that no other Persons had any Interest therein, he might without difficulty pay the same before the Term *i*.

h See the seventeenth and eighteenth Articles of the tenth Section of Legacies.

i Javolenus eum qui rogatus post decem annos restituere pecuniam ante diem restituerat, respondit: si propter capientis personam, quod rem familiarem tueri non posset, in diem fideicommissum relictum probetur, ut perdituro ei id hæres ante diem restituisset nullo modo liberatum esse. Quod si tempus hæredis causa prorogatum esset, & commodum medii temporis esse sentiret: liberatum eum intelligi. Nam & plus eum præstitisse, quam debuisset. *l.* 15. *ff. de ann. leg.*

IX.

9. A Donation has the Effect of an Election of a Substitute, whom the Donor was impowered to chuse.

If he who was charged with a Fiduciary Bequest or Substitution at the time of his Death, in favour of some one of his Children whom he should think fit to chuse, had given in his Life-time to one of his Children the Things which were subject to this Fiduciary Bequest; this Donation would be in the place of an Election, if the same were not revoked. For altho' that the Liberty of this Choice ought to last until the Death of the Person charged with this Fiduciary Substitution, and that it would be the Interest of all the Children that the said Donation should not destroy the said Liberty; yet it would be sufficient that the Donee had been made choice of, and that the said Choice had not been revoked; seeing the said Choice would be confirmed by the Will of him, who, having it in his power to make another Choice, had not done it. So that it would be the same thing, as if this Choice had been made at the time of his Death *l*.

l A filia pater petierat, ut *cui vellet ex liberis suis, prædia cum moreretur, restitueret.* Uni ex liberis prædia fideicommissi viva donavit. Non esse electionem, propter incertum diem fideicommissi, certæ donationis videbatur, nam in eum destinatio dirigi potest, qui fideicommissum inter cæteros habiturus est, remota matris electione. *l.* 77. §. 10. *ff. de leg.* 2.

X.

10. The Bounds of the Liberty to give to one of the Substitutes more than to the others.

If a Testator, having instituted his Son his Heir or Executor, had charged him to restore to his Children his Inheritance, praying him at the same time to give to one of them whom he should name to him, something more than would fall to the Share of the others; the said Executor would not have an indefinite Liberty to give to this Son the greatest part of the Inheritance, but only a power to regulate and settle some small Advantage for him that would not make too great an Inequality between him and the others *m*.

m Pater cum filia pro semisse hærede instituta, sic testamento locutus fuerat: *Peto, cum morieris, licet alios quoque filios susceperis, Sempronio nepoti meo plus tribuas in honorem nominis mei.* Necessitas quidem restituendi nepotibus viriles partes, præcedere videbatur. Sed moderandæ portionis, quam majorem in unius nepotis personam conferri voluit, arbitrium filiæ datum. *l.* 76. §. 5. *ff. de legat.* 2.

XI.

11. Order of the Substitutes in divers Degrees.

If a Father who had several Children, having instituted his Wife his Executrix, had intreated her to restore his Inheritance to their Children, or to such of them as should happen to be alive, or to restore it to their Grandchildren, or to any one of them whom she should chuse, or to some one of his Family whom she should name; a Disposition conceived in these Terms would not leave to the said Executrix an indefinite Liberty to chuse whomsoever she should think fit from among

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these three sorts of Substitutes. But this Expression would call in the first place all the Children of the first Degree, and they would all of them be preferred to all the Grandchildren of the Testator; and in default of the Children, she might chuse among the Grandchildren, but could not prefer to them the collateral Relations, whom she could not call to the Succession but in default of the Children and Grandchildren *n*.

n *Peto de te, uxor carissima, (uti) cum morieris, hæreditatem meam restituas filiis meis, vel uni eorum, vel nepotibus meis, vel cui volueris, vel cognatis meis, si cui voles ex tota cognatione mea.* Inter filios respondi substitutionem fideicommissi factam videri. Circa nepotes autem, (&) cæteros cognatos, facultatem eligendi datam, ex cæteris autem cognatis, si nepotes superessent, non recte mulierem electuram, propter gradus fideicommissi præscriptos. Deficiente vero gradu nepotum, ex cognatis, quam velit personam eligi posse. *l.* 57. §. 2. *ff. ad Senat. Trebell.*

What is said here of the Choice from among the Grandchildren, must be understood without prejudice to their Legitime or Child's Part.

XII.

12. The Parties who are mutually substituted to one another, may renounce the mutual Substitution.

If two Brothers who are substituted reciprocally to one another, in case one of them should die without Issue, had agreed between themselves that the Substitution or Fiduciary Bequest should have no effect, this Agreement would annul the Sustitution. For they might discharge one another from it, that each of them might possess freely that which his Father had left him, and that neither of them might have any Temptation to wish for the other's Death. Which Consideration renders such an Agreement so favourable, that Minority alone would not be sufficient to set it aside, unless it should appear by the Circumstances that one of the Parties had sustained Damage by the Agreement *o*.

o De fideicommisso a patre inter te & fratrem tuum vicissim dato, si alter vestrum sine liberis excesserit vita, interposita transactio rata est: cum fratrum concordia, remoto captandæ mortis alterius voto improbabili, retinetur. Et non potest eo casu rescindi, tanquam circumventus sis: cum pacto tali consenseris: neque eam, cui subveniri solet ætatem agere te proponas: nec, si ageres, iisdem illis de causis in integrum restitutionis auxilium impetrare deberes. *l.* 11. *C. de transact.*

Cum proponas, filios testamento scriptos hæredes rogatos esse (ut) *qui primus rebus humanis eximeretur alteri portionem hæreditatis restituerit*: Quoniam precariam substitutionem fratrum consensu remissam adseris, fideicommissi persecutio cessat. *l.* 16. *C. de pact.*

XIII.

13. The Prescription of substituted Goods runs both against the Executor, and likewise against the Substitute.

If a third Person who had honestly and fairly possessed some Goods, which were subject to a Fiduciary Bequest or Substitution, for so long a time as to acquire a Right by Prescription, computing therein the time which had run against the Executor who was charged with the Fiduciary Substitution, the Substitute could not deduct that time upon pretence that the Prescription could not run against the Executor to his Prejudice. For the Executor was the Master of the Goods, and it was his Business to enter a Claim, in order to interrupt the Prescription: And the Substitute might likewise on his part have watched for his own Interest. And it would be the same thing if it were some Right belonging to the Inheritance, which, for want of a Demand on the part of the Executor, had been lost by Prescription *p*.

p Si temporalis actio in hæreditate relicta fuerit, tempus, quo hæres experiri ante restitutam hæreditatem potuit, imputabitur ei, cui restituta fuerit. *l.* 70. §. *ult. ff. ad Senat. Trebell.* See the eleventh Article of the first Section. See the following Article.

We must understand this and the following Article, of Fiduciary Bequests or Substitutions which had not been published or inrolled, pursuant to the Ordinances which have been taken notice of at the end of the Preamble of this Title. For if a Substitution of a Land, for instance, had been inrolled, the Right of the Substitutes would be preserved against all Purchasers and other Occupiers.

XIV.

14. The Prescription of Lands substituted, which are alienated by the Usufructuary, divests the Substitute of the Property thereof.

If a Legatary of an Usufruct of Lands, which are subject to a Fiduciary Substitution, had disposed of the Property of the said Lands by his Testament, in favour of a Person who, being ignorant of the Fiduciary Substitution, had possessed the said Lands during the time required for Prescription; this Possessor could not any more be molested in his Possession by the Substitute *q*.

q Sticho testamento manumisso, fundi ususfructus erat legatus: &, cum is uti fruique desisset, fidei hæredum testator commisit, uti eum fundum darent Lucio Titio. Sed Stichus testamento suo ejusdem fundi proprietatem nepotibus suis legavit. Et hæredes Stichi ex testamento ejus legatariis nepotibus eum fundum tradiderunt. Quæsitum est cum nepotes legatarii ignoraverint conditionem fundi supra scripti priore testamento datam, & plusquam tempore statuto possederint, an eum fundum sibi adquisierint. Respondit, secundum ea quæ proponerentur, legatarios sibi adquisisse. *l.* 36. *ff. de usu & usuf. & red. legat.*

We must make the same Remark on this Article, which has been made on the preceding.

XV.

15. The Fiduciary Substitution after

If it should happen that the Executor or Legatee, who is charged with a Fiduciary Substitution that ought to take

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the Death of the Executor or Legatary, is not open by their civil Death. take place at his Death, should fall into a State of Civil Death, whether it were by a Sentence of Death, or by a Condemnation to some other Punishment, which would be attended with the Confiscation of his Goods; this Civil Death and this Confiscation would not lay open the Fiduciary Substitution. For besides that the Substitution would be understood only of a Natural Death, and that the Substitute might die before the Executor or Legatee, it might so happen that the Sentence of Condemnation might be annulled by an Act of Grace of the Prince, and that so this Executor or Legatee being restored to his former State and Condition, would enter again to the Possession of his Goods, or might acquire others. Thus, this Fiduciary Substitute could not demand the Goods that are substituted. But it would be just in such a Case, that Provision should be made for the Securiy of the substituted Goods, by Precautions to be taken between the Fiduciary Substitute and those to whom the substituted Goods should go r.

r Cornelio Felici mater scripta hæres rogata erat restituere hæreditatem post mortem suam, cum hæres scripta condemnata esset a fisco, & omnia bona mulieris occuparentur: dicebat Felix, se ante pœnam esse? hoc enim constitutum est. Sed si nondum dies fideicommissi venisset, quia posset ipse prius mori, vel etiam mater alias res acquirere, repulsus est interim a petitione. *l.* 48. §. 1. *ff. de jure fisci.*

As to the Precautions mentioned in the Article, see the third Article of the second Section of the Falcidian Portion.

XIV.

16. The Substitution to an Executor, or Legatee, in case he should die without Issue, remains without any effect, if he leaves Children behind him.

If an Executor or Legatee were charged with a Fiduciary Bequest or Substitution, in case he should happen to die without Issue, and that he had Children who survived him, this Fiduciary Substitution would remain without any effect. And even altho these Children should renounce the Succession of their Father, yet the Substitute would have no Right, because the Condition of the Fiduciary Substitution would not be accomplished, and because the Intention of this Testator was not to engage the said Children to become Heirs to their Father, but to leave to him the free Use and Disposal of the substituted Goods, in case he had Children s.

s Cum erit rogatus, *si sine liberis decesserit*, per fideicommissum restituere, conditio defecisse videbitur, si patri supervixerint liberi. Nec quæritur, an hæredes extiterint. *l.* 114. §. 13. *ff. de leg.* 1. *l.* 1. *C. de cond. ins. v. l.* 6. §. 2. *C. ad Senat. Trebell. l.* 85. *ff. de hæred. inst.*

¶ It is not so much for the Case explained in this Article, that we have added this last Rule to this Title, as for the Consequences which may be gathered from it for resolving a Question which is commonly proposed, and which is expressed in these Terms, to wit, *If the Children who are in the Condition, are in the Disposition*; that is to say, if the Children who surviving their Father, make the Right of the Substitute to cease, are themselves substituted.

This Question has divided the Interpreters, the greatest part of whom have been of opinion, that the Children are substituted. Others, and among them the most able Interpreter of them all, are of a contrary opinion; and to support it, they quote the Text cited on this Article, and some others, but without explaining the Consequences which they gather from them: And seeing none of those Texts decide precisely this Question, and that it is so frequently started, that we cannot well dispense with examining it, it would seem that it might be urged against the Opinion of those who will have the Children to be substituted, that the Text cited on this Article, and all the others which decide that the Fiduciary Substitution, *in case there be no Issue*, ceases when there is Issue, seem to imply the Consequence, that there is no Substitution with respect to the Children. This Consequence is not only founded on this Reason which is expressed in the Texts, that the Condition of the Fiduciary Substitution is not come to pass; for to this one might reply, that this Reason respects only the Substitute; but it it is also founded on this, that we see that in all the Laws which mention this Case, and which decide it after the same manner, there is not any one of them in which it has been thought fit to add any Words to this effect, That truly the Fiduciary Substitution was null in respect of the Substitute, but that it would go to the Children, as being comprehended in the Disposition of the Testator, and called by him to the substituted Goods. This Addition seems to be so natural and so necessary, that seeing none of the Authors of these Laws have thought of it, we may conclude from thence that they did not think that the Substitution took in the Children. And among these Texts there is not one of them where this Addition would have been more natural

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ral and more necessary than in the Text cited on this Article, and which we have made choice of for that reason. For the Circumstance of the Childrens renouncing their Father's Succession, made it still more necessary to have added, That altho they were not Heirs to their Father, yet they would nevertheless reap the Benefit of the Fiduciary Substitution.

We may add to these Reasons, altho they seem to be decisive enough in themselves, that if we examine into the Intention of the Testator who substitutes to his Executor, or to a Legatee, *in case he has no Children*, it does not seem as if he had any the least View of calling the Children to the Substitution. For if that had been his Intention, he would have substituted the Children in the first place, and not called another Substitute, except in default of them. Thus, when the Testator does no other thing, but barely dispose in favour of a Fiduciary Substitute, in case he have no Children, his Intention appears to be, That in case there be Children, their Father shall not be any longer charged with the Fiduciary Substitution, but shall have free Liberty to dispose of the Goods in favour of such of his Children as he shall think fit to chuse, or of other Persons.

We think that we may venture to say in relation to this Question, that the Interpreters who have invented it, have made a doubt of that which the Simplicity of the Principles sets in a clear and evident Light, and that their Sentiment is contrary to the Rules: And the Author whom we just now quoted was of this Opinion, as to this matter *. The Reader may have remarked in some Places of this Book such like Opinions of the Interpreters, opposite to the Spirit of the Laws. And we make this Reflection here, that we may have an opportunity of observing farther, that we see in this Question, and in the Sentiment of those Interpreters, a remarkable Example of the Difficulties which they have started in the matter of Substitutions, framing in this manner Questions, and deciding them by other Principles than those of the Laws, and taking afterwards their own Decisions for new Principles, from whence they raise and resolve in the same manner other Questions. Thus it is that they have perplexed this matter of Substitutions, which altho in it self intricate enough, may nevertheless be reduced to Principles and Rules that are plain enough, and which are sufficient for resolving all the Questions that can arise, or that can be imagined. It is to these Principles, and to these Rules, that we have confined our selves in this Book, as well as the others, having endeavoured to comprehend therein every thing that is in the Laws, which is conformable both to our Usage, and to Equity, without leaving out even the particular Cases which are specified in the Laws, and which may make the Use of the Rules easier.

* Deficientibus superioribus conjecturis, negarem & pernegarem eos qui sunt in conditione esse in dispositione, ex l. Gallus, &c. *Cujac. consult.* 35. *These Conjectures taken from the Words of the Testament about which this Author was consulted, make no Alteration in his Opinion touching the general Position.*

TIT. IV.

Of the Trebellianick Portion.

BY the Trebellianick Portion is meant the fourth Part, which the Laws appropriate to Executors who are charged with an universal Fiduciary Bequest of the whole Inheritance, or of a part of it; which distinguishes the Trebellianick Portion from the Falcidian Portion. For the Falcidian Portion relates to Legacies, and to particular Fiduciary Bequests of certain Things.

This fourth Part was called the Trebellianick Portion, because of a Decree of the Senate, which was named thus from the Name of one of the Consuls of that Year in which it was made, ordaining that the Executor who should be charged to restore the Inheritance to the Fiduciary Substitute, should be discharged of all the Debts and Burdens, and that the same should pass with the Goods to the Substitute. But seeing the Executors, who had but little or no profit from the Inheritance which they were obliged to restore, refused to accept it, when they were only to make Restitution of it; it was ordained by another Decree of the Senate, that the Executor who should be charged with a Fiduciary Bequest of the Inheritance, might retain the fourth Part thereof. But because of some Inconveniencies in this last Decree of the Senate, which it would be to no purpose to mention here, *Justinian* confounded the two Decrees of

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of the Senate together, giving to the first the Effects of them both, in such Parts of them as he intended should subsist both of the one and the other. So that the Name of Trebellianick Portion has ever since been applied to this Fourth Part that is taken out of the Fiduciary Substitutions of Inheritances. But this Trebellianick Fourth Part being founded on the same Equity, and being of the same nature with the Falcidian Portion, or rather being only a sort of Falcidian Portion, in that it retrenches the Dispositions of a Testator who should charge his Executor to restore more than three Fourths of the Inheritance; this Affinity between these two Fourths has been the Reason why the Laws have confounded them together, and that they have even given to the Trebellianick Portion the Name of the Falcidian *a*. And seeing for this reason the Rules of the Falcidian Portion do almost all of them agree to the Trebellianick Portion, it is necessary that we should join them to those which shall be explained in this Title, in which we shall confine our selves to such Rules as are necessarily to be distinguished from those of the Falcidian Portion. And as to the Rules of the Falcidian Portion, which have no relation to the Trebellianick Portion, they come within so narrow a compass, and are so easily distinguished, that it would be altogether useless to make any Remark on them here, seeing they may be easily discerned by the bare reading of them.

We shall say nothing here of the double Fourth Part which belongs to Children who are charged with Fiduciary Substitutions, to avoid repeating what has been said of this matter on the sixteenth Article of the first Section of Direct and Fiduciary Substitutions.

The Reader ought not to be surpriz'd that he finds in this Title only a few Articles; for it was necessary that we should confine our selves to the Rules of which it is composed: And all the Rules which may be thought to be wanting here, and which swell in the Body of the *Roman* Law the Title relating to this Subject, have been explained either under the Title of the Falcidian Portion, as we have just now remarked, or in the other Titles of this fifth Book, where we have set down every Rule in its proper place.

a V. l. 6. C. ad Senat. Trebel. l. 1. §. 19. eod.

SECT. I.

Of the Use of the Trebellianick Portion, and wherein it consists.

The CONTENTS.

1. *Definition of the Trebellianick Portion.*
2. *It takes place for an Executor who has but a part of the Inheritance.*
3. *The Testator may in lieu of the Trebellianick Fourth Part assign to the Executor either Houses, Lands, or some other Thing.*

I.

THE Trebellianick Portion is the fourth Part of the Inheritance, which ought to remain to the Executor who is charged to restore it *a*.

1. Definition of the Trebellianick Portion.

a Ut ei qui rogatus esset hæreditatem restituere, perinde liceret quartam partem retinere, atque ex lege falcidia ex legatis retinere conceditur. §. 5. *inst. de fideic. hered.*

II.

If he who is charged with a Fiduciary Substitution, be Heir or Executor only for a Part of the Inheritance which he is charged to restore, he will have the Trebellianick Portion out of it; which will be the fourth Part of his Portion of the Inheritance. And it would be the same thing, if several Heirs or Executors were charged to restore their Shares of the Inheritance, or only some of them theirs. For every one of them would have the Trebellianick Portion of his own Share *b*.

2. It takes place for an Executor who has but a part of the Inheritance.

b Potest autem quisque & de parte restituenda hæredem rogare. §. 2. *in f. eod.*

Et hoc casu eadem observari præcipimus quæ in totius hæreditatis restitutione diximus. §. 8. *in f. eod.*

III.

Altho the fourth Part which ought to remain to the Executor, be a Quota of the Inheritance, which makes it necessary that there should be a Partition of the Estate made between the Executor and the Fiduciary Substitute; yet the Testator may assign to the Executor a certain Land, or Tenement or other Thing, or even a Sum of Money in lieu of the said fourth Part; and in this Case if the Executor restore the whole Inheritance to the Fiduciary Substitute, excepting what is thus reserved to him by the Testator

3. The Testator may in lieu of the Trebellianick fourth Part assign to the Executor either Houses, Lands, or some other thing.

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Testator, the Substitute would be solely answerable for all the Charges; whereas if the Executor should take the fourth Part of the Inheritance, the Goods and the Charges of the Inheritance would be divided between them proportionably to their Shares *c*.

c Si quis una aliqua re deducta, sive præcepta, quæ quartam continet (veluti fundo, vel alia re) rogatus sit restituere hæreditatem, simili modo ex Trebelliano Senatus-Consulto restitutio fiet, perinde ac si quarta parte retenta rogatus esset reliquam hæreditatem restituere. Sed illud interest, quod altero casu, id est, cum deducta, sive præcepta aliqua re restituitur hæreditas: in solidum ex eo Senatus-Consulto actiones transferuntur. Et res, quæ remanet apud hæredem, sine ullo onere hæreditario apud eum remanet, quasi ex legato ei acquisita. Altero vero casu, id est, cum quarta parte retenta rogatus est hæres restituere hæreditatem & restituit: scinduntur actiones, & pro dodrante quidem transferuntur ad fideicommissarium, pro quadrante remanent apud hæredem. Quin etiam licet una re aliqua deducta aut præcepta, restituere aliquis hæreditatem rogatus sit, in qua maxima pars hæreditatis contineatur, æque in solidum transferuntur actiones: & secum deliberare debet is, cui restituitur hæreditas, an expediat sibi restitui. Eadem scilicet interveniunt & si duabus pluribusve deductis præceptisve rebus, restituere hæreditatem rogatus sit. Sed & si certa summa deducta præceptave, quæ quartam vel etiam maximam partem hæreditatis continet: rogatus sit aliquis hæreditatem restituere: idem juris est. *§. 9. inst. de fideic. hæred. l. 30. §. 3. ff. ad Senat. Treb. l. 2. C. eod. l. 47. §. 1. ff. ad leg. Falc.*

SECT. II.

Of the Causes which make the Trebellianick Portion to cease, or which diminish it.

The CONTENTS.

1. *The Testator may forbid the Deduction of the Trebellianick Portion.*
2. *The Executor who restores voluntarily the whole Inheritance, without retaining any thing, cannot afterwards demand the Trebellianick Portion.*
3. *The Fiduciary Substitute who is charged with a second Restitution, has no right to the Trebellianick Portion.*
4. *How the Fruits are reckoned or not reckoned as Part of the Trebellianick Portion.*
5. *The Fruits are not reckoned to the Children as Part of their Trebellianick Portion.*
6. *Penalty of the Executor who is charged to restore the Inheritance, and who has not made an Inventary of the Effects.*

I.

1. The Testator may forbid the Deduction of the Trebellianick Portion.

If the Testator has expresly forbidden the Deduction of the Trebellianick Portion, the Executor is at liberty either to accept or refuse the Inheritance: but if he does accept it, he will be obliged to fulfil the Fiduciary Substitution without retaining any thing *a*.

a Neratius scribit si hæres rogatus restituere totam hæreditatem, *non deducta Falcidia*, &c. *l. 1. §. 19. ff. ad Senat. Trebell.*

Si vero expressim designaverit (testator) non velle hæredem retinere Falcidiam, necessarium est valere testatoris sententiam. *Nov. 1. c. 2. §. ult.*

Aut si parere noluerit, eum quidem recedere ab hujusmodi institutione, locum vero fieri (sicut dudum prædiximus) substitutis, & cohæredibus, & fideicommissariis, & legatariis. *d. §. in f.*

See the last Article, and the Remark that is there made on it.

II.

2. The Executor who restores voluntarily the whole Inheritance, without retaining any thing, cannot afterwards demand the Trebellianick Portion.

If the Executor who might have retained the Trebellianick Portion, had restored the whole Inheritance without any Deduction, he would not afterwards be admitted to demand it: For it would be presumed that he had made Restitution of the whole Inheritance, only that he might fulfil more punctually the Fiduciary Substitution; unless it should appear by the Circumstances that some Error in Fact, or some other Cause, ought to destroy this Presumption *b*.

b Si totam hæreditatem rogatus restituere tu sponte adieris, & sine deductione quartæ partis restitueris: difficile quidem crederis per ignorantiam magis, non explendi fideicommissi causa hoc fecisse: sed si probaveris per errorem te quartam non retinuisse, recuperare eam poteris. *l. 68. §. 1. ff. ad Senat. Trebell.*

See the fifteenth and sixteenth Articles of the fourth Section of the Falcidian Portion.

III.

3. The Fiduciary Substitute, who is charged with a second Restitution, has no right to the Trebellianick Portion.

If the Fiduciary Substitute of the Inheritance, or of a part of it, were likewise charged to restore it to another Person, he could not deduct a second Trebellianick Portion out of it, altho the Executor who had restored the Inheritance to him had retained his fourth Part: For the Trebellianick Portion is due only to the Executor who succeeds immediately to the Testator, unless the Testator has likewise granted it to this Fiduciary Substitute *c*.

c Nunquam legatarius vel fideicommissarius, licet ex Trebelliano Senatus-Consulto restituitur ei hæreditas, utitur legis Falcidiæ beneficio. *l. 47. §. 1. ff. ad leg. Falc.*

Neratius scribit: si hæres rogatus restituere totam hæreditatem, non deducta Falcidia, rogato & ipsi, (ut) alii restituat: non utique debere eum detrahere fideicommissario secundo quartam: nisi liberalitatem tantum ad priorem fideicommissarium hæres voluit pertinere. *l. 1. §. 19. ff. ad Senat. Trebell.*

Qui

Qui fideicommissam hæreditatem ex Trebelliano, cum suspecta diceretur totam accepit, si ipse quoque rogatus sit alii restituere, totum restituere cogetur: & erit in hac quoque restitutione Trebelliano locus. Quartam enim Falcidiæ jure fideicommissarius retinere non potuit: nec ad rem pertinet, quod, nisi prior, ut adiretur hæreditas, desiderasset, fideicommissum secundo loco datum intercidisset. Cum enim semel adita est hæreditas, omnis defuncti voluntas rata constituitur. Non est contrarium quod legata cætera non ultra dodrantem præstat. Aliud est enim, ex persona hæredis conveniri: aliud proprio nomine defuncti precibus adstringi. *l.* 55. §. 2. *eod.*

IV.

4. How the Fruits are reckoned or not reckoned as part of the Trebellianick Portion.

If the Goods subject to the Fiduciary Substitution were to be restored only some time after the Death of the Testator, or after the Existence of a condition on which the Substitution should depend, the Fruits which the Executor had reaped before the Substitution was open, would be reckoned to him as part of his Trebellianick Portion *d*. But the Fruits reaped by the Executor after the time that the Fiduciary Substitution was to take place, when the Restitution of the substituted Goods was delayed only thro the Negligence of the Substitute, would not be reckoned as part of the Trebellianick Portion due to the said Executor *e*.

d Fructus in quartam imputantur. *l.* 18. §. 1. *ff. ad Senat. Trebell.*

Ante diem fideicommissi cedentem fructus, & usuræ quas debitores hæreditarii, cum postea cessisset dies solverunt: item mercedes prædiorum ab hærede perceptæ, portioni quadrantis imputantur. *l.* 52. §. 5. *eod.*

e Si hæres post multum temporis restituat cum præsenti die fideicommissum sit, deducta quarta restituet. Fructus enim, qui percepti sunt, negligentia petentis, non judicio defuncti, percepti, videntur. Alia causa est, si sub conditione, vel in diem rogatus fuerit. Tunc enim quod percipitur summovet Falcidiam, si tantum fuerit quantum quartam facit & quartæ fructus. Nam fructus, qui medio tempore percepti sunt, ex judicio testantis percepti videntur. *l.* 22. §. 2. *eod.*

See the sixteenth Article of the fourth Section of the Falcidian Portion, the ninth Article of the first Section of Substitutions, and the fifteenth Article of the second Section of the same Title.

V.

5. The Fruits are not reckoned to the Children as part of their Trebellianick Portion.

The Rule explained in the preceding Article, which reckons to the Executor the Fruits as Part of his Trebellianick Portion, relates only to such Executors as are not Children or Descendants of the Testator. For the Fruits which the Children enjoy before the Fiduciary Substitution is open with which they are charged by their Father, Mother, or other Ascendant, accrue to them without any Diminution of the Claims or Demands which they may have upon the Inheritance which they are charged to restore; whether it be that the Fiduciary Substitution be in favonr of their own Children, or other Descendants of the Testator. And they will have over and above the Fruits which they may have enjoyed, their entire fourth part of the whole Inheritance; even altho the Testator had ordained that those Fruits should be reckoned as part of it *f*.

f Jubemus quoties pater vel mater filio suo, filiæ, filiis vel filiabus, ex æquis vel in æquis partibus hæredibus institutis, invicem seu simpliciter quosdam ex his, aut quemdam rogaverit qui prior sine liberis decesserit, portionem hæreditatis suæ superstiti seu superstitibus restituere: ut omnibus modis retenta quarta pro authoritate Trebelliani Senatus consulti, non per imputationem redituum, (licet hoc testator rogaverit vel jusserit) sed de ipsis rebus hæreditariis, dodrans restituatur. Idemque in retinenda legis Falcidiæ portione obtinere jubemus. Et si pater vel mater filio seu filia institutis (sicut supradictum est) hæredibus, rogaverit eos easve nepotibus vel neptibus, pronepotibus vel pronepribus suis, ac deinceps restituere hæreditatem. *l.* 6. *C. ad Senat. Trebell.*

VI.

6. Penalty of the Executor who is charged to restore the Inheritance, and who has not made an Inventary of the Effects.

Seeing the Trebellianick Portion is a fourth Part of the Inheritance, the Executor who pretends to retain this fourth Part, ought to shew what the Goods of the Inheritance consist in, in order to regulate that which he may retain, and that which he ought to restore. And this is what he cannot do but by making an Inventary of all the Goods of the Inheritance. Which lays a double Tie on this Executor to make the said Inventary; both for his own Interest, that he may establish his Right to the Trebellianick Portion, and regulate the Proportion of it, and for the Interest of the Fiduciary Substitute, that he may be able to judge of the Fidelity of the Restitution of the substituted Goods, as has been mentioned in the twentieth Article of the first Section of Substitutions. Thus the Executor, who being charged with a Fiduciary Substitution of the Inheritance, or of a part of it, had neglected to make an Inventary of the Goods, would be very justly deprived of the Trebellianick Portion, unless it were in a Case which should not require this Precaution, or that particular Circumstances should exempt him from this Penalty, which would be justly inflicted on him in case his not having made an Inventary could be any ways imputed to his want of Fidelity, or to his Neglect *g*.

g See the Texts cited on the twentieth Article of the first Section of Direct and Fiduciary Substitutions.

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¶ It is to be remarked on this Article, and on the twentieth Article of the first Section of Substitutions, that several Interpreters have been of opinion, that altho the Executor who is charged with a Fiduciary Substitution of the Inheritance has neglected to make an Inventary of the Goods, he is not for that Omission to be deprived of the Trebellianick Portion. And the chief Foundation on which they build their Opinion is, that the Privation of the Trebellianick Portion being a Punishment, it ought not to be inflicted on the Executor unless there be an express Law that has established it: That it is true, that the Laws have ordained that the Executor shall forfeit his Right to the Falcidian Portion of Legacies when he has neglected to make an Inventary; but that this Punishment ought not to be extended to the Executor who is charged with a Fiduciary Substitution of the Inheritance, or of a part of it, because Penal Laws are not to be extended beyond the Cases for which they were designed. The other Interpreters, on the contrary, ground their Opinion on the Necessity of an Inventary, in order to justify the Fidelity of the Executor in making the Restitution; and they add, that whatever the Laws have regulated in the matter of the Falcidian Portion is common to the Trebellianick Portion, because of the Confusion which the Laws have made of these two Fourths into one, as has been observed in the Preamble of this Title, and that the same Reasons make it necessary to have an Inventary in the one case as well as the other; and that likewise *Justinian* in his first Novel, *Chap.* 2. where he ordains, that the Falcidian Portion shall be forfeited in case there be no Inventary, obliges the Executor to satisfy not only the entire Legacies, but also the Fiduciary Bequests; *Non retinebit Falcidiam, sed complebit legatarios & fideicommissarios*: Which Words those of the other Party restrain to Fiduciary Bequests of particular things, and that with very good reason.

This Question has been variously decided in divers Tribunals of *Europe*, and there have been likewise contrary Judgments given thereupon in several Parliaments of this Kingdom; in which they have always had a due regard to the particular Circumstances of each Case: For it is certain that there are Cases in which it would not be just to deprive the Executor of the Trebellianick Portion for want of an Inventary; as for example, if an Executor were charged to restore the Inheritance at the same Instant that he should accept it; because in this Case, which was very frequent under the *Roman* Law, there would be no Inventary to make, the Fiduciary Substitute having nothing to do but to take the Declaration of the Executor who restores the Inheritance to him, and so to take possession of the Goods: And the like Case might happen if a Testator who had a mind to convey his Inheritance, or a Part of it, to a Relation or Friend who was absent in a foreign Country, had instituted another Person his Executor, and had charged him to restore the Inheritance which he left to him in trust to his absent Friend as soon as he should return, and that the said absent Person chanced to return about the time of the Testator's Death; for the Executor in this case being willing to restore the substituted Inheritance at the same time that he accepted it, would have no occasion to make an Inventary in order to preserve his Trebellianick Portion. There are also other Cases in which it would not be just to deprive the Executor of the Trebellianick Portion for his not having made an Inventary; as for example, if the Executor were a Minor, and his Guardian had omitted to make the said Inventary, or if the Death of the Testator had happened in the time of a Plague. And if in these and other the like Cases the Fiduciary Substitute should pretend that the Restitution were not entire, he would be allowed to bring Proofs of the Goods, and of their Value. We were in doubt whether we should except also the Case where the Executor should happen to be a Son of the Testator's, and were charged with a Fiduciary Substitution in favour of his own Children: if, for example, the Substitution were only for the Benefit of one of the Children, and that the Circumstances should give ground to presume that some Favour had been shewn to the other Children in prejudice of the Substitution. What gives occasion to the Doubt is, that on the one part the Father might prejudice the Interest of the Child who was to have the Benefit of the Substitution, and might diminish the Restitution in favour of the other Children; and that on the other part the said Father of the Substitute being to retain out of all the Goods of the Testator

Teſtator both his Legitime, and alſo the Trebellianick Portion, according to the Remark made on the ſixteenth Article of the firſt Section of Subſtitutions, the ſame is conſidered as a Part of his Legitime. So that it might be a Hardſhip to deprive him of it for want of an Inventary. But if the Executor were a Stranger, or even a collateral Relation, and charged with a Fiduciary Subſtitution, it would ſeem to be juſt that for the want of an Inventary he ſhould forfeit the Trebellianick Portion, as he would forfeit the Falcidian Portion on the ſame account, there being the ſame Reaſons for both. And altho we ſhould ſuppoſe that *Juſtinian* in this Novel had only the Falcidian Portion in his view, yet it does not ſeem to be neceſſary that we ſhould have an expreſs Law to oblige the Executor who is charged with a Fiduciary Subſtitution to make an Inventary of the Goods, in order to prove his Fidelity in making reſtitution of them. This Duty is enjoined by the Law of Nature, and by conſequence it is natural alſo that the want of an Inventary ſhould be puniſhed by ſome Penalty, which ought to be at leaſt the Privation of a Benefit, which conſiſting in a Quota of the Inheritance, could not be given to the Executor unleſs he ſhould make appear what the Inheritance conſiſted in; ſeeing otherwiſe it would be an Encouragement to fraudulent Concealments of the Effects.

It is upon theſe different Conſiderations that we have thought proper to compoſe this Article in the manner in which it is conceived, in order to reconcile the Letter of the Rules of Law with Equity, which ought to be the Life and Spirit of them.

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THE

PUBLICK LAW:

BEING A

SUPPLEMENT

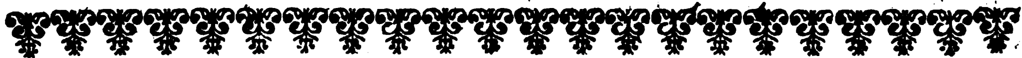
TO THE

CIVIL LAW

IN ITS

NATURAL ORDER.

TOME II.



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The Author's Epistle Dedicatory to the *French* KING.

SIR,

YOUR Majesty having done me the honour to approve of the Design of the Work of the Civil Law in its Natural Order, and to lay Your Commands on me to finish it, I began with that Part of the said Laws which is called the Private Law, which consists of the Matters which respect the Interests of particular Persons among themselves, and from whence arise the Differences which take up the time of all the Tribunals, and even of Your Majesty's Council, and of which Your Majesty is pleased often to take Cognizance Yourself; but I did not hope to live long enough, nor to have Strength enough to undertake the Matters of the Publick Law. Besides, I had very good reason to be afraid of the Consequence and Difficulties of the great number of Matters which this Law takes in; which obliged me to confine my first Design to the Matters of the Private Law. For in order to examine the Publick Law thoroughly in its full Extent, and such as it is received in Your Kingdom; it is necessary that we should begin with the Foundations of the Authority and Power which God hath placed in the sacred Person of Your Majesty for the Government thereof, the Rights annexed to the said Power, the Veneration, the Obedience, and the Fidelity which all Your Subjects owe to Your Majesty, and to all Your Orders and Commands. We must enter into a particular detail of all Your Majesty's Royal Rights, which take in the Use of the Sovereign Power in Peace and in War, the Forces and other Succours that are necessary for preserving the State in Peace and Tranquillity, and defending it against the Attacks of Enemies. We must therein treat of the general Policy of the Kingdom, of the different Orders of Persons which compose the State, of their Functions and their Duties, of the Military Art, of the Revenue, of the Administration of Justice, of the Punishment of Crimes, of the Order of Judicial Proceedings, of the Duties of Judges, and of all the particular Matters which are comprehended under these general Parts of the Publick Order. Seeing it is in these Matters that Your Majesty is chiefly engaged, and that they are the Object which is most worthy of Your Royal Care, I have endeavoured, that I might keep up as much as

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was possible to the Dignity of these Matters, and of Your Majesty's great Zeal, both for Religion and Justice, to build upon the Principles both of the one and the other those of the Matters of the Publick Law. For as the Publick Order is the Work of God himself, who disposes of the Government of all Kingdoms, who gives to Kings and other Princes all their Power and Authority, who regulates the Use and Order of the Body of the Society of Mankind, of which they are the Heads; so it is from the Fountain of Truths which he teaches us by the means of Religion, and from the natural Lights of Justice and Equity, that we are to gather the Detail of the Rules of the Publick Law, *as well as all the others. I hope, Sir, that since God has given me the Grace to undertake this Work with these Views, he will be pleased so far to give a Blessing thereto, that the Truths which I have gathered from the Fountains which flow from him, may not lose their Strength and Beauty thro my Weakness and want of Skill; and that the sincere Design which I have had to serve the greatest Prince of the World, either in the present or past Ages, may render agreeable to him, and useful to his Subjects, and perhaps to himself, a Work which in its own Nature is not unworthy of him. I am, with a most profound Veneration,* SIR,

YOUR MAJESTY'S

Most Humble, Most Obedient,

and Most Faithful Servant and Subject,

Domat.

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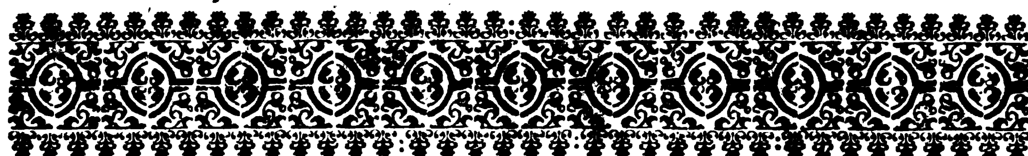

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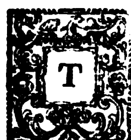

THE Author of this Book is induced to publish it to the World, that he may discharge the Engagement under which he put himself, when, as he was explaining in the Treatise of Laws, which is placed as an Introduction to the Book of the *Civil Law in its Natural Order*, the Matters treated of there, and distinguishing them from the Matters of the Publick Law, he said, that he intended to compose another Book of Matters relating to the *Publick Law a*. He thought that since God had been pleased to make use of him as an Instrument in setting in order the Matters contained in the Book of the Civil Law, it was a Duty incumbent on him to attempt such another Work in relation to the Publick Law: And altho the Matters of the Publick Law, having a relation to the general Order of a State, seemed to claim the Precedence before those which regard only what is transacted between particular Persons, and which belong to that Part of the Law which is called the Private Law, which has been explained in the Treatise of the *Civil Law in its Natural Order*; yet several Considerations determined the Author to begin with the Private Law. Which Reasons are to be explained here, not only to justify the said Order, which the Author has thought fit to observe, but likewise to inform the Reader of some Differences, which it is of importance to take notice of, that are between the Design of the Book of the *Civil Law in its Natural Order*, and that proposed in this Book of the *Publick Law*; for these Considerations produce both these Effects.

Seeing the Matters relating to the Private Law, which have been explained in the Book of the *Civil Law in its Natural Order*, do almost all of them derive their Rules from the Law of Nature, and that of all Nations the *Romans* have cultivated the most the Knowledge of the said Rules, and have left the most ample Collections of them; it is principally in the Books of the *Roman* Law that the Rules of the Law of Nature are preserved, and it is there that we have the first knowledge of them; and the said Books of the *Roman* Law are considered as the General Law, that is to say, the Law that ought to be observed every where, as containing the essential Rules of Equity; and it is for this Reason likewise, that the *Roman* Law is called Written Reason, *Ratio Scripta*. For altho there be in the *Roman* Law many Principles of Niceties that are contrary to our Usage, and even to Equity, and that we find there many Rules which we reject; yet seeing the greatest part of what composes the Books of the *Roman* Law consists in Principles and Rules of the Law of Nature; that we have there the Detail of the greatest part of the Science of the Private Law; and that the said Detail contains an infinite Number of Principles and Rules, the Use of which extends not only to the Matters of the Publick Law, but likewise to those of all the several kinds of Laws, and even to those of the Canon Law; it was natural, and even necessary, for the Design of setting the Laws in their true Order, that since we had determined to set about this Work on the Books of the *Roman* Law, we should begin with the Private Law, which is the principal and greatest part of it; whereas it contains much fewer Rules of the Publick Law, and there is hardly in it any one Rule concerning several Matters that are of the greatest Importance in the Publick Law.

From this first Consideration there arises a second one, which has likewise induced the Author to begin with the Private Law, that he might follow the natu-

a *See the Treatise of Laws towards the Close.*

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ral Method of beginning with what is easiest. The Facility which is meant here, is not that which the Reader may have to learn more easily some Matters than others; but that of the Composition, which has been more difficult in many of the Matters of the Publick Law, than it has been in those of the Private Law. For as to the Composition of the *Civil Law in its Natural Order*, we had the advantage to find almost all the particular Rules collected together in the Body of the *Roman* Law; and there are but few that it was necessary to add to them. So that the main Difficulty which occurred in the Composition of the said Book of the *Civil Law in its Natural Order*, was not to find out Matter for Rules; but it was quite of another nature, and consisted on one hand, to find out in several Rules the Principles and Reasons on which they were grounded, and which are not found in the *Roman* Law, and to compose the greatest part of the Definitions which are there wanting; and on the other hand, to give to almost all the Rules a different Turn of Expression from what they have in the Texts of the *Roman* Law, in order to set them in their true Light, and to shew their true meaning, either by assembling together many of the said Rules which ought to make only one, or by dividing some of them which contain different Rules, which it is necessary to distinguish, and to rank in the natural Order which their different Situations give them, according to the Connexion which they have with one another, and according as they depend upon or follow one another. But as for the Publick Law, we had not a Collection of Materials ready prepared to our hand, out of which we might compose the Rules thereof. For besides that as to many of the Matters which shall be treated of in this Book, there is nothing to be found concerning them in the *Roman* Law, as has been just now observed, we do not meet with any where else a Collection of Rules of all the Matters of the Publick Law, that is to say, of that sort of Rules which are of natural Equity, and which have the same Character with those of the Private Law, which have been explained in the Book of the *Civil Law in its Natural Order*, and which may be the Subject-matter of a Science, as being an Object of the Understanding. But we have only in the Ordinances the arbitrary Rules of the Publick Law, which are only the Object of the Memory, and do not demand the Use of reasoning, except when there happens to arise Doubts and Difficulties about their true Meaning. In which Case there is a Necessity of having a recourse to the Principles of Natural Equity, in order to resolve them; as has been explained in the same Treatise of Laws *b*.

This Assistance therefore of Materials for Rules having been wanting in the Composition of this Book of the *Publick Law*, as to the greatest part of the Matters thereof, we have been obliged in many of them to search into their Nature and their Extent, and to pick out what might serve as matter for Rules, and from thence to frame a System, as it were, of a new kind of Science: not that we call it such by reason of the Novelty of all the particular Matters contained in it, but because of the System it self; which on one hand is new with respect to the Order in which the particular Matters are ranked, and which on the other hand contains divers Matters not commonly reckoned to be part of the Publick Law, but which ought however to be naturally comprehended therein because of the relation which they have to the general Order of a Commonwealth. For it is this Relation which makes the Character of the Matters of the Publick Law.

There is likewise this Difference between the Matters of the Publick Law and those of the Private Law, That the Rules relating to the Matters of Private Law are of a far more frequent and more necessary Use in the Administration of Justice, than the Rules of the Publick Law. For the Rules of the Private Law concern all sorts of Persons indifferently, and as much Persons in a private Capacity as in publick Imployments, seeing every one may have in his domestick Affairs occasions where it may be necessary to have recourse to the Rules of the Private Law; whereas it is much seldomer that there arise Affairs in Families which demand the Use of the Rules of the Publick Law. Thus, the Study of the Private Law is in one Sense of a more general Necessity, and of a larger Extent, than that of the Publick Law; which was likewise another Reason why we thought fit to explain the Rules of the Private Law before those of the Publick Law, altho in another Sense there are more Persons concerned and

b *See the twenty eighth Article of the eleventh Chapter of the Treatise of Laws.*

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interested in the Publick Law than in the Private Law. For whereas many Persons live without standing in need of the Administration of Justice, to maintain them in their Rights, there is no body who is not interested in the good Order of the Government, which cannot subsist but by the Rules of the Publick Law. Every one hath also his different Duties which he owes to the Publick, and especially those who exercise some Publick Function, have their peculiar Duties and Obligations which are proportioned to their Professions; and the several Rules of all these Duties and Obligations make a part of the Publick Law, and shall be the Subject-matter of this Book. So that if the Publick Law be not quite so necessary as the Private Law, for the common and ordinary Use of all sorts of Persons, yet it is nevertheless of such an extensive Usefulness, that every body is concerned in it.

The Reader may be able to judge, by these different Considerations, of the Motives which have induced the Author to treat of the Matters of the Private Law before those of the Publick Law; and may see at the same time the Differences between the manner of the Composition of the one and of the other. And it remains still that we should explain more particularly the Distinctions between the Matters of the Publick Law, and those of the Private Law, and the other Matters of divers kinds of Laws, in order to give an Idea of the Matters which are treated of in this Book, and to draw a Plan of them, whereby one may see the Nature and Order of the Matters: And this shall be the Subject-matter of the Preface, which shall likewise contain some Reflexions necessary to be made before we enter on the particular Rules.

Some Persons may perhaps think that we ought not in this Book to have enlarged on the Functions and Duties of every Profession, nor upon other Matters which perhaps may be thought not so proper to come within this Design. The Author was in doubt for these very Reasons, whether he ought not to suppress all those Matters; but many Persons of great Abilities, and of a superior Rank, were of opinion, that he ought not to leave them out, nor even the Detail of the Functions and Duties of particular Persons, because the said Detail does naturally come within the Design of this Book.

If any one should be surprized that we have quoted here several Texts of the *Roman* Law, which do not exactly suit with our Usage, they may be pleased to consider, that all the Texts cited here carry with them their own Authority, having a Character of Truth, such as may justify their being quoted, seeing the Spirit of the said Texts is always agreeable to our Usage.

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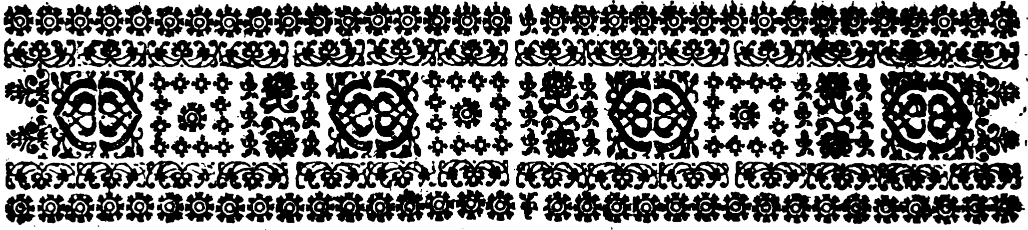

THE PREFACE.

1. Order of the Matters of the Publick Law with respect to the Society of Mankind.

ALL the Laws which regard the Conduct of Men among themselves, being nothing else but the Rules of the Society in which God has placed them, it is in this Order that we must discover that of the said Laws, and of the Subject-matter of them; and it is for this Reason that we have prefixed to the Book of the *Civil Law in its Natural Order* a Treatise, where we have established the first Principles and Foundations of the Order of Society, of which we have there drawn a Plan, in order to give a View both of the Matters themselves, and the Laws relating to them.

As it is therefore in that Plan, that we have given the Idea of the Nature and Order of the Matters of the Book of the Civil Law, and of the Spirit and Use of the Rules of the said Matters; so we may by the help of the said Plan give likewise an Idea of the Matters of the Publick Law which are to be treated of in this Book, and of the Laws which are the Rules of the said Matters.

In order to distinguish the Matters which are to be treated of in this Book, from those that have been explained in the *Civil Law in its Natural Order*, and from all other Matters of the several sorts of Laws, it is necessary to consider, in the said Plan of the Order of the Society of Mankind, all the several sorts of Matters in general, the Situations which link them together, or separate them one from another, and the Characters which make their Differences. And we shall be able by that means to discern what it is that distinguishes them all among themselves, in the same manner as in Geography, we distinguish the Countries one from another by their Situations, and by their Confines: and altho we have explained in the Treatise of Laws the general Order of all the Matters of the Laws, yet we cannot forbear to mention it here, in so far as relates to the Publick Law. But what we shall take notice of here, shall be with another view, in a manner altogether different: So that there will not be any Repetitions of the same Things for the same Purposes.

But since it is impossible to give just Ideas of the Order of Society, with respect to the Distinction between the Matters of the Publick Law, and those of the other kinds of Laws, without premising some general Reflexions, and which are somewhat long, the Reader will be pleased to excuse the Length of them because of their Necessity.

All the Laws in general are of two sorts: One of those which concern Religion; and the other of those relating to the Temporal Policy. And each of these two kinds of Laws hath also its peculiar Matters.

We must observe, that among other Differences between Religion and the Policy for Temporal Affairs, there is one which is remarkable, and which it is necessary to explain here.

Seeing there is in the whole Universe only one true Religion, which for this Reason is called Catholick, that is to say Universal, all Persons who make Profession thereof are united in one Church, under one Chief Vicar of Jesus Christ, Successor

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Successor of Saint *Peter*, in whom is vested the universal Power of the Spiritual Government of the said Church, who is the Center of its Unity, and who is at the same time the common Father of all the Faithful, who are the Members thereof dispersed over the whole Universe. But it is not the same with respect to the Temporal: For altho it be true that the Society which God has formed among Men, does not exclude any one from being a Member thereof, and that it takes in all Mankind, yet there is no Power on Earth which has an universal Government over all the People; and it happened only under *Adam* and under *Noah*, that Mankind, consisting of one single Family, was under the Power of one Man alone. But excepting these two Times, Mankind being multiplied and dispersed, they divided themselves into different Nations, and formed different sorts of Governments, which we have seen ever since throughout the several Ages; and there never has been any other Power which had a general common Authority over all the Nations besides God, who alone is called King of Kings, and Lord of Lords *a*. So that whereas Religion hath its Unity in that of the Church, which is extended to the whole Universe, and that therefore whatever is essential in Religion, whether it respect the Matters, or the Rules, is common every where, and that all Catholick Nations are subject to the sole Government thereof; each State hath its peculiar Policy for Temporal Affairs, and its Order of Government distinguished from the others, even in Matters that are most essential and most fundamental. Thus, there are some States whose Government is a Monarchy, and others where it is a Commonwealth. Thus, among the Monarchies, some of them are Hereditary, others Elective; and among the Commonwealths, the Government in some of them is in the hands of a few Persons, which makes that kind of Commonwealth which is called Oligarchy; and in others, many of the inferior sort of the People have a Share in the Government, which is called Democracy; and there are some, where the Commonwealth is governed by some of the principal Families, which is called Aristocracy. As for the Detail of the Ways of the Government, each State hath its own proper Ways; and they are all of them distinguished by their several sorts of Regulations for the publick Order. Which is the reason why neither their Laws, nor the Matters which they regulate, are all the same every where.

It would seem by these Reflexions upon the Difference there is between Religion and the Temporal Policy, that seeing, with respect to Spirituals, there are but few Kingdoms where the true Religion is received, and that as to Temporals, there is no universal Power which extends over all Mankind, one might think that as there is no Government, either Spiritual or Temporal, which extends to all Men, and consequently no Laws whereof the Observance can be enjoined them by an Authority that is common over them all, so there is not among them an universal Society.

But it is nevertheless certain, that there is among all Men a Bond or Tie which God hath formed, and which engages every particular Person to another, in Duties which the Conjunctures may furnish them with occasion to perform. And if there be some barbarous Nations that are ignorant of this Truth, yet Religion teaches us that every Man ought to look upon every other Man as his Neighbour and Fellow-Creature; and that whatever Distinction there may be among Men on account of the Differences of Nations, Languages, Customs, and Religion, yet they all mutually owe to one another the good Offices and the Duties which the Occasions that bring them together, and their Wants may demand.

It is the Precept of this Duty, which the second Law enjoins to all Men without distinction, which is the Foundation of the Universal Society which God hath established among them, and from which no one is excluded; not only because that those who know this Law ought to look upon themselves as Neighbours to all other Men, and on all other Men as their Neighbours; but because they ought to consider even those Persons who are the farthest from observing this Duty at present, as being still in a possibility of loving and practising it, which gives to all Men a Right in that Society.

But besides this Foundation of the universal Society of Mankind, which is the Spirit of the Divine Law, there is yet another, which is a Consequence of the former; and which is the Humanity that is common to all Men, and known

a King of Kings, and Lord of Lords, Rev. 19. 16.

throughout

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throughout all the World, even to those who live in Darkness, and have not received the Light of the Gospel.

By Humanity we mean here, that natural Sentiment which causes every one, at the sight of his own Image, and of his own Nature in all other Men, to be touched with the different Impressions of Tenderness, Compassion, and other Affections, which the sight of his own Likeness raises in him, according to the Condition in which he sees him, and which disposes him to the performance of those different Duties which the Wants of his Fellow-Creatures may demand of him; and in general, to do for others that which he would that they should do for him, and not to do that to them which he would not that others should do to him. And this Sentiment is nothing else but an effect of the Nature of Man: For God having formed him of a Nature destined to love him, and to love his Fellow-Creature, and so to accomplish by this double Love the two first Laws which are the Foundation of all the others, as has been explained in the Treatise of Laws; the Corruption occasioned by the Fall of Man not having totally destroyed, but only weakened and darkened in him the Spirit of these two Laws, he has retained his Inclination to Love. But having lost both the Love of God, and the Rectitude of that Love which he ought to have for his Neighbour, there remains in him, together with a Self-Love, which has taken the place of the Love of God, an Inclination to love in others a Resemblance of his own Nature. And this is what we call that Humanity which we see exercised among Men, by some more, and by others less, according to the Bounds or Extent that their Self-Love leaves for the Love of others.

It is by this Principle of Humanity, and by the Lights which have remained in the Spirit of Man after his Fall, and which make in every one his Reason and Understanding, that the Society of Mankind has been kept up among those who know nothing of Religion. For it is by the help of this Reason, and of this Humanity, that they discern that which we call Equity, or to speak more properly, they are Equity it self; seeing it is nothing else but the Light of Reason, and the Sentiment of Humanity, which compose the Law of Nature.

It is likewise by the help of these Principles that Nations have made to themselves Laws, and that they have established in every Nation an Order of Government. And because these Ties among Men are not confined to what passes within the Bounds of every State, and that it is necessary that Nations be linked to one another, whether it be on account of the Engagements between the particular Inhabitants of one Nation and those of another, or because of the Correspondencies between those who are Governors of each Nation, the want of a common Sovereign, vested with the universal Monarchy, has obliged the Inhabitants of the several Nations to use Humanity and Reason in doing mutual Justice to one another on the Occasions which form between them some Engagement, or some Duty; and many Nations have, besides this common Tie, Treaties with one another, which are to them instead of Laws. But seeing the Non-observance of those Treaties, and the Violations of the Law of Nature, have among those who are not subject to one common Sovereign no other Revenger but God alone, who does not exercise his Government over Mankind in a visible manner, he has permitted the Use of Wars for repressing and punishing the Injustices of one Nation towards another, when the Injustices are such as deserve to be chastised in this violent manner, and which, by rendring this manner of Chastisement necessary, do render it also just, as shall be hereafter explained.

We may judge by this State of the Society of Mankind throughout the Universe, that God has made the same to subsist by the means of three several kinds of Ties, which distinguish it as it were into three Parts, or into three Orders, according to so many different manners of his Conduct towards Mankind.

The first of these kinds of Ties, is that which is made by Religion, the Spirit of which takes in all People, and tends to bring into the Bosom of the Church all Nations without distinction.

The second, is that which is made by Humanity, the Tie of which ought to unite all Mankind notwithstanding their Differences in Matters of Religion.

The third, is that which is formed in every State, by the Order which unites all the Families whereof it is composed under one and the same Government, whether they profess in it the true Religion, or whether they be ignorant of it.

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The first of these three kinds of Ties, which is that of Religion, extends over the whole Universe. For altho the true Religion be not as yet known in all Places, yet it is the Spirit of the Christian Church to embrace all Nations without Distinction; and there is no Country where Christianity either hath not been already known, or will not be known in its due time.

The second kind of Ties, which is that which is made by the natural Rules of Humanity and Equity, ought naturally to have its Extent over all the World; and it doth also prevail every where in some degree; but in many Places it is violated in several manners, and differently, according as the People are more or less swayed by Interest and Passion.

The third Tie, which is that made in every State by the Union of the Persons who compose it under one and the same Government, is confined within the Boundaries of each State. So that there are as many Ties of this kind as there are States which are distinguished by their different Governments.

As these three different Orders, or Parts of the Universal Society, have their different Relations to the common Good, and to the different Engagements and Duties of Men; so the subject Matter of their Laws, and also their Laws themselves, have in the same manner their Differences proportioned to their Uses.

The first Order, which is that of Religion, whether we consider it in the Extent given to it by its Spirit, which excludes no body, or in its effective Extent over the Nations which receive it, and which are within the Pale of the Church, hath for the subject Matter of its Laws every thing which relates to the good Order of the Society with respect to Divine Worship. This takes in the Lights which God hath communicated to his Church, of his Nature, of his Attributes, of the Creation of Man, of his Fall, of the Mysteries which have recovered him from his Fall, of the Law which he ought to observe, of all the particular Rules of Faith, and of Manners; one part whereof relates to the Duties of Subjects towards their Princes, and of Princes towards their Subjects, and other Matters which make a part of the Publick Order; the Authority of the Church, and the Regulations which the Apostles, their Successors, and the Councils have established in it; a great part whereof is preserved by the Tradition of the Ecclesiastical Discipline, that is to say, the Polity of the Church. And all these Matters of Religion have for their Laws the Ten Commandments, the Gospel, the Doctrine of the Apostles, and all the Books of the Old and New Testament, the Councils, Tradition, and the Decrees of Popes. As to which there is this Difference to be observed between Matters of Faith and Manners, and Matters of Discipline, That these being subject to Changes, their Rules are subject also to Alteration, and may be different according to the Times and Places; whereas the Rules of Faith, and the essential Precepts of Manners are the same every where, and remain always unchangeable, because they are nothing else but Divine Truths revealed in the Holy Scriptures. But besides these Laws of the Church, seeing it hath for its Government only Powers, whose Ministry is spiritual, and that it is not wont to repress by Force and by temporal Punishments those who transgress its Laws, and disturb its Order in a manner which would deserve these sorts of Punishments; Christian Princes have reckoned it their Duty to protect by their Laws the Laws of the Church, and to chastise and punish with temporal Punishments, even with Death itself, those who transgress the Laws of the Church in the Cases where these Punishments ought to be inflicted. We shall examine more fully in the nineteenth Title of the first Book this Matter of the Use of the Temporal Power in Matters relating to the Church; and we shall there shew in what manner the Spiritual and Temporal Powers agree and consist with one another.

The second Order, or the second Part of the Society which is formed and maintained among Nations by Humanity, and by natural Equity, being common to all the People of the Universe, hath for its Subject the Use of Commerce, and of the several Communications and Intercourses which one Nation has with another, and the particular Subjects of one State with those of another, the Liberty of Passage from one Country to another, the Freedom of Navigation over the Seas, Fidelity in Commerce, Hospitality, and other Matters of the like nature, which have render'd Negotiations necessary, Treaties between Nations, Embassies, the Safety of Ambassadors and Envoys. And even in a time of War, there are Rules of Humanity and of Equity that ought to be observed in it; such as those that relate to the manner of making War, and of declaring it, the Safety of Hostages,

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tages, Humanity towards Prisoners of War, Moderation in Acts of Hostility, the Observance of Treaties of Peace, of Truces, of Suspensions of Arms, the right Use of Reprisals, and other Matters of the like kind.

As to what relates to the Rules of these Matters between Nations, it is necessary to distinguish between the People who know the Christian Religion, and those who are ignorant of it. These have for Laws common among them all, without distinction, the Rules of Humanity and of Natural Equity, which compose the Law of Nature, that is to say, the Law which Nature dictates to all Men; and some of them have besides these Rules those of the Treaties which they have made among themselves, one Nation with another; and they have also for Rules between Nations, certain Usages which are commonly received over all, and which they faithfully observe. But the People who know the Christian Religion, have among them, besides the Rules of Natural Equity, and the Rules of Treaties, and of these Usages observed between Nation and Nation, the Laws of Religion, which comprehends within its bounds all the several Duties of what nature soever they be; and which not only contains Rules that are more perfect than those which are derived barely from the Law of Nature, but likewise enforces a more strict and religious Observance of the Rules of the Law of Nature themselves.

However, seeing there is no common Power which hath Authority over all the Nations, to maintain the Observance of these Laws, and to punish the Transgressors of them, as has been already remarked, there are only two ways of supplying that Defect. One, which chiefly relates to particular Persons, when the particular Subjects of one State suffer some Injustice from those of another, is to demand Justice from the Judge of that other State. For it is to the Judge of the Person against whom Justice is demanded, that the injured Party ought to address himself; seeing it is he alone who has power to condemn those over whom his Authority reaches, and who are not subject to others. And the other way, which chiefly regards the Injustices in which the whole Nation is interested, and which may deserve to be repressed by Force, is the Way of Arms by a just War, which becomes necessary, as has been already remarked, when a Nation, or those who are Governours thereof, fail towards another Nation in the Observance of the Rules of the Law of Nature, or of those of their Treaties; and violate the Fidelity which they reciprocally owe to one another, and which is the only Security of the Peace which can unite them.

It is this kind of Laws of Humanity, and of Equity, which regulate what is transacted between one Nation and another in the Matters that have been just now mentioned, which we call the Law of Nations; altho this Word of the Law of Nations have another Meaning in the *Roman* Law, as shall be hereafter remarked.

As to the third part of the Order of Society, which is confined to the Persons united in one State under one and the same Government, the Matters which arise from this Order are of two sorts, which it is necessary to distinguish. The first is of the Matters which concern the general Order of the State, such as those relating to the Government, the Authority of the Sovereign, the Obedience that is due to him, the Forces that are necessary for preserving the Publick Quiet, the Management of the publick Revenue, the Order of the Administration of Justice, the Punishment of Crimes, the Functions of the different sorts of Offices, Imployments, and Professions which the publick Order demands, the general Policy for the Use of the Seas, of Rivers, of the Highways, of Mines, of Forests, of the Game, of Fishing, the Government of Towns and other Places, the Distinctions of the different Orders of Persons, and other Matters of the like nature.

The second sort of Matters of this third part of the Order of Society in every State, is of those which relate to what is transacted between particular Persons; their several Engagements, whether by Covenants, such as Sales, Exchanges, Hiring and Letting, Loans, Deposits, Partnerships, Donations, Transactions, and others: or without Covenant, such as Guardianships, Prescriptions, Successions, Testaments, Substitutions, and others.

It is this first sort of Matters, which having relation to the general Order of a State, are the Matters which belong to the *Publick Law*; and those of the second sort respecting only what passes among particular Persons, are the Matters of that other part of the Law, which is called for this reason the *Private Law*.

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As to the Laws of these two kinds of Matters, there are two sorts of them in use in all the Nations of the World. One is of the Laws of Nature; and the other is of the Laws peculiar to every Nation; such as the Customs which a long Usage has authorized, and the Laws which the Legislative Power of every Nation may enact. But besides these two sorts of Laws that are common to all the Nations, the States where Christianity is known, have over and above the Laws of Religion, which comprehends within its Bounds every thing that relates to the good Order of the Government; and it likewise approves the peculiar Laws of every State. For we ought to suppose, that in a Catholick State there is no Law contrary to the Law of God.

We must observe on what we have just now said of Religion, with respect to the States where it is known, that altho we mean here by Religion only the true Religion, which is the Catholick; yet seeing there are many States which make profession of the Christian Religion, and which altho they be separated from the Catholick Religion, and consequently engaged in false Religions, have nevertheless knowledge of, and do receive many Principles and many Rules of the true Religion, especially of those which relate to the good Order of the Temporal Government; they may be distinguished from those States which are ignorant of the true Religion, such as the *Mahometans* and Idolaters: and we ought to comprehend them in what has been said of People who have the knowledge of Religion, restraining with respect to them what has been said of the Knowledge which they may have thereof, to the Knowledge of such of the Laws of Religion which they profess the Observance of.

It is these two sorts of Matters of this third part of the Order of the Society of Mankind which have been treated of; to wit, the Matters of the *Publick Law* in this Book, and those of the *Private Law* in the Book of the *Civil Law in its Natural Order*; but in another Method and Order than what they seem naturally to have. For it would seem that the Matters of the *Publick Law* relating to the general Order of the Government of a State, ought to go before the Matters which pass between particular Persons, and which make the *Private Law*; but other Considerations determined us to begin with the *Private Law*, as has been explained in the *Advertisement*.

It appears by this Plan of the Order of the Society of Mankind, of the Parts which compose this Society, and of the Laws and Matters of every one of the said Parts, that these several Matters are in a different manner the Object of different sorts of Knowledges; which we might distinguish as so many different Parts of the Science of Laws, if it is permitted to comprehend them all under one common Name. Thus the Laws which concern Matters of Religion, may be considered as the Science of the Church, and they are called the Laws of the Church. Thus the Rules of what passes between Nations which are under different Governments, and which are gather'd either from Humanity itself and Natural Equity, or from their Treaties and their Usages, make the System of the Laws which we call the Law of Nations; and which under this Name comprehends as it were a kind of Science of this sort of Laws, which hath its Definitions, its Principles, and its particular Rules. Thus the Laws which relate to Matters of the *Publick Law*, and those which compose the *Private Law*, are considered as a Body of Laws, the Knowledge whereof is termed the Science of the Law; which Term, in the common Acceptation thereof, seems to be restrained to the Laws which regulate in every State that which regards the general Order of the Policy, and that of the Administration of Justice; and which form a System, the Observance whereof is enforced by the Authority of the Secular Powers of every State, as the Spiritual Powers maintain the Authority of the Laws of the Church. Which distinguishes the Science of the Laws of the Church, and that of the *Publick* and *Private Law*, from the Science of the Law of Nations; in that the Nations who live under different Governments having no common Sovereign whose Authority may oblige them to the Observance of the Rules of the Law of Nations, the imperfect State of these Rules is the reason why they are not considered as the subject Matter of a Policy, or of a Science of Law, but as Engagements and Duties of Natural Equity and Humanity, the Observance whereof depends purely on the Will of those whom they concern; and the Injustices committed against the said Duties cannot be restrained by a Temporal Authority, which is superior both to the Persons who commit the Injustice, and to those who suffer it. So that properly speaking, it is only those Per-

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sons who have the Government of a Nation in their hands to whom the Knowledge of the Law of Nations is necessary. But seeing the Laws of the Church, and those of the Publick and Private Law, make up a Science of Law, which is necessary for the publick Welfare, and for the Administration of Government and Justice in a State; the Study of this Science is become necessary to the Persons who are to exercise either Imployments or Professions, which have any relation to this Order of Government, or to this Administration of Justice. And it is for this reason that these Professions and these Imployments are appropriated to Persons whose Capacity for them is publickly acknowledged, and who have acquired the said Capacity by a regular Study in an University: from which they have a Testimony of their Abilities in this Science by these sorts of Qualities or Titles, which are called Degrees of Batchelor, Licentiate, Doctor, in the Faculty of Law.

It is for the Study of this Science that the Canon Law and the Civil Law are taught in the Universities. It is in the Canon Law that we have the Laws of the Church, the Articles of Faith, the Rules of Manners, and the Order of the Ecclesiastical Discipline. What concerns Faith and Manners is taken from the Scriptures, and from the Explanations thereof which we have from Tradition and the Councils. And what relates to the Discipline of the Church is taken out of the same Councils, from Tradition, from the Decrees of the Popes, and the Doctrine of the Fathers. And it is the Books of the *Roman* Law, which are otherwise termed the Civil Law, that contain the Depositum of the Laws, in the manner that has been explained in the Preface to the Book of the *Civil Law in its Natural Order*. And because the Order of the general Government of a State, and of the Administration of Justice, which are the Object of this Science, requires the Use of Secular Authority, for the Defence of Religion, and the Observance of the Laws of the Church; and that in many Cases the Knowledge of the said Laws is necessary to those who exercise the Functions of the Civil Government, and of the Administration of Justice, it has been thought fit to join to the Study of the Civil Law, which is necessary for obtaining Degrees in the Universities, the Study of the Canon Law, which has otherwise this Connexion with the Civil Law, that besides the Rules concerning Spiritual Matters, it contains many Rules which relate only to Secular Affairs, concerning which the Popes have made several Constitutions, whether it be because of the Relation which the Temporal Power has to the Spiritual in several Matters, as for example that of an Oath, Marriage, Usury, and others; or because of the Temporal Authority which the Popes have in their own Dominions in all Matters whatsoever.

We may judge by this general Idea of these three Parts of the Order of the Society of Mankind, and by the Reflections which have been just now made thereupon, that there is in every one of them some Matters which have such a Connexion and such a Relation to others of another Part, that they have a Place likewise in that other Part, and by that means are comprehended under two Parts, whereas the other Matters of each Part are peculiar to that Part, and are confined to it. Thus, for example, in the first of these three Parts, which is that of Religion, the Matters which concern the Mysteries of Faith are so peculiar to that Part, that they have no manner of relation to the two other Parts. And in the same part of Religion, the Necessity of maintaining Order in the Church, and of curbing those turbulent Spirits who should attempt to disturb that Order, demands the Use of the Authority of Temporal Princes, who may chastise them with other Punishments than those which the Church can inflict. This necessity of maintaining Order in the Church by the Interposition of the Authority of Temporal Powers, hath also a relation to the Temporal Policy of the State, which makes it a Duty incumbent on those who have the Civil Government in their hands, to maintain the said Order in the Church; and because of this Relation, the Protection of the Policy of the Church becomes a Matter of the Temporal Policy of a State. Thus, for another example, in the same Part of Religion, the Matter touching the Disposal of Church Benefices belongs properly to the Church, which ought to have the filling up the Places of its Ministry. But because there arise often Difficulties about the Possession of Benefices; and that those whose Possession is the most evident and most legal, ought to be maintained therein during the Pendency of the Suit, even against those who may chance to have a better Title, and such as may annul the Right of the Possessors, the Nature of Possession makes the

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Dispute touching the Possession of Benefices to be a Matter of the Temporal Government, to which it belongeth to maintain the Possessors in their Possession, to hinder all Acts of Violence, and to chastise those who should attempt any thing by force. So that this Matter concerning the Possession of Benefices, as well as that of the Punishment of Persons who cause Troubles and Disturbances in the Church, and some other Matters of the like nature, having such relation to the Temporal Policy of a State, they have also a Rank among the Matters of this third Part. Thus in the second Part, which is that of the Law of Nations, the Necessity of Commerce in a State, obliging the Inhabitants to communicate to Strangers what they have of their own that is superfluous, and to draw from other Countries what the Inhabitants there have that the others want; Commerce with Strangers is a Matter, concerning which the Government of a State establishes Rules different from those of the Law of Nations. Thus in the same second Part of the Law of Nations, the Necessity of War in the Cases which may oblige Nations to have recourse to it, rendring the Use of Arms and of Military Government necessary in a State, this is likewise a Matter in which this Military Government hath its Rules, which make a Part of the general Policy of a State.

There is no occasion to give Instances of Matters of the Temporal Policy of a State, in order to shew that there are Matters in this third Part, which have relation to other Matters of the two other Parts, of Religion, and of the Law of Nations. For besides that those very Examples, which we have just now mentioned with respect to the two first Parts, produce the same Effect, and that the Reader may judge thereof by the Remark which has been newly made on an Oath, on Marriage, on Usury, and on the other Matters which have relation to the Temporal and to the Ecclesiastical Policy; we make here this Remark touching the Connection and Relation which some Matters of one Part have with those of another, only to give a reason of our treating in this Book of the *Publick Law*, of some Matters which more naturally belong to the Policy of the Church than to that of the State; but which we are obliged to explain because of this Relation and Connection which they have to the Temporal Policy of the Publick Law, as may be seen by the Plan, and the Table of the Matters of this Book.

We cannot forbear making here one Reflection, in order to give an account why in this Idea which we have just now given of the Law of Nations, and of the general Government of every State, we have not followed that which the *Roman* Law gives us of it; where, in the very first Beginning of the Body of the *Roman* Laws, Law in general is distinguished into two kinds, one of the *Publick Law*, and the other of the *Private Law* *a*: and this last is subdivided into three Parts. The first, of the Law of Nature, which is reduced to that which is common to Men and Beasts, such as the Conjunction of the two Sexes, the Procreation and Education of Children *b*; the second of the Law of Nations *c*; the third of the Civil Law *d*. And afterwards there are comprehended among the Matters of the Law of Nations, the Contracts of Sale, of Letting and Hiring, Leases, Obligations *e*, and in general every thing which natural Reason renders just among all Men *f*: and the Civil Law is limited to that which is peculiar to every State *g*.

We

a Hujus studii duæ sunt positiones, publicum & privatum. Publicum jus est, quod ad statum rei Romanæ spectat; Privatum quod ad singulorum utilitatem. Sunt enim quædam publice utilia, quædam privatim. Publicum jus in sacris, in sacerdotibus, in magistratibus consistit. *l.* 1. §. 2. *ff. de just. & jur.*

b Jus naturale est, quod natura omnia animalia docuit. Nam jus istud non humani generis proprium; sed omnium animalium, quæ in terra, quæ in mari nascuntur, avium quoque commune est. Hinc descendit maris atque fœminæ conjunctio, quam nos matrimonium appellamus; hinc liberorum procreatio, hinc educatio. Videmus etenim cætera quoque animalia, feras etiam istius juris peritia censeri. *d. l.* 1. §. 3.

c Jus gentium est quo gentes humanæ utuntur. Quod a naturali recedere facile intelligere licet, quia illud omnibus animalibus, hoc solis hominibus inter se commune sit. *d. l.* §. *ult.*

d Jus civile est, quod neque in totum a naturali vel gentium recedit, nec per omnia ei servit: itaque cum aliquid addimus, vel detrahimus juri communi, jus proprium id civile efficimus. *l.* 6. *eod.*

e Ex hoc jure gentium introducta bella, discretæ gentes, regna condita, dominia distincta, agris termini positi, ædificia collocata, commercium, emptiones, venditiones, locationes, conductiones, obligationes institutæ. *l.* 5. *eod.*

f Quod vero naturalis ratio inter omnes homines constituit, id apud omnes peræque custoditur, vocaturque jus gentium, quasi quo jure omnes gentes utuntur. *l.* 9. *in fin.*

g Omnes populi, qui legibus & moribus reguntur; partim suo proprio, partim communi omnium jure utuntur.

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We may say of these Distinctions, that they do not agree with our Usage. For we do not comprehend the Law of Nations under the Name of the Private Law; we do not rank Contracts of Sale, of Letting and Hiring, nor other Obligations, under the Law of Nations; by which Word we understand only the Rules of what passes between one Nation and another, as has been already explained. We do not confine the Civil Law to that which is peculiar to one People, as are in *France* the Ordinances and Customs; but under the Name of the Civil Law we take in all the Rules of natural Equity which relate to Matters of Contracts, of Covenants, Mortgages, Guardianships, Prescriptions, Donations, Successions, Testaments, and others, which are treated of in the *Roman* Laws, to which we give likewise the Name of the Civil Law. And, in fine, as to the Law of Nature, we do not restrain it to that which is common to Men and Beasts; but we understand by this Law, all the Rules of natural Equity, which Reason teaches Men, and which in this Distinction of the *Roman* Law is called the Law of Nations *h*. Thus the Law of Nature, in the Sense which we give to this Word, does not make a kind of Law distinct from the others; but on the contrary, it is to be found in all of them. For there is an infinite number of Rules of natural Equity, both in Religion, in the Law of Nations, and in the Policy of every State; both in that part of it which is called the Publick Law, and likewise in that which has the Name of the Private Law. It is only this Law of Nature, that we consider in the *Roman* Law, and which is the Cause why we receive the Rules of the *Roman* Law which are of natural Equity, and which for this Reason are not only in use with us, but have their Authority in all Places. And it is for this reason, because the *Roman* Law contains a vast Collection of these Rules of natural Equity, that we call it the General or Common Law of Mankind. And it is by this Character of natural Equity, that we distinguish the Law of Nature from that which is called the positive Law, that is to say, that sort of Arbitrary Laws which are enacted by those who are vested with the Legislative Authority in every State *i*.

We shall confine our selves here to this Reflection which has been made on these different kinds of Laws, all which come under the general Name of Law. For what has been said may suffice to satisfy the Reader, why we have not followed in this Plan the Distinctions of the *Roman* Law. And seeing there are divers sorts of Laws which are differently called by the general Name of Law, as those of the Divine Law, of the Law of Nature, of the Positive Law, and many others; and seeing we are to treat here of the Publick Law, Order requires that we should give just Ideas of the Nature, and of the Character of the Laws of which it is composed; and that we should distinguish them more particularly.

Having thus drawn this general Plan of the Order of the Society of Mankind, and having seen in this Plan the Situation of the Matters of the Publick Law, which are to be treated of in this Book; it is necessary to take a nearer view of the Detail and Order of these Matters. And in order to give this view, it is necessary in the first Place to consider in general, that as the Publick Law is nothing else but a System of the Rules, which respect the general Order of the Government and Policy of a State; the first Object which offers itself in this System is this Government it self, and this Policy; as to which it is necessary before all things to see what is the Necessity thereof, and what ought to be the Use of it: for it is upon this Foundation, that all the Rules of the Publick Law are built.

The Design of God in linking Men together in Society, in order to unite them by the Spirit of the two primary Laws, as has been already explained in the forementioned Treatise of Laws, implied the Necessity of a Subordination *l* among them, which should place some of them over the others. For this Society forms a Body of which every one is a Member; and as the Body is composed of divers Members, so there is a Subordination not only of all the Members under

utuntur. Nam quod quisque populus ipse sibi jus constituit, id ipsius proprium civitatis est vocaturque jus civile, quasi jus proprium ipsius civitatis. *l.* 9. *in prin.*

We are to understand the Word Civitas *in this last Text, not of a single Town or Corporation, but of a Nation or People. For that Word is taken in this sense in some of the best* Latin *Authors, and we often find it used in this Sense in the Commentaries of* Julius Cæsar.

h D. l. 9. in f.

i See the eleventh Chapter of the Treatise of Laws in the Civil Law in its Natural Order.

l Where no Counsel is, the People fall; but in the Multitude of Counsellors there is Safety, Prov. 11. 14.

† the

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the Head, but also of the Members among themselves, according as the Functions of the one depend on the Functions of the others. Thus, seeing the Body of the Society is to be composed of an infinite Number of different Conditions and Professions necessary for the common Good; it is essential to the Society that there should be a general Subordination of all the Conditions and Professions under one Power, which should maintain the Order thereof; and that the Conditions and Professions should be subordinated one to another, according as their Functions may depend one upon another, or have relation one to the other. And it is the Necessity of this Order which requires that of Government, especially in the Condition in which we are, under so strong a Biass to a Love of our selves, to serve our own Interests, and to gratify our Passions; which would overthrow the Order of the Society, if the Authority of the Government did not moderate them, and curb them, by inflicting Punishments on those who offer to disturb the said Order.

But even altho we should suppose a Society of Men void of Self-Love, yet the Subordination of some of them to the others would nevertheless be necessary among them, for the Things which they would have to treat of together: and the Necessity under which they would be of assembling together, of placing themselves, of proposing Matters, of deliberating, and of executing what should be resolved on, would require an Order of Subordination among them, which should set some of them over the others; whether it were by the Nature of their Functions, or by the Difference of Age, or by the Diversity of Talents, or by the Preference given by a Majority of Votes, or by other Views.

We may add on this Subject of the Necessity of a Subordination in all Conjunctions of many Persons together, which God hath established with respect to Men, in all Places where he has placed more than one Person. Thus, when he created Man, he took out of him the Woman, whom he gave him to be a Companion, and a Help meet for him, formed out of one of his own Members, and like unto himself *m*, to unite them in the Society of Marriage; and he made the Husband the Head of the Wife, and established this Subordination between them, even before they had lost the Innocence of their Creation. Thus, in the Union which he had formed by Birth, between Parents and Children, to unite them in the Society of a Family, he hath subjected the Children to the Authority of the Parents. Thus, when upon the Increase of Families, they assembled together in order to compose divers People united in different Places, the Subordination of Children to Parents being confined to every Family, God established over each People Princes who should have the Government of them *n*.

This first View of the Necessity of Government, discovers at the same time the Use thereof; which is, to establish in a State the Dominion of Peace and Justice, from whence proceeds the publick Tranquillity, and on which depend the two essential Parts of the publick Good, as to temporal Concerns, and which are the End that all those to whom God has committed the Government of a State ought to have before their eyes. The first consists in procuring that every thing relating to the Publick be in such order, that on the part of the Government nothing be wanting to particular Persons that may make their Life easy and happy in the Society; which depends on the Assurance that every one ought to have of a prompt and ready Protection from Justice. The second, which is a Consequence of the first, consists in encouraging in a State Sciences, Arts, Trade, and every thing else that may tend to the publick Good; that all sorts of Persons may be put in a condition not only of rendring themselves capable of their Professions, but of perfecting themselves in them, and of acquitting themselves with skill and fidelity in the discharge of their Functions and Duties.

These Advantages are the Sources of the Happiness of a State, and ought to be the Fruits of the Government. And in order to render the Government such as the common Good doth require, the first Means, and which is the Foundation of the good Use and good Effects of the Government, is, that those who are in the highest Stations, and in whose hands God hath placed the Sovereign Power, should have for the Principle of their Conduct the View of this common Good; and that in order to procure the same, and to make it lasting, they should take on one hand the Assistance of wise Counsels, whether it be they themselves who have the Choice of their Counsellors, or whether the Laws of the State have

m *It is not good that the Man should be alone: I will make him a Help meet for him*, Gen. 2. 18.
n *Over every Nation hath he set a Ruler*, Ecclus. 17. 14.

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provided that certain Persons should be called to give their Advice; and that on the other hand, they should have Forces necessary to support Justice, and to maintain Peace and the publick Tranquillity. Which requires the Use of Arms for two different Ends: One, to contain the Subjects in their Obedience, to punish Crimes, and to chastise as occasion offers those who by any Attempts should disturb the Peace and publick Order of the Society; and the other to oppose by Force of Arms Strangers who should offer to encroach on the Rights of the State, and that in such a manner as that it should be necessary to declare War against them in order to bring them to Reason.

For the first of these two Ends, the Use of Arms ought to be restrained to what may be absolutely necessary for enforcing Obedience to the Orders and Decrees of Justice. And it is for this Use that Arms are put into the hands of the Governors of Provinces, and other Officers and Ministers of Justice, to whom Force is necessary for executing the said Orders, according to the Functions of their Ministry.

As to the second of the two Ends for which the Use of Arms is required, which is the Necessity of the Defence of the State against the Attempts of Strangers, there are two sorts of Forces: One, the Use of which is perpetual, which is that of fortified Places in the Sea-Ports, and on the Frontiers, with sufficient Garisons to defend them; and the other, which is necessary only in Time of War, is that of levying such a Number of Troops as the Occasion may require.

It is for these two Uses of Forces, that God gives to those who have the Sovereign Power of Government in their hands, the Right of Arms; that they may make Justice to reign in their Dominions among their Subjects; and that they may do themselves Justice against such Strangers as shall oblige them to take up Arms when there are just Causes for it, and which God puts into their hands as the only way of doing Justice between People who live under different Governments, and who are not subject to any temporal Power that is common to them. For seeing they cannot have between them any common Judge, as has been remarked, who has a Right to give Laws to them, or to decide their Differences, unless they themselves agree to it; and there being none but God alone who is their common Lord and Master, but who does not exercise his Government in a visible manner over them; he administers Justice between them by the Successes he gives to the War, making Arms to serve for the natural Use which he has given them, which is to support the Empire of Justice. For the Use of all Force, in other hands than those of Justice, cannot be otherwise than criminal; and it becomes just in War it self, only when it arms the Hand of Justice, because that is the Hand of God, who for this reason has taken upon him the Name of the God of Hosts. So that it is he alone who is taken, or who ought to be taken for Judge by those who, having no common Judge on Earth, are obliged to have recourse to Arms for the decision of their Differences. And altho it does not alway happen that the Event of War decides in favour of those who had Justice on their side, and that often on the contrary Victory remains to the Oppressor; in the same manner as it does not always happen, even in the best governed States, and under the wisest Princes, and those who apply themselves with the greatest diligence to the discharge of their Duty, that Justice is exactly distributed on all Occasions by those who are intrusted with the Administration of it; yet there can nothing happen on the part of God but what is just, whatever Injustice there may be on the part of Man. For it is always the Justice of God that governs: And seeing he finds in all Men just Causes for letting them suffer Injustice, and that no Injustice can escape the Vengeance which he prepares in its due time for all those who shall be found guilty of it, the Events of Wars render Justice to Men in this Point, by putting all Parties into that Condition which the Justice of God, and his Providence, would have them to abide in. Thus, it is in his providential Government, as extending to the whole Universe, and to the end of all Ages, that the only Throne of the Justice of this Sovereign Judge is seated, who is King of Kings, and Judge of all Men, and the only Judge who reigns for ever, and over all.

If thou seest the Oppression of the Poor, and violent perverting of Judgment and Justice in a Province, marvel not at the matter; for he that is higher than the highest regardeth, and there be higher than they, Ecclesiastes 5. 8.

For the Kingdom is the Lord's; and he is the Governor among the Nations, Psalm 22. 28.

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It is easy to discover, by what has been already said in this Preface, the Relation which all the Matters of the Publick Law have to the Order of Society; so that it does not seem necessary that we should enlarge any further thereon, since the bare reading of every one of them in this Book will be sufficient for judging of the Connexion which they have to the Order of Society. It remains then only that we should distinguish here the Matters of the Publick Law.

2. Distinction of the Matters of the Publick Law into four Parts.

Seeing the Matters of the Publick Law are of divers sorts, and pretty numerous; and that according to the different manners of considering them under divers Views, they may be divided into several sorts of Distinctions, out of which it is free for us to make a Choice, and to divide them into more or fewer Parts; we have thought that we might make use of this Liberty to chuse one Distinction, which seems to reduce all these Matters, under a simple and natural Order, into four Parts, which shall make as many Books.

The first shall comprehend the Matters which relate to the Government and general Policy of a State, and that which composes the Order thereof.

The second shall be of the Functions of the Persons appointed to maintain the said Order, Officers of Justice, and others who partake of the publick Functions.

The third shall contain the Matters which have relation to the Restraint and Punishment of those who trouble the said Order by wicked Attempts against the Prince, against the State, or who disturb in any other manner the publick Tranquillity, and the Quiet of Families, by the several sorts of Crimes and Offences that are committed.

The fourth, which will be a Consequence of the second and third, will take in the Rules of the Administration of Justice, which compose the Order of Judicial Proceedings. And this comprehends two Parts of the said Order: One, which concerns the Instruction and Judgment of Civil Causes; and the other, which relates to the Instruction and Judgment of Criminal Matters.

In the first Book we shall explain the Necessity and the Use of Temporal Government, and the Obedience that is due to the Powers who exercise this Government. And in treating of this Matter, we shall examine the Question, Which of the two sorts of Government is the most natural and most useful, whether Monarchy, or a Commonwealth. We shall afterwards treat of the Power, of the Rights, and of the Duties of those who have the Supreme Government in their hands; of the Functions and Duties of the Persons who are called to be of their Council; of the Use of the Forces necessary in a State for maintaining the Order of it within, and for defending it against all Enemies from without, and of the Military Government; of the Revenue necessary to preserve the State in good Order, and of the Functions and Duties of those who are concerned in collecting and managing the publick Customs and Imposts; of the Demesnes of the Prince; of the means to procure plenty of every thing in a State, and to prevent the Dearth of Things that are most necessary; of Fairs and Markets; of the Policy in relation to the Use of the Seas, the Rivers, the Bridges, the Market-Places, the Highways, and other publick Places; of Navigation, of Forests, of Hunting, and Fishing; of the several Orders and Degrees of Persons who compose a State, of Corporations in general, of those of Towns and other Places; of Universities, Colleges, and Academies for the Instruction of Youth, and for teaching Sciences and Arts both Liberal and Mechanick; of Hospitals. And towards the Close of the said first Book we shall explain in the last Title of all, what relates to the Use of the temporal Sword with regard to the Church.

In the second Book, we shall treat of Officers in general, and of other Persons who partake of the publick Functions; of the several sorts of Offices; and also of the Dignity, Authority, Rights, Privileges and Ranks of Officers in general; of the Functions and Duties of the Officers of Justice, of Advocates, and others who are any way subservient in the Administration of Justice.

In the third, we shall explain the several sorts of Crimes and Offences, their Nature, their Characters, their Distinctions, according as they transgress differently the Duties towards God, towards the Prince, towards the Publick, towards particular Persons; and the different kinds of Punishment which the Offenders and their Accomplices may deserve.

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In the fourth Book, the first Part of the Order of Judicial Proceedings shall take in the Rules of the said Order for the Instruction of Civil Causes; such as the Demands which are made by the Parties in Judgment, the Intervention of Parties in Causes begun by others, the Distinctions of the several sorts of Sentences, the Production of Titles, the Proofs of Facts which are contested, the Deeds and Writings of the Parties, the Ways of obtaining a Redress against Sentences of Inferior Courts, Appeals, Decrees of the Supreme Courts from which there lies no Appeal, and the Ways of procuring the same to be revoked or annulled.

The second Part of this Order of Judicial Proceedings shall contain the Rules of proceeding in Criminal Prosecutions; such as Complaints, Accusations and Denunciations, Informations and Decrees, the Contumacy of Parties refusing to appear, the seizing and imprisoning Offenders, the Examination and confronting of Witnesses, Torture, Sentences of Condemnation or Absolution, the Enlargement of Prisoners, Appeals, Acts of Grace, Pardons, and Prescription of Crimes.

3. Three Matters preliminary to the four Parts of the Publick Law.

It must be remarked on this Plan of the Matters of the Publick Law, that they have this in common with those of the Private Law, which has been treated of in the Book of the *Civil Law in its Natural Order*; that they ought all of them to be preceded by three Matters which are equally a part of the Publick Law and of the Private Law, and are preliminary both to the one and to the other, to wit, that which respects the Nature and Spirit of the Rules, the Distinctions of Persons, and the Distinctions of Things. And seeing these three Matters have been explained under so many Titles, which compose the Preliminary Book of the *Civil Law in its Natural Order*, it is needless to repeat any part thereof in this Place; and it may be presupposed that the Reader who has a mind to read this Book of the *Publick Law*, has already perused, or will peruse that Preliminary Book, where he will easily discover the relation which the Rules explained there have to the Publick Law. Thus, for example, that which concerns the several Distinctions of Laws into divine, human, natural, arbitrary, written, not written, the Ways of interpreting them, and the Cases in which it is necessary, in order to have the right Interpretation of them, to have recourse to the Sovereign, relates not only to the Matters of the Private Law, but hath also its Use in the Matters of the Publick Law, which is composed of all these several kinds of Laws, as will appear throughout the whole Detail of this Book. Thus, for the Distinctions of Persons, they relate not only to the Capacity or Incapacity of Engagements, and to the other Matters of the Private Law, as has been explained in the Title of Persons, but they have likewise their Use in the Publick Law: As, for example, what relates to the Capacity or Incapacity of Persons for publick Offices, the greater or lesser Severity in the Punishment of Crimes according to the Qualities and Ages of the Persons, the Acts which Persons may or may not do in a Court of Justice, the Matters relating to Confiscations, Aliens, Bastardy, and other Matters of the Publick Law. Thus, for the Distinctions of Things, the Use of these Distinctions is not confined to the Matters of the Private Law; but there are many Things which have such a relation to the Publick Law, that their chief Use, and almost the only Use of them, is for the Publick, such as the Seas, Rivers, Sea-Ports, the Highways, the Streets, the publick Market-Place, the Houses and other Places destined for publick Uses. And there are likewise many Things which cannot go to the Possession and Use of particular Persons, but by Ways and upon Conditions which are regulated by the Publick Law; such as Mines, Treasures, the Use of Hunting, Fishing, and others of the like nature.

We may add to the Remark which we have just now made on the Distinctions of Rules, of Persons, and of Things, that seeing the Publick Law respects the general Order of the Society of Mankind, and that there has been laid down in the Treatise of Laws a Plan of this Society, in order to give a more perfect Knowledge of the Laws which regulate the same, of the Persons who compose it, and of all the Things which are for their Use: And since the said Plan contains a great number of Principles which are essential to the Order of this Society, and to every thing that goes towards the forming of the said Order; the Reader will not mispend his Time in reading over the said Treatise of Laws, with a particular View to apply what is therein contained to the Matters and Rules of the Publick Law.

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It remains only that we should acquaint the Reader with the manner in which we shall treat of the Matters which are to compose this Book. And he is desired to take notice in the first place, that he is not to expect to see here all the particular Rules of every individual Matter. For we find it necessary to leave out a great many of them, and to confine our selves to those which may agree with the Design which we proposed to our selves in making choice of the Rules, which is the same that we have followed in the Book of the *Civil Law in its Natural Order*. And in order to give a more distinct Idea of the Rules which are to be inserted in this Book, and of those which are to be left out of it, it is necessary to remark that in all the Matters of the Publick Law, as well as in those of the Private Law, two sorts of Rules are to be distinguished: One is of the Rules which are of the Law of Nature, and which, being necessary Consequences of the Principles of Justice and Equity, are unchangeable, and the same at all times, and in all places. And the other is of the Rules which are established by those who have the Power and Authority to make Laws, and which are called Arbitrary Laws, which may be established, abolished, or changed, according as occasion requires, and at the Will and Pleasure of the Lawgiver. As to the Nature and Use of these two kinds of Rules, the Reader may consult what has been said of this Matter in the eleventh Chapter of the *Treatise of Laws*. We shall only just mention here what has been there proved, That it is those Natural Rules which are the Object of the Understanding, and that it is in the Knowledge of them that the true Science of the Law does consist; whereas the Arbitrary Laws are only the Object of the Memory. Which makes this Difference between these two kinds of Laws, That as for the Arbitrary Laws, seeing they are all of them written either in the Ordinances, or in the Customs, the Study thereof is easy, and requires almost no reasoning, unless it be to explain the obscure and ambiguous Expressions that may occur therein. For as to the other sorts of Difficulties which occasion those Questions that are called Questions of Law, they depend on the Rules of the Law of Nature, as has been explained in the same place. But the Study of the Laws of Nature demands that they should be set every one in their proper Light, and all of them placed in the Order which they have from their Connexion with one another, and with their Principles. Thus, as we have endeavoured in the Book of the *Civil Law in its Natural Order*, to place there in their due Order and proper Light the Natural Rules relating to the Private Law, so we shall endeavour in this Book of the *Publick Law*, to rank in the same Method and Order the Natural Laws which relate to the Publick Law; and we shall leave out the Arbitrary Laws which are in the Ordinances and Customs, except it be some few, which it may be necessary to take in, as shall be remarked hereafter.

4. Some Account of the Manner in which the Matters of this Book are to be treated of.

We are obliged likewise to acquaint the Reader in the second place concerning the same Subject of the Distinction of Natural and Arbitrary Laws, that there is this Difference between the Publick and the Private Law, That whereas in the Private Law there are but few Arbitrary Laws, there is an infinite number of them in the Publick Law; so that the Reader will find a great many more of these Arbitrary Laws left out in this Book, than there are omitted in the Book of the *Civil Law in its Natural Order*. But this Difference, as to the Omission of more or fewer of the Arbitrary Laws, is of no moment as to what is necessary and essential for possessing the Science of the Publick Law and of the Private Law, which consists in the Knowledge of the Natural Laws.

We must acquaint the Reader in the third place, of an important Difference there is between the Publick Law and the Private Law, as to what concerns the Natural Laws of the one and the other, and which consists in this, That as for the Natural Rules of the Private Law, we find them all almost in the Body of the *Roman* Law; and altho they be not ranked there in their due Order and proper Light, yet we have been able in the Book of the *Civil Law in its Natural Order* to quote Texts out of the *Roman* Law upon the greatest part of the Articles, whether it be that the said Texts do exactly agree with the Rule explained in the Article, or whether they comprehend only one part of it; and that we have been obliged to give to the Rules their full Extent by the Principles gathered from the Law of Nature. But as for the Publick Law, it comprehends an infinite number of the Rules of the Law of Nature, which are not collected either in the *Roman* Law, or any where else; and of which a great number is taken from the Divine Law, or are Consequences deduced from the Natural Principles of

of Justice and Equity; so that there will be in this Book a great number of Articles drawn from these Sources, and on which there will not be one Text cited out of the *Roman* Law, but on many Articles we shall cite the Passages of Holy Scripture on which the said Articles are founded.

We ought in fine to inform the Reader, that altho in pursuance of our first Design as to this Book we ought to have left out all the Arbitrary Laws in general, yet we have been should insert some of the Laws of this kind, because of the Connexion which they have with the Law of Nature, and of the Necessity of knowing them. Thus, for example, it is an Arbitrary Rule of the Ordinances in the Matter of Proofs, which forbids the receiving of Proof by Witnesses alone when the Contract exceeds the Sum of one hundred Livres: But this Rule being an Exception of great Importance, and of frequent Use to the Natural Rule which allowed of Proofs by Witnesses without any Distinction, the Connexion between this Exception and the said Rule, and the Consideration of its frequent Use, induced us to insert it here. And there are also some other Arbitrary Rules, which the like Considerations will oblige us to mention in the same manner, and to join them to the Rules of the Law of Nature. But for the other Arbitrary Rules which are not of the like Use, we shall forbear mentioning them. And in order to give a general Idea of the Characters which distinguish the Natural Laws which shall be comprehended in this Book, and the Arbitrary Laws which shall be left out of it, the Reader may form to himself this Idea by Examples of the Laws of these two kinds in every one of the four Parts of the Publick Law.

Thus, in the first Part, which relates to the Order of Government, there is a very great Number of Rules of the Law of Nature, which are the principal and most essential Rules thereof; such as those which concern the Authority, the Rights, the Duties of those who have the Administration of the Government in their hands, the Obedience which is due to them and to their Ministers, the Functions and Duties of the said Ministers, the Use of the Forces necessary for maintaining the publick Tranquillity, and for defending the State against the Attempts of Enemies, the Order of the Military Government, that of the Management of the Revenue, the Distinctions of the several Orders of Persons, their Functions and their Duties, the general Policy as to Things which belong to the publick Use, the Government of Towns and other Corporations, of Universities, of Hospitals, of Arts, of Trade, the Protection of the Laws of the Church: For all these sorts of Rules are within the Design of this Book. But in these very Matters there is an infinite Number of Arbitrary Laws, which are not to be inserted here; as, for example, those which regard the Detail of several inferior Rights of the Prince, the Distinctions of some Functions which he distributes differently to his Ministers, and to those whom he calls to assist in his Councils for divers sorts of Affairs, the particular Rules relating to the respective Offices and Service to be performed in the War, for the Artillery, for Provisions, for Forage, and other necessary Precautions for several Purposes; the particular Regulations about several sorts of Imposts, and the manner of levying the publick Taxes; the Statutes of Companies of Trades for the Standard and Quality of their Work, the Regulations of Universities for the Time and Manner of their Studies, and other Matters of the like nature.

Thus, in the second Part of this Order, it is agreeable to the Law of Nature that there should be in a State divers Officers for the different Functions that may be necessary for the publick Good; for since the Sovereign cannot apply himself to every thing, it is necessary that he should have under him Persons to whom he may intrust the Functions which he himself cannot perform. Which makes it necessary that there should be established divers sorts of Officers of Justice, of the Policy, of the Revenue, and others; and that every one of them should have the Characters either of Dignity or Authority suitable to their Ministry, and that they should discharge their Duties; which takes in a great number of Rules of Natural Equity, which ought to be placed in this Book. But there are to be found in the same Matters other Arbitrary Rules, which ought to be left out; such as those which distinguish all the several sorts of Functions which are allotted to the different sorts of Officers, which regulate their Salaries and Perquisites, which ascribe unto them certain Rights, certain Privileges, and others of the like nature.

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Thus, in the third Part of the same Order, the Law of Nature requires that Crimes should be punished, and that the Punishments should be proportioned to the Quality of the Crimes and Offences. And it is also by the Rules of the Law of Nature, that we ought to distinguish the different Characters of the several sorts of Crimes and Offences which render them more or less heinous, and that in every kind we ought likewise to distinguish the particular Circumstances of each Crime, which may determine the Punishment thereof to be more or less rigorous. And these sorts of Rules are the Subject-matter of this Book. But it would not be proper to collect here the different Rules or Arbitrary Customs, which relate to the manner of putting Criminals to the Torture, which is called the *Question*; the Regulations for securing the Persons of Offenders, the several sorts of Punishment which are practised in different Places, and other Matters of the like kind.

Thus, in the fourth and last Part, the Law of Nature demands that Justice should be duly administer'd, that Law-Suits should be well instructed and decided; that for the whole Detail of what may be necessary for duly instructing and deciding a Law-Suit, there should be a stated Order for all Judicial Proceedings, to be observed in all Cases: In which Order there are many particular Rules which are of Natural Equity, such as that of hearing both Parties, of taking Proofs of Matters of Fact, of granting certain Delays, and others of the like nature. And these sorts of Rules shall be explained in this fourth Part. But we shall not insert here a great many Arbitrary Laws; such as those which regulate the manner of citing the Parties, the Delays after Citation, the manner of drawing up Sentences and Decrees, the Formalities of several Proceedings, the manner of Appeals, and others of the like kind, and the several ways of proceeding in the different Instances.

We could not well omit making all these Reflexions, in order to explain the Design which we proposed to our selves in this Book, and to give a general Idea of the Nature and Order of the Matters to be treated of therein, and of the Characters which distinguish the Rules which are to be comprehended in it from those which we have thought proper to leave out.

As to the Distinction of the Rules, the Reader may be able to judge by the last Reflexions which we have just now made, that it would not have been proper to have inserted in this Book the infinite number of Arbitrary Laws, without which one may be fully Master of the Science of the Publick Law, and of which there are several Collections, where they may all be seen. And he will be convinced more and more by the reading of this Book, that such a Medley would have been troublesome, disagreeable, and full of Inconveniencies.

As to what concerns the Nature and Order of the Matters, the Reader may have been able to judge of them by the Distinctions that have already been made; and he may still do it more easily by the View which he will have of them in the following Table.

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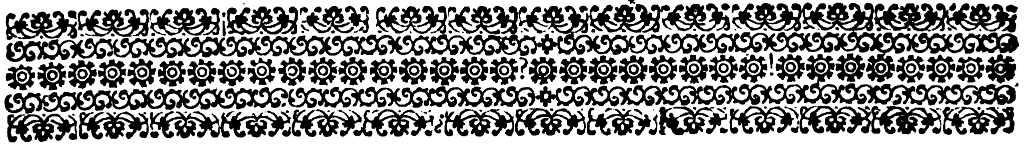

A TABLE of the Titles contained in the Four Books of the *Publick Law.*

BOOK FIRST.

Of the Government and general Policy of a State.

Title I. *Of Government.*
II. *Of the Power, Rights, and Duties of those who are vested with the Sovereign Authority.*
III. *Of the Council of the Prince, and of the Functions and Duties of those who are Members of it.*
IV. *Of the Use of the Forces necessary for the Defence of the State, and of the Duties of those who serve in the Army.*
V. *Of the Revenue, and of the Functions and Duties of those who have any Office or Imployment about it.*
VI. *Of the Demesnes of the Sovereign.*
VII. *Of the Means to procure plenty of all things in a State; of Fairs and Markets, and of Regulations to prevent the Dearth of things that are most necessary.*
VIII. *Of the Policy relating to the Use of the Seas, Rivers, Sea-Ports, Bridges, Streets, Market-Places, High-Ways, and other publick Places; and of what concerns Forests, Hunting, Fowling and Fishing.*
IX. *Of the several Orders of Persons who compose a State.*

Remarks on the following Titles.

X. *Of the Clergy.*
IX. *Of the Persons whose Condition engages them in the Profession of Arms, and of their Duties.*
XII. *Of Commerce.*
XIII. *Of Trades and Handicrafts.*
XIV. *Of Husbandry, and the Care of Cattel.*
XV. *Of Communities in general.*
XVI. *Of the Corporations of Towns, and other Places, of Municipal Offices, and of the Domicil of every Person.*
XVII. *Of Universities, Colleges, and Academies for the Instruction of Youth.*
XVIII. *Of Hospitals.*
XIX. *Of the Use of the Temporal Power in what regards the Church.*

BOOK SECOND.

Of the Officers and other Persons who are employed in the publick Functions.

Title I. *Of the several sorts of Offices and other Charges.*
II. *Of the Authority, Dignity, Rights and Privileges of Officers.*
III. *Of the Duties in general of those who execute Offices.*
IV. *Of the Duties of Officers of Justice.*
V. *Of the Functions and Duties of some other Officers of Justice besides Judges, and who are subservient in the Administration of Justice.*
VI. *Of Advocates.*
VII. *Of Arbitrators.*

BOOK THIRD.

Of Crimes and Offences.

Title I. *Of Heresy, Blasphemy, Sacrilege, and other Impieties.*
II. *Of High Treason.*

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Title III. *Of Rebellion against the Orders and Decrees of Courts of Justice.*
IV. *Of unlawful Assemblies, taking up of Arms, and using of force.*
V. *Of Duels.*
VI. *Of Embezlement of the Publick Money.*
VII. *Of Extortions and other Misdemeanours committed by Officers.*
VIII. *Of counterfeiting the King's Coin.*
IX. *Of Assassinates, Murders, Poisoning, of Parricides, and other Attempts against the Life of other Persons; of Self-Murder, and exposing of Children.*
X. *Of Theft and Robbery, and fraudulent Bankrupcies.*
XI. *Of Forgery.*
XII. *Of Adultery.*
XIII. *Of Attempts made upon the Chastity of any Person.*
XIV. *Of Injuries and Defamatory Libels.*
XV. *Of the several Transgressions of the Rules of the Policy of the State.*
XVI. *Of Associates and Accomplices in Crimes and Offences.*
XVII. *Of Crimes and Offences committed by Communities.*
XVIII. *Of the Punishment of Crimes and Offences.*

BOOK FOURTH.

Of the Order of Judicial Proceedings.

PART FIRST.

Of the Instruction of Civil Causes.

Title I. *Of the several sorts of Demands and Actions in Courts of Justice.*
II. *Of the Instruction of Causes in the several Instances in general, whether the Proceedings be upon Appearance of the Parties, or by Default; and of Delays.*
III. *Of the Proceedings which ought to precede certain Instances.*
IV. *Of the Incidents which happen in the Instruction of Causes in the several Instances.*
V. *Of Interlocutory Sentences.*
VI. *Of Interventions.*
VII. *Of the Production of Titles and other Writings.*
VIII. *Of the several sorts of Proofs of Facts which are contested.*
IX. *Of the written Pleadings of the Parties.*
X. *Of Peremptions.*
XI. *Of Sentences, of their Execution, and of Costs.*
XII. *Of the Ways of obtaining a Redress against Sentences.*
XIII. *Of Proceedings in Appeals.*
XIV. *Of Decrees of the supreme Courts from whence there lies no Appeal, and of the Ways of procuring them to be reversed or annulled.*

SECOND PART.

Of the Instruction of Criminal Prosecutions.

Title I. *Of Accusations, Complaints and Denunciations.*
II. *Of Informations and Decrees.*
III. *Of Contumacy.*
IV. *Of the seizing and imprisoning of Offenders.*
V. *Of the Examination of Persons accused.*
VI. *Of the repeating and confronting of Witnesses.*
VII. *Of Torture.*
VIII. *Of Sentences of Condemnation or Absolution, and the Enlargement of Prisoners for a time.*
IX. *Of Appeals.*
X. *Of Acts of Grace, Pardons, Abolitions and Prescriptions of Crimes.*

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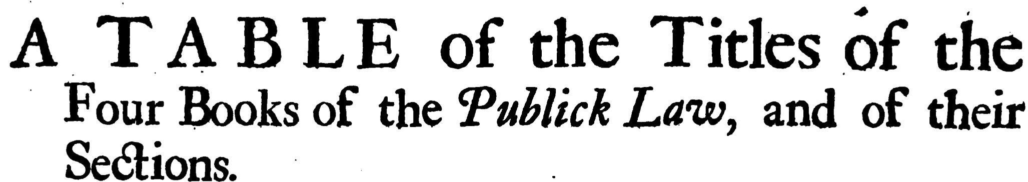

A TABLE of the Titles of the Four Books of the *Publick Law*, and of their Sections.

BOOK FIRST.

Of the Government and general Policy of a State.

TITLE I.

Of Government.

Sect. I. *Of the Necessity and Use of Government.*
II. *Of the Obedience due to Governours.*

TITLE II.

Of the Power, Rights and Duties of those who are vested with the Sovereign Authority.

Sect. I. *Of the Power of the Sovereign, and what ought to be the Use thereof.*
II. *Of the Rights of those who have the Sovereign Authority.*
III. *Of the Duties of those who are clothed with the Sovereign Authority.*

TITLE III.

Of the Council of the Prince, and of the Functions and Duties of those who are Members of it.

Sect. I. *Of the Functions of Officers, Ministers, or others who are bound to give Princes Counsel or Advice.*
II. *Of the Duties of Officers, Ministers, or others who are bound to give Counsel or Advice to Princes.*

TITLE IV.

Of the Use of the Forces necessary for the Defence of the State, and of the Duties of those who serve in the Army.

Sect. I. *Of the Use of Forces within a Kingdom.*
II. *Of the Use of Forces without the Kingdom, of Military Discipline, and of the Duties of those who are in the Service.*

TITLE V.

Of the Revenue, and of the Functions and Duties of those who have any Office or Imployment about it.

Sect. I. *Of the Necessity of Taxes, and of their kinds.*
II. *Of the laying on in general of the several sorts of Publick Taxes.*
III. *Of the Assessments of particular Persons.*
IV. *Of Taxes on Immoveables.*
V. *Of the Duties laid on Provisions and Merchandize.*
VI. *Of the levying all sorts of publick Taxes.*
VII. *Of Exemptions from the several sorts of Taxes.*
VIII. *Of the Functions and Duties of those who have any Office or Imployment about the publick Revenue.*

TITLE VI.

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TITLE XVII.

Of Universities, Colleges and Academies; and of the Use of Sciences and Liberal Arts, with respect to the Publick.

Sect. I. *Of the Rules which relate to the Government and Discipline of Universities and Colleges.*
II. *Of the Duties of those who are Members of Universities, Colleges, Academies; and of all Professors of Sciences and Liberal Arts.*

TITLE XVIII.

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II. *Of the Use of the Temporal Power, for restraining the Encroachments of the Ministers of the Church on the Rights of the Prince, and of Appeals on account of such Encroachments.*
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BOOK SECOND.

Of the Officers, and other Persons employed in publick Functions.

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Of the several sorts of Offices and other Charges.

Sect. I. *Distinction of Charges and Offices by their Natures, and their different Characters.*
II. *Distinction of Officers by their different Functions.*

TITLE II.

Of the Authority, Dignity, Rights, and Privileges of Officers.

Sect. I. *Of the different sorts of Dignity and Authority annexed to Offices.*
II. *Of the Rights and Privileges of Officers.*
III. *Of the Rank of Officers.*

TITLE III.

Of the Duties in general of those who execute Offices.

Sect. I. *Of the Capacity of Officers.*
II. *Of the Probity of Officers.*
III. *Of the Application of Officers, and their Functions.*

TITLE IV.

Of the Duties of Officers of Justice.

Sect. I. *Of the Capacity of Officers of Justice.*
II. *Of the Probity or Integrity of Officers of Justice.*
III. *Of the Application of Officers of Justice in the Discharge of their Functions.*

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Of the Functions and Duties of some other Officers of Justice besides Judges, whose Ministry is a part of the Administration of Justice.

Sect. I. *Of the Functions and Duties of Registers.*
II. *Of the Functions and Duties of Proctors.*
III. *Of the Functions and Duties of Apparitors and Bailiffs.*
IV. *Of the Functions and Duties of Jailers.*
V. *Of the Functions and Duties of Publick Notaries.*

TITLE VI.

Of Advocates.

Sect. I. *Of the Functions of Advocates.*
II. *Of the Duties of Advocates.*

TITLE VII.

Of Arbitrators.

Sect. I. *Of the Functions of Arbitrators, and their Power.*
II. *Of the Duties of Arbitrators.*

BOOK THIRD.

Of Crimes and Offences.

BOOK FOURTH.

Of the Ways of terminating Law-Suits and Differences; and of the Order of Judicial Proceedings.

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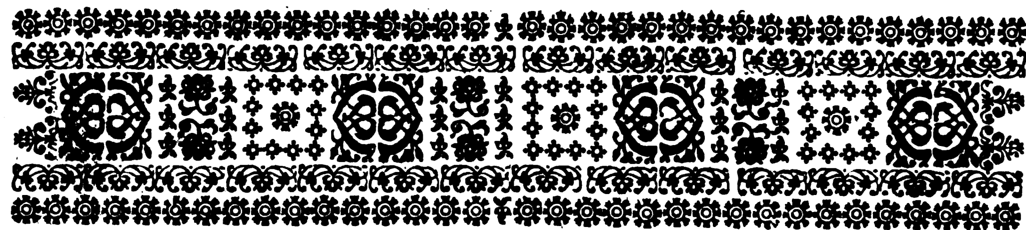

THE PUBLICK LAW; BEING A SUPPLEMENT TO THE CIVIL LAW IN ITS NATURAL ORDER.

BOOK I.

Of the Government and General Policy of a State.

THERE is no Body who is not thoroughly perſuaded of the Conſequence of good Order in a State, and who does not ſincerely wiſh to ſee that State well regulated in which he is obliged to paſs his Life. For every one comprehends and feels within himſelf by Experience and by Reaſon, that the ſaid Order concerns and regards him in ſeveral Manners. So that Self-Love is ſufficient to inſpire this Sentiment into all thoſe who are not of ſeditious or rebellious Tempers, or engaged in other irregular Courſes which Order and Juſtice do not allow of. But altho there be nothing more natural to every Man than to conſider in the Publick Good the Share which he himſelf has in it, and that this Conſideration ought to have the Effect of engaging all ſorts of Perſons without Exception, to contribute on their part to the Support of it; yet we ſee on the contrary that nothing is more frequent than to find even ſome of thoſe who by their Employments are engag'd to apply themſelves to this Publick Good, who ſhew by their Conduct that they are either very little influenced by, or very little inſtructed in the Principle which ought to engage them to ſuch a Duty.

Every Body knows that the Society of Mankind forms a Body of which every one is a Member: and this Truth which the Scripture teacheth us, and which the Light of Reaſon makes clear

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and evident *a*, is the Foundation of all the Duties which respect the Conduct of every Member towards all the other Members in particular, and towards the Body in general. For these sorts of Duties are nothing else but the Functions which are proper to the Engagements under which every one happens to be by the Rank which he holds in this Body.

It is from this Principle that we are to draw, as from the Fountain, all the Rules of the Duties both of those who govern, and of those who are subject to the Government. For it is by the Situation every one holds in the Body of the Society, that God, of whom he holds his Place, prescribes to him, by calling him to that Station, all his Functions and all his Duties. And as he enjoins to all the exact Observance of the Precepts contained in his Law, and which are the common Duties of all sorts of Persons; so he prescribes to every one in particular the Duties which are peculiar to his State and Condition, by the Rank which he holds in the Body of which he is a Member, which implies the Functions and Duties of every one of the Members towards all the others, and towards the Body.

If we examine upon this Principle which is so certain, so plain and so natural, the Conduct of particular Persons, as to what concerns their Duties towards the Publick, and the Conduct of those whose Profession obliges them to promote the publick Good, and to maintain Order in the State; we shall find that all the said Members are so far from considering themselves under this Obligation, and from directing to this end the Functions which their Rank demands of them, that the greater part consider only themselves, without any regard to the Body of which they are Members, and regulate all their Conduct without any View of the Order or Publick Good of the said Body. But every one places his All in himself, and his Self-Love directing the whole Conduct of his Life to his own particular Advantage, he consecrates to it the entire use of the Rights, the Duties, and the Functions which he ought to exercise only as being a Member of the common Body, and he turns them even against the Good of the said Body, if he thinks that his own particular Good requires that he should make this bad use of them, or he quite abandons them, if he finds that he cannot draw from them some Profit or Advantage to himself. Thus, we see an infinite number of Persons, who instead of giving to the Dignity annexed to the publick Charges in which they are placed, its natural Use, which is to give Authority to their Ministry, by procuring Respect and Obedience from those who are subject to their Jurisdiction, use their Authority to no other purpose than to display their Ambition, and to draw to their Persons the Honour and Respect which is due only to the Rank which they hold. Thus, we see some who make no other use of the Authority of their Offices, which are destined for the Support of Justice, than as a Handle to exercise Injustice and Violence, and to oppress those who ought to be protected by that Authority. Thus, the greater part exercising their Ministerial Functions only with a view to the Honour, Profits, and other Advantages which accrue to them thereby, they act and are in effect only as dead Members, when their Self-Love discovers no other Advantage to be reaped from their Functions besides the Publick Good.

It appears sufficiently by this first Reflection, what is the Foundation of all the Duties of those who ought to contribute to the Publick Order; and that since this Order cannot subsist but by the Concurrence of the Functions of all the Members who compose the Body of the Society, the Depravation or Corruption in the Discharge of the said Functions by the Members, or their bare ceasing to perform them, produces in the Society as it were a Distemper which troubles and disturbs the Order of it. Seeing therefore it is upon the Foundation of this Truth, *That the Society forms a Body of which every one is a Member*, that the different Rules concerning the Duties of those who compose this Society are built, and that the said Duties are the most essential Part of the Matters of the Publick Law; we have been obliged to begin the particular detail of these Matters by this Reflection on the said Foundation, which will be of use in all the subsequent Parts of this Book, where we shall explain the Functions and Duties of the several sorts of Persons whose Imployments may have any manner of relation to the Publick Order.

a Dominus membrorum suorum nemo videtur. *l.* 13. *ff. ad leg. Aquil.* But now hath God set the Members every one of them in the Body, as it hath pleased him. 1 *Cor.* 12. 18.

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TITLE I.

Of the Government and General Policy of a State.

Divers sorts of Governments.

ALTHO every State hath its peculiar Manner of Government, and there be in all States some Laws or Usages which distinguish the Names, the Number and the Power of those who are placed in the highest Stations; yet there is this common to all of them, that the general Order is maintained in them by a superior and sovereign Power, whether it reside in one or in many Persons.

They call those Monarchies, or Monarchical States, where the Sovereignty resides in one Person alone, to whom they give in general the Name of Prince: and they give the Name of Republicks to those States where the Sovereignty resides in many Persons.

The Monarchical States are of several sorts, Empires, Kingdoms, and others under divers Names: Many of them are Hereditary, and others are Elective. Among the Hereditary Monarchies there are some which descend only to the Heirs Male; and in others the Daughters succeed for want of Male-Issue. We may reckon among the Monarchical States, divers States which under the Names of Dutchies, Counties, Marquisdoms, and other the like Names, form Principalities of which the Dukes, the Counts, the Marquisses, are Sovereigns; and altho they hold their Sovereignties and Principalities as Fiefs of other Princes to whom they are Vassals, yet they have nevertheless a Sovereign Empire over their Subjects. There are even some Kingdoms which are held in Fee. There are likewise Principalities annexed to Bishopricks, and which go to the Bishop by virtue of his Election to the Bishoprick.

Republicks are also of divers sorts: For there are some of them which are called Aristocracies, where the Government is in the hands of Persons of the first Rank: And there are others which are called Democracies, in which Persons of the meaner sort of the People may be called to the Government. They give likewise the Name of Oligarchy to some Republicks, where the Government is in the hands of a few Persons, to distinguish them from the others where the Government is in the hands of a greater Number. Thus these several Manners of Government in Republicks distinguish them from one another; but they have all of them this in common, that it is by Election that the highest Places in them are filled, whether this Election be made by a certain Body which has the Right of electing, or by Deputies of divers Orders, or by other Ways.

Which of the two Governments ought to be preferred, Monarchy or a Commonwealth.

Of these two general Kinds of Government, Monarchical and Republican, the Monarchical is the most universal and the most antient. It is the most universal, because we see that at this Day the whole World is divided into Monarchies, excepting a small number of Republicks; and because we know from the Histories of all Ages, and of all Places, that this sort of Government hath always been most in use. And it may be observed that all the Republicks which are now extant in *Europe*, where is the greatest number of them, have all of them put together only a very small Extent of Territory, and that there is not one of them but what has been taken out of a Monarchical Government which went before it. For they have all of them been taken off either from the *Roman* Empire, or from other Monarchical States. And if we look back to the Republick of *Rome*, the most flourishing Common-Wealth that ever was, we know that it was preceded also by a Monarchy.

As to the Antiquity of these two Forms of Government, that of Monarchy hath its Origin from the Creation of the World, when it was altogether natural, that one single Family becoming one People, the Paternal Power of the first Head of the Family, whose Children and Descendants composed the said People, should be in his Person a Right of Government, and that this Unity of Government which was natural in the first Beginning of the Society of Mankind should continue in it. Thus we see that after the Deluge, which put Mankind into the same Condition they were in at the Creation, one only Person was the Head of the first Society; and when it divided and dispersed itself in order to form many Societies in divers Countries, each Society retained this Manner of Government. We may likewise observe, that in the Holy Scriptures, which are the only Writings wherein

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wherein we have the History of many Ages from the Creation of the World, before those other Ages of which we have some Vestiges in the other Books, there is not the least mention made of Republicks. But we see there, that Monarchical States were every where in use, and so multiplied, that in the small Extent of Territory which environed the State of the *Jews*, there was reckoned a great number of Kings, every one of which could have but very narrow Dominions. And in the succeeding Ages, we see from the same Holy Writings, and from other Books, that almost all the Governments of the Universe have been Monarchical.

It would seem that we might gather from this Antiquity of the Monarchical Government, from its Origin, which it derives from the Paternal Government, and from its Duration in all Ages over the whole World, that it is the most natural Government, and that it is the Government which the Generality of People have judged to be the most useful. And altho it be true, that the Multitude is not always of the most reasonable Opinion, yet this Truth is restrained to two sorts of Opinions and Sentiments, in which the Plurality is often subject to Error. One sort is of the Opinions in Matters the Knowledge whereof depends on the Principles of Sciences, that are known but to a few Persons, and of which the Truths are hidden, and often contrary to what appears to the Senses, which the greater part of Mankind make the Rule of their Judgments. And the other sort is of the Sentiments which are inspired into us by the Corruption of our Hearts, the Biass of Self-Love, and the Impressions of the Passions; for seeing we are all born with an Inclination to Evil, and that but few Persons attain to that degree of Perfection as to govern their Actions by the Views of Truth and of Justice; the Multitude goes astray and wanders in the Sentiments which proceed from the Heart: and we should judge almost always very imprudently, very falsly, and even criminally, if we should judge of the Sentiments and Motions of the Heart according to the Taste of the Multitude. Thus, for example, we should make a wrong Judgement if we should think that the Love and Pursuit of Pleasures, of Riches and Honours, were the best Course, because it is that which the Multitude follows. But in Matters in which the Knowledge of Justice and Truth does not depend either on the Study of Sciences, or on the Purity and Uprightness of the Heart, and where the Diversity of Opinions is no ways contrary to Religion nor to good Manners, the Multitude judges almost always better than those Persons who have a mind to distinguish themselves from the Croud, and who pursue other Views than those to which natural Inclination leads the Generality of Mankind. For that Inclination is nothing else but a Propensity to follow the Lights which God gives us naturally; and Reason is the Principle which he has given us for the Use of the said Lights. We see likewise sometimes that this Bent of the Multitude to an Opinion, is founded on natural Principles which are not so easily discovered, and which those who lean to the contrary Opinions have not enquired into. The Reader may meet with an Instance of this in the Preamble of the third Section of the ninth Title of this first Book.

We may add to all these Considerations, which prove that the Monarchical State being the most universal and the most antient, is the most natural and most useful, that it is likewise the most conformable to the Spirit of the Divine Law, and to the Government of God himself over Mankind. For it was this sort of Government that God made choice of, when he set about forming a People over whom he was to display his Almighty Providence, that he might represent another People which he was to gather out of all the Nations of the World, and which was likewise to have one only Sovereign, whose Reign should reach over all the World, and to all Ages. He began with chusing and distinguishing one Family, and establishing therein the Person who was the Head of the Family as the first Sovereign Prince, allowing him likewise the Use of Arms: the Descendants of this first Head who composed this elect People having been in a Captivity of four hundred Years *a* under the Tyranny of a neighbouring People, where they multiplied to such a degree as to make up more than six hundred thousand Men able to bear Arms. When it was the Will of God to deliver them out of that Captivity, he raised up unto them a Deliverer who set them free, and who exercised over this People all his Life-time the Functions of a Prince under the visible

a Know of a Surety, that thy Seed shall be a Stranger in a Land that is not theirs, and shall serve them, and they shall afflict them four hundred Years. Gen. 15. 13. Acts 7. 6.

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visible Direction of God, who employed that Man alone to execute his Orders in every thing relating to the Government. And ever after, this People had always Leaders, who governed them under the Name of Judges, that is to say, according to the Stile of the Holy Scriptures, Princes who had the Government. Thus, during the Lifetime of *Moses*, and of the Princes his Successors, the Government of the *Jewish* Nation was always Monarchical, that is to say, in the Person of one Man alone; so that when *Moses*, finding it impossible for him of himself alone to regulate all the Controversies of the People, chose out among the Elders the wisest and most skilful Persons to ease him in his Function, he reserved to himself the Cognizance of such Difficulties as might be too hard for the ordinary Judges, and might deserve that he himself should hear and determine them *b*. From the beginning of the Government of *Joshua* his Successor, God told him that he should be with him as he had been with *Moses*; and he began to act as Chief, he alone having the Government, giving out his Orders to the first among the People who were to command under him, and who promised him all of them a faithful Obedience, they declaring to him at the same time, that the first who should fail to obey him in every thing which he should command, should be put to death *c*.

The Government of the Judges was succeeded by that of the Kings, by a Change which it is not necessary to explain here. For the Question here is not concerning the different Manners in which one Person alone may have the Government; but only in general about the Preference of the Government of one Person alone to that of a Commonwealth, as being the most natural and the most conformable to the Government which God himself exercised over his chosen People. And in effect, after that God had given to this People a King which they had desired of him, and that he had punished both the People for having desired a Government different from that which he himself had directed, and also the King for not having followed all his Orders; yet nevertheless he gave unto them a second King, and he himself chose for that Office a Person who deserved that singular Commendation of being a Man according to God's own Heart *d*, and whom he render'd worthy to represent by his Reign that of the Prince who was to be born of him, and who was to form that heavenly Kingdom, of which the Kingdom of that chosen People was a Type and Figure. And he gave to this second King many Successors of his own Descendants, who reigned over the People.

We see by this Succession of Monarchies over all the World, and throughout all Ages, and by the Conduct of God towards the *Jewish* Nation, that the Monarchical State is the most natural and the most conformable to that which God himself exercised over his own People. And it is by this same Conduct that God having formed the Society of every State, as a Body of which the Persons who compose it are so many Members, he has established in every State a Head *e* to govern it, and to be in his stead, as a Father in a Family, and who by the Unity of the Government imitates and represents the Government of his Providence, and contains the Members of that Body of which he is Head within the Bonds and Ties which ought to form the Order of the Society which unites them.

It seems to follow from these Truths, that the Monarchical State is the most natural, and the most useful. And likewise we see, that the Inconveniencies which cannot fail to arise in all Things wherein the Conduct of Men has any share, are naturally less in Monarchies than in Commonwealths. Thus, in a Monarchy the Subjects do not dream of aspiring to the Dignity of Sovereign; and we find there much fewer Cabals and Factions. For the Ambition of particular Persons having for its Bounds the Rank of a Subject, it never goes the Length of an Attempt in any one to raise himself to the Dignity of Sovereign, and to disturb the State by Seditions

b And the Cause that is too hard for you, bring it unto me, and I will hear it, Deut. 1. 17.

c Whosoever he be that doth rebel against thy Commandment, and will not hearken unto thy Words in all that thou commandest him, he shall be put to death, Joshua 1. 18.

d He raised up unto them David *to be their King, to whom also he gave Testimony, and said, I have found* David *the Son of* Jesse, *a Man after mine own Heart, which shall fulfil all my Will*, Acts 13. 22.

The Lord hath sought him a Man after his own Heart, and the Lord hath commanded him to be a Captain over his People, because thou hast not kept that which the Lord commanded thee, 1 Sam. 13. 14.

e Over every Nation hath he set a Ruler, Ecclus. 17. 14.

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ditions and Civil Wars. But in a Commonwealth many Persons being capable of pretending to the highest Stations, and the Way being open to them by Election, Cabal and Party have often times a greater Share in the Elections than Merit. And those who aim at the first Places, never fail to make Cabals that they may succeed in their Design. And if they want Occasions and Conjunctures for employing Force, they endeavour to gain Voices by Bribes, by Promises, by Threatenings as to those whom they think they can influence by such means, and by other ways, which cause Divisions in Families, corrupt those who have the Right of electing, and raise to the Government the worst of Subjects. Thus these unjust Elections are likewise attended with the Inconvenience of Envies, Jealousies, Divisions, Enmities, and make that Submission to those who get into the Places of the Government by these unfair ways more irksome, and sometimes more odious. The Elections that are made even in the fairest manner, do not hinder those who think they have more Merit than the Persons raised over their Heads to the Government, from looking on them with a jealous Eye, and do not prevent divers bad Consequences which attend Popular Elections, and which are directly opposite to the publick Good, which ought to be the Fruit of Government. We see likewise in Commonwealths, that those who are in the highest Stations having their own proper Interest, and that of their Families, separate and distinct from the Interest of the State, the publick Good is in danger of being postponed to their own private Advantage, on all Occasions where their Preferments may be useful to promote their particular Interests. Whereas in a Monarchy the Sovereign Power being in the hands of one only Person, who ought to have one only View, and one only Interest, that of the Good of the State, which he ought to look upon as his own proper Interest, nothing divides it. And this Unity, which doth not hinder the Use of good Counsels, makes the Resolutions more steady, more secret, and more adapted to the Good of the State, and facilitates the Execution of them, rendring it more expeditious, more powerful, and more absolute by the Union of all the Forces, and of every thing which belongs to the Execution in the Person of the Sovereign, in whom resides the Fulness and Unity of the Government.

Besides these Advantages which are natural to Monarchical Government, we may take notice of one more that is common to almost all the Monarchies that are in being, and which is not to be met with in the greatest part of Commonwealths. Every body knows that in order to procure and to preserve the Good of a State, it is necessary that due Care should be taken that it may abound with all Things which may contribute to the Necessities and Conveniences of Life for all sorts of Persons who are Members of it; that the People may live there in Peace, and in Safety against all Attempts from Neighbours and Enemies; that Justice may reign in it absolutely, and without controul; that the Art of War, Sciences, Arts, Trade may flourish there by the Multitude of Persons who cultivate them, and by distributing Rewards to the Trades and Professions of such Persons as have done singular Services to the Publick; that the publick Revenue be so regulated as that it may be sufficient for the Expences which all those Things demand, which are necessary for the common Good of the State. From whence it follows, that the larger a State is, the more it has all these Advantages, and it hath them in a less Degree, in proportion to the Narrowness of its Bounds. For in a small Territory all sorts of Things are in less plenty, and the Inhabitants have not the Helps necessary for procuring them elsewhere: Skilful and able Persons are to be found there in a much smaller Number: There is but little Assistance to be had from the publick Revenue: The Inhabitants are greatly exposed to the Insults of Strangers, and the most inconsiderable Attempts against them are enough to overturn the State. Seeing therefore it is for the Good of a State that it flourish and support it self by its Wealth and by its Strength, which cannot be done without an Extent of Territory that may be able to supply it with every thing that is necessary, we may venture to say that these Advantages have always been, and are still naturally peculiar to all the great Monarchical States, such as we see at this Day in the far greatest part of the World; and that they are wanting in almost all the Commonwealths that are now in being, for they are confined to a narrow Extent of Territory, and their small Force exposes them to the Insults of their Neighbours, and obliges them to im-

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plore the Protection of other Princes, which may some time or other bring them under the Subjection of a foreign Dominion, and be attended with troublesome Consequences. And that which causes this small Extent of Territory in Republicks, and deprives them of the Advantages which great States have, is because the Government of Republicks is natural only to a small People, who separate and distinguish themselves from others by their peculiar Manners, that they may reunite themselves by Ties which link those who are Members of their Society more closely together, and be associated under a Government which is more agreeable to their Inclinations; so that this Union is not so easily formed among many People. But the great States have been formed either by the Increase of the first People who got first possession of a Country, or by Conquests which have enlarged its first Boundaries; and some States, especially those of *Europe*, were large Portions taken out of the *Roman* Empire, when it was dismember'd. And all these Ways, and the others which may have given Birth and Increase to all the great Monarchies, have had this Consequence of putting them in a Condition not to fear the Attempts of one another, and of procuring in every one of them plenty of every thing that may be for the Good and Support of a State.

We must not urge as an Instance against these Remarks on the Advantages of Monarchical Government, the Grandure of the Commonwealth of *Rome*; for we are to consider as the Body of that Commonwealth only *Rome* it self, or the People of *Rome*, who, having made themselves Masters of other Nations, did not look upon them to be Parts of their Commonwealth, but only as States subject to their Dominion. And as for the Inconveniences which Commonwealths are liable to, the Commonwealth of *Rome* fell in a few Ages into the greatest of those that have been taken notice of, having been brought to its end by the Ambition of the Authors of the last Civil Wars, in which the Conqueror made himself Master of the Commonwealth, and converted it into a Monarchy *f*.

We may add to these Reflexions on the Advantages of Monarchies, those of *France*, which, of all the States of the World, is that wherein the said Advantages do most abound, by its extent into several large Provinces, by its Situation in the most temperate Climate, and bordering on the two Seas; by its producing every thing that is either good or necessary for human Life; by the Multitude of its Springs, Rivulets, and Rivers proper for Navigation, in order to have an easy Communication between the several Provinces; by its lying near several neighbouring States; by the Politeness of the Nation, which produces many great Genius's and Great Men in all sorts of Professions; by its Riches, and its great Forces. And likewise there never was known a State which had so long and firm a Duration with so many Advantages over and above others.

It seems that we may gather from all these Reflexions, that Monarchical Government ought to be preferred to that of a Republick; and that it follows from some of the Reasons of the said Preference, that among Monarchies the Government of those which are Hereditary is more natural, more useful, and attended with fewer Inconveniences than that of Elective Monarchies. For whereas in Hereditary Monarchies it is God himself who seems to dispose more visibly of the Government, by calling to it Princes by their Birth; Elections are liable to great Inconveniences, whether it be by the Choice of the Persons, in which it is easy to be deceived, or by Cabals and Factions. And the Reign of Elective Princes, even those whose Election has been carried on in the fairest way, has its Inconveniences of Divisions in the Election, of long Interreigns which expose the Country to Factions and to other bad Consequences, of want of Obedience to an Authority that is not so absolute, of Slowness in the Dispatch of the publick Affairs, and other bad Consequences. So that of all the States, the most natural, and the most perfect, is that of Hereditary Monarchies, which descend only to the Male Issue.

It is not necessary that we should answer here the Objections of the Inconveniencies which happen in Monarchies, when the Sovereigns chance to be incapable of supporting the Weight of the Government, whether it be because of their Minority, or because of some Defects they may labour under, or even because of Vices which may incline them to make a bad Use of their Power. We all know that there is in every thing divers sorts of Inconveniencies, that

f Evenit ut necesse esset Reipublicæ per unum consuli. *l.* 11. *ff. de orig.*

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that there is nothing upon Earth so good and so perfect as to be quite free from all manner of Inconvenience, and that the best Establishments have their Imperfections; so that these Objections prove nothing at all. For besides that the Inconveniencies of Republican Governments are more frequent, and as great, or rather greater than those of Monarchies, when the matter is to judge of the Usefulness of a Government, and of all other sorts of Things, we ought to consider the Nature thereof in it self, and to judge that to be the best which hath naturally the Characters of the greatest Good. And as for the Inconveniencies which may happen in Monarchies by reason of any Vice or Defect in the Prince, they are an Effect of the Providence of God, which we ought to bear patiently, in the same manner as the bad Successes of the justest Wars, and the other Chastisements which come from the Hand of God. For it is to him alone that the Events of Things are reserved, and no human Prudence is able to ascertain them to be good; and it is in his Hand that Governments are, and the Wills of those who govern *g*. And even in States where the Governors have the greatest Wisdom and Application, whether it be in Monarchies or Commonwealths, there is no preventing an infinite number of Injustices committed by those to whom the Sovereign or the Republick are obliged to intrust that which those who are in the highest Stations of the Government are not able to do by themselves. And these Injustices are often more criminal than those which might proceed from the Sovereign himself. And in a word, God himself hath forewarned us, not to be surprized if we see Iniquity seated in the Throne of Justice. For if those who are set over others do not take care to maintain Justice in their Dominions, God has reserved it to himself to manifest his Power in the Severity of the Punishment which he prepares for the Injustices of those Princes who shall not have taken his Law for their Rule, and who shall not have reigned according to his Spirit *h*.

g The King's Heart is in the hand of the Lord, as the Rivers of Water: He turneth it whithersoever he will, Prov. 21. 1.

h If thou seest the Oppression of the Poor, and violent perverting of Judgment and Justice in a Province, marvel not at the matter: For he that is higher than the highest regardeth, and there be higher than they. Moreover, the Profit of the Earth is for all: The King himself is served by the Field, Ecclef. 5. 8, 9.

For Power is given you of the Lord, and Sovereignty from the Highest, who shall try your Works, and search out your Counsels. Because being Ministers of his Kingdom, you have not judged aright, nor kept the Law, nor walked after the Counsel of God, horribly and speedily shall he come upon you; for a sharp Judgment shall be to them that be in high Places. For Mercy will soon pardon the meanest, but mighty Men shall be mightily tormented. Wisd. of Sol. 6. 3, 4, 5, 6.

Be wise now therefore, O ye Kings; be instructed ye Judges of the Earth. Serve the Lord with Fear, and rejoice with Trembling. Kiss the Son, lest he be angry, and ye perish from the Way, when his Wrath is kindled but a little: Blessed are all they that put their Trust in him, Psal. 2. 10, 11, 12.

What has been said hitherto of the Advantages of Monarchical Government, and of that among the rest of its Conformity to the Government which God himself exercised over the *Jewish* Nation, ought not to have this effect, That because all these Considerations seem to prove that the Monarchical Government is the most natural, the most useful, and the most conformable to the Conduct of God, we ought from thence to conclude that the Government of Commonwealths is contrary to the Order of Nature, and opposite to the Spirit of God; since not only hath he not made a general Law ordaining this only kind of Monarchical Government to be established in all Countries, but he has even approved the Government of Republicks, having made no manner of Alteration in those Republicks which he has enlighten'd with the Light of his Gospel. For his Apostles and their Successors lived peaceably in all States, under the Government which they found established in them, and without meddling with their Form of Government, whether it was Monarchical or Republican, they taught the reciprocal Duties both of those who govern, and of those who are subject to the Government; having looked upon all the rest which concerns the Quality and the Title of those who govern, whether they be Princes, or others, as a Temporal Matter, subject to divers sorts of Temporal Policies, every one whereof may suit with the Gospel, especially seeing that even in the Matters of the Spiritual Policy of the Church, its Discipline is different in divers Places, and even in the same Places it hath been subject to Changes.

The Reasons why we have thought fit to examine this Question here.

We could not forbear, before we should proceed to the Detail of this Matter of Government, to consider this Question, Which of the two Governments is the most useful. For altho

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tho it may seem that every Nation is prepossessed as to this Question, and gives it in favour of the Government to which they themselves are subject, and that this Question may appear to be a mere Curiosity; yet it is of Importance on one part to know the Truth in this matter, and on the other part to know what are the Duties of those who happen to live under one of these two sorts of Government, which is, or which they believe to be the least adtageous; for there are many Persons who would prefer to the Government under which they themselves live that of the other kind. And we may be able to judge by all the Reflexions which have been made, both on the one and the other Form of Government, that altho it appear that Monarchy is the best of Governments, yet seeing both the Forms agree with Religion, and are consequently agreeable to the Order of God, that we may perform under either of them all our Duties; and that we ought for this Reason to live peaceably under that Form of Government where our Lot has cast us, it was necessary to examine this Question; that whilst we gave the Preference to Monarchy before a Commonwealth, we might declare at the same time, what is very true, that the Reasons of this Preference are of no other use than to satisfy those who shall relish them; and to inform others, that the Liberty of their Sentiments on this Question, which no body can take from them, does not free them from the Necessity of obeying sincerely the Government under which it is their Lot to live, be it Monarchy or a Commonwealth; and that every Attempt to disturb the Peace and common Good of either the one or the other Form of Government, is a Crime whose Heinousness cannot be sufficiently punished. These Truths agree perfectly well with all that has been said on this Question: So that the natural Conclusion to be gathered from thence is, That they who live in a Monarchical State may very justly believe that theirs is the best Form of Government; and that those who live in a Commonwealth, and who would prefer Monarchy to their Republican Government, are nevertheless bound to yield perfect Obedience to the Commonwealth; and that all of them without distinction, whether they reason on this Question, or whether they do not think at all of it, and whatever Opinion they may be of, are equally obliged to pay Obedience to the Government under which they live, pursuant to the Rules which shall be explained under this Title; which we shall divide into two Sections, which shall comprehend all that we thought could well be digested into Rules on this Subject: One Section shall be of the Necessity and Use of Government; and the other of the Obedience due to Governors.

SECT. I.

Of the Necessity and Use of Government.

The CONTENTS.

1. *Causes of the Necessity of a Government.*
2. *Paternal Authority the first kind of Government.*
3. *The Distinction of Imployments demands a Government.*
4. *The Multitude of Families, which is necessary in a State, requires also a Government.*
5. *Another Cause of the Necessity of Government, for the punishing those who disturb the publick Order.*
6. *It is from God that Sovereigns derive their Authority.*
7. *The Use of Government.*

I.

1. Causes of the Necessity of a Government.

ALL Men being equal by their Nature, that is to say, by Humanity which makes their Essence, it does not make any one of them dependant on the others *a*. But in this Equality of Nature they are distinguished by other Principles which render their Conditions unequal, and form among them Relations and Dependencies which regulate the different Duties of every one toward the others, and render the Use of a Government necessary to them; as will appear by the Articles which follow.

a I my self am a mortal Man, like to all, and the Offspring of him that was first made of the Earth. And when I was born, I drew in the common Air, and fell upon the Earth, which is of like nature; and the first Voice which I uttered was crying, as all others do. For there is no King that had any other Beginning of Birth. For all Men have one Entrance into Life, and the like going out. Wisd. of Solomon. Chap. 7. ver. 1, 3, 5, 6.

Quod ad jus naturale attinet, omnes homines æquales sunt. *l. 32. ff. de reg. jur.*

II.

2. Paternal Authority the first kind of Government.

The first Distinction which subjects some Persons to others, is that which is made by Birth between Parents and Children. And this Distinction makes a first kind of Government in Families, where the Children owe Obedience to their Parents who are the Heads of the Families *b*.

b Honour thy Father with thy whole Heart, and forget not the Sorrows of thy Mother. Remember that thou wast beget of them; and how canst thou recompense them the Things that they have done for thee? Ecclus. 7. 27, 28.

Children obey your Parents in all Things. Colos. 3. 20.

III.

3. The Distinction of Imployments demands a Government.

The second Distinctions of Persons, is that which is made among all Men by the Necessity of the divers Imployments that are necessary to form the Society, and to unite them all in a Body, of which every one is a Member *c*. For as God has render'd necessary to every Man the Assistance of many others for several Wants, so he has distinguished their Conditions and Imployments for the respective Uses of all these Wants, assigning to every one of them their Place where they ought to apply themselves to their Functions. And it is by these Differences of Imployments and Conditions, depending the one upon the others, that are formed the Ties which compose the Society of Men; as the Conjunctions of the several Members compose the Body. And this renders the Use of a Head necessary for uniting and governing the Body of the Society, which these several Imployments ought to form, and for maintaining the Order of the Correspondencies which are to supply the Publick with the Use of the different Functions due from every one according to his Situation, which makes his Engagement *d*.

c But now hath God set the Members, every one of them in the Body, as it hath pleased him. And if they were all one Member, where were the Body? But now are they many Members, yet but one Body. 1 Cor. 12. 18, 19, 20.

For he hath made the Small and Great. Wisd. of Sol. 6. 7.

d Abide in thy Labour. Ecclus. 11. 21.

IV.

4. The Multitude of Families, which is necessary in a State, requires also a Government.

The same Cause which demands this Variety of Professions for composing the Order of a State, demands also the associating of many Families together, that they may increase and multiply, and bring up Persons fit for all Imployments, and perpetuate the Duration of them. And the Wants of those Families, which imply the Use of those very Imployments, depend on an infinite Detail of Ties and Engagements of the one to the other, which render the Order of a Government necessary *e*.

e By these were the Isles of the Gentiles divided in their Lands, every one after his Tongue, after their Families, in their Nations. Gen. 10. 5.

V.

5. Another Cause of the Necessity of Government, for punishing those who disturb the publick Order.

This is likewise a Consequence from all these Principles, that seeing all Men are not inclined to perform all their Duties, aud that on the contrary many are prone to Wickedness; it was necessary, for maintaining the Order of their Society, that Injustices and all Attempts to disturb the said Order should be repressed; which could not be done but by an Authority given to some Persons over the others, and which made the Use of a Government necessary *f*.

f But if thou do that which is evil, be afraid; for he beareth not the Sword in vain: For he is the Minister of God, a Revenger to execute Wrath upon him that doth evil. Rom. 13. 4.

VI.

6. It is from God that Sovereigns derive their Authority.

This Necessity of a Government over Men whom their Nature makes all equal, and who are not distinguished one from the other but by the Differences which God puts between them by their Conditions, and by their Professions, shews that it is on the Divine Order that Government depends; and as there is none but God alone that is the Natural Sovereign of Men *g*, so it is likewise from him that they who govern derive all their Power and Authority, and it is God himself whom they represent in their Functions *h*.

g For the Lord is our Judge, the Lord is our Lawgiver, the Lord is our King, he will save us. Isa. 33. 22.

h He set a Ruler over every People. Ecclus. 17. 17.

For Power is given you of the Lord, and Sovereignty from the Highest. Wisd. of Sol. 6. 3.

By me Kings reign, and Princes decree Justice. Prov. 8. 15.

I will not rule over you, neither shall my Son rule over you: The Lord shall rule over you. Judges 8. 23.

Thine is the Kingdom, O Lord, and thou art exalted as Head above all. 1 Chron. 29. 11. *In thine hand is Power and Might, and in thine hand it is to make Great, and to give Strength unto all.* Ibid. 12.

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It may be remarked on what is said in this Article, that it is from God that Sovereigns derive their Power, that it is one of the Ceremonies in the Coronation of the Kings of *France*, for them to take the Sword from off the Altar, thereby to denote that it is immediately from the Hand of God that they derive the Sovereign Power, of which the Sword is the principal Emblem.

See on the same Subject the Preamble of the following Title.

VII.

7. The Use of Government. We see clearly enough by these Causes of the Necessity of a Government, what the Use of it is; and that in general it is to maintain the publick Order in the whole Extent of the several Parts whereof it consists, to keep the particular Subjects in peace, and to punish the Attempts of those who disturb the Peace and Tranquillity of the State, to procure that Justice be administer'd to all who are under a necessity of suing for it, and to take care of every thing that may be necessary for the common Good of a State *i*.

i That we may lead a quiet and peaceable Life. 1 Tim. 2. 2.

SECT. II.

Of the Obedience due to Governors.

The CONTENTS.

1. *Obedience due to Governors.*
2. *Obedience to the supreme Head.*
3. *This Obedience is a Duty of Conscience.*
4. *Obedience to the Ministers of the Sovereign.*
5. *Wherein consists the Obedience to Government.*
6. *The Extent and Limits of this Obedience.*

I.

1. Obedience due to Governors. SEEING Government is necessary for the publick Good, and that it is God himself who hath established it, it is consequently necessary also that those who live under its Jurisdiction, be subject and obedient to it. For otherwise it would be God whom they would resist; and Government, which ought to be the Band of Peace and Union, from whence the publick Good of a State is to arise, would be an Occasion of Division and Troubles, which would end in the Ruine of the State *a*.

a Let every Soul be subject unto the higher Powers. For there is no Power but of God: The Powers that be, are ordained of God. Whosoever therefore resisteth the Power, resisteth the Ordinance of God. Rom. 13. 1, 2.

II.

2. Obedience to the supreme Head. The first Duty of Obedience to Government, is that of obeying those who are placed in the highest Station, whether they be Monarchs, or others who are Heads of the Body that is formed by the Society, and to obey them in the same manner as the Members of the natural Body obey the Head to which they are united *b*.

b Submit your selves to every Ordinance of Man for the Lord's sake, whether it be to the King, as Supreme. 1 Pet. 2. 13.

III.

3. This Obedience is a Duty of Conscience. This Obedience ought to be considered, with respect to him who is vested with the Government, as the Power of God himself, who hath established him as his Vicegerent here on Earth. Thus, it is not out of fear of the Weight of the Authority wherewith the supreme Governor is clothed, and of the Punishments due to Disobedience, nor in consideration of the Advantage which we may reap by our Obedience, that we ought to obey, but out of a sincere Will to perform an essential Duty. For altho the Meanness of the Motives of fear of Punishment, and of Self-Interest, does not destroy the publick Order, provided the Obedience be otherwise entire, yet it is nevertheless imperfect for accomplishing the Duty of him who ought to obey; because this Duty is in him an Engagement which binds his Conscience, without any regard to his particular Interest *c*, which Self-Love may suggest as a Motive for his Actions.

c For Rulers are not a Terror to good Works, but to the Evil: Wilt thou then not be afraid of the Power? Do that which is good, and thou shalt have Praise for the same. For he is the Minister of God to thee for good: But if thou do that which is evil, be afraid; for he beareth not the Sword in vain; for he is the Minister of God, *a Revenger to execute Wrath upon him that doth evil. Wherefore ye must needs be subject,* not only for Wrath, but also for Conscience sake. *Rom.* 13. 3, 4, 5.

IV.

4. Obedience to the Ministers of the Sovereign. Seeing the Government implies a great many particular Functions, which the Sovereign alone is not able to perform; and besides those which are peculiar to himself, and which he does not intrust to other Persons, there are many Functions which he commits to divers sorts of Officers, Ministers, or others who have a share in the Government; the same Duty of Obedience to

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the Sovereign obliges us likewise to pay obedience to those Persons to whom he commits the said Functions *d*.

d Submit yourselves to every Ordinance of Man for the Lord's sake, whether it be to the King as supreme, or unto Governours, as unto them that are sent by him for the Punishment of evil Doers, and for the Praise of them that do well. 1 Peter 2. 13, 14.

V.

5. Wherein consists the Obedience to Government.

The Obedience to Government comprehends the Duties of observing the Laws, of doing nothing that may be contrary to them, of executing what is commanded, of abstaining from what is forbidden, of bearing the publick Charges, whether they oblige the Subjects to the Performance of some Functions, or to some Contributions: and in general every one is obliged not only not to transgress in any thing against the publick Order; but to contribute towards it every thing that may particularly be incumbent on him *e*.

e Let every Soul be subject unto the higher Powers. Rom. 13. 1.
Render therefore to all their Dues; Tribute to whom Tribute is due, Custom to whom Custom, Fear to whom Fear, Honour to whom Honour. Rom. 13. 7.
This is a Consequence of the preceding Articles.

VI.

6. The Extent and Limits of this Obedience.

Since this Obedience is necessary for maintaining the Order and Peace which ought to be formed by the Union of the Head and Members who compose the Body of the State, it makes it an universal Duty to all the Subjects in general, and in all Cases, to obey the Orders of the Sovereign, without leaving any Person at liberty to make himself Judge of the Order he is commanded to obey. For otherwise every one would be Master, by having a right to examine what is just, and what is not: and this Liberty would encourage Seditions. Thus, every particular Subject owes Obedience even to Laws and Orders that may perhaps be in themselves unjust, provided that on his part he can execute and obey them without Injustice *f*. And the only Exception which can dispense with a punctual and exact Obedience, is limited to the Cases where one cannot obey without disobeying the Divine Law *g*.

f Put them in mind to be subject to Principalities and Powers, to obey Magistrates, to be ready to every good Work. Tit. 3. 1.
Fear God, honour the King. Servants, be subject to your Masters with all Fear, not only to the Good and Gentle, but also to the Froward. For this is thank-worthy, if a Man for Conscience toward God indure Grief, suffering wrongfully. 1 Pet. 2. 17, 18, 19.
Altho these last Words respect only the Obedience of Slaves to their Masters, yet they are applicable to the Obedience due to Princes, and they are commonly applied to it. For, as it is said in the Article, we must obey even unjust Orders, if we can do it without partaking in the Injustice.

g We ought to obey God rather than Men. Acts 5. 29.

TITLE II.

Of the Power, Rights, and Duties of those who have the supreme Authority.

THE Power of the Sovereign Authority ought to be proportioned to the Ministerial Function, and to the Rank which is held in the Body of the Society of Men who compose a State, by him who being the Head of it, ought there to supply the Place of God. For seeing it is God who is the sole natural Governour of Men, their Judge, their Lawgiver, their King *a*; there can be no lawful Authority of one Man over others, but what he derives from the Hand of God. Thus the Power of Sovereigns being a Branch of the Power of God, it is as it were the Arm and the Force of Justice, which ought to be the Soul of the Government, and which alone hath the natural Use of all Authority over the Minds and Hearts of Men; for it is over these two Faculties of Man that Justice ought to have its Empire.

The Authority of Justice over the Mind of Man, is nothing else but the Force of Truth over Reason and over good Sense; and the Authority of Justice over the Heart of Man is nothing else but the Force of its attractive Power which begets a Love thereof in the Heart. But because all Minds and all Hearts do not suffer themselves to be guided by the Light and Charms of Truth and Justice, and that many reject them, and give themselves up to commit Injustice; the Divine Providence has thought fit to order, that Justice should have other Arms besides Light to lighten the Mind, and Charms to touch the Heart, and that it should reign in another manner over those who

a The Lord is our Judge, the Lord is our Lawgiver, the Lord is our King. Isaiah 33. 22.

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resist its natural Empire, which ought to regulate the Conduct of every Person.

It is in this manner that God, who is Justice and Truth itself, reigns over Men; and it is after this manner that he would have those to whom he entrusts the Reins of Government to use the Power which he gives them, that they may render their Government amiable to those who love Justice, and terrible to those who not being Lovers of Justice attempt to resist it.

According to these Principles, which are the natural Foundation of the Authority of those who govern, their Power ought to have two essential Characters: One is to support Justice, to which the said Power owes entirely its Being; and the other is to be as absolute as the Empire of Justice ought to be, that is to say, the Empire of God himself, who is Justice, and who will reign by them, as he will have them to reign by him *b*; which is the reason why the Scripture gives the Name of Gods to those to whom God commits the Right of judging, which is the first and the most essential of all the Functions of Government *c*. For since this Right is natural only to God, it is him whom we ought to consider in the Person of those to whom he commits the Divine Function of governing and judging Men: And it is indeed the Judgment of God which they ought to render *d*, seeing it is his Place which they supply, and his Power which he has given them by advancing them to the Government, which they can hold of none else but him. And this he shewed in a particular manner in his Government of the *Jewish* Nation under *Moses*, under the Judges, and under the Kings, he himself having chosen *Moses*, the Judges, and their first Kings. And altho the Choice which God makes always of the Persons whom he intends to put into the first Place of the Government, be not manifested by an express Order, as it was in the Government of the *Jewish* People during those first times; yet it appears by these Examples, that it is God who in all sorts of States disposes of the Government. And no body can be ignorant, how that as God is the Master of all Events, so he has in his hands the Direction of those which make the Sovereign Power to pass from one hand to another, whether it be by Succession, Election, or other ways. So that it is from him that even the Princes who are Infidels derive their Power *e*.

b *By me Kings reign, and Princes decree Justice.* Prov. 8. 15.

c Psal. 81. 1, 6. John 10. 34, 35. Exod. 22. 8.

d *Ye shall not respect Persons in Judgment, for the Judgment is God's.* Deut 1. 17. *Take heed what ye do; for ye judge not for Man, but for the Lord.* 2 Chron. 19. 6.

Since therefore Princes derive their Power from God, and that he puts it into their hands only as an Instrument of his Providence and of his Conduct over those States, whose Government he commits to them; it is evident they ought to make such an use of this Power as may answer the Ends which the said Divine Providence intends they should propose to themselves; and that the sensible and visible manner in which their Authority is to be exercised, ought to be only the Work of the Will of God, who hiding from our Eyes his own universal Government of the World, is pleased to manifest by the Ministry of Princes that part of it which he delegates to them over the People who are their Subjects. It is this Will of God, the Government of which they ought to render visible by the means of this Power committed to them, which ought to be the Principle and Rule of the Use they should make of the said Power, seeing it is an Instrument of the divine Will, and is entrusted to them only for this end.

This is without doubt the Foundation and the first Principle of all the Duties of Sovereign Princes, which consists in setting up the Kingdom of God, that is to say, in governing all things according to his Will, which is no other than Justice. Thus, it is the Reign of Justice which ought to be the Glory of the Reign of Princes.

It follows from this first Principle, that all the several Steps of the Government of Princes ought to have the essential Character of Justice which they are obliged to support and maintain, and that having for this end a coercive Power put into their hands throughout the whole Extent of their Dominions, the Body of the State ought to feel that its Head is animated with the Love of Justice, the Empire of which he is bound to establish: And the Head himself, who should animate and govern this Body, ought not to propose to himself any other View in this divine Ministry, besides that of imploying his Authority to reduce to a dutiful Submission to this Empire of

e *Thou couldst have no power at all against me, except it were given thee from above.* John 19. 11.

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Justice such of his Subjects as refuse to submit to it willingly, and to render it absolute as much as in him lies, that his People enjoy Peace and Tranquillity, which are the Fruits of it.

It is by this Love of Justice, that Princes render themselves amiable to their People, whom they govern with an Authority so much the more absolute the more natural it is, and when it is the divine Order which is the Principle of their Authority, and which regulates the use of it. It is the good use of this Ministry that gains Princes the Love and Veneration of their Subjects who delight in Peace and Tranquillity, and which makes them to be dreaded by those who are of restless and turbulent Spirits. It is this good Use of the Ministry which makes Princes, seeing they are not able of themselves, how good and wise soever they may be, to administer Justice to their Subjects on all the particular Occasions which occur, to apply themselves to the finding out all possible Ways of filling the Offices with Persons who are most likely to use the Authority which they are obliged to delegate to them, in the manner and way that they themselves ought to use their own Authority, and who for a right discharge of the Trust committed to them have both the Capacity and Probity that their Functions may demand.

It is also by the means of this Love of Justice that Princes ought to be sensible, that their Power should be absolute over their Subjects, only in order to procure an universal Obedience, which may contain them all in Order and Peace; and their Power ought to be employed only for this end. Thus those whom God raises to this Dignity have the Power to make Laws and Regulations that are necessary for the publick Good; to nominate and appoint Officers necessary for the Administration of Justice, and for all the other Uses which the publick Good may demand.

The Dominion therefore of Sovereigns whom God exalts to this Rank being founded on God's own Dominion, which he delegates to them for the Functions of the Government which he puts into their hands; it is by him that they reign, and consequently it is according to his Law that they ought to reign.

It appears sufficiently by this Account of the Origin of the Power of those who have the Sovereign Authority, and by the essential Characters of the said Power, what the Use is which they ought to make of it, what are their Rights, and what are their Duties. For it is upon these Foundations, and by these Principles that we are to judge thereof; and this shall be the subject Matter of three Sections. The first shall be of the Use of this Power; the second of the Rights which are the Consequences thereof; and the third of the Duties of those who exercise it.

SECT. I.

Of the Power of the Sovereign, and what ought to be the use of it.

The CONTENTS.

1. *The Conjunction of Authority with Force, makes the Power of the Prince.*
2. *Obedience due to Authority, without the use of Force.*
3. *Two Uses of Forces, one within the Kingdom, and the other without.*
4. *Forces necessary within the Kingdom.*
5. *Forces necessary in case of Danger from without.*
6. *The Forces ought to be proportioned to the Wants of a State.*
7. *Wherein consists the good use of Forces.*

I.

1. The Conjunction of Authority with Force, makes the Power of the Prince.

THE Power of the Sovereign implies an Authority to exercise the Functions of the Government, and to make use of the Force that is necessary for the said Ministry *a*. For Authority without Force would be despised, and almost useless: and Force without a lawful Authority, would be no other than Tyranny; as it happens when an Usurper occupies the Throne *b*, or when a lawful Prince attempts to make Conquests on his Neighbour without ground for a just War. But when the Force accompanies the good Use of Authority, the Reign of the Prince is the Reign of Justice, and he dispels all Injustices by his bare Presence *c*.

a For he beareth not the Sword in vain: for he is the Minister of God, a Revenger to execute Wrath upon him that doth Evil. Rom. 13. 4.

b Many Kings have sat down on the Ground, and one who was never thought of hath worn the Crown. Ecclus. 11. 5.

c A King that sitteth on the Throne of Judgment, scattereth away all Evil with his Eyes. Prov. 20. 8.

II. An-

II.

2. Obedience due to Authority, without the use of Force.

Authority alone without any other Force, would be sufficient to govern Persons who know their Duty, and are willing to perform it. For altho it should happen to be separated from its Force, yet the Subjects are bound nevertheless to submit to it, and to pay Respect and Obedience to it; and they incur the Punishment of Rebellion if they are disobedient *d*. Thus the rebellious Insolence of *Shimei* against *David* when he was bereaved of his Forces, was a Crime of High Treason, which the Clemency of that Prince induced him heartily to forgive, in so far as concerned the Injury done to his own Person, altho in that respect he might have punished him; but this Clemency gave way afterwards to the just Severity which so great a Crime deserved. And *David*, who was willing to die without revenging himself, but not without doing Justice in his own Lifetime, commanded his Successor to take care that that Crime might not go unpunished *e*.

d Wherefore ye must needs be subject, not only for Wrath, but also for Conscience sake. Rom. 13. 5.

e See 2 *Sam.* 16. 5. ch. 19. ver. 18. 1 *Kings* 2. the 8th, 40th, and following Verses.

III.

3. Two Uses of Forces, one within the Kingdom, and the other without.

As there are two Uses of the Power of the Sovereign, both of them necessary for the publick Tranquillity; one which consists in containing the Subjects in a dutiful Obedience, and in repressing Violences and Injustices; and the other in defending the State against the Attempts of Enemies; so this Power ought to be accompanied with the Forces necessary for these two Uses *f*.

f That we may lead a quiet and peaceable Life. 1 Tim. 2. 2.

IV.

4. Forces necessary within the Kingdom.

The first of these two Uses of Forces for maintaining the publick Tranquillity within the Kingdom, comprehends the Forces that are necessary for the Security of the Sovereign himself against Rebellions, which would be frequent if Force were not joined with Authority; as also the Forces requisite to contain the Subjects in peace among themselves, and to repress the Attempts which any of them may make against their Fellow-Subjects, and likewise against the Publick, and to put in execution the Orders of the Sovereign, and all the several things that may be necessary for the Administration of Justice. Thus, this first use of Forces being perpetual, as are the occasions that may require it; the Order of Government demands, that the Sovereign have always the Forces that are necessary for the maintenance of Justice; which consists in Officers, and other Ministers set over those Functions, with the Use of Arms, as occasion may require *g*.

g This is a Consequence of the preceding Article.

V.

5. Forces necessary in case of danger from without.

The Use of Forces for defending the State against the Attempts of Enemies is also perpetual, because the Danger of such Attempts is always to be feared, and the want of Forces may expose the Kingdom to it. And these Forces consist in fortified Places on the Frontiers, in Garisons to defend them, and in Troops either already on foot, or ready to be raised on occasion *h*.

h This is a Consequence of the third Article.

VI.

6. The Forces ought to be proportioned to the Wants of a State.

It follows from these different Uses of the Forces necessary to the Power of the Sovereign, that they ought to be proportioned to the Wants and Abilities of the States. Thus these Forces ought to be greater in time of War than of Peace, and lesser for maintaining Order in a quiet peaceable State, than for suppressing Tumults and Commotions in a time of Sedition *i*.

i As the time shall be appointed. 1 Macc. 8. 25.

VII.

7. Wherein consists the good use of Forces.

We may reckon among the Forces necessary in a State, the Wisdom of the Prince who regulates the Use of them by a good Counsel, and who makes the Success of his Arms to depend on the Assistance of Heaven, by the Justice of his Undertakings. For the greatest Armies without the hand of God, are but Weakness; and with the Divine Assistance the smallest Armies are victorious *m*.

m Wisdom is better than Strength. Wisdom of Solomon, 6. 1.

Wisdom is better than Weapons of War. Eccles. 9. 18.

For the Victory of Battle standeth not in the multitude of an Host, but Strength cometh from Heaven. 1 Maccab. 3. 19.

SECT.

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SECT. II.

Of the Rights of those who have the Sovereign Authority.

SINCE the Rights of Sovereigns are derived to them by a Consequence of the Power which they hold of God, as hath been explained in the Preamble of this Title, they can have no other Rights but such as have nothing in them contrary to the Use which God requires them to make of the said Power; and it is for this reason that he enjoins them to study his Law, that they may there learn both their Power and their Duty, of which the Spirit of this Divine Law ought to be the Rule *a*. This shews in what Sense we ought to take that Expression in the Scripture, where *Samuel* speaking to the People who had demanded a King such as those of other Nations, and giving them to understand, by the Order of God, what would be the Rights of that King; he enumerated the tyrannical Injustices which the King whom they demanded might exercise over them, giving thereunto the Name of the Rights of the King, as if those Injustices were really and truly a Right *b*. It is evident that this Expression coming from the same Spirit of God, who had commanded that all Kings should study his Law in order to make it the Rule of their whole Conduct, and who had laid down this Injunction with a view to those very Kings whom he had foretold that this People would afterwards demand *c*; he did not grant unto them Rights directly opposite to the Law which he had enjoined them to follow as their Rule. But those Tyrannical Injustices were called the Rights of the King for this reason, because that as the Legal Rights of Sovereigns are exercised by virtue of their Power, so the Injustices which Kings might commit by abusing this Power, would have the Character of a Right by reason of the Necessity under which the Subjects would be of submitting to them, as has been shewn in the last Article of the second Section of the first Title; which would have, with respect to them, the Effect of a lawful Right; since they could not shake off the Yoke of the Princes Power, altho on the part of the Prince this bad Use of his Power would be manifest Tyranny.

a And it shall be when he sitteth upon the Throne of his Kingdom, that he shall write him a Copy of this Law in a Book, out of that which is before the Priests, the Levites. *And it shall be with him, and he shall read therein all the days of his Life; that he may learn to fear the Lord his God, to keep all the Words of this Law, and these Statutes, to do them. That his Heart be not lifted up above his Brethren, and that he turn not aside from the Commandment to the right hand or to the left; to the end that he may prolong his Days in his Kingdom, he and his Children in the midst of* Israel. Deuter. 17. 18, 19, 20.

And said unto him, Behold, thou art old, and thy Sons walk not in thy ways: now make us a King to judge us like all the Nations. But the thing displeased Samuel, *when they said, Give us a King to judge us: And* Samuel *prayed unto the Lord. And the Lord said unto* Samuel, *Hearken unto the Voice of the People in all that they say unto thee; for they have not rejected thee. but they have rejected me, that I should not reign over them. ——Shew them the manner of the King who shall reign over them. And* Samuel *told all the Words of the Lord unto the People that asked of him a King. And he said, This will be the manner of the King that shall reign over you: He will take your Sons, and appoint them for himself, for his Chariots, and to be his Horsemen, and some shall run before his Chariots. And he will appoint him Captains over thousands, and Captains over fifties, and will set them to ear his Ground, and reap his Harvest, and to make his Instruments of War, and Instruments of his Chariots.* 1 Sam. 8. 5, 6, &c.

c Deuter. 17. 14.

The CONTENTS.

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2. *The Right of making War, Treaties of Peace, and others, with Strangers.*
3. *The Right to make Laws.*
4. *The Right to protect Religion.*
5. *The Right to appoint Officers, to regulate their Functions, and to suppress Offices.*
6. *Right of granting Dispensations.*
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8. *The Right to recompense the several Merits of Subjects with Titles of Honour, and Pensions out of the Publick Money.*
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17. The

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17. *The Right of coining Money.*
18. *And of prohibiting all other Coin except that which the Prince allows to be current.*
19. *The Right in Mines.*
20. *The Right to set off his Power by Marks of a sensible Grandure.*
21. *A Right to have Guards for their Persons.*
22. *A Right to have many Officers for their Houshold.*
23. *The Demesne of the Prince.*
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30. *Forfeitures.*
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32. *The Right of Succession to the Estates of Aliens.*
33. *The Right of Succession to Bastards who die intestate and without Children.*
34. *How these four sorts of Rights and Revenues may be applied.*

I.

1. The first Right of the Sovereign is the Exercise of his Authority for the Publick Good.

The first Right, and that on which depend all the other Rights of the Persons whom God raises to the Sovereign Authority, is the Power of administring the Government, with the use of the Authority and Forces in which his Power consists, and of employing his said Power for the support of Justice, and for maintaining the publick Tranquillity in the Dominions committed to his Care *a*.

a For he is the Minister of God to thee for Good. Rom. 13. 4.
See the third Article of the third Section.

II.

2. The Right of making War, Treaties of Peace, and others with Strangers.

The first Right implies two Rights in general; one is concerning every thing without the Kingdom which may have any relation to the Good of the State; and the other respects every thing within the Kingdom which may tend to the same Good. Thus with respect to things without the Kingdom, the Sovereign has right to make War against those who make any Attempt, or commit any Injustice, either against the State, or against himself who is Head of it, if the Reparation of the said Injustice demands the use of Arms. And this Right consists likewise in a Power to make Treaties of Peace, or other Treaties, according as Occasion requires, with other Princes and States, either for keeping up Alliances with them for a mutual defence of each other, or Correspondencies for Trade, or other Ties and Engagements for other Purposes; which implies the Right of sending to Foreign Princes Ambassadors or Residents *b*. Thus within the Kingdom the Sovereign has a Right to exercise his Power for the several Purposes explained in the following Articles.

b This is a consequence of the first Article, and of the Motive for the use of Arms for maintaining the State in Safety against any Attempts that might disturb the Peace and Tranquillity thereof. See what has been said in the Preface concerning the Use of War. *No body is ignorant of the multitude of Proofs which we have in Scripture of the Power which Princes have to make War, and of the Examples of Princes of the greatest Sanctity who have undertaken and carried on Wars.*

III.

3. The Right to make Laws.

Among these Rights of the Sovereign as to things within the Kingdom, the first is that of administring Justice, which ought to be the Foundation of the publick Order, whether he administer the same in Person, on such Occasions as may require his Presence in Judgment, or causes it to be administred by those to whom he delegates this Right. And this Administration of Justice implies the Right of making Laws and Regulations that are necessary for the publick Good *c*, of causing them to be duly observed and executed, as also the other preceding Laws which are not abrogated; of giving to all the Laws their Vigour and just Effect, and of adjusting the Difficulties which may arise in the Interpretation of the Laws and Regulations; when the Difficulties are such as exceed the Bounds of the Power of the Judges, and make it necessary to have recourse to the Authority of the Lawgiver *d*.

c By me Kings reign, and Princes decree Justice. By me Princes rule, and Nobles, even all the Judges of the Earth. Prov. 8. 15, 16.
d De his quæ primo constituuntur, aut interpretatione, aut constitutione optimi principis certius statuendum est. *l. 11. ff. de legib.*

Si enim in præsenti leges condere soli imperatori concessum est, & leges interpretari solo dignum imperio esse oportet. *l. ult. C. eod.*

Legis interpretationem culmini tantum principali competere, nemini venit in dubium: cum promulgandæ quoque legis auctoritatem fortunæ sibi vindicet eminentia. *Nov.* 143. Inter æquitatem jusque interpositam interpretationem, nobis solis, & oportet, & licet inspicere. *l.* 1. *C. eod.* Leges sacratissimæ, quæ constringunt hominum vitas, intelligi ab omnibus debent, ut universi præscripto earum manifestius cognito, vel inhibita declinent, vel permissa sectentur. Si quid vero in iisdem legibus latum fortassis obscurius fuerit, oportet id ab imperatoria interpretatione patefieri, duritiamque legum, nostræ humanitati incongruam, emendari. *l.* 9. *C. de leg. & const. pr.*

By the Ordinance of Moulins, *Art.* 1. *and that of* 1667. *Tit.* 1. *Art.* 3. *it is ordained, that the Parliaments, and the other Courts of Justice, shall make their Remonstrances to the King, touching whatever shall be found in the Ordinances contrary to the Good or Conveniency of the Publick, or which may require Interpretation, Explanation or Mitigation.*

If in the giving Judgment upon Law Suits which shall be depending in any of our Courts of Parliament, or other Courts of Justice, there arises any Doubt or Difficulty touching the Execution of any Articles of our Ordinances, Edicts, Declarations and Letters Patents, we forbid them to interpret the same; but require and enjoin them in such Cases to apply themselves to us, that they may learn from us what our Intention and Meaning is touching the said Matters. Ordinance 67. Title 1. Art. 7.

[In *England*, when any Doubt or Difficulty arises concerning the Interpretation of a Law, or Construction of a Statute, which the Judges are not able to resolve and determine, recourse in that case is had to the King in Parliament, where the King, by the Advice and with the Consent of the Lords and Commons in Parliament assembled, exercises the Legislative Power, by enacting new Laws and Statutes, and explaining what is found to be doubtful and ambiguous in old ones. *Lex Angliæ sine Parliamento mutari non potest.* Coke 2. Inst. p. 97.618. 4 Inst. chap. 1. pag. 25, Bracton de legibus Angliæ, lib. 1. cap. 1, 2.]

IV.

4. The Right to protect Religion.

The Right of causing the Laws to be duly observed, and of maintaining in the State the general Order and Policy thereof by the Administration of Justice, and the good Use of the Sovereign Power, gives to the Prince a Right to employ his Authority for procuring a due Observance of the Laws of the Church, of which he ought to be *the Protector, the Guardian, and the Executor*; that by the Assistance of his Authority Religion may reign over all the Subjects, and that the Policy of the Church being supported by that of the State, both of them may concur in maintaining the State in Peace and Tranquillity, which ought to be the Effect of their Union *e*.

e The Kings of France *stile themselves* Protectors, Guardians, Conservators and Executors *of what the Church teaches and enjoins.* See the Ordinance of *Francis* I. in *July* 1543. See the tenth Chapter of the Treatise of Laws, in the first Tome of the *Civil Law in its Natural Order.* See the ninth Article of the third Section.

[*The Kings of* England *enjoy the Title and Stile of* Defender of the Faith, *and* Supreme Head of the Church of *England*; *and it is under their Authority, and by their particular Permission, that the Clergy assemble themselves in Convocation, to make Laws or Canons in relation to Matters Spiritual. And they are prohibited under severe Penalties to assemble without the King's Writ, or to enact any Laws or Constitutions without his especial Assent.* Stat. 26 Hen. 8. cap. 1. 35 Hen. 8. cap. 3. Coke 4. Inst. pag. 344. Stat. 25 Hen. 8. cap. 19. entitled, *The Submission of the Clergy.*]

V.

5. The Right to appoint Officers, to regulate their Functions, and to suppress Offices.

Seeing the Sovereign Authority regards the universal Order and Policy of the State, and the Publick Good, and extends to every thing necessary to compose the said Order, and to form the general Policy for the Administration of Justice, for the Government of the Army, for the Management of the Revenue, and for every thing which may demand the Use of Authority, the Sovereign hath therefore the Power of filling up the Offices and Imployments that are necessary for all these different Parts of the Publick Order and Policy, with Persons who may exercise the Functions thereof, and of assigning to every one of them their proper Functions, and giving them the Dignity, the Authority, or the other Characters that are proper for the Functions committed to their Charge. Which implies a Right to erect Offices which may be of necessary use to the Publick Good; to settle the Rights and Functions thereof; and also the Right to suppress such Offices as appear to be useless and burdensom to the State *f*.

f Moreover thou shalt provide out of all the People able Men, such as fear God, Men of Truth, hating Covetousness, and place such over them, to be Rulers of thousands, and Rulers of hundreds, Rulers of fifties, and Rulers of tens; and let them judge the People at all Seasons. And it shall be, that every great Matter they shall bring unto thee, but every small Matter they shall judge. Exod. 18. 21, 22.

So I took the chief of your Tribes, Wisemen, and known, and made them Heads over you, Captains over thousands, and Captains over hundreds, and Captains over fifties, and Captains over tens, and Officers among your Tribes. And I charged your Judges at that time, saying, Hear the Causes between your Brethren, and judge righteously between every Man and his Brother, and the Stranger that is with him. Deuter. 1. 15, 16. 2 Kings 18.

VI.

6. Right of granting Dispensations.

The Power of making Laws implies that of granting certain Dispensations which the Laws do allow of; and it is one

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one of the Rights of the Sovereign to grant Dispensations of this kind. Thus, for example, it is one of the Rules for the Appointment of Officers, that they should be of the Age regulated by Law: but since there may be Persons whose Birth, Virtue, and Capacity may so distinguish their Merit, as to recommend them to Offices before they have attained the Age required for exercising them; it is for the publick Good, that the Sovereign should dispense with this Rule in their particular Case, and it is only he alone that has this Power *g*.

g The same Power is necessary for dispensing with a Law, as for making it.

Ætatis venia Principale beneficium. *l.* 2. *C. de his qui ven. at. impetr.*

Altho the Dispensation of Age mentioned in this Text be for another Use, yet it may be applied to the Rule explained in this Article.

[In *England*, the King has Power to grant Dispensations in many particular Cases, which are expresly reserved to him by the Statute; such as the holding Plurality of Livings, and other Cases, which it would be too tedious to enumerate here. *Stat.* 25 *Hen.* 8. *cap.* 21. But as to the Power of dispensing with the Law in general, where it relates to the Publick Good, or to the Property of private Persons, it is held to be the antient Fundamental Law of this Realm, that all Dispensations of this kind, without the Consent of Parliament, are void. *Hujusmodi vero Leges Anglicanæ & Consuetudines, Regum authoritate, jubent quandoque, quandoque vetant, & quandoque vindicant & puniunt transgressores: quæ quidem cum fuerint approbatæ consensu utentium, & Sacramento Regum confirmatæ, mutari non poterunt nec destrui* sine communi consensu & consilio eorum omnium quorum consilio & consensu fuerunt promulgatæ. *Bracton de Legibus Angliæ, lib.* 1. *cap.* 2. This Matter, touching the Power of dispensing with the Laws, is very learnedly discussed by Dr. *Stillingfleet*, late Bishop of *Worcester*, in his *Ecclesiastical Cases, Part* 2. *chap.* 3. and by my Lord Chief Justice *Vaughan*, in his Reports, in the Case of *Thomas* vers. *Sorrel*. *Vid. Coke's* 3 *Inst. cap.* 86.]

VII.

7. Right of granting Privileges.

It is also owing to the Order of Justice and Policy that there has been established in the best regulated States divers Privileges, which are nothing else but Exceptions from the general Rules in favour of some Persons. Thus, for example, it is but just that the Inventors of new Things, which are of singular Use to the Publick, and who are desirous to reap some Advantage from their Inventions, should have the Privilege of being the sole Traders in the Things which they communicate to the Publick, and that this Privilege should be granted them during a certain Time, to be to them in lieu of a Reward for the Merit of so great a Service, to recompense the Pains and Charges they have been at, and to serve as an Example to excite others who are capable of rendring the like Services. And there are divers sorts of other Privileges, which are Benefits and Favours to be obtained only from the Sovereign *h*.

h This is the Consequence of the precedent Article. Nulli sit liberum, nulli permissum, ut novum aliquid urbis incolæ in urbe sustineant: sed in honorem æternæ urbis corporatis indulta suffragia valere præcipimus. *l. un. C. de privil. Corp. urb. Rom.*

Privatas possessiones nostras ab universis muneribus sordidis placet immunes esse; neque earum conductores, neque colonos ad extraordinaria munera vel superindictiones aliquas conveniri. *l.* 1. *C. de priv. Dom. Aug. v. Tit. ff. de priv. vet.*

VIII.

8. The Right to recompense the several Merits of Subjects with Titles of Honour, and Pensions out of the Publick Money.

As it is conducive to the general Order of Justice, and to the good Government of a State, that the Services and other Merits of Subjects who may contribute to the Publick Good should be rewarded either by Titles of Honour, or by other Favours, which coming from the hand of the Sovereign may be the more remarkable; so it is the Sovereign alone who has the Right to distribute these kinds of Favours. Thus, it is he alone who can ennoble the Persons who, not being born in the Rank of Nobility, have render'd themselves worthy of that Honour. Thus, he may institute and create Orders which may give a Dignity, and a Rank of Honour to those on whom he confers the same, granting unto them particular Marks of this Favour, to be worn either about their Persons, or in their Coats of Arms, and which may procure them the Esteem and Respect that may be due to the said Dignity. Thus, the Sovereign may, in favour of Persons of Quality, and in consideration of their Services, annex Titles of Honour unto Lands held in Fee. Thus, he may assign Pensions out of the Publick Revenue to those who by some singular Service may have merited this Recompence and Mark of Honour *i*.

i This is a Consequence of the Right of Government, and of the Administration of Justice.

[Of antient Time there were Feudal Baronies in *England*, as in other Countries; but at this Day there are none. *Coke's* 4 *Inst. pag.* 5.]

IX.

9. The Right of naturalizing Strangers.

Besides these sorts of Benefits and Favours which are dispensed only by the Sovereign, there are many others which the Good of the State renders necessary, and which can be derived only from him. Thus, when a Foreigner

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reigner is desirous to fix his Habitation in a Kingdom, and there to enjoy the Liberty and the Rights which are peculiar to those who are Subjects thereof, and which the Subjects of other Kingdoms have no Title to; they are placed in the Number of the Members of the State, of which they are desirous to become Subjects, by the Favour of the Prince, which is granted in *France* by Letters of Naturalization, which are obtained from the King, and which are called so, because those who obtain them are reputed by the effect of the said Letters to be as natural-born Subjects of *France l*.

l Natales antiquos, & jus ingenuitatis, non ordo præstare decurionum, sed a nobis peti potuit. *l.* 1. *C. de jur. aur. annul.* Aureorum usus annulorum beneficio principali tributus, libertinitatis quoad vivunt imaginem, non statum ingenuitatis præstat. Natalibus autem antiquis restituti liberti, ingenui nostro constituuntur beneficio. *l.* 2. *eod.*

Altho these Laws have no precise relation to the Right of Naturalization, yet they may be applied to it. See the fourth Article of the fourth Section of the sixth Title.

[*The Law of* England *makes a Difference between* Naturalization *and* Denization. *Naturalization is, when an Alien born is naturalized by Act of Parliament; and an Alien so naturalized is to all Intents and Purposes as a natural-born Subject of* England, *and enjoys the same Liberties and Privileges in all respects. Denization is, when an Alien is enfranchised, or made Denizen, by the King's Letters Patent; who is not entitled to all the Privileges which those Aliens enjoy who are naturalized by Act of Parliament. For if he who is made Denizen by Letters Patent had Issue in* England *before his Denization, that Issue is not inheritable to his Father: But if his Father be naturalized by Parliament, such Issue shall inherit. And there are many other Differences between them.* Coke's 1 Inst. fol. 8. a. 129. a.]

X.

10. The Right to legitimate Bastards.

The Legitimation of Bastards is likewise one of the Rights which peculiarly belong to the Sovereign, who alone may, by Letters of Legitimation, remove the Obstacles and the Incapacity under which Bastards lie, by reason of the Defect in their Birth, which excludes them from certain Honours, and certain Offices, of which they are made capable by the Benefit of this Legitimation *m*.

m Ab imperio hoc percipientibus, ut in uno eodemque, hoc quod agitur, fit donum patris & principis: Id est, dicere, naturæ simul & legis. *Nov.* 74. *c.* 2. §. 1.

These Words are taken out of the seventy fourth Novel, where mention is made of a Manner of Legitimation which was in use in the Roman *Law; when a Father who had only Bastard Children did ordain by his Testament, that they should be his lawful Successors. This Disposition had its effect, if the said Children did obtain the Confirmation thereof by Letters from the Prince.*

The Effect of the Legitimation of Bastards is limitted to the removing of the Incapacities mentioned in this Article, and does not extend to the giving them the Right of Succession, as many have thought, and as is even regulated by some Customs in France. *For such an Use of Legitimation would be repugnant to Equity and good Manners; and it would be unjust and indecent, that a Bastard, legitimated by the Letters of the Prince, should be admitted to share with Children begotten in lawful Wedlock the Succession of their Father or Mother, and that he should claim a Right to the Successions of the Children and Relations of his Father or Mother. For all these Successions are appropriated by Nature, and by the Laws, to those to whom a lawful Birth gives the Title of Children and Relations; and the Vice of an unlawful Birth cannot be so defaced as to put the Bastard into the natural Condition of a Son or lawful Relation, to the Prejudice of those who are really such.* See the third Article of the fifth Section of the fifth Title, and the Remark that is there made on it.

[This Power of legitimating Bastards has been very rarely exercised in *England*; and when it has been exercised, it has been always by Authority of Parliament. Our Chronicles mention one Instance of this Kind in the twentieth Year of the Reign of *Richard* the Second, when *John* of *Gaunt*, Duke of *Lancaster*, caused to be legitimated in a Parliament then held the Issue which he had by *Katherine Swinford* before he married her. *Seldeni Dissertatio ad Fletam, cap.* 9. Long before this, at a Parliament held at *Merton* the twentieth Year of the Reign of *Henry* the Third, it had been attempted by the Bishops of *England* to have it enacted by a general Law, that all such as were born before Matrimony should be legitimate, and made capable of succeeding to Inheritances, as well as the Children born after Matrimony, in conformity to the Civil and Canon Law in this Particular. But all the Earls and Barons with one Voice answered, That they would not change the Laws of the Realm, which to that Time had been used and approved. And so the Law in *England* remains to this Day. *See the Stat.* 20 *Hen.* 3. *cap.* 9. *Coke* 2 *Inst. pag.* 96, 97. *Selden ad Fletam, cap. eod. Bracton de Legibus, lib.* 5. *cap.* 19.]

XI.

11. Divers Acts which demand the Authority of the Sovereign in the Administration of Justice.

All these kinds of Rights are natural Consequences of the Power of those who are vested with the Sovereign Authority; and there may be others, which the peculiar Laws of every State reserve in the same manner solely to the Sovereign. Thus, in *France* it is the King alone, who is reputed to be present in all his Courts of Judicature, and who gives to the Sentences and Decrees of the said Courts the Authority and the Form that is necessary for their being put in Execution, and it is in his Name that they are sped. Thus, in the matter of Restitutions and Rescissions of Contracts which are founded on Acts of Fraud or Violence, on Wrong, on Minority, Letters are obtained from the King for relieving those Persons who have just Cause of Complaint from the Contracts of which they do complain; and the Judges are required by the

the said Letters, which are directed to them for that purpose, to reinstate the Parties in the same Condition they were in before the said Contracts, if there appears to be just Cause for rescinding them. And in the Course of the Administration of Justice, and Decision of Law-Suits, whether in the first Instance, or in Appeals, the Parties procure the like Letters for several Purposes, which are Matters belonging to the Order observed in Judicial Proceedings, which it is not our Business to explain in this place. We shall only observe here, that these sorts of Letters, as also many of those which contain Grants of Privileges, and some others which have been mentioned in the foregoing Articles, do not require that the Prince himself should take particular Cognizance of them, altho they demand his Authority, and that it be in his Name that they are sped: But the dispatching of such Letters is left to the proper Officers, to whom the Sovereign gives that Power, and to whom he commits the said Functions; and the Judges, to whom the said Letters are directed, are obliged to take Cognizance of the Truth of the Facts which the Parties have alledged in order to obtain them, if the Favours which the said Letters grant have no other Foundation besides the Truth of the Facts alledged *n*.

n Universa rescripta, sive in personam precantium, sive ad quemlibet judicem manaverint, quæ vel adnotatio, vel quævis pragmatica sanctio nominentur; sub ea conditione proferri præcipimus, *si preces veritate nitantur.* Nec aliquem fructum precator oraculi percipiat impetrati, licet in judicio adferat veritatem, nisi quæstio fidei precum imperiali beneficio monstretur inserta. Nam & vir magnificus quæstor, & viri spectabiles magistri scriniorum, qui sine præfata adjectione qualecumque divinum responsum dictaverint: & judices, qui susceperint, reprehensionem subibunt. *l. 7. C. de divers. rescr. & prag. sanct. V. T. h. T.*

According to our Usage in France, *we must distinguish between the Letters of Naturalization, those of Legitimation, which have been mentioned in the two foregoing Articles, those which contain certain Privileges, together with others of the like Nature, and the Letters which are mentioned in this Article. Those of the first sort are dispatched in the Great Chancery, and the others, which are commonly called Letters of Justice, or Judicial Writs, issue out of the Chanceries of the respective Parliaments, and other Jurisdictions.*

XII.

12. The Right to regulate the Punishment of Crimes.

Seeing the Administration of Justice renders the Use of Laws for the Punishment of Crimes necessary, it is a part of the Authority of the Sovereign to have Power to establish new Punishments, and to make them either severer or milder, according as the Frequency and Consequences of the Crimes may require *o*.

o Evenit, ut eadem scelera in quibusdam provinciis gravius plectantur: ut in Africa messium incentores; in Mysia vitium: ubi metalla sunt, adulteratores monetæ. *l. 16. §. pen. ff. de pœnis.*

Nonnunquam evenit, ut aliquorum maleficiorum supplicia exacerbentur, quoties nimium multis personis grassantibus, exemplo opus sit. *d. l. §. ult.*

There are many Ordinances which have enacted Punishments for Crimes.

XIII.

13. Power to remit the Punishments of Crimes.

The Power which the Sovereign has to inflict Punishments, and to make them severer or milder, implies that of granting particular Pardons to those who are accused of Crimes, if there be any good Considerations which may induce him to it. Thus, he may commute and mitigate the Punishment of a condemned Person, by inflicting one that is milder. Thus, before Condemnation, he may remit the Punishment, if the Circumstances make the Necessity of punishing the Crime to cease; as, if it is Homicide committed involuntarily, and in the defence of the Life of the Party accused. And there are also Cases where some particular Considerations may oblige the Sovereign to pass an Act of Oblivion of the Crime, either on account of Services which the Criminal has already render'd to the State, or which he may render hereafter, or for other Causes. And he may also discharge from Punishment those who have been already condemned, and restore them to their former State and Condition *p*.

p Cum salutatus esset a Gentiano, & Advento, & Opilio Macrino præfectis Prætorio, clarissimis viris; item amicis, & principalibus officiorum & utriusque ordinis viris, & processisset; oblatus est ei Julianus Licinianus ab Opilio Ulpiano tunc legato in insulam deportatus, tunc Antoninus Augustus dixit, *Restituo te in integrum provinciæ tuæ*; & adjecit, ut autem scias quid sit in integrum restituere, honoribus, & ordini tuo, & omnibus cæteris te restituo. *l. 1. C. de sent. pass. & rest.*

Generalis indulgentia nostra, reditum exulibus seu deportatis tribuit. *l. 7. eod. V. T. h. T.*

XIV.

14. Power to permit or prohibit the Assemblies of Communities and Corporations.

Seeing it is for the Order and good Government of a State, that not only Crimes, but every thing else which may disturb the publick Tranquillity, or any way endanger it, should be repressed, and that for this Reason all Assemblies of many Persons in one Body are unlawful, because of the Danger from those

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those Assemblies which may meet for no other end but to concert some Enterprize against the Publick, even those Assemblies which have nothing in view but what is just and lawful, cannot be formed without the express Approbation of the Sovereign, after he is fully satisfied of their Usefulness, and Tendency to the publick Good. Which makes it necessary to obtain leave to establish Corporations and Communities, Ecclesiastical or Temporal, Regular or Secular, and of all other kinds whatsoever, Chapters, Universities, Colleges, Monasteries, Hospitals, Companies of Trades, Fraternities, Common Councils of Cities and other Places, and all others which assemble together many Persons, for what end soever it be. And it is only the Sovereign who can grant this Leave, and approve the Communities and Corporations to whom the Right of assembling themselves together may be granted *q*.

q Mandatis principalibus præcipitur præsidibus provinciarum, ne patiantur esse (collegia, sodalitia) neve milites collegia in castris habeant. *l.* 1. *ff. de colleg. & corp.*

In summa autem, nisi ex senatusconsulti auctoritate, vel Cæsaris, collegium vel quodcunque tale corpus coierit: contra senatusconsultum, & mandata, & constitutiones collegium celebrat. *l.* 3. §. 1. *eod.*

Neque societas, neque collegium, neque hujusmodi corpus passim omnibus habere conceditur. Nam & legibus & senatusconsultis, & principalibus constitutionibus ea res coercetur. Paucis admodum in causis concessa sunt hujusmodi corpora: ut ecce vectigalium publicorum sociis permissum est corpus habere: vel aurifodinarum, vel argentifodinarum, & salinarum. Item collegia Romæ certa sunt quorum corpus senatusconsultis atque constitutionibus principalibus confirmatum est: veluti pistorum & quorumdam aliorum, & naviculariorum. *l.* 1. *ff. quod cuj. un. nom.*

XV.

15. The Right to give to Communities the Liberty of possessing Goods, and holding them in Mortmain.

It is a Consequence of the Right of permitting the Erection of Communities and Corporations, to permit them likewise to possess Goods moveable and immoveable for their Use *r*. And this Permission is particularly necessary for the Possession of Immoveables. For seeing the said Communities are perpetual, their Immoveables become unalienable, and cannot any more change their Master. So that the Prince, and the Lords of the Manor, of whom the said Immoveables were held in Fee, upon condition of paying a certain Acknowledgment at every Change of Master by Sale, or otherwise, according to the Titles or the Customs, lose the said Right in Lands which pass to Communities. And the Prince has moreover a further Interest in such Alienations, because of the Service which the Possessors of Lands held in Fee of the Crown owe him, when he summons his Vassals to attend him in his Wars. Thus, Communities cannot possess Immoveables but by the Permission of the Prince, and at the Charge of satisfying him for the Interest which he has therein, and the Lords of Manors for their respective Interests. And this Permission is granted by Letters which are called a Licence of Mortmain.

r Quibus autem permissum est corpus habere collegii, societatis, sive cujusque alterius eorum nomine, proprium est, ad exemplum reipublicæ, habere res communes. *l.* 1. §. 1. *ff. quod cuj. univ. nom.*

XVI.

16. The Right to permit Fairs and Markets.

As Towns and other Places cannot form Assemblies under pretext of consulting about their Affairs, without having first obtained a Right so to do from the Sovereign; so neither can they hold Fairs and Markets without leave from the Prince *s*.

s Qui exercendorum mercatuum aut nundinarum licentiam, vel veterum indulto, vel nostra authoritate meruerunt. *l.* 1. *C. de nund. & mercat.* Nundinis impetratis a Principe. *l.* 1. *ff. de nund.*

XVII.

17. The Right of coining Money.

The Necessity of settling the Price of all Things that are in Commerce, and of which it is necessary to make an Estimate, whether it be for Sale, letting them to Hire, or for all other sorts of Commerce, and the several Wants of Mankind, hath render'd the Use of Money necessary to the Publick, that is to say, the Use of some Matter which may have an easy Currency from one Hand to another, and which may stand instead of the Value of the Things of which it is necessary to pay the Estimation. And this required the Authority of the Sovereign for making choice of this Matter, and for giving it its precise Value, which may in one or more Pieces make up all sorts of Values, from the lowest to the highest. Thus, the Right of making choice of this Matter, the coining it into Money, the Regulations which fix the Weight of it, its Size, Figure, and Value, and which give it Currency in a State, belongs only to the Sovereign. For it is he alone that can oblige his Subjects to receive for the Price of Things the Money which he makes current, and which he authorizes by his Image, or other

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other Mark that is stamped upon it. It is this Right which is called the Right of coining Money, and which implies that of raising or lowering the Value of it, of crying down the old Species and coining new, according as the Circumstances of the Times, the Plenty or Scarcity of the said Matter, the Wants of the State, or other Causes may give occasion to the said Changes *t*.

t Si quis nummos falsa fusione formaverit, universas ejus facultates fisco nostro præcipimus addici. In monetis etenim tantum modo nostris, cudendæ pecuniæ studium frequentari volumus; cujus obnoxii, majestatis crimen committunt. Si quis super cudendo ære, vel rescripto aliquo, vel (etiam) adnotatione nostra sibi arripuerit facultatem, non solum fructum propriæ petitionis amittat, verum etiam pœnam quam meretur excipiat. *l.* 2. & 3. *C. de fals. monet.*

[*In* England *it has been ordained of antient time, that no King of this Realm should change his Money, nor impair, nor amend the same, nor coin other Money, except of Gold or Silver, without Assent of Parliament.* Coke 2 Instit. pag. 576. Coke 3 Instit. pag. 17.]

XVIII.

18. And of prohibiting all other Coin except that which the Prince allows to be current.

It is a Consequence of this Right of the Sovereign to coin Money, that there can be no other Money current in his Dominions, but what is coined by his Order, or the Coin of another State which he allows to be current in his Territories. Thus all coining of Money, altho it be equal as to the Value and Weight of the Matter to that which has the Image of the Sovereign, is a capital Crime; and with much greater Reason is it a capital Crime to coin false Money, or Money that is adulterated, and to clip and file the current Coin of the Nation *u*.

u Quoniam nonnulli monetarii adulterinam monetam clandestinis sceleribus exercent: cuncti cognoscant necessitatem sibi incumbere, hujusmodi homines inquirendi, ut investigati tradantur judici, facti conscios per tormenta illico prodituri, ac si digni, suppliciis addicendi. *l.* 1. *C. de fals. mon.*

[*By the Law of* England *the forging of the King's Coin is High Treason. And likewise if any Person for Lucre or Gain sake, shall by any Art, Ways, or Means whatsoever, impair, diminish, falsify, scale, or lighten the King's Money, the same is declared by Act of Parliament to be High Treason.* Coke's 3 Instit. p. 16, 17. *This Punishment did at first extend only to the King's Money coined within the Realm; and therefore if a Man had counterfeited the Money of another Kingdom, tho it were current within the Realm, it was not Treason, until it was so declared by Parliament. But forging or counterfeiting of Foreign Money, which is not current within the Realm, is Misprision of Treason; and the Offender forfeits as for Concealment of High Treason.* Coke ibid. p. 17.]

XIX.

19. The Right in Mines.

The Necessity of Metals, not only for Money, Arms, and Artillery, but for an infinite number of other Wants and Conveniences, many of which relate to the Publick Interest, renders the said Matters, and those of other Minerals, so useful and necessary in a State, that the Order of Government requires that the Sovereign should have over the Mines which produce the said Matters, a Right independent of that of the Proprietors of the Places where the said Mines lie. And moreover it may be said, that the Right of the Proprietors in its first Origin was confined to the use of their Lands for sowing them, planting, and building, or for other the like Uses; and that their Titles did not suppose a Right to the Mines which were unknown, and which Nature destines for the Use of the Publick, by the Want which a Kingdom may have of the Metals and other particular Matters that are dug out of Mines. Thus the Laws have regulated the Use of Mines, and leaving to the Proprietors of the Lands that which appeared to be just, they have likewise settled a Right for the Sovereign in the said Mines *x*.

x Perpensa deliberatione duximus sanciendum, ut quicumque metallorum exercitium, velit affluere, is labore proprio, & sibi, & reipublicæ commoda comparet. Itaque si qui sponte conduxerint, eos laudabilitas tua octonos scrupulos in balluca quæ græce χρύσαμμος appellatur, cogat exolvere. Quidquid autem amplius colligere potuerint, fisco potissimum distrahant, a quo competentia ex largitionibus nostris pretia suscipiant. *l.* 1. *C. de metal. & met.*

Ob metallicum canonem, in quo propria consuetudo retinenda est quatuordecim uncias ballucæ pro singulis libris constat inferri. *l.* 2. *eod.*

Cuncti qui per privatorum loca saxorum venam laboriosis effossionibus persequantur, decimas fisco, decimas etiam Domino repræsentent: cætero modo propriis suis desideriis vindicando. *l.* 3. *eod.*

See the ninth Article of the first Section of the sixth Title.

[By an Act of the Parliament of *England*, 5° & 6° *Gul. & Mar. cap.* 6. it is enacted and declared, that all Persons Subjects of the Crown of *England*, Bodies Politick or Corporate, having any Mine or Mines within the Kingdom of *England* or *Wales*, wherein any Ore is discovered or wrought in which there is Copper, Tin, Iron, or Lead, shall and may enjoy the said Mine or Mines, or Ore, notwithstanding they shall be pretended or claimed to be a Royal Mine or Mines: Provided, that their Majesties, their Heirs and Successors, and all claiming any Royal Mines under them, may have the Ore of such Mines, paying to the Owners of the said Mines the Rates settled by the said Act of Parliament.]

XX.

20. The Right to set off his Power by Marks of a sensible Grandure.

We ought to place in the number of the Rights which the Law gives to the Sovereign, that of having all the Marks of Grandure and Majesty necessary for setting off the Authority and Dignity of

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of a Power of so great an Extent and Elevation, and for imprinting a Veneration for it on the Minds of all the Subjects. For altho they ought to consider in the Power of the Sovereign the Power of God which subjects them to that of the Sovereign, and to reverence it without any regard to the sensible Marks of Grandure that may happen to be annexed to it; yet as God accompanies with a visible Splendour his own Power, which displays it self both on the Earth and in the Heavens, as it were upon a Throne and in a Palace, the Magnificence whereof strikes the Beholders into Admiration; and as when he exercised his august Power of a Lawgiver, he published his Law with Prodigies which imprinted such a Respect and Terrour on the Minds of the Spectators, that they were not able to behold the Glory thereof; he is willing that in proportion to the Share of this Power which he communicates to Sovereigns, it should be set off in their Hands by Marks which are proper for procuring to them the Respect of the People. Which cannot be otherwise done than by that Pomp which appears in the Magnificence of their Palaces, and in the other Marks of a sensible Grandeur with which they are environed, and which God himself has allowed the Use of to Princes who have reigned according to his Mind *y*.

y And God said to Solomon, *Because this was in thine Heart, and thou hast not asked Riches, Wealth, or Honour, nor the Life of thine Enemies, neither yet hast asked long Life; but hast asked Wisdom and Knowledge for thy self, that thou mayest judge my People, over whom I have made thee King: Wisdom and Knowledge is granted unto thee, and I will give thee Riches and Wealth, and Honour, such as none of the Kings have had that have been before thee, neither shall there any after thee have the like.* 2 Chron. 1. 11, 12. 1 Kings 3. 11, 12. *And* Solomon *determined to build a House for the Name of the Lord, and a House for his Kingdom. And* Solomon *told out threescore and ten thousand Men to bear Burdens, and fourscore thousand to hew in the Mountain, and three thousand and six hundred to oversee them. And* Solomon *sent to* Hiram *the King of* Tyre, *saying, As thou didst deal with* David *my Father, and didst send him Cedars to build him an House to dwell therein, even so deal with me.* 2 Chron. 2. 1, 2, 3.

XXI.

21. A Right to have Guards for their Persons.

It follows from this Use of the Grandure necessary to Princes, that altho they ought not to set their Hearts upon it, but ought rather to elevate them to a Zeal for the Glory of God; yet they have a Right, for the good of the Publick, to make use of the Marks necessary for displaying this Grandure. Thus it is very just and reasonable that they should have Soldiers for the Guard of their Persons and of their Houses, and that they should allow likewise the Use of Guards to those who supply their Place in the Government of the Provinces *z*.

z That his Heart be not lifted up above his Brethren. Deut. 17. 20.

And Solomon *gathered together Chariots and Horsemen; and he had a thousand and four hundred Chariots, and twelve thousand Horsemen, whom he bestowed in the Cities for Chariots, and with the King at* Jerusalem. 1 Kings 10. 26.

XXII.

22. A Right to have many Officers for their Houshold.

It is for the same Use that the Service of their Houses obliges them to have for their Domesticks a great number of Officers of different sorts for divers Uses, and that the said Officers are commanded by others whose Offices are among the chief Offices of the State, and which are conferred on Persons of the first Rank *a*.

a So King Solomon *was King over* Israel. *And these were the Princes which he had;* Azariah *the Son of* Zadok, *the Priest;* Elihoreph *and* Ahiah, *the Sons of* Shisha, *Scribes;* Jehoshaphat, *the Son of* Ahilud, *the Recorder;* and Benaiah, *the Son of* Jehojada, *was over the Host; and* Zadok *and* Abiathar *were the Priests; and* Azariah, *the Son of* Nathan, *was over the Officers; and* Zabud, *the Son of* Nathan, *was principal Officer, and the King's Friend; and* Ahishar *was over the Houshold; and* Adoniram, *the Son of* Abda, *was over the Tribute. And* Solomon *had twelve Officers over all* Israel, *which provided Victuals for the King and his Houshold; each Man his Month in a Year made Provision.* 1 Kings 4. 1, 2, &c.

And when the Queen of Sheba *had seen the Wisdom of* Solomon, *and the House that he had built and the Meat of his Table, and the sitting of his Servants, and the Attendance of his Ministers, and their Apparel, his Cup-Bearers also, and their Apparel, and his Ascent by which he went up into the House of the Lord, there was no more Spirit in her.* 2 Chron. 9. 3, 4.

XXIII.

23. The Demesne of the Prince.

It is likewise a Consequence of the Grandure of the Sovereign, especially in Hereditary Monarchies, that the Prince should have a Demesne peculiar to the Crown, consisting of Lands and of Rights which yield Revenues to him, and that he should have Power to give out of this Demesne Portions to his Children, according as the Laws of the State may have provided in that Matter. Thus in *France* the King takes out of his Demesne a Patrimony for his Male-Children, which is commonly called an Appennage, of which Notice shall be taken in another Place *b*.

b See the Title of the Prince's Demesne, and in that Title the fourteenth Article of the first Section.

XXIV.

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XXIV.

24. The Right of raising the necessary Supplies.

For the Use of many of the Rights of the Sovereign which have been just now explained, and for the Exercise of his Power in the several Wants of the State in Peace and in War, it is just that the Sovereign should have the Right of drawing from the State itself the Supplies which its Wants render necessary *c*: As will appear more fully in the Articles which follow.

c Wherefore ye must needs be subject, not only for Wrath, but also for Conscience sake. For, for this Cause pay you Tribute also: For they are God's Ministers, attending continually upon this very thing. Render therefore to all their Dues, Tribute to whom Tribute is due, Custom to whom Custom, Fear to whom Fear, Honour to whom Honour. Rom. 13. 5, 6, 7. *See the fourth Title.*

[In *England* it has been received as a perpetual standing Law ever since the Reign of *Edward* I. that no Subsidy, Tax, Imposition, or other Aid or Charge whatsoever, is to be imposed or levied upon the Subject without Consent of Parliament. *Stat. de tallagio non concedendo, edit. anno* 34 *Edw.* I. 3 *Car.* I. *cap.* 1. *Coke* 2. *Inst. pag.* 532, 533.]

XXV.

25. Different occasions for Taxes.

In the time of Peace it is necessary to keep in repair the Fortifications of strong Towns, to maintain the Garisons, and to subsist the other Troops that are necessary for the defence of the Kingdom, and Safety of the Prince's Person; to supply the other Expences necessary for his Houshold; to pay the Wages of the several sorts of Officers; to repair and keep in good condition the Highways, the Bridges, the Causeys; to render the Use of the Sea-Ports safe and commodious; to facilitate the Navigation of the Rivers; and to provide for all the other Charges of the State. Which gives to the Sovereign a Right to demand from the Subjects the Money that is necessary for all these Uses *d*.

d See the Passage cited on the preceding Article.

XXVI.

26. A Right to levy Troops for the War, and to provide for the Expences which the War may require.

In time of War it is necessary to have Troops, both Cavalry and Infantry, Horses, Arms, Artillery, Ammunition, Convoys for Provisions, Ships of War, if it be a Kingdom that borders on the Sea, and every thing that the Quality of the War may require. This implies the Right to levy Soldiers, to fortify more and more the strong Places, or to build new Fortresses according as the Occasion may require; and in general to provide every thing that may be necessary for supporting the War, and defraying the Charges of it out of the Publick Money *e*.

e This is also a Consequence of the twenty fourth Article.

XXVII.

27. A Right to oblige those to take up Arms who are bound to that Service.

The Right of levying Soldiers comprehends that of obliging not only those to take up Arms who by their Military Offices are bound to it, but also those who by particular Engagements may be bound to serve in the Wars *f*. Thus in *France* all Gentlemen, and all those who hold Fiefs in chief, or Mesne-Fiefs, are tied to this Service. For the Gentry have the said Quality with this Burden, and all Vassals owe this Service on account of their Fiefs, which are either held immediately of the Crown, as the first and greatest Fiefs are, or are held of these greater Fiefs, as Mesne-Fiefs. So that the King has a right to oblige the Vassals and Gentry to take up Arms; which is done by an Order which is called an Order for assembling the Ban and Arrier-Ban.

f In the Roman *Empire they obliged all Persons to take up Arms whom they found proper for it, and they were chosen by Officers named* Conquisitores, *who were the Persons who made that choice which they called* Delectus; *and it was a Crime to refuse the Service when they were called to it. But this Election was only practised in Cases of Necessity; and seeing the Troops were usually sufficiently filled with Soldiers who listed themselves voluntarily, they moderated the Punishment of those who declined to serve when called to it.* Gravius autem delictum est detrectare munus militiæ quam adpetere. Nam & qui ad delectum olim non respondebant, ut proditores libertatis in servitutem redigebantur. Sed mutato statu militiæ recessum à capitis pœna est. Quia plerumque voluntario milite numeri supplentur. *l.* 4. §. 10. *ff. de re milit.*

And the Lord sent thee on a Journey, and said, Go, and utterly destroy the Sinners, the Amalekites, *and fight against them, until they be consumed.* 1 Sam. 15. 18.

[In *England*, in case of any Insurrection within the Kingdom, or fear of an Invasion from abroad, the King directs the Militia of the Kingdom to be assembled, in order to suppress the said Insurrection, and repel the said Invasion. The Militia is under the Direction of Commissioners of Lieutenancy named by the King for the several Counties, Cities, and Places of the Kingdom. And the manner of assembling the said Militia, and assessing the Subjects towards the Charge of the same, is particularly laid down in *Stat.* 13 & 14 *Car.* II. *cap.* 3. By which Statute it is expresly provided, that none that have advanced a Month's Pay, shall be charged with any other Month's Payment till they are reimbursed. For which reason, it has been necessary in the late Reigns, when there has been occasion to raise the Militia of the Kingdom, to have an Act of Parliament for that purpose, directing the Militia to be raised for that Year, tho the Month's Pay formerly advanced be not repaid.]

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XXVIII.

28. A Right to regulate the Expences of the State according to the Wants thereof.

The Right which the Sovereign has to demand of his Subjects the Monies that are necessary for the different Wants which have been just now explain'd, extends to the regulating the ordinary Expences in the time of Peace, and to the regulating also the extraordinary Expences in the time of War, and to the taking care that Funds be provided sufficient for defraying the said Charges, either by laying on Imposts, or by other ways. Thus Taxes upon Land, the Excise, and other Subsidies, are Aids which the Subjects owe to their Sovereign, and which by consequence he has a Right to demand of them according as the Exigencies of the State may require *g*.

g See the twenty fourth Article of this Section, and the fourth Title of this Book.

XXIX.

29. Four several sorts of Revenues independent of the Necessity of the Expences.

Besides these Funds of publick Taxes and Imposts levied upon the Subjects, which ought to be lesser or greater according to the Wants of the State, the Sovereign has likewise other sorts of Rights to Goods which belong to him naturally as being Head of the Body of the State, and without any regard to the publick Wants *h*. Which comprehends four several Rights, which shall be explained in the following Articles.

h See the Articles which follow, and the second, third, fourth, and fifth Sections of the Title of the Prince's Demesne.

XXX.

30. Forfeitures.

The first of these Rights is that of the Forfeiture of the Goods of Persons condemned to Punishments, which ought to have this Consequence, such as are at this day in *France* the Punishment of Death, of Condemnation to the Gallies for ever, and of perpetual Banishment out of the Kingdom. For those who lie under such a Sentence being incapable of possessing any thing, and deserving moreover this Punishment of having their Goods confiscated, they are justly deprived of the Goods which they possessed. For which reason these Goods being without an Owner, do belong to the Publick, and go to the Sovereign who has a Right to all such Goods. And we must place in the same Rank the Fines or Pecuniary Mulcts inflicted on Offenders, over and above what they are condemned to give as an Alms to the Poor, and for a Reparation of the Civil Interest of the Parties concerned. These Pecuniary Mulcts are what they call in *France* the King's Fines, which are adjudged to the King, either out of the forfeited Goods, when the Forfeiture belongs to the Lord of the Mannor, and not to the King, or out of the Goods which remain to the Person that is condemned, and who has not incurred the Pain of Forfeiture *i*.

i Deportati nec earum quidem rerum quas post pœnam irrogatam habuerint, hæredem habere possunt; sed & hæ publicabuntur. *l. 2. C. de. bon. dam.*

See the second Section of the Title of the Prince's Demesne.

XXXI.

31. The Right to vacant Goods that have no Owner, and to the Successions of those who die without Heirs.

The second of these Rights is that which entitles the Sovereign to all Goods that are vacant, that is to say, which are found to be without any Owner; such as the Goods of those who die without leaving any Relation behind them, and without making a Testament: for the want of Heirs in those Persons makes their Successions to pass to the Prince. And there are likewise other sorts of vacant Goods, as shall be explained in the third Section of the Title of the Prince's Demesne *l*.

l Successorium Edictum idcirco propositum est, ne bona hæreditaria vacua sine Domino diutius jacerent, & creditoribus longior mora fieret. E re igitur prætor putavit, præstituere tempus his, quibus bonorum possessionem detulit, & dare inter eos successionem: ut maturius possint creditores scire utrum habeant, cum quo congrediantur, an vero bona vacantia fisco sint delata, an potius ad possessionem bonorum procedere debeant, quasi sine successore defuncto. *l. 1. ff. de success. edict.* Intestatorum res qui sine legitimo hærede decesserint, fisci nostri rationibus vindicandas. *l. 1. C. de bon. vacant.*

See the third Section of the sixth Title of the Prince's Demesne.

XXXII.

32. The Right of Succession to the Estates of Aliens.

The third of these Rights is that by which the King acquires the Goods of Strangers who die within his Dominions without having been naturalized, and without leaving behind them Heirs who are natural born Subjects. For since no Person is capable of succeeding to them, their Estates are in the same Condition as the Estates of Persons dying without Heirs, and do belong to the King *m*.

m See the fourth Section of the sixth Title of the Prince's Demesne.

XXXIII.

33. The Right of Succession

The fourth and last of these Rights is that of Succession to Bastards, which entitles

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to Bastards who die intestate, and without Children.

entitles the King to the Goods of Bastards who die without leaving behind them Children begot in lawful Wedlock, or making a Testament. For seeing they can have no lawful Heir, their Succession falls into the Condition of that of Persons dying without Heirs *n*.

n See the fifth Section of the sixth Title of the Prince's Demesne.

XXXIV.

34. How these four sorts of Rights and Revenues may be applied.

It is to be observed that these four sorts of Rights in *France* have this belonging to them in common, That the King disposes in three different manners of that which he happens to acquire by any one of these several Titles. For if it be Lands he acquires, he may incorporate them into his Demesne by the ways which are prescribed for that purpose, and which shall be explained in their proper place: thus, there are Lands annexed to the Crown by Confiscations. Or the King may make a Grant of them to Persons whom he has a mind to gratify, or to reward, for some past Services. And as for the Fines and other Goods which consist in Money, he may either give them away, or he may comprize all these sorts of Profits within the Farms of the Demesnes, and leave them to the Farmers thereof. For all these ways of conveying to the Prince these several sorts of Goods, do not render them inalienable till after they are annexed to the Demesne, as shall be explained when we come to treat thereof *o*.

o See the twenty second, twenty third, twenty fourth, and twenty fifth Articles of the first Section of the sixth Title of the Prince's Demesne.

SECT. III.

Of the Duties of those who are vested with the Sovereign Authority.

The CONTENTS.

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2. *They ought to study the Rules of Government in the Holy Scriptures.*
3. *The first Rule is, To use their Power for the Support of Justice.*
4. *Another Rule, The Love of Justice.*
5. *Another Rule, Freedom of Access for Complainants, and Care to repress Violence.*
6. *Another Rule, To make choice of good Ministers, and of good Officers.*
7. *Another Rule, Free Access for Persons who are to make Proof of the Truth.*
8. *Another Rule, To use Precaution for finding out the Truth.*
9. *Another Duty, To protect Religion and the Laws of the Church.*
10. *Another Duty, Prudence in granting Privileges and Exemptions, and in inflicting Punishments.*
11. *A Duty in respect of Strangers.*
12. *A Duty in the Management of the Revenue.*
13. *A Summary of the Duties of the Sovereign.*
14. *In what Sense the Sovereign is said to be above the Law.*

1. The first Duty of the Sovereign, is to acknowledge that he holds his Power of God.

THE first and most essential of all the Duties of those whom God exalts to the supreme Government of a Kingdom, is to own and acknowlege this Truth, That it is from God that they derive all their Power; that it is his Place which they fill; that it is by Him that they ought to reign, and from Him that they are to have that Wisdom and Understanding which are requisite for the Art of governing. And they ought to make these Truths the Principles of all the Rules of their Conduct, and the Foundation of all their Duties *a*.

a See the sixth Article of the first Section of the first Title.

Thou hast made me King over a People, like the Dust of the Earth in Multitude. Give me now Wisdom and Knowledge, that I may go out and come in before this People. 2 Chron. 1. 9, 10.

Give therefore thy Servant an understanding Heart, to judge thy People, that I may discern between Good and Bad. 1 Kings 3. 9.

Give me Wisdom, that sitteth by thy Throne. Wisd. of Sol. 9. 4. See the Preamble of this Title.

I will send thee a Man out of the Land of Benjamin, and thou shalt anoint him to be Captain over my People Israel, that he may save my People out of the hand of the Philistines. 1 Sam. 9. 16.

II.

2. They ought to study the Rules of Government in the Holy Scriptures.

The first Consequence which naturally arises from these Principles is, That Sovereigns ought to know that which God demands of them in the Station where he has placed them, and what Use they ought to make of the Power which he has given them. And it is of him that they are to learn it, by reading his Law, which he has expresly commanded them to study, having laid down therein the Rules which they ought to know, in order to their governing well *b*.

b And it shall be when he sitteth upon the Throne

Throne of his Kingdom, that he shall write him a Copy of this Law in a Book, out of that which is before the Priests the Levites. And it shall be with him, and he shall read therein all the Days of his Life; that he may learn to fear the Lord his God, to keep all the Words of this Law, and these Statutes, to do them. Deut. 17. 18, 19.

The Book of the Law shall not depart out of thy Mouth, but thou shalt meditate therein Day and Night, that thou mayest observe to do according to all that is written therein: For then thou shalt make thy way prosperous, and then thou shalt have good Success. Josh. 1. 8.

III.

3. The first Rule is, to use their Power for the Support of Justice.

The first Rule which the Law of God lays down touching the Duties of the Sovereign, is a Consequence of this Truth, That it is of God that he holds his Power: And the same Divine Law which teaches Princes this Truth, and which informs them of the natural Use of their Power, commands them not to make thereof an Instrument of Pride and Vanity; but to imploy it in such a manner for the Support of Justice, as that they may not give their Authority to any other Use besides this; and that they do exercise it for this purpose as often as occasion shall offer, so as that nothing may be capable of diverting them from it. For a Sovereign ought to look upon himself as a Father of the People who compose the Body of which he is the Head; and to consider that they are to answer to the severe Judgment which God will exercise against those who shall have made a bad Use of the Power which they held of him *c*.

c That his Heart be not lifted up above his Brethren; and that he turn not aside from the Commandment to the right Hand, or to the left. Deut. 17. 20.

Hear therefore, O ye Kings, and understand; learn ye that be Judges of the Ends of the Earth. Give ear, you that rule the People, and glory in the Multitude of Nations. For Power is given you of the Lord, and Sovereignty from the Highest, who shall try your Works, and search out your Counsels. Because being Ministers of his Kingdom, you have not judged aright, nor kept the Law, nor walked after the Counsel of God; horribly and speedily shall he come upon you: For a sharp Judgment shall be to them that be in high Places. For Mercy will soon pardon the meanest; but mighty Men shall be mightily tormented. Wisd. of Sol. 6. 1, 2, 3, &c.

IV.

4. Another Rule, The Love of Justice.

This Duty of Sovereigns, not to imploy their Authority but for the Support of Justice, implies that of a great Love for the Justice which they are obliged to support and maintain, and of a great Application to know what it is that Justice requires, and to enforce the Observance thereof *d*.

d Love Righteousness, ye that be Judges of the Earth. Wisd. of Sol. 1. 1.

Give therefore thy Servant an understanding Heart, to judge thy People, that I may discern between Good and Bad. 1 Kings 3. 9.

V.

5. Another Rule, Freedom of Access for Complainants, and Care to repress Violence.

It is a Consequence of the Love of Justice in the Heart of the Prince, that he make himself easy of Access to receive the Complaints of Persons who suffer some Violence, or some Injustice, whether it be from those who abuse the Authority of Justice, being intrusted by the Prince with the Administration of some Branch thereof, or from those who by their Condition being exalted above others, should make use of that Advantage for oppressing them *e*.

e Deliver him that is spoiled out of the hand of the Oppressor, lest my Fury go out like Fire, and burn that none can quench it. Jer. 21. 12.

Then Samuel *took a Viol of Oil, and poured it upon his Head, and kissed him, and said, Is it not because the Lord hath anointed thee to be Captain over his Inheritance?* 1 Sam. 10. 1.

VI.

6. Another Rule, To make choice of good Ministers, and of good Officers.

Seeing the Sovereign cannot by himself exercise all the Functions in which his Power and Authority are to be imployed for the Support of Justice, and that he is obliged to divide among a great Number of Ministers and Officers those different Functions; the Administration of the sovereign Power, which he holds of God, lays another Duty upon him of making a good Choice of the Ministers and Officers to whom he delegates any part of his Authority. Which obliges him to enquire into the Characters of the Persons whom he imploys, when it is he himself that is to chuse them; and when the Election is to be made by others, to see that they observe the standing Rules and Orders of the Kingdom for that purpose, and the Regulations which he himself may have made for filling up the Offices with Persons in all respects duly qualified for the Imployment, both by their Capacity and their Probity; and to inform himself of the good or bad Use which they make of the Authority which they have in their hands *f*.

f And he set Judges in the Land, throughout all the fenced Cities of Judah, *City by City. And said to the Judges, take heed what ye do: for ye judge not for Man, but for the Lord, who is with you in the Judgment. Wherefore now, let the Fear*

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Fear of the Lord be upon you, take heed and do it: for there is no Iniquity with the Lord our God, nor respect of Persons, nor taking of Gifts. 2 Chron. 19. 5, 6, 7.

Have but one Counsellor of a thousand. Ecclus. 6. 6.

VII.

7. Another Rule, Free Access for Persons who are to make Proof of the Truth.

In the Occasions where the Sovereign himself exercises his Authority in Person, whether it be that the Consequence of the Affair requires it should be so, or that particular Considerations oblige him to reserve to his own Cognizance what he might have committed to other Persons, whether Ministers or Officers, he is obliged to make an exact Inquiry into the Truth, and to render himself accessible to the Persons who may be able to furnish him with Proofs of it. Thus, he ought to hear equally both the Complainants and Defendants, and to allow them as much as is possible the free Use of the Ways which may lead him to the Knowledge of the Truth; that after having discovered the same, he may decree, and cause to be executed, that which shall appear to be just *g*.

g The King that faithfully judgeth the Poor, his Throne shall be established for ever. Prov. 29. 14.

Hear the Causes between your Brethren, and judge righteously between every Man and his Brother, and the Stranger that is with him. Ye shall not respect Persons in Judgment, but ye shall hear the small as well as the great: you shall not be afraid of the Face of Man, for the Judgment is God's. Deut. 1. 16, 17.

VIII.

8. Another Rule, To use Precaution for finding out the Truth.

Since it often happens that in the Cases where the Sovereign ought to take cognizance of the Truth, the same is smothered by the Prevarication of those very Persons to whom he commits the Care of enquiring into it, or of those who, having the Honour to approach his Person, make Reports to him either of Complaints, or of other Affairs, in which they disguise the Truth; it would be prudent in the Prince, and it is his Duty, to moderate the Confidence which he places in all his Ministers, and in all those who have the Honour to approach him, and of whom he may take Advice, or receive any Testimony of the Truth. For it is often prudent in the Prince, especially in Affairs of Importance, and wherein any Minister expresses a great Earnestness, to consider that the Truth may be industriously concealed from him, and to take therefore the proper ways for discovering it, lest by suffering himself to be imposed upon by Lying, Imposture, and Calumny, he should grant his Protection to some Injustice *h*, and give too ready an ear to Ministers who are Protectors of Iniquity *i*.

h Then shalt thou enquire and make search, and ask diligently: And behold if it be Truth, and the Thing certain, that such Abomination is wrought among you, thou shalt surely smite the Inhabitants of that City with the Edge of the Sword, destroying it utterly, and all that is therein, and the Cattle thereof, with the Edge of the Sword. Deut. 13. 14, 15.

And it be told thee, and thou hast heard of it, and enquired diligently, and behold it be true, and the Thing certain, &c. Deut. 17. 4.

They that seek the Lord, understand all Things. Prov. 28. 5.

i If a Ruler hearken to lyes, all his Servants are wicked. Prov. 29. 12.

IX.

9. Another Duty, To protect Religion, and the Laws of the Church.

Seeing the Sovereign is the only Person who has within his Dominions the Temporal Power in its full Extent, and that he ought to imploy the said Power for the Support of Justice and Truth, and that both the one and the other are inseparable from the Spirit of Religion and the Worship of God, of whom he holds his said Power; he ought likewise to imploy the said Power for the defence of Religion, and of the Worship of God, of whom he holds it; which obliges him to protect and maintain the free Exercise of Religion, to give to the Laws of the Church the Assistance which may be necessary to inforce the Observance of them. And thus we see in *France*, that as to what relates to the *Roman* Catholick Religion, and as to what the Church decrees and determines, the Kings of *France* declare themselves *Protectors*, *Guardians*, *Conservators*, and *Executors* of the same *l*.

l Ordinance of Francis *the First, of the Month of* July, 1543.

Unam nobis esse, in omni nostræ reipublicæ & imperii vita, in Deo spem credimus: scientes quia hæc nobis & animæ & imperii dat salutem. Unde & legislationes nostras inde pendere competit, & in eam respicere: & hoc eis principium esse, & medium, & terminum. *Nov.* 109. *in præfat.*

See the fourth Article of the second Section.

X.

10. Another Duty, Prudence in granting Privileges and Exemptions, and in inflicting Punishments.

We may reckon among the Duties of those who have the Sovereign Authority committed to them, Prudence in the dispensing of Bounties and Rewards which are to distinguish Merit, procure it to be esteemed, and to induce others to imitate it. And they ought likewise to be very circumspect in granting Privileges, Exemptions, and other Favours, especially such as might turn

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to the prejudice of other Persons *m*. And in inflicting Punishments and Corrections, they may mitigate the Severity on some occasions, where Wisdom and Clemency may agree together *n*, not bating any thing of the Severity thereof in the Cases where the Necessity of an Example, and the Dignity of Justice demand Firmness and Resolution.

m Meritò ait prætor, *qua ex re quid illi damni detur*. Nam quotiescumque aliquid in publico fieri permittitur, ita oportet permitti, ut sine injuria cujusquam fiat. Et ita solet princeps quoties aliud novi operis instituendum petitur, permittere. *l.* 2. §. 10. *ff. ne quid in loco pub. vel itin. fiat.*

Si quis a principe simpliciter impetraverit, *ut in publico loco ædificet*; non est credendus sic ædificare, ut cum incommodo alicujus id fiat: neque sic conceditur, nisi forte quis hoc impetraverit. *d. l.* §. 16.

n Si vindicari in aliquos severius contra nostram consuetudinem pro causæ intuitu jusserimus, nolumus statim eos aut subire pœnam, aut excipere sententiam: sed per dies triginta super statu eorum fors & fortuna suspensa sit. *l.* 20. *C. de pœn.*

It appears by this Law, that it is prudent for the Prince, when he has been moved to inflict a severer Punishment than what is ordinary, to take time to consider of it, and to suspend in the mean while the Execution thereof, if the Circumstances will allow of it.

XI.

11. A Duty in respect of Strangers.

Besides these Duties of the Sovereign which have been explained in the preceding Articles, and which relate to his Conduct within the Kingdom, he has his Engagements with respect to Strangers, who are his Neighbours or Allies, whether it be for cultivating a Friendship and good Correspondence with them as much as is possible, or for defending himself and his Dominions from any Attempts they shall make against them *o*.

o If it be possible, as much as lieth in you, live peaceably with all Men. Rom. 12. 18.

Altho this Text of Scripture relates chiefly to Persons in a private Capacity, yet the Truth which it teaches is common to Princes.

XII.

12. A Duty in the Management of the Revenue.

Seeing many of the Duties of the Sovereign, whether it be within or without his Kingdom, demand the Use of Money, and a Right to levy it *p*; this Right implies the Duty of a prudent Conduct in laying on Taxes, and in proportioning them to the Wants of the State, and to the Abilities of the People *q*.

p See the twenty fourth and following Articles of the second Section.

q Neither shall he greatly multiply to himself Silver and Gold. Deut. 17. 17.

Quod communiter omnibus prodest hoc rei privatæ nostræ utilitati preferendum esse censemus. Nostrum esse proprium subjectorum commodum imperialiter existimantes. *l. un.* §. 14. *C. de cad. toll.*

XIII.

13. A Summary of the Duties of the Sovereign.

These general Duties we have just now explained, comprehend in their extent the whole Detail of the Duties of those who are vested with the Supreme Authority. For they extend to every thing that relates to the Administration of Justice, the general Policy of the State, the publick Order, the Tranquillity of the Subjects, the Quiet of Families, the Watchfulness about every thing that may contribute to the common Good, the Choice of able Ministers and such as love Justice and Truth, the Nomination of good Officers for the Dignities and Offices which the Sovereign himself ought to fill with Persons who are known to him, and the Observance of the Regulations for filling up the other Offices by other ways than his own proper Choice, the discerning between the Use of Severity or Clemency on the Occasions where Justice may admit of a Mitigation of the Rigour of the Law, a prudent Dispensation of Bounties, Rewards, Exemptions, Privileges, and other Favours; a discreet Management of the Publick Money; Prudence in his Conduct with regard to Strangers; and in a word every thing that may render the Government agreeable to the Good, terrible to the Wicked, and worthy in all respects of the divine Function of governing Men, and of the Exercise of a Power, which, being derived from none but from God, is a Branch of the Divine Power itself *r*.

r This is a Consequence of the preceding Articles.

Salutem reipublicæ tueri nulli magis credit convenire, nec alium sufficere ei rei quam Cæsarem. *l.* 3. *ff. de offic. præfect. vig.*

See 2 Chron. 34. *and* Psal. 100.

XIV.

14. In what Sense the Sovereign is said to be above the Law.

We may add for a last Duty of the Sovereign, which is a Consequence of the first, and which likewise includes all the others, that altho his Power seems to set him above the Law, there being no body upon Earth that has a right to call him to an account for his Administration; yet he ought to observe the Laws which relate to him; and he is obliged to do it, not only that he may give a good Example to his Subjects, and render their Duty amiable

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to them; but because he is not dispensed with as to his own Duty by virtue of this Power of Sovereign *s*, but on the contrary this Rank obliges him to prefer to his own particular Interest the common Good of the State, which he ought in honour to look upon as his own proper Good *t*.

s Digna vox est majestate regnantis legibus alligatum se principem profiteri, adeo de auctoritate juris nostra pendet auctoritas. Et revera majus imperio est submittere legibus principatum. Et oraculo præsentis Edicti, quod nobis licere non patimur, aliis indicamus. *l.* 4. *C. de legib. & const. pr.*

Licet enim lex imperii solemnibus juris Imperatorem solverit, nihil tamen tam proprium imperii est, quam legibus vivere. *l.* 3. *C. de testam.*

t See the Law quoted on the thirteenth Article.

TITLE III.

Of the Prince's Council, and of the Functions and Duties of those who are called to it.

WE intend to treat under this Title of that which relates in general to the Functions and Duties of those who are called to the Council of Princes, in what sense soever that Word be taken, whether it be of standing Councils in some States, and such as are composed of Officers of whom the Laws of the Kingdom oblige the Prince to take Counsel and Advice, or that he himself make choice of the Persons whom he is pleased to call to his Council. For we ought to suppose that Prudence will direct even Princes who have the most upright Intentions, and who are of the greatest Abilities, as it is indeed their Duty, to take Counsel and Advice in Affairs which they have to regulate, whether it be for the Good of the State in general, or to render Justice to particular Persons *a*: and as on one hand they ought to inform themselves of the Truth of the Facts which they cannot know of themselves, and which yet it is necessary that they should know; so on the other hand it is for their Interest, and for the Good of the Publick, that they should take the Assistance of the Experience and Knowledge of Persons who are capable to give them good Counsel and Advice *b*.

We have thought proper to explain in this Title that which relates in general to the Functions and Duties of the Persons, who by their Offices, or by the Will of the Prince, are called to give them

a Humanum esse probamus, si quid de cætero in publica privataque causa, emerserit necessarium quod formam generalem & antiquis legibus non insertam exposcat, id ab omnibus antea tam proceribus nostri palatii, quam nobis placuerit, tunc legata dictari. Et sic ea denuo collectis omnibus recenseri, & cum omnes consenserint tunc demum in sacro nostri numinis consistorio recitari; ut universorum consensus nostræ serenitatis auctoritate firmetur. *l.* 8. *C. de leg. & const. pr.* Bene enim cognoscimus, quod cum vestro consilio fuerit ordinatum, id ad beatitudinem nostri imperii, & ad nostram gloriam redundare. *d. l. in f.*

The Honour of Kings is to search out a Matter. Prov. 25. 2.

He that walketh with wise Men shall be wise. Prov. 13. 20.

b There was never any Prince in the World who stood less in need of Counsel than did *Moses*, of whom it may be said that God himself was his Counsel, to whom he had liberty of free Access in all his Straits and Difficulties; and yet nevertheless he received agreeably, and followed the Advice which *Jethro* his Father-in-Law gave him touching the manner in which he administer'd Justice to the People.

And it came to pass on the morrow, that Moses *sat to judge the People; and the People stood by* Moses *from the Morning unto the Evening. And when* Moses's *Father-in-Law saw all that he did to the People, he said, What is this thing that thou dost to the People; why sittest thou thyself alone, and all the People stand by thee from Morning unto Even? And* Moses *said unto his Father-in-Law, because the People come unto me to enquire of God. When they have a Matter, they come unto me, and I judge between one and another; and I do make them know the Statutes of God and his Laws. And* Moses's *Father-in-Law said unto him, The thing that thou dost is not good: Thou wilt surely wear away, both thou and this People that is with thee; for this thing is too heavy for thee, thou art not able to perform it thy self alone. Hearken now unto my Voice, I will give thee Counsel, and God shall be with thee: Be thou for the People to God-ward, that thou mayst bring the Causes unto God. And thou shalt teach them Ordinances and Laws, and shalt shew them the Ways wherein they must walk, and the Work that they must do. Moreover, thou shalt provide out of all the People able Men, such as fear God, Men of Truth, hating Covetousness, and place such over them to be Rulers of thousands, Rulers of hundreds, Rulers of fifties, and Rulers of tens; and let them judge the People at all Seasons: And it shall be that every great Matter they shall bring unto thee, but every small Matter they shall judge; so shall it be easier for thy self, and they shall bear the Burden with thee. If thou shalt do this thing, and God command thee so, then thou shalt be able to endure, and all this People shall also go to their Place in Peace. So* Moses *hearkened to the Voice of his Father-in-Law, and did all that he had said.* Exod. 18. 13, 14, 15, *&c. See* Prov. 1. 5. *See* Tob. 4. 19.

Nos autem in constitutionum compositione multa quidem & alia de istis decrevimus: existimavimus autem oportere nunc consiliis perfectioribus causam considerantes etiam quædam corrigere, non aliorum solum modo, sed etiam quæ a nobis ipsis sancita sunt. Non enim erubescimus si quid melius etiam horum, etiam, quæ ipsi prius diximus adinveniamus, hoc sancire, & competentem prioribus imponere correctionem, nec ab aliis expectare corrigi legem. *Nov.* 22. *in Præfat.*

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them Counsel; or who by the same Engagement of their Offices, or otherwise, are bound in Duty, and have Opportunity to give them some Advice, or to inform them of the Truth of Facts which they are ignorant of, and which it is necessary they should know in order to give the proper Directions therein as the Occasion may require. Thus the Rules which shall be explained in this Title regard in general all those Functions and all those Duties, whether the Counsel to be given be concerning Affairs which relate to the Person of the Prince, or his Houshold, or to Affairs of State, such as Declarations of War, Treaties of Peace, general Regulations touching the Policy and Government of the State, and other the like Matters; or whether it be concerning particular Affairs, of what nature soever they be, which may deserve that the Prince himself should take cognizance of them.

It is in this general and indefinite Sense that we intend to treat here of the Council of the Prince. So that the subject Matter of this Title respects in general all the Persons, Officers, Ministers, and others who are about Princes, and who are to give them any Counsel or Advice of what nature soever it may be. And this shall be the Subject Matter of two Sections; one shall contain the several sorts of Functions of the said Persons, and the other the Duties which are the Consequences of them.

SECT. I.

Of the Functions of Officers, Ministers, or others who are engaged to give Princes Counsel or Advice.

The CONTENTS.

1. *The Functions of the said Persons are of several sorts.*
2. *There are three sorts of Functions, according to three sorts of Affairs.*
3. *There are three other sorts, according to the three sorts of Persons who are to exercise them.*
4. *Difference between Counsel and Advice.*
5. *Two sorts of Counsel and Advice; those which concern the Rights of the Prince, and those which relate to his Functions.*
6. *Difference between Functions annexed to Offices, and others.*
7. *All these Functions oblige to proportionable Duties.*

I.

THE Functions of those who have the Honour to be about the Prince, whether it be on account of their Offices, or as being Ministers, or because he honours them with his Confidence, are different and of several sorts, according to their Engagements, and according to the Occasions, as will appear by the Articles which follow *a*.

1. The Functions of the said Persons are of several sorts.

a See all the Articles of this Section.

II.

These Functions may be distinguished in general by their Nature into three kinds. The first is of those which concern the Person of the Prince, his Rights, and his Interest. The second is of those which regard the Publick. And the third is of those which relate to the particular Affairs it is necessary the Prince should be informed of *b*.

2. There are three sorts of Functions, according to three sorts of Affairs.

b All the Affairs which can come to the knowledge of the Prince belong to one of these three kinds.

III.

We may under another View distinguish these Functions with respect to the Persons who are to exercise them; which makes three sorts of them. The first is of those which are proper and natural to the Persons who have Offices about the Prince. Thus in *France* the Officers of the Crown, the Secretaries of State, and others, have several Functions of the three kinds explained in the second Article. The second is of the Functions of those Officers, who, altho they are not immediately about the Person of the Prince, have notwithstanding Opportunity, and are bound to inform him of Facts relating to their Charges, and which it is highly important the Prince should know. Thus it is the Function of the Governours of Provinces to acquaint the Prince with what passes within their Jurisdiction that may be worthy of his knowledge. Thus it is the Function of Judges to have recourse to the Prince in Matters which may demand his Cognizance, whether it be for the Reformation of some Abuses, or for other Causes. The third is of the Functions of such Persons as, without any particular Engagement by their Offices, are called to

3. There are three other sorts, according to the three sorts of Persons who are to exercise them.

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to be about the Person of the Prince, whether it be that they are imployed as Ministers of State, or that they are the Prince's Favourites in whom he reposes a great Confidence, are naturally under an Engagement to give him Counsel or Advice according to the Opportunities and Conveniences which the Honour they have to approach the Prince's Person may afford them *c*.

c All Persons who are called to give Princes Counsel or Advice, are under some one of these three sorts of Engagements.

IV.

4. Difference between Counsel and Advice.

It is necessary to observe this Difference between Counsel and that which we call here Advice; that by Counsel we mean the Sentiments of those who give Counsel, and who recommend what they judge proper to be done in the Matter under Deliberation: and that by Advice is meant the Information or Intelligence which is given to the Prince, of things which he is ignorant of, and which he ought to know, or which it would be convenient that he should know in order to give the necessary Directions therein. And this implies the Duty of informing him of the Facts and Circumstances, of which the Truth may be either concealed or disguised from him *d*.

d It is on the one hand impossible for Princes to know by themselves all the Facts which deserve their Knowledge, and on the other it is necessary they should have Information of them, that they may give proper Directions therein, either by themselves or by the Vigilancy of their Ministers. I am not able to bear you my self alone: the Lord your God hath multiplied you —— How can I my self alone bear your Cumberance, and your Burden, and your Strife? Take ye wise Men, and understanding, and known among your Tribes, and I will make them Rulers over you. *Deut.* 1. 9, 12, 13.

And hardly do we guess aright at things that are upon Earth, and with Labour do we find the things that are before us. *Wisdom of Solomon*, 9. 16.

V.

5. Two sorts of Counsels and Advices; those that concern the Rights of the Prince, and those which relate to his Functions.

Since it is for the Service of the Prince that it may be necessary that Counsel or Advice should be given him, we may under this View distinguish them into two sorts, which will comprehend them all. The first is of those which concern the Interest and the Rights of the Prince, and the second of those which have relation to the Duties which he owes to the State in general, and to his Subjects in particular *e*.

e Whatever may be worthy of the Prince's Knowledge, relates either to his own Rights and Interest, or the Affairs of the Publick, or the Concerns of particular Persons who apply to him for Remedy therein.

VI.

6. Difference between Functions annexed to Offices and others.

Among these different Functions of the Persons who approach the Prince, whether they be Officers or others, some are essential to the Offices which the said Persons enjoy, or to the Engagements which they are under by the Prince's Order, and nothing dispenses with their Performance thereof on the Occasions where the same may be necessary; and other Functions are necessary only in so far as Prudence may render them useful. Thus Officers, and others to whom the Prince commits any Part of the Administration, or whom he engages in any other sort of Service, have their Functions regulated by their Imployments, which oblige them to give the Counsel and Advice that properly belongs to their Ministry. Thus those very Persons, and others who have a free Access to the Prince, may have Occasions of giving Counsel or Advices, which, altho the same be not essential to their Imployments, may nevertheless be of so great importance as to require that they should make use of the Confidence which the Prince has placed in them to communicate them unto him; but without intruding themselves too officiously upon the Prince; and taking the Precautions which Prudence may suggest to them, as proper for procuring a good Success in their Application *f*.

f There is this Difference between these two sorts of Functions, that those which are annexed to Offices oblige indispensably, and that the other Functions do not oblige so absolutely, but are to be exercised with Prudence and Discretion. And Prudence is likewise required in the discharge of the Functions which are indispensably annexed to Offices, so as that they be exercised in such a manner as to render them useful by taking the Precautions which the Nature of the Affairs and the Circumstances may require.

VII.

7. All these Functions oblige to proportionable Duties.

All these several Functions oblige the Persons whom they concern to Duties proportioned to their Offices, or other Engagements, as shall be explained in the following Section *g*.

g See the following Section.

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SECT. II.

Of the Duties of Officers, Ministers, or others who are engaged to give Counsel or Advice to Princes.

The CONTENTS.

1. *The first Rule, to give such Advice and Counsel as is conformable to the Principles of the Duties of Princes.*
2. *To regulate them according to Justice and Truth.*
3. *Without Passion and without Self-Interest.*
4. *Three sorts of Duties, according to three sorts of Advices and Counsels.*
5. *Advices and Counsels relating to the Prince.*
6. *Advices and Counsels which respect the Good of the State.*
7. *Advices and Counsels which regard particular Persons.*
8. *Fidelity in informing the Prince of the Truth.*
9. *Integrity in giving Counsel and judging in the Cases where they are called to it.*
10. *Three different sorts of Duties of three different sorts of Persons who may be about the Prince.*
11. *The Duty of representing the Inconveniences that might attend the Execution of an Order which might have bad Consequences.*
12. *The Protection of the Weak.*
13. *Fidelity in performing all the Duties in Matters of the smallest Concern.*
14. *To avoid false Wisdom and false Policy.*
15. *Not to turn their Greatness into Pride.*

I.

1. The first Rule, to give such Advice and Counsel as is conformable to the Principles of the Duties of Princes.

SEEING the Counsels and Advices which Persons who are about Princes, whether it be on account of their Offices or otherwise, may give them, relate to the Conduct which Princes ought to observe in the Conjunctures where the said Counsels and Advices may be of use: The first Rule of the Duty of those Persons is the same with the first Rule of the Conduct of Princes, and of their Duties. Thus, as the Duties of a Prince consist in holding the Place of God here upon Earth, and in exercising according to his Spirit the Power which he holds of him, as has been explained in its Place; so the Duties of those who are about his Person consist in inspiring into the Prince, whether it be by their Counsels or Advices, only such Sentiments as have the Character of the same Divine Spirit *a*.

a See the first Article of the third Section of the second Title.

II.

2. To regulate them according to Justice and Truth.

It follows from this first Rule, and from this first Duty, that in the Advices and Counsels which are given to Princes, all Wisdom, all Prudence, all Policy whatsoever, which hath not for its Principle and Foundation Justice and Truth, which the Prince ought to support and maintain, and which it is his Business, his Honour, and his Glory so to do, are a Breach of this Duty. Thus all Advices, and all Counsels opposite to Truth and Justice, whether they be calculated for advancing the Fortune of those who give them, or for favouring some Passion or some Interest either of the Advisers themselves, or of their Relations or Friends, ruin the Foundations and transgress the essential Rules of the Conduct of Princes, the Maxims of which God will have them to take from the Spirit of his Law, as being the Source of the Wisdom, the Forces, and Counsels of which they stand in need *b*. And those who give Counsel upon any other Principle, or with any other view, cannot but draw upon themselves the bad Consequences thereof, and the Vengeance which God prepares for such a Prevarication *c*.

b With him is Wisdom and Strength, he hath Counsel and Understanding. Job 12. 13.
Counsel is mine, and sound Wisdom; I am Understanding, I have Strength. Prov. 8. 14.
There is no Wisdom, nor Understanding, nor Counsel against the Lord. Prov. 21. 30.
See the second Article of the third Section of the second Title.
c He leadeth Counsellors away spoiled, and maketh the Judges Fools. Job 12. 17.

III.

3. Without Passion and without Self-Interest.

The first Duty which is so essential and so indispensably necessary, comprehends all the others, of which the most general and that of the greatest Importance is, for those who give Counsel and Advice to Princes to examine narrowly whether their Passions and their Interests, or those of the Persons whom they are desirous to serve, have not too great a share in the Counsels and Advices which they give; that they may take care not to give any Counsel or Advice where their Love for themselves, or their Friends, does not give way to the Love of Truth and Justice, and where

where they do not prefer to the greatest Fortune, the greatest Interest, and the greatest Grandure, the Glory and the Duration of the Prince's Reign, which are the natural Consequences of a Conduct that is founded upon Justice and Truth *d*.

d For by Speech Wisdom shall be known, and Learning by the Word of the Tongue. In no wise speak against the Truth, but be ashamed of the Error of thine Ignorance. Ecclus. 4. 24, 25.

If thou followest Righteousness, thou shalt obtain her, and put her on as a glorious long Robe. Ecclus. 27. 8.

IV.

4. Three sorts of Duties, according to three sorts of Advices and Counsels.

These general Duties contain three kinds of particular Duties, which are to be distinguished according to the three kinds of Functions explained in the second Article of the preceding Section. The first is of the Duties which relate to the Prince's Person, his Rights, and Interest. The second is of those which concern the Publick; and the third of those which regard the Affairs of particular Persons *e*.

e All sorts of Advices and Counsels that can be given to Princes, may be reduced to these three kinds.

V.

5. Advices and Counsels relating to the Prince.

As for the Counsels and Advices in Matters which may relate to the Prince himself, the Duties of the Persons who give them, consist in a sincere Fidelity, which has nothing in view besides his true Good, which is inseparable from Truth and Justice, and in a discreet use of the necessity of making it known to him without Dissimulation and without Flattery; but still with such Prudence and Energy, as to discharge the double Duty which they owe him, both that of Respect for his Person, as also that of Zeal for his Service. Thus, for example, if there is any Dispute concerning an Estate, or a controverted Right, between the Prince and any one of his Subjects; seeing the Prince is himself the natural Judge of it, there being none superior to him that can judge it, and he being the Sovereign Dispenser of Justice in his own Dominions; it is the Duty of those who give him Counsel to distinguish two different Interests of the Prince: one which has no relation either to his Person or his Duties, but only to the Rights in question; and the other, which is his true and essential Interest, to do Justice even in his own proper Cause. So that those who are his Counsellors ought to regulate their Sentiments according to what this second and principal Interest of the Prince does demand, and to propose and back it with that Prudence and Freedom which a Duty of this nature requires *f*.

f Seeing the Prince himself is bound to regulate his own Conduct by a Prudence and Discretion that are worthy of the Divine Wisdom, by which he ought to govern; so those who are his Counsellors ought to regulate their Conduct by the same Spirit in proportion to their Ministry. Counsel is mine, and sound Wisdom; I am Understanding, I have Strength. By me Kings reign, and Princes decree Justice. *Prov.* 18. 14, 15.

There came a Man of God to him, saying, O King, let not the Army of *Israel* go with thee. ——But if thou wilt go, do it, be strong for the Battle: God shall make thee fall before the Enemy; for God hath Power to help and to cast down. 2 *Chron.* 25. 7, 8.

VI.

6. Advices and Counsels which respect the Good of the State.

As to the Counsels and Advices which respect the Good of the State, as there are Deliberations of divers sorts, so they ought to be proportioned to the said Deliberations. Thus the Duties of such Counsels are different: For if, for example, the Matter be only to give bare Counsel in the Affairs of the Publick, whether they relate to the War, or to the Civil Government, or whether they be other Affairs in which the particular Interest of the Persons who are to give the said Counsel is no ways concerned, they discharge their Duties, if being capable of giving good Counsel, they join to the Capacity that is necessary a great Application to study and find out the Good of the Publick, and to make choice of an Expedient that may be useful to it. And it rarely happens that in these sorts of Counsels they have occasion for that Disinterestedness which would be otherwise necessary, if the Affairs about which they are consulted had any Mixture of Interest and Passion that might counterballance the Publick Good. But in the Conjunctures where this Mixture may chance to be, they ought to join to their Capacity a sincere and disinterested Fidelity, that they may not fall into the enormous Crime of directing their Counsels to the Views of their own Interest, and of preferring that to the Good of the Publick *g*.

g This is a consequence of the three first Articles.

VII.

7. Advices and Counsels which regard particular Persons.

In the Cases where the Advices or Counsels regard the Affairs of particular Persons, it is necessary to distinguish two different sorts of Duties. One respects

spects that which they who have the Honour to be about the King's Person owe to Truth; and the other has relation to what they owe to Justice and to Equity, as shall be explained in the two Articles which follow *h*.

h See the following Articles.

VIII.

8. Fidelity in informing the Prince of the Truth.

Seeing it is not possible for Princes, even those of the greatest Penetration, and who apply themselves the most diligently to their Duties, to have always themselves a particular Knowledge of the Facts relating to the Affairs which they are to regulate or judge, and which are not handled after the manner of Judicial Proceedings, as Law-Suits are which contain the Proofs of the Facts alledged, but are Affairs of another nature; such as Complaints of Persons under Oppression, and other Affairs of the like nature; they are obliged to trust to those who are about them for getting Information of the Truth thereof. Thus it is the Duty of those Persons to inform themselves very exactly of the Truth, that they may afterwards lay the same before the Prince, without any disguise, and without having any regard either to the Quality of those who complain, or of those who are the Oppressors. For as it is the Duty of the Prince to protect those who suffer any Violence, and to exercise all the other sorts of Functions of the Sovereign Power which he has in his hands; so it is likewise the Duty of those who by virtue of the Rank they hold about the Prince are obliged to serve him on the said Occasions, to be faithful on their part in not concealing the Truth in the case of any Injustice *i*; and to inform him of the Facts which it is necessary know, that he may be able to administer Justice, and to protect Innocence and Truth.

i Who hold the Truth in Unrighteousness. Rom. 1. 18.

Altho this Passage relates to a Prevarication against a Duty of another nature than that which is mentioned in this Article, yet it may be very naturally applied to it.

IX.

9. Integrity in giving Counsel, and in judging in the Cases where they are called to it.

When the Truth being sufficiently known to the Prince, the Duty of informing him of it is fulfilled, it is a second Duty in the Cases where it is necessary to give Counsel concerning Facts that are known, and in all other Cases where Counsel is to be given to the Prince, to give Counsels that are wholly disinterested, and which have for their Principle and Foundation a Zeal for Justice. And in the Cases where those Persons are to administer Justice themselves to particular Persons, whether it be by virtue of their Offices, or by order of the Prince; they enter into the Engagements of the Duties of Judges, which are explained in their proper Place *l*.

l See the fourth Title of the second Book.

X.

10. Three different sorts of Duties of three different sorts of Persons who may be about the Prince.

As there are three sorts of Persons who may be under an Engagement to give some Advices or some Counsels to the Prince, as hath been explained in the third Article of the first Section; so the Duties of the said Persons are different, according to the Difference of their Engagements. The Officers or Ministers who are of the Prince's Council have their Duties regulated by the Necessity of their Functions, which make the liberty of exercising them natural to them; and are obliged to give the Prince unbiass'd Counsels in every thing that may belong to their Ministry, whether it respect the Order of Government, or the Administration of Justice, or the Management of the Revenue, or the Ease of the People, or other Affairs which regard the Interests and Rights of the Prince, and the publick Good, or which concern the Interests of particular Persons. The Officers who, without being of the Prince's Council, are obliged by virtue of their Offices to inform him of the Matters of Fact which it is necessary he should know, are bound to acquaint him therewith. And if the Matter be in relation to the Reformation of some Abuses, they ought to inform him of the Consequence of them, and propose to him proper Remedies for redressing them. The Persons who have no other Engagement about the Prince besides the Honour which he does them by employing them about his Person, have their Duty regulated by the Confidence which he reposes in them, and by the free Access he gives them. Which implies the Obligation of acquainting him sometimes, as Prudence directs, with the Facts it may be of importance for him to know, such as some Oppression which it might be in his power alone to revenge, or other Facts of the like nature *m*.

m See the third and sixth Articles of the first Section.

XI.

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XI.

11\. *The Duty of representing the Inconveniencies that might attend the Execution of an Order which might have bad Consequences.*

We may reckon among the Duties of giving Counsel or Advice to the Prince, the Conduct which those Persons ought to observe, who being charged with the Execution of some Order which had been surreptitiously obtained from the Prince, foresee that it might turn to some Injustice, or prejudice the Interest of the Prince. For both Prudence and their Duty would oblige them to take the necessary Measures for representing in an humble submissive manner to the Prince the Consequences that might be apprehended to ensue thereupon *n*.

n It was because of this Duty that Joab *made his Remonstrances to* David *upon the Order which he had given for numbering his People.* And again the Anger of the Lord was kindled against *Israel*, and he moved *David* against them, to say, Go number *Israel* and *Judah*. For the King said to *Joab* the Captain of the Host, which was with him, Go now thro all the Tribes of *Israel*, from *Dan* even to *Beersheba*, and number ye the People, that I may know the Number of the People. And *Joab* said unto the King, Now the Lord thy God add unto the People, how many soever they be, an hundredfold, and that the Eyes of my Lord the King may see it: But why doth my Lord the King delight in this thing? 2 *Sam.* 24. 1, 2, 3.

And Satan stood up against *Israel*, and provoked *David* to number *Israel*. 1 *Chron.* 21. 1.

XII.

12\. *The Protection of the Weak.*

The Importance and Consequence of all these Duties which have been now explained is not confined to Affairs of great moment, but they extend even to the smallest Matters where it may be necessary to have recourse to the Prince. Thus the Interests of the meanest Persons who suffer any Oppression, and whose Deliverance depends upon the Prince, make it a Duty in those whose proper business it is to lay the same before the Prince, to hear the Complaints that are brought before them, that they may inform the Prince thereof, and to protect the Weak against the Violence of those who are in power. For it is in order to support the Weak against Oppression and Injustice, that God hath established the use of Authority *o*.

o Deliver him that is spoiled out of the hand of the Oppressor. Jer. 21. 12.

Execute ye Judgment and Righteousness, and deliver the Spoiled out of the hand of the Oppressor; and do no wrong, do no violence to the Stranger, the Fatherless, nor the Widow, neither shed innocent Blood in this case. Jer. 22. 3.

The Lord raised up Judges, which delivered them out of the hand of those that spoiled them. Judges 2. 16.

Deliver him who suffereth Wrong from the hand of the Oppressor. Ecclus. 4. 9. Psal. 52. 5.

XIII.

13\. *Fidelity in performing all the Duties in Matters of the smallest Concern.*

It is not enough that the Persons who are obliged to all these several Duties perform some of them on some particular occasions, of which they reserve to themselves the distinction, neglecting the others which they believe they may omit without any prejudice to their Honour or Fortune; but they ought to perform all the Duties in general as much as in them lies. For the Principle which ought to be the Rule of their Conduct does not reject any one of them; seeing the said Principle ought to be a fixed Habit of a generous Love of Truth and Justice, which never fail to have an Interest in all Affairs which may deserve the Prince's Cognizance. Thus every one of the said Conjunctures makes it a Duty incumbent on them to exercise their Ministry and their Power for the support of Justice and Truth *p*.

p He who is faithful in that which is least, is faithful also in much. Luke 16. 10.

XIV.

14\. *To avoid false Wisdom and false Policy.*

As the Principle of the Duties of the Prince, and the true Grandure of his Glory consists in filling in a manner worthy of God the Place which he holds of him; so it is also the Principle of the Duties, and of the true Honour of those whose business it is to give the Prince Counsel and Advice, to inspire into him only such Sentiments as are suitable to this Grandure. Thus nothing is more opposite to their Duties than that Littleness of Soul and Spirit which bounds their Views to those of their own Preferment and Fortune, and to other Meannesses of human Motives which engage them in base and unworthy Flatteries, and to give Counsel that is founded only upon a false Wisdom, and upon a Policy that is criminal. But this Conduct, what Success soever it may have, cannot escape the knowledge of God, nor skreen it self from his Justice *q*.

q There is no Wisdom, nor Understanding, nor Counsel against the Lord. Prov. 21. 30.

I will destroy the Wisdom of the Wise, and will bring to nothing the Understanding of the Prudent. 1 Cor. 1. 19.

The Wisdom of their wise Men shall perish, and the Understanding of their prudent Men shall be hid. Isaiah 29. 14.

See the Text quoted on the eleventh Article of this Section.

XV.

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XV.

15. Not to turn their Greatness into Pride.

We may add as a last Duty of those who have the Honour to be about the Prince, and to have a share in his Confidence, that the Use which they ought to make of it, according to the Rules that have been now explained, obliges them not only not to use that Advantage against Justice and Truth, but on the contrary, to defend and support them with all their Force; and further, not to make use of the Honour which they have of approaching the Prince's Person, as an occasion of shewing to the World their Pride and their Vanity. For this would be to debase the Dignity of their Ministry, and to raise among the Subjects a Spirit of Indignation and Aversion against this Use of an Authority, which ought naturally to procure unto them the Respect and Love of the People, and which they would certainly gain by a moderate Use of the Prince's Favour, which raises them above the rest of the Subjects r.

r *Many the more often they are honoured with the great Bounty of their gracious Princes, the more proud they are waxen.* Esther 16. 2.

If thou be made the Master of a Feast, lift not thy self up, but be among them as one of the rest; take diligent care for them, and so sit down. And when thou hast done all thy Office, take thy Place, that thou mayest be merry with them, and receive a Crown for thy well ordering of the Feast. Ecclus. 32. 1, 2.

Then the Men of Israel *said unto* Gideon, *Rule thou over us, both thou and thy Son, and thy Son's Son also; for thou hast delivered us from the hand of* Midian. *And* Gideon *said unto them, I will not rule over you, neither shall my Son rule over you; the Lord shall rule over you.* Judges 8. 22, 23.

Altho this Text relates to the Prince, yet it may be applied to his Ministers.

TIT. IV.

Of the Use of the Forces necessary for the Defence of a State; and of the Duties of those who serve in the Army.

What Rules are to be explained under this Title.

THE Reader may easily judge from the Design of this Book, which has been explained in the Preface, that he is not to expect to see under this Title the Detail of the several Matters which might be comprehended in a particular Treatise of the Forces necessary in a Kingdom; for this Design might extend to the Rules of Fortification, and of attacking and defending strong Towns, to the Rules for the Exercise of Soldiers, to those of the Marches of the Troops, of their Encampments, of their making Retreats, of an Order of Battle, of the Artillery, of Ships of War, and to other the like Matters. But this Detail, altho it be of a very important Consequence, yet seeing it hath its particular Rules which Experience and Use diversify according to Times and Places, ought not to be mixed with the Rules which are to compose the Science of the Law, and that of the Publick Law, which is a part of the Law in general, and which hath its Principles in the Divine Law, and in the immutable Rules of natural Equity. So that we shall comprehend under this Title only the Rules which have this Character, and some of which have been taken from the Body of the *Roman* Law. And these are reduced to the Rules of Justice, which may direct the right Use of the Forces of a State, whether it be for maintaining within the Kingdom Order, Peace, and Tranquillity, by supporting Justice, or for defending it, against the Attempts of Enemies from without. And these sorts of Rules shall be the Subject-matter of two Sections. The first shall be of the Use of Forces within the Kingdom; and the second of the Use of Forces without the Kingdom, and of the Military Government, which regulates the Duties of the Officers of War and of the Soldiers.

SECT. I.

Of the Use of Forces within a Kingdom.

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I.

1. The Use of Forces for the Support of Justice.

SEEING Forces are necessary for the Support of Justice against those who do not voluntarily submit themselves to it, they are of use in all Cases where the Administration of Justice is necessary, and where it may meet with any Obstacle *a*.

a For Power is given you of the Lord, and Sovereignty from the Highest. Wisd. of Sol. 6. 3.

II.

2. The Force of Justice ought to to reign in all Cases.

This Use of Forces within a Kingdom for supporting Justice therein, extends in general to every thing which hath relation to the publick Order and the common Good, as also to the Administration of Justice between the Subjects. Thus, the said Forces are communicated from the Sovereign to the whole Body of which he is the Head, and he dispenses them to all the Uses of the Body and of the Members. So that as it is the Force of Justice which ought to animate this Body and these Members, and which is as it were the Life of the Body; so it ought to be felt in all the Members thereof, in the same manner as the Life of the Soul makes it self to be felt in what it animates *b*.

b This is a Consequence of the preceding Article.

III.

3. The Power resides in the Person of the Sovereign.

The first place in which the Force of the Authority of the Sovereign within his Dominions resides, and from whence it ought to diffuse it self throughout the whole Body, is his own Person, which ought to be environed with all the Marks and all the Pomp of Authority, in such a manner, that as it is in him that the Ministry of the whole Dispensation of Justice hath its Origin, so the Force of Justice may derive its Origin from him likewise, that so the good Use which the Wisdom of the Prince ought to make of this Power, may be the Foundation of the publick Quiet *c*.

c See the Passage cited on the first Article.
A wise King is the upholding of the People. Wisd. of Sol. 6. 25.

IV.

4. It is communicated from him to the Officers.

It is in order to attain this Use of the Power of the Sovereign that he exercises the principal Functions thereof himself, and commits the others which he cannot or ought not to exercise in Person to those whom he raises to this Ministry, whether it be in the quality of Officers of the Crown, Governors of Provinces, or Magistrates, and all others to whom he communicates a Share of the Authority, whether it be for the Administration of Justice, for the Civil Government, or for the whole Detail of the Functions which the publick Good doth demand. Thus, this Power ought to be considered in the hands of the said Officers and other Ministers, as being the Power of the Prince, which he holds of God *d*.

d Submit your selves to every Ordinance of Man for the Lord's sake, whether it be the King as Supreme, or unto Governors, as unto them that are sent by him. 1 Pet. 2. 13.

V.

5. The Use of the Power of the Sovereign for the Benefit of every particular Person.

This Power of the Sovereign, and the Functions thereof, which he commits to his Ministers, ought to have this effect, to make Peace to reign among his Subjects by means of the Reign of Justice, which may contain them all in that Order which produces the said Peace, by making every one of them to dread the Power of Justice if they rebel against it, and assuring them of its Protection if they are faithful and obedient. For which reason it is that every particular Person who contains himself within the bounds of his Duty, ought to have the same use of this Power as if he himself had the Dispensation of it, provided that he has Justice on his side. And it is in this use of the Power, so as to make every particular Person sensible of their having the Protection thereof, that the publick Tranquillity doth consist *e*.

e For every Man sat under his Vine, and his Fig-Tree, and there was none to fray them. 1 Maccab. 14. 12.
He strengthned all those of his People that were brought low. 1 Maccab. 14. 12.

XI.

2. Use of the Power for punishing Crimes.

Seeing the Use of the Forces necessary in a Kingdom for the Support of Justice, cannot have always, and in all Cases, its effect so as to stop the Torrent of Iniquity which carries along with it so many Injustices, which no Vigilancy of the Sovereign, nor of his Ministers, is able to prevent, and that often those very Persons to whom he intrusts the said Power, make use of it against

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against Justice itself; it is therefore a Consequence of the Ministry of the said Power, that when the Peace and Order which Justice ought to support is disturbed, Justice may make the Weight of its Forces to be felt by those who were not restrained by Fear. Thus the Disorder which hath troubled the Peace is redressed by Punishment and Correction, whether it be by inflicting them on the particular Persons who have been disobedient to the Authority of Justice in order to reduce them to a Subjection to it, or by taking Vengeance of those Ministers, by means of the natural Use of Authority, for the criminal Abuse which they have made thereof *f*.

f But if thou do that which is evil, be afraid; for he beareth not the Sword in vain: for he is the Minister of God, a Revenger to execute Wrath upon him that doth Evil. Rom. 13. 4.

For the Punishment of evil Doers. 1 Pet. 2. 14.

VII.

7. The Forces ought to be proportioned to the Use of the Government.

It follows from all these Truths, that the Use of Forces, as to what concerns the internal State of a Kingdom, demands that they should be such as to suffice for giving Authority to the Government, imprinting on the Minds of all the Subjects Respect and Obedience to the Sovereign, and to those who exercise his Authority, for giving to the Good an Assurance of the Protection of Justice, and for terrifying the Wicked with the Fear of Punishment *g*.

g For Rulers are not a Terror to good Works, but to the Evil; wilt thou then not be afraid of the Power? Do that which is good, and thou shalt have Praise of the same: For he is the Minister of God to thee for Good. Rom. 13. 3, 4.

VIII.

8. The Duty of those who share in the Authority.

All these several Uses of Authority in a Kingdom demand the Application of the Sovereign, and Fidelity in his Ministers in all the Functions committed to them, for dispensing the same according as there is occasion. And this Fidelity is one of the Duties of those Ministers, which shall be explained in its proper place *h*.

h See the fourth Title of the second Book.

SECT. II.

Of the Use of Forces without the Kingdom, of Military Discipline, and of the Duties of those who serve in the Army.

The CONTENTS.

1. *The Use of Forces without the Kingdom.*
2. *In what these Forces do consist.*
3. *Different Uses of the Forces according to the different Occasions.*
4. *Necessity of Military Discipline.*
5. *The first Rule of Military Discipline, Obedience to the Head.*
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8. *The first Part of this Conduct, Vigilance in carrying on his own Undertakings, and in preventing those of the Enemy.*
9. *The second Part of the General's Conduct, is to be careful to have his Troops in good Order.*
10. *Third Part of the General's Conduct, Vigilance in providing all the Necessaries for the War.*
11. *The Duties of subaltern Officers.*
12. *The Duty of Soldiers.*
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15. *Three sorts of Discharges.*
16. *Other arbitrary Regulations for the Military Discipline.*
17. *Officers and Soldiers ought to abstain from all manner of Violence and Extortion.*

I.

1. The Use of Forces without the Kingdom.

THE Use of Forces as to what concerns the external State of a Kingdom, consists in defending it against the Attempts of Strangers, by preventing them before they are fully ripe, and by resisting those which could not be foreseen before they were put in execution *a*.

a See the second Article of the second Section of the second Title.

II.

2. In what these Forces do consist.

This Occasion for Forces to prevent the Enterprizes of Strangers, or to put a stop to them, obliges those who have the supreme Government in their hands to

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provide for the Safety of the Kingdom, not only by having strong Places on the Frontiers well garisoned, but also by a Facility of assembling Troops readily on any emergent Occasion, or even by having them always in a readiness, if there be reason for using such Precaution: Which ought to depend on the Prudence of the supreme Governours, who should take such wise and prudent Measures as not to alarm their Neighbours, and oblige them to take up Arms, which might draw on Wars; and who likewise ought not to neglect to prevent the Enterprizes which seem to threaten the Kingdom, and might surprize it, if not timely prevented *b*.

b And he (Jehosaphat) *placed Forces in all the fenced Cities of* Judah, *and set Garisons in the Land of* Judah, *and in the Cities of* Ephraim. 2 Chron. 17. 2.

And Jehosaphat *waxed great exceedingly, and he built in* Judah *Castles and Cities in store. And he had much Business in the Cities of* Judah; *and the Men of War, mighty Men of Valour, were in* Jerusalem. *And these are the numbers of them according to the House of their Fathers; of* Judah, *the Captains of thousands,* Adnah *the chief, and with him mighty Men of Valour, three hundred thousand,* &c. 2 Chron. 17. 12, 13, 14.

And there was sore War against the Philistines *all the Days of* Saul; *and when* Saul *saw any strong Man, or any valiant Man, he took him unto him.* 1 Sam. 14. 52.

III.

3. Different Uses of the Forces according to the different Occasions.

It is also on the same Prudence of the supreme Governours that the use of the Forces in open War ought to depend. For according to the Causes of the Wars, the Acts of Hostility committed by the Enemies, the Violences, the Inhumanities which they are guilty of, and the other Manners in which they on their part use their Forces, a Nation may use different ways of defending themselves, or attacking their Enemies with more or less Moderation. Thus when a Town is besieged, the Besiegers do not begin with violent Attacks and an Assault upon the Place; but they first summon the Governour of the Town to surrender it, and if he refuses, then they go on with their Attacks; and if they come to capitulate, the Conditions are made easier or harder, according as the Condition in which the besieged are, and their Conduct may oblige the Besiegers to treat them *c*.

c When thou comest nigh unto a City to fight against it, then proclaim Peace unto it. And it shall be, if it make thee Answer of Peace, and open unto thee, then it shall be that all the People that is found therein, shall be Tributaries unto thee, and they shall serve thee. And if it will make no Peace with thee, but will make War against thee, then thou shalt besiege it. And when the Lord thy God hath delivered it into thy hands, thou shalt smite every Male thereof with the Edge of the Sword. Deut. 20. 10, 11, 12, 13.

IV.

4. Necessity of Military Discipline.

Since the Use of Forces is not only necessary in time of War, but may be so also in time of Peace, whether it be for Garisons, or for other Troops that may be necessary for other Services, Military Discipline is also necessary in both those times. And this Discipline consists first of all in some general Rules that are common at all Times and Seasons, and relate to the Duties of Soldiers and Officers; and secondly in particular Regulations which are diversified according to the Times, the Places, and the Occasions. We shall explain these general and common Rules in the Articles which follow; and as to the particular Regulations, it would neither be possible nor of any service to make a Collection of them in this Place, seeing those which have been made hitherto relating to this Matter, are to be found in the Ordinances, in the Edicts, and in the several Regulations which have been touching this Matter *d*.

d See the following Articles.

[By the Law of *England* the Exercise of Martial Law, or Military Discipline, is not permitted within his Majesty's Dominions in time of Peace, when the King's Courts are open for all Persons to receive Justice, according to the Laws of the Land. But it having been judged necessary of late Years, that a certain number of Troops should be kept on foot even in time of Peace, for the Guard of his Majesty's Royal Person, and for the Safety of the Kingdom, the Exercise of Military Discipline, for the better Government of the said Troops, has been from time to time permitted by express Acts of Parliament, under certain Restrictions and Limitations, particularly specified in the said Acts. See *Stat.* 3. *Car.* I. *cap.* 1. and 12 *Anna, An Act for the better regulating the Forces to be continued in her Majesty's Serivce*; as also the subsequent Acts of Parliament for the Punishment of Mutiny and Desertion. See the Lord Chief Justice *Hale*'s History of the Common Law of *England*, *chap.* 2. *pag.* 38, 39.

There is this Difference to be observed with respect to the Exercise of Martial Law in *England*, that altho it is not permitted in the Land Forces in time of Peace, except by the express Consent of Parliament, which is renewed from time to time; yet the same is allowed to be exercised over the Naval Forces on board the Fleet in time of Peace as well as War. And there are for that purpose standing Articles and Orders, ratified by the Parliament, for the regulating and better Government of his Majesty's Navy, Ships of War, and Forces by Sea. See 13 *Car.* 2. *cap.* 9. In the twelfth Year of the Reign of the late Queen *Anne*, some Doubts having arisen at the Board of Admiralty touching the Construction of the said Act of Parliament of 13 *Car.* II. *cap.* 9. whether the same was to be put in execution in time of Peace as well as War, the

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the late Queen did, upon Application to her by the Lords Commissioners of the Admiralty, direct the Judges to consult and give their Opinion upon the said Act. And accordingly the Judges of the Common Law, and some Doctors of the Civil Law, having met together on *December* 22. 1713, in Obedience to her Majesty's Command, and having taken the said Matter into consideration, they agreed in the following Opinion; 'That the Act of Parliament 'made in the thirteenth Year of King *Charles* II. 'entitled, *An Act for establishing Articles and Orders for the regulating and better Government of his Navy, Ships of War, and Forces by Sea,* 'was made for the Regulation and better Government of the Fleet at all times, *as well in Peace as War*; and that Mutiny, or any other of the Offences therein specified, committed by any Person or Persons in actual Service and Pay in her 'Majesty's Fleet, or Ships of War, at the time of 'such Offence, may be punished in a Court-Martial 'according to the Direction of that Act, *in time either of Peace or War*, provided such Offence be 'done upon the main Sea, or in any Ships or Vessels being and hovering in the main Stream of 'great Rivers, only beneath the Bridges of those 'Rivers nearest to the Sea, where the Admiralty had 'before that Act Jurisdiction, in case of Murder and 'Mayhem.' Which Opinion they reported to her Majesty.]

V.

5. The first Rule of Military Discipline, Obedience to the Head.

The first of all the Rules of Military Discipline, and which is common to Officers and Soldiers, is the Duty of Obedience to the Orders which they are to execute. Thus the General of an Army owes this Obedience to the Orders of the Sovereign, and the other Officers owe it to the General, and to other their superior Officers; and the Soldiers owe it to all those who have a Right to command them. For without this Obedience the Use of Forces would be ineffectual; since instead of being united in carrying on that only End proposed by the Sovereign, they would be divided into the different Views of those who by their Disobedience would turn them to other Uses *e*. Thus the Disobedience both of Soldiers and Officers is justly repressed by the Punishments which the particular Regulations may have established, and even by Death itself, if the Consequence demands that Severity *f*.

e See the second Section of the first Title.
f See the following Article.

VI.

6. Disobedience is punished, altho it have a good Success.

The Consequence of Obedience in Military Government is such, that even Success itself, let it be ever so great, cannot justify Disobedience, nor be an Excuse for it. But altho he who disobeys may have taken in effect a better Course, or may have avoided or prevented Inconveniences which would have ensued upon his obeying his Orders, or that he may have obtained Advantages which could not have been hoped for except from the Course which he has followed, his Disobedience does nevertheless deserve the Punishment that may be due to it, and even the Loss of Life, according to the Quality of the Fact, and the Circumstances. For all the Good which the Success of an Act of Disobedience would cause, would not be able to counterballance the infinite Evils which would follow upon the Impunity of this overthrowing of all Order and Discipline. And the Liberty which all those who should flatter themselves with obtaining much greater Advantages from their own private Views and Designs might imagine they had to disobey, would put all into Confusion, and into such a Disorder as would ruin all Military Government, and would destroy that Union in which consists the Use of Forces.

g In bello qui rem a duce prohibitam fecit, aut mandata non servavit, capite punitur, etiamsi res bene gesserit. *l.* 3. §. 15. *ff. de re milit.*
Ye shall not do after all the things that we do here this Day, every Man whatsoever is right in his own Eyes. Deuter. 12. 8.

VII.

7. Three Parts of the Conduct of the General.

We may set down as a second Rule of Military Discipline, the Watchfulness of the General about every thing that may be necessary for the Execution of the Orders of the Sovereign, in relation to the War he has entrusted him with the Management of. And this contains three different Parts of his Conduct, which comprehend the whole detail thereof, and on which depends the good Use of the Forces that are in his hands *h*, as will appear by the Articles which follow.

h See the Articles which follow.

VIII.

8. The first Part of this Conduct, Vigilance in carrying on his own Undertakings, and preventing those of the Enemy

The first Part of the Conduct of the General, is Vigilance in discovering the Designs of the Enemy, in forming his own Designs as Occasion may offer, and in concealing them until the Execution thereof require that he make known either his Designs, or that which may be necessary to be done in order to attain them, without letting them be discovered by the Motions which are made for the more effectual Accomplishment of them. And this Vigilance implies the Care of observing and watching the Countenance, the Motions, and the Proceedings of the Enemy,

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my, and of sending out Detachments, to view their Situation, their Number, their Force; the use of good Spies for the Discoveries that may be made by their means, and the other Ways of prying into the Designs and Undertakings of the Enemy, if there be ground to fear any, that proper Means may provided for preventing them, or resisting them; Application in concerting his Designs in a manner proportionable to the Number and Condition of his Forces, and to the Advantages which he may hope to obtain over those of the Enemy, whether it be in giving of Battle, or forming a Siege or other Undertaking, the General determining himself in these Matters, after mature Deliberation thereupon with his Council, and pursuant to the Orders of the Prince; Moderation in good Success, and an Intention to improve the Advantages of Victory, and to prevent any Slackness or Remissness of Discipline that may be apt to creep in after some Advantage has been gained over the Enemy; a Firmness and Steddiness which in bad Events may preserve a Presence of Mind for diminishing the Losses, or repairing them, for re-establishing that which may be preserved, for rallying the Troops, and inspiring them with fresh Courage; for conducting a Retreat without Trouble, without Emotion, and with all the Order that is possible; and in a word, for acting on all Occasions whatsoever with that Prudence and Courage which may answer the present Wants, and may inspire both into Officers and Soldiers a Zeal to acquit themselves on their parts of all their Duties *i*.

i He that ruleth, with Diligence. Rom. 12. 8.
Altho this Text does not particularly respect the Duties of those who have the Command of Armies; yet these Duties are comprehended under this Precept, since in general whoever is entrusted with a Government, with a Command, or other Publick Ministry, is obliged to be diligent and careful in the discharge of his Functions.

IX.

9. The second Part of the General's Conduct, is to be careful to have his Troops in good Order.

The second Part of the General's Conduct relates to the good Order and the good Condition of all the Troops which may happen to be under his Command. This comprehends an Exactness in observing punctually himself, and causing others to observe the Regulations already made, and in making new ones according as there is occasion *l*; an Application to know personally as much as he can the several Regiments he commands, the Condition of every Regiment, if the Number of the Officers and Soldiers be entire, in order to have it as compleat as may be; the Care to examine if all the Soldiers have their Arms in good Condition, and to punish those who are faulty therein *m*; an Enquiry into the Characters of the Officers, and of those who are distinguishable by their Birth, their Services, their Conduct, their Valour, Experience; a Distinction of the Regiments, of the Companies, and of the other Bodies, according as they are stronger or weaker, more or less inur'd to War, that they may regulate by all these Views the Choice either of the Regiments or of the Persons who shall be most proper for the different Expeditions; an Exactness to keep the Soldiers within their Camp, or in their Posts, to review the Troops, to keep the Soldiers and Officers to their Duty, and to make them do their Exercises; the visiting of the Guards and Centinels; the keeping of the Keys which ought to be in his Custody *n*; a Dexterity to make himself be beloved and feared both by the Officers and Soldiers, and in giving his Orders to join a Mildness with the Authority of the Command, and to apply the several Temperaments that may be necessary according to the Quality of the Orders, and that of the Persons to whom he commits the Execution of them; Prudence in not exposing the Army, or a Part of it, or even single Soldiers, to Danger without great Necessity; a Care, to see that Justice be administer'd, and Discipline observed throughout the Army; a prudent Severity in punishing the

l Officium regentis exercitum, non tantum in danda, sed etiam in observanda disciplina consistit. Paternus quoque scripsit, debere eum qui se meminerit armato præesse, parcissime commeatum dare; equum militarem extra provinciam duci non permittere; ad opus privatum, piscatum, venatum, militem non mittere. Nam in disciplina Augusti ita cavetur. Et si scio, fabrilibus operibus exerceri milites, non esse alienum: vereor tamen, si quicquam permisero quod in usum meum aut tuum fiat, ne modus in ea re non adhibeatur, qui mihi sit tolerandus, *l.* 12. *ff. de re milit.*

m Arma non sine flagitio amittuntur. *l.* 2 §. *ult. ff. de capt. & post. lim. rev.*
Miles qui in bello arma amisit, vel alienavit, capite punitur. *l.* 3. §. 13. *ff. de re milit.*

n Officium tribunorum est, vel eorum qui exercitui præsunt, milites in castris continere, ad exercitationem producere, claves portarum suscipere, vigilias interdum circumire. *l.* 12. §. 2. *ff. de re milit.*

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Crimes of the Soldiers, such as those who abandon their Posts, Deserters who may be differently punished according to the quality of the Desertion and the Circumstances *o*; those who resist him, and violate the Respect due to his Person *p*; those who transgress the general Rules, or the particular Orders which concerned them *q*: An Application to repress the Extortions and Violences which Officers or Soldiers may be guilty of towards other Persons *r*; and to prevent and pacify all Quarrels and Tumults among them, and especially those which may be likely to cause a Sedition in the Army *s*: An Easiness of Access for receiving Complaints, and doing Justice upon them *t*: A Care of the Sick and Wounded *u*: Prudence in discerning, and likewise in recompensing as much as is possible signal Services that deserve it: And lastly, a Vigilance about every thing that may be necessary for putting and keeping the Troops in a good Condition, and holding them in a Readiness for all the Services which his several Orders may require.

X.

10. Third part of the General's Conduct, Vigilance in providing all the Necessaries for the War.

The third part of this Conduct of the General takes in all the rest of his Functions, which consist in joining to the good Condition and to the good Disposition of the Troops, the Art of posting them advantageously, of providing Subsistence for them, of adding to the Force of the Men all the other necessary Helps, such as Artillery, and all the Instruments and Materials that the Quality of the War by Land or by Sea, and the different Expeditions may demand, whether it be for defending themselves, or attacking the Enemy, or for forming a Siege, or executing all manner of Enterprizes or Orders. And this implies a Care to chuse an advantageous Ground for a Camp, to fortify it, to defend the Avenues thereof, to place Guards and Centries, to order Detachments, to see that the Army be supplied with Provisions, and that there be sufficient Convoys to guard the same, to be well informed of the Quantity and Quality of the Grain, and of the Ammunition Bread, and of their Weight, and of every thing that ought to be furnished for the Subsistence of the Troops, and of Forage for the Horses: To provide every thing that may be necessary for the Undertakings, such as to facilitate the Passages over Rivers, and thro difficult Ways: To cause the Officers who are placed Overseers over all these different Functions to bring him in an Account of the Condition of that which belongs to their Ministry; and to inform himself of all the Particulars as minutely as he can, or to recommend the Care of what he cannot visit himself to Persons in whom he may confide: And in a word, to study and procure every thing that may strengthen and augment the Forces, and contribute to the good Use that ought to be made of them.

o Non omnes desertores similiter puniendi sunt: sed habetur & ordinis & stipendiorum ratio, gradus militiæ, vel loci muneris deserti, & ante actæ vitæ, sed & numerus, si solus, vel cum altero, vel cum pluribus deseruit, aliudve quod crimen desertioni adjunxerit. Item temporis quo in desertione fuerit, & eorum quæ postea gesta fuerint. Sed & si fuerit ultro reversus non cum necessitudine, non erit ejusdem sortis. Qui in pace deseruit eques gradu pellendus est, pedes militiam mutat: in bello idem admissum capite puniendum est. *l.* 5. *D. l.* §. 1. *ff. de re milit.*

Si præsidis, vel cujusvis præpositi ab excubatione quis desistat, peccatum desertionis subibit. *l.* 3. §. 6. *eod.*

Qui excubias palatii deseruerit, capite punitur. *l.* 10. *eod.*

p Qui manus intulit præposito, capite puniendus est. Augetur autem petulantiæ crimen dignitate præpositi. Contumacia omnis adversus ducem, vel præsidem, militis capite punienda est. *l.* 6. §. 1, & 2. *ff. de re milit.*

Irreverens miles non tantum a tribuno, vel centurione, sed etiam a principali coercendus est. Nam eum, qui centurioni castigare se volenti restiterit, veteres notaverunt. Si vitem tenuit, militiam mutat; si ex industria fregit, vel manum centurioni intulit, capite punitur. *l.* 13. §. 4. *eod.*

q Delicta secundum suæ auctoritatis modum castigare. *l.* 12. §. 2. *eod.*

r Decem librarum auri mulcta ferietur quisquis administrator, rogator, apparitorve ullus militans scilicet, vel iter agens, ullo in loco aliquid ab hospite postulaverit. *l.* 5. *C. de metat. & epidem.*

Nequis comitum vel tribunorum, aut præpositorum, aut militum nomine, salgami gratia culcitras, lignum, oleum a suis extorqueat hospitibus, sed nec volentibus hospitibus, in prædictis speciebus aliquid auferat: sed sint provinciales nostri ab hac præbitione securi: comitibus, tribunis, vel certe præpositis militibusque gravi vexationi subjacentibus. *l. un. C. de salgamo hosp. n. præb.*

s Si quis commilitonem vulneravit, si quidem lapide militia rejicitur: si gladio, capitale admittit. *l.* 6. §. 6. *ff. de re milit.*

Qui seditionem atrocem militum concitavit, capite punitur. *l.* 3. §. 19. *eod.*

t Querelas commilitonum audire. *l.* 12. §. 2. *eod.*

u Valetudinarios inspicere. *D. l.* 12. *in fine.* *See the Law quoted on the following Article.*

x Frumentationibus commilitonum interesse, frumentum probare, mensorum fraudem coercere. *l.* 12. §. 1, & 2. *ff. de re milit.*

It is by the good Use of these Regulations that the Troops can subsist in the natural Condition in which they ought to be.

See the Texts cited in the preceding Article; and the Ordinances of Henry the Third at Blois, *Art.* 315. *and at* Fountainbleau *in* 1553, *Art.* 8, *and* 28. *Of* Lewis *the Thirteenth at* Paris *in* 1633.

1633. *Of* Lewis *the Fourteenth at* Compeigne *in* 1655.

Joshua *arose, and all the People of War, to go up against* Ai: *And* Joshua *chose out thirty thousand mighty Men of Valour, and sent them away by Night. And he commanded them, saying, Behold, ye shall lie in wait against the City, even behind the City; go not very far from the City, but be ye all ready: And I, and all the People that are with me, will approach unto the City; and it shall come to pass, when they come out against us, as at the first, that we will flee before them,* &c. Josh. 8. 3, 4, 5.

XI.

11. The Duties of Subaltern Officers.

The Rules of Military Discipline which relate to other Officers besides the General, and who serve under him, are reduced to those of the Conduct of the General himself, according as they are applicable to the Subaltern Officers, in proportion to their Functions, and to a strict and faithful Observance of the Regulations of their Charges, and of the particular Orders which concern every one in his proper post *y*.

y See the preceding Articles.

XII.

12. The Duty of Soldiers.

As for the Soldiers in particular, the Military Discipline obliges them to apply themselves to the Service which they are bound to by their Engagement. This comprehends the Respect and Obedience which they owe their Officers *z*; as also an Affection for their Persons on all Occasions where it may be in their power to do them any Service, and especially to assist them when they see them in danger *a*; Fidelity in every thing that may require an exact and ready Execution of their Orders, whether it be for a March, for a Retreat, for an Encampment, for a Siege, for an Attack, for a Battle, for being placed in a Guard, or as a Sentinel, or for any other Function of the Service; which they ought to perform with the greatest Chearfulness, with all possible Care, and without Delay *b*; that they should be careful of their Arms, their Clothes, their Horses, for those who are obliged to have Horses *c*; that they should be assiduous in the Service, which they ought never to quit or interrupt without Leave, and then they ought to return when the time of their Leave is expired, unless they have some just Excuse *d*; that they should prefer their Functions in the Service to their own private Concerns, unless they are dispensed with by their Officers *e*. And finally, an exact Observance of the Regulations and Orders which concern them in particular, even to the exposing of their Lives, if the Occasion should require their doing so.

z See the third Article.

a Qui præpositum suum protegere noluerunt, vel deseruerunt, occiso eo, capite puniuntur. *l.* 3. §. *ult. ff. de re milit.*

Qui præpositum suum non protexit, cum posset, in pari causa factori habendus est. Si resistere non potuit, parcendum ei. *l.* 6. §. 8. *eod.*

b Omne delictum est militis quod aliter quam disciplina communis exigit, committitur; veluti segnitiæ crimen, vel contumaciæ, vel desidiæ. *l.* 6. *ff. de re milit.*

c Arma non sine flagitio amittuntur. *l.* 2. §. *ult. de cap. & post. rev.*

Miles qui in bello arma amisit, vel alienavit, capite punitur; humane militiam mutat. *l.* 3. §. 13. *ff. de re milit.*

d Si ad diem commeatus quis non veniat, perinde in eum statuendum est, ac si emansisset, vel deseruisset, pro numero temporis; facta prius copia dicendi, num forte casibus quibusdam detentus sit, propter quos venia dignus videatur. *d. l.* 3. §. 7.

e Milites qui a republica armantur & aluntur, solis debent utilitatibus publicis occupari, nec agrorum cultui, & custodiæ animantium vel mercimoniorum quæstui; sed propriæ muneris insudare militiæ. *l.* 15. *C. de re milit.*

Militares viros, civiles curas arripere prohibemus: aut si aliquam hujusmodi sollicitudinem forte susceperint, & militia statim & privilegiis omnibus denudari decernimus, formidantibus his motum nostræ serenitatis, qui temeritate saluberrimis statutis obviam ire tentaverint. *l.* 16. *eod.*

XIII.

13. Crimes and Offences of the Soldiers.

All these different Rules of the Military Discipline for Soldiers are so very essential, that every thing that is a Violation of any one, even the least of them, ought to be punished with Punishments proportionable to the Crimes and Offences, according to the quality of the Facts and Circumstances. Thus, a Soldier who goes over to the Service of the Enemy, if he is taken, is punished with Death: Thus, a Deserter in the time of War, is also punished with Death, both because of the Quality of the Crime, and because of the Consequence *g*; and Desertion in time of Peace, is punished according to the Consequence thereof: Thus, Desertion from a particular Function, such as the Guard of a Post, or the Station of a Sentinel, or others of the like nature, deserves a Punishment suitable to the Circumstances of the Fact, and the particular Regulations which may have been provided against such Offences *h*. Thus, every

f Is qui ad hostem confugit, & rediit, torquebitur, ad bestiasque vel in furcam damnabitur: quamvis milites nihil eorum patiantur. Et is qui volens transfugere adprehensus est, capite punitur. *l.* 3. §. 10, & 11. *ff. de re milit.*

g Qui in pace deseruit eques gradu pellendus est: pedes militiam mutat. In bello idem admissum capite puniendum est. *l.* 5. §. 1. *ff. de re milit.*

h Qui stationis munus reliquit, plusquam emansor

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every thing that violates the respect due to the Officers, whether it be by some Gesture, or some insolent Language, or otherwise, and all Acts of Disobedience are so many Crimes against the Military Discipline, which deserve to be punished in a manner proportionable to the Disobedience, the Insolence, and the Attempt *i*. Thus, Absence without Leave, the delaying to return after the Time of Leave is expired, without just Cause, deserve their particular Punishments *l*. And Quarrels, Mutiny, Negligence, Carelesness, the Loss of their Arms, and the other Faults, Crimes, or Offences against the Laws of Military Discipline, are punished with Punishments that are in use *m*; and a Soldier is punished even for running away, on an Occasion where his so doing may have given a bad Example to others, and where it was contrary to his Duty *n*.

for est, itaque pro modo delicti, aut castigatur, aut gradu militiæ dejicitur. *l.* 3. §. 5. *eod.*

Si præsidis vel cujusvis præpositi ab excubatione quis desistat, peccatum desertionis subibit. *d. l.* §. 6.

i Irreverens miles non tantum a tribuno vel centurione, sed etiam a principali coercendus est. Nam eum qui centurioni castigare se volenti restiterit, veteres notaverunt. Si vitem tenuit, militiam mutat. Si ex industria fregit, vel manum centurioni intulit, capite punitur. *l.* 13. §. 4. *eod.*

l Qui commeatus spacium excessit, emansoris vel desertoris loco habendus est. Habetur tamen ratio dierum quibus tardius reversus est: item temporis navigationis, vel itineris: & si se probet valetudine impeditum, vel a latronibus detentum, similive casu moram passus, dum non tardius a loco profectum se probet, quam ut occurrere posset intra commeatum, restituendus est. *l.* 14. *eod.*

Si ad diem commeatus quis non veniat, perinde in eum statuendum est, ac si emansisset, vel deseruisset, pro numero temporis facta prius copia docendi num forte quibusdam casibus detentus sit propter quos venia dignus videatur. *l.* 3. §. 7. *eod.*

m See the preceding Articles.

n Qui in acie prior fugam fecit, spectantibus militibus, propter exemplum capite puniendus est. *l.* 6. §. 3. *eod.*

Arma alienasse grave crimen est; & ea culpa desertioni exæquatur, utique si tota alienavit. Sed & si partem eorum, nisi quod interest. Nam si tibiale, vel umerale alienavit, castigari verberibus debet. Si vero loricam, scutum, galeam, gladium, desertori similis est: Tironi in hoc crimine facilius parcetur. Armorumque custodi plerumque ea culpa imputatur, si arma militi commisit non suo tempore. *l.* 14. §. 1. *eod.*

According to the Roman *Law the Crimes of Soldiers were differently punished.* Pœnæ militum hujuscemodi sunt; castigatio, pecuniaria mulcta, munerum indictio, militiæ mutatio, gradus dejectio, ignominiosa missio. Nam in metallum, aut in opus metalli non dabuntur, nec torquentur. *l.* 3. §. 1. *eod.*

XIV.

14. Time of Service.

The Engagements of Officers and Soldiers last during the Time that they ought to serve, and do not cease but by a Discharge, either general, if the Troops are broken or disbanded, or particular, and for some Cause *o*.

o See the following Article.

XV.

15. Three sorts of Discharges.

The particular Discharges of Soldiers are of three sorts, according to three several sorts of Causes. For a Soldier may be discharged after the Time of Service for which he was engaged is elapsed, or because some Infirmity, or other Cause, may excuse him from serving; or by reason of some Crime, or some Offence, for which he may have deserved to be broke, and to be expelled the Army *p*.

p Missionum generales causæ sunt tres: honesta, causaria, ignominiosa. *Honesta*, est quæ tempore militiæ impleto datur. *Causaria*, cum quis vitio animi, vel corporis minus idoneus militiæ renunciatur. *Ignominiosa* causa, est cum quis propter delictum sacramento solvitur. *l.* 13. §. 3. *ff. de re milit.*

There was a very great difference between these three sorts of Discharges; for those who had quitted the Service, missione honesta, *were capable of enjoying the Privileges of Veterans.*

Si solemnibus stipendiis & honeste sacramento solutus es, licet super hujusmodi re instrumenta (ut dicis) facta perdita sint: tamen si aliis evidentibus probationibus veritas ostendi potest, veteranorum privilegia etiam usurpare posse dubium non est. *l.* 7. *C. de fide instrum.*

XVI.

16. Other arbitrary Regulations for the Military Discipline.

Besides these Rules of Military Discipline which have been just now explained, there are other particular and arbitrary Regulations which are different in divers Places, and which in the same States are often varied, according as Experience or other Causes may give occasion for so doing. Thus we see the Orders for the Service often changed, as also those for the Artillery, for Provisions and Forage. And these sorts of Regulations oblige those whom they concern to observe them, and the Officers to look to the Execution thereof, according as the Orders of the Prince may have directed them *q*.

q There is in the Ordinances a great Number of Regulations for the Military Discipline, and even some of those which have been explained in this Section.

See the Ordinance of Henry *the Third at* Fountainbleau, *in the Year* 1553, *Art.* 8, *and* 28. *at* Blois, *Art.* 108. *at* Villiers-Costerests *in* 1570. *Art.* 1. *That of* Charles *the Ninth at* Paris *in* 1533, *Art.* 2. *Of* Charles *the Sixth in* 1413. *Of* Francis *the First in* 1523. *Of* Henry *the Fourth in* 1591, *Art.* 1. *Of* Lewis *the Thirteenth at* Paris, *in* 1616.

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XVII.

17. Officers and Soldiers ought to abstain from all manner of Violence and Extortion.

We must add to all the Duties both of Officers of War and Soldiers, that of a good Use of the Forces which they have in their hands, and of imploying them only for the Execution of their Orders, abstaining from all manner of Violence and Oppression, and contenting themselves with the Allowance appointed them by the Prince *r*.

r Do Violence to no Man, neither accuse any falsly, and be content with your Wages. Luk. 3. 14.
Omne delictum est militis, quod aliter, quam disciplina communis exigit, committitur: veluti segnitiæ crimen, vel contumaciæ, vel desidiæ. *l. 6. ff. de re milit.*

TIT. V.

Of the Publick Revenue; and of the Functions and Duties of those who have any Office or Imployment about it.

The Duty of contributing to the Expences of the State.

SEEING the State forms a Body, of which every one is a Member; and that all the Members of a Body ought to perform their Functions in it, that the Body may subsist in the good Order in which it ought to be for the common Good; it is both necessary and just that all those who compose a State, since they may look upon the Good of the State to be their own proper Good, should also look upon it as their peculiar Duty to do what they ought on their part to contribute to this common Good. And they ought to be moved to a Performance of their Engagements and Duties towards the Publick, not out of fear of the Punishments which those who fail in the Performance of their Duty may deserve; but by an inward Persuasion of Reason and Conscience, as has been observed in another Place *a*.

This Truth, which respects in general all sorts of Duties towards the Publick, comprehends particularly the Duty of those who compose a State, to contribute towards the Expences which the publick Good makes necessary, whether it be for preserving Order in it, or for defending it against its Enemies; since without this Help the State would inevitably perish by Injustices, Violences, Divisions, Seditions; and it would be left as a Prey to its Neighbours, who would take the advantage of its Disorders and Want of Money to invade it.

a See the third Article of the second Section of the first Title.

Several sorts of Expences in a Kingdom.

The Expences of a Kingdom are of several sorts. There are extraordinary Expences in the Time of War: And there are Expences that are always necessary; such as those of the King's Houshold; those for the keeping in repair fortified Places, for maintaining Garisons in them, and other Troops which may be necessary in Time of Peace; those of the Pay of the Officers, and of all those who have publick Salaries, the Charges of Embassies; those for the Repair of Bridges, for the Conveniency and Safety of Navigation, for making Rivers navigable, mending the Highways, and many others.

Two sorts of Funds for these Expences, the Prince's Demesnes, and Taxes levied on the Subject.

For supplying all these Expences of the State, which may be greater or lesser, according to the Times, there are two sorts of Funds: That of the Revenues which are gathered from the several sorts of Taxes and Imposts, which are greater or lesser, according as the Expences may increase or diminish, and which are properly called the Publick Revenue, which shall be treated of under this Title; and that of the Revenues arising from the Prince's Demesne, which shall be the Subject-matter of the following Title.

The Contributions or Taxes for defraying the Expences of the State can be levied only on the Persons who compose it: And as we cannot demand of Persons any more than what may arise from their Goods, comprehending under this word *Goods* all the Estate and Effects which every one hath of whatever sort they be, and in what manner soever he may have acquired them; it is from these Goods and Effects that the whole Supply of the Revenue of a State does proceed. Thus, in order to explain the divers manners in which the Funds of the Publick Revenue are provided for, it behoveth us in the first place to distinguish the several sorts of Goods which may contribute to them; and in the second place to consider the different ways that are taken for levying the said Contributions.

All Goods whatsoever may be divided into two kinds: One of Immoveables, taking in under this kind Ground-Rents, Annuities, and the other sorts of Goods which are of the nature of Immoveables, such as Offices, and many

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ny Rights. And the other of Moveables, or mobiliary Effects, comprehending under this sort of Goods, Gold, Silver, Jewels, Merchandize of all sorts, Credits, the Profits of Industry, and all other Goods which are not Immoveable.

According to this Distinction of these two general kinds, which comprehend all sorts of Goods without exception, there might be three ways of raising out of them the Funds for the Expences of the State, whether they be ordinary or extraordinary. The first, by raising them all out of the Immoveables; the second, by taking them only out of the other sort of Goods; and the third, by laying them partly on the Immoveables, and partly on the Moveables.

Of these three ways, the two first would be unjust. For the Charges of the State respect the Persons; and seeing every one ought to contribute towards them in proportion to his Estate, there would be no manner of reason for laying the said Charges rather on one kind of Goods than the other, and to make the whole Burden to fall on those who should chance to have Goods of that kind which are made subject to the Charge, and to free intirely from the said Charge those whose Goods should happen to be all of another nature.

The third Manner therefore of levying the Funds for the Expences of the State out of both the kinds of Goods, is undoubtedly the most just and the most natural, since it affects all sorts of Goods indifferently, and even those acquired by Industry; so that no body is exempted from it, except those who having neither Goods nor Industry are themselves a Burden to the State, which is forced to provide for their Subsistence. And it is to this third Manner that all sorts of Taxes and Imposts are reduced in general, whether it be under the Name of Land-Tax, Excise, Customs, or others; not so as that every one of these kinds of Taxes is laid on all the kinds of Goods, but they are raised differently, the one upon one kind of Goods, and the others upon the other kind; so that all Persons and all sorts of Goods contribute to the Publick Charges, excepting the Exemptions and Privileges, which shall be explained in the seventh Section.

Three sorts of Imposts. The Imposts or Assessments which are called in *France*, *Le Tailles*, or Land-Tax, are Contributions of certain Sums of Money which are levied yearly in two different manners; the first whereof is in use in most of the Provinces of *France*, and the second in some others. The first is that of Imposts or Assessments which are called Personal, being laid on every Head of a Family, who is assessed according to his Estate, whether it consist in Moveables or Immoveables, or in the Perquisites of his Labour and Industry; which is called a Personal Tax, because it is levied on each Person who is Head of a Family, with regard to all his Goods and Effects without distinction. And the second, which is called a Real Tax, is an Imposition of a certain Tribute or Tax which is levied on every Land and Tenement in proportion to its Revenue, without having any regard to the Possessor of it. And in the Places where this Tribute or Tax is in use, there is another Impost or Assessment which is Personal, being laid on every Head of a Family, for his other Goods besides his Immoveables, and for his Gains by his Labour and Industry. So that whereas in the Provinces of *France* where the Taxes are Personal, each Person is only liable to one single Assessment for all his Goods, and the Gains which he makes by his Labour and Industry. In the other Provinces where the Real Taxes are in use, there are two different Assessments for those who have Immoveables, and other sorts of Goods.

These Real Taxes on Lands and Tenements were in use among the *Romans* b; and it is from them that we have derived the use of Real Taxes in some of the Provinces of *France* which are governed by the *Roman* Law.

Besides these two sorts of Taxes, whether they be Real on Immoveables, or Personal upon Persons, there are other different sorts which are neither laid upon Immoveables, nor upon Persons on account of their Goods, but on certain kinds of mobiliary Effects, such as Salt, Wine, and other Wares and Merchandizes, without any regard to the Persons to whom they belong. These sorts of Duties come under the Denomination of Excise, Customs, and other Names, and are distinguished from the Personal Tax, because that Tax is laid on Persons on account of their Goods and the Gains which they make

b Is, qui agrum in alia civitate habet, in ea civitate profiteri debet in qua ager est. Agri enim tributum in eam civitatem debet levare, in cujus territorio possidetur. *l.* 4. §. 2. *ff. de cens.* V. Tot. h. Tit.

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make by their Industry; whereas these other Impositions are laid on these kinds of Goods without respect to the Persons to whom they may belong. Thus the Duty upon Salt is laid upon that Commodity in such a manner as to restrain private Persons from having it, except for the Price which the King has fixed; and the Commerce and Distribution thereof is committed only to such Persons as the King names for that purpose. Thus the Excise, the Customs, and other Duties are levied on Wines and other Liquors, and on other Wares and Merchandizes which are made liable to the said Duties, and are collected either at the Entry of these sorts of Goods into the Ports, or into the Towns, or in their Passage from one Province to another, or at the time of their Sale, or otherwise, according to the different Regulations made therein.

Besides these several sorts of Imposts, and others of the like kind, there is likewise in *France* another Tax which is called the Tenths, which are a Tax or Imposition laid upon the Revenues of Church Benefices; for the Revenues of the Temporal Goods belonging to Church Benefices ought to contribute towards the Publick Good of the State.

Other kinds of Revenues belonging to the Sovereign.

All these sorts of Taxes or Impositions make up the greatest Part of the Publick Revenue, which is destined for supplying the several Wants of the State. But besides these several Funds, the Sovereign has other Revenues, and other sorts of Rights, such as Forfeitures, Fines, the Successions of Foreigners or Aliens, those of Bastards, and of Persons who die without leaving any Heir behind them, the Right to vacant Goods, and the other casual Revenues; such as in *France* those which the King draws from venal Offices, whether it be by the annual Acknowledgment due from those who are possessed of the Offices charged with such annual Acknowledgment, in order to perpetuate the said Offices in their Family, or by the Forfeiture of the Offices by those who die without having paid that Acknowledgment.

Of all these Kinds of Revenues, we shall treat under this Title, as we have already observed, only of those which are properly called the Publick Revenue, and which are these several sorts of Taxes or Contributions. And we shall explain in the following Title that which relates to the King's Demesne, Goods that are vacant, or which have no Owner, Forfeitures, and those Successions which fall to him for want of Heirs or otherwise. And in treating of all these Matters, we shall confine ourselves to the Rules which have the Characters that have been remarked at the End of the Preface to this Book. So that the Reader must not expect to find here all the several Rules relating to these Matters which are contained in the Ordinances: And there are even some Matters which we shall take no manner of notice of hereafter; as for example, those casual Duties due upon Offices, the Tenths, and other Duties explained in the Ordinances. For these Duties and others are of the same nature with those which shall be explained; and the same Rules which are within the Design of this Book, may be applied to them. And as for the other Rules which regard the Detail of all these Matters, they are to be found in the Ordinances.

It remains only that we set down the Order of the particular Matters treated of under this fifth Title, which we have divided into eight Sections. The first is of the Necessity of Taxes, and of their Kinds. The second, of the laying on in general of the several sorts of Taxes. The third, of the rating or assessing particular Persons. The fourth, of the particular Taxes on Immoveables. The fifth, of Imposts on Wares and Merchandize. The sixth, of the levying and collecting all these sorts of Taxes. The seventh, of the Exemptions from several sorts of Taxes. The eighth, of the Functions and Duties of those who have any Office or Imployment about the Publick Revenue.

We shall not take up time to explain here, nor in any other Part of this Title, the relation which the Taxes that are in use with us may have to those mentioned in the Texts of the *Roman* Law which shall be quoted. This useless Curiosity would exceed the Bounds of the Design of this Book; and it sufficeth to acquaint the Reader, that he ought not so much to study in those Texts to find out the Conformity between our Taxes and those mentioned in the said Texts, as to apply the Rules we gather from them for our Use.

[*The Publick Taxes in* England *are levied by Authority of Parliament, according to the present Occasions and Exigencies of the State. And they are laid upon Lands, and Tenements, and Personal Estates, upon Liquors, and upon most sorts of Wares and Merchandizes, in such manner and in such Proportion as the Wisdom of the Parliament judgeth necessary to supply the Demands which are made by the King for the Publick Service.* See the several Acts of Parliament made in every Session for these purposes.]

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SECT. I.

Of the Necessity of Taxes, and of their Kinds.

The CONTENTS.

1. *The Justice of Taxes.*
2. *The Duty of paying the Taxes.*
3. *Divers sorts of Taxes.*
4. *It is only the Sovereign that can lay on and regulate the Taxes.*
5. *The Publick Expences regard either the whole Kingdom in general, or particular Towns and other Places.*
6. *Contributions for the Expences of Towns ought not to be raised without the Permission of the Sovereign.*

I.

1. The Justice of Taxes.

THE Necessity of Publick Money for the Subsistence of the State in time of Peace and of War, demands Contributions for the raising of the said Money: So that the common Good justifies the laying on and levying of the Taxes which the Occasions of the State render necessary *a*.

a See the twenty third and twenty fourth Articles of the second Section of the second Title.
See the second Book of the Chronicles, *ch.* 10.

II.

2. The Duty of paying the Taxes.

It follows from this Necessity, and from this Justice of Taxes, that all those whom they concern are obliged to pay them as a most lawful Debt, and that they may be constrained to do it by the Ways which the Laws and Usage have established for that End *b*.

b Render unto Cæsar *the things which are Cæsar's, and unto God the things which are God's.* Mat. 22. 21. Mark 12. 17. Luke 20. 25.

Wherefore ye must needs be subject, not only for Wrath, but also for Conscience sake. For, for this Cause pay you Tribute also. For they are God's Ministers attending continually upon this very thing. Render therefore to all their Dues; Tribute to whom Tribute is due, Custom to whom Custom. Rom. 13. 5, 6, 7.

Seeing the Payment of Taxes is a Duty, and that this Duty is an Effect of the Necessity of these publick Aids for the common Good, and of the Justice which imposes the said Charge; we may from thence conclude, that it is a Duty of Conscience. And it is enjoined as such in these Passages of the Gospel and of St. *Paul.* From whence it follows, that it is not lawful to defraud the Publick of the said Duties, and to imbezzle them. For besides that an Injustice is done thereby, either to the Publick, or to those who have farmed the Taxes, it is because of the said Frauds which are so frequent, that the Government in order to prevent them is obliged to use several Precautions which are very chargeable. And these Frauds are likewise unjust by reason of this Effect which they have of encreasing the Publick Expences, which would be much less if every one were faithful to his Duty in paying the Taxes.

The defrauding of the Publick of the Taxes was called a Crime in the *Roman* Law. *Fraudati vectigalis crimen.* l. 8. ff. de publ. & vectig.

III.

3. Divers sorts of Taxes.

It is a Consequence of the Necessity of Taxes, that they should be greater or lesser according to the Occasions and Exigences of the State, and that according to the divers sorts of Goods and Commerces in each Kingdom they should be diversified, and raised differently in proportion to what the Persons and Goods may be able to bear, to the end that each sort of Tax being less, those who are to bear it may be thereby eased. Thus Impositions are laid upon Persons because of their Goods and the Profit which every one may make by his Labour and Industry; and this is called a Tax on Personal Estates. Thus a Tax is laid upon Lands and Tenements, which is called a Tax on Real Estates. Thus divers sorts of Duties are laid upon some sorts of Provisions, such as Salt and Wine; and upon other sorts of Goods and Merchandize: all which come under the Names of Excise, Customs, and other Imposts of divers sorts *c*.

c Munerum civilium quædam sunt patrimonii, alia personarum. *l.* 1. *ff. de muner. & honor.*

Sciendum est quædam esse munera aut personæ aut patrimoniorum. *l.* 6. §. 3. *eod.*

Altho this Text relates to other Charges than Taxes upon Persons, yet they may be comprehended under this Division, and also under the Name of the Taxes which were levied at Rome *by the Head or Poll.* Tributum capitis. *l.* 3. *ff. de censib.*

Divus Vespasianus Cæsarienses colonos fecit, non adjecto ut & juris Italici essent, sed tributum his remisit capitis. *l. ult.* §. 7. *eod.*

As to Taxes upon Land, vid. tot. tit. ff. & C. de censib.

As to Excise, Customs, and other Imposts, vid. tit. ff. de public. & vectig.

Ex præstatione vectigalium nullius omnino nomine quicquam minuatur, quin octavas more solito constitutas omne hominum genus, quod commerciis voluerit interesse dependat; nulla super hoc militarium personarum exceptione facienda. *l.* 7. *C. de vectig. & com. Vid. tit. C. de annon. & Trib. & seq.*

As to the Relation which these Texts have to our Taxes, the Reader may consult the last Remark in the Preamble of this Title.

IV.

4. It is only the Sovereign that can

All the Taxes and Contributions that can be levied in a Kingdom, whether

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lay on and regulate the Taxes.

ther it be upon Persons, or upon Lands and Houses, or upon Provisions and Merchandize, or otherwise, being destined for the Publick Good, and all those upon whom the said Taxes are to be raised being obliged to bear the Burden of them whether they will or not, it is only the Sovereign who having alone the universal Authority of the Government, and the Right of providing for the Publick Order, and for every thing wherein the Good of the Kingdom is concerned, may lay on Taxes and Impositions of all kinds, and regulate the Use of them. And it is he alone who can either establish new Taxes, or augment the old ones, or diminish them, or make any other Alterations in them *d*.

d Vectigalia sine imperatorum præcepto, neque præsidi, neque curatori, neque curiæ constituere, nec præcedentia reformare, & his vel addere vel minuere licet. *l.* 10. *ff. de public. & vectig.*

Omnes pensitare debebunt, quæ manus nostræ delegationibus adscribuntur, nihil amplius exigendi vel remittendi potestatem esse; nam si quis vicarius, aut rector provinciæ aliquid jam cuiquam crediderit remittendum, quod alii remiserit de propriis dare facultatibus compelletur. *l.* 4. *C. de annon. & trib.*

[*It has been already observed, that in* Great Britain *no Taxes are imposed or levied on the Subjects but by and with the Consent of Parliament.* See the Remark on the twenty fourth Article of the second Section of the second Title of this Book.]

V.

5. The publick Expences regard either the whole Kingdom in general, or particular Towns and other Places.

The Publick Order and the common Good of a Kingdom demand two sorts of Expences; the first is of those which concern the whole Kingdom in general, such as the Expences of a War, those for subsisting Garisons and other Troops in time of Peace, the Expences for the Prince's Houshold, those for the Salaries of the Officers, and many others: And the second is of the Expences which are necessary for the Government of every particular Town and other Places, such as paving the Streets, the keeping in repair the Fountains, the Town-Halls and other publick Edifices, and for their other Charges. It is because of these two sorts of Expences that it is usual to have two sorts of Publick Money. One is of the Money that is destined for the Expences which concern the whole Kingdom in general, and of which the Sovereign orders the Disposal and Application; and this Money is collected and received by Officers whom the Prince names for that purpose. And the other is of the Money allotted for the Expences of Towns, which does not enter into the Coffers of the Prince, but is received by Persons to whom the Communities of Towns and other Places commit that Trust *e*.

e See the following Article.

VI.

6. Contributions for the Expences of Towns ought not to be raised without the Permission of the Sovereign.

Altho these Impositions of Money necessary for the Expences of Towns, and other Places, seem not to concern the State, and that one may think that those Corporations might regulate the said Impositions, and levy the said Money without leave from the Prince, yet nevertheless it is necessary to have his leave; and they cannot raise any greater Sum for the said Expences than what he allows. For besides the Abuses that are to be feared on the part of those who should lay on these Impositions; it is certain that otherwise they are of great Importance to the State, upon two Considerations: One is, that the good Order of the State depends on that of the Towns and other Places; and the other, that it concerns the State that those Expences be regulated in such a manner, as that they do not hinder the raising of the Taxes which the Inhabitants of the Towns and other Places are bound to pay to the Publick. And it is by reason of this Necessity of having leave from the Sovereign to levy these sorts of Impositions, that they are called in *France* Imposts by Letters of Licence from the Prince; whither they be laid on by way of Capitation or Poll-Tax, that is, so much on every Head, or by other Ways, according as the Prince gives leave *f*.

f Non quidem temere permittenda est novorum vectigalium exactio: sed si adeo tenuis est patria tua, ut extraordinario auxilio juvari debeat, allega præsidi provinciæ, quæ in libellum contulisti, qui re diligenter inspecta, utilitatem communem intuitus, scribet nobis quæ compererit: & an habenda sit ratio vestri, & quatenus existimabimus. *l.* 1. *C. vectig. nov. inst. non posse.*

See the fourth Article.

SECT. II.

Of the laying on in general of the several sorts of Taxes.

The CONTENTS.

1. *The Manner of laying on the Taxes is different according to the Nature of the Tax.*
2. *Three kinds of Taxes.*
3. *The first kind of Taxes is that on the Personal Estate.*
4. *Second kind, Taxes on the Real Estate.*
5. *Third kind, Imposts upon Provisions and Merchandize.*

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6. *The Manner of laying on the Tax on Personal Estates.*
7. *The Manner of laying on the Tax on Real Estates.*
8. *The Duties on Goods and Merchandizes are laid on by Regulations, which fix how much each sort is to pay.*
9. *The Tax on Personal Estates is liable to Changes.*
10. *As is also the Tax on Real Estates.*
11. *The Imposts on Wares and Merchandizes are fixed.*
12. *The Revenue of the Prince arising from the Customs laid on Goods and Merchandize may rise or fall, but the Produce of the Tax on Real and Personal Estates is always certain.*
13. *The yearly Produce of the Excise and Customs cannot be fixed at any certain precise Sum.*
14. *All these Taxes do respect both Persons and Things directly or indirectly.*

I.

1. The Manner of laying on the Taxes is different according to the Nature of the Tax.

THE Manner of laying on the Publick Taxes is different, according to the different Nature of the Taxes *a*, which shall be distinguished in the Article that follows.

a See the following Article.

II.

2. Three kinds of Taxes.

The Taxes are of three sorts, as hath been already observed *b*. Those which are levied upon Persons on account of their Goods, moveable and immoveable, and of the Profits which they make by their Labour and Industry. Those which are raised upon Immoveables, without respect to the Persons. And those which are gathered from mobiliary things on which Duties have been laid, and which Duties are collected either in the Passage of those things from Place to Place, or in the Commerce of them, or otherwise, without regard to the Persons to whom they may belong. And for these three sorts of Taxes there are three Manners of laying them on, which shall be explained in the Articles that follow.

b See the third Article of the preceding Section, and the Preamble of this Title.

III.

3. The first kind of Taxes is that on the Personal Estate.

The first sort of Taxes is that which is called Personal, by which Persons are assessed in a certain Sum in proportion to their Goods, and to what they acquire by their Labour and Industry *c*; which shall be the subject Matter of the third Section.

c Tributum capitis. *l. 3. ff. de cens.*
Divus Vespasianus Cæsarienses colonos fecit, non adjecto, ut & juris Italici essent, sed tributum his remisit capitis. *l. ult. §. 7. eod.*

IV.

4. Second kind, Taxes on the Real Estate.

The second sort of Taxes is that which is raised on Immoveables, and is called a Real Tax, being laid on each Land and Tenement *d*; and which shall be explained in the fourth Section.

d V. tot. tit. ff. de censib.
Omne territorium censeatur. *l. 4. C. eod.*
See the first Article of the fourth Section of this Title.

V.

5. Third kind, Imposts upon Provisions and Merchandize.

The third sort is that of the Duties or Imposts which are levied on certain Provisions and Merchandize which the Laws have made subject thereto *e*, which shall be the subject Matter of the fifth Section.

e Omnium rerum ac personarum, quæ privatam degunt vitam, in publicis functionibus æqua debet esse inspectio. Hoc ideo dicimus quia nonnulli privatorum elicitas suffragio proferunt sanctiones, quibus vectigalia vel cætera hujusmodi, quæ inferri fisco moris est sibi adserant esse concessa. Si quis ergo privatorum hujusmodi rescriptione nitatur, cassa eadem sit. Vectigalium enim non parva functio est, quæ debet ab omnibus, qui negotiationis seu transferendarum mercium habent curam, æqua ratione dependi. *l. 6. C. de vectig. & comm. V. T. h. T. V. T. ff. de public. & vectig.*

VI.

6. The Manner of laying on the Tax on Personal Estates.

The Tax on Personal Estates in *France* is laid on after this manner: First the King by an Order in writing regulates for every Year the Sum which he intends should be raised throughout the whole Kingdom. And that Sum being divided among the Provinces, the Towns, and the other Places, the several Inhabitants of each Place are rated and assessed for the Share which they are to bear of the same *f*.

f See the fourth Article of the first Section, and the third Section.
This Tax is laid on in France, *first by an Order of the King whereby he regulates the Sum Total of the Tax; and then it is divided among the Generalities, the Officers whereof, who are the Treasurers of* France, *make a second Distribution thereof among the Elections, who make a third Division thereof, by which it is fixed and adjusted what Proportion of the said Tax is to be paid by each respective Town and other Place, where the Persons appointed to make the particular Assessments make up Rolls or Lists, wherein each particular Person is rated for what he ought to pay in proportion to his Goods, and the Gains he makes by his Industry.*

[The Manner of laying on and levying the Publick Taxes in *Great Britain* is thus: The King lays before the House of Commons Estimates of the several sorts of Expences which are judged to be necessary for the Service of the current Year. And the Commons

Commons having voted the necessary Subsidy or Aid to his Majesty for defraying the said Expences, they then consider of proper Ways and Means to raise the Sums granted with the greatest Ease and Equality to all his Majesty's Subjects, partly by a Tax upon Lands and Tenements and Personal Estates, and partly by an Excise upon Liquors, and by Customs and Duties laid on Goods and Merchandize, and by other Ways, as they in their great Wisdom judge to be meet and proper. Which Aids and Subsidies being settled and adjusted by the Commons, and approved of by the Lords, have afterwards the Royal Assent, and thereby become Acts of Parliament, and are binding on all the Subjects.

In the Act of Parliament which grants an Aid to his Majesty by a Land-Tax, there is a certain Sum fixed by Parliament, which is to be raised on Lands and Tenements, and Personal Estates throughout the whole Kingdom of *Great Britain*, according to the Proportions and in the manner prescribed by the said Act. Which Act specifies the particular Sums that are to be raised in each County, City, Town, or other Place within the Kingdom, and the Proportion that is to be laid on the respective Lands, and Tenements, and Personal Estates of the Inhabitants of the said Counties, Cities, Towns, and other Places. And in the said Act Commissioners are named and appointed for the respective Counties, Cities, Towns, Boroughs and other Places throughout the Kingdom, for the better assessing, ordering, levying, and collecting of the several Sums of Money so limited and appointed to be raised. Which Commissioners are directed to ascertain and set down in writing the several Proportions which ought to be charged upon every Hundred, Lathe, Wapentake, Rape, Ward, or other Division, for and towards the raising and making up the whole Sum charged upon the whole County, City, or other Place, for which they are appointed Commissioners. And the said Commissioners have power to name Assessors for each Parish, Township, or Place within the respective Divisions, who are to rate and assess the several Inhabitants of the Parish, Township, or Place for which they are appointed Assessors. And the said Commissioners do likewise appoint Collectors for each Parish, Township or Place within their respective Divisions, who are to collect and levy the Monies which are assessed, and to pay the same into the hands of the Receiver General, who is to pay the said Monies into the Exchequer. *Coke* 4. *Inst. ch.* 1. *See the several Acts of Parliament for the Land Tax.*]

VII.

7. The Manner of laying on the Tax on Real Estates.

The Tax on Real Estates in *France* is laid on in the same manner in each Province, and in each Town, and in every one of the other Places where it is in use, in proportion to what all the Lands and Tenements situate within any Division ought to pay of the Tax that is laid upon the whole Kingdom. And the Officers who are named for that purpose do rate and assess each particular Land or Tenement in proportion to the Rent which they yield *g*.

g See the fourth Section.

VIII.

8. The Duties on Goods and Merchandizes are laid on by Regulations, which fix how much each sort is to pay.

The Duties on Goods and Merchandizes are imposed in *France* by Regulations which fix the Sum that each kind of Goods is to pay, and which is to be levied in proportion to the Value of the things, which are estimated according to their Nature, either by Number, Weight, or Measure. These Duties are settled and adjusted by the means of Tariffs, or Books of Rates, which contain the Tax or Impost that is laid on each sort of the things that are taxed *h*.

h See the fifth Section.

IX.

9. The Tax on Personal Estates is liable to Changes.

It is to be observed concerning the Tax on Personal Estates, that it is subject to two sorts of Changes. One on the part of the Prince who may make the Tax greater or lesser; and the other on the part of those who are to pay it, because of the Events which may encrease or diminish the Fruits of the Ground in the respective Parishes, and the Goods of particular Persons, and even the Number of the Inhabitants of a Place; which occasions the augmenting or dimishing the Sums that are allotted to be levied on the respective Places, and the Assessments of particular Persons *i*.

i See the fifth Article of the third Section.

X.

10. As is also the Tax on Real Estates.

The Tax upon Lands and Tenements may likewise receive Changes, either by reason of the Augmentation or Diminution of the general Tax, or because of the Loss which the Lands may have sustained by an Inundation, or by other Accidents, or because of Augmentations or Diminutions that may happen to every Estate; as if one plants in it, or builds on it, or if some Inundation or other Accident renders it barren, or destroys some Portion of it *l*.

l Illam æquitatem debet admittere censitor, ut officio ejus congruat, relevari eum, qui in publicis tabulis delato modo frui certis ex causis non possit; quare, & si agri portio chasmate perierit, debebit per censitorem relevari. Si vites mortuæ sint, vel arbores aruerint; iniquum, eum numerum inseri censui.

Quod si exciderit arbores, vel vites; nihilominus eum numerum profiteri jubetur, qui fuit census tempore, nisi causam excidendi censitori probabit. *l.* 4. §. 1. *ff. de censib.*

See the fifth and seventh Articles of the fourth Section.

XI.

11. The Imposts on Wares and Merchandizes are fixed.

The Impositions on Wares and Merchandizes in *France* receive no other Augmentations or Diminutions, besides those which the Prince makes, by Regulations which either raise or lower the Duties

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Duties on the respective kinds of Goods, or on some of them. For whereas the Tax upon the personal Estates, and Lands belonging to particular Persons may be greater or lesser, altho the general Tax continue the same, because of the Changes which have been mentioned in the two preceding Articles; yet the Taxes on Wares and Merchandizes being laid not on any one Thing in particular, but in general on the Kind in proportion to the Number, Weight, and Measure, the said Tax cannot be changed except by a general and universal Change, which augments the Duty, or diminishes it *m*.

m This is an effect of the Nature of these sorts of Impositions, each Thing being estimated on a certain foot in order to fix the Duty, which it would neither be just nor possible to raise or lower, in proportion to the different Estimations that might be made of the several Things of one and the same kind.

XII.

12. The Revenue of the Prince arising from the Customs laid on Goods and Merchandize, may rise or fall; but the Produce of the Tax on real and personal Estates is always certain.

It follows from these Differences between these several sorts of Impositions, that, with respect to the Prince, the Changes which may happen in the Taxes on real and personal Estates, do neither augment nor diminish the Sum that is to be paid into the Prince's Coffers. For the Sum Total which he has directed to be raised by the said Tax throughout the whole Kingdom is to be levied; and the Changes respect only the particular Persons, and the Lands and Tenements which are to contribute towards the general Tax, and which may be divided among them unequally, according as the said Changes may give occasion thereto. But as for the Duties and Impositions on Wares and Merchandizes, there may happen, and there does likewise often happen, many Changes which augment or diminish the Income of that Branch of the Revenue, altho the Duty on each kind of Goods continues to be the same. For the Commerce of a Merchandize may increase or diminish: There may likewise be a greater or less Consumption of the Things subject to the said Duties: Some of them may grow rarer, or it may happen that some sort of Merchandize is not any more imported into a Kingdom where it was formerly in use *n*.

n This a Consequence of the preceding Articles.

XIII.

13. The yearly produce of the Excise and Customs cannot be fixed at any certain precise Sum.

It follows from the same Differences between these several Impositions, that whereas in the Taxes on personal Estates, and upon Lands and Tenements in *France*, the Prince may fix a certain Sum to be raised thereby throughout the Kingdom; he cannot fix in the same manner the Sum to be raised by Duties or Impositions on Wares and Merchandizes; seeing every Year there may happen Changes which make it impossible to fix the Produce of that Branch of the Revenue at any certain precise Sum. And it is for this Reason that these sorts of Taxes are farmed out either by Cant or Auction, or by Contract with particular Persons, to whom the King assigns over his Right in consideration of a certain Sum of Money *o*. And he might likewise let out to Farmers the Tax on real and personal Estates, according as the Circumstances of the Times, and the Conditions of the Contract may make that Method more advantageous than levying the Tax by the hands of the Officers who are appointed for that Service.

o Publicani dicuntur qui publica vectigalia habent conducta. *l.* 12. §. *ult. ff. de publ. & vectigal.*

Publicani autem sunt, qui publico fruuntur. Nam inde nomen habent, sive fisco vectigal pendant, vel tributum consequantur: & omnes qui quid a fisco conducunt, recte appellantur publicani. *l.* 1. §. 1. *eod.*

XIV.

14. All these Taxes do respect both Persons and Things directly or indirectly.

Altho all these sorts of Impositions of the said several Taxes have a direct relation either barely to Persons, or barely to Things; yet there is not any one of them which does not affect the Things, and also oblige the Persons. Thus, the Tax on the real Estate regards those who are the Proprietors or Possessors of the Lands and Tenements, or who reap the Profits of them, altho the Tax does not particularly mention them. Thus, the Duties and Imposts on Goods and Merchandizes respect those who are the Owners of them, altho they be not named, nor known. Thus, the Tax on personal Estates affects the Goods of the Persons who are assessed, altho the Assessments do not make any mention of their Goods *p*.

p This is a Consequence of the preceding Articles.

SECT.

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The Rule of this Text may be applied to the Tax on personal Estates, and it is usually applied to it.

SECT. III.

Of the Assessments of particular Persons for their Personal Estates.

The CONTENTS.

1. *The Tax for Personal Estate is imposed on the Head of the Family.*
2. *Widows and unmarried Women may be assessed.*
3. *Children who are emancipated, altho they be not married, are assessed.*
4. *The Assessments ought to be in proportion to the Goods.*
5. *In assessing the Goods, the Charges ought to be deducted.*
6. *Every one is assessed in the place of his Abode.*
7. *Assessments made in the place of one's Abode, take in the personal Estate which they have elsewhere.*
8. *Equity to be observed in Assessments.*
9. *The Assessments of particular Persons are made by the Assessors.*
10. *The Assessors cannot exempt themselves.*
11. *Assessments of Offices.*
12. *One may apply for a Mitigation of their Assessment.*
13. *The Effect of the Mitigation.*
14. *Another way of obtaining a Mitigation of one's Assessment.*

I.

1. The Tax for personal Estate is imposed on the Head of the Family.

THE Taxes which respect personal Estates are imposed in each Town, and in each Place, not upon every individual Person in particular, as upon every one of those who compose a Family; but upon every Head of a Family, in proportion to his Goods and his Acquisitions by his Industry. For it is because of their Goods and Industry that particular Persons are assessed *a.*

a See the third Article of the first Section.

II.

2. Widows and unmarried Women may be assessed.

Widows and unmarried Women, who are Heads of a Family, may be assessed as well as Men, but not Women who are married; for their Husbands are assessed for their own Goods, and also for the Goods of their Wives. But Wives who have a Separation of Goods may be assessed: for since they enjoy their Goods independently of their Husbands, they ought also to bear this Burden. *b.*

b Patrimoniorum munera mulieres etiam sustinere debent. *l. 9. C. de muner. patr.*

III.

3. Children who are emancipated, altho they be not married, are assessed.

When Children are emancipated, whether they have Children of their own, or whether they have none, and whether they be married or not, they are assessed, if they have any Goods, or any Acquisitions by their Industry. For the Emancipation makes them Heads of a Family *c.*

c This is a Consequence of the first Article.

IV.

4. The Assessments ought to be in proportion to the Goods.

The Assessments of every Family are laid upon him who is Head of it, according to the Share which he ought to bear of the Sum that is to be levied on the Place of his Abode, in proportion to his Goods, and to the Goods of the other Families inhabiting the same place, so as that the Strong may help out the Weak. So that according to the greater or lesser Value of the Goods of each Family, their Assessments ought to be greater or lesser *d.*

d Ita ut relevato onere rei quod imminet fatigatis, translatio in eos qui integris viribus florent, & adscriptio tributorum æqua lance dividatur. *l. 10. C. de fund. patrim.*

The Reader must not forget, as to the Quotations of Texts out of the Roman Law, *in relation to this Matter, the last Remark made in the Preamble to this Title.*

V.

5. In assessing the Goods, the Charges ought to be deducted.

Seeing the Assessments ought to be made on the foot of the Goods, and of the Acquisitions by Industry, and that every one has more or less Income from his Estate, and Profit by his Industry, in proportion to the Charges of his Condition, the Number of his Children, the Debts which he owes, the Losses which he may have sustained, and other Causes which may lessen and diminish the clear Profit which he might otherwise make by the Income of his Estate, and by his Industry: The Assessments for personal Estates ought to be made in proportion to the Goods, in such a manner, as to join to this Proportion that of the Conditions of the Persons, of the Debts which they owe, and of their other Charges, that every one may be assessed in that Sum which these Proportions joined together may demand. And as there happen every Year divers Changes in the Estates of Families, and in their Charges, and that likewise the Tax may

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may be raised or diminished, for this reason the Assessments are renewed every Year *e*.

e This is a Consequence of the preceding Article.

VI.

6. Every one is assessed in the place of his Abode.

Since Assessments for personal Estates respect directly the Persons without mention of their Goods, altho they are to be made in consideration of their Goods; every one is assessed in the Place of his Abode, and not in the Places where their Goods may chance to be situated *f*.

f Intributiones quæ agris fiunt, vel ædificiis, possessoribus indicuntur: munera vero quæ patrimoniorum habentur, non aliis quam municipibus vel incolis. *l. 6. §. ult. ff. de muner. & hon.*

Originis ratione, ac domicilii voluntate ad munera civilia quemque vocari, certissimum est. *l. 6. C. de inc. & ubi quisque.*

Altho these Texts have relation to other sorts of Charges, yet they may be applied to Taxes.

VII.

7. Assessments made in the place of one's Abode take in the personal Estate which they have elsewhere.

Altho Assessments on account of personal Estates express only the Persons who are assessed, without making any mention of their Goods, yet it is for their whole personal Estate that the Assessment is made: and the same is regulated in proportion not only to the Goods which they have in the place of their Abode, but also those which they have elsewhere, excepting the Immoveables which they may chance to have in another place, which is subject to the Tax on real Estates; for these Goods bear their Charge in the Places where they are situated *g*.

g This is a Consequence of the preceding Articles.

VIII.

8. Equity to be observed in Assessments.

In order to settle the foot on which the Assessments for personal Estates are to be made, it behoveth to begin by taking out of the Number of those who are to contribute, such as have any one of the Exemptions which shall be explained in the seventh Section, and then to distribute the Sum which is to be raised in the Place among all the rest of the Inhabitants of the same, in proportion to the Share which every one ought to bear thereof, according as it is greater or lesser, and as every one has more or less Goods, and Profits by his Industry *h*.

h See the fourth Article.

IX.

9. The Assessments of particular Persons are made by the Assessors.

Seeing the Assessment of Persons for personal Estates ought to be made with that Equity which is due to the several Regards that ought to be had to the Conditions, the Goods and Acquisitions of the Persons, and to their Charges, it cannot be rightly made but by Persons who have a thorough knowledge of the Condition of the Families which are to be assessed. Thus, in order to make this Assessment, choice is made of the Inhabitants of the same Place, and of different Conditions, who are named every Year; and the Name of Assessors is given to the Persons to whom this Function is committed *i*.

i Nec inspectio, nec peræquatio fiat aliter quam ex scripta jussione principis. *l. ult. C. de ann. & trib.*

This Text may be applied to the Imposition of Taxes, which are laid on pursuant to the Regulations for that purpose by Persons who are called Assessors, and who are chosen by the Inhabitants of the respective Parishes, as having knowledge of the Estates and Charges of those who are to be assessed.

X.

10. The Assessors cannot exempt themselves

The Assessors cannot be Judges in their own Cause; and therefore their Assessment remains on the same foot as it was before their Nomination: And they cannot ease themselves of their former Assessment, except in so far as the Tax is lessened with respect to all the Inhabitants in general. But if they have cause to shew why they ought be eased in their Assessment, they may alledge the same before the proper Judges, in order to have a Redress therein, in the same manner as in the exorbitant Assessments of other particular Persons, as shall be shewn in the twelfth Article. Neither can they discharge or ease their Wives, their Children, or other Relations *l*.

l Generali lege decernimus neminem sibi esse judicem, vel jus sibi dicere debere: in re enim propria iniquum admodum est alicui licentiam tribuere sententiæ. *l. un. C. ne quis in sua causa jud.*

Qui jurisdictioni præest, neque sibi jus dicere debet, neque uxori, vel liberis suis, neque libertinis, vel cæteris quos secum habet. *l. 10. ff. de jurisdic.*

It is the same thing as to Assessors; for it is a kind of Judgment which they render in settling the Assessments.

See the ninth Article of the eighth Section.

XI.

11. Assessments of Offices.

Since it frequently happens in little Places, that there are some Inhabitants thereof

thereof, who by virtue of their Offices and their great Estates take so much Authority upon them, as that the Assessors dare not assess them in the just proportion which they ought to bear; this Abuse is remedied by making Application to the proper Judges of such Cases, who regulate their Assessments; for which reason they are called Assessments of Office, because they are made independently of the Function of the Assessors, and by the Office of the Judges who are to take cognizance of the said Matters, and to assess those Persons upon a just and equitable foot with their Neighbours *m*.

m See the Text cited on the following Article.

It is both just and necessary to supply by this means the Injustice and the Weakness of the Assessors, who favour these sorts of Persons to the prejudice of others.

Peræquatores ac discussores si incurrerint culpam negligentiæ vel gratiæ, non solum bonorum jacturam, verum etiam annonarum in quadruplum mulctam subire debebunt: ea vero, quæ in damnum provincialium fuerint accepisse convicti, in quadruplum cogentur exolvere. *l. 6. C. de censib. & cens.*

See the fourth Article of the Regulation of the Tax on real and personal Estates for the Year 1600.

XII.

12. One may apply for a Mitigation of their Assessment.

If the particular Persons who are assessed complain that their Assessment is excessive, and desire that it may be moderated, whether it be that the Assessors refuse to do them Justice, or that the Value of their Estates, and the greatness of their Charges was not sufficiently known, or that they have sustained Losses; they may sue for Redress before the proper Judges against those who represent the Community, whether they be Sheriffs, Consuls, or others. And in order to judge of their Demand for a mitigation of their Assessments, the Officers whose business it is to hear and determine all such Complaints, name Persons who are called skilful Persons, or Arbitrators, whom the Parties on both sides agree to, or whom the Judges name of their own accord, pursuant to the Rules which shall be explained in their proper place. And the said Arbitrators, after having examined the Roll of the Assessments, the Circumstances of the Plaintiff, as to the Income of his Estate, and the Charges with which the same is burdened, and the other Writings produced by the respective Parties, regulate the Assessment complained of, and may either confirm it, or mitigate it, as they shall judge reasonable *n*.

n Quoniam tabularii civitatum per collusionem potentiorum sarcinam ad inferiores transferunt, jubemus, ut quisquis se gravatum probaverit, suam tantum pristinam professionem agnoscat. *l. 1. C. de censib. & censitor.*

XIII.

13. The Effect of the Mitigation.

The Defalcation which he who complained of his Assessment may obtain, will not excuse him from paying the Sum he is assessed at provisionally; for it is necessary that the whole Sum which is laid upon the Place, be levied without any diminution *o*. But care is taken to do him Justice afterwards in the following Years.

o This is an Effect of the Privilege of Monies granted for the Use of the Publick.

[The Act for the Land-Tax in *England* impowers the Commissioners, upon Complaint made to them, to abate and lessen the Assessments for that Year, and does not postpone the granting Relief to the subsequent Year.]

XIV.

14. Another way of obtaining a Mitigation of one's Assessment.

Besides this way of making a Complaint in general terms of their being over-rated in the Assessment, there is another way, which is called Comparison; by which the Party who complains is obliged to name some Person among those who are assessed with him, whom he alledges to be under-rated, and upon whom he desires that the Overplus of his Assessment may be laid. So that it is between them two that the Question is to be decided, what share each of them ought to pay of the Sum which their two Assessments amount to *p*.

p Qui gravatos se esse a peræquatoribus conqueruntur, & injusto oneri impares esse proclamant, competitionis habeant facultatem: ut quid remissum gratia, quidve interceptum fuerit fraude convincant, & ex eo levamen accipiant, quod per deformia & criminosa commercia sibi impositum esse deplorant, ut aliis demeretur. *l. 5. C. de censib. & censitor.*

Ut quod ei fuerat superfusum ille cognoscat quem debitæ functioni fraus clandestina subtraxerat. *d. l.*

This way of Comparison would not be attended with any Inconveniencies, if it were circumscribed to that of leaving him who complains of his Assessment, at liberty to produce Instances of other Persons who are assessed at a much less Sum than he is, in proportion to their Estates; which is the Method when a Complaint is received in general terms. But when one singles out another Person, in order to have a part of his Assessment thrown upon him, this way may indeed be useful to the Publick, but is attended with this bad Consequence, that it is often an occasion of Quarrels and Enmities among Neighbours.

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SECT. IV.

Of Taxes on Immoveables.

The CONTENTS.

1. *In what manner the Tax on Real Estates is laid on.*
2. *This Tax is imposed in the Places where the Lands and Tenements are situated.*
3. *The Form of the Imposition.*
4. *In what manner the Taxes on Lands and Tenements oblige the Persons.*
5. *The Tax on each Land or Tenement may be raised or lessened according to the Changes that happen to the said Land or Tenement.*
6. *The Rate at which a Land or Tenement is assessed, is independent of the other Goods of the Proprietor or Possessor thereof.*
7. *The Tax which is lost upon one Estate is cast upon the others.*
8. *The Duty of those who make the Assessments for the Land Tax to inform themselves of the Changes.*
9. *The whole Estate is liable for the whole Tax.*
10. *One may apply for a Diminution of their Assessment in the Land Tax.*

I.

1. In what manner the Tax on Real Estates is laid on.

THE Taxes on Immoveables, which are called Taxes on the Real Estate, are imposed in the Places where the said Tax is received on each Estate, in proportion to what the Revenue which they yield is able to bear of the Sum Total that is to be levied on all the Lands and Houses of that Place, estimating them all according as their Revenue is more or less considerable *a*.

a Omne territorium censeatur. *l. 4. C. de censib. & censit.*
Ut sterilia atque erema his quæ culta vel opima sunt compensentur. *D. l.*

II.

2. This Tax is imposed in the Places where the Lands and Tenements are situated.

The Taxes on Lands and Tenements are laid on in the Places where the Lands and Tenements are situated, and not in the Places where the Persons to whom they belong inhabit. For they are imposed on the Lands and Tenements themselves which are subject to the said Tax, without any regard to the Persons, whether they be Proprietors or Possessors thereof *b*.

b Is qui agrum in alia civitate habet, in ea civitate profiteri debet, in qua ager est. Agri enim tributum in eam civitatem debet levari in cujus territorio possidetur. *l. 4. §. 2. ff. de censib.*

III.

3. The Form of the Imposition.

The Imposition on each Land or Tenement is distinguished by the Nature of the Land or Tenement, by its Situation, by its Extent, and by its Confines *c*.

c Forma censuali cavetur, ut agri sic in censum referantur nomen fundi cujusque, & in qua civitate & quo pago sit, & quos duos vicinos proximos habeat. *l. 4. ff. de censibus.*
Quot jugerum sit. *D. l.*

IV.

4. In what manner the Taxes on Lands and Tenements oblige the Persons.

Altho the Taxes on Lands and Tenements do directly affect only each Land and Tenement that is subject thereto; yet seeing the said Tax ought to be taken out of the Revenues thereof, the Charge of it follows those who have enjoyed the Fruits, and received the Rents. Thus the Proprietors, the Possessors, the Mortgagees, the Usufructuaries and their Tenants, and others who may have enjoyed by other Titles, ought to pay these Taxes. And altho the Fruits themselves be no more in being, yet the other Goods of the said Persons ought to answer for them *d*.

d In tributiones quæ agris fiunt, vel ædificiis, possessoribus indicuntur. *l. 6. §. ult. ff. de mun. & honor.*

V.

5. The Tax on each Land or Tenement may be raised or lessen'd according to the Changes that happen to the said Land or Tenement.

Seeing the Tax on each Land or Tenement ought to be imposed on the foot of the Revenue that it may yield, it may be either raised or lessened in proportion to the Augmentation or Diminution which may happen in the Revenue. Thus the Revenue of an empty Space of Ground in a Town may be augmented by building a House or Shop upon it. Thus a Country Farm may be improved by making a Plantation or other Improvement in it. Thus, on the contrary, Lands and Tenements may perish or be diminished, as a House by Fire or by Decay; a Ground may be carried away either in whole or in part by a Flood. And in all these Cases, and others of the like nature, the Tax may be either augmented or diminished in proportion, and may even cease entirely if the Land or House perishes *e*.

e Quisquis vitem succiderit aut feracium ramorum fœtus vetaverit, quo declinet fidem censuum, & mentiatur callidæ paupertatis ingenium, mox defectus competenti indignationi subjiciatur. *l. 2. C. de censib.*

Illam

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Illam æquitatem debet admittere censitor, ut officio ejus congruat relevari eum qui in publicis tabulis delato modo frui certis ex causis non possit. Quare & si agri portio chasmate perierit, debebit per censitorem relevari. Si vites mortuæ sint, vel arbores aruerint, iniquum, eum numerum inseri censui. Quod si exciderit arbores vel vites, nihilominus eum numerum profiteri jubetur qui fuit census tempore, nisi causam excidendi censitori probabit. *l.* 4. §. 1. *ff. eod.*

See the tenth Article of the second Section.

VI.

6. The Rate at which a Land or Tenement is assessed, is independent of the other Goods of the Proprietor or Possessor thereof.

The particular Impositions on each Land or Tenement are independent of all manner of regard for those who are the Proprietors or Possessors of them. And whether they be rich or poor, the Lands and Houses are assessed on the same foot. For it is on the Lands and Houses, and in proportion to the Rent which they may yield, that this Burden ought to be laid, without regard to any thing else *f*.

f Onus fructuum hæc impendia sunt. *l.* 13. *ff. de imp. in res dot. fact.*

Indictiones non personis sed rebus indici solent: ideo ne ultra modum earumdem possessionum quas possidet conveniaris præses provinciæ prospiciat. *l.* 3. *C. de annon. & trib.*

VII.

7. The Tax which is lost upon one Estate is cast upon the others.

In order to settle the Proportion that each Land or Tenement is to pay, it is necessary to leave out of the Number of the Lands and Tenements of the Places where the Tax is to be levied, those which may happen not to be subject to it, as also those which have perished, or are become unfruitful by an Inundation, or other Accident, and to distribute the Tax among the others *g*.

g Cum divus Aurelianus parens noster civitatum ordines pro desertis possessionibus jusserit conveniri, & pro his fundis qui Dominos invenire non potuerunt, quos præceperamus earumdem possessionum triennii immunitate percepta de solemnibus satisfacere, servato hoc tenore præcipimus, ut si constiterit ad suscipiendas easdem possessiones ordines minus idoneos esse; eorumdem agrorum onera possessionibus & territoriis dividantur. *l.* 1. *C. de omn. agr. desert.*

VIII.

8. The Duty of those who make the Assessments for the Land Tax to inform themselves of the Changes.

Altho there be no Change in the general Imposition of the Land-Tax that is to be raised in any Place or Division, yet since the particular Assessments of the several Lands and Houses may be encreased or lessened on account of the Changes explained in the fifth and seventh Articles, and that the Augmentation or Diminution of the Assessment of one particular Land or House diminishes or angments the Assessments of some others; it is the Duty of those who are entrusted with the Regulation of the said Assessments, to inform themselves of these Changes *h*.

h See the fifth and seventh Articles of this Section.

IX.

9. The whole Estate is liable for the whole Tax.

If an Estate which is subject to the Land Tax, and comprehended under one single Assessment in the Distribution of the Sum that is to be raised in the Place where it lies, happens to be divided either among Coheirs, or by an Alienation of one part of it, or by some other means; each Portion of the said Estate would be liable for the whole Sum that the said Estate was assessed at; and he who should be sued for the whole Tax would be compelled to pay it, and he would recover the Portions of the others *i*.

i Cum possessor unus expediendi negotii causa tributorum jure conveniretur, adversus cæteros quorum æque prædia tenentur, ei, qui conventus est, actiones a fisco præstantur, scilicet omnes pro modo prædiorum pecuniam tributi conferant. *l.* 5. *ff. de censib.*

X.

10. One may apply for a Diminution of their Assessment in the Land Tax.

If the Proprietors or Possessors of Lands and Tenements that are subject to the Land Tax, pretend that they are exorbitantly taxed in comparison of others, they may complain of it, and sue for Redress in the Way and Method that is practised in the Places where the said Lands and Tenements are situated *l*.

l See the Text cited on the fifth Article, and that of the fourteenth Article of the preceding Section.

SECT. V.

Of the Impositions laid on Goods and Merchandize.

The CONTENTS.

1. *These Duties are of several sorts.*
2. *How they are collected.*
3. *The same.*
4. *How Doubts, whether some particular Merchandizes be liable to the Duty, ought to be determined.*
5. *Duty upon Salt.*
6. *Difference between these Imposts, and the Tax on Lands and Personal Estates.*
7. *The Duties of the Excise and Customs in some Countries are let to Farm.*
8. *After the Farms have been adjudged to the highest Bidder for a certain time, others are admitted to outbid him.*

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9. *The Farmers, and others who contract for the said Duties, are obliged to give Security.*

10. *A Condition of the Leases of these Duties, when they are farmed out.*

I.

1. These Duties are of several sorts.

THE Impositions on Goods and Merchandize are those which are called by the Names of Excise, Customs, and other Appellations *a*; and they have all of them this in common, that they are levied on the things which are subject to them, and in the Places where the things are at the time when this Duty ought to be paid, as shall be explained by the Articles which follow.

a Vectigalia. *l.* 1. *C. de vectig. & comm.*
Octavæ. *l.* 7. *C. eod.*
Portorium. *l.* 203. *ff. de verb. signif.*

II.

2. How they are collected.

The Duties which are payable at the Passage or Entry of Goods and Merchandize into Towns and other Places where they are to be sold, are due at the Passage or at the Entry. And those who carry or transport them, whether it be upon their own account or on the account of others, ought to pay there the said Duties at the time of their Passage or Entry *b*.

b Ex his tantum speciebus quas de locis propriis unde conveniunt, huc deportant, octavarii vectigal accipiant. *l.* 8. *C. de vectig. & comm. V. l.* 203. *ff. de verb. signif.*

These Duties, and the Ways of collecting them, depend on the Regulations which have made Provision therein.

III.

3. The same.

If this Duty is due on Goods which are not to pass from one Place to another, such as Wine which the Person who made it of his own Vineyard sells by retail in the Place where it grew, it ought to be paid in the Place where the said Goods are *c*.

c The Duty on such things is collected in the manner prescribed by the Regulations.

IV.

4. How Doubts, whether some particular Merchandizes be liable to the Duty, ought to be determined.

Seeing there is an infinite Number of different sorts of Goods and Merchandizes, that there are some which are not liable to any Duty whatsoever, and that of those which are not expresly exempted, there may be some concerning which it may be doubted whether they are or are not comprehended under the Kinds expressed in the Regulations and Book of Rates, as being liable to the said Duties; this Doubt is to be decided either by the Usage, if there is any in relation to the said Matter, or by the Considerations which may determine either for their being subject to the Duty, or for their being exempt from it; which depends on the Prudence of the Judges who are to take cognizance of the Matter, or on the Regulation thereof by the Sovereign, if the Difficulty be of such importance as to require it *d*.

d In omnibus vectigalibus fere consuetudo spectari solet. Idque etiam principalibus constitutionibus cavetur. *l.* 4. §. *ult. ff. de public. & vectig.*

Earum rerum vectigal quarum numquam præstitum est, præstari non potest. *l.* 9. §. 6. *eod.*

Res exercitui paratas, præstationi vectigalium subjici non placuit. *D. l.* §. 7.

V.

5. Duty upon Salt.

We must reckon in the number of the Duties of this sort that which is laid on Salt, which in *France* is different from the other Duties in this respect, that whereas the Commerce of all other Commodities is permitted to particular Persons, that of Salt is not allowed to any within the Provinces where that Duty takes place, except to such as are authorized by the Prince, who makes them Masters of all the Salt within the said Provinces, and they distribute it for the Price that is fixed; which comprehends, besides the Value of the Salt, the Duty which the Prince gathers from it *e*.

e Publica vectigalia intelligere debemus ex quibus vectigal fiscus capit: quale est vectigal portus, vel venalium rerum, item salinarum. *l.* 17. §. 1. *ff. de verb. signif.*

Qui salinas, & cretifodinas, & metalla habent, publicanorum loco sunt. *l.* 13. *ff. de publican.*

Si quis ita hæredem instituerit, *Titius qua ex parte mihi socius est in vectigalia salinarum pro ea parte mihi hæres esto.* l. 59. §. 1. ff. de hæred. instit.

VI.

6. Difference between these Imposts and the Tax on Lands and Personal Estates.

There is this Difference between the Duties laid on Goods and Merchandizes, and the Taxes upon Personal Estates, and upon Lands and Houses, that, as has been observed in another Place, the Total of the general Imposition that is laid on Lands, and Houses, and on Personal Estates, are fixed by the Sovereign at certain Sums which he ordains to be raised; whereas the general Imposition which is laid on Goods and Merchandize cannot be fixed at any certain Sum: and there is nothing regulated but the Duty on each kind, without any certainty what the Sum Total will amount to *f*: For that varies constantly, for the Causes explained in

f See the sixth, seventh, and twelfth Articles of the second Section.

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in the twelfth Article of the second Section.

VII.

7. The Duties of the Excise and Customs in some Countries are let to farm.

The Changes which render the total Sum arising from the Duties on Goods and Merchandize uncertain, induce them in *France* to let them out to Farm by Cant or Auction to the highest Bidder, or by Contract with those who offer the best Condition, whether there be a publick Auction, or not *g*.

g Penes illum vectigalia manere oportet qui superior in licitatione exstiterit. *l.* 4. *C. de vectig. & comm.*

VIII.

8. After the Farms have been adjudged to the highest Bidder for a certain time, others are admitted to outbid him.

The Farms of the Duties arising by the Excise and Customs which are let by Cant or Auction to the highest Bidder, imply the Condition, that if within a certain time after they are adjudged to the highest Bidder, others outbid them in a certain Sum regulated by Use, they shall be put into the Place of the first Farmer. Which Usage is noways unjust; because, besides that the Persons to whom the Farms were first adjudged knew of this Usage, and had their Lease only on this condition, it hath its Equity, which is founded on the Advantage that redounds thereby to the Publick *h*.

h Si tempora quæ in fiscalibus auctionibus vel hastis statuta sunt, patiuntur: cum etiam augmentum te facturam esse profitearis: ad rationalem nostrum, ut justam uberioris pretii oblationem admittat. *l.* 4. *C. de fide & jur. hast.*

Tempora adjectionibus præstituta ad causam fisci pertinent. Nisi si qua civitas propriam legem habeat. *l.* 1. *C. de vend. reb. civ.*

Idem respondit, si civitas nullam propriam legem habet de adjectionibus admittendis, non posse recedi a locatione vel venditione prædiorum publicorum, jam perfecta tempora enim adjectionibus præstita ad causas fisci pertinent. *l.* 21. §. *ult. ff. ad municip.*

This last Text confirms the Privilege which the Exchequer has in this particular, because it opposes to it the Usage of Adjudications in relation to Duties belonging to Towns, which have not this Privilege, unless the same be expresly granted to them.

The Rule explained in this Article is established by the Ordinances, which allow of the doubling and trebling the Farms of the Aids or Subsidies.

IX.

9. The Farmers, and others who contract for the said Duties, are obliged to give Security.

The Consequence of the Duties that are laid on Goods and Merchandize, and of those which are laid on Salt, make it necessary to take Security from the Farmers, or those who contract for the said Duties; and the Conditions of the Engagement of the Sureties are regulated by the Lease or Contract which contains their Obligation *i*.

i Qui fidejusserint pro conductore vectigalis in *universam conductionem*, in usuras quoque in jure conveniuntur: nisi proprie quid in persona eorum verbis obligationis expressum. *l.* 2. §. 12. *ff. de adm. rer. ad civit. pert.*

[*In* England *every Receiver, Collector, or other Officer Accomptant to the King for any part of his Majesty's Revenue, is, before his Entry upon the Office, bound with Surety or Sureties for his true Accompt and Payment.* Stat. 7. Edw. VI. cap. 1.]

X.

10. A Condition of the Leases of these Duties, when they are farmed out.

Whether it be that these Duties on Goods and Merchandize have been farmed out by Cant or Auction, or by Contract at a certain Price agreed for, the Conditions of the Farmers and Contracters, the Eases and Abatements which they may claim, and the other Consequences of the Events, are regulated either by their Contract, or by the Conditions of their Lease, if Provision has been made therein for such Cases. And if there should arise Difficulties unforeseen which may concern the Interest of the Prince, they would be adjusted by his Counsel. For the Interest which he may have in the said Matter does not divest him of the general Administration of Justice within his Dominions, and of the Right of rendring Justice, or causing it to be render'd by his Ministers even in the Causes where he himself is a Party; seeing he cannot acknowledge any other Authority besides that which God hath put into his hands, and which he dispenses either by himself, or by his Ministers *l*.

l This is a Consequence of the Right of Sovereignty.

SECT. VI.

Of the levying of all sorts of Publick Money.

The CONTENTS.

1. *Divers sorts of Rules for levying the Publick Money.*
2. *The Taxes for Personal Estates affect all the Goods of the Person who is assessed.*
3. *The Privilege of Taxes.*
4. *They affect the Goods which the Person assessed has in other Places besides that of his Abode.*
5. *The Land Tax affects the Lands which are charged therewith, as also the other Goods of those who are in Arrear for the same.*
6. *The private Agreements between the Proprietors and Possessors of Lands cannot change the Order of levying the said Tax.*

7. The

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7. *The Place where the Duties on Goods and Merchandizes are levied.*
8. *This Duty is levied on the thing it self, which is seized for the Payment of it.*
9. *The Owner may relinquish the Goods for the Duty, or get it moderated.*
10. *If one defrauds the King of the Customs, the Goods are confiscated.*
11. *Ignorance does not excuse him who has defrauded the King of the Customs.*
12. *No body is compelled to assist in collecting the Imposts on Goods and Merchandizes, as they are in the Tax on Real and Personal Estates.*
13. *Punishments of the Misdemeanours of those who collect these Duties.*
14. *All the Goods of Persons owing any sort of Taxes are engaged for the same.*
15. *One ought not to be cast into Prison for not paying the Taxes.*
16. *The Taxes do not admit of any Compensation.*
17. *Taxes do not prescribe.*
18. *In doubtful Cases those who are indebted for Taxes, are favoured against the Exchequer.*

I.

1. Divers sorts of Rules for levying the Publick Money.

As there are three kinds of Impositions explained in the three preceding Sections, so there are three different sorts of Rules which regard the levying of each of these three kinds; and there are also some Rules common to all the three, as will appear in the Articles which follow *a*.

a See the three preceding Sections.

II.

2. The Taxes for Personal Estates affect all the Goods of the Person who is assessed.

As the Taxes on personal Estates are levied on the Persons on account of their Goods and the Profits which they make by their Industry, so they affect the said Goods and the said Profits. And the Collectors of the said Taxes may by the bare Effect of the Assessments signed by the proper Officers, distrain the Fruits and the moveable Effects of the Party who is assessed, without any other Obligation or Condemnation. For these sorts of Goods belonging to the Persons assessed are bound and engaged by the bare Effect of the Assessment *b*.

b Fiscus semper habet jus pignoris. *l. 46. §. 3. ff de jur. fisc.*

One may for the Tax on Real and Personal Estates distrain the Moveables and all sorts of Mobiliary Effects, and also the Fruits of the Lands and Tenements, but not the Lands and Tenements themselves. For with respect to the Immoveables, it sufficeth that the Fruits thereof be hypothecated for the annual Charge of the Taxes.

[In the several Acts of Parliament in *England*, for granting an Aid to his Majesty to be raised by a Land Tax, Power is given to the Collectors thereof, in case of Non-payment, to levy the Sum assessed, by Distress and Sale of the Goods and Chattels of such Persons as refuse or neglect to pay, or distrain upon the Messuages, Lands and Tenements charged with any Sum or Sums of Money. *See the several Acts of Parliament for the Land Tax.*]

III.

3. The Privilege of Taxes.

This Mortgage of the Goods of those who are assessed is privileged, and the Tax is preferred before all other Debts, except such as have some privileged Mortgage on the thing that is distrained, for some of the Causes explained in the fifth Section of the Title of Pawns and Mortgages *c*.

c Respublica creditrix omnibus chirographariis creditoribus præfertur. *l. 38. §. 1. ff. de reb. auct. jud. possid.*

See the twenty third Article of the fifth Section of the Title of Pawns and Mortgages, and the fourth, fifth, and following Articles of the same Section in the Book of the Civil Law in its Natural Order.

IV.

4. They affect the Goods that the Person assessed has in other Places besides that of his Abode.

Seeing the Assessments for Personal Estates are made on the foot of all the Goods which the Persons assessed are possessed of, they affect not only the Goods they have in the Places of their Habitation; but even all their other Goods, in what Place soever they are situated, are bound for the same *d*.

d Illorum qui publica, sive fiscalia debent, omnia bona sunt obligata. *l. ult. C. vectig. nov. inst. n. p.*

V.

5. The Land Tax affects the Lands that are charged therewith, as also the other Goods of those who are in Arrear for the same.

The Land Tax affects directly only the Lands which are charged therewith. But because it is a Charge on the Fruits, it follows those who have enjoyed them, whether they be Proprietors, Usufructuaries or others. And since their Enjoyment of the Fruits makes them Debtors for the Tax due from the Lands, their other Goods are engaged for the same for the time that they enjoyed them *e*.

d Imperatores Antoninus & Verus rescripserunt, in vectigalibus ipsa prædia, non personas conveniri, & ideo possessores etiam præteriti temporis vectigal solvere debere. Eoque exemplo actionem si ignoraverint, habituros. *l. 7. ff. de publ. & vectig.*

Universa bona eorum qui censentur vice pignorum pro tributis obligata sunt. *l. 1. C. in quib. caus. pign. vel hyp. tac. cont.*

VI.

6. The private Agreements between the Proprietors

Seeing the Land Tax affects the Land which is charged, and regards him who reaps the Fruits thereof, nothing can be done in derogation of the said Mortgage

and Possessors of Lands cannot change the Order of levying the said Tax.

gage by any Covenant between the Proprietor of the Land and other Person who has the Enjoyment of it. Thus when a Proprietor mortgages to his Creditor the Land that is subject to the said Tax, and gives him the present Enjoyment and Possession thereof, the Proprietor undertaking to pay the Tax, this Agreement would not discharge the Creditor from paying it, but he would be liable to pay the Tax because of his Enjoyment of the Fruits *f*. Thus the Purchaser of Lands or Tenements who should stipulate that the Seller should bear the Charge of the Tax, would nevertheless be answerable for it. For these private Agreements can make no change as to the Rights of the Exchequer, and they give only an Action of Relief against him who has undertaken to pay the Tax *g*.

f Inter debitorem & creditorem convenerat, ut creditor onus tributi prædii pignerati non agnosceret: sed ejus solvendi necessitas debitorem spectaret: talem conventionem quantum ad fisci rationem, non esse servandam, respondi. Pactis enim privatorum formam juris fiscalis convelli non placuit. *l.* 42. *ff. de pact.*

g Rei annonariæ emolumenta tractantes cognovimus hanc esse causam maxime reliquorum, quod nonnulli captantes aliquorum momentarias necessitates, sub hac conditione fundos comparant, ut nec reliqua eorum fisco inferant, & immunes eos possideant. Ideoque placuit, ut si quem constiterit hujusmodi habuisse contractum, atque hac lege possessionem esse mercatum: tam pro solitis censibus fundi comparati, quam prò reliquis universis ejusdem possessionis obnoxius teneatur. Cum necesse sit eum qui comparavit, censum rei comparatæ agnoscere: nec liceat cuiquam rem sine censu comparare, vel vendere. *l.* 2. *C. sine cens. vel rel. fund. comp. n. p.*

VII.

7. The Place where the Duties on Goods and Merchandizes are levied.

The Impositions on Goods and Merchandizes are levied on the things themselves which are subject thereto, and in the Places where the Duty ought to be paid, whether it be at their Entry into a Port, or at a Passage, or in the Places where the Goods are to be sold, or elsewhere, according to the Nature of the Imposition, and the Regulations which have been made therein *h*.

h See the second and third Articles of the fifth Section.

VIII.

8. This Duty is levied on the thing itself, which is seized for the Payment of it.

Altho the Owners of the Goods and Merchandizes which are subject to Duties do not appear, yet since the Impost is not laid on any Person in particular, but only in general on each kind of the several Goods and Merchandizes, the same is levied on every one of them according as its Nature subjects it thereto. And this Duty is levied on the thing itself, which is seized and stopped in the Place where the Duty ought to be paid *i*.

i Ad res ejus omnemque substantiam exactor accedat. *l.* 2. *C. de exact. trib.*

If it is lawful to seize the Goods for all manner of Contributions, much more is it lawful to seize the things themselves which are subject to the Duty.

IX.

9. The Owner may relinquish the Goods for the Duty, or get it moderated.

If the Owner was present at the Entry of the Goods or Merchandizes which he owned to be his, and that they were delivered to him upon his undertaking to pay the Duty afterwards, he would be personally bound for it, and his other Goods would be engaged for the said Duty. But if it should happen that the thing were not worth the Duty, and that the Owner should chuse rather to abandon it, than to take it, and to pay the Duty, he would be quit by abandoning the thing, if the Impost were not moderated. For it is only on account of the thing itself that this Duty is due *l*.

l Indictiones non personis, sed rebus indici solent. Ideo ne ultra modum earumdem possessionum quas possides conveniaris, præses provinciæ prospiciat. *l.* 3. *C. de annon. & trib.*

This Text may be applied to this Rule.

X.

10. If one defrauds the King of the Customs, the Goods are confiscated.

If the Owners of these sorts of things committed any manner of Fraud to avoid paying the Duty thereof, as if for avoiding Payment of the Customs of Goods at their Entry, they should run them, the Fraud being discovered, the Goods and Merchandizes would be confiscated. And this Confiscation would take place against the Heir or Executor; for he who had committed the Fraud, had already incurred this Penalty. And if there were other Punishments ordained by the Statutes and Ordinances, those who were guilty of the Fraud, and their Accomplices, would be liable to them *m*.

m Commissa vectigalium nomine etiam ad hæredem transmittuntur. Nam quod commissum est statim desinit ejus esse qui crimen contraxit, dominiumque rei vectigali acquiritur. Ea propter commissi persecutio, sicut adversus quemlibet possessorem, sic & adversus hæredem competit. *l.* 14. *ff. de public. & vectig. & com.*

Fraudati vectigalis crimen ad hæredem ejus qui fraudem contraxit, commissi ratione transmittitur. *l.* 8. *eod.*

XI.

11. Ignorance does not excuse him who

We reckon as a Fraud in this matter, all the Ways which are made use of to con-

has defrauded the King of the Customs.

conceal from the knowledge of the Persons imployed to collect these Duties the things which are liable to them, whether it be that he who uses this Way does it with design to cheat, knowing well enough that they ought to pay the Duty, or whether he be ignorant of it. And his Goods and Merchandizes will be confiscated *n*. For this Duty being imposed by a publick Law, it is presumed to be known by every body; and if Ignorance were a sufficient Excuse, every one would plead it *o*.

n Licet quis se ignorasse dicat, nihilominus eum in pœnam vectigalis incidere, divus Adrianus constituit. Divi quoque Marcus & Commodus rescripserunt, non imputari publicano, quod non instruxit transgredientem: sed illud custodiendum ne decipiat profiteri volentis. *l.* 16. §. 5 *&* 6. *ff. de public. & vectig. & comm.*

o See the ninth Article of the first Section of the Rules of Law, in the first Tome of the Civil Law in its Natural Order.

XII.

12. No body is compelled to assist in collecting the Imposts on Goods and Merchandizes, as they are in the Tax on Real and Personal Estates.

There is this Difference between the levying of the Imposts on Goods and Merchandizes, and that of the Tax on Real and Personal Estates, that no body is compelled to assist in levying the said Imposts, no more than to take them to farm, unless they engage therein voluntarily; and it belongs to the Farmers and others who have contracted for the Duties of this kind, to take care of levying them *p*. But in levying the Tax on Lands and Personal Estates, one may be compelled to assist therein; for it is one of the Functions of those Offices which are called Municipal, of which notice shall be taken in its due place *q*. Thus the Sheriffs or Consuls of the respective Towns and other Places, or the other sorts of Officers, or Overseers, according to the Usage of the several Places, are obliged to levy the said Tax. For which reason this Imployment of collecting the publick Taxes has nothing in it that is mean or dishonest, and it does not any ways derogate from the Dignity which they may have by other Offices *r*.

p Ad conducendum vectigal invitus nemo compellitur. Et ideo impleto tempore conductionis elocanda sunt. *l.* 9. §. 1. *ff. de public. & vectig.*

Cum quinquennium, in quo quis pro publico conductore se obligavit, excessit; sequentis temporis nomine non tenetur, idque principalibus rescriptis exprimitur: divus etiam Adrianus in hæc verba rescripsit, valde inhumanus mos est isti quo retinentur conductores vectigalium publicorum & agrorum si tantidem locari non possint, nam & facilius invenientur conductores si scierint fore, ut, si peracto lustro discedere voluerint, non teneantur. *l.* 3. §. 6. *ff. de jure fisci.*

Si cum Hermes vectigal octavarum in quinquennium conduceret, fidem tuam obligasti, posteaque spacio ejus temporis expleto, cum idem Hermes in conductione, ut idoneus detineretur non consensisti, sed cautionem tibi reddi postulasti: non oportere te de posterioris temporis periculo adstringi, competens judex non ignorabit. *l.* 7. *C. de locat. V. l.* 11. *eod.*

q See the first Article of the fourth Section of the sixteenth Title.

r Exigendi tributi munus inter sordida munera non habetur. Et ideo decurionibus quoque mandatur. *l.* 17. §. 7. *ff. ad municip. & de inc.*

[*In the Acts of Parliament in* England *by which the Land Tax is imposed, Commissioners are therein named for putting the said Acts more effectually in Execution, and they have Power to compel Persons to serve in making the several Assessments, and collecting the Sums that are assessed.*]

XIII.

13. Punishments of the Misdemeanours of those who collect these Duties.

Since the levying of the Duties which are imposed on Goods and Merchandizes at their Entry into Ports, or at their Passage from one Place to another, or otherwise, is liable to Concussions and Violences which those Persons who are employed to collect the said Duties may commit, because of the Facility they have of turning into Violence the Force which they have in their hands, and of cheating either in the Duty itself, or in the Quality or Quantity of the things which are subject to it, or otherwise; Punishments are therefore ordained for these sorts of Concussion and Violence, and they are repressed according to the Quality of the Fact and the Circumstances, pursuant to the Regulations which have been made therein *s*.

s Quantæ audaciæ, quantæ temeritatis sint publicanorum factiones, nemo est qui nesciat; idcirco prætor ad compescendam eorum audaciam hoc edictum proposuit. *l.* 12. *ff. de publ. & vectig. & comm.*

Prætor ait, quod publicanus ejus publici nomine vi ademerit quodve familia publicanorum, si id restitutum non erit, in duplum, aut si post annum agetur, in simplum judicium dabo. Item si damnum injuriæ furtumve factum esse dicetur, judicium dabo. Si ad quos ea res pertinebit non exhibebitur, in dominos sine noxæ seditione judicium dabo. *l.* 1. *ff. eod.*

XIV.

14. All the Goods of Persons owing any sort of Taxes are engaged for the same.

It is common to the recovering of all the different sorts of Taxes, that all the Goods of the Persons who are indebted on that score, are engaged for the Payment of them, whether the Tax be laid on Persons, as the Tax on Personal Estates, or whether it affect certain Things, as the Tax on Lands and Houses, and the Imposts on Goods and Merchandize *t*.

t Illorum qui publica sive fiscalia debent, omnia bona sunt obligata. *l. ult. de vectig. nov. inst. n. p.*

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Res eorum qui fiscalibus debitis per contumaciam satisfacere differunt, distrahantur, comparatoribus data perpetua firmitate possidendi. *l.* 1. *C. de cap. & distr. pign. trib. caus.*

See concerning the Mortgage of the Goods of Persons owing Taxes, the Remark on the second Article as to Immoveables.

XV.

15. One ought not to be cast into Prison for not paying the Taxes.

It is likewise a Rule common to all sorts of Taxes, that no body can be imprisoned for not paying them, unless they be guilty of some Offence. For the Taxes regard the Persons of Men only because of their Goods: And they are of themselves a Burden sufficient without adding to it this Hardship, which, thro the Indiscretion of the Persons who should have this Power in their hands, might be a means to fill all the Prisons of the Kingdom *u*.

u Nemo carcerem plumbatarumque verbera, aut pondera, aliaque ab insolentia judicum reperta supplicia in debitorum solutionibus, vel a perversis, vel ab iratis judicibus expavescat. *l.* 2. *C. de exactor. tribut.*

Satis sit debitorem annonarum ad solvendi necessitatem captione pignorum conveniri. *l.* 2. *C. de cap. & distr. pign. tribr. caus.*

[*According to our Usage in* England, *Persons refusing to pay the publick Taxes may be imprisoned. For by the Act of Parliament, which imposes the Tax on Lands and personal Estates, if any Person or Persons shall neglect or refuse to pay their Assessment by the space of ten Days after Demand, any two of the Commissioners are thereby authorized to commit such Person or Persons* (*except a Peer or Peeress of* Great Britain) *to the common Goal, there to remain without Bail or Mainprize, until Payment be made of the Money assessed, and of the Charges for bringing in of the same.* See the Act for the Land-Tax.]

XVI.

16. The Taxes do not admit of Compensation.

It is also common to all sorts of Taxes, that they do not admit of any manner of Compensation, neither for what may be due to the Persons paying the Taxes from those who collect them, nor for what may be owing to them either by the Exchequer it self, or the Prince. For as to those who collect the Taxes, it is not to them that they are due: And as for the Prince, seeing the Taxes are destined and set apart for the publick Service, it is no ways allowable, that they should be diminished on account of what the Prince may owe on another score to the Persons of whom the Tax is demanded; since they have no reason to fear the Insolvency of the Exchequer, which is always solvent *x*.

x Ut debitoribus fisci quod fiscus debet compensetur sæpe constitutum est, excepta causa tributoria & stipendiorum. *l.* 46. §. 5. *ff. de jure fisci.*

Ob negotium copiarum, expeditionis tempore mandatum, curatorem condemnatum, pecuniam jure compensationis retinere non placuit: quoniam ea non compensatur. *l.* 20. *ff. de compens.*

In ea, quæ reipublicæ te debere fateris, compensari ea quæ invicem ab eadem tibi debentur, is cujus de ea re notio est, jubebit: Si neque ex Kalendario, neque ex vectigalibus, neque ex frumenti vel olei publici pecunia, neque tributorum, neque alimentorum, neque ejus qui statutis sumptibus servit, neque fideicommissi civitatis debitor sis. *l.* 3. *C. eod.*

Fiscus semper idoneus. *l.* 2. *in f. ff. de fund. dot.*

Nec solet fiscus satisdare. *l.* 1. §. 18. *ff. ut legat. seu fid.*

See the fourth Article of the seventh Section of the fifth Title.

XVII.

17. Taxes do not prescribe.

Altho the Taxes ought to be levied within their proper Times, and that the Taxes on Lands and personal Estates ought to be levied every Year, and the Duties on Goods and Merchandizes ought to be collected in the Places, and at the Times prescribed by the Statutes and Ordinances for that purpose; yet all the Taxes to which a Right has been once acquired, may be levied in the subsequent Years; and there are no other Prescriptions for the Arrears of Taxes besides those which the Ordinances and the Usage of Places may have established *y*. Thus, for example, he who should produce Acquittances for three subsequent Years of any Tax or Imposition, would be presumed to have acquitted the preceding Years, and would be discharged from them, unless there were evident Proof that he had not paid them *z*. But the Right of the Tax it self is imprescriptible. Thus, Lands subject to the Land-Tax are not freed from it by Prescription, unless there be some Title to shew their Exemption *a*.

y Justas etiam quæ locum habent fisci actiones præcipimus concremari ob hoc solum quod suis temporibus prolatæ non sunt. *l.* 6. *C. de jure fisci.*

z Quicumque de provincialibus & collatoribus, decurso posthac quantolibet annorum numero, cum probatio aliqua ab eo tributariæ solutionis exposcitur, si trium cohærentium sibi annorum apochas securitatesque protulerit, superiorum temporum apochas non cogatur ostendere: neque de præterito ad illationem functionis tributariæ coarctetur: nisi forte aut curialis, vel quilibet publici debiti coactor, sive compulsor possessorum vel collatorum habuerit cautionem, aut id quod reposci deberi sibi manifesta gestorum adsertione patefecerit. *l.* 3. *C. de apoch. publ.*

We must understand this Text, according to the Usage in France, *of the Cases where the Tax is levied by one and the same Person. For if the Case were, for example, of the Taxes for several Years, which had been laid either on real or personal Estates, and had been levied by different Consuls or Collectors, every one of them having their distinct respective Years wherein they were charged with the levying of the Tax for that Year, the Payment which had been made to three of them, would be of no prejudice to the preceding Consuls or* Col-

Collectors, whose Rolls are not indorsed, and who had given no Acquittance.

a Jubemus eos qui rem aliquam per continuum annorum quadraginta curriculum sine quadam legitima interpellatione possederint, de possessione quidem rei, seu dominio nequaquam removeri. Functiones autem, seu civilem canonem, vel aliam quampiam publicam collationem eis impositam dependere compelli. Nec huic parti cujuscunque temporis præscriptionem oppositam admitti. *l. 6. de præsc.* xxx. *vel* xl. *ann.*

XVIII.

18. In doubtful Cases those who are indebted for Taxes are favoured against the Exchequer.

In all sorts of Taxes and Impositions, if there arise any Difficulties which render the Cause of the Exchequer doubtful, so as that its Right appears to be uncertain, whether it be that it is not sufficiently enough established, as if some particular Merchandize were not clearly enough expressed in the Enumeration of the several sorts of Merchandizes upon which the Duty is laid, or that the Duty being sufficiently established, there be some doubt concerning the Quality of the Duty, or other such like Difficulties; these kinds of Doubts ought to be resolved in favour of particular Persons against the Exchequer. For besides that the Exchequer is in the place of the Plaintiff, and that in general every Demand ought to be clear, and well proved, the Rights of the Exchequer are entitled to Favour and Privilege only in so far as concerns the Justice of the Taxes, which makes them necessary for the publick Good, and the Facility of levying them; which is restrained to Taxes that appear to be clearly and evidently established, and does not extend to the Demands and Pretensions which the Officers imployed in levying the Taxes, or the Farmers thereof, may make beyond the Bounds of the Duties and Impositions which are clearly fixed and established by the Sovereign. *b*

b Non puto delinquere eum qui in dubiis quæstionibus contra fiscum facile responderit. *l. 10. ff. de jure fisci.*

Actore non probante, qui convenitur, etsi nihil ipse præstat, obtinebit. *l. 4. in f. C. de edendo.*

See the last Article of the first Section of the ensuing Title.

SECT. VII.

Of Exemptions from the several sorts of Taxes

The CONTENTS.

1. *All Persons are subject to the personal Taxes, unless they are exempted.*
2. *It is the same thing as to the Taxes on real Estates.*
3. *The Imposts on Goods and Merchandizes are limited to certain Things.*
4. *Three sorts of Exemptions from Taxes.*
5. *Exemptions from Taxes for several Causes.*
6. *Exemptions granted by Towns, and other Places, to certain Persons.*
7. *Exemptions which pass, or do not pass to the Heirs.*
8. *The Exemptions which go to Descendants, do not go to those of Daughters.*
9. *Age, Sex, Children, do not exempt: And it is necessary to have a Privilege for Exemption.*
10. *The Exemptions depend on the Favour granted by the Sovereign.*
11. *The Exchequer is exempt from all manner of Taxes.*
12. *The Exemptions of Things pass to all Possessors and Successors, but not the Exemptions of Persons.*
13. *The Privilege of the Place ceases by the Removal of one's Habitation to another Place.*

I.

1. All Persons are subject to the personal Taxes, unless they are exempted.

THE Taxes on personal Estates regard in general all Persons who are settled in the Places which are subject thereto: For there are some Places in *France* which are not subject to this Tax. And even in the Places which are subject to it, there may be Persons who are exempt from it *a*.

a Munera quæ patrimoniis, publicæ utilitatis gratia, indicuntur, ab omnibus subeunda sunt. *l. 2. C. de muner. patr.*

Altho this Text relates to other sorts of Charges, yet the Rule is with much more reason true as to the Charges of Taxes.

II.

2. It is the same thing as to the Taxes on real Estates.

The Taxes on real Estates or Immoveables are limited in *France* to such as are situated within the Provinces which are subject to the said Tax: And as for the other Provinces, it is by virtue of a Franchise or Immunity, and not

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not of a Privilege, that they are exempted from the said Tax *b*. But in the Provinces which are subject to the said Tax, there are Exemptions which except certain Lands from being charged therewith; and there are also some Persons who are exempted *c*.

b In the Roman *Empire, the Conditions of the Provinces were different; some of them were totally exempt.* Barcenonenses immunes sunt. *l.* 8. *ff. de censib.*

Others were of an easier Condition than the generality. But in France *there are but few of those Provinces where the* Roman *Law is most in use, which are subject to the Tax on real Estates.*

c See the tenth Article.

III.

3. The Imposts on Goods and Merchandizes are limited to certain things.

The Imposts on Goods and Merchandizes are also restrained not only to the Things which are subject to the said Duties, but likewise for every one of the said Things to the Cases of their Entry, of their Passage, and others where the Duty ought to be collected. And there are two sorts of Exemptions from these Duties: One of certain Things that are not subject to the Duty, as Books. And the other of some Persons who have some Privilege which discharges them of the said Duty *d*.

d See the eighth Article of the second Section; as also the tenth Article of this Section.

IV.

4. Three sorts of Exemptions from Taxes.

It follows from the three preceding Articles, that the Exemptions or Immunities from Taxes are of three sorts: Some are general and common to Provinces, to Towns, and to certain Places; and others are particular and peculiar to some Persons; and there are some which except certain Things. Thus, for the general Exemptions, some Provinces have a Franchise or Immunity from the Tax on personal Estates, and most of them are exempted from the Tax on real Estates. And in the Provinces subject to the Tax on personal Estates, there are Towns and other Places which are exempted from it. And there are also some Provinces which have an Exemption or Immunity from Impositions on Goods and Merchandize, or on some kinds of them. And there are some Things which are exempted throughout the whole Kingdom *e*.

e Quamquam in quibusdam beneficia personis data immunitatis cum persona extinguantur, tamen cum generaliter locis, aut cum civitatibus immunitas sic data videtur, ut ad posteros transmittatur. *l.* 4. §. 3. *ff. de censib.*

One sees in this Text the Distinction between personal Exemptions which are limited to certain Persons, and those which are granted to Towns and other Places, which are common to all those who are Inhabitants of those Places, and pass to those who shall be such for the future.

V.

5. Exemptions from Taxes for several Causes.

The particular Exemptions from personal Taxes are of two sorts: One is of those which belong to some Persons by the bare Effect of their Quality, without having any Title thereto in their own private Right. Thus, Ecclesiastical Persons are exempted from this Tax, in consideration of that Quality. Thus, the Gentry in *France* are exempted because of their Nobility; and many Officers are entitled to this Exemption on account of their Offices. And the other is of the Exemptions granted for other particular Causes, as for certain Functions, or upon other Considerations in favour of which the Prince may grant this Privilege. And we see in the Regulations concerning this Matter many of these Exemptions of several sorts *f*.

f Quibusdam aliquam vacationem munerum graviorum conditio tribuit. *l.* 6. *ff. de jure immun.*

Altho this Text relates to other Exemptions, yet the Rule agrees to the Exemption from Taxes.

Mechanicos, geometras & architectos, qui divisiones partium omnium, incisionesque servant, mensurisque & institutis opera fabricationibus stringunt, & eos qui aquarum ductus & inventos modos docili liberatione ostendunt in par studium docendi atque discendi nostro sermone compellimus. Itaque immunitatibus gaudeant & suscipiant docendos, qui docere sufficiunt. *l.* 2. *C. de excus. artif.*

VI.

6. Exemptions granted by Towns, and other Places, to certain Persons.

Besides the Exemptions explained in the preceding Article, there are some which the Corporations of Towns and other Places may grant to certain Persons, to engage them to settle among them, and there exercise some Functions that are useful to the Publick. Thus, it is the Custom in some Places to encourage Physicians, and Professors of Arts and Sciences, to come and settle among them by such like Exemptions, none of which is of any prejudice to the Rights of the Crown; for the publick Taxes are not by this means diminished, and the Inhabitants of those Places bear willingly the Share of the publick Taxes which would fall upon those Persons; and they do not even thereby increase their own Assessments, which continue the same *g*.

g Exceptis qui liberalium studiorum antistites sunt, & qui medendi cura funguntur, decurionum decreto immunitas nemini tribui potest. *l.* 1. *C. de decr. decur. sup. imm. quib. conced.*

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Nec intra numerum præstitutum ordine invitos medicos immunitatem habere sæpe constitutum est, cum oporteat eis decreto decurionum immunitatem tribui. *l.* 5. *C. de profess. & med.*

Negotiatores qui annonam urbis adjuvant, item navicularii, qui annonæ urbis serviunt, immunitatem a muneribus publicis consequuntur, quamdiu in ejusmodi actu sunt. Nam remuneranda pericula eorum, quin etiam & hortanda præmiis, merito placuit, ut qui peregre muneribus, & quidem publicis, cum periculo & labore funguntur, a domesticis vexationibus & sumptibus liberentur: cum non sit alienum dicere, etiam hos reipublicæ causa, dum annonæ urbis serviunt, abesse. *l.* 5. §. 3. *ff. de jure immun.*

See the tenth Article of the fourth Section of the sixteenth Title of this Book.

Sometimes they give likewise Salaries to Physicians and others, besides an Exemption from Taxes. And in this Case it is the Duty of those Physicians to attend the Poor gratis. Archiatri scientes annonaria sibi commoda a populi commodis ministrari, honeste obsequi tenuioribus malint, quam turpiter servire divitibus. Quos etiam ea patimur accipere quæ sani offerunt pro obsequiis, non ea quæ periclitantes pro salute promittunt. *l.* 9. *eod.*

We have no such Examples among us of Physicians, who bargain for a certain Sum of Money in case the Patient recovers: It is only Quacks and Mountebanks that practise after this manner.

VII.

7. Exemptions which pass or do not pass to the Heirs.

Among the particular Exemptions of Persons, there are some which are limited to one Person, and do not go to his Descendants; such as those which are granted in consideration of some Functions, or of some Offices, which have not the Effect to ennoble the Person *h*. And there are some which go to the Descendants, such as the Exemption on the score of Nobility; and that of Offices which ennoble the Person, whether it be that the Office ennobles the first who is vested with it, or that it hath this effect only after it has passed from Father to Son, whose Children are intitled to the Exemption: and there may likewise be some Exemptions which upon particular Considerations pass to all the Descendants of those to whom they have been granted *i*.

h Personis datæ immunitates hæredibus non relinquuntur. *l.* 1. §. 1. *ff. de jure imm.*

Quod datur personis, cum personis admittitur. *l.* 1. §. 43. *ff. de aq. quot.*

Sordidorum munerum excusatio delata personis, ad hæredem successoremve transire non potest. *Neque enim potest esse perpetuum, quod non rebus, sed personis contemplatione dignitatis atque militiæ indulsisse nos constat.* l. 13. C. de excus. mun.

See, in relation to the Exemptions which do not go to the Heirs, the third Section of the fifth Law, ff. de jure immun. *which has been quoted on the foregoing Article.*

i Immunitates generaliter tributæ eo jure ut ad posteros transmitterentur, in perpetuum succedentibus durant. *l.* 4. *eod.*

VIII.

8. The Exemptions which go to Descendants, do not go to those of Daughters.

The Exemptions which pass to Descendants are limited to those of the Male Issue, and do not go to the Children of Daughters. For these do not follow the Condition of their Mothers, but that of their Fathers *l*.

l Generi posterisque datæ custoditæque (*immunitates*) ad eos qui ex fœminis nati sunt non pertinent. *l.* 1. §. 2. *ff. de jure imm.*

Cum legitimæ nuptiæ factæ sint, patrem liberi sequuntur. *l.* 19. *ff. de stat. hom.*

There are some Places in France, where the Children of Fathers who are ignoble, and Mothers who are noble, are likewise noble. It is with respect to this Usage that it is said, the Mother ennobles the Issue.

IX.

9. Age, Sex, Children, do not exempt; and it is necessary to have a Privilege for Exemption.

There is no Exemption barely on account of Age, whether it be Infancy, or old Age, or because of Sex, or for the number of Children, or for other Causes besides those of Privileges *m*, or Exemptions specified in the Regulations made concerning this Matter.

m Munera quæ patrimoniis injunguntur vel intributiones, talia sunt ut neque ætas ea excuset, neque numerus liberorum. *l.* 6. §. 4. *ff. de mun. & hon.*

Neque tempore ætatis, neque numero liberorum a muneribus quæ patrimoniorum sunt, excusationem quis habere potest. *l.* 5. *C. de mun. patrimon.*

Etiam minores ætate patrimoniorum muneribus subjugari solent. Unde intelligis te frustra plenam immunitatem desiderare cum munera, quæ impensas exigunt, subire te necesse sit. *l.* 7. *C. de mun. patrim.*

Patrimoniorum munera mulieres etiam sustinere debent. *l.* 9. *eod.*

Altho the Contributions mentioned in these Texts were different from our Taxes, yet the Rule agrees to them, and it is in use with us, except in some Places, where they grant to Minors an Exemption from personal Taxes. Which may be perhaps grounded on a Law which we find in the Body of the Roman Law, where it is said, that in some Provinces the Children were exempt from the Poll-Tax, until the Males arrived at the Age of fourteen, and the Females at that of twelve, and after they were past sixty five Years. Ætatem in censendo significare necesse est, quia quibusdam ætas tribuit ne tributo onerentur. Veluti in Syriis, a quatuordecim annis masculi, a duodecim fœminæ usque ad sexagesimum quintum annum tributo capitis obligantur. *l.* 3. *ff. de censib. There are likewise some Regulations and Usages which grant an Exemption to those who have ten Children.*

X.

10. The Exemptions depend on the Favour granted by the Sovereign.

The particular Exemptions from the Tax on Lands, and those from the Duties that are laid on Goods and Merchandizes, depend on the several Regulations which have made different Provisions therein, and are not the same with

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with the Exemptions from the Tax on personal Estates. For Ecclesiasticks, for example, and Gentlemen who are exempt from the Tax on personal Estates, are not exempt from the other Taxes. Thus, the said Exemptions depend on particular and different Grants, which may be easily learned from the several Regulations in these Matters *n*.

n *The Privileges and Exemptions depend on the Favours granted by the Prince, which those who lay claim to them must verify and instruct.*

XI.

11. The Exchequer is exempt from all manner of Taxes.

Whatever belongs to the Sovereign on the score of his Demesnes, and all Goods and Merchandizes destined for his Use, and for his Houshold, or for the Army, is subject to no manner of Contribution *o*.

o Fiscus ab omnium vectigalium præstationibus immunis est. *l.* 9. §. *ult. ff. de public. & vectig.*

Res exercitui paratas præstationi vectigalium subjici non placuit. *D. l.* §. 7.

XII.

12. The Exemptions of Things pass to all Possessors and Successors; but not the Exemptions of Persons.

There is this Difference between personal Exemptions and the Exemptions of Things, that these pass all of them to all those whom the Contributions may affect, Heirs, Purchasers, or others: And the Exemptions of Persons are limited to those to whom they are granted, and do not go to the Heirs except in the Cases explained in the seventh Article *p*.

p Et datur interdum prædiis, interdum personis. Quod *Prædiis* datur, extincta persona non extinguitur: quod datur *Personis*, cum personis amittitur. Ideoque neque ad alium dominum prædiorum, neque ad hæredem, vel qualemcunque successorem transit. *l.* 1. §. 43. *ff. de aqu. quot.*

Rebus concessam immunitatem non habere intercidere rescripto Imperatoris nostri ad Pelignianum recte expressum est. Quippe personis quidem data immunitas cum persona extinguitur: rebus, nunquam extinguitur. *l.* 3. §. 1. *ff. de censibus.*

Privilegia quædam causæ sunt, quædam personæ. Et ideo quædam ad hæredem transmittuntur, quæ causæ sunt: quæ personæ sunt, ad hæredem non transeunt. *l.* 196. *ff. de reg. jur.*

See the Texts quoted on the seventh Article.

XIII.

13. The Privilege of the Place ceases by the Removal of one's Habitation to another Place.

Seeing there are Places exempt from certain Contributions, the Inhabitants of those Places enjoy the Exemption only during the Time that they live there; and if they go and settle in another Place that is not exempt, they cannot enjoy that Privilege there *q*.

q Qui originem ab urbe Roma habent, si alio loco domicilium constituerunt, munera ejus sustinere debent. *l.* 3. *ff. de mun. & hon.*

Incola & his magistratibus parere debet, apud quos incola est: & illis, apud quos civis est. Nec tantum municipali jurisdictioni in utroque municipio subjectus est, verum etiam omnibus publicis muneribus fungi debet. *l.* 29. *ff. ad municip.*

SECT. VIII.

Of the Functions and Duties of those who have any Office or Imployment about the publick Revenue.

The CONTENTS.

1. *Two sorts of Receipts, of two sorts of publick Moneys.*
2. *The Method and Order of laying on the Tax on real and personal Estates.*
3. *In what manner the Taxes ought to be distributed in the several Divisions and Districts of the Kingdom.*
4. *The Changes which happen in Places, change the Proportions of the Taxes.*
5. *The Distribution of the Taxes ought to be made without respect of Persons.*
6. *The Officers who settle the Proportions of the several Places, ought to receive no Presents.*
7. *The Duty of the Assessors, who regulate the Assessments of particular Persons.*
8. *They ought to regard no other Recommendation besides that of Justice.*
9. *The Assessors cannot lessen their own Assessments, nor those of their Relations.*
10. *They cannot impose either more or less than what is ordained.*
11. *Divers Persons appointed for levying the Taxes.*
12. *Duty of the Receivers.*
13. *Another Duty of Receivers.*
14. *Duty of the Collectors.*
15. *Those who are Receivers and Collectors ought to give diligent Attendance, and not to delay those who come to make Payments.*
16. *Several other Duties of those who are imployed in imposing and levying the publick Taxes.*
17. *Duties of those who are imployed in levying the Duties on Goods and Merchandizes.*

1. Two sorts of Receipts of two sorts of publick Moneys.

IT is necessary to distinguish two sorts of Moneys which compose the publick Revenue. Those which are raised on Persons, or on Lands, such as the Tax which is laid on the real and personal Estates *a*; and those which are

a Stipendium a stipe appellatum est, quod per stipes id est modica æra colligatur. Idem hoc etiam

are levied on Goods and Merchandize *b*. And it is also necessary to distinguish the different Functions which respect the levying of these several sorts of Moneys. For as to the Tax on Lands and personal Estates, there is the Function of the Persons who are concerned in distributing and ascertaining the several Proportions that particular Places and Persons are to pay of the general Tax; and the Function of the Persons who collect it. And altho these two sorts of Functions may chance to be sometimes confounded in the same Persons, as shall be hereafter observed, yet they are distinct in themselves, and oblige the Persons to Duties of different sorts. And as to the Moneys which are raised on Goods and Merchandizes, there is no other Function besides that of levying them. For as to the Imposition thereof, which is nothing else but the Taxation of the Duties which are to be paid for each kind, it depends on the Regulation which the Prince makes therein.

etiam tributum appellari Pomponius ait. Et sane appellatur ab intributione tributum, vel ex eo quod militibus tribuatur. *l.* 27. §. 1. *ff. de verb. signif.*

Census fundi. *l.* 2. *C. sine cens. vel rel. fund. comp. non poss. toto titulo. ff. de censibus.*

b Ex præstatione vectigalium nullius omnino nomine quicquam minuatur, quin octavas more solito constitutas omne hominum genus quod commerciis voluerit interesse, dependat. *l.* 7. *C. de vectigal. & comm.*

II.

2. The Method and Order of laying on the Tax on real and personal Estates.

The Tax on real and personal Estates is imposed and laid on in *France* by five different Degrees. The first is the Order of the King, by which he regulates the Sum which he intends shall be raised throughout the Kingdom on all those who are subject to the said Tax. The second is a second Order, which allots to the several Provinces the Proportion of the said Tax which each Province is to bear; which is made by Generalities. The third is that of the Distribution, which is made by the Officers of each Generality among the several Divisions or Elections which depend on the said Generality. The fourth is the Allotment which the Officers of the respective Divisions or Elections make of the Proportion that is to be bore by the respective Towns, Boroughs, and Parishes of each Division or Election. The fifth and last is that of the Assessments which are made in each Town, and in each Place of the several Inhabitants within the same, by those who are employed in that Function, whether they be called Sheriffs, Consuls, Assessors, or by other Names *c*.

c Delegatio quæ ab amplissima præfectura in diversas Provincias ex more quotannis emittitur. *l. ult. Cod. de can. larg. titul.*

See the fortieth, forty first, and forty second Articles of the Regulation in January, 1634.

[The Method observed in *England* for raising and levying the Tax on Lands and personal Estates is thus: The Parliament fixes the Sum Total that is to be raised throughout the Kingdom; as also the Proportions thereof which each County, City, Borough, Town, or other Place, is to pay; and likewise ascertains the Pound-Rate which all real and personal Estates within the Kingdom are to be charged with towards raising the said Sum. And the Act of Parliament appoints Commissioners for the respective Counties, Cities, and other Places within the Kingdom, for the more effectual raising and levying the said Tax. And the said Commissioners at their first general Meetings, do ascertain and set down in Writing the several Proportions which are to be charged upon every Hundred, Lathe, Wapentake, Rape, Ward, or other Division, towards making up the whole Sum charged upon the whole County, City, or other Place for which thy are appointed Commissioners. And they likewise appoint Assessors for each Parish, Township, or Place within their respective Divisions; who are with all Care and Diligence to assess the full Sum given them in charge respectively, by an equal Pound-Rate upon all real and personal Estates within the Limits, Circuits, and Bounds of the respective Parishes or Places for which they are appointed Assessors. And the said Assessors when they carry in their Assessments to the Commissioners, do at the same time also return the Names of two or more able and sufficient Persons living within the Limits and Bounds of the said Parishes, Townships, and Places, to be Collectors of the Moneys which have been assessed; for whose Fidelity the Parish or Place in which they are imployed as Collectors is answerable. The said Collectors pay in the Moneys which they collect and levy to the Receiver-General, or his Deputy; who pays the same into the Exchequer. *See the Act for the Land-Tax.*]

III.

3. In what manner the Taxes ought to be distributed in the several Divisions and Districts of the Kingdom.

The Duties of the Officers who are charged with the Distribution of the several Proportions of the General Tax which each Place is to be charged with, consist in taking as exact an Information as is possible, of what Share every Town, and every Parish is able to bear of the Sum Total that is to be raised. Which depends on the Number of its Inhabitants, on their Professions and Employments, their Goods, their Trade, the Number of those who are exempt, the Extent of their Territory, its Quality, and on other Considerations which may help to regulate the Share which every Place ought to bear of the General Tax, in proportion to its Conveniences and Inconveniences, and to the common Charge that is laid upon the whole *d*.

d It is by this Proportion that the Charge of each Place ought to be regulated.

IV.

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IV.

4. The Changes which happen in Places, change the Proportions of the Taxes.

Since there often happen divers Changes which may increase or diminish the Advantages of one Place in respect of another, and cause in some Places Losses which may entitle them to an Easement in the Taxes, or Changes which may give occasion to augment their Charge; it is the Duty of the said Officers to inform themselves every Year of the said Changes: As if there have happened in some Places great Damages by Hail, by Frost, by Inundations, by Barrenness, or other Losses which have destroyed the whole Crop, or a part of it; if there have been any Distempers that have swept away great numbers of the People; if many of the Inhabitants, or some of the wealthiest among them, have left the Place, or if on the contrary they have had an Accession of new Inhabitants; if there be any Persons who have a Right of Exemption, or who claim it right or wrong; if any new Grant has been made to the Place, whereby its Trade is increased, such as that of holding Fairs or Markets, and of all other Changes of the like nature, that they may alter the Proportions of the Taxes, and may either ease or lay a heavier Charge on the Places according as the Changes which have happened to them may require *e*.

e Since every Place bears its Charge in proportion to the Goods, and the Conveniences and Inconveniences of the Inhabitants, the Charge ought to be lesser or greater, according as considerable Changes may give occasion thereto; and in order to have an exact Information thereof, the proper Officers who are elected for that purpose ought to visit the several Parishes.

See the third and fourth Articles of the Regulation in March 1600, *and the fortieth and forty third Articles of the Regulation in* January 1634.

V.

5. The Distribution of the Taxes ought to be made without respect of Persons.

It is also a Duty of the said Officers not to augment or diminish the Proportion of any Parish on account of any Advantages which may redound to themselves thereby, either in consideration of their own Interests, or of those of their Relations, or of their Friends, or of other Persons whom they are desirous to serve; as if they themselves, or any of their Relations or Friends had any Lands or Goods in a Parish, or if they had any particular Interest to have its Proportion of the Taxes diminished. For the Liberty which the said Officers have to regulate the several Proportions of the respective Places, is not to make them to depend wholly on their Will and Pleasure, but that they may regulate the Charge of every Parish in proportion to what the Inhabitants of that Parish ought in justice to bear *f*.

f This Duty, as all the others of the said Officers, is of the Law of Nature, which obliges Persons to render Justice without respect of Persons; and it is part of their Oath.

See the hundred thirty sixth Article of the Ordinance of Charles V. *in the Year* 1379.

By the Roman *Law Exemptions which were obtained by unfair Means were punished by Fire.*

His nostræ serenitatis edictis, civitatum tabulariis erit flamma supplicium, si cujusdam fraude, ambitu, potestate, injustam cujuspiam profiteantur immunitatem: ac non secundum præcedentem definitionem omnes omnino, abolita specialium immunitatum gratia, necessitas tributariæ functionis, firmata censitorum peræquatorumque Provincialium judicum peræquatione constrinxerint. *l.* 1. *C. de immun. nem. conced. v. l.* 2. *eod.*

VI.

6. The Officers who settle the Proportions of the several Places ought to receive no Presents.

Seeing the settling and ascertaining the Proportions of the Tax with which the several Places are to be charged, is an Act of Justice, the Abuse of which turns to the Prejudice of those who are over-rated by means of an unjust Easement granted to others; it is therefore expresly forbidden to those who exercise these Functions to take any Presents of what nature soever they may be. And the Persons who are found to have their hands polluted with such Filthiness will incur the Punishments which the Laws have provided in that Case, and which the Circumstances may deserve *g*.

g There needs no express Law to prohibit an Abuse of this kind: But seeing it has been frequently practised, the same is provided against by the hundred and fifty second Article of the Ordinance of Orleans, which prohibits all Officers any ways employed in the Taxes and Aids to demand or take any Present whatsoever, whether it be in Money, Venison, Wild Fowl, Cattle, Grain, Hay, or other thing whatsoever, directly or indirectly, upon pain of forfeiting their Salaries, without any Abatement or Mitigation thereof to be made by the Judges.

VII.

7. The Duty of the Assessors, who regulate the Assessments of particular Persons.

After that the Proportion which each Place is to bear of the said Tax has been settled and adjusted, the Persons who are appointed to distribute the same among the several Inhabitants of the said Place, ought to regulate their Assessments. And their first Duty is to write down in a Roll or List the number of the Persons who are liable to be taxed, to inform themselves exactly of those who have Exemptions, or who have been discharged from their

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Assessments, or a part thereof, to enquire into the Changes which have augmented or diminished the Number of the Inhabitants, into the Losses that every one may have sustained, or the Accession of Goods which they may have had by some Succession or otherwise. And they ought to receive and examine the Memorials and Writings which are offer'd to them by any one, as Proofs of the Facts which may oblige them to moderate his Assessment; and they ought to regulate all the several Assessments according to Equity, without regard to the Credit or Authority of any Person, or to other Considerations that may induce them to favour some more than others: but their Assessments ought to be settled in such a manner as that the Burden laid upon the Rich may diminish that of the Poor, and that every one may bear his Part of the Burden in protion to his Estate and his Industry, and according as his Condition and the State of his Family render his particular Charges greater or lesser *h*.

The Taxes ought to be distributed, and the Assessments made, on the foot of this Proportion. And this is what is called in the Ordinances, the Strong helping out the Weak, or the Rich the Poor.

See the Ordinance of Orleans, *Art.* 123. *and that of* Blois, *Art.* 341.

Quoniam tabularii civitatum per collusionem potentiorum sarcinam ad inferiores transferunt, jubemus ut quisquis se gravatum probaverit, suam tantum pristinam professionem agnoscat. *l.* 1. *C. de censib. & censitor.*

Altho this Text relates to Taxes on Lands, yet it may be applied to the Case of this Article.

By a Law of the Theodosian *Code, those who had been over-rated in their Assessments had a right to get them moderated and regulated according to Equity.*

Qui gravatos se a peræquatoribus conquesti sunt, & injusto oneri impares esse proclamant, competitionis habeant facultatem, ut quid remissum gratia, quid interceptum fuerit fraude, convincant: & ex eo levamen accipiant, quod per deformia, & criminosa commercia sibi impositum esse deplorant, ut aliis demeretur. Sed in eo tempus placuit definiri, ne plures frustra litibus premerentur, si nullis intercepta metis actio tolleretur. *l.* 4. *C. Theod. de cens. peraq. & inspec.*

VIII.

8. They ought to regard no other Recommendation besides that of Justice.

This general Duty of those who settle the Assessments of particular Persons implies that of having regard to no other Recommendation besides that which every particular Person may have from the Condition of his Estate and of his Affairs, and of discharging or easing no body whatsoever but with this view. For otherwise they would do an Injustice to those whose Assessments should be encreased by this Diminution *i*.

i This is a Consequence of the preceding Article.

IX.

9. The Assessors cannot lessen their own Assessments, nor those of their Relations.

If the Assessors should have just cause to demand some Easement in their own particular Assessments, or if any of their near Relations should have just Cause to apply for the same Ease and Relief in their Assessments; they could not do justice to themselves, nor to their Relations. But as for their own proper Assessments, they ought to apply to a Court of Justice for Redress therein; and their Relations ought to make the same Application for what concerns them, according to the Usages and the Regulations in such Cases *l*.

l Seeing it is a kind of Judicial Function which they exercise in this Case, they cannot administer Justice to themselves, nor to their Relations.

See the tenth Article of the Regulation of the Tax for the Year 1600.

[In *England* the Assessors are always assessed by the Commissioners within their respective Divisions. And in case any Persons think themselves over-rated in their Assessments, they may appeal to the Commissioners within six Days after Demand; and such Appeals being once heard and determined by the Commissioners, are final, without any further Appeal upon any pretence whatsoever. *See the Acts of Parliament for the Land Tax.*]

X.

10. They cannot impose either more or less than what is ordained.

We may set down as another general Duty, and which is common to all those who are concerned in settling and adjusting the Proportions and Assessments, either of the respective Divisions, or of particular Persons, that they ought to regulate the same in such a manner as that there be no Imposition of any greater Sum than what they are charged with, and likewise that there be no Deficiency of the Sum to be raised for want of having assessed the respective Divisions and the several Inhabitants of each Division at a full Proportion of the Sum Total that is to be raised. And if they should add to the Sums that are ordained to be levied, either Impositions of another kind, or greater Sums, it would be a Misdemeanour that would be punishable according to the Quality of the Fact, and the Circumstances *m*.

m It is prohibited to the Assessors and other Officers of the Taxes, upon pain of Death, to impose any more Money than what is contained in the Warrants and Commissions, and that which is allowed for collecting the Monies, and making up the Rolls, and for the other Charges.

See the Ordinance of Lewis XII. *of the eleventh of* November 1508.

XI.

11. Divers Persons appointed for levying the Taxes.

As there are divers Officers who regulate the Proportions of the Taxes where-

wherewith the Generalities and the Elections are to be charged, and other Persons who in each Place or Division settle the Assessments of the particular Inhabitants; so there are also several Officers who receive the Monies levied in each Generality, and in each Election; and other Persons who levy and collect the Monies which are assessed in each particular Place. And these Receipts and Collections oblige those who are charged therewith to the different Duties, which shall be explained in the Articles which follow *n*.

n See the following Articles.

XII.

12. Duty of the Receivers.

The principal of these Officers are the Receivers General, who are charged with the Receipt of all the Monies collected on account of the Taxes within a Generality, and which ought to be paid into their hands by the particular Receivers of the respective Elections. And it is to these particular Receivers that the Collectors are to pay in the Assessments of the particular Persons living within the Bounds and Limits of the Places for which they are appointed Collectors. Thus the first Duties of the Receivers General and Particular are to receive the Sums that ought to be paid in to them in the manner that is prescribed them, and to convey or remit the Monies which belong to their Receipts: to wit, the Particular Receivers ought to transmit the Monies which they receive to the Office of the Receivers General; and the Receivers General ought to pay the said Monies into the King's Exchequer within the time that is prescribed *o*, without detaining in their hands on any pretence whatsoever any part of the Monies which they have received; whether it be that there was a greater Sum levied than ought to have been, or that they represent some Persons as being insolvent, altho they have received the Payments made by them, and conceal them, or by other ways. For these Misdemeanours are a kind of Crime, of which notice shall be taken in its due place.

o Diu minime penes ipsos susceptores maneat facta collatio; sed statim quodcunque a provincialibus fuerit exolutum, sacris thesauris inferatur. *l.* 7. *C. de suscept. præp. & arcar.*

Omnem summam auri vel argenti, & reliquarum specierum quæ sacris largitionibus ex more penduntur. Statim ut exactio fuerit celebrata, ad thesauros uniuscujusque provinciæ, vel ad proximos referri sub obsignatione tabularii cæterorumque quos sollicitos esse debere præcedentia jussa decreverunt, & thesaurorum præpositis consignari præcipimus: ut exinde ad sacrum comitatum integer omnium titulorum numerus dirigatur. *l.* 1. *C. de can. larg.*

XIII.

13. Another Duty of the Receivers.

The Duty of the Receivers, and more especially of the particular Receivers in the several Divisions, obliges them to join to the Care and Vigilance their Function requires, the Temperaments of Humanity, and not to use any Violence, which may make the legal Ways of Constraint which they are allowed to use, more harsh and severe than is necessary; whether it be by the too great Frequency of Seizures, Executions, Imprisonments, and other ways of Compulsion used at unseasonable Times, or by Law-Suits, with a view only to occasion Charges, or by other vexatious ways *p*.

p See the following Article, and the Text that is quoted on it.

XIV.

14. Duty of the Collectors.

As to those who are charged with levying the Assessments of particular Persons, Consuls, Collectors, or others, whether they be the same Persons who make the Assessments, or different Persons, they are obliged in making this Collection to use all the Moderation that is consistent with their Duty, and not to proceed to the Distress and Sale of Goods, and to the other compulsory Means which they are impower'd to use, except when they find themselves necessarily obliged to have recourse to these Ways for procuring Payment; and not to make use of them, as many do, with a view only to multiply Charges, and to reap Profit thereby, and to make the Expences so much the greater, as the Conjuncture of the Time, or other Circumstances, may render the Payments more difficult *q*. And it is likewise their Duty not to seize or distrain the things that are necessary for Food and Raiment, for the Culture of Lands, for the Exercise of the Trade or Profession of the Persons who are assessed, according as the Laws and Ordinances have prohibited the distraining of these sorts of things *r*; and

q See the hundred and twenty second Article of the Ordinance of Orleans.

Non acerbum se exactorem, nec contumeliosum præbeat, sed moderatum, & cum efficacia benignum, & cum instantia humanum. *l.* 33. *ff. de usur.*

r Vestis relinquenda est debitori, & ex mancipiis quæ in eo usu habebit, ut certum sit, eum pignori daturum non fuisse. *l.* 6. *ff. de pign. & hyp.*

Res quas neminem credibile est pignori specialiter daturum fuisse, generali pacti conventione quæ de

and they ought to abstain from all manner of Concussion and Violence, and not to exact any thing of the Persons assessed beyond the Sum at which they are assessed, whether it be under pretext of making the Payment thereof easy to them, or as Interest for the Delay they grant them, or upon any other pretence whatsoever. But they ought on the contrary to facilitate the Payments, either by receiving smaller Sums upon account, or waiting till Harvest-time, or for other convenient Seasons, when the Persons who are assessed may be able to raise Money. And as to the Payments which the Collectors are bound to make to the Receivers, their principal Duty consists in not detaining in their hands the Monies which they have collected; which happens more readily and more frequently to these sorts of Persons than to the Receivers: For the Collectors being for the greatest part Men of less Wealth and Substance than the Receivers, some of them apply the King's Money to their own particular Affairs, and run in Debt to the Publick.

de bonis tuis facta est, in causa pignoris non fuisse rationis est. *l.* 1. *C. quæ res pign. obl. poss. vel non.*

Executores a quocumque judice dati ad exigenda debita, ea quæ civiliter poscuntur: servos aratores, aut boves aratorios, aut instrumentum aratorium pignoris causa de possessionibus non abstrahant. *l.* 7. *C. eod.*

Pignorum gratia aliquid quod ad culturam agri pertinet, auferri non convenit. *l.* 8. *eod.*

If thou at all take thy Neighbour's Raiment to pledge, thou shalt deliver it to him by that the Sun goeth down. For that it is his Covering only, it is his Raiment for his Skin, wherein shall he sleep. Exod. 22. 26, 27.

No Man shall take the Nether or the Upper Millstone to pledge; for he taketh a Man's Life to pledge. Thou shalt not pervert the Judgment of the Stranger, nor of the Fatherless, nor take a Widow's Raiment to pledge. Deuter. 24. 6, 17.

They drive away the Ass of the Fatherless, they take the Widow's Ox for a Pledge. They reap every Man his Corn in the Field, and they gather the Vintage of the Wicked. They cause the Naked to lodge without Clothing, that they have no Covering in the Cold. They pluck the Fatherless from the Breast, and take a Pledge of the Poor. Job 24. 3, 6, 7, 9.

When there is a necessity to proceed by Distress and Execution, there shall be left to the Persons upon whom the Distress is made, one Cow, three Ewes or two She-Goats, to help to maintain them, unless it be that the Debt for which the Distress is made, arises from the Sale of the same Beasts, having lent the Money to buy them: And besides there shall be left to the Person upon whom the Distress is made, a Bed to lie on, and a Sute of Cloths to wear. *Ordinance of* 1667. *Title* 33. *Art.* 14.

See the fifteenth and sixteenth Articles of this Title, and the Ordinance of *Orleans*, Art. 28. that of *Blois*, Art. 37. the Edict of the sixteenth of *March* 1593, and other Regulations.

XV.

15. Those who are Receivers and Collectors ought to give diligent Attendance, and not to delay those who come to make Payments.

It is a general Duty, and common to all those who are employed in levying and receiving the Publick Monies, to be diligent and assiduous in their Function, and not to delay those who have any Payments to make, and who by their Delay may be put to Expences on account of their stay, or suffer some other Damages. And if the Delay should be with design to put the Persons who were come to pay, to Charges, this Misdemeanour would be punished according to the Circumstances. And if those Persons who should have a Payment to make would prevent any bad Consequences that might arise from their Non-Payment, they may guard against any Inconvenience of this kind by making a Tender of the Money in due Form *s*.

s Susceptores publicos absque omni mora aurum censemus suscipere, ne quis per hanc occasionem sumptus facere compellatur. Nam si solvere volens a suscipiente fuerit contemptus, testibus adhibitis contestationem debebit proponere ut, hoc probato, & ipse securitatem debitam, commissi nexu liberatus, cum emolumentis accipiat: & qui suscipere neglexerit, ejus ponderis quod debebatur, duplum fisci rationibus per vigorem officii præsidis inferre cogatur. *l.* 1. *C. de suscept. præp. & arcar.*

Humanitatis necessitate commoti. *l.* 9. *ff. eod.*

Aurum sive argentum quodcumque a possessore confertur, arcarius vel susceptor accipiat: ita ut provinciæ moderator, ejusque Officium ad crimen suum noverit pertinere, si possessoribus ullum fuerit ex aliqua ponderum iniquitate illatum dispendium: & quidquid ex provinciis ad nostrum dirigitur ærarium, id ad illustres viros ærarii nostri comites relatione deferatur. *l. ult. C. eod.*

XVI.

16. Several other Duties of those who are employed in imposing and levying the Publick Taxes.

Besides these general Duties of all these Persons who are charged with the Distribution and Collection of the Publick Taxes, there are others of several sorts which relate to the manner of exercising their Functions. Thus the Officers who settle the Proportions of the respective Places or Divisions, have their Rules prescribed to them as to the manner in which they are to proceed, and how they ought to visit the several Parishes when there is occasion for their so doing, as in the Cases explained in the fourth Article, and for other sorts of Functions. Thus the Receivers have also their Rules laid down to them how to govern themselves in their Receipts, as to the Forms of the Acquittances which they are to give; the manner of making up their Accounts, and other Matters of the like nature. And there are also other Rules which relate to the Functions of those who settle the Assess-

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ments of the several Inhabitants, or who collect the Money that is assessed. But these sorts of Rules which are established by the Ordinances, and the Edicts and Declarations published concerning these Matters *t*, not having the Character of the Rules that are to be explained in this Book, as has been already observed in another Place *u*, they ought not to be set down here; and it is easy for the Reader to find them in the said Edicts and Ordinances.

t The Detail of these Rules is contained in the Ordinances.

See that of Francis I. *in the Year* 1517. *Art.* 45, 49. *in* 1535. *Art.* 11, 29. *in* 1517. *Art.* 47. *See that of* Lewis XII. *in* 1508. *See the States of* Orleans, *Art.* 140. *See that of* Charles VII. *in the Year* 1388. *Art.* 208.

Neminem susceptionis munere functum ad idem munus adstringi, nisi se prius vinculo solicitudinis superioris absolverit. Nam neque eos qui placuerint gravare, justi est, neque eos qui displicuerint tenere, prudentis est. *l.* 4. *de suscept. præp. & arcar.*

One may judge by this Text how great the Care and Vigilancy is which is required in those who are employed in distributing and levying the Publick Taxes.

u See the End of the Preface.

XVII.

17. Duties of those who are imployed in levying the Duties on Goods and Merchandizes.

The Duties of the Officers, and other Persons who have the Charge of levying the Impositions which are laid on Goods and Merchandizes, and who are employed in gathering in the Duties on Salt, the Excise on Liquors, the Customs on Goods imported and exported, and other Imposts of the like kind, are of a less Extent than the Duties of the Officers and other Persons who are employed in the Distribution and Collection of the Taxes on Lands and Personal Estates. For as to those other kinds of Contributions, the Imposition consists in the Tax which the Prince lays upon each kind of Goods and Merchandizes, and it is paid out of the things themselves in the Places where the Duty ought to be paid. Thus the Duty of the Persons who are concerned in levying the said Imposts, whether they be the chief Commissioners, or others imployed under them, consists in not committing any Abuses, in not exacting any greater Sum than what is due, in giving diligent Attendance at their Offices, that they may not delay those who have Payments to make, in visiting the Merchandizes in the presence of the Owners, without spoiling them, disordering them, or causing any manner of Damage to them; and finally in observing in the discharge of their Functions the Rules which are prescribed them by the Ordinances *x*.

x Exact no more than that which is appointed you. Luke 3. 13.

The Opportunities and the Conveniency which those Persons who are employed in collecting these Imposts have of exercising Violence and Extortion, oblige those who have the naming of them, and the Officers who are their Judges, to watch narrowly their Conduct, and to keep them within the Bounds of that Moderation which their Function requires, and which may be very consistent with their Duty, as St. John *told the Publicans who consulted him. It was because of these Abuses, which went even the length of Robbery, that the* Romans *made particular Laws for repressing them.* Quantæ audaciæ, quantæ temeritatis sint Publicanorum factiones, nemo est qui nesciat. Idcirco Prætor compescendam eorum audaciam hoc edictum proposuit. Quod familia Publicanorum furtum fecisse dicetur, item si damnum injuria fecerit, & id ad quos ea res pertinet, non exhibetur: in dominum sine noxæ deditione judicium dabo. *l.* 12. *ff. de public. & vectig. & comm.*

TITLE VI.

Of the Demesnes of the Sovereign.

BEFORE we proceed to explain what is meant by this Word, the Demesnes of the Sovereign, it is necessary to observe that the Prince may have two sorts of Goods; those which he has in the Quality of Sovereign, and which depend on the Sovereignty, and those which properly belong to his Person independently of his Title of Sovereign. Thus in *France* the Lands which are annexed to the Crown are the first of these two sorts; thus the Lands and other Goods which the Prince acquires by Succession are of the second.

If by the Word, the Sovereign's Demesnes, were to be understood in general all the Estate and all the Rights which he may have, the Demesnes would comprehend the Goods of both these kinds; and in this case it would be necessary to distinguish two sorts of Demesnes; that which we call in *France* the Demesnes of the Crown, and that of the Estate belonging properly to the Person of the Prince independently of his Quality of Sovereign, in the same sense that we give sometimes to the Word Demesne, when we speak of the Possessions of particular Persons.

If on the contrary we will take this Word, the Demesnes of the Sovereign, in the Sense which it seems to have in the Ordinances, it will be understood only

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only of the Demesnes of the Crown; for they declare whatever is Part of the King's Demesne to be inalienable, excepting in the Cases which shall be hereafter mentioned *a*. Which restrains the Sense of this Word to the Goods which depend on the Crown, seeing it is only those which the Ordinances have forbid to be alienated, and that nothing hinders the Sovereign from disposing as he pleases of the Goods which belong to him as his own by any other Title; unless it be that the said Goods have been annexed to the Crown by the way which the same Ordinances have established, and of which notice shall be taken in its proper place *b*.

This Word, the Demesnes of the Sovereign, signifies therefore commonly with us the Goods which depend on the Sovereignty, and not those which belong to the Prince as his own private Property by some other Title, and which we may call if we please his private Demesne. Thus in *France* we commonly understand by the King's Demesne, not only the Lands annexed to the Crown, but also the Rights of another nature, such as the Right of Forfeiture, that of Succession to the Estates of Aliens, as also to the Estates of those who die without any Heir, the Right to the Successions of Bastards; and we likewise comprise therein other Rights, such as the Excise and Customs, which the Ordinances themselves seem to place in the number of the Goods belonging to the King's Demesnes; seeing there are Edicts which have ordained some of the Goods of the Demesne to be alienated, and have comprehended therein the Alienation of the Excise. According to this Meaning, which takes in the Excise and Customs as Part of the Demesnes, it would seem that we might likewise comprise in it all the other sorts of Rights which compose the Publick Revenue, and which have been explained in the foregoing Article, seeing they are Rights which depend on the Sovereignty, and which augment the Goods, and the Revenues thereof, and make as it were a Patrimony for the Prince, according to the Expression of the *Roman* Law, where they call by the Name of Patrimonial Lands, those which belong to the Prince by virtue of that Quality *c*.

Besides the Rights of the Sovereign which bring him in a Revenue, and which for this reason are naturally a part of his Demesne, we reckon commonly in *France* among the Rights of the Demesne those which are called the Rights of Justice, altho' there be only some of the said Rights which bring in any Revenue, the others producing none at all; which obliges us to distinguish here these two different kinds of Rights of Justice.

We call in general Rights of Justice, certain Rights which are either a part of the Right of administring Justice, or which are Consequences of it. Thus the Rights of appointing Officers for the Administration of Justice, of having Courts of Justice, Prisons, Pillories, Gibbets, of reaping the Profit of Confiscations and of Fines, are Rights that are called Rights of Justice, and which do naturally belong only to the Sovereign, as that of administring Justice does. But since it is the Usage in *France*, that many Lords have the Rights of Justice which the Kings have granted them within the Bounds of their Lands, they have also these sorts of Rights which we have just now mentioned, but in a different manner; for we distinguish three kinds of Justice or Jurisdiction, the highest, the middlemost, and the lowest, which have their different Rights, and which it is not our Business to explain here, seeing this Matter, which depends on Custom and Usage, does not come within the Design of this Book. We shall only observe here, that these Rights of Justice being of two sorts, one of those which produce no Revenue, such as the Right of having Courts, or other Places, for the Administration of Justice, Pillories, and Gibbets; and the other of those which produce a Revenue, such as the Right to Forfeitures and Fines: we shall set down in this Title among the Rights of the Demesne of the Sovereign, only the Rights of Justice which produce some Revenue, taking this Word Demesne in the Sense which signifies properly the Patrimony of the Prince, that is to say, his Goods, his Rights, and his Revenues. Thus what shall be said in this Title of these sorts of Rights must be understood to be within the Bounds of the Lands which belong to the King, and of which the Jurisdiction has not been alienated from the

a See the 14th Article of the 1st Section.

b See the 24th Article of the 1st Section.

c Fundi Patrimoniales, & qui ex emphyteutico jure ad domum nostram diversis generibus, devoluti sunt, sic eis, qui eos poposcerint, cedunt, ut commissi metus esse non possit. Neque enim magis commodamus nostra, quam tradimus ea jure dominii: ita tamen, & ea quæ in nostra possessione positi præstiterint, & in posterum solvant. *l.* 4. *C. de fund. patrim. V. T. h. T.*

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the Crown. For in the Lands belonging to the Lords of Mannors who have a Jurisdiction within themselves, the said Rights belong to them.

It follows from all that has been said of the Goods and Rights of the Demesne, that it is necessary to distinguish the Meaning of these two Words, *Goods* and *Rights*. For the Word Goods is more general, and every thing that is a Right of the Demesne is also part of the Goods thereof. But there are Goods of the Demesne which ought not to be comprehended under the Name of Rights. Thus the Crown-Lands are Goods but not Rights of the Demesne. But seeing these two Words *Goods* and *Rights* are often taken in one and the same Sense, and that it is easy to distinguish that which is only part of the Goods, from that which is properly speaking a Right, we shall make use of these two Words in this Title, in such a manner as to avoid all Equivocation which may render the Sense dubious.

It remains only that we should distinguish the Matters which are to compose this Title, which we have divided into eight Sections. The First, where we shall explain the Nature and the Kinds in general of the Rights of the Demesne. The Second, where we shall treat particularly of the Right of Forfeiture. The Third shall be of the Right of Succession to Persons who have no Heir, of vacant Goods, and of Waifs. The Fourth shall be of the Right of Succession to the Estates of Aliens. The Fifth of the Right of Succession to Bastards. The Sixth shall contain the Rules common to the several sorts of Goods and Rights of the Demesne. The Seventh shall contain the Privileges of the Exchequer. And the Eighth shall treat of that which the Sovereign may have independently of that Quality, and as his private Patrimony or Demesne.

SECT. I.

Of the Nature and Kinds in general of the Rights of the Demesne.

The CONTENTS.

1. *Definition of the King's Demesne.*
2. *The Demesne is different from the private Patrimony of the Prince.*
3. *Three sorts of Goods of the Demesne.*
4. *The first is of Lands and Immoveables.*
5. *The second is of the Publick Revenue.*
6. *The third is of several other Rights of divers kinds.*
7. *Goods comprised under the first kind.*
8. *Other Goods which come under the same kind.*
9. *Another Revenue of the same kind, the Mines.*
10. *Other Goods of the second kind.*
11. *Another Revenue of the same kind.*
12. *The Goods of the Demesne are inalienable.*
13. *There are some Goods of the Demesne inalienable in their own Nature, and others only because of the Privilege of the Sovereign.*
14. *It is lawful to alienate the Goods of the Demesne, in two Cases.*
15. *A kind of Alienation of the Goods of the second sort.*
16. *Alienations of the Goods of the Demesne are made with the Charge of Reversion.*
17. *Alienations made for the Necessities of the War, are made with a Reservation of a perpetual Faculty of Redemption.*
18. *The Appennages are made on condition of Reversion in case of Failure of Male-Issue.*
19. *The Goods of the third kind are also inalienable.*
20. *The Demesne is imprescriptible.*
21. *There are some Rights which can belong only to the Demesne, and others which become Part of the Demesne by Changes.*
22. *How Lands that were not a part of the Demesne may become so.*
23. *The Prince disposes of the Goods not yet annexed to the Demesne.*
24. *How the private Goods of the Prince become part of the Demesne.*
25. *Two Ways of uniting and incorporating Lands into the Demesne.*
26. *In doubtful Cases the Cause of the Exchequer is not favoured.*

I.

THE Demesne of the Sovereign consists of the Goods and of the Rights which he possesses by virtue of that Quality *a*.

1. Definition of the King's Demesne.

a Sacrum patrimonium. *l. ult. C. de vectig. & comm.*

Omnes omnino quocunque titulo possidentes, quod delegatio super indicti nomine videtur, amplexa velut canones cogantur inferre ut ne qua sit dubietas, hac aperte definitione decernimus, ut id potius canonis vocabulo postuletur. Nulla igitur domus vel sacri patrimonii vel emphyteutici juris vel hominum privatorum, etiam si privilegium aliquod habere doceatur ab hac necessitate sejuncta sit: quæ jam non extraordinarium, ut hactenus, sed ipsis facientibus canonicum nomen accepit. *l. 1. C. de indict.*

II. This

II.

2. The Demesne is different from the private Patrimony of the Prince.

This Demesne is distinguished from that of the Goods and Rights which the Sovereign may have by any other Title, and which may be called his private Demesne *b*, of which we shall treat in the eighth Section.

b Privatum patrimonium. *l. 2. C. de off. com. rer. priv.*

Quoties alicui colonorum agrum privati patrimonii nostri placuerit venumdari; non unus tantum, qui forte consortibus suis gravis ac molestus existat, sed alii quoque duo vel plures ex simili origine ac jure venientes in supradicta emptione socientur. *l. ult. C. de agric. & dom. vel fisc.*

III.

3. Three sorts of Goods of the Demesne.

The Demesne of the Sovereign, which belongs to him in that Quality, is composed of three different kinds of Goods, which are explained in the three following Articles *c*.

c See the following Articles.

IV.

4. The first is of Lands and Immoveables.

The first sort of Goods of this Demesne, are the Immoveables which belong to the Sovereign, either by the Establishment of the Estate, or by Conquest, or by other ways *d*, as is explained in the 22d and following Articles. And we must comprehend under this first kind, the Lands which the Sovereign may have acquired by a private Title, such as Succession, Donation, or otherwise, when the said Lands have been annexed to the Crown in the manner which shall be explained in the same Articles.

d Fundi patrimoniales & qui ex emphyteutico jure ad domum nostram diversis generibus devoluti sunt. *l. 4. C. fund. patrim. V. T. h. T.*

Variæ causæ sunt, ex quibus nuntiatio ad fiscum fieri solet. Aut enim se quis quod tacite relictum est, profitetur capere non posse, vel ab alio præventus defertur, vel quod mors ab hæredibus non vindicatur: vel quod indignus quis hæres nunciatur: vel quod princeps hæres institutus, &c. *l. 1. in princip. ff. de jure fisc.*

V.

5. The second is of the publick Revenue.

The second sort of the Goods of the Demesne are the several Duties and Impositions which compose the publick Revenue of the State, such as those which have been treated of in the preceding Title *e*.

e Tributa, Vectigalia, &c. *See the second Section of the preceding Title.*

VI.

6. The third is of several other Rights of divers kinds.

The third sort of the Goods of the Demesne comprehends all the other different Rights of the Prince, such as the Rights of Forfeiture, of Succession to those who have no Heirs, of Succession to the Estates of Aliens, of Succession to Bastards; the Rights of Frank-Fees, of new Acquisitions, of Mortmain; the Rights of the Sovereign on the Seas, to Forests, Hunting, Fishing; the Rights of Justice which bring in some Revenue, according to the Remark which has been made in the Preamble of this Title; the Duties and Revenues which the King draws from the Offices belonging to his Demesne; such as those of Registers and Notaries Publick; the Casualties of other Offices, and other Duties and Revenues of the Demesne, which have almost all of them this in common, that the Revenues of this third sort depending on uncertain Events, are a kind of casual Revenue *f*.

f See concerning the Rights of Forfeiture, of Succession to those who leave no Heir behind them, of Succession to the Estates of Aliens, and of Successions to Bastards, the four following Sections; touching the Rights of Frank-Fees, of new Acquisitions, and of Mortmain, the fifteenth Article of the second Section of the second Title. And as to the Rights of the King on the Seas, to Forests, Hunting, and Fishing, seeing they contain a Detail of arbitrary Rules which are to be found in the Ordinances, and which do not come within the Design of this Book, we shall not make any Collection of them here; and it sufficeth to remark in general the Order of the said Rights. But seeing there are Rules of Policy relating to the Matters of the Seas, of Forests, of Hunting and Fishing, which are within the Design of this Book, we shall explain them in the eighth Title. And as for the Rights of Justice, it is a Matter which does not belong to the Design of this Book; because, as has been said at the End of the Preamble of this Title, those Rights belonging to the Lords of the Manor, who have the Jurisdiction within their own Bounds, are regulated by Custom and Usage; and those of the King, which may come within the Design of this Book, such as Forfeitures, Fines, and others, are explained each of them in their proper Place.

VII.

7. Goods comprised under the first kind.

We must comprehend under the first kind of Goods of the Demesne certain other Immovables besides Lands, such as Houses, Shops, Stalls, and other Buildings in publick Places, or Places vacant, and having no Owner, and which have been granted by the Prince, in consideration of a certain Rent, by Alienations or Engagements which have been made thereof; such as are in *Paris*, the Shops in the Palace, and in the Market-Places *g*. But we must not take in under this first sort of Goods of the De-

g This is a Consequence of the fourth Article.

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mesne the publick Places, the Highways, and the other Things of this kind, which are out of the Commerce of particular Persons, and destined to the Use of the Publick. For these sorts of Immoveables producing no manner of Revenue, are not reckoned in the number of Goods; and the Rights which the Publick and the Sovereign have in them are of another Nature than the Rights which Property gives *h*.

h See the second and third Articles of the first Section of Things.

VIII.

8. Other Goods which come under the same kind.

It is necessary likewise to comprehend under this first kind of Immoveables belonging to the Demesnes, the Lands which are waste, that is to say, which have never been cultivated, and which have no Owner: And also the Islands which are formed in the great and navigable Rivers, Tolls, Passages, Bridges, Ferry-Boats, Fisheries, Mills, and other Things which depend on the Right to Rivers, and to the Highways *i*.

i Insula quæ in flumine publico nata est, publica esse debet. *l. penult. in f. ff. de acq. rer. dom.*

This Text seems to be contrary to others of the Roman *Law, which say, That the Islands growing in Rivers do belong to the Proprietors of the neighbouring Grounds, according to their Proximity to the said Islands, and in proportion to the Extent of their Grounds.*

Insula quæ in mari nata est, (quod raro accidit) occupantis fit: nullius enim esse creditur. At insula in flumine nata (quod frequenter accidit) siquidem mediam partem fluminis tenet, communis est eorum qui ab utraque parte fluminis prope ripam prædia possident: pro modo (scilicet) latitudinis cujusque fundi quæ prope ripam sit. Quod si alteri parti proximior sit, eorum est tantum qui ab ea parte prope ripam prædia possident. §. 22. *inst. de rer. divis. l.* 7. §. 3. *ff. de acq. rer. dom.*

Insula est nata in flumine contra frontem agri mei, ita ut nihil excederet longitudo regionem prædii mei. Postea aucta est paulatim, & processit contra frontes & superioris vicini, & inferioris. Quæro, quod adcrevit, utrum meum sit, quoniam meo adjectum est, an ejus juris sit, cujus esset, si initio ea nata ejus longitudinis fuisset? Proculus respondit, flumen illud, in quo insulam contra frontem agri tui eam natam esse scripsisti, ita ut non excederet longitudinem agri tui, si alluvionis jus habet, & insula initio propior fundo tuo fuit, quam ejus, qui trans flumen habeat, tota tua facta est, & quod postea ei insulæ alluvione accessit, id tuum est etiam si ita accessit, ut procederet insula contra frontes vicinorum superioris atque inferioris, vel etiam ut propior esset fundo ejus qui trans flumen habet. *l.* 56. *eod.*

It would seem that in this last Law save one, de acqu. rer. dom. *a Distinction ought to be made of two sorts of Rivers, those which were for the Use of the Publick, and other lesser Rivers. And likewise the Ordinances which reckon these Islands a part of the Demesnes of the King, are restrained to those which grow in great and navigable Rivers. So that it may be said, that the Authors who are of opinion that these Ordinances are contrary to the* Roman *Law, have not made Reflection on this Text which we have just now quoted.*

See the King's Edict of the Month of April, 1683, *in which the antient Ordinances are mentioned.*

IX.

9. Another Revenue of the same kind, the Mines.

We may also comprehend under the Goods of this first kind, the Revenues which the Sovereign draws from Mines, and which are regulated to a tenth Part *l*.

l This tenth Part is regulated pursuant to the Roman *Law by the Ordinances of* Francis *the Second, bearing Date the 29th of* July, 1560; *of* Charles *the Ninth, dated the 26th of* March, 1563; *and others.*

Cuncti qui per privatorum loca saxorum venam laboriosis effossionibus persequuntur, decimas fisco, decimas etiam domino repræsentent: cætero modo propriis suis desideriis vindicando. *l.* 5. *C. de metall.*

See the nineteenth Article of the second Section of the second Title.

X.

10. Other Goods of the second kind.

If under the second kind of Goods belonging to the Demesne, which are the publick Revenue, we should take in every thing that is called in *France* the King's Money, we might place in that Rank the Tenths which the Clergy pay to the King, the Impositions which are laid on in some Provinces by the name of Free Gift, the Money which is raised for the Maintenance of the King's Guards, the Subsistence of the Houshold, and all the other Revenues of the like kind *m*.

m Nostrum ærarium. *l. ult. C. de quadr. præscr.*

Res fisci nostri. §. 9. *inst. de usucap.*

XI.

11. Another Revenue of the same kind.

We may likewise, with much more reason, place in this second kind the Profits and Revenues which the Right of coining Money may produce, whether it be by raising the Value of the Bullion that is coined into Money, or by raising the Value of the Species. For the Right of coining Money belongs to the Sovereign alone *n*.

n Si quis nummos falsa fusione formaverit, universas ejus facultates fisco nostro præcipimus addici. *In monetis enim tantummodo nostris cudendæ pecuniæ studium frequentari volumus; cujus obnoxii, majestatis crimen committunt.* Et præmio accusatoribus proposito, quicunque solidorum adulter poterit reperiri, vel a quocunque fuerit publicatus, illico omni dilatione summota, flammarum exustionibus mancipetur. *l.* 2. *C. de fals. monet. V. tit. C. de muril. & gynac.*

XII.

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XII.

12. The Goods of the Demesne are inalienable.

There is this in common to all the Goods of the Demesne of these three sorts, that they are all of them inalienable, but in different Respects. For there are some of them which of their own Nature, and by their Quality are inalienable; and there are others which are inalienable only because of the Privilege of the Sovereign, when he is become Master of them. We shall see in the Articles which follow this Distinction, and these different Effects in the three sorts of the Goods of the Demesne *o*.

o See the Edict of the 30th of June, 1539.

Intellecto jamdudum quod charissimus in Christo filius noster Hungariæ Rex illustris alienationes quasdam fecerit in præjudicium regni sui & contra Regis honorem: nos eidem Regi dirigimus scripta nostra, ut alienationes prædictas, non obstante juramento si quod fecit de non revocandis eisdem, studeat revocare. Quia cum teneatur, & in sua coronatione juraverit, jura regni sui & honorem coronæ illibata servare: illicitum profecto fuit, si præstitit de non revocandis alienationibus hujusmodi juramentum & propterea penitus non servandum. *Cap. intellecto extra de jure jur.*

Nulli jam in posterum licere præcipimus patrimoniales seu limitrophos, vel saltuenses fundos qui per tractum orientis positi sunt, ad jus transferre privatum: sive dempto, sive salvo canone juris fundorum immutatio postuletur, &c. *l. 13. C. de fund. patr.*

See the twentieth Article of this Section.

XIII.

13. There are some Goods of the Demesne inalienable in their own Nature, and others only because of the Privilege of the Sovereign.

Of all the different sorts of Goods of the Demesne, those which by their Nature belong to the Sovereign, and cannot belong to other Persons; such as the publick Taxes, the Right of coining Money, and others, are naturally inalienable. And those which in their own Nature might have belonged to other Persons, such as the Crown-Lands, are inalienable only because they have passed to the Possession of the Sovereign, and because of his Privilege, and of their being appropriated to the Uses of the State *p*.

p This Distinction results from the Nature of these several sorts of Goods.

XIV.

14. It is lawful to alienate the Goods of the Demesne in two Cases.

Altho the Goods of the Demesne be inalienable, yet if it happens that the Good of the Publick requires they should be alienated, the Prince may alienate them. But that happens only in two Cases: One is, that of Necessity in a Time of War. And the other is in order to give to the younger Sons of the Sovereign a Patrimony, which is called an Appennage *q*, and which it is just to take out of these sorts of Goods for the said younger Sons and their Male-Issue, who may in process of time succeed to the Crown. But this Alienation is made only on the Conditions explained in the sixteenth and eighth Articles.

q The Demesnes of the Crown of France *cannot be alienated, except in two Cases only: One is, for an Appennage to the younger Sons of the House of* France; *in which Case they revert again to the Crown, if the said younger Sons die without Male-Issue, in the same Estate and Condition they were in at the time of the said Grant, notwithstanding any Disposition, Possession, or any other Act, express or tacit, that may have past or happened during the time of the Appennage. The other, for the raising of ready Money for the necessary Expences of a War, after Letters Patent have issued for this Purpose, and been register'd in the Parliaments of* France, *in which Case there is a perpetual Power of Redemption. Ordinance of* February, 1566, *Art. 2.*

See the Ordinance of Blois, *Art. 329. See the twenty third Article of the second Section of the second Title.*

XV.

15. A kind of Alienation of the Goods of the second sort.

Altho the Goods which can belong to none but to the Sovereign be inalienable in their own Nature, such as the Tax on real and personal Estates, the Excise, the Customs, and others; yet a sort of Alienation is made of them when the King creates Rents or Annuities, which he sells and assigns on the said Revenues as occasion requires; and these sorts of Alienations are limited to the Sums regulated by the Edicts which ordain them, and affect those Revenues only till the Redemption of the said Rents: But the Fund of the said Revenues remains always the King's; so that the annual Impositions of the said Revenues, even for the Years in which the Purchasers of these Annuities have the Benefit of them, are nevertheless collected as usually in the King's Name, and by his Orders; and the Monies are returned into the hands of the Officers appointed to pay the said Rents or Annuities *r*.

r See the Ordinances of April 1574, *of* September 1591, *of* February 1594, *and others.*

It is of this kind of Rents or Annuities that those are which are paid at the Town-House of Paris, *which are assigned on the Subsidies, and several other Funds.*

XVI.

16. Alienations of the Goods of the Demesne are made with the Charge of Reversion.

The Goods of the Demesne cannot be alienated but upon condition of their reverting to the Crown whensoever the Case falls out; and this Reversion is different, according to the Cause

Cause of the Alienation, as shall be explained in the two following Articles.

XVII.

17. Alienations for the Necessities of the War, are made with a Reservation of a perpetual Faculty of Redemption.

In the Case of alienating the Immoveables of the Demesne for the Necessities of the War, the Goods alienated revert to the Sovereign, he reimbursing the Purchasers of the Price of their Purchases. Thus, these Alienations are never made but with the Charge of a perpetual Faculty of Redemption: For which Reason the Purchasers are looked upon to be a sort of Mortgagees, and are obliged to preserve the Goods and the Rights in their good Condition *t*.

t See the Ordinances cited on the 14th Article.

XVIII.

18. The Appennages are made on condition of Reversion in case of Failure of Male Issue.

In the Case of an Alienation for an Appennage, the Reversion has not place, except when the Cause of the Alienation and the Appennage comes to cease. Which happens only in the Case where the Persons on whom the Appennage was first settled, or their Male Successors, die without Issue Male. And the said Lands which were granted as an Appennage, ought in this Case to be restored in the same Condition in which they were at the time of making the Settlement, free from all the Charges and Debts of the Person on whom they were settled; for otherwise it would be in his power to annul the Right of Reversion *u*.

u See the Ordinances quoted on the 14th Article.

XIX.

19. The Goods of the third kind are also inalienable.

The Alienations which have been spoken of in the preceding Articles, do not concern the Rights and casual Revenues which have been explained in the sixth Article; for those Rights are inseparable from the Sovereignty: And moreover, they do not agree with the two Causes which are the Foundation for alienating the Goods of the Demesnes; but some of the said Rights depending on the Right of Justice, such as the Right of Forfeiture, and the Right of Succession to those who die without Heirs, they have passed to Lords of Manors, who have a Jurisdiction within their own Lands; and they belong also to the younger Sons of the Royal Family, who have Appennages settled on them in the same manner as the other Rights of the Lands given them for their Appennage *x*.

x This is a Consequence of the Nature of those Rights. See the 6th Article.

XX.

20. The Demesne is imprescriptible.

The same Reasons which make the Goods of the Demesne inalienable, render them likewise imprescriptible, since they would be alienated, if they could be acquired by Prescription. Thus, no particular Person can acquire the Property of them by the bare Effect of a long Possession: For besides the Consequence of preserving the Demesne for the Good of the State, the Quality of the Sovereign making it impossible for him to look narrowly to the Preservation of all the particular Goods belonging to his Demesne, Prescription ought not to run against him *y*.

y See Art. 12. of this Section, and Art. 2. of the 5th Section of Possession, and of Prescriptions in the Book of the Civil Law in its Natural Order.

The Goods of the Demesne are declared to be imprescriptible by the Edict of Francis *the First, of the 30th of* June, 1539. *even altho they had been possessed for a hundred Years; altho by the* Roman *Law, the Funds belonging to the Exchequer, and to the Prince's Demesne, might have been prescribed by a Possession of forty Years.*

Nullum jus privatum vel publicum in quacunque causa, vel quacunque persona, quod prædictorum quadraginta annorum extinctum est jugi silentio moveatur. *l. 4. C. de præscr.* 30, *&* 40 *an.*

Jubemus omnes qui in quacunque Diœcesi, aut in quacunque Provincia, vel quolibet saltu (vel civitate) fundos patrimoniales, vel templorum, aut agnothetici, seu relevatorum jugorum, vel cujuscunque juris per quadraginta jugiter annos (possessione scilicet non solum eorum qui nunc detinent, verum etiam eorum qui antea possederant, computanda) ex quocunque titulo, vel etiam sine titulo hactenus possederunt, vel postea per memoratum quadraginta annorum spatium possederint, nullam penitus super dominio memoratorum omnium fundorum vel locorum vel domorum a publico actionem, vel molestiam, aut quamlibet inquietudinem formidare, sed impositum canonem, pro qualitate juris, cujus prædia sunt vel loca, per singulos annos solventes, pro certo habeant suum esse quod possident, vel postea possederint. Ita ut omnibus ad excludendam omnem quolibet modo ex publico movendam quæstionem, nuda ex quocunque titulo, vel etiam sine titulo corporalis quadraginta annorum jugis possessionis exceptio possit sufficere; hoc etiam adjiciendo, ut illi quoque qui adempto canone hujusmodi fundos ab initio principali jussione datos sibi fuisse confirmant: si per quadraginta annos adempti canonis beneficium jugiter possederunt: nec canonem cujus ademptionem quadraginta (sicut dictum est) annorum, possessio testatur, possint penitus profligari: eo quod nostræ pietati placuit in utroque casu, id est tam salvo, quam adempto canone, possessorum nostrorum jura in eo statu in quo per quadraginta annos, sicut dictum est, jugiter manserunt, absque ulla innovatione durare. *l. ult. C. de fund. patrim.*

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It was only the Tribute or Tax upon the Land that was imprescriptible.

Jubemus eos qui rem aliquam per continuum annorum quadraginta curriculum sine quadam legitima interpellatione possederint, ne possessione quidem rei seu dominio nequaquam removeri: functiones autem, seu civilem Canonem, vel aliam quampiam publicam collationem eis impositam dependere compelli, nec huic parti cujuscunque temporis præscriptionem oppositam admitti. *l. 6. C. de prescr. 30 vel 40 ann. For it is a Right whereof the Use and Cause do never cease.*

XXI.

21. There are some Rights which can belong only to the Demesne, and others which become part of the Demesne by Changes.

It results from the preceding Articles, that of all these sorts of Goods of the Demesne, there are some which have never belonged to any other but to the Demesne, such as the Excise, the Customs and other Imposts, which could never belong to particular Persons, and are in use only for the benefit of the Publick, and by virtue of the Authority of the Powers who are vested with the supreme Government, and have the Right of imposing them; and there are others of the said Goods which have been in the Commerce of particular Persons, and are become Part of the Demesne by Changes, such as Lands annexed to the Crown z.

z This is a Consequence of the different Natures of those Rights. See the following Article.

XXII.

22. How Lands that were not a part of the Demesne may become so.

The Lands united to the Crown are of three sorts. The first is of those which are part of the antient and original Demesne appropriated to the Kings for their Use, and for their Expences; and we may put down in this number that which has been added to to the Crown by Conquest. The second is of those which the Kings have acquired by Forfeitures, by the Death of Persons dying without Heirs, by inheriting the Estates of Aliens, or by succeeding to Bastards. And the third is of the Lands which have fallen to them by Succession, or other Titles. And these two last sorts of Goods become part of the Demesne by the Union which incorporates them into the Demesne, as shall be explained in the 24th and 25th Articles a.

a See the three following Articles.

XXIII.

23. The Prince disposes of the Goods not yet annexed to the Demesne.

The Goods which the King acquires by any one of the Ways explained in the preceding Article, are not united immediately to the Demesne; for those which arise from the Rights of Forfeiture, of Succession to those who die without Heirs, of Succession to the Estates of Aliens and of Bastards, being Profits and Revenues which the King might dispose of, they are not considered as a Capital which becomes immediately a part of the Possessions of the Demesne; but the King disposes of them as he thinks fit, either by giving them away, or by keeping and uniting them to the Demesne in the manner explained in the two following Articles b.

b By the Roman Law the Prince disposed of the Goods belonging to what they called his private Patrimony.

Fundi patrimoniales, & qui ex emphyteutico jure ad domum nostram diversis generibus devoluti sunt, sic eis, qui eos poposcerint, cedunt, ut commissi metus esse non possit. Neque enim magis commodamus nostra quam tradimus ea jure dominii: ita tamen, ut ea quæ in nostra possessione positi præstiterint & in posterum solvant, *l. 4. C. de fund. patrim. V. T. h. T.*

Since it often happens that the Goods which fall to the King by Forfeiture, by the Death of Persons who leave no Heirs behind them, by the Death of Aliens and of Bastards, are Goods subject to Rights which the Lords of Mannors have therein, the King parts with them, that he may not be subject to the said Duties, or to make any amends for the same to those Lords of the Manner to whom they should be due. And to justify this, they quote an Ordinance of Philip the Fair, *which directs this Course to be taken, and that the King should rid his hands of these Estates within a Year and a Day.*

XXIV.

24. How the private Goods of the Prince become part of the Demesne.

The Goods which the King has acquired by particular Titles, and those which are fallen to him by some of the Titles mentioned in the preceding Article, become part of the Demesne, when they have been held and possessed in the same manner and on the same Conditions on which he holds and possesses the Goods of the Demesne. Thus all the Goods which are expresly set apart, annexed and incorporated for the use and benefit of the Crown, or which have been possessed and managed by the Receivers and Officers of the King, for the space of ten Years, and enter'd into their Books of Accounts, are reputed, and are in reality the Goods of the Demesne c.

c These are the Words of the 2d Article of the Ordinance of February 1566. *touching the Demesne. And in the 13th Article of the same Ordinance it is said, that the foregoing Articles shall be held as a Law and Ordinance, as well for the antient Demesne of the Crown, as for other Lands since accrued and fallen to the King.*

Fiscus cum in privati jus succedit, privati jure pro anterioribus suæ successionis temporis utitur: cæterum posteaquam successit habebit privilegium suum. Sed utrum statim atque cœpit ad eum pertinere nomen, an vero postquam convenit debitorem, an postquam relatum est inter nomina debitorum quæritur

ritur ——— Puto tamen exinde privilegio esse locum, ex quo inter nomina debitorum relatum nomen est. *l. 6. ff. de jure fisci.*

This Text agrees with the said Ordinance.

XXV.

25. Two Ways of uniting and incorporating Lands into the Demesne.

It follows from the preceding Article, that there are two ways of uniting and incorporating into the Demesne Lands and other Immoveables. The one is express, when the King declares that he unites and incorporates into the Demesne the Lands which he might have otherwise disposed of: and the other is tacit, when he suffers the Lands, which it was in his power to give away, and which were not annexed to the Demesne, to be annexed and incorporated in it in the manner explained in the 24th Article *d*.

d Rerum nobis notitia intimetur, ut jussu nostro vacantia vel aliæ res nomine occupentur ærarii. Quæ forma etiam in parte bonorum vel in una alterave re seu actione una vel etiam pluribus servetur. *l. ult. C. de bon. vac. & incorpor.*

Si quando aut alicujus publicatione, aut ratione juris aliquid rei nostræ addendum est rite atque solemniter per comitem rerum privatarum, deinde per rationales in singulis quibusque provinciis commorantes incorporatio impleatur, & diligens stilus sigillatim omnia adscribat. *l. 3. eod.*

See the foregoing Article.

XXVI.

26. In doubtful Cases the Cause of the Exchequer is not favoured.

It may be remarked as a last Rule of the Rights of the Demesne, that altho the said Rights be very favourable in their nature, and by reason of their being set apart for the Publick Good, altho they be inalienable, altho they be imprescriptible, and that it is of Importance to the State that the said Rights should be preserved; yet this Favour does not reach so far as to extend these Rights beyond their just bounds. And it is on the contrary for the Good of the Publick, and agreeable to Equity, that in the Cases where upon due consideration the Cause of the Exchequer may appear doubtful, one should incline to the other Side. For the Favour of the Cause of the Exchequer does not go so far as to prefer a doubtful Pretension of the Officers of the Exchequer to the Interest of particular Persons, which are found to be an equal Ballance with those of the Exchequer, and which may have Equity on their side *e*.

e Non puto delinquere eum, qui in dubiis quæstionibus contra fiscum facile responderit. *l. 10. ff. de jure fisci.*

Tantum etenim nobis superest clementiæ, quod scientes etiam fiscum nostrum ultimum ad caducorum vindicationem vocari, tamen nec illi pepercimus, nec augustum privilegium exercemus: sed quod communiter omnibus prodest, hoc rei privatæ nostræ utilitati præferendum esse censemus, nostrum esse proprium subjectorum commodum imperialiter existimantes. *l. un. §. 14. in f. C. de caduc. toll.*

See Art. 18. of the 6th Section of the preceding Title, the Remark on Art. 3. of the 5th Section of this Title, and Art. 14. of Sect. 7. of this Title.

SECT. II.

Of the Right of Forfeiture.

THE Reader may see concerning the Subject Matter of this Section, the 12th Article of the 2d Section of Persons; the 11th, 20th, 25th, 33d, 34th, 35th, and 36th Articles of the 2d Section of Heirs and Executors in general, and the Remarks there made upon them; the 5th Article of the 4th Section, and the 1st Article of the 13th Section of the same Title, and the 14th Article of the 2d Section of Testaments.

The CONTENTS.

1. *Definition of Forfeiture.*
2. *Two sorts of Forfeitures.*
3. *Fines.*
4. *In what manner Forfeitures and Fines are acquired.*

I.

1. Definition of Forfeiture.

Forfeiture is a Punishment, which is called by that Name, because it deprives those who have incurred it of all their Goods, and applies them to the Exchequer *a*.

a Damnatione bona publicantur, cum vita adimitur aut civitas. *l. 1. ff. de bon. dam.*

II.

2. Two sorts of Forfeitures.

We must distinguish two kinds of Forfeitures. The first is of all the Goods; such is that of Persons condemned for Crimes which deserve this Punishment; as are in *France* the Crimes of those who are condemned either to Death, or to the Gallies for ever, or to perpetual Banishment out of the Kingdom *b*. The second, of certain kinds

b Cum vita adimitur aut civitas. *l. 1. ff. de bon. dam.*

Qui rei capitalis damnati sunt. *l. 13. ff. de bon. possess.*

Qui rei postulati, vel qui in scelere deprehensi, metu criminis imminentis mortem sibi constituerunt: hæredem non habent. Papinianus tamen libro sexto decimo responsorum ita rescripsit, ut (ut) qui rei criminis non postulati, manus sibi intulerint: bona eorum fisco non vindicentur. Non enim facti sceleritatem esse obnoxiam, sed conscientiæ metum in reo velut confesso teneri, placuit. Ergo aut

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of things which are acquired to the Exchequer by contravening the Ordinances and Regulations which have established this Penalty. Thus for example, Goods and Merchandizes are confiscated when the Owners have defrauded the Publick of the Duties they were to have paid for them *c*.

aut postulati esse debent, aut in scelere deprehensi: ut si se interfecerint, bona eorum confiscentur. Ut autem divus Pius rescripsit, ita demum bona ejus qui in reatu mortem sibi conscivit, fisco vindicanda sunt, si ejus criminis reus fuit, ut si damnaretur, morte aut deportatione afficiendus esset. *l. 3. ff. de bon. eor. qui.*

See Sect. 2. Art. 11. of Heirs and Executors, and the Ordinance of 1673. Art. 29. of Defaults.

c Pœnâ commissi. *l. 3. C. de vectig. & com.*

III.

3. Fines.

We may place in the rank of Forfeitures the Condemnations of Persons in Fines of certain Sums of Money for divers sorts of Crimes and Offences, or for having defrauded the Prince of his Due. For these Fines being adjudged to him by the Sentences of Condemnation, they belong to him as well as the Forfeitures *d*.

d Mulctarum severa compendia ærario nostro proficua esse quærenda nullus ignoret: nisi ipse judex id, quod ad pœnam admissi facinoris exculpitur, vel publicis operibus, vel cursui publico, vel aliis necessariis causis specialiter deputaverit. *l. 5. C. de modo mulct.*

The Judges may adjudge the Fines either to the King, or to the Lord of the Mannor within his Lands, or to Hospitals, or to Prisoners.

IV.

4. In what manner Forfeitures and Fines are acquired.

Seeing Forfeitures and Fines are Punishments, they are not due till after a Sentence of Condemnation from which there lies no Appeal *e*.

e Provocationis remedio condemnationis extinguitur pronunciatio. *l. 1. §. ult. ff. ad Senat. Turpill.*

SECT. III.

Of the Right of Succession to Persons who leave no Heir behind them, of vacant Goods, of Waifs, and of Treasures.

The CONTENTS.

1. *Definition of the Rights of Succession to Persons who leave no Heir.*
2. *Definition of vacant Goods.*
3. *The Right of Succession to Persons dying without Heirs, takes in all the Goods, Moveable and Immoveable.*
4. *Another sort of vacant Goods.*
5. *Lands recovered from an Enemy.*
6. *Waifs or Strays.*
7. *Treasures.*

I.

1. Definition of the Right of Succession to Persons who leave no Heir.

BY the Right of Succession to Persons who leave no Heir behind them, is meant the Right which the Prince has to all the Goods of those who die without lawful Heirs, and without making a Testament; for these Goods having no Owner, pass to the Publick, and are acquired to the Prince who is the Head of it *a*.

a Scire debet gravitas tua, Intestatorum res qui sine legitimo hærede decesserint, fisci nostri rationibus vindicandas: Nec civitates audiendas quæ sibi earum vindicandarum jus veluti ex permissu vindicare nituntur: & deinceps quæcunque intestatorum bona civitatibus obtentu privilegiorum suorum occupata esse compereris, ad officium nostrum eadem revocare non dubites. *l. 1. C. de bon. vac. & incorpor.*

Vacantia mortuorum bona tunc ad fiscum jubemus transferri, si nullum ex qualibet sanguinis linea, vel juris titulo legitimum reliquerit intestatus hæredem. *l. 4. eod.*

II.

2. Definition of vacant Goods.

By vacant Goods are meant Goods of Persons who die without Heirs, which is the Case explained in the foregoing Article; and the said Goods are acquired to the Exchequer, if they are not claimed by Creditors: And there are likewise other sorts of vacant Goods, which shall be taken notice of in the 4th Article *b*.

b Vacantia mortuorum bona. *l. 4. C. de bon. vac.*

III.

3. The Right of Succession to Persons dying without Heirs, takes in all the Goods, Moveable and Immoveable.

The Right of Succession to Persons who die without Heirs, comprehends all sorts of Goods, Moveables and Immoveables, Rents, Debts due to the Deceased, and in general all Goods and Effects of all kinds which did belong to him who dies without Heirs; and all these sorts of Goods are acquired to the Prince *c*.

c This is a Consequence of the first Article.

IV.

4. Another sort of vacant Goods.

We may consider as a kind of vacant Goods, those which for other Causes besides the Death of Persons who leave no Heir behind them, are without an Owner, such as Lands and Houses unoccupied and claimed by no body *d*.

d These sorts of Goods are of the same Condition as Goods vacant by the Death of one who leaves no Heir behind him.

V. We

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V.

5. *Lands recover'd from an Enemy.*

We must not reckon in the number of vacant Goods, the Lands which having been for some time in the possession of Enemies, by an Usurpation, or a lawful Conquest, which had stript the antient Proprietors of them, had been acquired to those who by that Event were become Masters of them. And if the Country thus conquer'd is restored again either by a Conquest, or by a Treaty of Peace, every Proprietor enters again to his Lands, as if he had always retained the Property of them *e*.

e Verum est, expulsis hostibus ex agris quos ceperint, dominia ad priores dominos redire: nec aut publicari aut prædæ loco cedere. Publicatur enim ille ager qui ex hostibus captus sit. *l.* 20. §. 1. *ff. de capt. & postlim. revers.*

VI.

6. *Waifs, or Strays.*

Neither ought we to place in the number of vacant Goods, Moveable Things, which being lost by their Owners, fall into the hands of those who find them; for if they cannot discover the Owner, the things belong to the Finders, pursuant to the Rule explained in the 10th Article of the 2d Section of Possession. But we must except from this Rule the Usage in *France* as to Cattle which are lost, and which we call Strays, which by the Customs and Usage of *France* belong to the King as a Right of Justice, and to the Lord of the Mannor who has the Rights of Justice *f*.

f See the 10th Article of the 2d Section of Possession.

¶ This Distinction between Cattle and other things lost, may be founded upon this, that Cattle are more easily lost than other sorts of things which it is easier to keep, and that therefore care ought to be taken to keep those Cattle for their Masters from whom they have strayed; which is done with greater Fidelity, and with more Ease, by the Aid of Publick Justice than by particular Persons. It is for this reason that the Customs of *France* do not adjudge those Strays to the King, or to the Lords of the Mannor, till a certain time after they have been proclaimed, in order to find out the Owners, and to deliver to them their Cattle, they paying the Expence of their keeping, and other Charges, if there be any.

It may be observed on the word *Strays*, that by the antient Usage in *France* they gave the name of Strays to Strangers or Aliens, perhaps for this reason, that no body knew whence they came, as no body knows from whence Cattle that are strayed do come.

[*The time limited by the Law of* England *for acquiring a Right of Property in Strays, is a Year and a Day. And therefore it is that if a Horse is taken as a Stray, the Lord of the Mannor who took him has no right to work him within the Year; for until the Year and a Day be expired, he has no Property in him.* Rolls 1. Abridg. pag. 879.]

VII.

7. *Treasures.*

We may put down Treasures in the number of Goods that are vacant, and which have no Owner; for Treasures consist of Money or other precious things, which are discovered in secret Places where the Owners had deposited them for Safety, and of which there is no Proof to shew to whom they belong *g*. Thus these Treasures being without any Owner, our Usage in *France* has given to the King a Right in them, and has fixed this Right at a third Part, giving the other two thirds, the one to the Finder, and the other to the Owner of the Ground where the Treasure was found.

g Thesaurus est vetus quædam depositio pecuniæ, cujus non extat memoria, ut jam dominum non habeat; sic enim fit ejus, qui invenerit, quod non alterius sit. *l.* 31. *ff. de acquir. rer. dom.*

¶ We see by this Article that Treasures, for want of Owners, have three assigned them; every one of whom has his third part, but in a different manner. The Proprietor of the Ground, in which the Treasure is found, being Master of the Ground, seems to be likewise Master of all that is in the Ground, and he is in a manner in possession of it, altho he is ignorant that the Treasure is in his Ground, and that in order to possess it it seems necessary to have an Intention so to do. *Neratius & Proculus (&) solo animo non posse nos adquirere possessionem, si non antecedat naturalis possessio. Ideoque si thesaurum in fundo meo positum sciam, continuo me possidere, simul atque possidendi affectum habuero: quia, quod desit naturali possessioni, id animus implet. Ceterum quod Brutus & Manlius putant, eum qui fundum longa possessione cepit, etiam thesaurum cepisse, quamvis nesciat in fundo esse, non est verum. Is enim, qui nescit, non possidet thesaurum, quamvis fundum possideat. Sed & si sciat, non capiet longa*

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ga possessione: quia scit alienum esse. Quidam putant, Sabini sententiam veriorem esse: nec alias eum qui scit, possidere, nisi si loco motus sit; quia non sit sub custodia nostra. Quibus consentio. l. 3. §. 3. ff. de acquir. vel amit. poss.

Some antient and able Lawyers have been of opinion, as appears from this Law, that the Possessor of a Ground in which a Treasure is, acquires by a long Possession both the Ground and also the Treasure. And it is most certain, that on one hand the Treasure hath no other Possessor, and on the other hand that every Possessor has a general Intention to possess every thing that is in his Grounds. And whether he has acquired them by a legal Title or by a long Possession, he has always an Intention, even an express one, to possess, and to have to himself all the Rights which are annexed to his Right to the Ground; and this implies the Right to the Treasure. So that it seems strange, that in one of the Customs in *France*, where mention is made of Treasures, they are adjudged to belong to the King in his own Grounds, or to the Lord of the Mannor in his, without saying any thing of the Proprietor of the Ground, or even of the Finder of the Treasure. Thus the Right which the Proprietor of the Ground has to the Treasure found in it, seems to admit of no Difficulty.

Next to the Right which the Proprietor of the Ground has to the Treasure, that of the Finder is wholly natural, and built upon two Foundations; one is the divine Providence which directs and orders the said Events, and which by putting into his hands that which is found in the Treasure, seems to give it him; and this Event is called *Dei beneficium*, in that single Law of the Code *de thesauris*. And the other is, because that if it were not for the Finder, the Right of the Proprietor of the Ground would be altogether useless to him: so that it is but just that the Finder should have a share in the Treasure. *Nemo in posterum super requirendo in suo, vel alieno loco thesauro, vel super invento ab alio, vel a se, effusis precibus pietatis nostræ benignitas aures audeat molestare. Nam in suis quidem locis unicuique, dummodo sine sceleratis ac puniendis sacrificiis, ut alia qualibet arte legibus odiosa thesaurum (id est condita ab ignotis Dominis tempore vetustiori mobilia) quærere, & invento uti, liberam tribuimus facultatem: ne ulterius Dei beneficium invidiosa calumnia persequatur: ut superfluum sit hoc precibus postulare, quod jam lege permissum est: & imperatoriæ Majestatis videatur prævenire liberalitas postulanda. In* alienis *vero terrulis nemo audeat invitis, immo nec volentibus, vel ignorantibus dominis opes abditas suo nomine perscrutari. Quod si nobis super hoc aliquis crediderit (esse) supplicandum, aut præter hujus legis tenorem in alieno loco thesaurum scrutatus invenerit (totum) hoc locorum Domino reddere compellatur: & velut temerator legis saluberrimæ puniatur. Quod si forte vel arando, vel alias terram alienam colendo, vel quocunque casu, non studio perscrutandi, in alienis locis thesaurum invenerit; id quod repertum fuerit, dimidia retenta, altera dimidia data, cum locorum domino partiatur. Ita enim eveniet, ut unusquisque suis fruatur & non inhiet alienis.* l. un. C. de thes.

As for the Right of the Exchequer, the Foundation upon which it is built is neither so clear nor so natural; and this Right was not so much as known in the antient *Roman* Law, which gave nothing to the Prince besides the Treasures found in his own Grounds, leaving all the other Treasures, one half to the Finder, and the other half to the Owner of the Ground. It is true, there were some Constitutions of the Emperors which established the Right of the Exchequer to Treasures *q*; but they were abolished by the Emperor *Leon*, who restored the antient Law by that Law of his, which is the only one in the Code *de thesauris*. And *Justinian*, who has inserted into his Code only that Law, confirms thereby the antient Law, and even ratifies it expresly in his Institutes, and by many Texts of the antient Lawyers, which he

q Quicunque thesaurum invenerit, & ad fiscum sponte detulerit, medietatem consequatur, inventi alterum tantum fisci rationibus tradat: ita tamen, ut citra inquietudinem quæstionis omnis fiscalis calumnia conquiescat. Haberi enim fidem fas est his qui sponte obtulerint, quod invenerint. Si quis autem inventas opes offerre noluerit, & aliqua ratione proditus fuerit: a supradicta venia debebit excludi.

Quisquis thesauros & condita ab ignotis dominis tempore vetustiore, monilia quolibet casu repererit, suæ vindicet potestati, neque calumniæ formidinem, fiscali aut privato nomine ullis deferentibus pertimescat. Non metalli qualitas, non reperti modus sub aliquo periculum quæstionis incurrat. In hac tamen naturali æquitate animadvertimus quoddam temperamentum adhibendum, ut si qui in solo proprio hujusmodi contigerit, integro id jure præsumat, qui in alieno in quartam repertorum partem eum, qui loci dominus fuerit, admittat. Ne tamen per hanc licentiam quisquam aut aliena effodiat aut in locis non sui juris per famam suspecta rimetur. *C. Theod. de thes.*

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he has collected in his Digests *b*.

b Thesauros quos quis in loco suo invenerit, Divus Hadrianus naturalem æquitatem secutus, ei concessit, qui eos invenerit. §. 39, *inst. de rer. div.*

At si quis in alieno loco non data ad hoc opera, sed fortuito invenerit; dimidium domino soli concessit, & dimidium inventori. Et convenienter, si quis in Cæsaris loco invenerit, dimidium inventoris & dimidium esse Cæsaris statuit. Cui conveniens est ut si quis in fiscali loco, vel publico vel civitatis invenerit, dimidium ipsius esse debeat, & dimidium fisci vel civitatis. *d.* §.

V. l. 7. §. 12. *ff. solut. matr.*

Si in locis fiscalibus, vel publicis, religiosisve, aut in monumentis thesauri reperti fuerint; Divi fratres constituerunt, ut dimidia pars ex his fisco vindicaretur. Item si in Cæsaris possessione repertus fuerit, dimidiam æque partem fisco vindicari: deferre autem se nemo cogitur, quod thesaurum invenerit, nisi ex eo thesauro pars fisco debeatur: qui autem cum in loco fisci thesaurum invenerit, & partem ad fiscum pertinentem suppresserit, totum cum altero tanto cogitur solvere. *l.* 3. §. *penult. & ult. ff. de jure fisci.*

Quæ quidem lex cum olim lata fuerit, victa autem post modum a cupiditate quæ multas egregias res labefactat, ad eademque suo vigore privata sit; nunc ab imperatoria nostra majestate in integrum restituitur. Jubebat autem illa ut qui indefossum thesaurum incidisset, si prædium in quo inventus esset, ad principem pertineret, alioquive publicum esset, illum ex æquo cum fisco partiretur. Si vero locus, unde thesaurus in lucem prodiisset, neque ad principem pertineret, neque publicus, sed alterius cujuspiam esset, is æqualibus partibus inter inventorem prædiique dominum divideretur: denique si inventoris prædium esset, ipsi res inventa universa cederet. Atque hæc quidem lex illa sanciit. Verum perversa cupiditas haud scio quomodo illa circumscripta, iniquoque lucro fisco donato, illi in hunc usque diem inventum thesaurum attribuit, legemque otiosam reddidit, ad quid hinc contingit. Qui alicubi reconditos latere thesauros sciunt, dum alios laboribus suis gavisuros, se autem frustra illos subituros, quin & interdum acerbis examinationibus subjiciendos considerant, illos investigare negligunt, itaque in perpetuum recondita manent & pereunt, quæ in lucem producta magnam hominibus erunt utilitatem allatura. Jubemus ergo, *uti deinceps* secundum veteris legis æquitatem judicetur: & quando thesaurus aliquis inventus fuerit, si locus ubi inventus fuerit, in publicis Imperatoriisve fundis sit, inventor illum cum fisco partiatur: si vero alterius cujuspiam sit, simili modo ipsum & inventor, & loci, in quo thesaurus inventus, dominus inter se dividant. *Nov.* 51. *Leonis.*

Altho the Novels of the Emperor Leon *be not received nor collected in the Body of the* Roman *Law, yet there are two things remarkable in this Novel of his. One is, that the Emperor severely condemns there the Avarice and the want of Charity in those Persons, who instead of giving to the Poor hoard up Treasures; which is not to be extended to Cases which oblige People to use this Precaution, as in a time of War, or other Danger, which may give a just occasion for laying up things of Value in Safety. And the other is, that he charges also those with a criminal Covetousness,* perversa cupiditas, *who had invented the Right of the Prince to Treasures, contrary to the Tenour of the antient Laws which have been just now cited.*

[The antient Common Law of *England* in relation to Treasures, seems to have been the same with the *Roman* Law, which gives all Treasures to the Finders; but afterwards the same were appropriated to the use of the King, as it were by consent of all Nations. *Cum igitur thesaurus sit nullius in bonis sit, & antiquitus de jure naturali esset inventoris, nunc de jure gentium efficitur ipsius Domini Regis.* Bracton de legibus Angliæ, Lib. 3. cap 3. §. 4. Briton. fol. 26. They distinguish between Treasures found in Land, and those found in the Sea; and say, that if a Treasure be found in the Sea, the Finder shall have it. And this Distinction is also taken notice of by my Lord *Coke* in his 2d *Instit. pag.* 168. where he says, that if Treasure be found in the Sea, the Finder shall have it at this Day. But he allows Wrecks of the Sea to belong to the Crown. *Ibid. pag.* 167.]

But altho we have not in *France* any Ordinance which expresly gives to the King a Share in Treasures, yet the Officers of the Demesnes have begun many Law-Suits in relation to this Matter, which have been attended with Judgments and Decrees, whereby one third part of the Treasure is given to the King, or to the Lord of the Mannor, a third to the Finder, and a third to the Owner of the Ground. Which is conformable to the Customs that have regulated this Matter; the greatest part of them giving to the King, or to the Lord of the Mannor, one third of the Treasure, another third to the Finder, and the other third to the Owner of the Ground; and a Moiety of the Treasure to the Lord of the Mannor, when the Finder is the Owner of the Ground. But there is one Custom which in this Case gives to the Finder two thirds; and nothing can be more just and equitable, seeing he ought to have one third as Finder, and another third as Proprietor of the Ground where the Treasure was found.

We shall not enlarge here on the Distinction which is made by some between Treasures which consist of Gold, and others. In order to establish the King's Right to those which consist of Gold, they quote an Ordinance of St. *Lewis*, which others say never was, and which in effect is not to be met with: So that that Thought is without Foundation.

SECT.

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SECT. IV.

Of the Right to the Estates of Aliens.

WE shall not repeat here what was necessary to be explained concerning the Right to the Estates of Aliens in the Matters of Succession, which the Reader may see in the several Places where the same is mentioned, *viz.* Art. 11. of the 2d Section of Persons; the 9th, 18th, 23d, and 31st Articles of the 2d Section of Heirs and Executors in general; the 2d Article of the 13th Section of the same Title; and the Remark on the 31st Article of the 2d Section, and the 13th Article of the Preface to the 2d Part of the Civil Law in its Natural Order, which treats of Successions.

The CONTENTS.

1. *Definition of the Right to the Estates of Aliens.*
2. *Who are Aliens.*
3. *There are some Countries who enjoy the Right of Naturalization in others.*
4. *Particular Strangers are naturalized by the King's Letters Patent.*
5. *Exception as to the Right of Succession to Aliens.*
6. *Another Exception.*

I.

1. Definition of the Right to the Estates of Aliens.

The Right to the Estates of Aliens, is that Right by which the Prince acquires the Estates left in his Dominions by Aliens who were not naturalized *a*.

a Peregrini capere non possunt (hæreditatem) *l.* 1. *C. de hæred. inst. L.* 6. §. 2. *ff. eod.*
Nec testari. *l.* 1. *in verba cives* Romani. *ff. ad leg. fals.*

II.

2. Who are Aliens.

Strangers, who are likewise called Aliens, are those, who, being born in another Country, and Subjects of another Kingdom than that of which they are Inhabitants, have not been naturalized *b*.

b See Art. 9. *of the 2d Section of the 2d Title.*

III.

3. There are some Countries which enjoy the Right of Naturalization in others.

We do not reckon in the number of Strangers or Aliens in a Kingdom, whose Estates fall to the Crown, those who are Subjects of another Country, to which the said Kingdom has granted the Right of Naturalization *c*.

c Sciendum est esse quasdam colonias Juris Italici. *l.* 1. *ff. de censib.*
Antoninus pius cognominatus (ex quo etiam ad nos appellatio hæc pervenit) jus Romanæ civitatis prius ab unoquoque subjectorum petitus, & taliter ex iis qui vocantur perigrini, ad Romanam ingenuitatem deducens, hoc ille omnibus in commune subjectis donavit. *Nov.* 78. *C. ult.*
Altho these Texts do not respect the Naturalization granted to Strangers, but other Rights granted to Provinces to which they did not belong; yet we may apply the Example thereof to this Article.

IV.

4. Particular Strangers are naturalized by the King's Letters Patent.

Particular Strangers, who have not the Privilege explained in the preceding Article, may be naturalized in a Kingdom by Letters Patent of the Prince, which have the Effect of making them to be of the same Condition with those who are born in it *d*.

d See Art. 9. *of the 2d Section of the 2d Title.*

[*We have already observed, that there is a great difference made by the Law of* England *between* Denization, *which is by the King's Letters Patent, and* Naturalization, *which is by Act of Parliament. For if he who is infranchised or denizated by the King's Letters Patent, had Issue in* England *before his Denization, that Issue is not inheritable to his Father. But if his Father be naturalized by Act of Parliament, such Issue shall inherit.* Coke's 1 Instit. fol. 129. a.]

V.

5. Exception as to the Right of Succession to Aliens.

The Children of Strangers, born in a Kingdom in which their Father was an Alien, having their Origin in that Kingdom, are Subjects thereof; and they have in it the Rights of Naturalization, as if their Father had been naturalized a Subject of it, and they succeed to him, altho he dies an Alien *e*.

e See Art. 3. *of the 4th Section of Heirs and Executors in general. The same Equity requires that the other Relations of Strangers should be admitted to succeed to them, if they are natural born Subjects of*, France. *And the Reason of not suffering the Wealth that is within the Kingdom to go to Strangers, ceases with respect to them.*
See the same 3d Article of the 4th Section of Heirs and Executors in general, and the 31st Article of the 2d Section of the same Title, and the Remarks there made upon it.

[By an Act of Parliament in *England*, made 11 & 12 *Guil.* 3. *cap.* 6. the Children of Aliens, who are born within any of the King's Realms or Dominions, are enabled to inherit the Estates of their Ancestors, either Lineal or Collateral, notwithstanding their Father or Mother were Aliens.]

VI.

6. Another Exception.

Altho the Goods of Strangers who die in *France*, belong to the King, and

and what they leave behind them cannot go to their Heirs; yet the Kings of *France* have excepted from this Rule foreign Merchants who come to certain Fairs in the Kingdom; and they leave the Goods which they may chance to have in *France* at the time of their Death, either to their Heirs of Blood, or their Heirs by Testament *f*.

f See Art. 3. *of the fourth Section of Heirs and Executors in general, and the Remark there made upon it; as also the Ordinances of* March 1463, *and* March 1583.

SECT. V.

Of the Right of Succession to Bastards.

WE ought to make here the same Remark which has been made in the foregoing Section, That we shall not repeat here what has been said concerning the Succession to Bastards in the Matters of Succession, which the Reader may have recourse to. See Art. 3. of the 1st Section of Persons; the 12th Article of the Preface to the 2d Part of the Civil Law in its Natural Order; and the 8th, 17th, 22th, and 30th Articles of the 2d Section of Heirs and Executors in general.

The CONTENTS.

1. *Definition of the Right of Succession to Bastards.*
2. *Right of Succession to Bastards, is a sort of Succession to Persons who have no Heirs.*
3. *The Legitimation of a Bastard by a subsequent Marriage of his Father with his Mother, sets aside any Claim which the Crown may have to his Estate on the score of Bastardy.*

I.

1. Definition of the Right of Succession to Bastards.

By the Right of Succession to Bastards, is meant the Right by which the Sovereign acquires the Estates of Bastards who die without leaving behind them any Children lawfully begotten, and without making a Testament *a*.

a See the Article cited in the Preamble of this Section.

II.

2. Right of Succession of Bastards, is a sort of Succession to Persons who have no Heirs.

The Right of Succession to Bastards is, as it were, a kind of Succession to Persons who have no Heirs. For it is the want of Heirs which makes the Estates of Bastards to go to the Prince; for they not having named any Testamentary Heirs or Executors, which they might have done if they were under no other Incapacity, they cannot have any Heirs of Blood, except the Children begotten by them in lawful Wedlock. And if they have no Children, their Estates being without an Owner, they go to the Exchequer *b*.

b Bastards having no Heirs, if they have not made a Testament, their Estates go to the Exchequer.

III.

3. The Legitimation of a Bastard by a subsequent Marriage of his Father with his Mother, sets aside any Claim which the Crown may have to his Estate on the score of Bastardy.

When Bastards are legitimated by the subsequent Marriage of their Father with their Mother, they are considered as legitimate; and their Estates are not subject to this Right of Succession to Bastards, but they pass to their Heirs of Blood; and they have also the Right of succeeding to them *c*.

c See, concerning this manner of Legitimation, Art. 17. *of the 2d Section of Heirs and Executors in general, and Art.* 22. *of the same Section.*

[This manner of legitimating Bastards by a subsequent Marriage of their Father with their Mother, mentioned in this Article, altho the same was approved both by the Civil and Canon Law, and has been received in most other Countries, yet it has never taken place in *England*. And when it was proposed in Parliament by the Bishops in the Reign of *Henry* the Third, as being agreeable to the Laws of the Church, the same was rejected by the unanimous Consent of all the Lords Temporal in Parliament. *Stat.* 20 *Hen.* 3. *cap.* 9. *Coke's* 2 *Inst. pag.* 98.]

¶ We have restrained the Rule explained in this Article to Bastards legitimated by a subsequent Marriage of their Father with their Mother. For the Legitimation by Letters Patent of the Prince has not the same Effect, and doth not make Bastards capable of Succession, as has been remarked on Art. 10. of the 2d Section of the 2d Title. But it might be started as a Question, Whether a Bastard, legitimated by Letters Patent of the Prince, leaving Goods behind him, without disposing of them by Will, his Goods will fall to the King by virtue of his Right of Succession to the Estates of Bastards, or if they will go to the nearest Relations of the Father or Mother of the said Bastard. The Difficulty lies in this, That by the Letters of Legitimation it is said, that the King and his Successors shall not pretend, by virtue of the Right of Succession to Bastards, to the Goods of the Bastard who is thus legitimated; which seems to leave the said Goods to those to whom

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whom they would have belonged, if the said Person had not been a Bastard, or had been legitimated by the Marriage of his Father with his Mother.

Upon this Question, it might be urged in behalf of the Relations of the Father and Mother of the Bastard, that the King having by his Letters of Legitimation renounced his Right, that Renunciation could be only in their favour. And to support the King's Right, it might be said, That the Stile of the Letters of Legitimation ought not to change the Nature of the Right of the Prince to the Succession of Bastards, which gives to the Prince the Estates of Bastards, when they have not disposed of them by Will; and that the said Letters not having made any legal Relation between the said Bastard and the Relations of his Father and those of his Mother, they have no manner of Title to be his Heirs at Law, unless it may be said that that Clause of the Letters of Legitimation is to them instead of a tacit Grant which the King makes them of the Goods of the Person whom he had legitimated in this manner.

If this Question did admit of any doubt, it would seem that it might be decided by the Rule explained in the last Article of the first Section of this Title *a*, which declares, that in doubtful Cases it may be decided against the Exchequer. Which ought more particularly to take place in the Cases which, as the present Case does, happen very seldom, and where it is the Will and Intention of the King himself that his Right should cease, unless that should happen which is hardly possible, that no one of those to whom the Estate of the Bastard should go by virtue of the Renunciation made by the King, would accept the said Succession on the score of Relation. But if they incline to accept of the Succession, it would seem that for the Reasons just now remarked, they ought to exclude the King; and in this Case it happens that the Right of Succession would not be reciprocal to the Bastards, and to the Relations of their Father and Mother; for whereas in this Case the Relations of the Bastard would succeed to him, if he should die *intestate*, he on his part could not succeed to any one of them by the same Title, and he would be excluded from their Successions by the other lawful Relations.

a See the last Article of the 7th Section of this Title, and the 18th Article of the 6th Section of the preceding Title.

SECT. VI.

Rules common to the several sorts of Goods and Rights of the Demesne.

WE have explained in the foregoing Sections the different sorts of the said Goods and Rights, and the Rules peculiar to every one of them; and seeing there are Rules common to all these kinds of Goods and Rights, they shall be the Subject-matter of this Section.

The CONTENTS.

1. *Distinction between the Goods and the Rights of the Demesne.*
2. *The Rights of the Demesne are inalienable, and imprescriptible.*
3. *Two sorts of Goods arising from the Rights of the Demesne.*
4. *Dispositions of the moveable Effects arising from the Rights of the Exchequer.*
5. *Dispositions of the Immoveables arising from the Rights of the Exchequer.*
6. *Difference between the Rights and Immoveables of the Demesne as to what concerns their Alienation.*
7. *Privilege of the Exchequer.*

I.

1. Distinction between the Goods and the Rights of the Demesne.

Altho it may seem that the Goods and the Rights of the Demesne are one and the same, yet it is necessary for the Use of the Rules of this Section to make a Distinction between them, which consists in this, That the word *Goods* is more general than that of *Rights*. For whereas all the Rights of the Demesne are in effect Goods belonging to it, there are Goods of the Demesne which are not reckoned in the Number of Rights, such as Lands. And it is not usual to call a Dutchy, or other Land, that is annexed to the Crown, a Right of the Demesne; but the Meaning of this Word, Right of the Demesne, is restrained to these sorts of Rights which are otherwise called Rights of the Exchequer, such as the Rights explained in the preceding Sections. The Use of this Distinction will appear in the following Articles *a*.

a This Distinction results from what has been said in the foregoing Sections, touching the Goods and Rights of the Exchequer.

See the End of the Preamble to this Title.

II.

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II.

2. The Rights of the Demesne are inalienable and imprescriptible.

There is this common to all the Rights of the Demesne, such as the Taxes, Subsidies, Confiscations, the Right of Succession to those who leave no Heir behind them, and other Rights, that they are inalienable and imprescriptible. For these Rights are in their own nature essential to the Sovereignty, and do not enter into Commerce; in the same manner as the Power of the Government, of which they are Consequences and Accessories, which cannot be separated from it. Thus, neither Prescriptions nor Alienations can put them out of the hands of the Prince *b*; but it is not the same thing as the Lands of the Demesne, as shall be shewn in the 6th Article.

b See Sect. 2. of the 2d Title, and Art. 12, 15, 19, and 20. of the 1st Section of this Title; and the Remark made on the 19th Article concerning the Rights of Forfeitures and Succession to those who die without Heirs.

III.

3. Two sorts of Goods arising from the Rights of the Demesne.

Seeing the Rights of the Demesne produce Profits and Revenues, which are so many sorts of Goods, it is necessary likewise we should distinguish the Goods arising from those Profits into two kinds; one of Immoveables, and the other of Moveables. Thus, the Rights of Forfeiture, of Succession to Persons dying without Heirs, of Succession to Aliens, and to Bastards, acquire to the Prince the Moveables, and the Immoveables of Persons condemned, of Persons dying without Heirs, of Aliens, and of Bastards *c*. And we must distinguish in these two sorts of Goods, the several Uses which the Prince makes of them, which depends on the following Rules.

c This is the natural Effect of these Rights, and of the Distinction of these two sorts of Goods.

IV.

4. Dispositions of the moveable Effects arising from the Rights of the Exchequer.

The Moveables and mobiliary Effects, other than the Monies arising from the Rights of Forfeiture, of Succession to Persons dying without Heirs, to Aliens, and to Bastards, are in effect Goods of the Demesne, since they belong to the Exchequer. But seeing there is not any one of these sorts of Goods which would belong to the Exchequer, if they remained in their own nature, unless there were among them Jewels or other Moveables of such Price and Value, as to deserve to be ranked among the Moveables of the Crown; there are three Ways to dispose of them: One by selling them, in order to apply the Money to the Payment of the Debts, and of the other Charges of the Goods which fall to the Prince by virtue of these Rights, and to give the Overplus to the Prince, paying the Moneys into the hands of the Receivers of the Revenues of the Demesnes. A second is, by leaving those mobiliary Effects to the Farmers of the Revenue, if they are comprized in their Leases, with the Charge of acquitting the Debts to which the said Goods are subject. And the third, by delivering over those Goods, with the same Charge of acquitting the Debts to which they are liable, to the Persons to whom the Prince gives a Grant of them *d*.

d It is in one of these three Manners that, according to the Usage in France, *the King exercises his Right on those Moveables.*

We must distinguish from the mobiliary Effects arising from the Rights mentioned in this Article, the Goods and Merchandizes acquired by the Confiscations, whereof mention has been made in the 10th Article of the 6th Section of the 5th Title.

V.

5. Disposition of the Immoveables arising from the Rights of the Exchequer.

The Immoveables acquired by the same Right, are likewise in one sense Goods of the Demesne, seeing they are as it were Fruits and Revenues thereof; and that all Revenues are the Goods of the Patrimony of the Person who has right to enjoy the Fund out of which the said Revenues issue; but they have not for all that the Nature of the Goods of the Demesne, which are part of the Patrimony of the Sovereign, so as to be inseparable from it, and to be in all respects in the same Condition with the other Immoveables annexed to the Crown, and which make a part of the Demesne. For since these Immoveables, which proceed from the Rights of the Exchequer, are Profits and Revenues, of which the Sovereign may dispose as he thinks good, he may either give them away, in which Case they will never become part of the Demesne; or he may unite and incorporate them into it, as has been said in the 23d and following Articles of the first Section. And in this Case they will be of the same Condition with the other Immoveables of the Demesne *e*.

e See Art. 23, &c. of the 1st Section.

VI.

6. Difference between the Rights and Immoveables of the

The Immoveables of the Demesne, whether they be part of the antient Demesne, or newly annexed to it, are not so absolutely inalienable, as the Rights

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Demesne, as to what concerns their Alienation.

Rights of the Demesne are: For whereas the Rights being essential to the Sovereignty, they cannot be separated from it *f*; the Immoveables not being of the same nature, may be alienated in the Cases explained in the 14th Article of the 1st Section.

f See the 2d Article.

VII.

7. Privilege of the Exchequer.

There is this likewise common to the Goods and to the Rights of the Demesne, that as for the Recovery, the Preservation and the Use of the said Goods and Rights, the Demesne of the Sovereign hath divers Privileges, which are called Privileges of the Exchequer, which shall be the Subject-matter of the following Section *g*.

g See the following Section.

SECT. VII.

Of the Privileges of the Exchequer.

The CONTENTS.

1. *Difference between the Rights and Privileges of the Exchequer.*
2. *Two sorts of Privileges of the Exchequer.*
3. *First Privilege of the Exchequer, that its Rights are inalienable and imprescriptible.*
4. *Another Privilege, that the Exchequer is always reputed solvent.*
5. *The Exchequer is exempt from all Contributions.*
6. *It has the Pre-emption of Metals.*
7. *The Exchequer has always a tacit Mortgage.*
8. *The Exchequer is preferred to prior Creditors on the Goods acquired by the Debtors after its Credit.*
9. *There is no Peremption of a Suit begun at the Instance of the Exchequer.*
10. *The Causes of the Exchequer are reviewed upon producing new Deeds or Writings.*
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12. *The Exchequer warrants not the Defects of the Things it sells.*
13. *The Exchequer is discharged from the Debts due from the Goods it sells, and the Creditors have their recourse against the Purchaser.*
14. *The Exchequer is not favoured in doubtful Cases.*

I.

1. Difference between the Rights and Privileges of the Exchequer.

We must not confound the Rights of the Exchequer with its Privileges. For whereas the Rights of the Exchequer are natural Consequences of the Sovereignty, and belong to the Prince by virtue of his Title of Sovereign; the Privileges of the Exchequer are only Consequences of the said Rights, which relate to the Preservation of them, or the ways of exercising them. Thus, the Rights of Forfeiture, of Succession to Persons who die without Heirs, of Succession to Aliens and to Bastards, of levying Taxes, and all the other Rights of the Sovereign, which have been explained in the 2d Section of the second Title, and in the first Section of this Title, are not Privileges, seeing they belong naturally to the Sovereign; but the manner of levying the Taxes on personal Estates by Distress of Goods, preferably to other Creditors, is a Privilege *a*.

a This Difference results from the Nature of the Rights, and from that of the Privileges.

II.

2. Two sorts of Privileges of the Exchequer.

The Privileges of the Exchequer are of two sorts: One is of those which arise naturally from the Quality of the Rights of the Exchequer. And the other is of those which have not that Character, but derive their Origin from some Laws, and some Usages. Thus, for example, the Privilege which the Exchequer has of being reputed always to be solvent, as shall be shewn in *Art.* 4. is a natural Consequence of a Rule which distinguishes the Condition of the Exchequer, from that of all sorts of private Persons, as to what concerns Solvency, or Insolvency. For whereas every private Person may either be already or become insolvent, it is impossible that the Exchequer should become insolvent, since it hath always by means of the publick Money, and out of the Goods of all the Subjects, the necessary Funds for all the Charges thereof. Thus, on the contrary, the Privilege of the Exchequer, which gives it the preference before Creditors, who have Mortgages of a prior Date to that of the Exchequer, in the Case which shall be explained in Art. 8. is not a Privilege which follows naturally from the Rights of the Exchequer; but it is an Exception to the Rule, which assigns to Creditors who have Mortgages their

Rank

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Rank according to the Dates of their respective Mortgages, even prior to the Exchequer. And this Exception has been established in favour of the Exchequer, by a Law which may be termed arbitrary. For it was not essential to the Condition of the Exchequer to have this Right, or this Privilege *b*.

b The Distinction of these two sorts of Privileges results from their Causes, and from their Characters, as will appear by the Articles which follow.

III.

3. First Privilege of the Exchequer, that its Rights are inalienable and imprescriptible.

The first of the Privileges of the Exchequer, among those of the first of the two sorts explained in the preceding Article, is that which renders inalienable and imprescriptible the Rights of the Exchequer, mentioned in the 2d Article of the foregoing Section. For it is a Privilege of the said Rights, that they cannot be alienated; and this Privilege, which distinguishes the said Rights from those of private Persons, is a necessary Consequence of the Nature and Use of the said Rights, which are appropriated to the Prince for the Good of the Publick *c*.

c As this Privilege is a part of the Nature of those Rights mentioned in Art. 12, 13, &c. of Sect. 1. so we have there explained in what Sense the Goods and Rights of the Exchequer are inalienable and imprescriptible. To which we must add what is said touching the Goods and Rights of the Exchequer in the preceding Section, and particularly in Art. 5, and 6. of this Section.

IV.

4. Another Privilege, that the Exchequer is always reputed solvent.

It is likewise by a Privilege of the same nature and of the first kind, that the Exchequer is always reputed to be solvent, and is never obliged to give Security in the Cases where private Persons, even the most substantial, are obliged to do it. Thus, if Legataries being desirous to make sure of their Legacies, which ought to be paid in hand, should hinder the Executor from touching the Goods of the Inheritance, he would be obliged either to pay the Legacies, or to give the Legataries Security for their Payment. But if the Prince were Heir to a Succession charged with the like Legacies, or that in the Case of a Succession, the Goods whereof had fallen to the Exchequer by Right of Forfeiture, of Succession in default of Heirs, of Succession to Aliens, or Bastards, or in other Cases, there should be any such like Cause which would oblige a private Person to give Security; the Exchequer in all these Cases would be exempt from it. For it cannot happen that the Exchequer should become insolvent, as has been explained in the 2d Article *d*.

d Semper satisdare cogitur cujuscunque sit dignitatis, vel facultatum quarumcumque hæres. *l. 1. §. 1. ff. ut legat. seu fideic. serv. caus. cav.*

Si ad fiscum portio hæreditatis pervenerit, cessabit ista stipulatio, quia nec solet fiscus satisdare. *d. l. 8. §. 18.*

Fiscus semper idoneus successor & solvendo. *l. 2. in f. ff. de fund. dot.*

V.

5. The Exchequer is exempt from all Contributions.

We ought to place likewise in this Rank the Exemption of the Prince from all Contributions on account of the things which are for his Use, and for the Use of the Exchequer. Thus the Lands belonging to the Crown do not contribute to the Land-Tax. Thus the Farmers of the Excise and Customs cannot demand any Duties for the Goods and Merchandizes which are destined for the use of the Prince, or of the Exchequer. And this Exemption is not so much a Privilege as a Franchise or Immunity naturally belonging to the Sovereignty, which cannot be subject to Charges imposed only for its Use and Benefit *e*.

e Fiscus ab omnium vectigalium præstationibus immunis est. *l. 9. §. ult. ff. de public. & vectig.*

Privatæ rei nostræ privilegiis permanentibus, nihil extra ordinem prædia jure perpetuo consignata sustineant: neque adjectis sæpius ac præter primum delegationis canonem postulatis afficiatur impendiis, quandoquidem neque aurario canoni sub privilegiis æstimato, aliquid ex ea jubentibus nobis præbitionum diversitate decutitur: & pari cum cæteris æstimari sorte non convenit, quas præter annonarias functiones æstimatas perpetua pensitationum prærogativa nexuerunt. *l. 10. C. de excus. mun.*

Evidenter atque absolute jubemus ne fundi ad patrimonium nostrum pertinentes, seu conductionis titulo seu perpetuo jure teneantur, aliquid præter ordinem superindicti vel pretii nomine de sordidis quibuscunque muneribus agnoscant. Nam & hoc a divis principibus imperatum est, & a nostra serenitate reparatum. *l. 15. eod.*

VI.

6. It has the Preemption of Metals.

We may likewise reckon in the number of the Privileges of the first kind, that which the Prince hath to be preferred before all private Persons in the buying of Metals which may be necessary for his Service, such as Gold, Silver, Copper, Iron, Lead, and other Metals, for coining Money, for Artillery, and other Uses. Thus, when the Rights of the Demesne in Mines are not sufficient for all the said Uses, the Metals which remain to the Proprietors of the Lands where the Mines are, are naturally appropriated to the said Uses for the Good of the Pub-

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Publick; and that for the Reasons explained in Tit. 2. Sect. 2. Art. 19. And the Prince in this Case takes them at their true Value *f*.

f Quidquid amplius colligere potuerint, (*metallorum*) fisco potissimum distrahant, a quo competentia ex largitionibus nostris pretia suscipiant. *l.* 1. *C. de metall. & met.*

VII.

7. The Exchequer has always a tacit Mortgage.

There is also another Privilege of the Exchequer, which may be ranked among those of the first kind. It is that which in all the Cases where the Exchequer is Creditor, gives it a tacit Mortgage on the Estate of the Debtor, altho there be no express Covenant for it. Thus, for example, the Farmers and others who contract for the Rights of the Demesne, and all who are under any Engagement to the Exchequer, by Leases, Sales, Letting and Hiring, or by other Covenants, mortgage all their Goods by the bare Effect of the Obligation which constitutes them Debtors; altho no express mention be made of the Mortgage: For the Consequence of the Rights of the Exchequer makes all lawful Ways for ascertaining the Recovery of them to be natural and necessary; and there can be no Way more lawful than the Mortgage of the Goods of the Debtors *g*.

g Fiscus semper habet jus pignoris. *l.* 46. §. 3. *ff. de jure fisci.*

Certum est ejus qui cum fisco contrahit, bona velut pignoris titulo obligari, quamvis specialiter id non exprimatur. *l.* 2. *C. in quib. caus. pig. vel hyp. tac. contr.*

Si in te jus fisci cum reliqua (solveres) debitoris pro quo satisfaciebas, tibi competens judex adscripsit & transtulit: ab his creditoribus quibus fiscus potior habetur, res quas eo nomine tenes, non possunt inquietari. *l.* 7. *C. de priv. fisci.*

V. l. 2. *C. de priv. fisci.*

¶ It may be remarked on this Article, that the Mortgage of the Estates of Debtors to their Creditors, is in general so just and natural, that it ought to belong to all sorts of Creditors, from the moment the Debt is contracted; and that even for those Debts which are purely personal, every Creditor ought to have a Mortgage on all the Goods of his Debtor, altho no such thing has been expresly stipulated; because the Obligation of the Person is nothing else but his Engagement to pay; which implies the Means of getting Payment, which cannot be had but out of the Goods of the Debtor. But because it is just that in a concurrence of Mortgages, the eldest should be preferred, and that it ought not to depend on the Collusion which is easily to be practised between a Creditor and his Debtor, to have the Mortgage antedated, which might be easily done if it were to be contained in a private Writing under the Hand and Seal of the Party; it has therefore been wisely established in *France*, that the Mortgage which was acquired in the *Roman* Law by a bare Covenant, without the Presence or Intervention of any publick Officer, cannot be acquired except by Acts or Deeds which have the publick Character of the Authority of Justice, which is that of the Prince. And it is for this reason, that in order to grant a Mortgage to a Creditor on the Estate of his Debtor, it is necessary to have a Contract or an Obligation executed before a publick Officer, who has a right to give it, or a Condemnation in Judgment by a Judge who has the same Power; for a Condemnation by Arbitrators would not be sufficient for that purpose. So that it may be said of the tacit Mortgage of the Exchequer, that according to the Law of this Kingdom, it is not so much a Privilege as a natural Right; since on one part it cannot be presumed of the Sovereign, that he would cause the Obligation of his Debtor to be antedated; and on the other part it is in the Person of the Sovereign that the Authority which gives the Mortgage resides. See upon this and the following Articles, and as to what concerns the Privilege of the Exchequer in Mortgages, the 19th and following Articles of the 5th Section of Pawns and Mortgages.

VIII.

8. The Exchequer is preferred to prior Creditors on the Goods acquired by the Debtors after its Credit.

In the same matter of Mortgages, the Exchequer hath another Privilege, which may be placed among those of the second kind; and that is the Preference which the Laws have given it on the Goods acquired by its Debtors after their Obligation to it. For the Exchequer is preferred on those Goods to prior Creditors, to whom the Debtors had mortgaged all their Goods present and future *h*.

h Si quis mihi obligaverat, *quæ habet habiturusque esset*: cum fisco contraxerit, sciendum est, in re postea acquisita, fiscum potiorem esse debere, Papinianum respondisse. Quod & constitutum est. Prævenit enim causam pignoris fiscus. *l.* 28. *ff. de jure fisci.*

See Art. 22. *of Sect.* 5. *of Pawns and Mortgages.*

IX. It

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IX.

9. There is no Peremption of a Suit begun at the Instance of the Exchequer.

It is also by a Privilege of this second kind, that altho it be a general Rule, that all Instances in Law-Suits determine by a Peremption, that is, by letting the Cause lie dormant without any Judicial Proceeding therein for the space of three Years; the Causes of the Exchequer are excepted out of this Rule, and the Suit which has been commenced for the Recovery of its Rights may be revived and continued after the Expiration of three Years; whereas, according to the common Rule, it would be necessary to begin the Suit anew *i*.

i Exceptis tantummodo causis quæ ad jus fiscale pertinent, vel quæ ad publicas respiciunt functiones. *l.* 13. §. 1. *C. de judic.*

See concerning this Privilege the following Article, and the Remark upon it.

X.

10. The Causes of the Exchequer are reviewed upon producing new Deeds or Writings.

In the same Order of Judicial Proceedings, it is another Privilege of the Exchequer, that altho it be a general Rule, that those who have been condemned by a Sentence or Decree, from which there lies no Appeal, cannot desire to be heard against the Sentence, upon pretence of having discovered new Deeds and Writings which they have a mind to produce anew, unless the said Writings had been concealed by the Fraud of the adverse Party; the Exchequer is excepted from this Rule, and may desire to be heard against any Sentence or Decree, if its Right is founded on Writings which have not been before produced, altho the adverse Parties could not be charged with having detained those Writings. For the Exchequer not having been sufficiently defended, it is but just, because of the Consequence of the Interest thereof, that the Causes which may have hindred the establishing of its Right, should not be prejudicial to it, and should not be imputed to a want of Vigilance and Care in the Prince, who has the same Interest in a Cause of the Exchequer, as if it were his own proper Cause *l*.

l Imperatores Antoninus, & Verus rescripserunt, quamquam sub obtentu novorum testamentorum, restitui negotia minime oportuit, tamen in negotio publico ex causa permittere se hujusmodi instrumentis uti. *l.* 35. *ff. de re judic.*

It is usual to compare the Exchequer to Minors; and as Minors who have not been defended, and whose Writings have not been produced, may be relieved against Sentences and Decrees, and get them to be annulled, if they can by new Writings establish their Right; it is just likewise that the Exchequer should have the same Right: So that this Privilege might for this Reason be ranked in the number of those of the first kind; and perhaps it might be reasonable to place there likewise for the same Reason the Privilege which has been explained in the preceding Article.

XI.

11. When Goods of the Exchequer are adjudged to the highest Bidder, others are allowed to outbid them within a certain time.

We may likewise place among the Privileges of the second kind, that which the King has in *France* of receiving within a certain time after his Farms have been adjudged to the highest Bidder, Persons who bid more, to the amount of a third Part of the Price; and in the same manner in the Case where the Goods of the Demesne have been adjudged to the highest Bidder, the Usage in *France*, is to admit within a limited time Persons to bid for them, if they raise the Price a third more *m*.

m Si tempora quæ in fiscalibus auctionibus vel hastis statuta sunt, patiuntur: cum etiam augmentum te facturam esse profitearis, adi rationalem nostrum, ut justam uberioris pretii oblationem admittat. *l.* 4. *C. de fid. & jur. hast. fisci.*

Si civitas nullam propriam legem habet de adjectionibus admittendis, non posse recedi a locatione vel venditione prædiorum publicorum jam perfecta; tempora enim adjectionibus præstita ad causas fisci pertinent. *l.* 21. *in f. ff. ad municip.*

Si sine ulla conditione prædia vendente republica, perfecta venditione, nulla ratione vereris ne adjectione facta offerri tibi dominium possit; tempora enim adjectionibus præstituta ad causam fisci pertinent, nisi si qua civitas propriam legem habeat. *l.* 1. *C. de vend. reb. civ.*

See the Ordinances touching this Matter.

XII.

12. The Exchequer warrants not the Defects of the things it sells.

It is also by another Privilege of the same kind, that in Sales made by the Exchequer, it does not warrant the Defects of the things sold *n*.

n Illud sciendum est Edictum hoc non pertinere ad venditiones fiscales. *l.* 1. §. 3. *ff. de adil. ed.*

¶ This Privilege, according to our Usage, doth not distinguish the Condition of the Sales made by the Exchequer from those made of the Goods of particular Persons by an Order of a Court of Justice; and it is not strictly speaking a Privilege in our Usage: For all the Sales of Goods, Moveables and Immoveables, made by Order of a Court of Justice, and by Cant or Auction, such as that of the Goods of a Succession that is abandoned to the Creditors, of Moveables seized by a Distress, and other Sales of the like nature, are made publickly by Cant or Auction, and always on the condition that those things be sold such as they are; because the said Sales not being made by the Owners of the Goods, those who expose them to Sale, are ignorant of the Qua-

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Qualities and Defects of the things sold. Thus, when a Sale is made of the Effects of a Succession that is abandoned to the Creditors in which there are Debts due to the Estate; they are sold without any Warranty, not so much as of the Payments which may have been made by the Debtors; and they never fail to insert in the Advertisements for the Sale, that the things will be sold without any Warranty. So that as the Sales made by the Exchequer are made by Cant or Auction, and after due Publication, in the same manner as Sales by Order of a Court of Justice, and that the same Reasons hold in the one as well as the other; it is but just that there should be likewise no Warranty of these sorts of Sales; and it is usual to sell in this manner the Estates that fall to the Exchequer, when there are Debts owing to the Estate which is sold.

XIII.

13. The Exchequer is discharged from the Debts due from the Goods it sells, and the Creditors have their recourse against the Purchaser.

It is a Consequence of the Rule explained in the preceding Article, that the Persons who purchase the Goods sold by the Exchequer, should be answerable for the Debts to which the said Goods may be liable; for it is on this Condition that they are sold to them, and the Creditors can have no Action against the Exchequer *o*.

o Eum qui bona vacantia a fisco comparavit, debere actionem quæ contra defunctum competebat, excipere. *l.* 41. *ff. de jur. fisc.*

Æs alienum, hæreditate nomine fisci vendita ad onus emptoris bonorum pertinere, nec fiscum creditoribus hæreditariis respondere, certum & absolutum est. *l.* 1. *C.* 1. *de hared. vel act. vend.*

See the Remark on the foregoing Article.

XIV.

14. The Exchequer not favoured in doubtful Cases.

All these Privileges which we have just now explained, and all the general Considerations which make the Rights of the Exchequer to be reckoned favourable, have not the Effect to render the Cause of the Exchequer in general more favourable than that of private Persons, who have an Interest to dispute some Right of the Exchequer; neither in a doubtful Case should the Judge always incline to favour the Exchequer: For tho it be true, that the publick Interest ought to be preferred to that of private Persons, and that because of the said Interest all the Rights of the Exchequer are very favourable, yet the Favour of that Interest consists in maintaining these Rights intire, and in the exercise of each Right in all the Cases where it may be reasonable to extend it. But in Doubts concerning the Extent of the said Rights, when the Consideration of the Equity which may be found in the Interests of particular Persons, counterballances the Interest of the Exchequer, it makes another sort of Publick Good, which the Prince will consider more than his own private Good; by preferring to the little Interest he may perhaps have in the Cases where these Doubts arise, the Interest of particular Persons, which is to them proportionably of much greater Importance than the small Profit which might accrue to the Exchequer is to the Prince: So that in these sorts of Difficulties, one may, according to Equity, not favour the Cause of the Exchequer, pursuant to the Rule explained in another Place *p*.

p See Art. 26. *of Sect.* 1. *of this Title, and Art.* 18. *of Sect.* 6. *of the preceding Title.*

Quod communiter omnibus prodest, hoc rei privatæ nostræ utilitati præferendum esse censemus, nostrum esse proprium subjectorum commodum imperialiter existimantes. *l. un.* §. 14. *in f. C. de cad. toll.*

SECT. VIII.

Of the Patrimony or private Demesne of the Prince.

The CONTENTS.

1. *Definition of the private Demesne of the Prince.*
2. *The Demesne comprehends that which the Prince acquires by Succession to his Relations.*
3. *And that which he acquires by Donation, or by Testament.*
4. *And the Purchases he makes with his own proper Goods.*
5. *The private Goods of the Prince may be annexed to the Demesne.*
6. *The Privileges of the Prince for his own private Patrimony.*
7. *The Prince may alienate his own proper Goods.*
8. *The private Patrimony of the Prince is exempt from all Contributions.*
9. *Other Privileges of the Exchequer which do not suit with the Patrimony of the Prince.*
10. *Privileges of the Patrimony or Demesne of the Princess.*

I.

1. Definition of the private Demesne of the Prince.

BY the private Demesne of the Prince is meant here all the Goods he may have by other Titles besides that of his Sovereignty *a*.

a Cæsaris ratio. *l.* 6. *in f. de jure fisci.*

Pos-

Possessio rei privatæ nostræ. *l.* 3. *C. de fund. rei priv.*

Privatum patrimonium nostrum. *l. ult. C. de agric. & mancip.*

II.

2. The Demesne comprehends that which the Prince acquires by Succession to his Relations.

The Goods which the Prince acquires by Succession to Persons of his Family, to whom he is Heir at Law, belong properly to the Prince himself, and not to the Exchequer. For he does not succeed as Sovereign, but as a Relation; so that the Publick has no Pretensions to those Goods *b*.

b The Quality of Sovereign does not deprive him of the Right of Succession.

III.

3. And that which he acquires by Donation or by Testament.

It is the same as to Goods which the Prince should acquire by Donation, by Testament or other Disposition, which should have regard only to his Person; for the Intention of the Donors and of the Testators, considering him only in his personal Capacity, the Exchequer would have no share in Bounties of this nature. But if the Donation or Testamentary Institution, or Legacies, or other Dispositions seem to regard the Crown, and it were the Intention of the Donors or Testators, that the things given should be annexed to the Crown, they would pass to the Demesne of the Crown, and would not go to the private Patrimony of the Prince *c*.

c He has the same Right as private Persons to accept of Donations, and to be instituted Heir or Executor, or to receive a Legacy.

Si imperator sit hæres institutus, posse inofficiosum dici testamentum, sæpissime rescriptum est. *l.* 8. §. 2. *ff. de inoff. test.*

Et in legatis Principi datis legem Falcidiam locum habere merito Divo Hadriano placuit. *l.* 4. *C. ad l. falc.*

IV.

4. And the Purchases he makes with his own proper Goods.

If the Prince had made Acquisitions upon other Titles, with Monies or other Effects arising out of his own Patrimony, whether by Exchange or otherwise, the Goods acquired by these Titles, would remain in his Patrimony *d*.

d This is a Consequence of the preceding Articles.

V.

5. The private Goods of the Prince may be annexed to the Demesne.

All these sorts of Goods which the Prince acquires as his own private Patrimony, remain in this Nature, if it is his Pleasure to possess them always by this Title. But if he unites and incorporates them into the Demesnes of the Crown, either expresly or tacitly, as has been explained in its Place, the said Goods will change their Nature, and have that of the other antient Goods of the Demesne *e*.

e See the Articles cited in the Remark on the preceding Article.

VI.

6. The Privileges of the Prince for his own private Patrimony.

During the time the private Goods of the Sovereign are not annexed to the Demesne of the Crown, he has nevertheless, with respect to his own proper Goods, the Privileges of the Demesne, so far as they may agree to him. For there are some that do not agree to him, and others which he may use, as shall be explained by the Rules which follow *f*.

f Quodcunque privilegii fisco competit, hoc idem & Cæsaris ratio & Augustæ habere solet. *l.* 6. *in f. ff. de jure fisci.*

See the last Article.

VII.

7. The Prince may alienate his own proper Goods.

Seeing the Privilege, which renders the Goods of the Demesne of the Crown inalienable, is founded on the Necessity of preserving the Possession of them to the Sovereign for the Publick Good, to which they are destined; and it is not so highly necessary that he should retain the Possession of his own private Goods, because they are not destined to the same Use; and on the contrary it is for his Interest that he should have power to dispose of them as he thinks fit; he has not the fruitless use of this Privilege, but he may alienate these sorts of Goods, and the Alienation he makes of them is irrevocable *g*.

g See Art. 23. *of Sect.* 1. *of Tit.* 5.

By the Roman *Law the Lands belonging to the Exchequer might be alienated irrevocably.*

Universi cognoscant has possessiones quas de fisco nostro comparaverunt, seu comparant, nullo a nobis jure retrahi, sed propria firmitate possessas, etiam ad posteros suos dominii perpetui durabilitate dimitti. *l.* 1. *C. de fund. rei. priv.*

Hi quibus patrimoniales possessiones per Asianam & Ponticam Diœcesim, vel a nobis, vel a divis parentibus nostris sacra largitate donatæ sunt, inconcusse possideant, atque ad suos posteros transmittant; quod quidem non solum in hæredibus sed etiam in contractibus omnis generis volumus custodiri. *l.* 6. *C. de fund. patrim.*

Retractare fiscum quod semel vendidit æquitatis honestatisque ratio non patitur. *l.* 2. *C. ne fisc. rem quam vend. er. l.* 1. *eod.*

Fundi patrimoniales, & qui ex emphiteutico jure ad dominum nostram diversis generibus devoluti sunt, sic eis, qui eos poposcerint, cedunt, ut commissi metus esse non possit, neque enim magis commodamus nostra, quam tradimus ea jure dominii: ita tamen, ut ea quæ in nostra possessione positi præstiterint, & in posterum solvant. *l.* 4. *C. de fund. patrim.*

¶ By the Usage in *France* the Goods belonging to the Demesne are inalienable, as has been explained in Tit. 5. Sect. 1. Art. 12, &c. But the King may alienate his own proper Goods, which have not been incorporated into the Demesne of the Crown. *See the same Sect 1. Art. 23, &c.*

In the Article we have mentioned only the Privilege which renders the Goods of the Demesne of the Crown inalienable, and not that which renders them imprescriptible. For whereas it is the Right and Interest of the Prince, altho he enjoys the Privileges of the Exchequer, not to use that Privilege which hinders Alienation; and on the contrary it is his Interest to have the Liberty of disposing of his own private Patrimony; it is not in the same manner his Interest not to use the Privilege which renders the Goods of the Demesne of the Crown imprescriptible; and it would be on the contrary for his Interest to make use of this Privilege. But it may be questioned whether, as to Prescription, the condition of the proper Goods of the Prince ought to be the same with that of the Goods of the Demesne, which the Edict of *Francis* I. makes imprescriptible, even altho they had been possessed for a hundred Years, as has been observed on Art. 20. of the first Section. For it is not of the same Consequence as to the private Goods of the Prince which may be alienated, that they should be imprescriptible, as it is for those which being part of the Demesne of the Crown, are appropriated for the Good of the State; and even as to those Goods, some have been of opinion that that Edict does not extend to them. But altho this Consideration may render the Condition of the Goods of the Demesne more favourable than that of the private Goods of the Prince, yet another Reason ought to secure them against Prescriptions, at least those of ten, twenty, and thirty Years. For if these Prescriptions do not run against Minors, because they cannot defend themselves; they ought for the same reason not to run against the Prince, because of the Care and Application he is obliged to give to the Good of the State, and the Multitude of his Affairs, which do not allow him time to watch against Prescriptions. And it was for this reason, that in the *Roman* Law, by which the Goods of the Prince, and also those of the Exchequer, might be prescribed, a Prescription of forty Years was necessary, as has been remarked on Art. 20. of the 1st Section. It is for want of fixed Rules in our Usage as to what concerns the Prescriptions of the private Goods of the Prince, which have not been united and incorporated into the Demesne, that we have abstained from setting down any Rule about them; and we have thought proper to make only this Remark.

VIII.

8. The private Patrimony of the Prince is exempt from all Contributions.

Seeing the Privilege, which renders the Goods of the Demesne of the Crown inalienable, does not suit with the Interest of the Prince for his own private Goods, he may abstain from making use of it; so on the contrary he does make use of that Privilege which exempts the Goods of the Demesne from all Contributions. For it is his Interest to make use of it for his own proper Goods; and he enjoys this Exemption with respect to every thing he possesses besides the Demesne of the Crown; and as he is the Dispenser of Exemptions, so he is entitled to take to himself in the first place what he gave to others *h*.

h See the Text cited in Tit. 4. Sect. 7. Art. 6, 11.

IX.

9. Other Privileges of the Exchequer which do not suit with the Patrimony of the Prince.

All the other Privileges explained in the preceding Section agree to the Prince for his own proper Goods; because the Motives of those Privileges are common to his private Rights, as well as to those of the Demesne *i*, excepting the Privileges explained in Art. 8, 11, 12. For as to the two last, they are proper only to the Exchequer, seeing the Prince may sell and alienate his own private Goods in the same manner and on the same conditions as private Persons may do. And as to the Privilege of the Mortgage explained in Art. 8. seeing it derogates from a general and equitable Rule, which has been established purely as a peculiar Favour to the Cause of the Exchequer, it must be left to the Prince himself to consider, whether he should claim this Privilege for his own private Patrimony and Estate, if the Case should fall out.

i See the Text cited in Art. 7.
See 1 Kings, Chap. 12.

X.

10. Privileges of the Patrimony or De-

The Civil Law gave the same Privileges to the Princess, for her Patrimony and

mesne of the Princess. and private Demesne, as the Prince enjoyed *l*.

l Quodcunque privilegii fisco competit, hoc idem & Cæsaris ratio & Augustæ habere solet. *l.* 6. *in f. ff. de jure fisci.*

Principes eadem (Augustæ) Privilegia tribuunt quæ ipsi habent. *l.* 31. *ff. de legibus.*

See the preceding Article, and the Remark there made upon it.

By an Edict of Charles IX. *of* May 25. 1566. *it is ordained, that the Officers belonging to the Lands of the Demesne or others assigned to the Queen, shall be called Officers of the King or Queen, whose Service, as is mentioned in the Preamble, is reputed to be that of the King.*

According to the Roman *Law, the Alienations and Grants made by the Princess, cannot be revoked.*

Sancimus omnes alienationes de aula procedentes, sive a nostra clementia, sive a serenissima Augusta conjuge nostra, sive ab his qui postea digni fuerint nomine imperiali, sive jam alienatum quiddam est, sive postea fuerit, sine omni inquietudine permanere——Quia igitur multa scimus, tam nosmetipsos, quam serenissimam Augustam conjugem nostram, variis personis jam donasse & vendidisse, & per alios titulos adsignasse & maxime sacrosanctis Ecclesiis & xenonibus & Prochotrophiis, & Episcopis, & Monachis, & aliis innumerabilibus personis, eandem liberalitatem ex nostra substantia, sive serenissimæ conjugis nostræ esse confectam. Sancimus etiam eos firmo jure habere quod consecuti sunt, ita ut contra illos quidem nulla moveatur actio—— Cum enim multa privilegia Augusta fortunâ meruit, & in donationibus sine insinuatione gestorum omnem firmitatem habentibus & super rebus quas pro tempore serenissimus Princeps divinæ Augustæ constante matrimonio donaverit, vel ipse a serenissima Augusta per donationis titulum consequatur, ut maneat illico. Donatio plena, nullo alio confirmationis tempore expectando : ita & hoc videatur imperiale esse privilegium. *l.* 3. *C. de quadr. præscr.*

TITLE VII.

Of the Means to have Plenty of all Things in a Kingdom; of Fairs, and Markets; and of Regulations to prevent the Dearth of Things that are most necessary.

IN order to explain the Subject Matter of this Title in the same manner that all the other Matters have been treated, we cannot omit considering in the natural Order of the Society of Mankind, what is the Rank and Use which this Matter hath therein. Which obliges us to make here a Reflection on the Divine Providence, of which the Use of this Matter hath been a Consequence. Thus it is necessary to remark, pursuant to the Principles laid down in the first Chapters of the Treatise of Laws, in which we have explained the Plan of the Society of Mankind, and its Foundations; that as the Design of God in relation to Man, by destinating him to the End for which he has created him, implies the Use of the Ties with which Men are linked together for the Exercise of the second Law; so he has multiplied in such a manner their Wants, that the least Necessities of Life demand the use of many things, and the Aid of many Persons. So that for supporting the Life of every Man in particular, and for preserving the Body of the Society which unites them all together, he has made necessary an infinite Number of different things, and many sorts of Labours, in order to have those things, and to render them fit for Use. It is with the same design that he has given to all these things different Natures, so that they cannot all of them be the Product of all Countries, and many of them grow only in certain Climates. Thus it is only by the Ties, and the Commerce which Nations have with one another, that each Nation can draw from the others, the things which it wants. And the same divine Providence which has made these different sorts of things necessary to Men, has made the Use of every one of them to depend on a Chain of Uses of many other things, in order to give it its proper Use; and at the same time on a like Chain of divers Labours of many Persons, whether it be in order to get the said things, or to put them in a condition for use.

It is by this Divine Disposition of things, that as to what relates to the Wants of every particular Person, even their most necessary Wants, which are those of Food, Raiment, and Remedies against the several sorts of Diseases, demand the use of an infinite number of things. Thus it is by the same Order, that we cannot draw from the Earth the Grain and other Fruits without cultivating it, without sowing, reaping, and employing about it the whole Detail of Agriculture. And for this Agriculture it is necessary to have Tools and Instruments of Iron, which can be had only from Mines, and by the means of other different Labours; and it is also necessary to have the Use of several Animals, and of many other sorts of things. Thus, before we can have the Use of Grain, it is necessary to have Mills, which must be made up of some sort of Build-

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Building or other, and of some Machines, which require the Labour and Skill of many Arts, every one of which doth also for its own proper Use depend on other different Things, and on divers Labours. Thus, for the Use of Things which cannot be had in every Kingdom, Navigation is necessary; and this implies a Necessity of an infinite number of Arts, of Trades, and of Matters of several kinds. And as to what concerns the Wants of the Body of the Society, the State cannot subsist without the Use of Forces by Land and by Sea, as has been shewn in its proper place *a*. This Want alone demands the Use of Arms, Fortifications, Artillery, and that of many Machines, of Ships of War, not only for Defence of the Kingdom, but also for protecting and securing the Trade of the Nation. And the publick Good requires likewise, for other Occasions, the Use of many Things, and the Exercise of many Arts. Thus *Solomon*, who was so wise, so rich, and powerful a Prince, stood in need of the Assistance of Things and of Persons, which he drew from other Princes, for the building of his Temple, notwithstanding he had already the Materials which *David* his Father had left him *b*.

We may easily judge by these few Reflexions, what is the Extent of the Wants of Men, and the Multitude both of Things and of Labours, which render Arts, Commerce, and Ties necessary, not only between Persons who compose one and the same State, but also between the Subjects of divers Princes, and between one Nation and another; that by these Intercourses and Ties, they may procure and have in plenty in every Kingdom that which must be had from other Parts, and which it cannot have within it self by Husbandry and other Arts; and that they may, in fine, imploy every thing that can be had by Agriculture and Trade.

The same Causes, which render the Means of having plenty of all Things in a Kingdom necessary, do in a singular manner require Precautions to be taken for having more especially plenty of the Things that are most necessary for Life, such as Grain and other Provisions; and for preventing a Dearth of them, that the Poor may not be destitute of what is necessary for their Subsistence.

In order to have plenty of all these Things in a Kingdom, and to have the Use of them, it is necessary both to manure the Ground, that it may yield all those things it is capable of producing, and to draw from foreign Countries those which are wanting, and to use the other Precautions; which shall be the Subject-matter of this Title, which we have divided into four Sections. The first is, concerning the plenty of Things which grow in every Kingdom. The second relates to the plenty of Things which must be fetched from other Parts: The third is of Fairs and Markets: And the fourth is touching the Means of preventing a Dearth of the Things that are most necessary.

a See Tit. 3. as also Tit. 2. Sect. 1.

b And Solomon *had threescore and ten thousand that bare Burdens, and fourscore thousand Hewers in the Mountains: Besides the Chief of* Solomon's *Officers which were over the Work, three thousand and three hundred, which ruled over the People that wrought in the Work. And the King commanded, and they brought great Stones, costly Stones, and hewed Stones to lay the Foundation of the House. And* Solomon's *Builders and* Hiram's *Builders did hew them, and the Stone-Squarers: So they prepared Timber and Stones to build the House.* 1 Kings 5. 15, 16, 17, & 18.

And David *commanded to gather together the Strangers that were in the Land of* Israel, *and he set Masons to hew wrought Stones to build the House of God. And* David *prepared Iron in abundance, for the Nails for the Doors of the Gates, and for the Joinings; and Brass in abundance, without weight: Also Cedar-Trees in abundance; for the* Zidonians, *and they of* Tyre, *brought much Cedar-Wood to* David. *And* David *said,* Solomon *my Son is young and tender, and the House that is to be builded for the Lord must be exceeding magnifical, of Fame and of Glory thoughout all Countries: I will therefore now make Preparation for it. So* David *prepared abundantly before his Death.* 1 Chron. 22. 2, 3, 4, 5.

See 2 Chron. chap. 1, 2, 3.

SECT. I.

Of what regards the Plenty of Things which grow in every Kingdom.

The CONTENTS.

1. *General Means for procuring Plenty.*
2. *The natural Order of the Tillage of the Ground.*
3. *It is necessary to cultivate the Lands, to make 'em yield what they are able to produce of greatest Value.*
4. *Multiplication of Persons is necessary for the Tillage of the Ground.*
5. *Protection due to those who till the Ground.*
6. *Vagabonds and idle Persons ought to be compelled to work.*
7. *The Use of Fairs and Markets.*

I.

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I.

1. General Means for procuring Plenty.

SINCE the principal Necessaries of Life are Food and Rayment *a*, it is chiefly of the Things necessary for these Uses that Plenty ought to be procured in every Kingdom by those who have the Government of it; and it is necessary likewise to take care, as much as is possible, that there be in the Kingdom abundance of all the other Things that are necessary for the other different Wants of the People. And this requires, in the first place, the Use of the ways that are proper for getting out of every Country all the Things it may yield for its own Wants, whether it be by tilling the Ground, or by a due Care of the Cattle necessary for the said Tillage, and which may serve for Nourishment or for Clothing, or by the other ways which may contribute thereto: And these same Wants of Human Life demand also a Trade with foreign Countries, that the Inhabitants may fetch from thence what their own Country cannot produce.

a Verbo victus continentur, quæ esui, potuique, cultuique corporis, quæque ad vivendum homini necessaria sunt. Vestem quoque victus habere vicem Labeo ait. *l.* 43. *ff. de verb. signif.*

Et cætera, quibus tuendi curandive corporis nostri gratia utimur, ea appellatione significantur. *l.* 44. *eod.*

II.

2. The natural Order of the Tillage of the Ground.

This Necessity of tilling the Ground, and of caring for the Cattle, requires that one should be able to discern the Nature of the Grounds, in order to draw from them those kinds of Fruits they are capable of producing: And as to the Fruits, to distinguish between those of which a greater Quantity is necessary, and those of which a lesser Quantity might suffice; reserving every where sufficient for the Nourishment of the Cattle, and proportioning the Tillage to all these different Wants *b*.

b It is the natural and common Usage to order the Tillage of the Land after this manner.

In Sorrow shalt thou eat of it all the Days of thy Life: Thorns also and Thistles shall it bring forth to thee; and thou shalt eat the Herb of the Field. Gen. 3. 17, 18.

III.

3. It is necessary to cultivate the Land: to make 'em yield what they are able to produce of greatest Value.

If the Quality of the Lands be found to be such, as that they are proper for yielding Fruits, or other Things, more precious than the Things that are most necessary for Nourishment and Clothing, which may be had elsewhere; it is for the Good of the State, and the Interest of particular Persons, to cultivate therein those sorts of Things, whether it be to trade in them within the Kingdom it self, or with Strangers, if they be in plenty enough *c*.

c This Choice depends on the Wants.

IV.

4. Multiplication of Persons is necessary for the Tillage of the Ground.

All these Wants furnish Imployment for the greatest part of Mankind; and it is likewise the natural Order, that if there were no other necessary Labours in their Society, they should all of them by their Nature be destined to those Labours from which they draw their Sustenance. Thus, in the first Ages Husbandry and the keeping of Cattle were Imployments common to the richest Persons. But because there are many other Wants besides these two sorts, and that the Order of Society requires they should all be provided for, the same Order has taken care to distinguish the Imployments of Men according to the different Functions which these several Wants render necessary. And seeing those of Agriculture, and of the Care of Cattle, require the Labour of a great many more Persons, the greatest Number is destined to those Functions by the Divine Providence *d*.

d This is the natural State of the Society of Mankind; and even in the State of Innocence, Man was imployed in tilling the Ground.

And the Lord God took the Man, and put him into the Garden of Eden, *to dress it, and to keep it.* Gen. 2. 15.

V.

5. Protection due to those who till the Ground.

It results from the Truths explained in the preceding Articles, that as the principal Means of procuring Plenty in a Kingdom of every thing it is capable of bringing forth for the Use of the Society, is the Multiplication of Persons who apply themselves to Husbandry, and to the Care of Cattle; so in order to increase the Numbers of the said Persons, and to have plenty of Cattle and all kinds of Things which may be had from several Countries, it is the Duty of those who are intrusted with the Government, to take all possible Care to promote and encourage the said Multiplication, by the Ways which may have that effect *e*. As among others, by protecting those Persons against the Oppressions and Violences to which their Condition exposes them, and which they suffer, either from some Lords of the Mannor, or from Persons who, being

e This is a Consequence of the preceding Article.

some

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ſome way or other imployed in the Adminiſtration of Juſtice, either as Judges or inferior Officers, are ſo far from doing Juſtice to thoſe poor Labourers, that they oppreſs them with Vexations and Hardſhips, either by cauſing them to be over-rated in their Aſſeſſments that they may thereby eaſe themſelves, or by promoting Law-Suits againſt them, or by requiring of them Services or Labour which they do not owe *f*: Which on one hand renders their Condition hard and diſagreeable to them, and obliges them often to put out their Children to ſome other Calling; and on the other hand, it makes them loſe the Time they would otherwiſe imploy in Labour, and deprives them of the Means of furniſhing the neceſſary Expences for their Husbandry, and other neceſſary Charges.

f Execute Judgment in the Morning, and deliver him that is ſpoiled out of the hand of the Oppreſſor. Jer. 21. 12.

Deliver him that is oppreſſed out of the hand of the proud Man. Eccl. 4. 9.

VI.

6. Vagabonds and idle Perſons ought to be compelled to work.

It is likewiſe one of the Means to increaſe the Number of Perſons neceſſary for theſe Labours, or to hinder the Decreaſe of them, to puniſh thoſe who, by their Birth and Condition being deſtined to this Profeſſion, abandon it out of Idleneſs; which leads them either to Poverty, or to the commiſſion of Crimes, and often both to the one and the other of the ſaid Diſorders; which fills the Country with Vagabonds and the worſt ſort of Poor. And therefore it is that the Laws have taken care to inflict Puniſhments on Vagabonds and ſturdy Beggars, and to compel them to work, for the Good of the Publick, as ſhall be explained in its proper place *g*.

g Cunctis quos in publicum quæſtum incerta mendicitas vocaverit inſpectis, exploretur in ſingulis & integritas corporum, & robur annorum, atque inertibus & abſque ulla debilitate miſerandis neceſſitas inferatur, ut eorum quidem quos tenet conditio ſervilis proditor ſtudioſus & diligens dominium conſequatur: eorum vero quos natalium ſola libertas perſequitur, colonatu perpetuo fulciatur, quiſquis hujuſmodi lenitudinem prodiderit, ac probaverit: ſalva Dominis in eos actione, qui vel latebram forte fugitivis, vel mendicitatis ſubeundæ conſilium præſtiterunt. *l. unic. C. de mendic. val.*

Go to the Ant, thou Sluggard, conſider her Ways, and be wiſe: Which having no Guide, Overſeer, or Ruler, provideth her Meat in the Summer, and gathereth her Food in the Harveſt. How long wilt thou ſleep, O Sluggard? when wilt thou ariſe out of thy Sleep? Yet a little Sleep, a little Slumber, a little folding of the Hands to Sleep. So ſhall thy Poverty come as one that travelleth, and thy Want as an armed Man. Prov. 6. 6, 7, 8, 9, 10, 11.

VII.

7. The Uſe of Fairs and Markets.

It would not be enough to have Plenty in a Kingdom of all Things, which may be had in it, if this Plenty were not diſperſed over all the Kingdom for the Benefit of thoſe who may want them: And on the contrary, the ſaid Plenty would be burdenſome to the Provinces which ſhould be over-ſtocked with ſuperfluous Commodities, whilſt others remain deſtitute of the Aſſiſtance which they ought to have from them. Thus, for the common Good of the Kingdom, it is neceſſary that there ſhould be ways to make thoſe ſuperfluous Commodities paſs from one Place to another, and from one Province to the neighbouring Provinces, that the Inhabitants of each Province may have plenty of what they want. And this is done by means of Fairs and Markets, which ſhall be the Subject-matter of the third Section *h*.

h See the 3d Section.

There are Fairs in certain Towns, which ſerve likewiſe to draw Merchants from foreign Countries.

See Art. 9. of the following Section; and Art. 4. of the 3d Section.

SECT. II.

Of what relates to the Plenty of Things that are to be fetched from foreign Countries.

The CONTENTS.

1. *Commerce between one Country and another.*
2. *Definition of Commerce.*
3. *Commerce with Strangers ought to be carried on by bartering Commodities for Commodities, as much as is poſſible.*
4. *The Uſefulneſs of the Commerce with Strangers, by furniſhing them with Commodities, is an Argument for exporting as many of them as is poſſible.*
5. *The Choice to be made in trading with Strangers.*
6. *Two ways of trading in thoſe Things which come from foreign Countries.*
7. *It is more profitable to engage Strangers to come and trade with us, than for us to go to them.*
8. *Unlawful Commerce with Strangers.*
9. *The Uſe of Fairs and Markets.*

I.

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I.

1. Commerce between one Country and another.

IT is by Commerce between one Country and another, that Things which are wanting in one Kingdom, are brought into it from other Parts. And this Commerce is carried on different ways; as shall be explained by the following Articles, which see.

II.

2. Definition of Commerce.

Commerce is a reciprocal Communication between two Persons; one of whom gives to the other one Thing, for another which he receives from him. And this Commerce is a Sale, if one of the two gives Money for the Thing he takes from the other; or an Exchange, if both the one and the other give other Things than Money *b*.

b See Sect. 1. *Art.* 1. *of the Contract of Sale, and Art.* 1. *of the Title of Exchange.*
See Tit. 12. *Sect.* 1. *Art.* 1.

III.

3. Commerce with Strangers ought to be carried on by bartering Commodities for Commodities, as much as is possible.

There is this difference between a Commerce carried on between the particular Subjects of one and the same Kingdom, and that which is negotiated between Subjects of different Kingdoms; that as to the first of these two sorts of Commerce, it is indifferent, as to the Good of the Kingdom, whether the Commerce be carried on by Sale, in giving Money for Goods, or by Exchange, in giving one Commodity for another; because the Money remains always in the Kingdom. But as to the second sort of Commerce, it is of importance to the Welfare of the State that the Commerce with Strangers be carried on by exchanging Goods for Goods, or by selling them Goods for their Money. For by this way, there accrues to the Publick a double Advantage, by keeping the Money within the Kingdom, and by bringing into it the Things which were wanting, discharging it only of its superfluous Commodities *c*.

c The Romans *punished severely those who, in trading with Strangers, gave them Gold for their Merchandizes.*

Si ulterius aurum pro mancipiis vel quibuscunque speciebus, ad Barbariem fuerit translatum a mercatoribus, non jam damnis, sed suppliciis subjugentur. *l.* 2. *C. de comm. & mercat.*

IV.

4. The Usefulness of the Commerce with Strangers, by furnishing them with Commodities, is an Argument for exporting as many of them as is possible.

It follows from this Usefulness of Commerce with Strangers, by giving them Merchandizes rather than Money, that it is for the Good of a State whose Territories are able to furnish Goods and Merchandizes over and above what is necessary for their own Consumption, to improve the Manufacture of such Commodities as are most proper for carrying on the Trade with Strangers; whether it be by supplying them with those Commodities in their kinds, such as Corn, Wine, and other Commodities of the like nature, or by transforming them into another nature, as by converting Flax into Linen-Cloth, Wool into Stuffs, and by making other Changes in this manner, in order to gain a double Profit, that of the Sale of the Goods and Merchandizes, and likewise that of the Price of the Labour of the Workmen who are imployed in several sorts of Manufactures *d*.

d This is a Consequence of the preceding Article.

V.

5. The Choice to be made in trading with Strangers.

If among the Strangers, with whom a Country may carry on a Trade, there be some who happen to have less store than others of the Goods and Merchandizes with which the said Country can furnish them, and more Money than they can well draw from them; and if there be no other Reasons for preferring to that Trade, that which may be carried on with other Countries, it is for the Good of the Kingdom to chuse rather that Trade than others *e*.

e This is likewise a Consequence of the 1st Article.

VI.

6. Two ways of trading in those Things which come from foreign Countries.

It is necessary also to distinguish among the foreign Countries, from whence a Nation is obliged to fetch Goods or Merchandizes of all sorts, the Countries in which they grow, from those who buy them up to sell them to others, in order to make a right Judgment whether it be more advantageous to go to the first, or to the others. And if for carrying on the said Trades Navigation be necessary, which by reason of the Distance of the Place is perillous, it is for the Interest of the State, and it will be prudent for the Sovereign to protect the said Trades, by appointing Ships of War for Convoys to the Merchant-Fleets *f*.

f This is also a Consequence of the first Article.

VII.

7. It is more profitable to engage Strangers

In trading with foreign Countries, it is necessary likewise to make a distinction between those Countries to which we

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to come and trade with us, than for us to go to them.

we should be obliged to transport the Goods and Commodities with which we are to furnish them, and those which would come and fetch away the Goods they want, and bring their own to us; for by this last way of Trading we should avoid the Perils and Charges of Navigation, and of Carriage. Thus it is for the Good of the State to engage Strangers to trade with us in this manner, by making it easy and agreeable to them to come among us, and by taking care to have safe and convenient Harbours *g*.

g It is natural to chuse out of these two Ways that which has the most Advantages.

VII.

8. Unlawful Commerce with Strangers.

All that has been said concerning the Commerce treated of here, and which may be carried on with Foreign Countries, is to be understood of that Commerce which is not prohibited by any Law of the Kingdom. For if there is any Prohibition, either of trading at all, or of trading in some particular Commodities, such as Arms *h*, or others, with certain Countries; those who should attempt to carry on any Commerce of that kind, would be punished with Confiscation of their Merchandizes, and be liable to the other Punishments which the Laws may have established, or which the Quality of the Commerce, and the Disobedience may deserve *i*.

h Nemo alienigenis Barbaris cujuscumque gentis ad hanc urbem sacratissimam sub legationis specie, vel sub quocunque alio colore venientibus, aut in diversis aliis civitatibus vel locis, loricas, scuta, & arcus, sagittas, & spathas, & gladios, vel alterius cujuscunque generis arma audeat venundare. Nulla prorsus iisdem tela, nihil penitus ferri vel facti jam, vel adhuc infecti, ab aliquo distrahatur. Perniciosum namque Romano Imperio, & proditioni proximum est, Barbaros, quos indigere convenit, telis eos, ut validiores reddantur, instruere. Si quis autem aliquod armorum genus quarumcunque nationum Barbaris alienigenis contra pietatis nostræ interdicta ubicunque vendiderit, bona ejus universa protinus fisco addici, ipsum quoque capitalem pœnam subire decernimus. *l. 2. C. quæ res exp. non deb.*

i Mercatores tam imperio nostro quam Persarum Regis subjectos, ultra ea loca, in quibus fœderis tempore commemorata natione nobis convenit, nundinas exercere minime oportet; ne alieni regni (quod non convenit) scrutentur arcana. Nullus igitur posthac imperio nostro subjectus ultra Nisibin, Callinicum, & Artaxatan emendi seu vendendi species causa proficisci audeat——Sciente utroque, qui contrahit, & species, quæ præter hæc loca fuerint venundatæ, vel comparatæ, sacro ærario nostro vindicandas; & præter earum rerum ac pretii amissionem, quod fuerit numeratum, vel commutatum, exilii se pœnæ sempiternæ subdendum. *l. 4. C. de commer. & mercat.*

Si quis inclytas nominatim vetustis legibus civitates transgredientes ipsi, vel peregrinos negotiatores sine comite commerciorum suscipientes fuerint deprehensi; nec proscriptionem bonorum, nec pœnam perennis exilii ulterius evadent. Ergo omnes pariter sive privati, sive cujuspiam dignitatis, sive in militia constituti, sciant aut sibi ab hujusmodi temeritate penitus abstinendum, aut supradicta supplicia subeundum. *l. ult. eod.*

Altho these Texts have not a precise Relation to this Rule, yet they may be applied to it; and it carries its Authority with it.

IX.

9. The Use of Fairs and Markets.

Seeing it is by the Use of Fairs and Markets, that the different Places and Provinces of a Kingdom are supplied with what is superfluous in other Parts thereof, as has been already mentioned in the last Article of the preceding Section; the said use of Fairs is also a means to procure plenty of those Merchandizes which come from Foreign Parts, as shall be explained in the following Section *l*.

l See Art. 4 and 5. of the following Section.

SECT. III.

Of Fairs and Markets.

The CONTENTS.

1. *Definition of Fairs.*
2. *Definition of Markets.*
3. *The choice of fit Places for Fairs and Markets.*
4. *Places proper for Fairs, to which it is intended to draw Strangers.*
5. *Privileges of Fairs.*
6. *The Privilege of exempting those who go to Fairs from all Arrests.*

I.

1. Definition of Fairs.

BY a Fair is meant a Concourse permitted by the Prince, of all sorts of Persons without distinction, for one or more Days, in a certain Place, there to sell, buy, or exchange the Goods and Merchandizes which every one brings thither, and there to carry on the different Trafficks which the Persons who are at the said Fairs may happen to agree on *a*.

a It is not permitted to hold Fairs or Markets without the Permission of the Prince, as has been taken notice of in Tit. 2. Sect. 2. Art. 16.

Nundinis impetratis a Principe, &c. *l. 1. ff. de nundin.*

II.

2. Definition of Markets.

By a Market is understood a resort of all sorts of Persons without distinction, permitted by the Prince, on certain

tain Days of every Week, in certain Places, there to sell, buy, or exchange whatever Goods and Merchandizes are brought thither, but principally Grain and Provisions. Thus Markets are distinguished from Fairs, in that the use of Markets is more necessary, and likewise more frequent; and in that they are restrained to fewer sorts of Merchandizes, and to fewer Persons *b*.

b Exercendorum mercatuum aut nundinarum licentia. *l. un. C. de nund. & mercat.*

III.

3. The choice of fit Places for Fairs and Markets.

The Use of Fairs and Markets being to draw to the Places appointed Goods and Merchandizes, for the Conveniency both of the Buyers and Sellers, they are appointed to be held in Places which have the most Conveniences for making them useful: which depends on the Easiness of access to the Places by good Roads, for the Carriage of the Merchandizes, and for the Conveniency of Persons; on the Nearness of those Places to the other Places from whence the Persons must come; on convenient Lodging for Travellers; on the Facility of dispatching other sorts of Affairs there, which may oblige many Persons to go to those Places; and on the other Advantages which may render one Place more commodious for that purpose than another *c*.

c The Publick Utility requires it should be so.

IV.

4. Places proper for Fairs, to which it is intended to draw Strangers.

As to the Choice of Places for holding Fairs, it is necessary to distinguish the Fairs held only for the benefit of the Inhabitants of some Province, or of a part of one, or even of several Provinces adjoining to the Place where the Fair is kept, from those Fairs which are established for drawing Strangers to it. For as to these, it is of importance for the Good of the Kingdom, to make choice of Frontier-Towns, to which Strangers may have easy Access, either by Sea or by Rivers. Thus the Fairs held in Sea-Port Towns, or in Towns to which Strangers may have the easiest access, are the most profitable *d*.

d The same publick Benefit will require this Choice of Places.

V.

5. Privileges of Fairs.

It is for this end, of drawing Strangers to Fairs, that Privileges are granted them; for if the Fairs were destitute of the said Privileges, Strangers might be discouraged from coming to trade there. And therefore in *France*, the Kings have granted in favour of some Fairs, the Privilege to Strangers who shall happen to die there, that the Goods they have in *France* shall go to their Heirs, or that they may dispose of them by Testament *e*.

e See Art. 3. of Sect. 4. of Heirs and Executors in general, and the Remark there made upon it.

There are many Ordinances which grant to Foreign Merchants, and others, frequenting certain Fairs, an Exemption from all Customs, and other Imposts, during the time of the said Fairs.

VI.

6. The Privilege of exempting those who go to Fairs from all Arrests.

The same Motive of the Usefulness of Fairs and Markets, has been the occasion of granting other Privileges likewise to those who frequent them, either on the account of Trade, or other Affairs. Thus it is not allowed to attach either their Persons or their Equipages, their Merchandizes or other Goods, for their Debts, whilst they are going to the Fairs, whilst they remain there, or return from them *f*.

f Qui exercendorum mercatuum aut nundinarum licentiam vel veterum indulto, vel nostra authoritate meruerunt: ita beneficio rescripti potiantur, ut nullum in mercatibus atque nundinis ex negotiatorum mercibus conveniant, vel in venalitiis aut locorum temporali questu & commodo privata exactione fectentur, vel sub prætextu privati debiti aliquam ibidem concurrentibus molestiam possint inferre. *l. un. C. de nund. & mercat.*

There are some Customs which regulate this Privilege after this manner.

SECT. IV.

Of the Means to prevent the Dearth of Things that are necessary.

The CONTENTS.

1. *All things are necessary for some use.*
2. *What are the things necessary for the greatest Wants.*
3. *What is meant by Dearth.*
4. *Causes of Dearth.*
5. *There is no hindring the raising of the Price in a Scarcity.*
6. *Precautions in Cases of Scarcity.*
7. *Prohibitions to export Grain out of the Kingdom.*
8. *Monopolies.*
9. *A Combination among those who have the Sale of certain things, to set them at a Price on which they agree.*
10. *Trade is prohibited to Officers and Gentlemen.*
11. *The Case of an universal Barrenness.*

I. ALL

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I.

1. All things are necessary for some Use.

ALL things are necessary for some Use or other. For God has not made any thing that is altogether useless; and each thing hath its proper Use, according to its Nature, and the different Wants of Men *a*. Some things are common to all Men, and every one has the free use of them, such as the Heavens, the Light, the Air, and the Water. Other things are the Property of some Persons, and are acquired several Ways, of which that of Commerce is the most frequent. And as to these things, some of them are of such a nature, that the Dearth of them is of no great importance to the Publick, such as Jewels and other precious things, the use whereof is necessary only for things which the Generality of Mankind may be easily without. But there are others, where it is for the Good of the Publick that they should be sold at a cheap Rate, such as the things necessary for Food and Clothing. For it is of consequence to every one not to be without these things; and if there be a Scarcity of them, it is with difficulty that one can have them during the Dearth; so that it is chiefly as to these sorts of things, that the Good of the State requires that the Dearth of them should be prevented as much as possible.

a And God saw every thing that he had made, and behold it was very good. Gen. 1. 31.

All the Works of the Lord are exceeding good. Ecclus. 39. 16.

See Mark 7. 37.

II.

2. What are the things necessary for the greatest Wants.

Of those sorts of things which are necessary for Food and Raiment, the most necessary, and that without which it is impossible to live, is at least Bread. Thus it is by the Dearth of Grain that the Publick suffers the most; and altho the Dearth of other things necessary for Food and Raiment be of much less Importance, yet it is for the Publick Good to procure such a plenty of them, as that the People of the poorer sort may have a sufficient Quantity according to their Wants *b*.

b The greatest Wants are those of the things without which we cannot live, and which may be sufficient for the most necessary occasions.

Having Food and Raiment, let us be therewith content. 1 *Tim.* 6. 8.

III.

3. What is meant by Dearth.

By Dearth is understood a considerable Rise of the Price of every thing, that is to say, of that which it is commonly worth, and which goes to such an excess that the common People cannot have what they want of it *c*.

c The Dearth spoken of here is that which makes it either impossible, or very difficult, for the meanest of the People to have the Necessaries of Life that are thus risen in their Price.

IV.

4. Causes of Dearth.

Seeing the Dearth of Grain is that which it is of the greatest importance to prevent, it is chiefly in procuring plenty of all sorts of Grain that the Ministers and Officers ought to be most diligent and watchful; and as Dearth may proceed from divers Causes, so the Remedies against it are different, and more or less easy. For it may happen, either because the Crop has been very small, by reason of a Barrenness or other Accidents; or because the Grain has been carried out of the Country, or is in the hands of Persons, who having bought up all the Grain, raise the Price of it *d*.

d These are the ordinary Causes of Dearth: To which we may add that which may happen by the Credit and Interest of certain Merchants who should combine to monopolize one kind of thing, and to deprive others of the Liberty of selling it, which would be prejudicial to the Publick Good, and contrary to the Divine Law.

Hear this, O ye that swallow up the Needy, even to make the Poor of the Land to fail, saying, When will the new Moon be gone, that we may sell Corn? And the Sabbath, that we may set forth Wheat, making the Ephah small, and the Shekel great, and falsifying the Ballances by Deceit? That we may buy the Poor for Silver, and the Needy for a Pair of Shoes; yea, and sell the Refuse of the Wheat? *Amos* 8. 4, 5, 6.

He that withholdeth Corn, the People shall curse him; but Blessing shall be upon the Head of him that selleth it. *Prov.* 11. 26.

See the 8th Article of this Section.

V.

5. There is no hindring the raising of the Price in a Scarsity.

If the Dearth proceeds from a Barrenness, or other Accidents, one cannot oblige those who have Grain, to sell it at the ordinary Price. For the Price of things ought to be different, according as they are in small or great Quantities, and according to the Circumstances of Times and Places *e*, and the Fruits may be sold dearer in a Scarcity, for this reason among others, that it is but just that the Proprietors or Possessors of the Lands which produce them, may draw from them the Expences of the Tillage, and likewise some Profit, for the doing of which the usual Price of a small Quan-

e Nonnullam pretio varietatem loca temporaque adferunt. *l.* 63. §. *ult. ff. ad leg. falcid.*

Quantity would not be sufficient: and in this Case the reducing it to the ordinary Price, which would be an Injustice to the Proprietors, would not be sufficient to procure Plenty of those Goods, the Scarcity whereof had raised the Price of them; but it would be necessary to remedy that by the Ways explained in the following Articles.

VI.

6. Precautions in Cases of Scarcity.

In the Cases of Scarcity of Grain, besides the Care of having it fetch'd from the next adjacent Places, from whence any Supply can be had, it is the Duty of the Magistrates to prohibit under severe Penalties, all Persons from selling any Corn in Granaries on the Market-Days, and to oblige them to sell it on those Days only in the publick Market-Places, at the usual Hours, and on other Days besides the Market-days to sell it in their Granaries at the Price of the preceding Market *f*.

f It is thus regulated by the Ordinances. See the Ordinance *of* Feb. 19. 1566. *Art.* 12. *As to the Case of Barrenness, see the last Article.*

VII.

7. Prohibitions to export Grain out of the Kingdom.

To prevent the Dearth of Grain, which might be occasioned by exporting too great Quantities thereof out of the Kingdom, the Ordinances have taken the necessary Precautions therein, that a sufficient Quantity be left in the Provinces, and that only what is superfluous be carried out of the Kingdom, and that after having obtained leave from the King for so doing *g*.

g We revoke and annul all Grants and Concessions, whether they be general or particular, for the Exportation of Corn and other Grain, Goods and Merchandizes, out of our Kingdom, or any Country, Lands or Lordships within our Dominions; and do enjoin all our Subjects, and other Persons, of what State and Condition soever they may be, not to export any Grain, upon pain of Confiscation of the same, without our express Leave and Permission first had and obtained. Ordinance of Francis I. of *November* 20. 1539.

There are many other Ordinances relating to this Exportation of Grain.

VIII.

8. Monopolies.

To prevent the Dearth which might be occasioned by those who should make themselves Masters of the Grain by Monopolies, that is, by buying up a great Quantity thereof, that they alone may have the Sale of it, and so be able to raise the Price of it; the Laws have enacted severe Penalties against those who are guilty of this Crime, as shall be explained in its Place *h*.

h Jubemus, ne quis cujuscumque vestis vel piscis, vel pectinum forte aut echini vel cujuslibet alterius ad victum vel ad quemcumque usum pertinentis speciei, vel cujuslibet materiæ, pro sua authoritate vel sacro jam elicito, aut in posterum eliciendo rescripto, aut pragmatica sanctione, vel sacra nostræ pietatis adnotatione, monopolium audeat exercere: si quis autem monopolium ausus fuerit exercere, bonis propriis expoliatus perpetuitate damnetur exilii. *l. un. C. de monopol.*

See Art. 10. *of Sect.* 1. *Tit.* 15. *of this Book.*

See Art. 4. *of this Section, and the Texts there quoted.*

IX.

9. A Combination among those who have the Sale of certain things, to set them at a Price on which they agree.

It is necessary to distinguish from Monopolies, another Cause of Dearth, which proceeds from a Combination among those thro whose hands any sort of Goods or Merchandize must pass, before People can have the use of it, and who being according to the Order of the Civil Policy, the only Persons of whom it can be bought, agree among themselves to raise the Price of it. Thus it is of certain Merchants or Tradesmen, that the things most necessary for Life are bought, which cannot be used till after they have been prepared for use; such as Bread, and some other things of the like nature, of which they often raise the Price, altho the things they prepare for use be not risen in proportion to the Price they set upon them. And there are also some Merchants and Tradesmen who ingross Corn and other Merchandizes with the same View of raising the Price thereof; it is on account of these Abuses, which may be reckoned in the number of Crimes, that the Laws have made Provision therein, in order to repress them, and to keep these sorts of things at their just Price *i*.

i Ne quis illicitis habitis conventionibus conjuret, aut paciscatur, ut species diversorum corporum negationis, non minoris quam inter se statuerint, venundetur——Cæterarum præterea professionum primates, si in posterum aut super taxandis rerum pretiis, aut super quibuslibet illicitis placitis, ausi fuerint convenientes hujusmodi sese pactis constringere; quadraginta librarum auri solutione percelli decernimus, &c. *l. unic. C. de monop.*

See the foregoing Article.

Provision has been made by an infinite number of Ordinances and Regulations for restraining the Abuses mentioned in this Article, some of which are but ill observed in many Places.

X.

10. Trade is prohibited to Officers and Gentlemen.

The same Causes which have render'd it necessary to make Regulations for repressing the Crimes and Abuses mentioned in the two preceding Articles, have likewise made it necessary to take away the Liberty of Commerce from Persons, who by their Quality or the Authority of their Offices, or the Nature of their Functions, would be enabled to commit, in the carrying on of such Commerce, two Injustices equally criminal, and contrary to the Publick Good; the

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the one of buying under the just Value, and the other of selling at too dear a Rate. And this is what the Laws have provided against, by prohibiting Gentlemen and Officers to have any hand in buying and selling Goods and Merchandizes *l*.

l Nobiliores natalibus, & honorum luce conspicuos, & patrimonio ditiores, perniciosum urbibus mercimonium exercere prohibemus, ut inter plebeios & negotiatores facilius sit emendi vendendique commercium. *l.* 3. *C. de commerc. & mercat.*

There are several Ordinances of many Kings, which prohibit all manner of Commerce to all sorts of Officers, and to Gentlemen, and more especially that of buying up Grain.

See Art. 14. *of Sect.* 2. *of Tit.* 11. *and Art.* 9. *Sect.* 1. *of Tit.* 11.

XI.

11. The Case of an universal Barrenness.

If the Dearth happens by reason of a general Barrenness in a Kingdom, or that it be even common to the neighbouring Nations, and that Wars, or other Obstacles, hinder the getting Supplies of Corn from foreign Countries; it is too late to provide against such Inconvenience, when there remains no more Corn that what will suffice for the present, or for a short time. And seeing such a Scarcity does sometimes happen, tho but seldom, it would seem to be for the Publick Good that some Provision were made against such Inconveniences; such as laying up every Year out of the Corn that cannot be consumed in the Kingdom, a certain Quantity according to its Plenty; or by fetching it from other Parts, in order to have a sufficient store thereof in reserve in the publick Granaries, according to the Directions which shall be given therein by the Prudence and Wisdom of the prime Ministers *m*.

m Behold, there come seven Years of great Plenty throughout all the Land of Egypt. *And there shall arise after them seven Years of Famine, and all the Plenty shall be forgotten in the Land of* Egypt, *and the Famine shall consume the Land. And the Plenty shall not be known in the Land, by reason of that Famine following, for it shall be very grievous—— Now therefore let* Pharaoh *look out a Man discreet and wise, and set him over the Land of* Egypt. *Let* Pharaoh *do this, and let him appoint Officers over the Land, and take up the fifth part of the Land of* Egypt *in the seven plenteous Years. And let them gather all the Food of those good Years that come, and lay up Corn under the hand of* Pharaoh, *and let them keep Food in the Cities. And that Food shall be for store to the Land against the seven Years of Famine which shall be in the Land of* Egypt, *that the Land perish not thro the Famine.* Gen. 41. 29, &c.

Omnia quæ in horreis habentur, expendi volumus, ita ut non prius ad id frumentum extendatur expensio, quod sub præfectura tua urbis horreis infertur, quam vetera condita fuerint erogata, & si forte vetustate species ita corrupta est, ut per semet erogari sine querela non possit; eidem ex nova portione misceatur, cujus adjectione corruptio velata damnum fisco non faciat. Ad istud autem negotium arbitratu ac judicio tuo, nobilis, prudens, fidelis, optime sibi conscius, pro integritate mentis opponatur custos ac mensor: qui vel frumenta modio metiatur, vel justis æstimationibus colligat quanta habeantur in condito. *l.* 1. *C. de cond. in publ. horr.*

Cum ad quamlibet urbem mansionemve accesseris, protinus horrea inspicere te volumus, ut devotissimis militibus deputatæ & incorruptæ species præbeantur. Nam si per incuriam officii gravitatis tuæ fartorum tectorum neglecta procuratione, aliqua pluviis infecta perierint, ad damnum tuum referentur. *l.* 2. *C. eod.*

TIT. VIII.

Of the Policy relating to the Use of the Seas, Rivers, Sea-Ports, Bridges, Streets, Market-Places, High-ways, and other Publick Places; and of what concerns Forests, Hunting, Fowling and Fishing.

HAVING explained in the preceding Titles that which relates to the general Order of the Government, we shall explain in this the general Policy of certain things which are of common use to this Society, and which it is necessary to distinguish from those which every Person may consume for his own private Use.

In order to distinguish these sorts of things from all others, and to understand rightly the Policy of their Use, it is necessary, first, to observe, that there is nothing in the Universe, which God has not created for the Use of Man, and that every thing in it is proportioned to his Nature, and to his Wants. So that we see in the Structure of the World, and in the Order and Beauty of every thing contained in the Earth and in the Heavens, the Dignity of Man for whom all these things have been made, and the Relation which all this great Fabrick of the Universe hath to his Use, and to his Wants *a*. And in this infinite mul-

a Lest thou lift up thine Eyes unto Heaven, and when thou seest the Sun, and the Moon, and the Stars, even all the Host of Heaven, shouldst be driven to worship them, and serve them, which the Lord thy God hath divided unto all Nations under the whole Heaven. Deut. 4. 19.

Thou madest him to have Dominion over the Works of thine hands: thou hast put all things under his Feet. Psal. 8. 6. Gen. 1. 26. Heb. 2. 7.

See the Treatise of Laws, chap. 1. numb. 3.

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multitude of things of all kinds, with which we are environed in this World, it is necessary to distinguish two different sorts of them, and two different manners of the Use which God gives us of them. The first of these two sorts of things, is of those which are so necessary, that no body can live without having a free and continual Use of them, such as the Air and Light; and it is because of this Necessity, that the Air encompasses the whole Earth, which is the Habitation of Mankind, and that it is penetrated by the Light which comes from the Heavens; so that no body can be deprived of the Use of the Air, and of the Light, unless condemned to lose his Life. And as to the manner of this Use, as it is of a continual Necessity, it is likewise so easily to be had, that it does not require any Industry or Labour; and every one has his proper use of these things independently of the Will of all others. Thus the Government has nothing to regulate in this matter. It can only take Precautions to keep the Air pure, and forbid the throwing out or exposing any thing in the publick Places, which may infect it and render it unwholesome.

The second sort of things, is of those which are necessary to Men for Food, Raiment, for Habitation, and all other sorts of Wants; which takes in the Earth, the Waters, and every thing they bear and bring forth, Grain, Fruits, Plants, Animals, Metals, Minerals, and all other things. And as for the manner of using all these things, it is distinguished from the manner of using the Air and Light; in that all those other things come to our Use, only by the means of some Labour and Industry, either in procuring them, or in fitting them for the Use that is to be made of them.

It is for this use of this second kind of things, that seeing they are all necessary in the Society of Mankind, and cannot be had and put to any Use, except by Ways which demand different Ties and Intercourses among Mankind, not only from one part of a Kingdom to another, but from one Country to another, and between Nations that lie the most remote from one another, God has taken care by the Order of Nature, and Men by the Civil Policy, to facilitate the said Intercourses. Thus it is by Nature, that one of the Uses which God has given to the Seas, and to Rivers, is that of opening Ways of Communication with all the Countries in the World by Navigation. And it is by means of the Civil Policy, that Towns and other Places have been built, where Men assemble together, and have intercourse with one another by means of Streets, Market-Places, and other publick Places proper for that purpose; and that the Inhabitants of every Town, every Province, every Kingdom, may have intercourse with all other Persons of what Country soever, by the means of High-ways. Thus for all these Intercourses by Land and Water, it has been necessary to establish Rules by this Policy; and these Rules shall make a part of the subject Matter of this Title. As for the other Rules of this Title, it is to be remarked, that besides this Use of the Seas and Rivers, for the intercourse of Men, they have another Use, which is likewise naturally common to all Men, that of the Fishery. The Surface of the Earth gives likewise naturally to Men the use of Hunting, especially in the Woods and Forests; which have moreover another use of much greater Importance for the common Good, by the great Advantage the Publick draws from the Use of Timber for building Houses and Ships, for warlike Engines, for the Artillery, for Bridges, for the Construction of Publick Edifices, Churches, Palaces, and others. It is because of these Uses, that the Ordinances in *France* have established a Policy, not only in relation to the King's Forests, and those belonging to Churches, and to all sorts of Communities, but also to those which belong to particular Persons; that they may be preserved for the said Uses, as Occasion shall offer. And as to what concerns the Use of Hunting and Fishing, in which the Liberty granted by the *Roman* Law was much greater than is allowed by ours *b*; seeing this Liberty given

b Est sæpissime rescriptum non posse quem piscari prohiberi; sed nec aucupari. *l.* 13. §. 7. *in f. ff. de injur.*

Jus piscandi omnibus commune est, in portu fluminibusque. §. 2. *inst. de rer. divis.*

Omnia animalia, quæ terra, mari, cœlo capiuntur, id est, feræ bestiæ, & volucres, pisces, capientium fiunt. *l.* 1. §. 1. *ff. de acq. rer. dom.*

Feræ igitur bestiæ, & volucres, & pisces & omnia animalia, quæ mari, cœlo & terra nascuntur; simul atque ab aliquo capta fuerint, jure gentium statim illius esse incipiunt, quod enim nullius est, naturali ratione occupanti conceditur: nec interest quod ad feras bestias & volucres attinet, utrum in suo fundo aliquis capiat, an in alieno. §. 12. *inst. de rer. divis.*

Dominium rerum ex naturali possessione cœpisse, Nerva filius ait, ejusque rei vestigium remanere de his quæ terra, mari cœloque capiuntur. Nam hæc protinus eorum fiunt, qui primi possessionem eorum

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given to all Persons without distinction would be attended with many Inconveniences, whether it were by diverting People from their Occupations, and encouraging Idleness, or by occasioning Quarrels between those who should hunt or fish in the same Places, or because of the Damage that would accrue to the Publick by fishing and hunting in certain Seasons of the Year, or with certain Tackle, and in certain Manners, which would destroy the wild Beasts and the Fish; it has been thought reasonable to provide against them; and the Civil Policy in *France* has set bounds to this Liberty by several Ordinances, which regulate to whom the Liberty of Hunting and Fishing is permitted, which prohibit the Use of it in certain Manners, and certain Seasons, and give other particular Directions therein.

It appears sufficiently by these Remarks, what are the Matters to be treated of under this Title. Some may perhaps imagine, that seeing we have made mention here of the Policy relating to Forests, because of the use of the Timber which grows in them, we ought likewise to have spoken here of Mines; but the use of Mines does not require a Policy, which has relation to the subject Matter of this Title: and we have put what concerns Mines in another Place, under another view, as also what relates to the Coin *c*.

It remains only that we should put the Reader in mind, that in these Matters, as well as in many others, it is necessary to distinguish, as has been said in the Preface, two sorts of Rules; one of those which are only Arbitrary, of which there is an ample Detail in the Ordinances, and which make particular Regulations; and the other is of the general Rules, which come within a narrower Compass, and are a part of the Law of Nature, and which contain the Principles of all the other Rules. It is to these general Rules that we intend to confine our selves, and to compose out of them this Title; whether they be found in the Ordinances of *France*, or be not to be met with there.

eorum adprehenderint. Item bello capta, & insula mari enata, & gemmæ, lapilli, margaritæ in littoribus inventæ ejus fiunt, qui primus eorum possessionem nactus est. *l.* 1. §. 1. *ff. de acq. vel amitt. possess.*

V. l. 3. *&* *l.* 55. *ff. de acq. rer. dom.*

Si quis in mari piscari, aut navigare prohibeatur. ——Injuriarum actione utendum est. *l.* 2. §. 9. *ff. ne quid in loc. public.*

Si quis me prohibet in mari piscari——Hic injuriarum conveniri potest. *l.* 13. §. 7. *ff. de injur. & fam.*

c See Art. 17, 18, 19. *of Sect.* 2. *of Tit.* 2.

And we shall divide the Title into two Sections. The first shall be concerning the several sorts of things which serve for publick Uses; and the second shall contain the Rules of the Policy relating to these sorts of things.

SECT. I.

Of the several sorts of Things which serve for publick Uses.

The CONTENTS.

1. *Two sorts of Things which are for publick Use.*
2. *The Use of the Seas is common to all the World.*
3. *The natural Cause of this Use.*
4. *Lakes which are called Seas.*
5. *Rivers are of Publick Use.*
6. *And also Sea-Ports.*
7. *Bridges are of publick Use.*
8. *The Streets and Highways also of publick Use.*
9. *As also Market-Places and other publick Places.*
10. *Forests.*
11. *Hunting and Fishing.*
12. *The Policy concerning publick Places.*

I.

1. Two sorts of things which are for publick Use.

THERE are two sorts of Things destined to the common Uses of the Society of Mankind, and which every one may freely use. The first is of those that are such by Nature; thus Rivers, Seas, the Banks of Rivers and the Sea-Shore, are for the common use of all Persons *a*. The second sort is of those which are of such a nature, that tho the Use of them be naturally necessary in the Society, either for spiritual Matters, such as Churches and Churchyards, or for Temporal Affairs, as the Streets, Highways, Market-Places, the Places where the Courts of Justice are held, Colleges, Town-Houses, and other publick Places; yet the Use of them is not given to Men by Nature; but it is the Civil Policy that makes choice of, and appropriates the Places which ought to serve the Publick for all these different Uses *b*.

a Naturali jure communia sunt omnia hæc, aer, aqua profluens, & mare, & per hoc littora maris. §. 1. *inst. de rer. divis.*

V. l. 2. §. 1. *ff. eod.*

Et quidem mare commune omnium est, & littora sicuti aer. *l.* 13. §. 7. *ff. de injur. & fam.*

b Universitatis sunt non singulorum quæ in civitatibus sunt, theatra, stadia, & si qua alia sunt communia civitatum. §. 6. *inst. de rer. divis.*

II. Of

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II.

2. The Use of the Seas is common to all the World.

Of all the Things destined to the common Use of Mankind, whether it be by Nature, or by the Civil Policy, there are none whereof the Use hath a larger Extent, and is more universal, than that of the Seas *c*, which are naturally common to the whole Universe. And it is for this reason, that Men have taken occasion, from the Use of the Seas that lie open to all Nations of the World, to render themselves Masters of the Seas, and by that means to make Invasions upon one another. When these Attempts are made by one Nation against another, it is only War that decides their Differences; and as to Enterprizes by Sea between the Subjects of one and the same Kingdom, or against the Rights of the Prince, Provision has been made in that matter by the Laws, of which mention shall be made in the second Section.

c It is by means of the Seas that all the Nations of the World have Intercourse with one another.

III.

3. The natural Cause of this Use.

This Use of the Sea, that is common to all the Nations of the World, is a pure natural Consequence of the Divine Providence, which, having made the Use of Waters necessary for Men, distributes them to them by Showers of Rain, by Springs, Rivulets, and by Rivers, the continual Course of which demands a Discharge proportionable to their Quantity. It is in order to receive all these Waters that God has made the Sea, whose vast Extent receives them from all Countries *d*; and this Place where they discharge themselves, which is common to them all, is at the same time an open Way by which they may have Intercourse with one another; and God has moreover given to the Sea plenty of Fish, and of many Things useful to all Countries *e*. We shall explain in the second Section the Policy relating to these different Uses of the Seas.

d All the Rivers run into the Sea, yet the Sea is not full. Eccles. 1. 7.

e So is this great and wide Sea, wherein are Things creeping innumerable, both small and great Beasts. Psal. 104. 25.

IV.

4. Lakes which are called Seas.

We may place in the Rank of Seas certain Lakes, which are of as large an Extent as many Provinces, and into which Rivers discharge themselves; and some of these Lakes have the Name of Seas given them, such as the *Caspian* Sea *f*.

f There are Lakes of a lesser Extent, which have gone by the Name of Seas. The Sea of *Tiberias*, John 6. 1.

V.

5. Rivers are of publick Use.

The Nature of Waters, which renders the Use of the Sea publick and common to all, renders also common and publick the Use of Rivers, in the manner that shall be explained in the 2d Section *g*.

g Flumina omnia & portus publica sunt. §. 2. *inst. de rer. divis.*

Riparum usus publicus est jure gentium, sicut ipsius fluminis. *l.* 5. *in prin. ff. de rer. div. & qual.*

Sed flumina pene omnia & portus publica sunt. *l.* 4. §. 1. *ff. eod.*

Flumina publica. *l.* 1. §. 4. *ff. de flum.*

Flumina publica, quæ fluunt, ripæque eorum publicæ sunt. *l.* 3. *in prin. eod. V. l.* 1. §. 3. *eod.*

VI.

6. And also Sea-Ports.

The Use of the Seas for Navigation, has made the Use of Sea-Ports necessary, which are Places proper for Ships to retire to, the Entry into them being easy, and they being convenient for lading and unlading Ships, and for affording them shelter against Storms. There are also Ports belonging to Rivers *h*.

h Ripæ publicæ sunt. *l.* 3. *ff. de flum.*

See the Texts cited on the preceding Article.

VII.

7. Bridges are of publick Use.

Rivers and Brooks have rendred the Use of Bridges necessary for crossing them; so that Bridges are of the Number of the Things destined to the publick Use *i*.

i Quæsitum est an is qui in utraque ripa fluminis publici domus habeat, pontem privati juris facere potest: respondit non posse. *l. ult. ff. de flumin.*

This Text speaks only of Rivers of a publick Use, which would make the Use of Bridges publick also. So that it would not be the same thing in a Bridge which any particular Person should make for his own Use over a Brook, in a Place in which the Publick had no manner of Interest.

See Art. 12. *of the following Section.*

VIII.

8. The Streets and Highways also of publick Use.

The Necessity of the frequent Intercourses which Men have with one another, and of the transporting of Things from one Place to another, has made it necessary to have Streets in Towns and other Places, and Highways leading from one Place to another. Thus, the Streets and Highways are publick Places, free

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free for the Use of all Persons without distinction *l*.

l Cuilibet in publicum petere permittendum id est, quod ad usum omnium pertineat; veluti vias publicas, itinera publica. Et ideo quolibet postulante de his interdicitur. *l.* 1. *ff. de loc. & itin. publ.*

Publici loci appellatio quemadmodum accipiatur, Labeo definit ut & ad areas, & ad insulas, & ad agros, & ad vias publicas, itineraque publica pertineat. *l.* 2. §. 3. *in prin. ne quid in loc. publ.*

Loca publica utique privatorum usibus deserviunt, jure scilicet civitatis, non quasi propria cujusque. *l.* 2. §. 2. *eod.*

IX.

9. As also Market-Places, and other publick Places. The Use of Fairs and Markets, and that of other Conveniences for People to meet together for other Occasions, has made it necessary to have publick Market-Places, Exchanges, and other Places; which are all, in the same manner as the Places where Courts of Justice are held, Colleges, and Town-Houses, publick Places *m*.

m Universitatis sunt non singulorum, veluti quæ in civitatibus sunt theatra, & stadia, & similia, & si qua alia communia sunt civitatum. *l.* 6. §. 1. *ff. de rer. divis.*

X.

10. Forests. Altho Forests be not of common and publick Use, as Seas, Rivers, and other Things spoken of in the preceding Articles; yet the Necessity of the divers Uses of the Timber growing in them, has made it necessary to establish a Policy concerning them, as shall be shewn *n*.

n See Art. 20. *of the following Section, and what has been said of Forests in the Preamble to this Title.*

XI.

11. Hunting and Fishing. Hunting and Fishing having their Use and Extent, not only on the Lands proper to some Persons, but in general over the Earth and in the Waters, they are therefore considered as being of a publick Use, and have likewise this relation to the Publick, that it reaps a Benefit by the Produce both of the one and the other. And therefore the Civil Policy hath likewise prescribed Rules for them *o*.

o See Art. 3, 10, 21. *of the following Section.*

XII.

12. The Policy concerning publick Places. All these different Uses which the Publick makes of these several sorts of Things, have their Policy settled by the Rules explained in the following Section.

SECT. II.

Of the Rules of Policy concerning Things which serve for publick Uses.

The CONTENTS.

1. *The Laws have regulated the Use of the Seas.*
2. *The Use of Navigation on the Seas.*
3. *The Use of Fishing in the Sea.*
4. *Who has the Right to Wrecks cast on Shore.*
5. *Divers Rules of the Policy relating to the Seas.*
6. *The Policy concerning the Sea-Ports.*
7. *The Policy concerning Rivers, the Advantage of making them navigable.*
8. *Prohibition to throw any thing into the Rivers that may be of prejudice to the Navigation.*
9. *The Banks of Rivers ought to be free for the Passage of the Horses who draw the Boats.*
10. *The Policy as to fishing in Rivers.*
11. *One cannot change the Course of the Water, nor divert it another way, nor do any other prejudice to the Rights of the Publick, and of particular Persons.*
12. *The Policy concerning Bridges.*
13. *Reparations of Bridges.*
14. *Three sorts of Ways.*
15. *The Policy concerning the Highways.*
16. *The Policy concerning the Streets, and other publick Places.*
17. *Reparation of the publick Places.*
18. *Penalties of Trespasses against the Policy concerning publick Places.*
19. *A Building made in a publick Place.*
20. *The Policy relating to Forests.*
21. *The Policy as to Hunting and Fowling.*

I.

1. The Laws have regulated the Use of the Seas. Altho the Use of the Seas be common to all, as has been said in Art. 2, 3. of the preceding Section; yet the Liberty of the said Use ought to have its Bounds, to prevent the Inconveniences which would ensue, if every one using, as he thought fit, the Liberty of Navigation or of Fishing, the Use made thereof by some should be prejudicial to others, or there should be even Encroachments on the Rights of the Prince. And this is what the Ordinances in *France* have provided against *a*.

a See the following Articles.

Altho it seems agreeable to the Law of Nature, that

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that the Use of the Seas should be common to all, and that by the Roman *Law fishing in the Sea, and in Rivers, was permitted to all without distinction.* Flumina autem omnia & portus publica sunt; ideoque jus piscandi omnibus commune est in portu fluminibusque. §. 2. *Inst. de rer. div.* Si quis in mari piscari aut navigare prohibeatur, non habebit interdictum, quemadmodum nec is qui in campo publico ludere, vel in publico balneo lavare, aut in theatro spectare arceatur: sed in omnibus his casibus injuriarum actione utendum est. *l.* 2. §. 9. *ff. ne quid in loco publ.*

It is likewise agreeable to the Law of Nature, that this Liberty, which is common to all, being a continual Occasion of Quarrels, and of many bad Consequences, should be regulated in some manner or other; and there could be no Regulation more equitable, nor more natural, than leaving it to the Sovereign to provide against the said Inconveniences. For as he is charged with the Care of the publick Peace and Tranquillity, as it is to him the Care of the Order and Government of the Society belongs, and it is only in his Person that the Right to the Things which may belong in common to the Publick, of which he is the Head, can reside; he therefore, as Head of the Commonwealth, ought to have the Dispensation and Exercise of this Right, that he may render it useful to the Publick. And it is on this Foundation, that the Ordinances in France *have regulated the Use of Navigation, and of Fishing in the Sea and in Rivers.*

II.

2. The Use of Navigation on the Seas.

As to Navigation, seeing it might happen at Sea, as well as on Land, that Persons may associate together for some bad Design, and under pretext either of Commerce, or of the Service of the Prince against the Enemies of the State, might fit out Ships for some Enterprize prejudicial to the Kingdom, or its Allies; it is not allowed to equip Ships of War or Merchant-Men, whether in Peace or War, and to set out upon long Voyages, without the Knowledge and Permission of the Admiralty *b*.

b See the Ordinance of Francis I. July 1517. *Art.* 22.

III.

3. The Use of fishing in the Sea.

As to Fishing in the Sea, it has been necessary to regulate the Use of it, either as to the Right and Liberty of fishing, or as to the different manners of fishing; and this has been taken care of by the Ordinances in *France*, which have declared certain manners of fishing unlawful *c*.

c See the Ordinance of March 1584. *Art.* 81, 82, 83. *and other Articles, and likewise the Ordinances relating to the Fishery.*

See the 10*th Article.*

[Several Regulations have been made by Acts of Parliament in *England*, for better preserving Sea-Fish, and restraining such Disorders and Abuses as tend to the Damage of the Fishery. *See Stat.* 3 *Jac.* 1. *cap.* 12. *and* 13 & 14 *Car.* 2. *cap.* 28. *and others.*]

IV.

4. Who has the Right to Wrecks cast on Shore.

Seeing there often happen Shipwrecks at Sea, and the Things lost are cast on the Shore, and fall into the hands of those who find them; the Laws have fixed a Time for the Owners to claim them: and if they do not appear within that time, the Prince has a Right in them, as he has in the other kinds of vacant Goods; and the Officers of the Admiralty, and the Finders of such Things, have also their Rights to a share in them, according as the same is regulated by the Ordinances *d*.

d By Art. 11. *of the Ordinance of* Feb. 1543. *of Things cast on Shore out of the Sea, there is one third Part belongs to the Admiral, one third to the King, and a third to the Person who has taken them up out of the Sea. Which seems to be conformable to the Ordinances in relation to Treasures, which divide them into three different Shares; one third to the King, a third to the Proprietor of the Ground, and a third to the Finder.*

See the Ordinance of March 1584. *Art.* 20, &c. *These Ordinances allow only one Year for the Owners of the Things to claim them in, which in all likelihood has been taken from this Law.* Si quis navicularius naufragium se sustinuisse adfirmet, provinciæ judicem, ejus videlicet in qua res agitur, adire festinet, ac probet apud eum testibus eventum: relatioque etiam ad sublimissimam referatur præfecturam: ita ut intra anni spatium veritate revelata, competens dispositio procedat. Quod si per negligentiam præfinitum anni spatium forsasse claudatur, supervacuas serasque interpellationes emenso anno placuit non admitti. *l.* 2. *C. de naufr.*

But the Year spoken of in this Law was not for this Case; and the first Law of this Title does not allot any share to the Prince of the Things lost by Shipwreck.

[In *England*, the Time allowed for Owners of Goods lost in a Shipwreck to claim them, was formerly a Year and a Day; and if no Person appeared to claim them within that Time, they were to remain to the King, or to such others to whom the Wreck belongeth. *Stat.* 3 *Ed.* 1. *c.* 4. But the Law in this particular has been render'd more favourable to the Owners of Goods lost in this calamitous manner, by a subsequent Act of Parliament, 12 *Anna*, entitled, *An Act for the preserving all such Ships, and Goods thereof, which shall happen to be forced on Shore, or stranded upon the Coasts of this Kingdom, or any other of Her Majesty's Dominions.* By which Act it is provided, that if the said Goods shall not be legally claimed within the space of twelve Months next ensuing by the rightful Owner, then publick Sale shall be made thereof; and if perishable Goods, forthwith to be sold, and after all Charges deducted, the Residue of the Monies arising by such Sale, with a fair and just Account of the whole, shall be transmitted to the Exchequer, there to remain for the Benefit of the rightful Owner when appearing, who upon Affidavit or other Proof made of his or their Right thereto, to the Satisfaction of one of the Barons of the Exchequer, shall, upon his Order, receive the same out of the Exchequer. This Act was made only for three Years; but it has been since made perpetual by another Act, 4 *Georgii.*]

V.

5. Divers Rules of the Policy relating to the Seas.

There are also many other Rules relating to the Use of the Seas, the Regulations about Shipping, those touching the Rights and Functions of Masters of Ships, the Punishment of Crimes committed on the Sea; and all these Matters have

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have their several Rules prescribed by the Ordinances in *France*, which see.

VI.

6. The Policy concerning the Sea-Ports.

The Policy concerning Sea-Ports makes a part of that of the Seas; and provision has been made by the Ordinances in *France*, that the Sea-Ports be kept in good Order, and that necessary Repairs be made to keep them in the good Condition in which they ought to be *f*.

f See the Ordinance of Oct. 1508. *Art.* 18.

VII.

7. The Policy concerning Rivers, the Advantage of making them navigable.

The Policy of Rivers consists in that which relates to the Fishery and Navigation of those which are, or may be made navigable by some Pains and Labour. And it is of Importance to the Publick that they be made navigable, as much as possible, whether the Sovereign is willing to be at the Charge of it himself, or to leave it to those who are willing to undertake it, he granting to such Undertakers the Rights and Privileges which this Service may deserve *g*.

g It is of very great Advantage to the Publick to render Rivers navigable; and there are Examples of Permissions granted to particular Persons to undertake Works for this purpose, allowing them Rights and Privileges for their Reward.

[The making Rivers navigable, being a Work in which the Property of a great many particular Subjects must needs be concerned, the same cannot be effectually carried on in *England* without the Authority of an Act of Parliament, which impowers the Undertakers to make Cuts, Locks, Turn-Pikes, or other Works proper for such Navigation, in the Lands of other Persons; and appoints Commissioners to settle and adjust the Damages to be made good to the Owners and Occupiers of such Lands where any Works shall be made for the said Navigation. And the Expence of such Works is either at the common Charge of the Counties which petition to have the River made navigable, or at the sole Charge of the Undertakers; who, towards the Reimbursement of their said Expence, are allowed to demand and exact a certain Duty or Toll on all Goods, Wares, and Merchandizes, as shall be carried up and down the said River when render'd fit for Navigation. *See the several Acts for making Rivers navigable.*]

VIII.

8. Prohibition to throw any thing into the Rivers that may be of prejudice to the Navigation.

In order to preserve the Navigation of Rivers, it is proper for the Government to prohibit and punish all Attempts which might hinder it, or render it inconvenient; whether it be by any Buildings, Fisheries, Stakes, Flood-Gates, and other hindrances, or by diverting the Water from the Course of the Rivers, or otherwise. And it is likewise forbidden to throw into the Rivers any Filth, Dirt, and other Things which might be of prejudice to the Navigation, or cause other Inconveniences *h*.

h Ait prætor: *Ne quid in flumine publico ripave ejus facias; ne quid in flumine publico, neve in ripa ejus immittas, quo statio iterve navigio deterior fiat.* l. 1. ff. de fluminibus.

Si flumen navigabile sit, non oportere prætorem concedere ductionem ex eo fieri, Labeo ait, quæ flumen minus navigabile efficiat. Idemque est, & si per hoc aliud flumen fiat navigabile. *l.* 10. §. 2. *ff. de aqu. & aq.*

Deterior statio, itemque iter navigio fieri videtur, si usus ejus corrumpatur, vel difficilior fiat, aut minor, vel rarior, aut si in totum offeratur. Proinde sive derivetur, aqua ut exiguior facta, minus sit navigabilis: vel si dilatetur, aut diffusa, brevem aquam faciat, vel contra sic coangustetur, & rapidius flumen faciat, vel si quid aliud fiat quod navigationem incommodet difficiliorem faciat, vel prorsus impediat, interdicto locus erit. *l.* 1. §. 15. *ff. de flum.*

Quominus ex publico flumine ducatur aqua, nihil impedit, nisi Imperator aut Senatus vetet; si modo ea aqua in usu publico non erit. Sed si aut navigabile est, aut ex eo aliud navigabile fit; non permittitur id facere. *l.* 2. *eod.*

See the Ordinances of 1415. *Art.* 1, 3, 4. *and* 5 May 1520. *Art.* 20. *of* Oct. 9. 1576. Decem. 1577. Jan. 1583. *Art.* 18.

IX.

9. The Banks of Rivers ought to be free for the Passage of the Horses who draw the Boats.

The same Usefulness of the Navigation of Rivers, demands the free Use of their Banks; so that in the Breadth and Length necessary for the Passage and Track of the Horses which draw the Boats, there be neither Trees planted, nor any other Obstacles in the way *i*.

i Ripæ publicæ sunt. *l.* 3. *ff. de fluminibus.*

Prætor ait: *quominus illi in flumine publico, navem ratem agere, quove minus per ripam onerare, exonerare liceat, vim fieri veto.* L. 1. in prin. ff. ut in flum. publ.

Nemo igitur ad littus maris accedere prohibetur ..... dum tamen villis & ædificiis, & monumentis abstineatur. *L.* 4. *ff. de divis. rer.*

Riparum usus publicus est jure gentium sicut ipsius fluminis. Itaque navem ad eas appellere, funes ex arboribus ibi natis religare, retia siccare, & ex mare reducere, onus aliquid in his reponere cuilibet liberum est, sicuti per ipsum flumen navigare. *l.* 5. *ff. de rer. divis.*

See the Texts quoted on the foregoing Article, and the Ordinance of 1415. *Art.* 2. *of* May 1520. *Art.* 3.

X.

10. The Policy as to fishing in Rivers.

As to fishing in Rivers, the Government has taken care to regulate it; so that it is not allowed to fish either at all Times, or with all sorts of Nets and Utensils indifferently: but the Regulations as to the Times, and manner of Fishing, are to be observed *l*.

l See the Ordinances of 1291. *of* 1326. *Art.* 4, 8, 9. *of* 1402. *Art.* 73, 74. *of* March 1515. *Art.* 90, 91. *of* August 1545. *Art.* 9.

XI.

11. One cannot change the Course of the Water,

Seeing the Use of Rivers belongs to the Publick *m*, no body can make any Change

m Flumina publica sunt. *l.* 3. *ff. de flum.*

nor divert it another way, nor do any other prejudice to the Rights of the Publick, and of particular Persons.

Change in them that may be of prejudice to the said Use. Thus, one cannot do any thing to make the Current of the Water slower, or more rapid, should this Change be any way prejudicial to the Publick, or to particular Persons *n*. Thus, he who should have an Estate divided by the Stream of the Water, or have separate Estates lying on the two Banks of the River, could not for his own Conveniency make a Bridge to join his two Estates together *o*. Thus altho one may divert the Water of a Brook, or of a River, to water his Meadows or other Grounds, or for Mills and other Uses; yet every one ought to use this Liberty so as not to do any Prejudice either to the Navigation of the River, whose Waters he should turn aside, or the Navigation of another River which the said Water should render navigable by discharging it self into it, or to any other Publick Use, or to Neighbours who should have a like Want, and an equal Right *p*. And if there were not Water enough for them all, or that the Use which some of them made of it were prejudicial to others, a proper Remedy would be applied according to the Occasion, by the Officers whose business it is to redress such Abuses.

n Ait pretor in flumine publico inve ripa ejus facere, aut in id flumen ripamve ejus immittere, quo aliter aqua fluat, quam priore æstate fluxit veto. *l. 1. ff. ne quid in flum. publ.*

Quod autem ait, *aliter fluat*, non ad quantitatem aquæ fluentis pertinet, sed ad modum & ad rigorem cursus aquæ referendum est: & generaliter dicendum est, ita demum interdicto quem teneri, si mutetur aquæ cursus per hoc, quod factum est, dum vel depressior, vel arctior fiat aqua, ac per hoc rapidior fit cum incommodo accolentium. Et si quod aliud, vitii accolæ ex facto ejus qui convenitur, sentient, interdicto locus erit. *l. 1. §. 3. ff. ne quid in flum. publ.*

Oportet enim in hujusmodi rebus utilitatem & tutelam facientis spectari sine injuria utique accolarum. *d. l. §. 7. in f.*

o Quæsitum est an is, qui in utraque ripa fluminis publici domus habeat, pontem privati juris facere potest? respondit non posse. *l. ult. ff. de fluminibus.*

See Art. 7. of Sect. 1. and the Remark there made on it.

p Plerosque scio prorsus flumina avertisse, alveosque mutasse, dum prædiis suis consulunt. Oportet enim in hujusmodi rebus utilitatem & tutelam facientis spectari, sine injuria utique accolarum. *l. 1. §. 7. in f. ff. ne quid in fluminibus.*

Quominus ex publico flumine ducatur aqua, nihil impedit: nisi Imperator aut Senatus vetet si modo ea aqua in usu publico non erit. Sed si aut navigabile est, aut ex eo aliud navigabile fit, non permittitur id facere. *l. 2. ff. de fluminibus.*

XII.

12. The Policy concerning Bridges.

The Policy in relation to Bridges on Rivers, and on Brooks, respects the manner of building them, and the care of keeping them in repair. As to the building of Bridges on navigable Rivers, they ought to be proportioned to the Conveniency of the Passage over them, by giving them a sufficient Breadth, and the other Dimensions; and to the Use of Navigation, by the Width and Height of the Arches, and by disposing them in a proper manner to receive the Stream of the Water that the Current may run in a direct Line thro the Hollow of the Arch. Thus we see Bridges whose Arches are either too strait, or too low to receive Boats loaded full to the Top, or which receive the Current of the Water on the Flank of the Piles *q*.

q Pontes fiant ubicumque oportet. *l. un. ff. de via publ.*

The Bridges ought to be proportioned to the Use of Navigation.

XIII.

13. Reparations of Bridges.

As to the Reparations of Bridges, Care is taken therein by the proper Officers appointed to have the Inspection of them; and the Charges of such Repairs are furnished either out of the King's Coffers for such Bridges as he is bound to keep in repair, or by the Contributions of Persons who may be liable to such Repairs, either on account of Tolls, or other Duties laid upon Bridges *r*.

r See the Ordinance of October 1508. *Art.* 18. *that of* Orleans, *Art.* 107. *and that of* Blois, *Art.* 282.

XIV.

14. Three sorts of Ways.

As to the Policy concerning Ways out of Towns, and other Places, it is necessary to distinguish three different sorts of Ways. The first is of the Highways which are for the publick Use, to go from one Place to any other; and these sorts of Ways terminate, either in other Ways, or at the Gates of the Towns, or other Places, or at the Sea, or at Rivers. The second is of the Ways which belong in particular to some Persons, for the Use of their Lands; and these terminate at one end in the Highways, and at the other end in the remotest of the Lands to which they lead *s*. The third is of the

s Viarum quædam publicæ sunt, quædam privatæ, quædam vicinales. Publicas vias dicimus, quas Græci Βασιλικάς, id est, regias, nostri prætorias, alii consulares vias appellant. Privatæ sunt quas agrarias quidam dicunt. Vicinales sunt viæ quæ in vicis sunt, vel quæ in vicos ducunt. *l. 2. §. 22. ff. ne quid in loco publ. vel itin. fiat.*

Privatæ viæ dupliciter accipi possunt: vel hæ, quæ sunt in agris, quibus imposita est servitus, ut ad agrum alterius ducant; vel hæ quæ ad agros ducunt: per quas omnibus permeare liceat, in quas exitur

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the Ways which are as Services between Neighbours, one of which has a right of Passage through the Lands of the other *t*.

exitur de via consulari : & sic post illam excipit via, vel iter, vel actus ad villam ducens : has ergo, quæ post consularem excipiunt in villas, vel in alias colonias ducentes, putem etiam ipsas publicas esse. *d. l.* §. 23.

Viæ vicinales, quæ in agris privatorum collatis factæ sunt, quarum memoria non extat, publicarum viarum numero sunt : sed inter eas, & cæteras vias militares hoc interest : quod viæ militares exitum ad mare, aut in urbes, aut in flumina publica, aut ad aliam viam militarem habent : harum autem vicinalium viarum dissimilis conditio est, nam pars earum in militares vias exitum habent ; pars sine ullo exitu intermoriuntur. *l. ult.* §. 1. *ff. de loc. & itin. publ.*

t Hæ quæ sunt in agris quibus imposita est servitus, ut ad agrum alterius ducant. *l.* 2. §. 23. *ff. ne quid in loc. pub. vel itin. fiat.*

Ait prætor : *in via publica, itinereve publico facere, immittere quid, quo ea via, idve iter deterius sit, fiat, veto.* l. 2. §. 20. ne quid in loc. publ.

Deteriorem autem viam fieri, sic accipiendum est, si usus ejus ad commeandum corrumpatur, hoc est ad eundum vel agendum, ut cum plana fuerit clivosa fiat, vel ex molli aspera, aut angustior ex latiore, aut palustris ex sicca. §. 32. *eod.*

Si viæ publicæ exemptus commeatus sit, vel via coarctata, interveniunt magistratus. §. 25. *eod.*

Si quis cloacam in viam publicam immitteret, exque ea re minus habilis via per cloacam fiat : teneri eum Labeo scribit, immisisse enim eum videri. §. 26. *eod. V. T. h. T.*

XV.

15. The Policy concerning the Highways.

The Policy relating to the Highways consists in keeping them in that good condition they ought to be in for the Conveniency of the Publick. And this takes in three sorts of Rules, those respecting the Breadth and other Conveniences of the Ways, such as the Pavement, if necessary ; those which forbid the putting or throwing out any thing in the Ways which may incommode the Passage ; and those which oblige to Reparations. And this Policy regards the Officers appointed to take care of the Highways, and who direct the Expences thereof, which are to be furnished either out of the King's Coffers, or by particular Persons, who upon the account of Tolls, or other Duties, are obliged to be at this Charge *u*. And as to the other Ways which serve for the Use of particular Persons, every one of the Parties concerned contributes to their Repair according to their Right and Interest, or according to their Titles and Possessions *x*.

u See the Ordinance of Orleans, *Art.* 107. *and that of* Blois, *Art.* 282, 355.

x The Reparations of the Ways for Services are properly incumbent on him who has the Right of Service. In omnibus servitutibus refectio ad eum pertinet qui sibi servitutem asserit, non ad eum cujus res servit. *l.* 6. §. 2. *ff. si serv. vindic.*

And as for the other Ways whereof the Use is in common to some particular Persons, every one is obliged to pay his proportion according to the Rule explained in this Article.

XVI.

16. The Policy concerning the Streets and other publick Places.

The Policy concerning the Streets, the Market-Places, and other Places which are for the publick Use, consists in putting and maintaining them in the good Condition they ought to be in, for rendring the Use of them free and commodious. Thus for the Streets and Market-Places, it is necessary to keep the Pavement in good Order, to take care that nothing obstruct the Passage, or render it inconvenient, to hinder the throwing out or exposing in them any Filth or other things that may be a Nusance to the Passengers ; that care be taken to keep them clean ; and that the Magistrates, or other Persons appointed to take care of the Streets, be diligent in seeing all these Regulations put in execution, making the Inhabitants contribute towards it, according to the Share that every one ought to bear of this Expence *y*.

y Ædiles studeant ut, quæ secundum civitates sunt viæ, adæquentur : effluctiones non noceant domibus : & pontes fiant ubicumque oportet. *l. un. ff. de via publ. & si quid in ea fact. esse dic.*

Construat autem vias publicas unusquisque secundum propriam domum & aquæ ductus purget, qui sub dio sunt, id est coelo libero : & construat ita, ut non prohibeatur vehiculum transire. *d. l.* §. 3.

Curent autem, ut nullus effodiat vias, neque subruat, neque construat in viis aliquid —— ædiles autem mulctent secundum legem : & quod factum est dissolvant. §. 2. *eod.*

Quicunque autem mercede habitant, si non construat dominus, ipsi construentes, computent dispendium in mercedem. §. 3. *in f. eod.*

Studeant autem, ut ante officinas nihil projectum sit, vel propositum : præterquam si fullo vestimenta siccet, aut faber currus exterius ponat. Ponant autem & hi, ut non prohibeant vehiculum ire. *d. l.* §. 4.

Sive ædium vitio, sive operis, quod vel in ædibus, vel in loco urbano, aut rustico, privato, publicove fiat, damni aliquid futurum sit : curat prætor, ut timenti damnum caveatur. *l.* 19. §. 1. *ff. de dam. infect.*

Non permittant autem rixari in viis, neque stercora projicere, neque mortissina, neque pelles jacere. *l. un.* §. *ult. ff. de via publ.*

See the Ordinance of 1567. *for the general Policy, Tit.* 17. *Art.* 1, &c.

XVII.

17. Reparation of the publick Places.

The Reparations necessary for publick Places are made, either at the Charge of the Publick, or of those who ought to contribute to them, according to the Quality of the Places, and the Usages and Regulations : and as to the particular Persons interested in the use of the Places to be repaired, none of them is exempted from contributing towards it ; but 'tis the common Charge of them all *z*.

z Absit ut nos instructiones viæ publicæ, & pontium

tium stratarumque opera, titulis majorum principum dedicata, inter sordida munera numerentur. Igitur ad instructiones reparationesque itinerum pontiumque nullum genus hominum, nulliusque dignitatis ac venerationis meritis cessare oportet. Domus etiam divinas tam laudabili titulo libenter adscribimus. *l. 4. C. de privil. dom. aug.*

Per Bithyniam cæterasque provincias possessores in reparatione publici aggeris, & cæteris hujusmodi muneribus pro jugerum numero vel capitum quæ possidere noscuntur dare cogantur. *l. 2. C. de immun. nem. conced.*

Emphyteuticarii possessores qui mansuetudinis nostræ beneficio ad extraordinaria minime devocantur munera: sicut cæteri provinciales, obsequium suum itineribus muniendis impendant. Nulla enim ratione debent ab hoc quod in commune omnibus profuturum est, sejungi. *l. 1. C. de collat. fund. patr.*

V. l. 1. §. 3. ff. de via publ. & si quid, quoted on the preceding Article.

XVIII.

18. Penalties of Trespasses against the Policy concerning publick Places.

The Trespasses against the Policy of Publick Places, are repressed by Fines and other Punishments, according to the Quality of the Facts, and the Circumstances. And if any particular Persons should suffer Damage by the said Trespasses, care would be taken to indemnify them, by condemning the Persons who had caused the Damage to make Satisfaction for it *a*.

a See the Ordinance quoted on Art. 16.

V. l. 1. §. 2. ff. de via publ. & si quid, cited on Art. 16.

XIX.

19. A Building made in a publick Place.

If it should happen that some Building were made in a publick Place, it might either be demolished, if it should prove any way hurtful or inconvenient, or be suffered to stand upon condition of its paying a Rent, or making some other Amends to the Publick, if found to be more advantageous to let it remain, either because it would be an Ornament to a Market-Place or other publick Place, or because of the Rent it would yield, or other Advantage that might be made of it *b*.

b Si quis, nemine prohibente, in publico ædificaverit; non esse eum cogendum tollere, ne ruinis urbs deformetur. Et quia prohibitorium est interdictum, non restitutorium. Si tamen obstet id ædificium publico usui: utique is qui operibus publicis procurat debebit id deponere. Aut si non obstet, solarium ei imponere. Vectigal enim hoc sic appellatur, (solarium) ex eo quod pro solo pendatur. *l. 2. §. 17. ff. de quid in loco publ.*

Sicut is, qui nullo prohibente in loco publico ædificaverat, cogendus non est demolire, ne ruinis urbs deformetur: ita qui adversus edictum prætoris ædificaverit, tollere ædificium debet. Alioquin inane & lusorium prætoris imperium erit. *l. 7. ff. eod.*

Si quid in via publica fiat, quia in alieno fit, satis dandum est. *l. 15. §. 6. ff. de dam. infect.*

XX.

20. The Policy relating to Forests.

Seeing the Publick has a great Interest in the Preservation of the Forests, from whence the Wood necessary for Fewel is taken, as also Timber for building of Houses, Ships, publick Edifices, Churches, Palaces, Bridges, and all other Works for warlike Engines, Carriages for the Artillery, Waggons for Provisions and Ammunition, and for other Uses; the Ordinances in *France* have provided by several Regulations, for the preservation of Forests, and not only of those belonging to the King, but likewise of those belonging to Communities, and especially those appertaining to Churches, and even of such as belong to private Persons *c*.

c See the Ordinance of Jan. 1518. *Art.* 30. *and the other Articles of the same Ordinance on the same Subject.*

[In *England* we have many Acts of Parliament providing for the better Regulation of Forests, and the Increase and Preservation of the Timber growing therein. See *Charta de Foresta*, 9 *Hen.* III. and other subsequent Statutes to that purpose, as also the Act 9 & 10 *Gul.* III. *cap.* 36. entituled, *An Act for the Increase and Preservation of Timber in the New Forest in the County of* Southampton.]

XXI.

21. The Policy as to Hunting and Fowling.

The Publick Interest, as to what relates to Hunting and Fowling, has made it necessary to establish Rules for preventing the Inconveniences happening from the bad use that may be made of it, either by Quarrels that would happen, if all Persons were allowed to hunt in all Places indifferently; or by the Prejudice the Game would receive, if a Liberty were granted to hunt in all Manners, in all Seasons; or by the Danger of encouraging Idleness too much in those whose Profession requires they should spend their time in other Exercises. The Ordinances contain many Regulations touching all these Matters *d*.

d See the Ordinance of Aug. 6. 1533. *and the other Ordinances touching this Matter.*

Our Usage in this Matter is very different from that of the Roman *Law, which allowed to all sorts of Persons indifferently the Liberty of Hunting and Fishing, as has been remarked in the Preamble to this Section.*

[There are many Laws and Statutes in force in *England* for the better Preservation of the Game of the Kingdom. By *Stat.* [illegible] 23 *Car.* II. *c.* 25. all Persons not having Lands [illegible] some other Estate of Inheritance in their own or in their Wives Right, of 100 *l. per Annum*, or for Life, or Lease for ninety nine Years of 150 *l. per Annum*, other than the Son and Heir of an Esquire, or other Persons of higher Degree, and Owners and Keepers of Forests, Parks, Chases, or Warrens, stocked with Deer or Conies, in respect of the said Forests, are declared to be Persons not allowed to keep any Guns, Bows, Grey-Hounds, Setting-Dogs, &c. Several other Acts have been since made to explain and amend the Laws relating to the Preservation of the Game, and for enforcing the due Execution thereof. See the Statutes 5° *Annæ*, *cap.* 14. 9° *Annæ*, 3° *Georgii*.]

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TIT. IX.

Of the several Orders of Persons who compose a State.

As God in his great Wisdom has thought fit to render Mankind necessary to one another, in order to engage them to the mutual Duties required of them by the second Law, which is the Foundation of their Society, as has been explained in its Place *a*; so he has multiplied and diversified their Wants, and made an infinite number of things necessary to them, which they cannot have the use of without the assistance of a great many Arts and Commerce, which require different Professions; the Ties and Relations of which to one another, and the Relation which all of them together have to the common Good of the Society of Mankind, unite them among themselves. And he has also made necessary in this Society an Order of Temporal Government, and every thing which respects the Exercise of Religion; which requires likewise the use of divers Arts and Sciences, and renders other different sorts of Conditions and Professions necessary. And out of all these together he has composed a Body, which hath its several Members for several Uses *b*.

It is these several sorts of Conditions and Professions, which being joined together compose the general Order of the Society of Men in a State; and it is by the Exercise of their Functions that it is to subsist; in the same manner as in the natural Body, the Union of the Members forms the Symmetry thereof, and the Exercise of their Functions gives it Life. And as in the Natural Body each Member hath its Situation proportioned to the Use of its Functions; so each Person hath its Situation and Order in the Society of Men, according to the use of the Functions and Duties which his Condition requires of him towards the Publick. Thus we give the Name of Order of Persons to the different Conditions and Professions, which by placing every one in their proper Station, and giving to them all their Rank, compose the general Order.

As the Uses of the Conditions and Professions of the Members of a Society are different, in the same manner as those of the Members of the Body, so they have also different Characters which distinguish them, and which it is necessary to consider in every one. Such are those of Usefulness, of Necessity, of Authority, and others proportioned to the said Uses, which consist in the Functions proper to every one, such as those of the Administration of Justice, of Service in the War, of Trade, of several sorts of Arts, and others. And it is by these different Characters, and by this Variety of Functions, that we distinguish the several kinds of Conditions and Professions, and the Ranks of Persons; which shall be the subject-Matter of the three Sections of this Title. The first shall be of the several Natures of Conditions and Professions, and of the Characters peculiar to every one. The second of their different Uses, which make different kinds of them. And the third of Rank and Precedency, whether it be between Persons of a different Condition, or of the same. But these three Sections shall contain only the Rules which respect precisely and in general the Nature, the Characters, and the Uses of the several kinds of Conditions and Professions, in order to distinguish them; and the Principles of Rank and Precedency also in general; without entring into the detail of the Functions and Duties of each Condition and Profession, or of the particular Combinations which distinguish the Ranks and Precedencies among Persons. For as to the said Ranks and Precedencies, it is sufficient to establish the Principles which regulate them all, without entring into a useless and cumbersome detail of the Particulars, of which there are Collections enough. And as to what respects the detail of the Rules peculiar to each Condition and Profession, their Functions and their Duties, we shall explain them under the following Titles, unless it be such as were to have their Rank in other Places. Thus the Rules which relate to the Prince, to his Counsellors, to those who serve in the War, to those employed

a *See chap. 2. of the Treatise of Laws, numb. 2.*

b *For the Body is not one Member, but many.* 1 Cor. 12. 14.

But now hath God set the Members every one of them in the Body, as it hath pleased him. And if they were all one Member, where were the Body? But now are they many Members, yet but one Body. 1 Cor. 12. 18, 19, 20.

Every one according to his Service, and according to his Burden. Numb. 4. 49.

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employed about the Revenue, have been explained in Tit. 2, 3, 4, 5. Thus the Rules of Officers in general, and particularly of the Officers of Justice, and other Persons who are any ways employed in the Administration of Justice, have their natural Order in the second Book; and one may easily see by the bare reading of the Table of the Titles, the Place of the Rules of the Functions and Duties of all the kinds of Conditions and Professions.

If any one should be surprized, that, in order to distinguish the Conditions and Professions of Men, we have not in this Title made use of the common Distinction of all the Conditions into three Orders, which are usually called the Three Estates, *the Clergy*, *the Nobility*, *and the Commons*; he is desired to consider that this Distinction is not of use for the Design of this Book: For on one hand, one is obliged to give in it more distinct Ideas of the Differences of Conditions, than what is given by this general Distinction of the three Estates; and on the other hand, if we had followed that Distinction, we could not have avoided the confounding among the *Commons*, which make the third Estate, the first Magistrates of the Kingdom, many of the Privy Counsellors, and other Persons who ought to have a distinguished Rank. So that without pretending to do any prejudice to the Use which this Distinction may have, we have thought proper under other Views to distinguish the Conditions of Men in another manner.

SECT. I.

Of the several Natures of Conditions and Professions, and of the Characters peculiar to every one of them.

The CONTENTS.

1. *The Foundation of the Distinctions of Conditions.*
2. *Two sorts of Qualities, which it is necessary to distinguish in each Person.*
3. *Difference between these two sorts of Qualities.*
4. *Remark on the foregoing Article.*
5. *Difference between the State of Persons, and their Condition or Profession.*
6. *We must distinguish the Condition from the Profession.*
7. *Definition of Profession.*
8. *Definition of Condition.*
9. *Conditions and Professions have divers Characters, which it is necessary to distinguish.*
10. *What are those Characters.*
11. *Definition of the Honour of a Profession.*
12. *Definition of Dignity.*
13. *Definition of Authority.*
14. *Definition of Necessity.*
15. *Definition of Usefulness.*
16. *The Character of Usefulness is common to all Professions; but it is nevertheless distinguished.*
17. *Divers Causes of these Characters.*
18. *Difference between the Characters of Honour and Dignity, and that of Authority.*
19. *Three Causes of the Honour and Dignity of Conditions and Professions.*
20. *Birth is the first Cause of Honour and Dignity.*
21. *Second Cause, Officers.*
22. *Third Cause, the Will of the Prince.*
23. *Other Causes of Honour without Dignity.*
24. *Divers Combinations of all these Characters of Conditions and Professions.*
25. *Two Characters proper to Arts: One, of those that are called Liberal. The other, of those which are termed Mechanick.*
26. *Three sorts of Arts.*
27. *Divers Names of these three sorts of Arts.*

I.

1. The Foundation of the Distinctions of Conditions.

ALL the manners of distinguishing the different Conditions and Professions of Men, have their Foundation in some Qualities, which the Laws consider in Persons, with respect to the Order of Society, and which give to every one his Rank in the Society; as will appear by the Articles which follow. *a*.

a The Conditions and Professions distinguish the Persons in the Order of the Society according to the relation they have to the said Order, in the same manner as the Members are distinguished in the Body, according to the relation they have to the Order and Use of the Body.

II.

2. Two sorts of Qualities, which it is necessary to distinguish in each Person.

We must distinguish in each Person two sorts of Qualities, which regard the Use of Human Society. One is, of those which make up the State of Persons; such are the Qualities of a Head of a Family, of a Son living under the Paternal Authority, of an Adult, of a Person under the Age of Puberty, and other the like Qualities, which have been explained in the Title of Persons in the Book of the *Civil Law in its Natural Order*. And the other sort is, of the Qualities which determine each Person

son to some certain kind of Life and Occupation, which sets him either above or below others in the Order of the Society, according to the Differences of those Qualities, from the very first of Prince, Duke and Peer, Count, Marquis, Officers of the Crown, and others, even to the meanest of Handicraftsmen, Labourers, and others of the meanest of the People *b*.

b See the following Article.

III.

3. *Difference between these two sorts of Qualities.*

There is this Difference between these two sorts of Qualities, That those which make the State of Persons, are all of them such, as has been observed in the Title of Persons, that each of them hath its Opposite which is contrary to it. So that every Person has necessarily one of the two opposite Qualities independently of their Condition; and, for example, there is no body, of what Condition or Profession soever, who is not either Head of a Family, or a Son under the Paternal Authority, Adult, or under the Age of Puberty, and the same of others. But the Qualities which determine Persons to a certain kind of Life, and which make the Conditions and Professions of Men, have not a like Opposition to one another: And there is no necessity of being, for instance, either an Officer, or a Merchant, or a Husbandman; for one may have none of these Qualities, and be either a common Soldier or a Tradesman, or of some other Condition or Profession *c*.

c See the two following Articles.

IV.

4. *Remark on the foregoing Article.*

It follows from this Difference between these two sorts of Qualities, that it is not from those which make the State of Persons, that we are to draw the Distinctions of Conditions and Professions; seeing they are such, that one of the opposite Qualities may agree to Persons of all Conditions and Professions. For tho there be some of those Qualities which make the State of Persons, that make also the Condition of some, such as the Qualities of Clergyman and of Gentleman; yet the opposite Qualities of Layman to that of an Ecclesiastick, and of Yeoman to that of Gentleman, do not regulate the Condition of those who are neither Clergymen nor Gentlemen. Thus, it is by another Character of the Qualities of Clergyman and of Gentleman, that they make the Condition of the Person different from the Character which regulates the State of Persons. Which proceeds from this, That these Qualities do not only respect the Condition of Persons according to the nature of this Character, which consists in the Capacity or Incapacity of Engagements and Successions, as has been explained in the Preamble of the Title of Persons; but do moreover determine Persons to some kind of Life, which does not agree to the opposite Qualities of Layman and Yeoman, which determine one to no kind of Profession, nor to any Condition *d*.

d Altho the Qualities of Clergyman and of Gentleman which constitute the State of Persons, make also their Condition, yet the Rule explained in this Article makes no Exception to that which has been explained in the preceding Article; which results from the Reason explained in this 4th Article.

V.

5. *Difference between the State of Persons, and their Condition or Profession.*

It follows from the preceding Articles, that it is necessary to distinguish the Condition and Profession from that which is called in the Language of the Laws the State of Persons. For the State of Persons consists, as has been said in the foregoing Article, in those Qualities which make the Capacity or Incapacity of Engagements and Successions; and the Conditions and Professions respect the kind of Life of every Person. And we must also distinguish the Profession from the Condition of Men; for there is a Difference between the one and the other, which it is necessary to consider, and which shall be explained in the Articles which follow *e*.

e See the Preamble of the Title of Persons, and the two Articles preceding this.

VI.

6. *We must distinguish the Condition from the Profession.*

Altho these two Words *Condition* and *Profession*, seem to be often synonymous, and that, for instance, the Conditions of an Officer, of an Advocate, of a Merchant, of a Tradesman, of a Husbandman, make also their Professions; yet there are other Qualities, which without marking their Professions, do nevertheless make the Condition of the Persons. Thus, the Quality of a Gentleman who does not make profession of Arms, and that of a bare Citizen who lives without any Imployment, are Qualities, which without marking the Profession, distinguish the Condition of the Person: So that it is necessary to distinguish the nature of Profession, from that of Condition, according to their Definitions, which shall be explained in the two Articles which follow.

VII.

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VII.

7. *Definition of Profession.*

By Profession is meant, a certain Imployment which engages one in some Labour of Mind or of Body, and to Functions annexed to the said Imployment; such as the Professions of divers sorts of Officers, of Advocates, of Merchants, Tradesmen, and others; some one of which every Person embraces voluntarily, according to his Estate, his Talents, and his Inclinations, and almost constantly with a view to spend his Life in that Profession: Which makes a Distinction between Professions and certain Offices, which tho they oblige to certain Functions and Imployments, are not however reckoned in the Number of Professions, because People may be engaged in them against their Will, and because they last only a certain Time; such are the Offices of Sheriffs, Consuls, Assessors, and Collectors of Taxes, and others, called Municipal Offices; of which notice shall be taken in the 16th Title. And as these Offices are not considered as Professions, so they do not regulate the Conditions of Persons; for Persons of Conditions altogether different are called to the said Offices *g*.

g It is necessary to observe these Characters of Professions, and that People engage in them willingly, and for what Time they please.

VIII.

8. *Definition of Condition.*

By Condition is understood the Situation of every one in some one of the different Orders of Persons, which compose the general Order of the Society, and allot to each Person therein a distinct separate Rank, which places some above or below the others, whether it be that they exercise some Imployment or Profession, or that they have none at all. Thus, in the Order of the Clergy, there are many of them who have only the bare Engagement in the Ecclesiastical State, without having therein either Charge or Imployment. Thus, among the Laity, those who are called bare Citizens, have their Condition regulated by this Quality, altho they are without Imployment or Profession *h*. And there are many other Conditions of a higher degree, which distinguish Persons by Qualities, which without being joined to any Imployment, and without the Character of Professions, do nevertheless mark the Condition.

h See as to these different Orders of Persons the 2d Section.

IX.

9. *Conditions and Professions have divers Characters, which it is necessary to distinguish.*

Since it is by the Differences of the Conditions and Professions, that we are to distinguish the Persons; it is therefore necessary to distinguish in the several kinds of Conditions and Professions, certain Characters which belong differently to the one and to the other, and which by diversifying them are the Foundations on which depend the Ranks of Persons. We shall explain these Characters in the Articles which follow *i*.

i There is no Condition or Profession but what has some one of these Characters, and many have them all.

X.

10. *What are these Characters.*

The different Characters, which it is necessary to consider in the several kinds of Conditions and Professions, are Honour, Dignity, Authority, Necessity, and Usefulness. For every Profession that hath not some one of these Characters, is because of that Want unlawful; and it is a part of the good Order of a Government to prohibit and abolish the Use of such Profession, as well as that of those Professions which tend to Corruption of Manners, and which the Church condemns and prohibits *l*.

l Good Policy, no more than Religion, cannot suffer a Profession which does not carry along with it some Advantage.

Wo to them that devise Iniquity. *Micah* 2. 1.

XI.

11. *Definition of the Honour of a Profession.*

The Honour of a Profession or Condition, is the great Consideration that it makes those who exercise it to be held in by the Publick. Thus, the Profession of an Advocate, and that of a Physician, imply an Honour, but without Dignity or Authority *m*. And even in the Conditions of Trade and Handicraft, as there are some of them that are more creditable than others, we may consider in them a kind of Honour that distinguishes them, and places some of them in a Rank above the others.

m Advocati, qui dirimunt ambigua fata causarum, suæque defensionis viribus in rebus sæpe publicis ac privatis lapsa exigunt, fatigata reparant, non minus provident humano generi, quam si præliis atque vulneribus patriam parentesque salvarent. Nec enim solos nostro imperio militare credimus illos, qui gladiis, clypeis, & thoracibus nituntur, sed etiam Advocatos. Militant namque causarum patroni, qui gloriosæ vocis confisi munimine, laborantium spem, vitam, & posteros defendunt. *l.* 14. *C. de advoc. divers. judicior.*

Medicorum quoque eadem causa est, quæ professorum, nisi quod justior: cum hi salutis hominum, illi studiorum curam agant. Et ideo his quoque ex-tra

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tra ordinem jus dici debet. *l.* 1. §. 1. *ff. de var. & extr. cogn.*

XII.

12. Definition of Dignity.

Dignity adds to bare Honour, and to the Consideration or Esteem that it may give, an Elevation which procures likewise Respect. Thus, the Condition of a Magistrate gives him, besides Honour, the Dignity of his Ministry, which ought to be respected. And there are many other Conditions, which without being annexed to Offices, give a Dignity greater or less, according to their Differences. Thus, the Princes of the Blood, the Knights of the King's Orders, Dukes, and those who have the Titles of Counts and Marquisses, have both Honour and Dignity proportionable to the Rank which the said Qualities may give them *n*.

n There is this Difference between bare Honour and Dignity; that Dignity obliges People to pay Respect, and bare Honour procures only Esteem and Consideration.

Bow thy Head to a great Man, *Ecclus.* 4. 7.

XIII.

13. Definition of Authority.

Authority is a Right to exercise some publick Function, with a power to enjoin Obedience to those over whom their Authority reaches. So that every Authority implies an Honour and Dignity proportionable to the Ministry to which it is annexed. Thus, the Offices of the Crown, the Governors of Provinces, the Mareschals of *France*, the Officers of War, and those belonging to the Administration of Justice, of the Civil Policy, and of the Revenue, and others who have some Jurisdiction, such as Officials, the Mayors and Sheriffs of Towns, the Judges of the Merchants, and all those who exercise publick Functions, which subject other Persons unto them; such as those who have some Superiority in Chapters, in Universities, in Colleges, in Hospitals, and who have all of them an Authority proportionable to their Ministries. And every one owes to these several sorts of Power and Authority, the Obedience that is necessary for obtaining the End for which the said Powers and Authorities have been ordained *o*.

o Put them in mind to be subject to Principalities and Powers. Tit. 3. 1.

Submit your selves to every Ordinance of Man, for the Lord's sake, whether it be to the King as supreme, or unto Governors, as unto them that are sent by him, for the Punishment of Evil-doers, and for the Praise of them that do well. 1 Pet. 2. 13, 14.

See Rom. 13. 5, 6, 7.

The Lord hath anointed thee to be Captain over his Inheritance. 1 Sam. 10. 1.

See ye him whom the Lord hath chosen, that there is none like him among all the People. 1 Sam. 10. 24.

XIV.

14. Definition of Necessity.

The Necessity of Professions may be understood two ways: One of the Professions without which it is impossible to live; such as Husbandry, and the Arts necessary to it, as also the other Arts which serve for Nourishment, for the Cure of Diseases, for Lodging, and for Clothing; and the Professions, without which the Government would be in Disorder, such as that of Arms, of the Administration of Justice, of the collecting and managing the publick Revenue, and others. And the other way of understanding the Necessity of Professions, is of those which not being of an equal Necessity with the former, are nevertheless necessary to many profitable and convenient Uses. Thus, the Art of Printing is not of this first kind of Necessity, but it is necessary in the second Sense, for an infinite number of very important Uses, altho they be not of this absolute Necessity. Thus, Painting and Imbroidery are necessary for Ornaments, which are useful in Churches and other Places. And it is of the first of these two sorts of Necessity, that we are to understand what is said here of the Necessity of Professions, to distinguish those of this Character from those which, altho they be very useful, yet are not of this first kind of Necessity *p*.

p The word Necessity *is understood with respect to the Use for which a Thing may be necessary, whether the said Thing be of it self necessary or not.*

XV.

15. Definition of Usefulness.

The Usefulness of Professions, is the good Use that may be made of them for the Publick, whether they be useful only without implying an absolute Necessity, or that they be even of the first sort of Necessity. Thus, we may distinguish two kinds of Usefulness of Professions. The first is of those which, not being necessary in the first of the two Senses explained in the preceding Article, are necessary in the second Sense, being useful for many lawful and convenient Purposes; such as the Professions of Goldsmiths, Jewellers, Ingravers, and others. And the second is, of those which are of the first sort of Necessisity *q*.

q It is in this manner that the Distinction may be made between Necessity and Usefulness.

XVI.

16. The Character of Usefulness is common to all

Altho this Character of the Usefulness of Professions be common to them all, whereas those of Honour, Dignity,

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Professions, but is nevertheless distinguished. ty, Authority, Necessity are not so; yet nevertheless it has, as all the others, this Effect, which has been remarked in the Preamble of this Title, to distinguish Conditions and Professions; not by the precise Idea of the Usefulness common to all Professions, but by the different sorts and degrees of Usefulness, greater or lesser in some than in others. Thus the Usefulness of the Art of Printing, being much greater than that of many other Arts, this Difference of the Usefulness distinguishes the Professions *r*.

r This Distinction is an Effect of the divers Degrees of Usefulness.

XVII.

7. Divers Causes of these Characters. We must observe as to these Characters of Conditions and Professions, that they have their several Causes, according as they have relation, either to the Nature of Man, or to the Order of Society. For some of them have an essential relation to the very Nature of Man, others have relation to the Order of the Society of Mankind, and to Government which maintains the said Order; and there are some which respect equally, both the Nature of Man, and the Order of Society. Thus the Professions of Husbandry, and of the other Arts and Commerces which are necessary to the Life of Man, have relation to our Nature, which subjects us to the Necessity of the Use of these Professions. Thus the Professions of those who distribute Justice, and who are to punish Crimes, respect the Order of Society, which renders the good Order of Government necessary. Thus the Professions of those who teach human Sciences, have relation to our Nature, and to the good Order of the Government. Thus the Professions which have the Characters of Honour, Dignity, and Authority, respect the same good Order of Government, which demands the use of the Professions which have these Characters annexed to them *s*.

s These Characters ought to be proportioned to the Uses of the Professions; as the Professions ought to be suited to the Nature of Man, and to the common Good of the Society.

XVIII.

18. Difference between the Characters of Honour and Dignity, and that of Authority. There is also this Difference to be remarked between the Characters of Honour and Dignity and that of Authority, that this hath its Foundation in the Right which the Prince gives to the Persons, who by their Offices are raised above others. For it is from him that all those derive their Authority who have any over others, whether it be that he confers it, by disposing of the Offices himself, or that they are filled up by his Order, and under his Direction. But Honour and Dignity may go to Persons, either by an express Order of the Prince, or by some other way, as shall be explained in the Articles which follow, and which are to be understood, as well as this, of the Professions which relate to Temporal Concerns. For as to those which regard spiritual Affairs, their Honour, Dignity and Authority do not proceed from the Temporal Power, but from the Spiritual Ministry which establishes them; which does not hinder but that this Honour, this Dignity, this Authority may stand in need of the Protection of the Prince to support them *t*.

t Honour and Dignity may be acquired either by an express Order of the Prince, as if he makes one a Knight of an Order, or without his express Order, as by the Birth of Princes, and that of other illustrious Persons; but Authority is acquired only by a Title which is held of the Will of the Prince. See the following Articles.

XIX.

19. Three Causes of the Honour and Dignity of Conditions and Professions. We may distinguish three different Causes of the Honour, and of the Dignity of Conditions and Professions, according to three several Causes which confer the said Characters; Birth, Offices and other Imployments, and the bare Will of the Prince independently of Birth, or of a Title of an Office, or other Imployment. We shall explain these three sorts of Honour and Dignities in the Articles which follow *u*.

u These three sorts of Causes are so many Principles which distinguish from the vulgar sort those who have some Rank of Honour or Dignity.

XX.

20. Birth is the first Cause of Honour and Dignity. Birth makes the Honour and the Dignity, not only of the Princes of the Royal Blood, and of other Princes, but also of other Persons who are descended of illustrious Families, whose Elevation gives them a very distinguished Rank, which procures them the Esteem and Respect which ought to be paid to the Merits of their Ancestors. For it is just, and for the publick Good, that the said Merits, which in those Families have been the Effect of Services done to the Publick, should be considered in the Persons of their Descendants; that the Consideration thereof may excite them to imitate the Example of those who have

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have procured to them the Honour and Dignity which they enjoy *x*.

x The Glory of Children are their Fathers. Prov. 17. 6.

But he began to consider discreetly, and as became his Age, and the Excellency of his antient Years, and the Honour of his grey Head, whereunto he was come, and his most honest Education from a Child. 2 Maccab. 6. 23.

XXI.

21. Second Cause, Offices.

Offices give to the Persons who are provided therewith, a Dignity suitable to their Functions, in order to procure to them the Esteem and Respect which ought to accompany the Obedience of the Persons over whom those Functions are to be exercised; and it is for this reason, that some Offices are called even by the bare Name of Dignities *y*.

y Dignity is annexed to the Qualities which procure Respect.

XXII.

22. Third Cause, the Will of the Prince.

The Will of the Prince gives Dignity, both to Persons who are in no Office, and to those who have it not by Birth; when he raises Persons to some Qualities, or to some Imployments which ought to have this Effect, whether it be to recompense them for Services already done, or to put them in a condition of doing Services, according as they may be capable thereof. Thus the Quality of Knight of any of the King's Orders, gives Honour and Dignity to those whom he raises to that Degree. Thus the Quality of Ambassador gives to those who are employed in Embassies, and even to those who are named to them, a Rank of Honour and Dignity. Thus those who without any Command in the Army, have by their Bravery and Conduct render'd themselves worthy of a considerable Post therein, and are called to it, are thereby raised to a Rank of Honour and Dignity proportionable to the Quality of the Function committed to them *z*.

z The Prince having in his Person the Sovereign Dignity, to which is due an entire and perfect Respect, this Respect would be violated, if a proportionable Respect were not paid to those whom the Prince doth honour.

What shall be done unto the Man whom the King delighteth to honour? Now *Haman* thought in his Heart, to whom would the King delight to do honour, more than to my self? And *Haman* answer'd the King; For the Man whom the King delighteth to honour, let the Royal Apparel be brought, which the King useth to wear, and the Horse that the King rideth upon, and the Crown Royal which is set upon his Head. And let this Apparel and Horse be delivered to the hand of one of the King's most noble Princes, that they may array the Man withal, whom the King delighteth to honour, and bring him on horseback through the Street of the City, and proclaim before him, Thus shall it be done unto the Man whom the King delighteth to honour. *Esther* 6. v. 6, 7, 8, 9.

Altho this Text of Scripture have not an exact Relation to this Article, yet it may be applied to it.

XXIII.

23. Other Causes of Honour without Dignity.

These several Causes that have been just now explained, which give Honour and Dignity, relate both to the one and the other; but there are others which give barely Honour without Dignity, as has been said in Art. 11. of Sect. 1. of the Professions of Advocates and Physicians. And there are likewise other Imployments which have the same effect, such as those of the Professors of Sciences, and others. And we may place in the Rank of the Conditions which give Honour without Dignity, that of simple Gentlemen, who have no Title that gives them any Dignity *a*.

a It is not necessary for the bare Character of Honour in a Profession, that it be annexed to it by the Title of an Office, or by the express Will of the Prince. For this Will is not necessary except for the Authority and Dignity which oblige even those to pay respect who would not do it willingly. But bare Honour requiring no manner of Submission, it may be annexed, and is so naturally, to the Qualities which draw Esteem and Respect.

XXIV.

24. Divers Combinations of all these Characters of Conditions and Professions.

The Diversity of these Characters of Honour, of Dignity, of Authority, of Necessity and of Usefulness, hath not this effect, that each Condition or Profession should have only one of the said Characters, for many have them all together; such as those of Prelates, of Magistrates, of Commanders in an Army. Others have only the bare Character of Usefulness without Necessity, as has been explained in the 14th and 15th Articles; some have Honour, Necessity and Usefulness, without Authority and without Dignity, as that of Advocates and Physicians. Thus these Characters are found joined or separated in divers Combinations, according as they agree to the different Natures of Conditions and Professions *b*.

b This is a Consequence of the preceding Articles.

XXV.

25. Two Characters proper to Arts, one of those that are called Liberal, the other of those that are termed Mechanick.

There is this common to these several sorts of Characters, of which we have spoken hitherto, that there is not any one of them but what is to be met with in many different kinds of Conditions and Professions. But there are two others which are to be met with only in Arts, and which distinguish certain Arts from the others. For we give this Name of Arts to different kinds of Professions, as will appear in the Article which follows. The first of these two Characters is that

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that which distinguishes among all the Arts those that are called Liberal Arts [c]; and the second is that of Arts to which they add the Quality of Mechanick [d]. We shall explain these two Characters in the following Article.

[c] *This Expression of Liberal Arts is taken from the* Latin Tongue, *where it signified the Arts which free Persons might exercise, to distinguish them from those which were more adapted to Slaves. And altho in our Language this Word Liberal Arts seems to be appropriated to certain Sciences, which are taught by the Name of Arts in the Universities, yet we often give the Quality of Liberal Arts to other sorts of Arts, of which notice shall be taken in the following Article; as, for example, to Painting, because in effect these sorts of Arts ought to be distinguished from the Arts which are commonly called Mechanick; and that the Persons who excel in them deserve a singular Esteem from the Publick. Thus we ought not to grudge giving the Quality of Works of a Liberal Art to the Pictures of* Raphael, *and of other famous Painters. And moreover, the Art of Designing is not unbecoming Persons even of the highest Quality.*

[d] *Altho this Word Mechanicks, when it is taken as a Substantive, signifies a Science of great Importance, which is a part of the Mathematicks, and which teaches the Principles of moving Force, and the Use of Machines; yet when it is an Adjective, added to the Word Art, this Expression of Mechanick Art is used only to denote the meanest and most laborious Arts, which are distinguished from others that are more honourable. Thus we do not call Painting a Mechanick Art; but we give this Name to the Arts or Trades of a Carpenter, Joiner, Ironmonger, Locksmith, Shoemaker and others.*

XXVI.

26. Three sorts of Arts.

We must distinguish in general three sorts of Professions, which this Word *Art* may signify. The first is that sort of Sciences that are taught in the Universities by the Name of Arts, that they may be distinguished from those which are there properly called Sciences. For in the Universities this last Name is given only to Divinity, to the Canon Law, to the Civil Law, to Physick; and the Name of Arts is there given to Philosophy, to Rhetorick, to Grammar, and to other human Sciences [e]. Thus the Word *Art* would comprehend Geometry, and the other Parts of Mathematicks, which may be taught in an University, altho they be a Science, and which of all human Sciences has the most certain Demonstrations. The second sort of Professions of Arts, which is very different from the former, is that of Handicrafts and Trades, which are called Mechanick Arts; which comprehends all the Trades that are exercised by a laborious Handywork; and to this sort belong the Trades of those who are called Handycraftsmen, such as Taylors, Carpenters, Shoemakers, Bakers, Pastry-Cooks, Locksmiths, and others. The third is another kind of some Arts, which ought not to be confounded with those Mechanick and Laborious Arts; because they are more creditable and of a more refined Use, and depend on many Principles and on many Rules that are taken from Geometry, from Astronomy, from the Opticks, from Perspective, and from other Parts of the Mathematicks; which is the reason that the Professors of some of these Arts are called Engineers. And it is in this Rank that we may place Architecture, the Art of Fortification, of Incampments, of the Marching of Troops, the Order of Battle, Maps, and other Plans; and we may likewise place in this Rank Musick, Painting, and some other Arts distinguished by other different Views.

[e] Præses provinciæ, de mercedibus jus dicere solet, sed præceptoribus tantum studiorum liberalium. Liberalia autem studia accipimus, quæ Græci ἐλευθερία appellant. Rhetores continebuntur, Grammatici Geometræ. *l. 1. in princip. ff. de extra ord. cogn.*

Si salarium alicui decuriones decreverint, decretum id nonnunquam ullius erit momenti: ut puta si *ob liberalem artem*, fuerit constitutum. *l. 4. §. ult. ff. de decr. ab ord. fac.*

Exceptis, qui liberalium studiorum antistites sunt, & qui medendi cura funguntur, decurionum decreto immunitas nemini tribui potest. *l. 1. C. de decr. de cur.*

Angariorum præstatio, & recipiendi hospitis necessitas, & militi & liberalium artium professoribus inter cætera remissa sunt. *l. 10. §. 2. ff. de vacat. & excus. mun.*

XXVII.

27. Divers Names of these three sorts of Arts.

It is because of the Distinction of these three different kinds of Arts that they have different Names given them. For besides the Name of Liberal Arts which is given to those of the first kind, they give them likewise the Name of Sciences, because of the Dignity of the things which they treat of; and we give to those of the second Class only the Name of Mechanick Arts or Trades; and as for those of the third sort, many place them in the number of Liberal Arts, on account of the Considerations observed in the preceding Article, of the Quality of their Uses, and of their Principles and Rules, which are a part of the said Sciences. To which we may add, that the Merit of those who excel in these Arts, places those who arrive at the greatest Perfection in them, in the Rank of Persons who do honour to a State, and some of them are placed even in the Rank of illustrious Men [f].

[f] *This is a Consequence of the preceding Articles.*

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SECT. II.

Of the several Uses of Conditions and Professions.

ALTHO there be some Employments or Conditions which seem to be of no use to the Publick, such as, for example, that of Domesticks of several sorts, of both Sexes, who are in the Service of particular Persons, or of Corporations, for divers Uses; there is not however any one of them which we ought not to look upon as a part of the Publick Order, and as being some way or other useful therein by the Functions which respect the common Good of the Society of Mankind, and of which it is of importance to the Publick to regulate the Use. Thus as to what concerns Servants and Domesticks; besides that there are many of them whose Services regard the Publick because of the Quality of their Masters, they have all of them in general their Functions which are useful in the Order of Society, and which make a part of the publick Good. For the Order of Society does require, that all Servants be obedient to their Masters in the things wherein they ought to obey them, that they perform their Duty punctually, that they be faithful, and that those who transgress these Duties, be punished according to the Quality of the Facts and Circumstances.

We may likewise take notice of another sort of Condition which seems to have no manner of relation to the Service of the Publick, which is that of those Persons who are called bare Citizens, who are without Imployment, unless it be that of caring for their own Family; but this Condition hath nevertheless its Use in the Order of Society. For besides that the Families, of which they are Heads, make a part of the Society, and that therefore the Care which they ought to take of them, hath its relation to the publick Good; they themselves are of use in the Society, by the Obligation they are under to bear the Offices of which they may be capable; such as that of Mayor, Sheriff, and others; and they bear likewise their Share in the Contributions to the publick Taxes. Thus their Condition has by that means its Usefulness. Thus in general the Publick Order takes in not only the Use of the Conditions and Professions which have a precise relation to the common Good, such as the Conditions of the Officers of Justice, of those concerned in the Revenue, of Soldiers, and others; but it comprehends also every thing that is in all the other Conditions which ties and unites Men to one another, which forms and maintains their Society, and which may be subject to the Laws which regulate the Order thereof. Thus as there is no Member in the Natural Body but what hath its Use for the whole Body, so likewise there is no particular Person in the Body Politick but what is engaged to Functions and Duties which respect the Society, by the effect of the conjunction of them all into one Body, the Order of which is to be formed by the Functions of every particular Member. And those who, being able to work, live in the Society without any Employment, and who not only do nothing for the Good of the Publick, but do not so much as apply themselves, either to their own domestick Affairs, or to some honest and lawful Business, are by this State of Idleness, which is the Source of all Vice, as it were rotten Members, and deserve that the Government should correct and chastise their disorderly Life. It was upon these Principles that the Laws of the *Romans* were grounded, which among other Functions allotted to that Officer, whom they called Censor, gave him that of the Correction of Manners, and particularly that of punishing idle Persons, and even those whose Lands were not duly cultivated *a*. And it is upon these very Principles that the Ordinances in *France* enjoin the punishing of Drunkenness, because of Idleness and the other Vices which are the Consequences thereof, and also the Correction of Vagrants, in order to prevent the Crimes into which Idleness leads them *b*. As to which we may make this Reflection, that it were to be wished, that due care were taken by proper Regulations to prevent the great Disorders that so frequently proceed from Idleness.

Seeing it is by the different Uses which the several Conditions and Professions

a Si quis agrum suum passus fuerat sordescere, eumque indiligenter curabat, ac neque araverat, neque purgaverat; sive quis arborem suam vineamque habuerat derelictui, non id sine pœna fuit: sed erat opus censorium. *Aulus Gellius, libro* 4. C. 12.

As to the Correction of Manners, see the same Author, Book 18. *Chap.* 3.

b See the Ordinance of Francis I. *of* August 30. 1536, *and the Ordinances against Vagabonds.*

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fessions are to have in the Society, that we ought to distinguish their kinds; it follows that every one of them ought to have its relation to some Want of the Society: Therefore it shall be by the several sorts of Wants that we shall distinguish in this Section the Uses of Conditions and Professions, and their Kinds. But tho the Conditions of Servants and Domesticks have their Use with regard to several Wants, which may concern the Publick, yet we shall not place this Condition among those which shall be the subject Matter of this Section; and that upon two Considerations which induce us not to do it: One is, because Conditions and Professions are properly speaking Imployments which People usually imbrace with an Intention to spend their whole Lifetime in them; whereas those who engage in the Service of other Persons, do subject themselves to it only for a certain time, and with a view of finding thereby Means or Helps for procuring Settlements that might last all their Lifetime. And the other is, because the bare Quality of Servant or Domestick does not distinguish any one Imployment; for there are Servants of several sorts for Services that are altogether different, more or less laborious, more or less creditable, and every one of which is distinguished by Functions, which in their nature make Conditions and Professions altogether different.

Thus a Gentleman of the Horse is a Sword-Man, a Preceptor is a Grammarian, or a Philosopher; so that we cannot form out of the Quality of Domestick a kind of Condition or Profession.

Neither ought we to place in the Rank of the Conditions, which we are to explain in this Section, that of mere Citizens. For besides that it has not of it self a Use which may have a precise relation to some Want of the Society, which requires this sort of Condition; there are bare Citizens who are of Conditions wholly different, some of them having been Officers, others Merchants, some Tradesmen, or of other sorts of Professions.

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I.

1. Two general kinds of the Use of Professions, which are the Ecclesiastical and the Secular.

All the Uses of all sorts of Conditions and Professions ought to be proportioned to the Wants of the Society, of which they compose the Order. And as it is necessary to distinguish two primary general Kinds which comprehend all these Wants; one of those which concern the spiritual Good of Religion, and the other of those which relate to the temporal Good of the Government of a State; so we may distinguish two primary general kinds of Conditions and Professions which comprehend them all; one is, of those which respect the spiritual Ministry of Religion, and the other of those which relate to the temporal Order of the Society. The first of these two kinds comprehends the Conditions and Professions of Persons who are in the Ecclesiastical Order, who are called by the Name of the Clergy, and which shall be the subject Matter of the ensuing Title. And the second takes in all the Conditions and Professions that are Secular *a*.

'*a* Every Ministry respects either the Spiritual 'Affairs of the Church, or the Temporal Concerns 'of the State.'

Duo sunt genera Christianorum. Est autem unum genus quod mancipatum divino officio & debitum contemplationi & orationi ab omni strepitu temporalium cessare convenit, ut sunt clerici—— Aliud vero genus est Christianorum, ut sunt laici. *Can. duo sunt.* 12. *q.* 1.

And it shall be unto them for an Inheritance; I am their Inheritance: And ye shall give them no Possession in Israel; *I am their Possession.* Ezek. 44. 28.

II.

2. The several Wants of the Society, make the several Uses of Professions.

The Uses of the Secular Professions are different, according to the Differences of the several Wants of the Society in Temporal Concerns; and as these Wants may be reduced to some general kinds, so we may reduce to the same kinds the Conditions and Professions,

sions, as shall be explained in the Articles which follow *b*.

'*b* As Conditions and Professions are established for composing the general Order, and for supplying all the Functions necessary for that Order, so they are distinguished by their Uses for the Wants which the said Functions demand.'

III.

3. The first Want of a State, the publick Tranquility.

The first general Want of the Society of Persons who compose a State, is that of maintaining it in Peace, and of defending it against Enemies or rebellious Subjects, who might disturb its Tranquillity, whether in the spiritual Affairs of Religion, or in the temporal Concerns of the State. And this Want makes the Profession of Arms necessary to repel, restrain, and revenge the Attempts or other Injustices which require the making of War, and to prevent or appease the Storms of seditious or rebellious Subjects, and to contain them within the Duty of Obedience. And this demands the Use of a sovereign Power, which may have the Right of making War, and that of reducing to Obedience, and of punishing rebellious Subjects; and that under this sovereign Power, which makes the Condition of the Head infinitely greater than that of all the others by reason of his Elevation, and of the Extent of his Authority, there be Persons whose Professions engage them to serve in the Wars; such as the Princes of the Blood, the Officers of the Crown who wear a Sword, the Governors of Provinces, the Dukes, Counts, Marquisses, and other Vassals, Gentlemen, the Officers and Soldiers of the Army *c*.

c *That we may lead a quiet and peaceable Life.* 1 Tim. 2. 2.
See the 4th Title.

VI.

4. The second Want, the good Order of the Government.

The second general Want of a State, is that of the good Order of the Government, for regulating every thing which relates to the publick Good in Peace and in War; and this makes the Use of the same Power of the Sovereign necessary, to whom all may pay Obedience who may have the Rights which have been explained in their place *d*, and who in the vast Extent of a Ministry that is so difficult, and of which he by himself is not able to exercise all the different Functions, may be assisted by a wise Council, and by Officers, or other Persons capable of these Functions, that is to say, who have sufficient Abilities, who are disinterested, faithful to the Sovereign, and zealous for the publick Good, whether they serve near the Person of the Prince in his Council *e*, or out of his Presence, as the Governors of Provinces.

d *See the 1st and 2d Titles.*

e *See the 3d Title.*

V.

5. Third Want, Administration of Justice.

It is a Consequence of the good Order of the Government of a State, that every thing in it be under the Power and Dominion of Justice, that those who demand Justice may have its Protection; and that those who violate it may be punished. Which renders the Use of the same Power of the Sovereign necessary, that he may render Justice on the Occasions worthy of his Cognizance, and establish the necessary Order for having it administer'd on all the particular Occasions where he cannot render it himself, taking care to fill up the Professions of the several sorts of Judges, and the others, with Persons capable of their Functions, and to be more especially careful in the Choice of good Judges, who, besides a Capacity suited to their Ministry, ought to have a Principle of Religion, to be Men of Stedfastness, of Courage, and of an Integrity proof against all Corruption, Lovers of Truth and of Justice *f*.

f *Moreover thou shalt provide out of all the People, able Men, such as fear God, Men of Truth, hating Covetousness, and place such over them, to be Rulers of Thousands, and Rulers of Hundreds, Rulers of Fifties, and Rulers of Tens. And let them judge the People at all Seasons: And it shall be that every great Matter they shall bring unto thee, but every small Matter they shall judge.* Exod. 18. 21, 22.

See Deut. 17.

'If these Qualities are necessary for the inferior Judges, it is much more necessary that those who are in the more important Offices should be furnished therewith.'

Ye shall do no Unrighteousness in Judgment: Thou shalt not respect the Person of the Poor, nor honour the Person of the Mighty; but in Righteousness shalt thou judge thy Neighbour. ——— *Ye shall do no Unrighteousness in Judgment, in Meteyard, in Weight, or in Measure,* &c. Levit. 19. 15, & 35.

Thou shalt not raise a false Report: Put not thine Hand with the Wicked to be an unrighteous Witness. Thou shalt not follow a Multitude to do Evil: Neither shalt thou speak in a Cause, to decline after many, to wrest Judgment. Neither shalt thou countenance a poor Man in his Cause. Exod. 23. 1, 2, 3.

See the 4th Title of the 2d Book.

See Psal. 57. 1. Deut. 1. 16.

VI.

6. Another Want, Regulations for the Things that are of publick Use.

It is likewise a Consequence of the good Order of Government, that all Things which are for the publick Use may be in such a Condition, that every one may have the free and commodious Use

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Use of them. Which demands a general Policy for these sorts of Things and Professions, and Officers to look after the due Execution of the said Policy. Thus, in *France* there are divers Officers who have the Direction of what relates to the good Condition of Rivers for Navigation, of Bridges, of Sea-Ports, of Highways, of Forests, of the Game, of the Fishery, and other Things which belong to the publick Use, and have been treated of under the 8th Title *g*.

g See the 8th Title.

VII.

7. The Necessity of a publick Revenue.

It is also a Consequence of the Order of Government, and one of the greatest Wants of a State, that there be a publick Revenue for supplying all the Expences which the common Good of the State may render necessary. And this Want demands the Use of Officers, and of other Persons, who may exercise the Functions on which depends the good Order and Direction of the Revenue, and who may take care of the Method of imposing and levying Taxes, may inspect the Accounts of those who have had the Management of them, and in general may give Order about every thing that relates to the said Direction and Management *h*.

h See the 5th Title.

VIII.

8. The Necessity of the Use of Sciences, and of Persons to teach them.

The good Order of Religion, and that of the Temporal Government, render the Use of Sciences necessary, such as Divinity, the Canon Law, the Civil Law, Physick, and the other Sciences taught in the Universities by the Name of Arts, as has been said in Sect. 1. Art. 26. which makes it necessary there should be Persons capable of teaching in these several Faculties of Arts and Sciences, such as the Professors in Universities ought to be *i*; and that there should be also Persons who actually exercise in publick some of the said Sciences, the Use of which is necessary in the Society, as the Science of Law for several Officers of Justice, and for Advocates, and that of Physick, for those who engage in that Profession.

i See Tit. 17. of Universities.

IX.

9. The Necessity of Commerce.

One of the greatest Wants of a State is to have conveyed into all Parts of the Kingdom the several kinds of Things necessary for all the different Uses of the Publick and of particular Persons, whether it be of such Things as grow within the Kingdom it self, or of such as must be fetched from other Countries. Which demands the Use of many different Commerces, and of Persons to carry them on, whether it be with Strangers, according to the Liberty that Princes give for such mutual Intercourse between their respective Subjects, or between the Subjects of one and the same Prince. And these are of two sorts: One is of Wholesale Merchants, who lay in great Stores of Goods, in order to sell them out by the Great to other Merchants. And the other is of those who sell to particular Persons in a less quantity, and who are called Merchants by Retail *l*.

l See the 12th Title of Commerce.

X.

10. The Necessity of the several sorts of Trades and Handicrafts.

In order to fit for use all the Things necessary for the Wants of Men, and even those which cannot possibly be wanted for Food, Lodging, and Diet, there is necessary an infinite number of Handi-Arts, which demand so many different Professions of Persons to exercise them *m*. And this kind of Profession alone imploys more than all the others put together, that have been mentioned in the preceding Articles.

m See Tit. 13. of Trades and Handicrafts.

XI.

11. The Necessity of Husbandry, and of the Care of Cattle.

Of all the temporal Wants of Mankind, the greatest, most natural, and most general, is, that of drawing from the Earth the Grain, the Fruits, the Wood, and other Things which it may produce for Food, Clothing, and Lodging, and for all the other different Necessities and Conveniences of Life; and also for the Nourishment and Care of the Cattle necessary for tilling the Ground, and for other Uses. So that Husbandry, and the other Labours about the Earth, are as it were the Foundation of the most necessary Supplies for all our Wants *n*. And as it is from the whole Surface of the Earth, that the Tillage and other Labours of Men draw these several Supplies, so the vast Extent of this Surface, which demands this Tillage and these other Cares, demands likewise the Labour of the greatest part of Mankind; so that the Number of those belonging to this Profession, surpasses very far the Number of all the other sorts of Professions put together.

n See Tit. 14. of Husbandry, and of the Care of Cattle.

Husbandmen, and they that go forth with Flocks. Jer. 31. 24.

See Jer. 51. 23. & 52. 16.

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XII.

12. Several kinds of Professions comprized under those which have been just now explained.

The Distinctions of Conditions and Professions, which have been just now explained in the preceding Articles, make general Kinds of them, under which are comprized many other Distinctions, which make particular Kinds, the Detail of which it was not proper to explain here, seeing they have all their Rank in their proper Place. Thus, for example, the general kind of Conditions and Professions necessary for the Administration of Justice, comprehends a great number of several particular Kinds, such as Judges of different Jurisdictions, Advocates, Proctors, Registers, and others, as will appear in the second Book *o*.

o This is a Consequence of the preceding Articles. See Book 2. Tit. 1.

SECT. III.

Of Rank and Precedency.

IT is not only to prevent or terminate the Differences which arise from the Ambition and Vanity of those who affect to set themselves above others, that it has been thought necessary to have Rules touching Rank and Precedency: But altho there were no Dispute of this kind, and that on the contrary every one made it his business to give way to others, and to place himself below those whose Rank is inferior to his; yet it would be necessary to have Rules for pointing out to every one his Rank, whether it be among Persons of different Conditions or Professions, or among those who are of the same. For the publick Order of the Society requires that nothing in it should be in disorder; and it would be a Disorder attended with a great many Inconveniences, if the Members of the Society had not their Places settled, and that on every occasion where many Persons meet together either to sit in an Assembly, or to march in a Procession, or otherwise, it should be necessary either to confound the Ranks, or to make those whose business it is to marshal the Company in their proper Ranks, to spend their time in regulating that which is uncertain.

It is not proper to explain here the several different Regulations about Rank and Precedency. Such an infinite Detail would be inconvenient and disagreeable, and would not have the advantage of giving a clear and perfect Knowledge of the Principles of this Matter, nor even that of establishing Decisions that are certain; seeing it happens every day that different Circumstances of Times, of Places, of the Qualities of the Persons, and others of the like nature, hinder the effect of drawing Consequences from one Case to another, which may seem to be alike. Therefore we shall confine our selves, as we have said in the Preamble of this Title, to the explaining of the Principles and essential Rules, on which may depend the Decision of the Questions relating to Rank and Precedency in all the Cases where there may arise Difficulties.

But tho we are not to enter here upon the Discussion of all the particular Questions relating to Rank and Precedency, yet the Design of explaining the Principles of this Matter leads us to make several Reflections upon the most important and most difficult of all the Questions of this kind, which is that concerning the Rank and Precedency between the Profession of Arms and that of Justice, which we commonly express in these two words, *the Gown and the Sword.* For tho this Question be sufficiently decided, as will appear hereafter, yet since this Decision has been rather the effect of Usage, than of a solemn Judgment given after hearing the Reasons alledged on both sides, many do not agree as to the Equity of the said Usage, which is as it were a tacit Judgment, which the Publick has pronounced between these two Orders. So that we have thought it necessary to dive into the bottom of this Question, and to examine the Principle on which it depends; in order to set the Truth of this Matter in a clear Light, not for satisfying a bare Curiosity, but to establish the Foundations of the Esteem and Respect that is due to these two Orders, and to justify the Distinction which places one of them above the other.

They who are of opinion, that the Profession of Justice ought to have Precedency before that of Arms, judge rightly that Arms ought only to serve for the defence of Justice, and that any other Use that should be made of it would be Violence and Tyranny; and that therefore Arms having their Advantage and Usefulness only from the Service they render to Justice, ought to give place to it. Among those who are of a contrary Opinion, that the Profes-

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ſion of Juſtice ought to give way to that of Arms, and who are by far the greateſt Number, moſt of them think of no other Foundation than that of the Advantage which Force gives, which renders it ſelf every where ſuperior, and makes every thing give way to that which is predominant.

If this Queſtion were to be decided by either of theſe Principles, it would be unjuſt to imagine that the Profeſſion of Arms ought to have the firſt Rank for this reaſon, becauſe it is neceſſary to yield to Force. For Princes, and others who poſſeſs the ſupreme Government, whether in Monarchies, or in Commonwealths, and who are to decide this Queſtion, having equally in their hands both the ſovereign Adminiſtration of Juſtice, and the ſovereign Exerciſe of Arms, they could not ſay that the Dignity of Juſtice muſt neceſſarily yield to the Force of Arms, ſeeing they themſelves are Maſters of the Exerciſe of this Force, and in a condition to judge of this Precedency by the Principles of Truth and Equity. So that if it is truly juſt that the Gown ſhould give place to the Sword, it ought to be upon other Principles, which give ſuch a Dignity to Arms, that the ſame being put into the Ballance with the Dignity of Juſtice, this ſhould yield to that.

In order therefore to diſcover the true Reaſons, upon which to ground the Precedency between theſe two Orders of the Profeſſion of Juſtice, and of that of Arms; it is neceſſary to conſider the Dignity of the one, and of the other, and to put them into the Ballance one againſt another; which it is eaſy to do, ſeeing the Dignity of Juſtice, and that of Arms, are placed in the greateſt Elevation, and have their Source in one and the ſame Place, which is the Perſon of the Sovereign, in whom God has placed the ſovereign Diſpenſation of Juſtice, which he has from the hand of God *a*, and which God himſelf hath armed with the Sword *b*, which our Kings for this reaſon take from off the Altar on the Day of their Coronation. Thus, it is from God that Princes derive immediately both the Diſpenſation of Juſtice, and the Uſe of Arms; and their Habits of Ceremony denote in their Perſons the Affinity and Union that is between the one and the other of theſe Miniſtries. And as in God, who is both infinitely juſt and infinitely powerful, the Works of his Power are thoſe of his Juſtice *c*; ſo he gives to Princes the Exerciſe of Power, and that of Arms which he puts into their hands, only that they may maintain and ſupport Juſtice *d*: from whence it follows that Arms are the Inſtrument of Juſtice, and conſequently cannot have any Glory or Elevation, except in ſo far as they are imployed in the defence of Juſtice. Thus, we revere in the Perſon of the Prince the Majeſty of Juſtice, whereof God makes him the Diſpenſer, and the Glory of the Power with which he arms him for the Maintenance and Support of Juſtice *e*.

It would ſeem, by this firſt View, that the Order of the Profeſſion of Arms ought to yield to that of the Profeſſion of Juſtice, of which Arms are the Inſtrument; but we muſt under another View diſtinguiſh in the Perſon of the Prince two different Rights of exerciſing Juſtice, or, to ſpeak more diſtinctly, two ſeveral ſorts of Juſtice, and two different Uſes of Arms for the one and for the other.

We have ſeen in the Preface to this Book, that there are, as it were, two Parts of the univerſal Order of the Society of Mankind. One, which conſiſts in what paſſes between Nations ſubject to different Governments, and which has for its Laws thoſe called by the Name of the Law of Nations. And the other, which comprehends that which paſſes in every State ſubject to one and the ſame Government, and which has for its Laws the Law of Nature, and the municipal Laws there in force.

Both the one and the other of theſe two Parts of the Order of the World, cannot ſubſiſt without the Exerciſe of Juſtice, which may make the Laws peculiar to each of them to be obſerved; and this Exerciſe of Juſtice in each of the

a Prov. 8. 15.

b 2 Maccab. 15. 16, 17.

c *The Works of his Hands are Verity and Judgment.* Pſal. 111. 7.

d *Bleſſed be the Lord thy God, which delighted in thee, to ſet thee on his Throne, to be King for the Lord thy God: becauſe thy God loved* Iſrael, *to eſtabliſh them for ever, therefore made he thee King over them, to do Judgment and Juſtice.* 2 Chron. 9. 8.

Thus ſaith the Lord God, Let it ſuffice you, O Princes of Iſrael, *remove Violence and Spoil, and execute Judgment and Juſtice, take away your Exactions from my People, ſaith the Lord God.* Ezek. 45. 9.

See Deut. 1. 15, 16, 17.

e *If your Delight be then in Thrones and Scepters, O ye Kings of the People, honour Wiſdom, that ye may reign for evermore. ..... A wiſe King is the upholding of the People.* Wiſd. of Sol. 6. 21, 24.

Therefore made he thee King, to do Judgment and Juſtice. 1 Kings 10. 9.

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the two Parts is different from that of the other. As to the second Part of this Order, which is limited to every State in particular, the Exercise of Justice is in the hands of those who have the Government of it; and they have the Authority and Power necessary for enforcing a due Observance of the Laws, and for punishing those who transgress them. But as for the first Part, when one Nation violates the Law of Nations with respect to another, there is no common Power on Earth, which can interpose and do justice between them. And seeing it is from God alone that each Prince derives his Power, he alone is the common Lord and Master who reigns over all, and who may set himself up for their Judge; and this he does by the means of War, which he permits Princes to have recourse to, when the Injustices of others give occasion for it. And it is for this reason that he takes to himself the Name of the Lord of Hosts *f*; because he exercises his Justice between Princes by the Success he is pleased to give to Wars. So that Wars are as it were a Tribunal on which God himself sits as Judge *g*; and it is his Justice which Victory makes to triumph therein. And tho he often suffers, as has been remarked in another place, the righteous Party to be oppressed by Force of Arms, in the same manner as he permits likewise that Princes and their Officers do not always render Justice in their Dominions; yet still it is the Justice of God, inseparable from every thing which he wills, that reigns by the Events he is pleased to give to Arms. And even when he suffers the righteous Party to sink under Violence and under Injustice, he turns the Events of his Providence to the Support of his Justice. For this Justice of his not being confined, as that whereof he grants the Dispensation to Men, to the restraining of some Injustices, according as the Occasions do happen, but having its Extent to the universal Government of all that passes among Mankind; as God finds always in all Men just Occasions for chastising both Princes and People, without doing injustice to any body; so it is by the different Judgments of his infinite Wisdom, that he does not give to all just Wars a successful Event. And this very Justice of his, which suffers Injustice and Oppression to triumph, chastising by this Event the Princes and People who bear the Weight of the Victory of unjust Arms, reserves to a proper time the Punishment of those, who by these Victories of theirs have been only the Instruments of his Justice, and they shall feel in their turn the Weight of his Hand.

Since therefore it is the Justice of God which Princes exercise, when the Injustices of their Enemies oblige them to make War; since it is by Arms that this Justice is to be render'd, and that the Victory which God gives to the Courage and Forces of the victorious Party *h*, decides in favour of Justice, and makes it to triumph, in order to impose its Yoke on those whom God would have subjected to it; this Function gives to the Arms imployed for the War a Dignity of Justice; and of a Justice very different from that which Princes administer to their Subjects. For whereas the Justice which Princes render to their Subjects commands the Arms, and regulates the Use of them; and whereas they are only the Instrument of Justice, with which the Prince, and under him the Officers of Justice, arm the Ministers who execute their Orders; and so this Justice has of it self its Authority and Dignity, and it is from it that the Arms it puts into the hands of its Ministers derive their legal Authority; the Justice which is exercised by War, has no Dignity, no Authority but what it derives from the Force of Arms. So that whereas the Ministers, who are armed by Justice in a State, that they may make it to reign over the Subjects, are below the Dignity of those whose Orders they execute, because these have the Administration of this Justice, and give to those

f I come to thee in the Name of the Lord of Hosts. 1 Sam. 17. 45.

For the Battel is the Lord's. 1 Sam. 17. 47.

God himself is with us for our Captain. 2 Chron. 13. 12.

g For God breaketh the Battels; for amongst the Camps in the midst of the People he hath delivered me out of the hands of them that persecuted me. Assur *came out of the Mountains from the North, he came with ten thousands of his Army, the multitude whereof stopped the Torrents, and their Horsemen have covered the Hills. He bragged that he would burn up my Borders, and kill my young Men with the Sword, and dash the sucking Children against the Ground, and make mine Infants as a Prey, and my Virgins as a Spoil. But the Almighty Lord hath disappointed them by the Hand of a Woman.* Judith 16. 3, 4, 5, 6.

See 1 *Chron.* 11. 14 & 21.

h They determined not to pitch Camp, but couragiously to set upon them, and manfully to try the Matter by Conflict. 2 Maccab. 15. 17.

'See this Passage quoted entire hereafter in this 'Preamble.'

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Ministers the Use of Arms; in War it is the Prince himself who is armed by the Hand of God, and who with his own hand imploys the Force of Arms, even to expose his own Life upon occasion, that he may exercise that Justice, which God has reserved to himself to render to Princes. Thus the Dignity of this Justice is in the Arms themselves which are to render it; and herein consists the Glory of Arms. And tho all Princes cannot, and even ought not always to fight themselves, and command their Armies in Person, and are obliged to intrust the Command of them to Generals, and to commit the Direction of the Arms to other Persons; those who are raised to this Honour, exercise the divine Function of the Justice of God between Princes, and it is by their Arms that they are to render it, and to impose its Yoke on their Enemies.

Thus it is by their Hands that God dispenses his Justice, as he dispenses it by the Hands of the Prince, to whom he has given a Right to make War. So that the Use of Arms in just Wars, gives to Princes, and to those who command their Armies under them, this double Glory, of being armed by the Hand of God for the Support of Justice, and of being at the same time the Defenders and Protectors of the State, by preserving the Goods and the Lives of all the Subjects at the hazard of their own.

If we consider in the Person of the Prince the Use of Authority for dispensing Justice among his Subjects, and that of Arms for the War, according to the Views we may have of this Parallel from the Reflections just now made upon it; we shall find therein the Foundations of the Glory of Arms, and of the Equity of the Judgment that Usage has made upon it; which has been only the natural Sentiment of the Multitude, and the general Bent of Mankind, who were persuaded, that the Use of Arms in War had a Rank of Honour and of Dignity above that which the Administration of Justice within a State can give, whether they knew, or whether they were ignorant of the Principles of the Dignity both of the one and the other of these two Orders.

All that has been said hitherto of the Dignity which the Profession of Arms receives from the Divine Providence, which commits the Use of them to Princes, that they may make War, ought to be understood only according to the Relation which the Conduct of the Princes, who take up Arms, has to the said Divine Providence. For tho all the contending Parties propose to themselves to have God for their Judge, and that the People of the two different Parties give the same Honour to the Profession of Arms; yet the Princes who engage in unjust Wars, draw upon themselves, notwithstanding that Appearance of Glory in the eyes of Men, a terrible Vengeance for daring to set up God for a Protector of Violence, and for employing the Power he has entrusted to them, as an Instrument of their Passions. Thus there is nothing of greater importance in the Conduct of Princes, than the care of not proposing to themselves any other Glory, any other Good, than that of maintaining the Power and Dominion of Justice. So that, as it is by Justice they ought to exercise their Power over their Subjects, it is only in behalf of Justice that they imploy the use of Arms against their Enemies, and that they engage in no War, except for Causes which they may justly hope that God will undertake the Defence and Protection of, and where they may be able to join to all they may expect from their Forces and from their Courage, a Confidence in his Help, and Success to the Arms which he puts into their hands. It was with this View alone, that the Princes who were animated by the Spirit of God, undertook and carried on their Wars, they engaging in no War but for Causes worthy to have God for their Judge and Defender. *Take this holy Sword a Gift from God, with the which thou shalt wound the Adversaries. Thus being well comforted by the Words of* Judas, *which were very good, and able to stir them up to Valour, and to encourage the Hearts of the young Men, they determined not to pitch Camp, but courageously to set upon them, and manfully to try the Matter by Conflict, because the City, and the Sanctuary, and the Temple were in danger.* 2 Macc. 15. 16, 17.

Tho it may seem reasonable to gather from all these Reflections on the Parallel of Arms and of Justice, of the Gown and of the Sword, that the Order of Arms has the first Rank; yet no body will pretend to infer from thence, that all who are of the Profession of Arms, ought to take place of all those who belong to the Order of the Administration of Justice. And we do not make this Remark here, to prevent

vent a Doubt which can never enter into any one's Mind; but only to inform the Reader, that, as shall be said in this Section, it is necessary to distinguish between the Precedency of one Order before another, and that of the Persons of one Order before the Persons of another. For as there are in each Order divers Degrees of Honour, of Dignity, and Authority; the Effect of the Dignity of one Order above another is only that we ought to compare the Persons of the respective Orders, according to the Rank which every one may have in his own Order. So that he who occupies in his Order the same Rank which another holds in his, provided both the one and the other are equally advanced in their respective Orders; he who is of the Order which has the greatest Dignity, will take place of the other. Thus, when there was in *France* a Constable; as he had among the Sword-Men, or in the Order of Arms, the same Rank which the Chancellor has in the Order of Justice, he took place of the Chancellor. But as those of each Order are unequally situated, every one in his own Order, and that there is on one side and the other more or less in every Person of the Dignity of his Order; the Ranks are regulated by the Proportion of the Rank that every one has in his own Order, and by the Quality of his Functions, and the other Circumstances which may come under consideration for regulating between them the Precedency of the one before the other. So that many Persons of an Order less honourable, have much more Dignity than others who are of a superior Order, and of whom they take place. All these things make up a large Detail, which it is not our business to enter into here; where we intend to confine our selves to the general Principles of the Matter of Precedency, as has been remarked in the Preamble of this Title.

It follows from this last Remark, that in the Questions touching Rank and Precedency, it is necessary to distinguish two sorts of Ranks or Precedencies, that of the Orders, which sets one Order above the other; and that of the Persons, whether they be of one and the same Order, or of divers Orders, which places them differently either by the bare View of their Order, or by other Views. It is these two ways of considering Ranks and Precedencies, which shall be the subject Matter of this Section.

Altho, besides the Professions mentioned in the foregoing Sections, there be other Professions peculiar to Women, yet we have made no Distinction of them. For besides that these Professions are comprised under some of the kinds that have been distinguished, when any Question arises about the Condition, Profession, and Rank of married Women, it is the Condition and Rank of the Husband which ought to regulate that of the Wife; unless it be in the Case of Princesses who marry below their Quality. And as Wives follow the Condition of their Husbands *i*, so it is with Widows who follow the Condition of their last Husband *l*; and as to young Women who are not married, they are of the same Order and Rank to which their Fathers belong *m*.

i Mulieres honore maritorum erigimus, & genere nobilitamus. *l. ult. C. de incol.*

Quoniam uxores coruscant radiis maritorum, hoc lege dante. *Nov.* 105. *cap.* 2. *in pri.*

Fœminæ nuptæ clarissimis personis, clarissimarum personarum appellatione continentur. ——Tamdiu igitur clarissima fœmina erit, quamdiu senatori nupta est, vel clarissimo, aut separata ab eo, alii inferioris dignitatis non nupsit. *l.* 8. *ff. de Senat.*

Cum te non ex Senatore patre procreatam sed ob matrimonium cum Senatore contractum, clarissimæ fœminæ nomen adeptam dices: claritas, quæ beneficio mariti tibi parata est, si secundi ordinis virum postea sortita es, redacta ad prioris dignitatis statum deposita est. *l.* 10. *C. de nupt.*

l Si autem minoris ordinis virum postea sortitæ fuerint, priore dignitate privatæ posterioris mariti sequentur conditionem. *d. l. in f.*

Non tamen permittimus mulieribus ad secundas venientibus nuptias, adhuc velle priorum maritorum dignitatibus aut privilegiis uti: sed ad quale post priorem venerint matrimonium, illius amplectantur fortunam; quæ enim priorum oblita est, non rursus ex prioribus adjuvabitur. *Nov.* 22. *cap.* 36.

m Clarissimarum fœminarum nomine, Senatorum filiæ, nisi quæ viros clarissimos sortitæ sunt, non habentur, fœminis dignitatem clarissimam mariti tribuunt, parentes vero donec plebeii nuptiis fuerint copulatæ. *l.* 8. *ff. de Senator.*

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8. *Sixth Order, the Profeſſion of Merchandize.*
9. *Seventh Order, of Trades and Handicrafts.*
10. *Eighth and laſt Order, Husbandry and the Care of Cattle.*
11. *Divers kinds of Conditions and Profeſſions under every one of theſe Orders.*
12. *The Character which diſtinguiſhes the Order of the Clergy.*
13. *Character of the firſt Lay Order, the Profeſſion of Arms.*
14. *Character of the ſecond Lay Order, the Prince's Privy Council.*
15. *Character of the third, the Adminiſtration of Juſtice.*
16. *Character of the fourth, the Revenue.*
17. *Character of the fifth, Profeſſion of Sciences and Liberal Arts.*
18. *Character of the fixth, of Merchandize.*
19. *Character of the ſeventh, of Trades and Handicrafts.*
20. *Character of the laſt Order, Husbandry and the Care of Cattle.*
21. *Ranks of Perſons are not all regulated according to the Ranks of the Orders.*
22. *Caſes where the Ranks of the Orders, or Claſſes, regulate thoſe of the Perſons.*
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25. *Diſtinction between the Uſe of the preceding Rules and that of the following.*
26. *Will of the Prince regulates the Precedency between Perſons of the ſame Order or Claſs.*
27. *The Ranks in one and the ſame Order or Claſs, diſtinguiſhed by the Differences of the Functions of every Perſon.*
28. *Among Equals of the ſame Claſs, their Rank is regulated by the Order of their Reception.*
29. *Perſonal Qualities make no Alteration in the Rule which ſettles Precedency according to the time of Admiſſion.*
30. *Why mention is made here of Rank and Precedency in relation to Municipal Offices.*
31. *Remark on the Rule, for deciding of Ranks by perſonal Qualities.*
32. *Two ſorts of Qualities neceſſary to be diſtinguiſhed.*
33. *Preference on account of the Difference of Conditions.*
34. *Preference becauſe of Age.*
35. *Preference for having ſerved in other Offices.*
36. *Preference, becauſe of the number of Children.*
37. *On account of greater Riches.*
38. *On account of the greateſt number of Voices in Elections.*
39. *Preference of a Scholar to an illiterate Perſon.*
40. *Preference on account of Birth.*
41. *Caſes where regard ſhould be had to the Parts and Vertue of the Perſons.*
42. *Preference according to the Uſage of Places.*
43. *The Regard which ought to be had to the ſeveral Combinations of Perſonal Qualities.*
44. *Precedency with regard to the Clergy.*
45. *Two Caſes where it is neceſſary to ſettle the Ranks of Clergymen.*
46. *The Rule of the Rank of Clergymen among themſelves.*
47. *Two Caſes of the Rank between Clergymen and Laymen.*
48. *All Clergymen take place of Laymen in the Caſes relating to their ſpiritual Functions.*
49. *Caſes where Clergymen and Laymen meet together in the ſame Body.*
50. *Caſes where Clergymen and Laymen have Precedency differently, according to their Qualities.*

I.

1. It is neceſſary to examine the Ranks of the Orders before thoſe of the Perſons.

Before we explain the Rules of Rank and Precedency among Perſons, whether they be of the ſame or of different Orders, it is neceſſary to conſider firſt the Ranks of the Orders among themſelves. For tho it often happens that ſome of an inferior Order take place of others who are of a higher Order, as has been ſaid in the Preamble; yet that is upon particular Conſiderations which ſhall be explained hereafter, and do not hinder but that in the Caſes where Perſons are diſtinguiſhed barely and preciſely by their Orders, thoſe of the moſt honourable Order precede thoſe of the leſs honourable. So that it is neceſſary to begin with the Ranks of the Orders: and as in the foregoing Section we have diſtinguiſhed the different kinds of Profeſſions, according to their Uſes for the Wants and Neceſſities of the Society, and have given to all thoſe different Wants, the Order which ſeemed to be moſt natural; ſo we ſhall purſue the ſame Method, as to the Ranks of the Orders *a*.

'*a* The firſt view in relation to the Ranks of 'Perſons is that of the Rank of their Orders, 'which regulates that of their Perſons, if there be 'no other reaſon of Diſtinction.'

See the 22d and following Articles.

II.

II.

2. The first Order is that of the Clergy.

Of all the Orders, the first in Honour, Dignity, and Necessity, is the Order of Ecclesiasticks, who are Ministers of Jesus Christ, Dispensers of the Mysteries of Religion, and who receive from him the Holy Ghost, for the Edification and Government of his Church. It is this Importance, and this Elevation of so august a Ministry, that gives to this Order preferably before all others, employed only about Temporal Concerns, a distinguished Rank, in proportion to their Differences. It is this Order which we call the Clergy; and tho all who belong to this Body, are not advanced to the sacred Ministry of those primary Functions, yet all the Functions which the several Orders of the Clergy exercise, having a relation to the Government of the Church, the Order of the Clergy hath its Dignity preferably to all other Orders whatsoever *b*.

b The Order of the Clergy is called the first Order of the Kingdom, in the Edict of the Month of April, 1695. *concerning the Ecclesiastical Jurisdiction.*

And thou shalt come unto the Priests the *Levites*, and unto the Judge that shall be in those Days, and enquire; and they shall shew thee the Sentence of Judgment. And thou shalt do according to the Sentence which they of that Place (which the Lord shall chuse) shall shew thee, and thou shalt observe to do according to all that they inform thee. *Deut.* 17. 9, 10.

III.

3. The first of the Lay Orders is that of the Profession of Arms.

Of all the Lay Orders, the first is that of the Profession of Arms, in the Exercise of which consists the Glory of the Prince, and which makes a Body whereof the Sovereign is the Head, and which hath for its Members the Princes of the Blood, the Officers of the Crown who are Sword-Men, the Governours of Provinces, and all the most illustrious Persons whose Birth and Qualities give them their Rank in this Order *c*.

c See the Preamble of this Section, and Sect. 2. Art. 3.

See the Remark on the following Article.

IV.

4. The second Order, the Council of the Prince.

The second Order of Laymen is that of the Ministers and other Persons whom the Prince honours with a Place in his Privy Council, where are debated the Affairs of State, those relating to the Order of the Government, and other Matters, which the Interest of the Church and the publick Good may occasion to be brought before them. And tho there may be in this Order Ecclesiasticks and Persons belonging to the Profession of Arms, Princes of the Blood and others; yet the Nature and Functions of this Order, not having the Character of Ecclesiastical Functions, nor of the Functions belonging to the Profession of Arms, it ought to be ranked among the Lay Orders, and in the next place to that of the Sword *d*.

d See Sect. 2. Art. 4.

¶ We must distinguish the Council mentioned in this Article, from that wherein are decided the Law-Suits between contending Parties, of which we shall speak in the following Article.

It is to be remarked on this Article, that tho it be true that the Prince is not only the Head in his Council, but that he alone, without the concurrence of his Counsellors, may make Orders and Decrees therein, except it be in the States where the Prince is obliged to conform himself to the Deliberations of his Council; yet we have not said in the Article, that the Council of the Prince makes a Body of which he is the Head, as has been said in the foregoing Article, that he is the Head of the Body which is composed of Persons whom their Birth and other Qualities engage to serve him in the Army. For there is this difference between this Body and that composed of the Prince's Council, that the Prince himself is not a Member of his Council, whereas he is armed with a Sword; and it is for this reason that in the foregoing Article we have assigned the first Rank to the Profession of Arms, because the Prince himself uses them, and the Princes of the Royal Blood take it as an honour to wear them, for the Service of the Prince, and under his Command. Thus of what Quality soever the Persons may be who are of the Prince's Council, there is no wrong done them by placing before their Order another wherein the Prince himself and Persons of so august and elevated Rank are comprehended.

See the Preamble of this Section.

V.

5. Third Order, of the Administration of Justice.

The third of these Orders is that of the Persons who exercise the Functions of the Administration of Justice, whether it be in the King's Council for Affairs which are cognizable there, or in that which is termed in *France* the Council for deciding Law-Suits between Parties, or in the several Courts of Justice, which it is not our business to

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enumerate here. This Order comprehends also the Officers who are sole Judges in Matters belonging to their Cognizance, and likewise the other Persons, who without being Judges, exercise the Functions necessary in the Administration of Justice, such as Advocates, Proctors, Registers, and others *e*. And seeing the Administration of Justice implies the Ministry of the Civil Policy, which is a part thereof, and that the greater part of the Officers of Justice, and the chief among them, exercise many Functions of the Civil Policy; and that also all others who have any Direction in the Civil Policy, have likewise Functions of administring Justice which the Civil Policy renders necessary; we ought not to separate the Civil Policy from Justice, and they may be both comprehended under one and the same Order, seeing their Functions are united to the greatest part of Offices, and to those in the first Rank of Justice, and are exercised by the same Persons *f*.

e See Sect. 2. Art. 5.

f See Sect. 2. Art. 6.

'The Reader ought not to be surprized that we 'have ranked in one and the same Order the Privy Council, the chief Courts of Judicature, the 'other inferior Judges, and also those who exercise 'other Functions besides those of a Judge, and 'which are necessary in the Order of the Administration of Justice. For it is certain that all the 'Functions of these several sorts of Officers, and 'other Persons, are of the same Order which relates to this Administration. And the great Difference there is between those who are the first of 'this Order, and those who have the last Rank 'in it, does not hinder them from being all in the 'same Order, when this Word is taken in the 'Sense it ought to have here, for the general Distinction of Conditions; no more than the Difference that is between a common Soldier and a 'Prince of the Blood, or a Mareschal of *France*, 'hinders the common Soldier from being of the 'Order of those who wear the Sword.'

VI.

6. Fourth Order, the Profession belonging to the Revenue.

We may put down in the fourth Rank the Order of Officers and others whose Professions and Imployments are about the Revenue, who have the Management and Direction of it, those who settle and adjust the Assessments in the Publick Taxes, those who collect them, and in general all who exercise any Functions, which have relation to the Management and good Order of the Publick Revenue *g*.

g See the Title of the Revenue.

¶ There are Officers who have an Administration of Justice, and who by reason of that Function may be placed in the Order which has been spoke of in the foregoing Article; such as the Officers of the Chamber of Accounts, whose Functions relate to Matters of Accounts, and who have other Functions of a different nature, and of much greater importance; the Officers of the Court of Aids, who render Justice to Parties who have Law-Suits with one another, not only in Matters belonging to the Revenue, but in all other Matters of what kind soever they be, when they come in as Incidents to the Matters of the Revenue, and likewise determine Claims to the Title of Nobility, when the same is contested, to those who pretend on that score an Exemption from the Taxes; the Treasurers of *France*, who besides their Functions in and about the Revenue, have the Direction of the Policy relating to the Highways, which is allotted to them by the Ordinances, for visiting and repairing the Highways, Causeys, Bridges, Pavements, Sea-Ports and Passages of the Kingdom. But altho all the said Officers, and others, such as those belonging to the Elections or Districts of the Kingdom, exercise Functions of Justice; yet they are properly speaking Officers belonging to the Revenue; and the Ordinances give that Quality to the Chambers of Accounts, and to the Treasurers of *France a*, and the Courts of Aids have it even by their Name.

a See the Ordinance of the Month of *August* 1598. Art. 2.

VII.

7. Fifth Order, the Profession of Sciences and Liberal Arts.

After these several sorts of Officers, the fifth Order of Professions, according to that of the Wants and Necessities of the Society, is the Order of Persons who profess the Sciences and Liberal Arts that are taught in the Universities and Schools *h*. Which is to be understood of the Professors of the Canon Law, of the Civil Law, of Physick, and of such sorts of Liberal Arts. For as to the Professors of Divinity, they belong to the Order of Ecclesiasticks; which makes the Universities mixed Bodies, composed of Churchmen and Laymen, as has been observed in another place *i*. It is under this Order that we ought to include those who having taken Degrees in the Faculty of Physick in an University, make Profession of practising it.

h See Sect. 2. Art. 8.

i See Tit. 17. of Universities, Sect. 1. Art. 1.

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VIII.

8. Sixth Order, the Profession of Merchandize.

Pursuant to the same Order, of the Wants of the Society, the Profession of Merchandize makes a sixth Order, which consists of the Persons who exercise the several Commerces necessary in a State; whether they be carried on only between Subjects of one and the same Prince, and be things which are the Growth and Manufacture of his Dominions, or be carried on with Strangers, for things which do not grow, or at least do not sufficiently abound, in the Territories of that Prince *l*.

l See Sect. 2. Art. 9.

IX.

9. Seventh Order, of Trades and Handicrafts.

The Use of Trades and Handicrafts makes a seventh Order of Professions, which are necessary to prepare and fit for use to the several Wants of the Publick, all the several Matters which the said Wants may demand *m*.

m See Sect. 2. Art. 9.

' It is by the help of Trades and Handicrafts ' that we apply to use all things that are either ne' cessary, useful, or convenient for all sorts of Wants. See *Heb.* 3. 4. 1 *Thess.* 4. 11.

Moreover there are Workmen with thee in abundance; Hewers and Workers of Stone and Timber, and all manner of cunning Men, for every manner of Work: Of the Gold, the Silver, and the Brass, and the Iron, there is no number. 1 Chron. 22. 15, 16.

For he, peradventure willing to please one in Authority, forced all his Skill to make the resemblance of the best Fashion. Wisdom of Solomon 14. 19.

X.

10. Eighth and last Order, Husbandry and the Care of Cattle.

The last Order of Professions, tho the first in necessity for the Life of Man, is that of Persons employ'd in Husbandry, and looking after Cattle *n*. These are likewise the most natural Professions, and which for this reason were in the first times the Employment of Persons even of the first Rank, among those whom God called to his Knowledge and Worship *o*: and it was Husbandry that was to be the Labour and Work of Man, even before his Fall; and seeing as a Punishment for his Fall, God has enjoined him a painful and laborious Life, to earn his Bread with the Sweat of his Brow, no body fulfils this divine Order in the literal Sense, more than Shepherds and Labourers *p*: but as this Calling is very laborious, and imploys the greatest part of Mankind, and removes them more than any other Profession from the Use of Rank and Precedency, we have therefore placed those who follow this Imployment in the last Rank.

n See Sect. 2. Art. 11.

o And Noah *began to be an Husbandman.* Gen. 9. 20.

And Jacob *said, I will again feed and keep thy Flock.* Gen. 30. 31.

Thy Servants Trade hath been about Cattle from our Youth even until now, both we and also our Father. Gen. 46. 34. ch. 47. 3.

Moses *kept the Flock of* Jethro *his Father-in-Law.* Exod. 3. 1.

But David *went and returned from* Saul, *to feed his Father's Sheep at* Bethlehem. 1 Sam. 17. 15.

And David *said unto* Saul, *Thy Servant kept his Father's Sheep, and there came a Lion and a Bear, and took a Lamb out of the Flock; and I went out after him, and smote him, and delivered it out of his Mouth.* 1 Sam. 17. 34, 35.

' It is remarkable in relation to this Subject, that ' after *Saul* had been chosen King of *Israel*, he ' conducted the Cattle home out of the Field.

And behold, Saul *came after the Herd out of the Field.* 1 Sam. 11. 5.

p In the Sweat of thy Face shalt thou eat Bread, till thou return unto the Ground; for out of it wast thou taken. Gen. 3. 19.

In Sorrow shalt thou eat of it all the Days of thy Life. Gen. 3. 17.

Therefore the Lord God sent him forth from the Garden of Eden to till the Ground, from whence he was taken. Gen. 3. 23.

See the Treatise of Laws, chap. 2. numb. 2. and the Preamble of Tit. 15.

XI.

11. Divers kinds of Conditions and Professions under every one of these Orders.

These different Orders, just now explained, are so many general Kinds, which comprise all the several Conditions and Professions; for there is not any one of them but what belongs to some one of the said Orders. But all the Orders have this in common, that there are in every one of them other Kinds less general, which distinguish the Persons of each Order as it were into divers Classes, which have different Ranks among themselves, as will appear by the following Articles. And tho the Differences of the said Classes be such, that they make several kinds of Conditions and Professions; yet seeing all the Conditions and Professions which are of one and the same Order, tho in different Classes, have a common Character belonging to them which ranges them under the Order distinguished by the said Character, it was not proper to make as many Orders as there are Classes; but to reduce all the Conditions and Professions to the least number of general Kinds possible *q*, observing between these kinds of Distinctions, that they be such, as that one may perceive in every one of them a Character which may agree to the several Classes comprized under it. And as

' *q* It is agreeable to Method and Order to be' gin with the most general Distinctions.

' See in the Articles which follow what are the ' Characters that distinguish the Orders, and are ' common to the several Classes of every one.

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as for the Detail of these Classes which it would be too tedious to enumerate at length, and which could not well be done without Confusion, it will be sufficient to give, in these following Articles, general Ideas, and some Examples which may make it easy to find out what any one desires to know of all this Detail.

XII.

12. The Character which distinguishes the Order of the Clergy.

In the first Order, which is that of the Clergy, the Character common to all who are of this Order, is their Destination to some Ecclesiastical Ministry or Function *r*. But under this Character it is necessary to distinguish, as it were into several Classes, the Bishops, Priests, and others in holy Orders, the Canons of Cathedral and Collegiate Churches, and others belonging to this Order, as shall be explained in the following Title.

r See the Preamble of the following Title.

XIII.

13. Character of the first Lay Order, the Profession of Arms.

In the second Order, to wit, that of the Profession of Arms, which is the first among the Lay Orders, the Character common to all the Persons of this Order, is their Engagement to serve in the Wars. But under this Character we must distinguish the Generals of an Army, the Mareschals of *France*, the Colonels, Captains, and other Officers, the Soldiers, and also the Persons whose Qualities engage them to this Service, as will appear in the 11th Title *s*.

s See Tit. 4. and Tit. 11.

XIV.

14. Character of the second Lay Order, the Prince's Privy Council.

In the second of the Lay Orders, under which are comprehended the Persons who compose the Privy Council of the Prince, the Character common to all who are of this Order is to have some of the Functions, which relate to the Order of Government, and to the common Good of the Church, and of the State. But seeing these Functions are different, it is necessary to distinguish under this Character the Ministers of State, the Secretaries of State, and others to whom the Prince distributes these Functions, either by the Title of Offices, or under other Titles *t*.

t See Art. 4. See 2 *Chron.* ch. 10, 11.

XV.

15. Character of the third, the Administration of Justice.

In the third Order, in which are the Persons who exercise the Functions of the Administration of Justice, the Character common to them, is that of being employed in some one of the said Functions; but it is necessary to distinguish in this Order Persons of Qualities very different, according to the Qualities of these Functions. For the first of this Order is the Chancellor, who is the Head of it, and of all the Courts of Judicature, whose Rank distinguishes him in a singular manner by his Elevation above all others of the same Order: and next to him come the Officers who are Members of the Council which has the Decision of Appeals from inferiour Courts of Justice; the Judges of the several Courts of Justice, both superior and inferior, the Stewards and other Officers belonging to Courts of the Royal Jurisdiction, those belonging to the Courts of Lords of Mannors, and others. And the same Character agrees likewise with Registers and other Officers who exercise Functions which have a relation to this Administration; which is the reason why they are comprehended under this Order: and the same reason holds for taking in likewise Advocates and Proctors *u*.

u See Art. 5. and the Remark there made on it.

XVI.

16. Character of the fourth, the Revenue.

In the fourth Order, of Persons who by their Offices or Imployments exercise Functions relating to the Revenue, the Character common to them, is their Engagement in these Functions; but it is necessary to distinguish in this Order Imployments that are widely different from one another. For it comprehends by this Character the chief Officers who have the Direction of the Revenue, the general and particular Receivers, and all others, even those who exercise the lowest of these Functions. And we may likewise take in under this Order other Officers, who, as has been remarked on Art. 6. may be placed in this Order *x*.

x And over the King's Treasures was Azmaveth *the Son of* Adiel; *and over the Storehouses in the Fields, in the Cities, and in the Villages, and in the Castles was* Jehonathan *the Son of* Uzziah. 1 Chron. 27. 25.
See Tit. 5. as also Art. 6. of this Section.

XVII.

17. Character of the fifth, Profession of Sciences and Liberal Arts.

In the fifth Order, of Persons who make Profession of Sciences and Liberal Arts, of which mention has been made in Art. 7. the Character common to them is the Study, the Knowledge, and publick Profession of some one of these Sciences or Liberal Arts. But we must distinguish in this Order those who profess the Civil and Canon Law, those who profess Physick, those who practise it, and

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and those who teach and profess the Liberal Arts *y*.

y See Tit. 17. Art. 7.

XVIII.

18. Character of the sixth, of Merchandize.

In the sixth Order, of Persons who exercise some Commerce, the Character common to them, is to lay up Stores, either by buying, by trucking, or otherwise, of Wares and Merchandize, in order to sell them; but it is necessary to distinguish in this Order different sorts of Merchants. Thus, the Merchants who trade into Foreign Countries are different from those who drive a Trade only within the Kingdom of which they are Subjects. Thus Wholesale Merchants differ from those who sell by Retail. Thus, we must distinguish under another View, the different Companies of Merchants by the different kinds of Merchandize in which they deal, Booksellers, Drapers, Grocers, Corn-Merchants, Wine-Merchants, Graziers, Woodmongers, and those of all the other kinds, of whom we may be able to judge by the few that have been reckoned up here *z*; without pretending, that the Order in which they are here named should be of any consequence for determining their Precedency, which may be different in divers Places *a*.

z See Tit. 13. Art. 8.

a See Art. 42. of this Section.

'The Rank or Precedency of Companies of 'Merchants, may be different in divers Places, 'according to the time of their Establishment, or 'by other Views.

XIX.

19. Character of the seventh, of Trades and Handicrafts.

In the seventh Order, which is that of Persons who exercise the different sorts of Trades and Handicrafts for the several Uses both of particular Persons and of the Publick, the Character common to them, is the Knowledge of the Rules of the Trade or Handicraft they profess, and the Industry and Experience necessary for practising them. But we must distinguish in this Order an infinite number of different Trades and Arts for several Uses. Thus, Pharmacy and Surgery are Arts that are exercised on the human Body, for the Cure of Diseases, of Wounds, and other Distempers. Thus, Printing is used, to give to the Publick the Use of Books of all sorts, and of other Things of which it is necessary to have a great many Copies, or to render them more authentick, or more commodious, by printing them. Thus Architecture and the Carpenter's Art are necessary for Buildings: and the infinite multitude of the other different Wants makes the Use of several other sorts of Arts necessary, as Taylors, Hatters, Shoemakers, Joiners, Locksmiths, Bakers and others; which distinguishes them, and according to their Uses, makes them more or less necessary, more or less useful, more or less reputable *b*.

b And Hiram *King of* Tyre *sent Messengers to* David, *and Cedar-Trees, and Carpenters, and Masons; and they built* David *a House.* 2 Sam. 5. 11.

And he made Staves of Shittim *Wood, and overlaid them with Gold.* Exod. 37. 4.

And they wrought Onyx Stones inclosed in Ouches of Gold, graven as Signets are graven, with the Names of the Children of Israel. Exod. 39. 6.

And he hath filled him with the Spirit of God, in Wisdom, in Understanding, and in Knowledge, and in all manner of Workmanship: And to devise curious Works, to work in Gold, and in Silver, and in Brass; and in the cutting of Stones to set them, and in carving of Wood to make any manner of cunning Work. Exod. 35. 31, 32, 33.

And it was covered with Cedar above upon the Beams, that lay on forty five Pillars, fifteen in a row. 1 Kings 7. 3.

Moreover, there are Workmen with thee in abundance, Hewers, and Workers of Stone and Timber, and all manner of cunning Men for every manner of Work. Of the Gold, the Silver, and the Brass, and the Iron there is no Number. 1 Chron. 22. 15, 16.

Send me now therefore a Man, cunning to work in Gold, and in Silver, and in Brass, and in Iron, and in Purple, and Crimson, and Blue, and that can skill to grave with the cunning Men that are with me in Judah *and in* Jerusalem, *whom* David *my Father did provide.* 2 Chron. 2. 7.

See the same Chapter, *ver.* 3, 4. See *Exod.* 36. and 38. *ver.* 21.

And in the uppermost Basket there was of all manner of Bake-meats for Pharaoh. Gen. 40. 17.

See Art. 9. Tit. 13.

XX.

20. Character of the last Order, Husbandry and the Care of Cattle.

In the last Order, of Husbandry, and the Care of Cattle, the Character common to them, is the Relation which their Functions have to the Tillage of the Ground. But it is necessary to distinguish in this Order Gardeners, Ploughmen, Vine-Dressers, Shepherds, and others; and among all those we must distinguish between such as work for themselves, whether in their own Lands, or in those of others, and hired Labourers who spend their time, and get their Livelihood by working for others *c*.

c See Art. 10. of this Section, the 14th Title, and the Texts cited on the Preamble of this Title.

See 1 *Chron.* 27. ver. 26, &c.

He digged many Wells, for he had much Cattle, both in the Low-Country, and in the Plains; Husbandmen also and Vine-Dressers in the Mountains, and in Carmel, *for he loved Husbandry.* 2 Chron. 26. 10.

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XXI.

21. Ranks of Persons are not all regulated according to the Ranks of the Order.

It apppears by these Distinctions of different Orders, and by the different Classes which each Order contains, that the Ranks of the Classes are not all regulated by the Ranks of the Order; seeing in many Orders there are Classes which have a Rank above others, who are of a much higher Order. Thus, the Rank of the first Officers who have the Direction of the Revenue, is above the Rank of many of the Officers of Justice. But the Effect of the Distinction of Orders, as to what relates to Rank and Precedency, is that the chief Persons of an Order, superior to another Order, have their Rank above those that are the first of the inferior Order. Thus, the first Officers of Justice have their Rank before the first Officers of the Revenue; and it is the same thing between the several Classes of one and the same Order. But as we descend from the first of every Order, or of every Class, to those who are inferior, the Ranks are not regulated between Persons of divers Orders, or of divers Classes, by the exact Consideration of the Rank of their Orders, or of their Classes, as has been remarked in the Preamble of this Title; but we ought to join to that Consideration that of the Honour, of the Dignity, and of the other Characters of the Functions of each Person, and weigh in the Ballance the Advantages on one side and the other, in order to regulate their Ranks by these Views *d*.

d See the Preamble of this Title.

XXII.

22. Cases where the Ranks of the Orders, or Classes, regulate those of the Persons.

It follows from the Rule explained in the preceding Article, that when there is any Contest about Rank and Precedency, between Persons of divers Orders, or of divers Classes in one and the same Order; it is necessary to begin by comparing the Order or Class of every one, with the Order or Class of the other, and to consider in each Order and in each Class what it has in it of Honour, of Dignity, of Authority, Necessity or Usefulness; and more especially what may make in it a Distinction of Honour. For as has been said in Sect. 1. Art. 11. there is even in the Profession of Merchandize, and that of Trades, a kind of Honour which places some of them above the others. And it is by this first View of the Ranks of Conditions and Professions that we ought to regulate that of Persons. So that if between those whose Ranks are to be adjusted, there were no other Distinction besides that of the Ranks of their Orders, or of their Classes, he who should be found in an Order, or in a Class, whereof the Rank ought to precede the other, would have the Precedency. Thus between Persons of the first Orders, and of the last, to wit that of Husbandry, those who are in the very last Degree of any of the other Orders will take place of those who are in the first Degree of this last Order. Thus in the Order of the Administration of Justice, a Counsellor of a Presidial Court in *France* will take place of a Counsellor of a Court belonging to a Bailywick, or Seneschal's Jurisdiction which has no Presidial Court, by the bare Distinction of the Ranks of their Classes *e*.

e This is a Consequence of the preceding Articles.

XXIII.

23. Cases where the Ranks of the Persons are not so regulated.

If in two Orders, or two Classes of one and the same Order, there be Persons, who by the Differences of their Functions, and other Advantages that every one has in his way, are distinguished; so that the Rank between them ought not to be regulated by that of their Order or Class; we ought to judge of it by a comparison of the Rank of every one in his own Order or Class, and by the Differences of their Functions, and of their other Advantages: For they may be such in the Person of him who is in the inferior Order, or in the lowest Class, that he ought to have the Precedency above him who has his Rank in the superior Order, or Class. Thus, for example, as touching the Orders, if we compare a Receiver of the Taxes, who is in the Order of the Revenue, to a Register, who belongs to the Order of the Administration of Justice in a Presidial Court, the Advantages of the Office and Functions of a Receiver, and his Rank in his Order, will give him the Precedency before Registers. Thus, for Classes of one and the same Order, if in that of the Profession of Arms, and in the Classes of Cavalry and Infantry, we compare a Captain of Infantry to a Trooper; the Captain will take place of him by the Quality of his Function, and by the Advantage of his Rank in his Class, above that which the Trooper ought to have in his Class *f*.

f This is also a Consequence of the foregoing Articles.

XXIV.

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XXIV.

24. *The Will of the Prince regulates the Rank between Persons of different Orders or Classes.*

We must add for another Rule of Rank and Precedency, the Will of the Prince, who may determine the Matter, either when he erects new Offices, or on other Occasions when he settles the Ranks of Persons. Thus many enjoy their Ranks by virtue of the Regulation which the Prince himself has made; and it is always this Will of the Prince, which is the primary Rule in this Matter, in the Cases where he has settled the Precedency. For as it is in him that the supreme Dignity resides, that he is vested with the Sovereign Authority, and with the Right to regulate every thing relating to the Publick Order; that of the Rank and Precedency of Persons cannot have any Rules more natural than those which he prescribes *g*.

g In albo decurionum in municipio, nomina ante scribi oportet eorum, qui dignitates, Principis judicio, consecuti sunt. *l.* 2. *ff. de albo scribendo.*

'The Prince has two Titles which give him 'this Right; one, as having in his Person the 'Sovereign Dignity and Authority, together with 'the Right of dispensing them to whomsoever he 'pleases; and the other is his Right to give a final 'Decision to every thing without Appeal.

XXV.

25. *Distinction between the Use of the preceding Rules and that of the following.*

One may see by the Rules explained in the four preceding Articles, that they contain the general Principles of this Matter of the Rank and Precedency between Persons of different Orders, or of different Classes in one and the same Order. And without entring into the detail of the several Combinations, which diversify these Precedencies according to the Differences of the particular Advantages peculiar to the Persons; the Rules we have just now explained, and these few Instances, will be sufficient for making an application of them to all the Questions of this nature. But since these Rules relate only to the Precedency between Persons of different Orders, or of distinct Classes, and that there arise also frequent Questions concerning Precedency between Persons of the same Order, or of the same Class; it remains that we should explain the Principles and Rules which ought to serve for deciding them; and this shall be the subject Matter of the Articles which follow *h*.

h This Article results from the preceding Articles.

XXVI.

26. *Will of the Prince regulates the Precedency between Persons of the same Order or Class.*

As it has been already remarked, that in Disputes touching the Rank and Precedency between Persons of distinct Orders, or different Classes, the Will of the Sovereign is the primary Rule; so it is likewise, for the same Reasons, the first and chief Rule in Cases of Precedency between Persons of the same Order, or of the same Class *i*.

i See Art. 24.

XXVII.

27. *The Ranks in one and the same Order, or Class, distinguished by the Differences of the Functions of every Person.*

As the Characters of Honour, Dignity, Authority, Necessity, and of Usefulness, distinguish Conditions and Professions of Men, and that it is by these Characters we assign to every one of them a Rank among the whole, which is proportioned to the Share which the said Condition or Profession has of these Characters to distinguish it from what the other Conditions and Professions have of them; so it is likewise by the Differences of what those who are of the same Order, or the same Class, may have more or less of the said Characters, that we ought to regulate their Ranks among them. And it is by this Rule, next to that of the Will of the Prince, that we should judge of their Precedency. Thus, for example, among Persons belonging to the Order of the Administration of Justice, seeing the Dignity and Authority of the Chancellor are much greater than the Authority and Dignity of all the Heads or Chiefs in the several Classes of the same Order, he holds the first Rank, distinguished in proportion to the Grandure and Extent of his Ministry. Thus, in the same Order, the Officers of the Parliaments in *France* have their Rank before the Officers of the inferior Courts of Justice. Thus among Persons of the same Class in the same Order, the Presidents of a Court of Justice, having more Dignity and Authority than the Judges, they have the first Rank; and in the other Courts of Justice, where there are Officers distinguished by other Names of Dignity, such as in Bailywicks and Seneschals Jurisdictions, the Lieutenants General, the Lieutenants Criminal, the particular Lieutenants, the Assessors and others who are called Chiefs, have their Rank above the Judges of the same Courts.

l See Art. 22.

XXVIII.

28. *Among Equals of the same Class, their Rank is regulated by the*

If in one and the same Class there be Persons not distinguished by their Functions, such as the Judges of the same Court of Justice, the Advocates of the same Parliament, or other Jurisdictions, the Proctors, Notaries, and other

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Order of their Reception.

ther Officers of the like kind, their Ranks are regulated by the Order of their Admission. For there being no other Causes of Distinction between them, it is just that they who enter into those Bodies and Societies, should not alter the Ranks of those whom they find in them; and that therefore those admitted in the last Place, should have the last Rank: otherwise it would be necessary that at the admission of every new Member, it be determined what his Rank should be with respect to every one of those admitted before him, and that all whom he were take place of, should lose their Rank *m*.

m Decuriones in albo ita scriptos esse oportet, ut lege municipali praecipitur. Sed si lex cessat, tunc dignitates erunt spectandae ut scribantur eo ordine quo quisque eorum maximo honore in municipio functus est, puta qui duumviratum gesserunt, si hic honor praecellat & inter duumvirales antiquissimus quisque prioris: deinde hi qui secundo post duumviratum honore in republica functi sunt, post eos qui tertio & deinceps: mox hi qui nullo honore functi sunt, prout quisque eorum in ordinem venit. *l. 1. ff. de albo scrib.*

See upon this Law Art. 35. of the same Sect.

XXIX.

29. Personal Qualities make no Alteration in the Rule that settles Precedency according to the time of Admission.

The Rule explained in the preceding Article respects only the Cases where those who are of one and the same Class, and have the same Functions, are admitted therein successively one after another, and at different times. For in that case, it is by the Dates of their Admission, that their Rank is regulated, without any regard to their former Condition, and the other Qualities which may distinguish them; as if one of them were older than the others; if he had exercised some Office, when the others never had been in any; if he were a Gentleman, or of a nobler Extraction than the others. For no regard is had to these Qualities, and others which shall be mentioned hereafter, except when the Question is about the Rank and Precedency between Persons admitted at the same time into some Society, where the Functions, the Honour, the Dignity and Authority of all ought to be the same; as if the Question were about settling the Rank between Persons called by one and the same Nomination to the Offices of Sheriffs, Consuls, Aldermen, Assessors, or others. For in that case it would be necessary to settle their Rank according to the Difference in their Conditions, and their other personal Qualities; as shall be explained in the Sequel of this Section *n*.

n See in relation to Municipal Offices the following Article.

¶ We must observe on this Article, in relation to Municipal Offices, such as Sheriffs, Consuls, Aldermen, that there are some Places where the said Offices are annual, and where a new Nomination is made every Year of Persons to fill them; and that in others the Aldermen serve longer than one Year, and that every Year they name only so many new ones as to supply the Vacancies of those who go out of the Office. But both in the one and the other of these two Usages, some of the said Officers may be continued; and in these two last Cases where there is only a Nomination of some part of them, or a Continuation of some of the old Officers, the Usages with respect to their Ranks between them are different. For in some Places the old ones take place of those who are newly named, without regard to the Differences of their Qualities; and in other Places the new ones may take place of the old ones, if their Qualities give them a Rank above the others. Thus a Judge of a Court of Justice will take place of an Advocate, or of a Merchant who had been named to the said Municipal Office before him.

XXX.

30. Why mention is made here of Rank and Precedency in relation to Municipal Offices.

Altho it may seem that the Matter of Rank and Precedency is handled here only with respect to the Conditions and Professions of Persons; and that the Qualities of Sheriffs, Consuls, Aldermen, Assessors, and others of the like kind, whom we have mentioned in the preceding Article, are not kinds of Conditions and Professions, as has been said in Sect. 1. Art. 7. yet we ought not to exclude out of this Title what relates to Rank and Precedency among Persons called to the said Municipal Offices: for there is no reason, while we are speaking of the Ranks of Conditions and Professions, why we should not explain the general Rules of all sorts of Rank and Precedency. And since, in the Question about Rank and Precedency among Persons called to those Municipal Offices, we first consider the Differences of their Conditions and Professions; and if they appear to be equal, we next proceed to the other personal Qualities; it is natural also, when the Question is about the Rank between Per-

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Persons called at the same time to other sorts of Offices, ranked in the same Class, and having the same Functions, that we should distinguish them likewise by their personal Qualities. Thus in the Case of the Erection of a new Court of Judicature, consisting of several Judges, to be received at the same time, and whose Ranks it should be necessary to regulate; it might be reasonable, if several presented themselves to be admitted at the same time, to admit first those who should appear to be distinguished by their personal Qualities. And seeing this Concurrence of many Persons to the same Offices happens yearly in Cities and Corporations for the Municipal Offices, the Questions about Precedency do arise more frequently there; and in order to decide them, recourse must be had to the Distinctions that are made by the personal Qualities, as has been said in the preceding Article; it would be reasonable to apply the same Rules to the like Cases of Offices of another nature *o*.

' *o* The same Principles and Rules agree to the ' several Cases of Precedency mentioned in this ' Article.

See the following Article.

XXXI.

31. Remark on the Rule for deciding of Ranks by personal Qualities.

Since it results from the preceding Articles, that in the Cases where there is a Concurrence of many Persons called to the same Offices, their Ranks ought to be regulated by their personal Qualities; it is necessary to observe, that this Rule ought not to be understood indifferently of all sorts of Qualities, but only of such as shall be explained in the Articles which follow: and tho the greatest part of the Rules relating to these Qualities be taken out of the Texts of the *Roman* Law which respect Municipal Offices; yet we must extend the Application of them to all the Cases to which they may agree, as has been observed in the preceding Article *p*.

p De honoribus sive muneribus gerendis cum quæritur, imprimis consideranda persona est ejus cui defertur honor, sive muneris administratio: item origo natalium, facultates quoque an sufficere injuncto muneri possint. *l.* 14. §. 3. *ff. de muner. & hon.*

' Altho this Text does not consider the personal ' Qualities mentioned in it with respect to Rank and ' Precedency, but only with respect to the Capacity of the Persons for the Offices; yet seeing ' these Qualities have their relation to the Exercise ' of the said Offices, it is natural, that since they ' are to be considered in the Persons called to those ' Offices, they be likewise considered in them as ' Advantages which may entitle those who are endowed with them to a Preference before those ' who want them; as shall be explained in the ' Articles which follow.

XXXII.

32. Two sorts of Qualities necessary to be distinguished.

In order to understand rightly what is the Nature of the personal Qualities which may be considered for settling the Ranks of Persons, it is necessary to distinguish in every Person two sorts of Qualities: One, of those which are internal, residing in the Mind and in the Heart, and which distinguish the Persons as they have more or less Understanding, Courage, Vertue or Probity; and the other, of those which are external, and reside neither in the Mind nor Heart, such as Age, Birth, Number of Children, and other like Qualities. There is this difference between these two sorts of Qualities, that those of the first sort are such as it is easy to be deceived in them, to take one for a Man of Sense and Judgment who has only some occasional Flashes of Wit; to take a learned Man without Judgment, whose Learning is nothing but Confusion, for an able skilful Person; a Hypocrite for a Man of Probity: but no body can be mistaken either as to Age, or as to Birth, or other Qualities of the like nature, of which mention shall be made hereafter. And there is also this difference between these two sorts of Qualities, that a Preference given to the Mind, or to Vertue, would occasion Jealousies, Enmities, and other bad Consequences; whereas there can be no Jealousy or Enmity between Persons, when one is preferred to the other, either upon the account of his great Age, or because he has a greater number of Children, or because his Extraction is evidently more noble, or if the Condition of the one is superior to that of the other; as if of the two one were an Officer of Justice, and the other a Merchant *q*.

' *q* One may be able to judge by the Reasons ' explained in this Article, of the Distinction to ' be made between the different Qualities of ' Persons, in order to settle their Ranks.

See on the same Subject the 41st Article.

XXXIII.

33. Preference on account of the Difference of Conditions.

Among these external Qualities that are to be considered in the concurrence of many Persons, called at the same time to Offices whose Functions are the same; as for instance, Aldermen of a City; if there be no Usage to the contrary, they consider first the Difference of Conditions and Professions: Thus, an Advocate would

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would be preferred before a Proctor *r*.

r In primis considerande persona. *l.* 14. §. 3. *ff. de muner. & hon.*

Lege municipali cavetur, ut præferentur in honoribus certæ conditionis homines. *l.* 11. §. 1. *ff. de muner. & honor.*

Amplioris honoris inferiori——Et ingenuum libertino præferemus. *l. ult. ff. de fide instr.*

' See this Text as it is quoted on Art. 31. and ' the Remark there made upon it.

' The other Circumstances being equal, the Dif- ' ference of the Conditions ought to decide the ' Precedency.

XXXIV.

34. Preference because of Age.

If there were no other Causes of Distinction between the Persons, one might consider their Ages, and place the Eldest before the Youngest. And it was likewise by the Age that the Policy which was established by the Divine Law advanced the Elders to the first Posts in the Ministry of the Government, next unto him who was established the Chief or Head thereof *s*.

s Go and gather the Elders of Israel *together.* Exod. 3. 16.

Thou shalt rise up before the hoary Head, and honour the Face of the old Man. Levit. 19. 32.

And the Lord said unto Moses, *Gather unto me seventy Men of the Elders of* Israel, *whom thou knowest to be the Elders of the People, and Officers over them.* Numb. 11. 16.

See *Deuter.* 22. 15.

Honour me now I pray thee before the Elders of my People. 1 Sam. 15. 30.

The Beauty of old Men is the grey Head. Prov. 20. 29.

Semper in civitate nostra senectus venerabilis fuit; namque majores nostri pene eumdem honorem senibus quam magistratibus tribuebant. Circa munera quoque municipalia subeunda, idem honor senectuti tributus est. *l.* 5. *ff. de jure immun.*

Semper seniorem juniore, & amplioris honoris inferiori, & marem fœminæ, & ingenuum libertino præferemus. *l. ult. ff. de fide instr.*

' Besides the Consideration of the Respect due to ' old Age, it gives moreover this Advantage, which ' has relation to the publick Good, that it is attend- ' ed with more Experience.

XXXV.

35. Preference for having served in other Offices.

We consider likewise as another Quality, which gives Preference, the Honour of having served in other Offices, which ought to entitle those to a Preference before others who have had the Advantage to bear Offices, the others never having had any; or if they have all been in Office, the Advantage of having been imployed in Offices of greater Importance, or of having served in like Offices for a much longer time, or in a greater number *t*.

t Decuriones in albo ita scriptos esse oportet, ut lege municipali præcipitur. Sed si lex cessat, tunc dignitates erunt spectandæ, ut scribantur eo ordine, quo quisque eorum maximo honore in municipio functus est: puta qui duumviratum gesserunt, si hic honor præcellat: & inter duumvirales antiquissimus quisque prior is: deinde hi, qui secundo post duumviratum honore in republica functi sunt. Post eos, qui tertio, & deinceps. Mox hi qui nullo honore functi sunt, prout quisque eorum in ordinem venit. *l.* 1. *ff. de albo scrib.*

' This Preference is founded on the Services ren- ' der'd to the Publick in the Exercise of Offices.

XXXVI.

36. Preference because of the Number of Children.

We ought also to consider in these Cases, the Difference between those who have Children, and those who have none, or who have fewer, in order to give the Preference to those who have Children before those who have none, or to those who have the greatest number; and this Preference hath its Equity founded on this Consideration, that Children are a Burden, the Weight whereof turns to the common Good; the Multiplication of Mankind being of great Importance to the Publick *u*.

u In albo decurionum præscriptis patrem non habenti filios anteferri constat. *l.* 9. *C. de decur.*

Qui plures liberos habet in suo collegio, primus sententiam rogatur, cæterosque honoris ordine præcellit. *l.* 6. *in f. ff. de decur. & fil. eor.*

XXXVII.

37. On account of greater Riches.

The same Consideration of the Qualities of which the Use may turn to the Publick Good, may likewise be a Motive for giving the Preference in the same Cases to those, who having greater Riches, may be more useful in the Society, by imploying their Wealth for divers Services, and for that among others, of bearing greater Burdens, and of paying larger Taxes *x*.

x De honoribus sive muneribus gerendis cum quæritur; in primis consideranda persona est ejus cui debetur honor sive muneris administratio, item origo natalium: *facultates quoque*, an sufficere injuncto munere possint: item lex, secundum quam muneribus quisque fungi debeat. *l.* 14. §. 3. *ff. de mun. & honor.*

Paucitas eorum qui muneribus publicis fungi debeant necessaria etiam ad dignitatem municipalem, si facultates habeant, invitat. *l.* 12. *in f. ff. de decur.*

' We may apply these two Laws to divers o- ' ther Causes of Precedency.

See the Remark quoted on Art. 31.

XXXVIII.

38. On account of the greatest number of Voices in Elections.

It is likewise a Consideration in the *Roman* Law, which is used in some Places, that in the Election of many Persons to Offices of a like nature by one and the same Nomination, if there be no other reasons for deciding the Preference, it is given to him who had most Voices in the Election *y*.

y Privilegiis cessantibus cæteris, eorum causa potior

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tior habetur, in sententiis ferendis, qui pluribus eodem tempore suffragiis jure decurionis decorati sunt. *l.* 6. §. 5. *ff. de decur. & fil. eor.*

XXXIX.

39. Preference of a Scholar to an illiterate Person.

The Distinction which Learning and want of Learning makes among Persons, may also be considered in these Cases, if other Qualities do not regulate the Preference in favour of an illiterate Person. For besides the advantage which the literate Person has over the other, he may be much more serviceable to the publick Good *z*.

z 'The other Circumstances being equal, the 'Scholar has the advantage of being capable of 'doing greater Service.

XL.

40. Preference on account of Birth.

The Consideration of Birth makes likewise a Distinction which may be the Foundation of Preference in the same Cases; either because of the Justice that may be due to the Merit of the Ancestors of him who is descended of the noblest Extraction, or because his Birth may put him in a condition of rendring himself more useful to the Publick by following the Footsteps of his Ancestors *a*.

a Item origo natalium. *l.* 14. §. 3. *ff. de muner. & hon.*

Ingenuum libertino præferemus. *l. ult. ff. de fide instr.*

See Art. 31. and the Remark there made on it.

XLI.

41. Cases where regard should be had to to the Parts and Vertue of the Persons.

Altho Brightness of Parts and a vertuous Disposition be not Qualities to be insisted on judicially as Arguments for Precedency, because of the Reasons explained in Art. 3. yet it does not from thence follow that they may not be considered by the Judges who are to determine the Precedency, and that they may not serve as a Motive for giving the preference to him who is judged to excel the others in Parts and Probity, in the Cases where recourse must be had to the personal Qualities, and where the other Qualities leave the Matter in suspence *b*.

b 'Altho it is not proper to alledge in a Court 'of Justice the Advantages of Parts and Vertue, 'yet there is no reason why upright Judges should 'not take them into consideration, if the other 'Qualities decide not the Matter.

XLII.

42. Preference according to the Usage of Places.

We may add as a last Rule in this matter of Precedency, the Usages of Places, if there be any such without Abuse *c*: And that even altho the said Usage should derogate from some of the Rules which have been just now explained; for Usages and Customs are in the place of Laws *d*.

c Decuriones in albo ita scriptos esse oportet ut lege municipali præcipitur. *l.* 1. *ff. de albo scrib.*

Legem quoque respici cujusque loci oportet. *l.* 5. §. 1. *ff. de jure imm.*

Herennius Modestinus respondit, sola albi proscriptione minime decurionem factum, qui secundum legem decurio creatus non sit. *l.* 10. *ff. de decur.*

Nonnunquam etiam longa consuetudo in ea re observata, respicienda erit. Quod etiam custodiendum principes nostri consulti rescripserunt. *l.* 11. *in f. ff. de decur.*

d See Art. 10, 11. of Sect. 1. of the Rules of Law.

Inveterata consuetudo pro lege non immerito custoditur, & hoc est jus quod dicitur moribus constitutum. Nam cum ipsæ leges nulla alia ex causa nos teneant, quam quod judicio populi receptæ sunt: merito & ea quæ sine ullo scripto populus probavit, tenebunt omnes, nam quid interest, suffragio populus voluntatem suam declaret, an rebus ipsis & factis? quare rectissime etiam illud receptum est ut leges non solum suffragio legislatoris, sed etiam tacito consensu omnium per desuetudinem abrogentur. *l.* 32. *ff. de leg. & senat. cons.*

XLIIII.

43. The Regard that ought to be had to the several Combinations of personal Qualities.

It is necessary to understand all that has been said hitherto of the different Considerations of the Qualities which may be weighed, in order to the setling of Ranks and Precedencies in such a manner as to examine in the several Cases the Combinations of the said Qualities, according as the same Person may either have only one of these Qualities without the other, or have many of them together; according as one of these Qualities may be more useful to the Publick than another, or even than two of the others; and according as the Advantages may be distinguished by the Circumstances. For as it is natural that the Differences of these Combinations, and of the Circumstances, should diversify the Advantages of one Person over another; so it is prudent for those who have Questions of this nature to decide, to examine the several Effects of these Combinations and of the Circumstances, in order to assign to every one his Rank in proportion to his Advantages *e*.

e 'Since it may happen that one Person may have 'several of these Qualities, when another has only one of them, and that these Qualities may be 'such as that one of them singly may be of more 'advantage than two of the others; it is by having 'regard to the several Combinations, and to the 'Circumstances, that we ought to judge of the Precedency founded on these Qualities.

XLIV.

44. Of Precedency with regard to the Clergy.

All the Rules which have been just now explained touching the Matter of Rank and Precedency, respect Lay Conditions and Professions, according to the relation they have to the publick Order of the Society; and seeing the Professions of Clergymen have also their relation to the same Order, and that the Rules

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Rules concerning them differ from the Rules of the Lay Professions, it remains that we should add them here, and they may be reduced to the following Rules *f*.

f See the following Articles.

XLV.

45. Two Cases where it is necessary to settle the Ranks of Clergymen.

As to the Rank of Clergymen, we must distinguish two sorts of Cases in general, where it is necessary that these Ranks should have their Rules. The first Rule concerns the Cases where the Question is about the Rank and Precedency of Clergymen among themselves. And the second is of the Cases where the Question is touching Rank and Precedency between Clergymen and Laymen. And both the one and the other have their different Rules, which shall be explained in the following Articles *g*.

g 'This is a natural Consequence of the Diversity of Ecclesiastical Functions, and of that of Lay Professions. For the different Degrees of Honour and Dignity in the Persons belonging to these two Orders, make it necessary to distinguish the Precedencies in the two Cases mention'd in this Article.

XLVI.

46. The Rule of the Rank of Clergymen among themselves.

The Clergy have their Rank among themselves according to their Characters, and the Dignity of their Functions, of Cardinals, Patriarchs, Primates, Archbishops, Bishops, and other Prelates, or according to their Holy Orders, of Priest, Deacon, Subdeacon, and the other Orders; or according to their Ministry, of Pastors, Archdeacons, Rural Deans, Curates; or according to the respective Qualities of their Benefices, whether they be of the Secular Clergy, as Canons and Prebendaries of Cathedral and Collegiate Churches; or of the Regular Clergy, such as Abbots, Chiefs of the several Orders, Abbots of Convents, Priors and others, and some Chapters; or that they hold their Benefices *in Commendam*, such as Abbots or Priors who hold their Abbies and Priories so. And in general every one has his Rank according to that of his Ministry, of his Order, of his Benefice, without any regard to personal Qualities. For seeing all the Places of Ecclesiasticks, and the Honours annexed to them, have their sole and precise relation to spiritual Functions; it is by the Differences of their Ministry and Functions, that they are distinguished in a separate Order, of which it is not proper to explain the Detail here; it being sufficient barely to observe, that among Ecclesiasticks who compose a Body in which they exercise the same Functions, such as in a Chapter those who are in the first Places, which are called Dignities, are there the first in Rank; and the others, such as the Canons or Prebendaries, have their Rank from the Day of their Instalment or Admission *h*.

h 'It is by the Differences of the Functions and Ministry that Clergymen have their Ranks.

XLVII.

47. Two Cases of the Rank between Clergymen and Laymen.

As to the Rank between Clergymen and Laymen, it is necessary to distinguish the Occasions in which Clergymen exercise the Functions of their Ministry, from those where the said Functions are not exercised: for these two Cases have their different Rules, which shall be explained in the three Articles that follow *i*.

i See the following Articles.

XLVIII.

48. All Clergymen take place of Laymen in the Cases relating to their Spiritual Functions.

In all the Cases where the Clergy exercise the spiritual Functions of their Ministry, such as the Performance of Divine Service in the Churches, the Administration of the Sacraments, whether it be in the Church or other Places, at Processions, and on other Occasions of the like nature, all Clergymen without distinction of the lowest degree, have their Rank before all the Laity; the Chief of whom owe to the least spiritual Functions a very great Respect *l*. And altho we see in some Cathedral and Collegiate Churches, and likewise in others, that during the Divine Service, certain Places among the Canons, or other Ecclesiasticks, are assigned to Lay-Officers, or to other Persons, such as Founders; yet they occupy those Places without performing any Function in the Divine Service, or having any more share in it than what all the common People have. But those Places are granted them as a Favour, for Considerations which the publick Order of the Society and the Interest of the Church render favourable, and in such a manner as does not give to Laymen any Rank in the Spiritual Order, nor any Precedency above those of that Order; neither does it make any manner of Change in their Dignity *m*.

l 'This is a natural Effect of the Quality of the Functions of Clergymen.

m 'Since it is by Favour that those Places are granted to Laymen, and that without their having any share in the spiritual Functions of the Divine Service; they do no manner of prejudice to the Precedency of the Clergy.

XLIX.

49. Cases where Clergymen and Laymen meet

In the Cases where the business is not to perform Divine Service, or any Spiritual Functions; and where it happens to

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together in the same Body.

to be necessary to settle the Rank between Clergymen and Laymen; it is likewise necessary to distinguish the occasions where Clergymen and Laymen happen to meet in one and the same Body in order to perform therein the same Functions, and those occasions where they have nothing to do in common together. Thus, for example: The Clergymen who are of the number of Judges in the Temporal Courts of Justice in *France*, such as the Parliaments and Presidial Courts of that Kingdom, and who are distinguished by the name of Ecclesiastical Counsellors or Judges, seeing they exercise the same Functions with the Lay Counsellors or Judges who sit on the same Bench, they have their Rank there only as the other Judges, according to the time of their admission; because they have all of them in those Tribunals the same Functions, and the same Dignity and Authority *n*. But on other occasions, where there are no Functions common to Clergymen and to Laymen, and where the business is not to exercise any Function of the Ecclesiastical Ministry, the Ranks are different according to the Rule which shall be explained in the following Article.

n 'Seeing it is by favour, and as a privilege 'granted to the Church, that the Kings of *France* 'have erected Offices of Ecclesiastical Counsellors 'or Judges in the Temporal Courts of Justice, 'and that their Functions are the same with those 'of the Lay Judges of the same Bench, there is no 'reason which gives the Precedency to the Ecclesiastical Judges before the others.

L.

50. Cases where Clergymen and Laymen have Precedency differently, according to their qualities.

When it happens that Clergymen and Laymen are in company together, whether it be casually, as in accidental Meetings at going in or out of a Room, or other rencounters of the like nature; or that they are called to some Assembly of Ceremony, in which the Ecclesiastical Ministry has nothing to do; the Clergymen have their Rank differently according to their own qualities, and the qualities of the Laymen with whom they chance to meet. For seeing in these Cases the Dignity of the Spiritual Functions is no way concerned, and that on all occasions, the Dignity which gives a Rank in the Publick, ought to be regulated by the qualities to which the publick Order of the Society requires the greatest respect should be paid, there are many qualities in Laymen which demand a much greater respect than what is due to many Clergymen, abstracting from their Ministry: and because the Combinations of this meeting of Clergymen and Laymen together are infinite, according to the differences of the qualities of the one and the other, the Rules of their Ranks on these sorts of occasions are diversified, which makes a detail that would be useless and inconvenient to explain in this place *o*.

o 'Setting aside the first Dignity of the Head of 'the Church, which gives him a Rank even above 'all the Temporal Princes whatsoever, all the o'ther Ecclesiastical Dignities may happen to meet 'with Temporal Powers which take place of them; 'and according to the different qualities of the 'Ecclesiastical and Lay Persons, the Order of their 'Ranks is different: so that many Laymen of 'the first Rank, the Princes of the Blood, the 'chief Officers belonging to the Sword and the 'Gown, have their Rank before the chief of the 'Clergy.

[According to the Rules of Precedency established in *England* among the Clergy, the great Officers, Nobility, and others of the Kingdom, the two Archbishops of *Canterbury* and *York* have place above all the great Officers and Nobility in Parliament, Council and Commissions, saving in some particular Cases where the Precedency is reserved to the Lord Chancellor or Lord Keeper; all the other Bishops have place above all the Barons of the Realm, but they give place to Viscounts, Earls, Marquisses and Dukes. If a Bishop of this Realm had in former days been made a Cardinal, he did not take any place of Precedency in Parliament as Cardinal, but took his place in right of his Bishoprick, in respect whereof he sat in Parliament, 31 *Hen. VIII. c.* 10. *Coke* 4. *Inst. p.* 361.]

Remark on the following Titles.

Having explained in the foregoing Title the several Orders of Persons who compose a State, and made as it were a Plan of the general kinds of Conditions and Professions; our proposed Method requires that we should now proceed to a particular Examination of each of the said Kinds, to consider in them the distinctions of their Classes, which are as it were particular Kinds, and to explain the Functions and Duties peculiar to every one of them: and this is what we shall treat of under the following Titles. But having been obliged by other Views of the Method we proposed, to treat of some of those general Kinds, and of their Classes, in other Places, and to explain the Functions and Duties of the Persons who compose them; it was not proper to repeat here what we have found necessary to place elsewhere. Therefore since it was necessary to explain what concerns the Privy Council of the Sovereign in the third Title; what

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what belongs to the Revenue in the fifth; what relates to the Order of the Administration of Justice and of the Civil Policy in the second Book; and the Professions of Sciences and Liberal Arts in the 17th Title, which is of Universities; the Reader ought not to be surprized that he does not find in the sequel proper Titles for these four Orders according to the Rank they are placed in among the others, seeing he may find them every one in their place. Neither ought he to be surprized that he does not find in every one of the other Orders, a detail of all their Classes; as for example, in that of Trades and Handicrafts, a particular enumeration of all the kinds of them; for such a detail would be equally tedious and useless: but we shall confine the distinctions of the Classes, according as their differences diversify the Functions and Duties of the Professions.

TIT. X.

Of the Clergy.

By Clergy is meant the Ecclesiastical State, and this name is taken from a word of the *Greek* Language, which signifies Lot, or Portion *a*; and it is given to Ecclesiastical Persons, as well because they ought to be the Portion of God, as that God ought to be theirs *b*. Clergymen are the Portion of God, because he consecrates them to himself by their vocation to a Divine Ministry, the Functions whereof being altogether Holy and Spiritual, have no relation but to his Worship, and to his Service, and require a disengagement from all worldly care and anxiety; so that their whole Conduct consists in devoting themselves wholly to God, and in bringing over to his Worship and Service all those to whom their Ministry may give them any relation *c*. And God is also reciprocally the Lot and Inheritance of the Clergy, to be to them instead of all the things from which the Purity and Holiness of this Ministry ought to wean their Affections. It was to foretel, and to represent this Duty of the Holiness of the Ministers of the Church of the New Covenant, that in the Old Covenant God having made choice of the *Levites* for the Priesthood, would not let them have any share in the Partition of the Land which was promised to the People of the *Jews*; telling them that he himself would be their Part, and their Inheritance *d*; and leaving them only Places to dwell in *e*, and the Tenths for their Subsistence *f*.

a Κλῆρος.

b Clericus qui Christi servit Ecclesiæ interpretetur primo vocabulum suum, & nominis definitione prolata, nitatur esse quod dicitur. Si enim Κλῆρος Græce, Sors Latine appellatur, propterea vocantur Clerici, vel quia de sorte sunt Domini, vel quia Dominus sors, id est, pars Clericorum est. Qui autem vel ipse pars Domini est, vel Dominum partem habet, talem se exhibere debet, ut ipse possideat Dominum, & possideatur a Domino. Qui Dominum possidet, & cum Propheta dicit, *pars mea Dominus*, nihil extra Dominum habere potest. Quod si quidpiam aliud habuerit præter Dominum, pars ejus non erit Dominus. Verbi gratia, si aurum, argentum, si possessiones, si variam supellectilem, cum istis partibus Dominus fieri pars ejus non dignatur. 12. q. 1. c. 5.

c Duo sunt genera Christianorum: est autem unum genus quod mancipatum divino officio, & debitum contemplationi, & orationi, ab omni strepitu temporalium cessare convenit, ut sunt Clerici & Deo devoti, ut videlicet conversi. Κλῆρος enim Græce, Latine Sors. Inde hujusmodi homines vocantur Clerici, id est, sorte electi. Omnes enim Deus in suos elegit. Hi namque sunt reges, id est, se & alios in virtutibus regentes, & ita in Deo regnum habent. 12. q. 1. c. 7.

De quibus probabilis conjectura non sit, eos sæcularis judicii fugiendi fraude, sed ut Deo fidelem cultum præstent, hoc vitæ genus elegisse. *Conc. Trid. Sess.* 23. *cap.* 4. *de reform.*

d And the Lord spake unto Aaron, *Thou shalt have no Inheritance in their Land, neither shalt thou have any part among them:* I am thy Part, and thine Inheritance *among the Children of* Israel. Numb. 18. 20.

The Priests the Levites, *and all the Tribe of* Levi, *shall have no part nor inheritance with* Israel: *they shall eat the Offerings of the Lord made by Fire, and his Inheritance. Therefore shall they have no Inheritance among their Brethren: the Lord is their Inheritance, as he hath said unto them.* Deuter. 18. 1, 2.

Cui portio Deus est, nihil debet curare, nisi Deum: ne alterius impediatur necessitatis munere: quod enim ad alia officia confertur, hoc religionis cultui, atque huic nostro officio decerpitur. Hæc enim vera est sacerdotis fuga, abdicatio domesticorum, & quædam alienatio charissimorum: ut suis se abneget, qui servire Deo elegerit. 12. q. 1. c. 6.

Hujusmodi homines vocantur Clerici, id est, sorte electi. Omnes enim Deus in suos elegit. 12. q. 1. c. 7.

e Command the Children of Israel, *that they give unto the* Levites *of the Inheritance of their Possession, Cities to dwell in; and ye shall give also unto the* Levites *Suburbs for the Cities round about them.* Numb. 35. 2.

The Cities of the Levites, *and the Houses of the Cities of their possession, may the* Levites *redeem at any time.* Levit. 25. 32.

f And behold I have given the Children of Levi *all the tenth in* Israel, *for an Inheritance, for their service which they serve, even the service of the Tabernacle of the Congregation.* Numb. 18. 21.

Under

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Under this Name of Clergy are comprehended all sorts of Ecclesiasticks; and by the appellation of Ecclesiasticks is understood all Persons separated from the State of simple Laymen, by an express destination to the Worship of God, whether it be in some of the Holy Orders, or in some inferior Order, or by the Tonsure and the Ecclesiastical Habit *g*, whether they have some Benefice, or have none at all. For by the bare Tonsure, the Bishop has given them an entrance into the Church, and placed them in the Ecclesiastical State, telling them that the Lord should be their Portion: which presupposes that they shall persevere therein. For many, after the Tonsure, quit this first Engagement, and return to the Rank of Laymen. Thus we give the Rank and Name of Ecclesiasticks, only to those, who being admitted into the Church by the Tonsure, do imbrace that Profession, and retain and carry the Marks of it.

There is this in common to the Clergy and to the Laity in every Catholick Country, that they compose all of them together two different Bodies, of which every one is a Member; The Body Spiritual of the Church, and the Body Politick of the State: for all the Laymen of a State are, as well as the Clergy, Members of the Church; and all the Clergy, as well as the Laity, are Members of the Body Politick, and Subjects of the Prince. But there is this difference between these two Bodies, that the Spiritual Body, which is made up of the Clergy and Laity in a Kingdom, makes a part of the Body of the universal Church, which reaches to the whole Universe, and which being only one, comprehends all the Catholicks of all Countries, whether Clergymen or Laymen; whereas the Politick Body of a State has its Limits within its own Territories, under the Government of its Prince, and independent of all others in matters Temporal: so that the Clergy and Laity who are under the Government of one Prince, are Members of no other Body Politick; but all the Clergymen and Laymen of all the Kingdoms and Churches in the World, are united and linked together as to Spirituals, in such a manner as that they compose all of 'em together only one Church, the Unity of which consists in this; that all the Nations have been called to one and the same Faith, to one and the same Law of one only God in one only Religion, which he has established and taught unto Men by his only Son, which is preached in all places, and is perpetuated throughout all Ages, by the bare Mission of his Apostles and their Successors, under one sole Head of the said Church, Successor of St. *Peter*, upon whom Jesus Christ hath founded it, and which he has always governed, and will govern to after Ages, by a Series of Successors of that first visible Head, and by the channel of the said Mission, which nothing can ever interrupt, and to which nothing strange or foreign can be united.

It may not be amiss to remark on the distinction of Clergymen and Laymen, this difference between these two Bodies of the Church and the State; That with respect to the Church, no Layman is capable of exercising in it any Spiritual Ministry, whereas many Clergymen exercise in the State Functions that are merely Temporal; as, for instance, the Ecclesiastical Judges in the Temporal Courts of Justice in *France*, and the Officials, in respect of the Jurisdiction which the Princes have granted to the Church in relation to Temporal concerns among Clergymen.

Since it is no part of the design of this Book, to explain in particular all the distinctions of Ecclesiasticks according to the difference of their Dignities, of their Ministry, of their Functions; but only to give a general Idea of them with respect to the Laws made by Christian Princes in relation to Ecclesiastical matters; we shall therefore limit according to this view the distinctions of Ecclesiasticks, which we shall make here.

We must in the last place observe on the word *Clergy*, that altho it agrees to the Universal Church, according to the Etymology of the word, as it has been explained in the beginning of this Preamble, and according to the Canons there cited; yet in *France* the word Clergy is commonly made use of, only to signify either the whole Clergy of the Kingdom, or the Clergy of each Diocess.

g Generaliter Clerici nuncupantur omnes, qui in Ecclesia Christi deserviunt, quorum gradus & nomina sunt hæc, Ostiarius, Psalmista, Lector, Exorcista, Acolytus, Subdiaconus, Diaconus, Presbyter, Episcopus. 21. *d.* *c.* 1.

[' In this Title of the Clergy, there are many ' things not applicable to the Clergy of the Church ' of *England*. For our Reformation from Popery ' has freed us from all manner of Subjection or ' Subordination to the See of *Rome*; and has laid ' aside several Ecclesiastical Dignities, such as Ab- ' bots

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'bots and Priors; as also the inferior Orders of 'Ecclesiasticks, and many useless Ceremonies 'which are still retained in the Church of *Rome*: 'However, we have not thought proper to leave 'out, or to alter any thing in the Articles which 'explain these matters; it being our Intention in 'this Translation not to deviate from the Original; 'and altho some of these things may be thought of 'no present use or service in our Reformed 'Church, yet the knowledge of them must be 'entertaining to such as are curious to know the 'Hierarchy and Discipline of other Churches, as 'well as that of our own.]

SECT. I.

The Distinction of Clergymen.

The CONTENTS.

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3. *Patriarchs, Archbishops, and Bishops have each their Sees in divers places.*
4. *Pastoral Functions.*
5. *Canons and Prebendaries of Cathedral Churches.*
6. *Divines and Preceptors.*
7. *Seminaries of Bishops.*
8. *Their Vicars General.*
9. *Their Officials.*
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11. *Collegiate Churches.*
12. *Ecclesiastical Communities.*
13. *Canons Regular.*
14. *Benefices held in Commendam.*
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16. *Nuns.*
17. *Ecclesiastical Professors in the Universities.*

I.

1. The Pope, Head of the Universal Church, is no Member of the Clergy of any of the States subject to Temporal Princes.

WE are not to comprehend as a Member of the Body of the Clergy of any of the States subject to Temporal Princes, the Sovereign Pontiff, the Successor of St. *Peter*. For besides that the height of a Dignity so distinguished renders him Head of the Universal Church, the common Father of all the Faithful, and even of all the Princes in the whole Universe; he himself is the Temporal Prince of the State wherein he has his See, that Temporal Dominion having been united by the Divine Providence, and the Bounty of Princes, to the Spiritual Power he holds from God *a*.

a In patrimonio beati Petri Apostolica sedes, & summi Pontificis auctoritatem, & summi Principis exequitur potestatem. *c.* 13. *Qui filii sint legitimi.*

II.

2. A Cardinal may be of another Clergy besides that of Rome.

Altho the Cardinals who compose the Sacred College be by virtue of that quality in a Rank which ties them to the Church of *Rome*; yet such of them as are Bishops, are likewise of the Body of the Clergy of the State in which their Bishoprick is situated *b*.

b 'A Cardinal Bishop has his Rank, both in 'the Sacred College, and among the Clergy of his 'Bishoprick.

III.

3. Patriarchs, Archbishops, and Bishops have each their Sees in divers places.

The Patriarchs, the Archbishops and Bishops, have every one of them their Sees in divers places, where they exercise the Apostolical Functions of their Dignities. And they are in their respective Sees the first of all the Clergy according to their Order among themselves *c*.

c 'It is necessary to distinguish the several 'Senses of the word Clergy, which have been re- 'marked at the end of the Preamble of this Title. *V. cap.* 4. *Sess.* 23. *Concil. Trid.*

IV.

4. Pastoral Functions.

The Pastoral Functions are dispensed by the Patriarchs, the Archbishops and Bishops, whose principal Ministry is to confer the Holy Ghost by the imposition of hands, to ordain Priests, Deacons, Subdeacons by Holy Orders, and other inferior Ministers of the Church, by the lesser Orders, and to receive all of them into the Church by the Tonsure, to administer all the Sacraments, and to bear the weight of the Pastoral Care of Souls. These are the several Functions of Episcopacy which constitute the Order of the Church, in which it is necessary to distinguish those who under the Bishops, and together with them, partake in the Functions of the Pastors of Souls *d*.

d *Jesus saith unto him, Feed my Sheep.* Joh. 21. 17. *Wo be to the Shepherds of* Israel *that do feed themselves: should not the Shepherds feed the Flocks?——And they were scattered because there is no Shepherd: and they became meat to all the Beasts of the Field, when they were scattered. My Sheep wandred throout all the Mountains, and upon every high Hill: yea, my Flock was scattered upon all the face of the Earth, and none did search or seek after them. Therefore ye Shepherds, hear the word of the Lord; As I live, saith the Lord God, surely because my Flock became a Prey, and my Flock became Meat to every Beast of the Field, because there was no Shepherd, neither did my Shepherds search for my Flock, but the Shepherds fed themselves, and fed not my Flock.* Ezek. 34. 2, 5, 6, 7, 8.

Now

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Now therefore, O Brethren, let us shew an Example to our Brethren, because their Hearts depend upon us, and the Sanctuary, and the House, and the Altar rest upon us. Judith 8. 24.

All ye Beasts of the Field, come to devour, yea all ye Beasts in the Forest. His Watchmen are blind; they are all ignorant, they are all dumb Dogs, they cannot bark; sleeping, lying down, loving to slumber. Yea, they are greedy Dogs which can never have enough, and they are Shepherds that cannot understand; they all look to their own Way, every one for his Gain, from his Quarter. Isaiah 56. 9, 10, 11.

Preach the Word, be instant in season, out of season, reprove, rebuke, exhort with all Long-suffering and Doctrine.——But watch thou in all things, endure Afflictions, do the Work of an Evangelist, make full Proof of thy Ministry. 2 Tim. 4. 2, 5.

See *Rom.* ch. 10.

Howl ye Shepherds, and cry. Jer. 25. 34.

Moreover in Jerusalem *did* Jehoshaphat *set of the* Levites, *and of the Priests, and of the Chief of the Fathers of* Israel, *for the Judgment of the Lord, and for Controversies, when they returned to* Jerusalem. 2 Chron. 19. 8.

V.

5. Canons and Prebendaries of Cathedral Churches.

The Dignity of Episcopacy has occasioned the Distinction of Cathedral Churches, that is to say, the Churches where the Bishops have their See, and where the Cathedral Churches are, which are composed of Canons or Prebendaries, the chief of whom have Names of Dignity, such as that of Dean, Abbot, Provost, or others, according to the Usage of Places. And these Canons or Prebendaries compose Bodies, every one whereof has always the Bishop for its Head, and which are destined for two principal Uses: one of which is to exercise during the Vacancy of the Episcopal See, the Functions of the voluntary Jurisdiction, which the Bishops may commit to their Vicars General; and that of the contentious Jurisdiction which is exercised in the Officialities. And the other Use of Cathedral Churches is to celebrate Divine Service; and they had formerly the Right, which many Chapters of the Cathedral Churches still retain, which is that of chusing the Bishop *e*: But in *France* the Right of Nomination to the Bishopricks has been granted to the Kings by the Church. And this Right may be considered in the King's Person, as agreeing to his Quality of Head of the People of all the Churches within his Dominions, because of the Share which the People of every Church formerly had in the Election of a Bishop in the Case of a Vacancy *f*.

e Mandamus, quatenus cum constet, electionem de præposito memorato a majori & saniori parte capituli celebratam fuisse, publicatam etiam & subscriptam, si dictus præpositus eidem electioni consenserit, ut per mutuum consensum eligentium & electi, quasi conjugale vinculum spiritualiter sit contractum. *C.* 21. *v. seq. de elect. & el. potest.*

f Nulla ratio sinit ut inter Episcopos habeantur, qui nec a Clericis sunt electi, nec a plebibus expetiti, nec a Provincialibus Episcopis cum Metropolitani judicio consecrati. Unde cum sæpe quæstio de male accepto honore nascatur; quis ambigat nequaquam istis esse tribuendam. *Dist.* 62. *C.* 1.

Nosse tuam fraternitatem volumus ad nostras aures fore perventum; Immolensem Episcopum ab hac luce migrasse, in cujus successoris electione populi divisionem provenisse audivimus, quod quia sæpe contingere solet (quærentibus singulis quæ sua sunt, non quæ Jesu Christi) non adeo miramur, veruntamen in hoc tuam plurimum oportet adhiberi solicitudinem, ut convocato clero & populo, talis ibi, eligatur per Dei misericordiam, cui sacri non obvient Canones. Sacerdotum quippe est electio, & fidelis populi consensus adhibendus est, quia docendus est populus, non sequendus. *Dist.* 63. *C.* 12.

'The Chapters of the Cathedral Churches have 'had a quite different Origin from the State in 'which they are at present. But it is not the De'sign of this Book to enter into this Detail, which 'is a part of the Ecclesiastical History.

[In *England* the manner of electing Bishops is at present thus: Upon the Avoidance of any Bishoprick, the King grants to the Dean and Chapter of the Cathedral Church belonging to the said Bishoprick, a Licence under the Great Seal to proceed to the Election of a Bishop, and therewith sends a Letter Missive, containing the Name of the Person whom they shall chuse. By virtue of which Licence the said Dean and Chapter must with all speed in due form elect the said Person named in the Letter Missive, and no other. And if they defer their Election above twelve Days after such Licence, then the King may nominate and present by his Letters Patent under the Great Seal, such Person to the said Bishoprick as he shall think fit. *Stat.* 25 *Hen.* VIII. *cap.* 5.]

VI.

6. Divines and Preceptors.

We may distinguish among the Canons of Cathedral Churches, those who are called Theologues or Divines, to whom the Ordinances in *France* have appropriated the Income of a Canonship, that they may preach on Sundays and the great Feasts, and give three times every Week publick Lectures on the Holy Scripture. And the same Ordinances have likewise appropriated the Revenue of another Canonship for the Maintenance of a Preceptor, who may instruct *gratis* the young Children; and they have also directed the like Establishments to be in the Collegiate Churches where there are more than ten Canons *g*.

g For Esdras *had very great Skill, so that he omitted nothing of the Law and Commandments of the Lord, but taught all* Israel *the Ordinances and Judgments. Now the Copy of the Commission which was written from* Artaxerxes *the King, and came to* Esdras *the Priest and Reader of the Law of the Lord, is this that followeth.* 1 Esdras 8. 7, 8.

'In every Cathedral or Collegiate Church there 'shall be reserved a Prebend for a Doctor in Divi'nity,

'nity, which shall be conferred upon him by the Archbishop, Bishop or Chapter; on condition that he shall preach and teach the Word of God on every Sunday and the great Festivals, and on the other Days he shall three times in the Week read a publick Lecture on the Holy Scripture: And all the Canons shall be obliged and compelled to attend such Sermons and Lectures on pain of forfeiting their Shares in the Distribution. *Ordinance of* Orleance, *Art.* 8. See the following Article of the same Ordinance. See the 33d and 34th Articles of that of *Blois*.

De quibusdam locis ad nos refertur, neque Magistros neque curam inveniri pro studio literarum, idcirco in universis Episcopis subjectisque plebibus, & aliis locis, in quibus necessitas occurrerit; omnino cura & diligentia adhibeatur, ut Magistri & Doctores constituantur, qui studia litterarum, liberaliumque artium dogmata assidue doceant: quia in his maxime divina manifestantur atque declarantur mandata. *Dist.* 37. *C.* 12.

Quoniam Ecclesia Dei sicut pia mater providere tenetur, ne pauperibus qui parentum opibus juvari non possunt, legendi & proficiendi opportunitas subtrahatur, per unamquamque Cathedralem Ecclesiam, Magistro, qui Clericos ejusdem & scholares pauperes gratis doceat, competens aliquod beneficium praebeatur. *C.* 1. *de Magistris & ne aliquid.*

Quia nonnullis propter inopiam, & legendi studium & opportunitas proficiendi subtrahitur, in Lateranensi Concilio pia fuit constitutione provisum, ut per unamquamque Cathedralem Ecclesiam, Magistro, qui ejusdem Ecclesiae Clericos, aliosque scholares pauperes gratis instrueret, aliquod competens beneficium praeberetur: quo & docentis relevaretur necessitas, & via pateret discentibus ad doctrinam. Verum quoniam in multis Ecclesiis id minime observatur, nos praedictum roborantes statutum, adjicimus, ut non solum in qualibet Cathedrali Ecclesia, sed etiam in aliis, quarum sufficere poterunt facultates, constituatur Magister idoneus, a Praelato cum Capitulo seu majore & saniori parte Capituli eligendus, qui Clericos Ecclesiarum ipsarum gratis in Grammatica facultate ac alios instruat juxta posse. Sane Metropolis Ecclesia Theologum nihilominus habeat, qui Sacerdotes & alios in sacra pagina doceat: & in his praesertim informet, quae ad curam animarum spectare noscuntur. Assignetur autem cuilibet Magistrorum a Capitulo unius praebendae proventus: & pro Theologo Metropolitano tantundem. *C.* 4. *eod.*

V. T. b. T.

Sacrosancta Synodus——statuit, & decrevit; quod in Ecclesiis in quibus praebenda, aut praestimonium, seu aliud quovis nomine nuncupatum stipendium pro Lectoribus sacrae Theologiae deputatum reperitur, Episcopi, Archiepiscopi, Primates, & alii locorum Ordinarii, eos qui praebendam, aut praestimonium, seu stipendium hujusmodi obtinent ad ipsius sacrae Scripturae expositionem & interpretationem per seipsos, si idonei fuerint, alioquin per idoneum substitutum, ab ipsis Episcopis, Archiepiscopis, Primatibus, & aliis locorum Ordinariis eligendum, etiam per subtractionem fructuum, cogant & compellant——Et quatenus in ipsis Ecclesiis nulla, vel non sufficiens praebenda foret, Metropolitanus, vel Episcopus ipse per assignationem fructuum alicujus simplicis beneficii ejusdem tamen debitis supportatis oneribus, vel per contributionem beneficiatorum suae civitatis & Dioecesis, vel alios prout commodius fieri poterit, de Capituli Concilio ita provideat, ut ipsa sacrae Scripturae lectio habeatur——Ecclesiae vero quarum annui proventus tenues fuerint, & ubi tam exigua est Cleri & populi multitudo, ut Theologiae lectio in eis commode haberi non possit; saltem Magistrum habeant, ab Episcopo cum Concilio Capituli eligendum, qui Clericos, aliosque scholares pauperes Grammaticam gratis doceat; ut deinceps ad ipsa sacrae Scripturae studia, annuente Deo transire possint, &c. *Conc. Trid. Sess.* 5. *cap.* 1.

VII.

7. Seminaries of Bishops.

Seeing the Holy Orders, and the Functions which are the Consequences thereof, and more especially those which belong to Pastors who have the Cure of Souls, who ought to be the Light of the World by their Doctrine, and the Salt of the Earth by the Holiness of their Lives, demand Qualifications suitable to this Ministry, and which cannot be acquired but by an Education and Study proper to prepare the Youth for that holy Ministry; the Bishops are obliged to have in their Dioceses Seminaries for that purpose, pursuant to the Direction of the Council of *Trent*, and of the Ordinances *b*. And the Consequence

b Cum adolescentium aetas, nisi recte instituatur, prona sit ad mundi voluptates sequendas; nisi a teneris annis ad pietatem & religionem informetur, antequam vitiorum habitus totos homines possideat, nunquam perfecte, ac sine maximo ac singulari propemodum Dei omnipotentis auxilio in disciplina Ecclesiastica perseveret, sancta Synodus statuit ut singulae Cathedrales, Metropolitanae, atque his majores Ecclesiae, pro modo facultatum, & Dioecesis amplitudine certum puerorum ipsius civitatis & Dioecesis, vel ejus provinciae, si ibi non reperiantur, numerum in Collegio ad hoc prope ipsas Ecclesias vel alio in loco convenienti, ab Episcopo eligendo, alere, ac religiose educare, & Ecclesiasticis disciplinis instituere teneantur. *Conc. Trid. sess.* 23. *c.* 18. *de reform.*

'The Archbishops and Bishops in their Dioceses shall be careful and diligent to erect Seminaries, pursuant to the first Article of the Edict of *Melun*; and in order to facilitate the Execution thereof in this Particular, all Benefices of more than six hundred Livres of yearly Revenue, shall be obliged to contribute thereto. *Ordinance of* Lewis XIII. *made at* Paris *in* 1614. *See that of* Blois, *Art.* 24.

Cum non deceat eos, qui divino ministerio adscripti sunt, cum ordinis dedecore mendicare, aut sordidum aliquem quaestum exercere; compertumque sit complures plerisque in locis ad sacros Ordines nullo fere delectu admitti; qui variis artibus ac fallaciis confingunt se beneficium Ecclesiasticum, aut etiam idoneas facultates obtinere: statuit sancta Synodus, ne quis deinceps Clericus saecularis, quamvis alias sit idoneus moribus, scientia & aetate, ad sacros Ordines promoveatur: nisi prius legitime constet, eum beneficium Ecclesiasticum quod sibi ad victum honeste sufficiat pacifice possidere——patrimonium vero, vel pensionem obtinentes ordinari posthac non possint, nisi illi quos Episcopus judicaverit assumendos pro necessitate vel commoditate Ecclesiarum suarum, eoque prius perspecto patrimonium illud, vel pensionem vere ab eis obtineri, taliaque esse quae eis ad vitam sustentandam satis sint, &c. *Conc. Trid. sess.* 21. *c.* 2.

Si quis neque sanctis pollens moribus, vel neque a Clero populoque vocatus, vel pulsatione coactus, impudenter Christi Sacerdotium jam quolibet facinore pollutus, injusto cordis amore, vel sordidis precibus

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quence of the Functions of those who have the Direction and Government of the said Seminaries, deserve that they should be here distinguished.

precibus oris, sive comitatu, sive manuali servitio, sive fraudulento munusculo Episcopalem seu Sacerdotalem, non lucro animarum, sed inanis gloriæ avaritia fultus dignitatem acceperit, & in vita sua non sponte reliquerit, eumque insperata mors pœnitentem non invenerit, proculdubio in æternum peribit. 1. *q.* 1. *c.* 115.

Cum nullus debeat ordinari qui judicio sui Episcopi non sit utilis aut necessarius suis Ecclesiis, sancta Synodus, vestigiis sexti Canonis Concilii Chalcedonensis inhærendo, statuit ut nullus in posterum ordinetur, qui illi Ecclesiæ aut pio loco pro cujus necessitate aut utilitate assumitur nonadscribatur. *Ibidem sess.* 23. *de reform. cap.* 16.

'It appears by these Regulations of the Council of *Trent*, and of the Ordinance, that the use of Seminaries is for the Education and Instruction of the Youth *a teneris annis*, and to fit and qualify some of them for Holy Orders, the Choice of whom ought to depend on the Qualities necessary for the faithful Discharge of so holy a Ministry. It is much to be wished that these Regulations of the Council of *Trent* were observed with the greatest Strictness possible; in which Case we should not see so many Ministers that are useless to the Church, and even a Burden to the Publick.'

VIII.

8. Their Vicars General.

The Bishops not being able to exercise personally all the Functions of their Ministry, they name Vicars-General, or Grand-Vicars, to whom they commit such of their Functions as are capable of being discharged by others than themselves; and these Vicars-General, or Grand-Vicars, have also a distinct Rank in the Church *i*.

i V. Tit. de Offic. Vic. in 6.

IX.

9. Their Officials.

Seeing the Vicars General or Grand Vicars of Bishops exercise the Functions of their voluntary Jurisdiction in what relates to spiritual Matters, and that the Bishops have another Jurisdiction, called a contentious Jurisdiction, and which is between all sorts of Persons, both Ecclesiasticks and Laymen, in spiritual Affairs, such as the Celebration of Marriage, and other Matters; and that they have likewise a Jurisdiction in Temporal Matters, that Princes have granted them in favour of Ecclesiasticks: And seeing this double contentious Jurisdiction cannot, as indeed it ought not, be exercised by the Bishops in Person, who ought to employ their Time in other Functions of much greater Importance, they appoint for the Exercise of the said Jurisdiction Officials, who are the Judges thereof, and Surrogates or Vicegerents, who officiate as Judges in the absence of the Officials; and likewise Promoters, who perform within the said Jurisdiction the same Function which the King's Proctors, or those of Lords of Mannors, do in Temporal Courts *l*.

l Licet in Officialem Episcopi per commissionem officii generaliter tibi factam causarum cognitio transferatur; potestatem tamen inquirendi, corrigendi aut puniendi aliquorum excessus, seu aliquos a suis beneficiis officiis vel administrationibus, amovendi, transferri nolumus in eundem: nisi sibi specialiter hæc committantur. *C.* 2. *de Offic. vic. in* 6.

X.

10. Ecclesiasticks who are Judges in the Temporal Courts.

The same Consideration which induced Princes to grant to the Church a Temporal Jurisdiction over all Ecclesiastical Persons, has induced the Kings of *France* to establish in the Parliaments and Presidial Courts, some Ecclesiastical Judges, Persons who are in Holy Orders, and who are called Ecclesiastical Counsellors or Judges, or Counsellors for the Church, that they may take care of the Interest of the Church in the Affairs wherein it may be any way concerned. And those who are put into the said Offices, exercise the same Functions with the other Judges, except in Criminal Causes, in which they do not assist, if the Crimes are punishable with corporal Punishments *m*.

m See Art. 213, 235. of the Ordinance of *Blois*.

By the Ordinance of *Lewis* XIII. made at *Paris*, it is ordained, 'That the Offices of the Ecclesiastical Judges in the Temporal Courts cannot be resigned but to Ecclesiastical Persons; and in case of the Vacancy of the said Offices by Death, that the same, as likewise those Places which shall happen to be filled by Lay Persons, by Dispensation or otherwise, shall be appropriated to the said Ecclesiasticks, until the Number of the Ecclesiastical Judges appointed by the Establishment of the said Courts shall be filled up.'

XI.

11. Collegiate Churches.

The Celebration of Divine Service in the Churches being no less necessary in all other Places than in those where the Bishops have their Sees, whether it be for the publick Prayers, or for the Consolation of the Faithful, the said Service is celebrated in the Parish-Churches where the Number of Ecclesiasticks is sufficient to perform it, at least on the Festival Days. And there are likewise other Churches which are called Collegiate Churches, and are founded for celebrating every day Divine Service at the proper Hours *n*.

n Statutum felicis recordationis Gregorii Papæ decimi, prædecessoris nostri, de his, qui ad parochialium Ecclesiarum regimen assumuntur, promovendis ad sacerdotium intra annum, alioquin eisdem Ecclesiis sint privati: quod cum sit pœnale, restringi potius convenit, quam laxari; declaramus ad Col-

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legiatas Ecclesias, etiamsi aliàs parochiales extiterint, & assumptos ad earum regimen non extendi: sed antiqua jura servari debere potius in eisdem. *C.* 22. *de elect. & el. pot. in* 6.

XII.

12. Ecclesiastical Communities.

Besides the Distinctions of Ecclesiasticks which have been explained in the foregoing Articles; there is in the Church an infinite number of Communities of several Monastical Orders, and others, some of which have Temporal Possessions, and others are Mendicants, who are called Regulars, because every one of them have their proper Rule, established by their Founder; and the greatest part of them are profess'd Monks, who are tied by Vows to the Observance of their Rule. There are likewise some Orders of Ecclesiastical Communities, who without taking upon them any Vow, and without the Name of Monk, have also their proper Rules and Habits, distinct from those of the Religious, and from those of other Ecclesiasticks; and all the said Orders and Communities have their Superiors General, and their different Functions *o*.

o 'Besides the antient Orders of the Rules of St. *Benedict*, St. *Basil*, St. *Augustin*, there are many others which have been established in these latter days under other Rules. *V.* 18. *q.* 2. *c.* 25.

XIII.

13. Canons Regular.

Among the said Regular Orders, there are some of them which are called Canons Regular, who in some Bishopricks compose the Chapters of the Cathedral Churches *p*.

p In omnibus igitur (quantum humana permittit fragilitas) decrevimus ut Canonici Clerici canonice vivant, observantes divinæ Scripturæ doctrinam, & documenta Sanctorum Patrum: & nihil sine licentia Episcopi sui, vel Magistri eorum incomposite agere præsumant, in unoquoque Episcopatu ut simul manducent & dormiant ut ubi his facultas id faciendi suppetit: vel qui de rebus Ecclesiasticis stipendia accipiunt, in suo Claustro maneant, & singulis diebus mane primo ad lectionem veniant, & audiant, quid eis imperetur. Ad mensam vero similiter lectionem audiant, & obedientiam secundum Canones suis ministris exhibeant. *C.* 34. *de consecr. dist.* 5.

XIV.

14. Benefices held in Commendam.

Among the said Regular Orders, some of them have given to their Superiors the Titles of Abbots, Priors, and others, according to the Differences of their Houses, and the different Functions of those who are in the highest Place and Station among them; and the said Titles in many of the said Houses, have past, without the Functions belonging to them, to those who are called Abbots, or Priors, *in Commendam*, that is to say, who without being professed Monks, have and possess, by a kind of Deposit called *Commendam*, these Titles, together with a part of the Revenues of the said Houses which has been appropriated thereto. It is by reason of these Titles to which the said Revenues are annexed, that we see in the Church that multitude of Benefices held *in Commendam* under the Names of Abbots, Priors, and other Titles; but many Regular Houses of several Orders, have kept their Abbies, Priories, and other Titles, and they fill the said Places with the Monks of their own Order; and all the Orders who have an Abbot for the Chief and General of their Order, observe it as a standing Rule among them, to retain the said first Place for one of their own Order, and which cannot be filled but by one who is either a professed Monk or a Cardinal *q*.

q 'We only take notice here in general of that kind of Benefices which are *in Commendam*, and do not think fit to enter into the detail of the several sorts of these *Commendams*, or to explain their Origin and Progress, the same being a Matter purely Historical, and foreign to the Design of this Book. Neither is it our business to explain here in what manner the Titles of Cures and their Revenues have past to others than the Curates, and from whence proceed the Prior-Curates, the Primitive-Curates, whether they be Monks of several Orders, or Chapters, or other Houses to which the Cures have been annexed, reserving only a small Portion of the Revenue to those who serve the Cure under the Name which is given them of perpetual Vicars.

'We shall not take up time to explain here the Distinction of the several Benefices which are called Regular, because they are possessed by Monks who have them as a Title, and enjoy them during their Lifetime. All these Matters take up a vast Detail, which it is not our business to explain here.

XV.

15. Knights of Malta, and other Knights of the like kind.

We may reckon in the number of Religious Orders the Military Order of the Knights of *Malta*, and other Orders of the like kind; for the said Knights are bound by Vows: upon which account the Church gives them the Name of Religious; which distinguishing them from Laymen, in the same manner as other Religious Persons are, gives them a Rank in the Ecclesiastical State *r*.

r Cum & plantare sacram Religionem, & plantatam fovere modis omnibus debeamus, nusquam hoc melius exequimur, quam si nutrire ea, quæ recta sunt, & corrigere, quæ profectum virtutis impediunt, commissa nobis auctoritate curemus. Fratrum autem, & Coepiscoporum nostrorum conquestione comperimus, quod fratres Templi, & Hospitalis, & alii Religiosi, &c. *C.* 3. *de privilegiis.*

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XVI.

16. *Nuns.*

We may place in fine in the Ecclesiastical State the Nuns of several Orders, who are separated from the World, and consecrated to God by solemn Vows *s*, which engage them to a Regular Life, and to the Celebration of Divine Service, whereof some of them make particular profession under the name of Canonesses: so that as it is by the Profession which Ecclesiasticks make to take God for their Portion, that they are particularly set apart for the Worship of God, and distinguished from Laymen; the same Profession made by Nuns ought to have with regard to them the like Effect *t*, in proportion to the Functions proper to their Sex.

s 'The sacred Canons give the name of Consecration to the Ceremony of giving the Veil to 'Nuns.

Placuit ut ante 25. annos ætatis ne Diaconi ordinentur, nec virgines consecrentur. 20. *q.* 1. *c.* 14. *V. dist.* 77. *c.* 5.

t Quæcumque tamen a nobis in omnibus quæ prius & quæ nunc prolata sunt, sacris nostris constitutionibus sunt sancita, de Clericis, aut Monachis, aut Monasteriis, hæc communia ponimus & in masculis & in fœminis, & monasteriis & asceteriis: non discernentes quantum ad istos masculum aut fœminam: eo quod sicut prædiximus, unum omnia in Christo consistant. *Nov.* 5. *c.* 13. §. 1.

XVII.

17. *Ecclesiastical Professors in the Universities.*

Seeing the Universities are Bodies composed partly of Ecclesiasticks and partly of Laymen, as has been remarked in another place *u*; the Professors who teach there Divinity, or Church-History, are of the Order of the Clergy, not only because of their Profession, but because they are really and truly Clergymen.

u See Tit. 17. Sect. 1. Art. 1.
See the last Article of the following Section.

SECT. II.

Of the Duties of Clergymen, with respect to the publick Order.

The CONTENTS.

1. *The Foundation of these Duties, the Holiness of the Ecclesiastical Ministry.*
2. *The Duty of Princes, to see that Clergymen perform their Duties which relate to the Publick.*
3. *The Right and Duty of Princes to maintain the Discipline of the Church.*
4. *The chief Duties of Pastors of Souls, are Learning, and a good Life.*
5. *Modesty in their Apparel and Furniture.*
6. *They ought not to cohabit with Women.*
7. *They ought to abstain from publick Shews, and Games of Hazard.*
8. *The Duty of Residence.*
9. *Residence of Canons.*
10. *Visitations of Bishops.*
11. *Disinterestedness in Clergymen.*
12. *Plurality of Benefices is unlawful.*
13. *The administration of the Sacraments ought to be gratuitous.*
14. *A good use of the Ecclesiastical Revenues.*
15. *The Duties of Professors of Divinity.*

I.

1. *The Foundation of these Duties, the Holiness of the Ecclesiastical Ministry.*

THE Duties to be explained here are those which have relation to the publick Order of the Society. But altho this Idea seems not to take in the general Duty of Clergymen, which obliges them to such a Purity in Life and Conversation as may be suitable to the Holiness of their Ministry; yet we ought to presuppose this primary Duty as the Foundation of those which are the subject matter of this Section; and it hath also its relation to the Publick, it being the Duty of Clergymen to edify others by their good Example *a*.

a Be ye Holy, for I am Holy. 1 Pet. 1. 16.
I am the Lord your God: ye shall therefore sanctify your selves, and ye shall be Holy, for I am Holy: neither shall ye defile your selves with any manner of creeping thing that creepeth upon the Earth. Levit. 11. 44. Ibid. 19. 2. & 20. 7. 1 Cor. 3. 9.
'If Holiness be enjoined to all the faithful in 'general, much more is it to Clergymen, whose 'Duty it is to instruct others by their Life and 'Conversation, as well as by their Doctrine.

Scire Prælati debent, qui si perversa unquam perpetrant, tot mortibus digni sunt, quot ad subditos suos perditionis exempla transmittunt; unde necesse est ut tanto se cautius a culpa custodiant, quanto per prava quæ faciunt non soli moriuntur. 11. *q.* 1. *c.* 3.

'Altho this Canon respects Clergymen who 'have the Cure of Souls, yet it may be ap'plied to all who exercise any Ministerial Function 'in which they ought to shew a good Example.

V. dist. 36. *cap.* 1. *Ibidem* 38. *cap.* 3. *Conc. Trident. Sess.* 23. *de refor. cap.* 14. *Ibidem, Sess.* 25. *c.* 18.

See Art. 4. of the foregoing Section, and the Texts there quoted.

II.

2. *Duty of Princes to see that Clergymen perform their Duties relating to the Publick.*

Altho the Duty of Edification and good Example which Clergymen owe to the faithful, extends in general to all the several steps of their Conduct which may come to the knowledge of any Person whatsoever, seeing they ought not to give to any body a bad Example; yet we are not here to enter upon this detail; our Business being to confine our selves to such Duties of Clergymen as have a precise relation to the

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the publick Order of the Society, and which may deserve that Princes should imploy their Authority to see them punctually observed *b*.

b See the following Article.

III.

3. *The Right and Duty of Princes, to maintain the Discipline of the Church.*

This Duty of Princes, to have a watchful Eye over the Clergy in the discharge of such of their Functions as have relation to the publick Order, is equally founded both on the Obligation Princes are under to imploy for the Service and Glory of God the Power they hold of him, in every thing which may concern Religion, and may want the assistance of that Power, and of the Sovereign Authority, which chiefly respects the publick Order. Thus in the Old Testament the good Princes took care to see that the Priests performed their Duties *c*. Thus the first Christian Emperors *d*, and in imitation of them our Kings *e*, have joined their Power to the Authority of the Church to enforce the observance of the Laws and Discipline thereof, and have backed by their Laws those touching the Duties of Clergymen, which have most relation to the Publick; having judged, *that the Zeal which they had for Religion, the good of the Church, the Dignity of the Priesthood, and the Welfare of the Publick, obliged them to contribute all in their Power to the maintenance of the said Discipline f*: and it is with this View that the Kings of *France* have made the several Laws which shall be explained in the following Articles, and that they therein stile themselves Protectors, Guardians, Conservators and Executors of what the Church teaches and decrees *g*.

c 'And *Jehoash* said to the Priests, All the Money of the dedicated things that is brought into the House of the Lord, even the Money of every one that passeth the account, the Money that every Man is set at, and all the Money that cometh into any Man's Heart to bring into the House of the Lord; let the Priests take it to them, every Man of his Acquaintance. 2 *Kings* 12. 4, 5.

'And he brought in the Priests, and the *Levites*, and gathered them together into the East Street; and said unto them, Hear me, ye *Levites*, sanctify now your selves, and sanctify the House of the Lord God of your Fathers, and carry forth the filthiness out of the Holy Place. 2 *Chron*. 29. 4, 5.

d Omni innovatione cessante, vetustatem & Canones pristinos Ecclesiasticos, qui usque nunc tenuerunt etiam per omnes Illyrici provincias servari præcipimus: ut si quid dubietatis emerserit id oporteat non absque scientia viri reverendissimi sacrosanctæ legis Antistitis Ecclesiæ urbis Constantinopolitanæ, (quæ Romæ veteris prærogativa lætatur) conventui sacerdotali sanctoque judicio reservari. *l. 6. C. de sacrosanct. Eccl.*

Qui sub prætextu Decanorum seu Collegiatorum, cum id munus non impleant, aliis se muneribus conantur subtrahere, eorum fraudibus credimus esse obviandum: ne quis sub specie muneris, quod minus exequitur, alterius muneris oneribus relevetur: ne argentariorum vel nummulariorum munera declinentur ab his, qui dici, tantummodo Collegiati vel Decani festinant: ideoque si quis eorum sub nudæ appellationis velamine Collegiatum seu Decanum se appellat; sciat pro se alium subrogandum, qui prædicto muneri sufficiens approbetur: subrogatione videlicet loco memoratorum vel eorum qui moriuntur, primatum ejus, qui subrogatur, admissa judicio: ab hac dispositione nemine se excusante sacrosanctarum Ecclesiarum reverentia. *l. 9. eod.*

See the first Titles of the Code of *Justinian*, and of that of *Theodosius*.

e See the Treatise of Laws, *Chap.* 10. *Numb.* 12.

f Sæpe quidem ipsis talia custodire debere prædicavimus. Videntes autem de his factam nobis relationem in necessitatem incidimus, ad præsentem veniendi legem, tum propter nostrum super Religionis studium, tum etiam propter sacerdotii ipsius simul & communis reipublicæ utilitatem. *l.* 34. §. 2. *C. de Episc. aud.*

g See the Ordinance of *Francis* I. in *July*, 1543.

IV.

4. *The chief Duties of Pastors of Souls, are Learning, and a good Life.*

The principal Duties of those who exercise the Functions of Pastors of Souls, are a good Life, and the knowledge of their Ministry, that they may exercise it with Mildness and Charity, with Courage, Steddiness, and a Zeal for Truth and Justice: and as such who are called to fill those Places, ought to have these essential Qualifications, that they may dispense to the faithful the Lights of this Knowledge, and join a good Example to their Instructions; so is it likewise the Duty of Prelates, Patrons and others, who are any way concerned in filling up the places of this Ministry, to be as careful as possible to nominate only such as these Qualities have rendred worthy of the Ministry *h*.

h 'We require and command all Prelates, Patrons and ordinary Collators to nominate to Ecclesiastical Benefices, and even to Curacies and others having the Cure of Souls, Persons of a good Life and Learning. *Ordinance of Orleans, art.* 4.

For the Priests Lips should keep Knowledge, and they should seek the Law at his Mouth. Mal. 2. 7.

If there arise a matter too hard for thee in Judgment, between Blood and Blood, between Plea and Plea, and between Stroke and Stroke; being matter of Controversy within thy Gates: then shalt thou arise, and get thee up into the place which the Lord thy God shall choose. Deut. 17. 8.

*A Bishop then must be blameless, the Husband of one Wife, vigilant, sober, of good Behaviour, given to Hospitality, apt to teach, not given to Wine, no striker, not greedy of filthy Lucre, but Patient, not a Brawler, not Covetous; one that ruleth well his own House, having his Children in subjection with all Gravity.——Moreover, he must have a good Report of them which are with-

without, lest he fall into Reproach, and the Snare of the Devil. 1 Tim. 3. 2, 3, 4, 7.

Let the Elders that rule well, be counted worthy of double Honour, especially they who labour in the Word and Doctrine. 1 Tim. 5. 17.

For a Bishop must be blameless, as the Steward of God; not self-willed, not soon angry, not given to Wine, no Striker, not given to filthy Lucre, but a lover of Hospitality, a lover of good Men, sober, just, holy, temperate; holding fast the faithful Word, as he hath been taught, that he may be able by sound Doctrine, both to exhort and to convince the Gainsayers. Tit. 1. 7, 8, 9.

Sit Rector discretus in silentio, utilis in verbo, ne aut tacenda proferat, aut proferenda reticescat. Nam sicut incauta locutio in errorem pertrahit, ita indiscretum silentium eos qui erudiri poterant, in errore derelinquit. Sæpe namque Rectores improvidi humanam amittere gratiam formidantes, loqui libere recta pertimescunt, & juxta veritatis vocem nequaquam jam gregis custodiæ pastorum studio, sed mercenariorum vice deserviunt: quia veniente lupo fugiunt, dum se sub silentio abscondunt. Hinc namque eos, per Prophetam Dominus increpat, dicens: *canes muti non valentes latrare,* hinc rursus queritur, dicens: *non ascendistis ex adverso, neque opposuistis murum pro domo Israel, ut staretis in prælio in die Domini*—Sacerdos ergo, si prædicationis est nescius, quam clamoris vocem daturus est præco mutus? Hinc est enim, quod super Pastores primos in linguarum specie Spiritus sanctus incedit: quia nimirum quos repleverit, de se protinus loquentes facit—sed cum Rector se ad loquendum præparat, sub quanto cautelæ studio loquatur, attendat: ne si inordinate ad loquendum rapiatur, erroris vulnere corda audientium feriantur, & cum fortasse sapiens videri desiderat, vanitatis compagem insipienter abscindat hinc: namque veritas dicit, *habete sal in vobis, & pacem habete inter vos;* per sal quippe verbi sapientia designatur. Qui ergo loqui sapienter nititur, magnopere metuat, ne ejus eloquio audientium unitas confundatur, &c. *Dist.* 42. *C.* 1.

Cum scripturæ sacræ scientia in boni Rectoris pectore si est virga directionis, sit & manna dulcedinis. Hinc etiam David ait: *Virga tua & baculus tuus ipsa me consolata sunt.* Virga enim percutimur, & baculo sustentamur. Si ergo est districtio virgæ, quæ feriat, sit & consolatio baculi, quæ sustentet. Sit itaque amor, sed non emolliens: sit rigor, sed non exasperans: sit zelus, sed non immoderate sæviens: sit pietas, sed non plus quam expediat parcens. Intueri libet in Mosis pectore misericordiam cum severitate sociatam. Videamus amantem pie, & districte sævientem. *Dist.* 45. *C.* 9.

V.

5. Modesty in their Apparel and Furniture.

Clergymen, and especially those who have the Cure of Souls, ought to observe both in their Apparel and Furniture, that decency and modesty that is proper to their State *i*.

i Clericus professionem suam & habitu & incessu probet: & ideo nec vestibus, nec calceamentis decorem quærat. *Dist.* 41. *C.* 8.

Episcopus vilem supellectilem, & mensam ac victum pauperem habeat, & dignitatis suæ authoritatem fide, & vitæ meritis quærat. *Ibid. C.* 7.

Omnis jactantia, & ornatura corporalis a sacrato ordine aliena est. Eos ergo Episcopos, vel Clericos, qui se fulgidis, & claris vestibus ornant, emendari oportet. Quod si in hoc permanserint epitimio tradantur, similiter & eos qui unguentis unguntur. 21. *q.* 4. *C.* 1.

Decet omnino Clericos in sortem Domini vocatos, vitam moresque suos omnes componere, ut habitu, gestu, incessu, sermone, aliisque omnibus nil nisi grave, moderatum, ac religione plenum præ se ferant. *Conc. Trid. Sess.* 22. *C.* 1. *de reform.*

Oportet——Clericos vestes proprio congruentes ordini semper deferre, ut per decentiam habitus extrinseci, morum honestatem extrinsecam ostendant ——Propterea omnes Ecclesiasticæ personæ, quantumque exemptæ, quæ aut in sacris fuerint, aut dignitates, personatus, officia, aut beneficia qualiacumque Ecclesiastica obtinuerint, si, postquam ab Episcopo suo, etiam per edictum publicum, moniti fuerint, honestum habitum clericalem illorum ordini, & dignitati congruentem & juxta ipsius Episcopi ordinationem & mandatum non detulerint, per suspensionem ab ordinibus, ac officio, & beneficio, ac fructibus, redditibus, & proventibus ipsorum beneficiorum, nec non si semel correcti denuo in hoc delinquerint, etiam per privationem officiorum & beneficiorum hujusmodi coerceri possint, & debeant. *Ibid. Sess.* 14. *C.* 6. *de reform.*

V. Sess. 23. *C. de ref.*

'We exhort all Archbishops, Bishops and Prelates, to be punctual in keeping their Residence, holding their Provincial Councils, obliging the Curates and other beneficed Persons to reside upon their Livings, and to live with great Simplicity and Modesty, in such manner as the Decrees and Canons of the Church require; and more especially in their wearing Apparel. And it is our Will and Pleasure, that the Judges should seize and apprehend such Ecclesiasticks as wear gawdy and indecent Apparel, and put them in Prison, that they may deliver them over into the hands of their Prelates, who shall be obliged to inflict Corporal Punishment on them. *Ordinance of* July 27. 1551. *Art.* 45.

VI.

6. They ought not to cohabit with Women.

It is a Consequence of the good Example which Clergymen are bound to give, that they do not cohabit with any Woman, besides those whom the Canons of the Church allow them to cohabit with *l*.

l Clericus solus ad fœminæ tabernaculum non accedat, nec properet sine majoris natu Sacerdotis jussione: nec solus Presbyter cum sola fœmina fabulas misceat, &c. *Dist.* 1. *C.* 20.

Interdixit per omnia sancta Synodus, non Episcopo, non Presbytero, non Diacono, vel alicui omnino, qui in Clero est, licere subintroductam habere mulierem, nisi forte matrem, aut sororem, aut amitam, aut etiam eas idoneas personas, quæ fugiant suspiciones. *Dist.* 32. *C.* 16.

Hospitiolum tuum aut raro aut nunquam mulierum pedes terant. Quia non potest toto corde cum Deo habitare, qui fœminarum accessibus copulatur. Fœmina conscientiam secum pariter habitantis exurit; nunquam de formis mulierum disputes. Fœminæ nomen tuum noverint; vultum nesciant. Fœminam, quam viderint bene conversantem, mente dilige, non corporali frequentia. Si bonum est mulierem non tangere, malum est ergo tangere. *Ibid. C.* 17. Neque enim hoc silere debeo, quod cum gravi animi tristitia dico: Sacerdotes enim cum fœminis habitare conspicio: quod nefarium est dicere, vel audire, & contra sanctorum Canonum sancita. Ubi enim talis fuerit commorantium cohabitatio, antiqui hostis stimuli non desunt. *Dist.* 81. *C.* 23. *Vid. seq.*

V. C. Trid. Sess. 25. *C.* 14.

Quicun-

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Quicunque cujuscumque gradus Sacerdotio fulciuntur, vel Clericatus honore censentur, extranearum sibi mulierum interdicta consortia cognoscant, ac tantum eis facultate concessa, ut matres, filias, atque germanas, intra domorum suarum septa contineant: in his enim nihil sævi criminis existimari fœdus naturale permittit. *l.* 19. *C. de Episc. & Cler.*

Presbyteris autem & Diaconis, & Subdiaconis, & omnibus in Clero conscriptis, non habentibus uxores secundum sacros Canones, interdicimus etiam nos secundum sanctarum regularum virtutem, mulierem aliquam in propria domo superinductam habere: tamen citra matrem, aut sororem, aut filiam, & alias personas quæ omnem suspicionem effugiunt. Si quis autem absque hac observatione mulierem in sua domo habet quæ potest ei suspicionem inferre, & semel & secundo a suo Episcopo, aut a suis Clericis admonitus ne cum tali muliere habitaret, ejicere eam de sua domo noluerit: aut accusatore apparente approbetur inhoneste cum muliere conversari, tunc Episcopus ejus secundum Ecclesiasticos Canones de clero eum amoveat, curiæ civitatis, cujus Clericus erat, tradendo. Episcopum vero nullam penitus mulierem habere, aut cum ea habitare permittimus. Si autem probetur nequaquam hoc custodiens, Episcopatu projiciatur, ipse enim se ostendit indignum Sacerdotio. *Nov.* 123. *c.* 29.

[' What is said in this Article, and the Texts here ' quoted out of the Civil and Canon Law, in relation to the Celibacy of the Clergy, is not to be ' extended to the Marriage of Priests in the Protestant Churches, where the Clergy are allowed to ' marry; the restraint under which they were in this ' particular in the times of Popery having been taken ' off at the Reformation, as an Innovation introduced into the Christian Church in the latter Ages, ' contrary to the Rule and Example of our Saviour ' and his Apostles. *Vid. Stat.* 2. *Ed.*VI. *cap.* 21. ' 5 & 6 *Ed.* VI. *cap.* 12.]

VII.

7. They ought to abstain from publick Shews, and Games of Hazard.

The profane Diversions of publick Shews are forbidden to all Clergymen; not only because of the opposition between such Diversions and the Lives of Christians, but also by reason of the Scandal which such an idle disorderly Life in Persons of their Character would give to the Faithful *m*; and they ought likewise to abstain from Games of Hazard *n*.

m Non oportet ministros altaris, vel quoslibet Clericos spectaculis aliquibus, quæ aut in nuptiis, aut scenis exhibentur, interesse: sed antequam Thimelici ingrediantur, surgere eos de convivio & abire. *Dist.* 5. *c.* 37. *de consecr.*

His igitur lege patrum cavetur, ut a vulgari vita seclusi, a mundi voluptatibus sese abstineant: non spectaculis, non pompis intersit. *Dist.* 23. *c.* 3.

Statuit sancta Synodus, ut quæ alias a summis Pontificibus, & a sacris Conciliis de Clericorum vita, honestate, cultu, doctrinaque retinenda, ac simul de luxu, commessationibus, correis, aleis, lusibus, ac quibuscumque criminibus, nec non sæcularibus negotiis fugiendis copiose ac salubriter sancita fuerunt, eadem in posterum iisdem pœnis vel majoribus arbitrio Ordinarii imponendis observentur. *Conc. Trid. Sess.* 21. *c.* 1. *de reform.*

Placet nostræ clementiæ, ut nihil commune Clerici cum publicis actionibus, vel ad curiam pertinentibus (cujus corpori non sunt annexi) habeant. Præterea his qui parabolani vocantur, neque ad quodlibet publicum spectaculum, neque curiæ locum, neque ad judicium accedendi licentiam permittimus: nisi forte singuli ob causas proprias & necessitates judicem adierint. *l.* 17. *c. de Episc. & Cl.*

n Episcopus aut Presbyter, aut Diaconus, aleæ atque ebrietati deserviens, aut desinat, aut certe damnetur. Subdiaconus, aut Lector, aut Cantor similia faciens, aut desinat, aut communione privetur. *Dist.* 35. *c.* 1.

Interdicimus sanctissimis Episcopis, Presbyteris, & Diaconis, & Subdiaconis, Lectoribus, & omnibus aliis cujuslibet venerandi Collegii aut Schematis constitutis, ad tabulas ludere, aut aliis ludentibus participes esse, aut inspectores fieri, &c. *Nov.* 123. *Cap.* 10.

VIII.

8. The Duty of Residence.

Seeing Clergymen, who are engaged in a Ministry of which they are bound to exercise the Functions, are obliged to perform them in the places to which they are called; Residence in those places is an essential indispensible Duty incumbent on them. Thus Bishops ought to reside in their Diocesses, and Rectors, Curates and others in their Parishes, and the other places where they ought to exercise their Ministerial Functions *o*.

o Interdicimus autem Deo amabilibus Episcopis proprias relinquere Ecclesias, & ad alias regiones venire. Si vero necessitas faciendi hoc contigerit, non aliter nisi cum litteris beatissimorum Patriarchæ, aut Metropolitæ, aut imperialem videlicit jussionem hoc faciant. *Nov.* 123. *c.* 9.

' We require all Archbishops, Bishops, Abbots, ' Prelates and others who have any Dignities within ' our Kingdom, and who live and reside without ' the Bounds and Limits of the same, and without ' our Dominions, to come and appear within the ' space of five Months after the Publication of ' these Presents, at their respective Benefices within ' our Kingdom, or one of them, and there to ' keep their continual Residence upon pain of deprivation of the Temporalities of their Benefices. ' *Ordinance of* Lewis II. *in* 1475.

' All Archbishops, Bishops, Abbots and Curates, shall reside in their respective Dioceses and ' Benefices, and there perform every one in Person ' the Duties of their respective Functions, upon ' pain of seizure of the Temporalities of their ' Benefices. We ordain, until it be otherwise ' provided, that by their Residence on their Benefices, or other Office which requires, according ' to our Ordinances, Residence and actual Service, ' which they shall be obliged to make a clear ' Proof of, they shall be dispensed from Residence ' on their other Benefices, which they hold by ' Dispensation, but upon condition nevertheless that ' they substitute for their Vicars Persons of sufficient ' Abilities, of good Life and Conversation; to ' every one of whom they shall assign such a Portion of the Revenue of the Benefice as may serve ' for his maintenance: otherwise, in default thereof we enjoin the Archbishop or Bishop of the ' Diocese to make due Provision therein. We ' strictly command our Judges and Proctors to see ' that these our Orders be duly executed, and to ' cause the Temporalities of the Archbishopricks, ' Bishopricks, Abbies, or other Benefices abovementioned, to be seiz'd without any Favour or ' Partiality within a Month after they shall have ' summoned the Prelates to reside themselves, and ' to cause the Clergy of their Diocesses to reside ' upon their respective Benefices. We also require

' our

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'our Judges and Proctors to take information of 'Non-Residences, &c. *Ordinance of* Orleans, *Art.* 5. See the Ordinance of *Blois*, Art. 14, &c.

Quia nonnulli modum avaritiæ non imponentes, dignitates diversas Ecclesiasticas, & plures Ecclesias Parochiales, contra sacrorum Canonum instituta nituntur accipere, ut cum unum Officium vix implere sufficiant, stipendia sibi vindicent plurimorum: ne id de cætero fiat, districtius inhibemus. Cum igitur Ecclesia, vel Ecclesiasticum ministerium committi debuerit, talis ad hoc persona quæratur; quæ residere in loco & curam ejus per se ipsam valeat exercere: quod si aliter factum fuerit, & qui receperit, quod contra sacros Canones accepit, amittat: & qui dederit, largiendi potestate privetur. *Cap.* 3. *de Clericis non residentibus.*

Quia in tantum quorumdam processit ambitio, ut non duas, vel tres, sed plures Ecclesias perhibeantur habere, cum nec duabus possint debitam provisionem impendere: per fratres, & Coepiscopos nostros hoc emendari præcipimus: & de multitudine (præbendarum) Canonibus inimica, quæ dissolutionis materiam, & evagationis inducit, certumque continet periculum animarum, eorum qui in Ecclesiis deservire valeant, indigentiam volumus sublevari. *Cap.* 5. *Decretal. de præbendis & dignitatibus. V. Tot. T. de Clericis non residentibus.*

Et illud etiam definimus, ut nemo Deo amabilium Episcoporum foris a sua Ecclesia plusquam per totum annum deesse audeat, nisi hoc per imperialem fiat jussionem (tunc enim solum erit inculpabile) sacratissimis Patriarchis uniuscujusque Diœceseos compellentibus Deo amabiles Episcopos suis inhærere sanctissimis Ecclesiis: & non longo itinere separari, neque in peregrinis demorari velle, neque sanctissimas Ecclesias negligere, neque annum excedere; quem & ipsum propter misericordiam constituimus. Si vero ultra annum erraverit & dereliquerit, & non ad Episcopatum remeaverit proprium, neque Imperialis aliqua eum (sicut prædiximus) detineat jussio: tunc si quidem sit Metropolita, circa Ecclesiasticam dispositionem segregatum, regionis illius Patriarcha revocet quidem cum legitimis inclamationibus, servans ubique sacrarum regularum observationem. Si vero maneat per omnia inobediens, expellatur a sacro Episcoporum choro: & alium introducat hujusmodi & reverentia, & verecundia, & honestate dignum. Si vero non Metropolita, sed aliorum Episcoporum aliquis sit qui erraverit, hæc omnia a Metropolita fiant: nemo enim eorum talem suscipiat occasionem, si dixerint propterea proprias derelinquere Ecclesias, proptereaque litium causas aut aliarum rerum propriarum, aut ad sacras Ecclesias respicientium circumlustrant, & hic constituti adhærent, aut in aliis veniunt locis. *Nov.* 6. *c.* 2.

Jubemus fieri omnibus manifestum, per singulas Metropoles uniuscujusque Provinciæ ipsi subjectis sanctissimis Sacerdotibus: quoniam non decet aliquem ipsorum aut eorum, qui in aliis Provinciarum civitatibus sub Metropolitano ordinati sunt, Episcoporum, secundum propriam voluntatem absque divina nostra speciali jussione, relinquere quidem gubernatam a se sanctissimam Ecclesiam, in hanc vero fœlicem commeare civitatem, qualiscumque emergat res: sed mittere oportere huc unum aut duos ex sibi subjecto pio clero, & facere manifesta nostræ pietati ea, quibus opus habent, aut per se ipsos aut per intermediam tuam beatitudinem: sicque perfrui justa & compendiaria nostra ope. Si enim quippiam eorum, quæ ad nos relata fuerunt, tale nobis visum fuerit, ut indigeat ipsorum Deo amantissimorum Sacerdotum præsentia, confestim tum proficisci jubebimus ipsos. Absque vero tali divina jussione neminem proficisci concedimus. *l.* 43. §. 1. *c. de Episc. & Cler.*

Declarat sancta Synodus omnes Patriarchalibus, Primatibus, Metropolitanis ac Cathedralibus Ecclesiis quibuscumque, quocunque nomine & titulo præfectos: etiamsi sanctæ Romanæ Ecclesiæ Cardinales sint, obligari ad personalem in sua Ecclesia vel Diœcesi residentiam, vel injuncto sibi Officio defungi teneantur, neque abesse posse, nisi ex causis & modis infra scriptis. Nam cum Christiana charitas, urgens necessitas, debita obedientia, ac evidens Ecclesiæ vel Reipublicæ utilitas aliquos abesse postulent & exigant; decernit eadem sancta Synodus has legitimæ absentiæ causas a beatissimo Romano Pontifice aut a Metropolitano vel ab eo absente, suffraganeo Episcopo antiquiori residente, qui idem Metropolitano absentiam probare debebit. *Conc. Trid. Seff.* 23. *de reform.*

['Regularly, Personal Residence is required of 'Ecclesiastical Persons upon their Cures. And 'therefore it is, that by the Common Law of *England*, if he that hath a Benefice with Cure, be 'chosen to an Office, as to an Office of Bailiff, 'or Beadle, or the like Secular Office, he may have 'the King's Writ to exempt him from serving in 'such Office. *Coke* 2. *Instit. pag.* 625.]

IX.

9. Residence of Canons.

This Duty of Residence respects among others the Canons and Prebendaries of Cathedral and Collegiate Churches, who are bound to assist in the Choir at the Celebration of Divine Service: and this Duty requires not so much a bare Presence without Attention and Modesty, to recite negligently and without Devotion the Words of the Psalms, and the other Prayers of the Church, as a serious, modest, and attentive Presence, which may edify the Faithful by a grave, distinct and articulate singing the Words they address to God, which God himself has endited, and which by this harmonious recital of them ought to raise in the Hearts of the Faithful the Sentiments of Piety which their Sense contains: and this Duty of Gravity and Modesty in the Church-Musick regards likewise the other Ecclesiasticks, and the Regular Communities of both Sexes who celebrate Divine Service in the Quire *p*.

p Canonicus præbendarius nisi unius Ecclesiæ in qua conscriptus esse non debet. *Dist.* 70. *c.* 2.

Canunt ut excitent ad compunctionem animos audientium. *Dist.* 21. *C.* 1.

Speaking to yourselves in Psalms and Hymns, and spiritual Songs, singing, and making Melody in your Heart to the Lord. Ephes. 5. 19.

Moreover, David *and the Captains of the Host separated to the Service of the Sons of* Asaph, *and of* Heman, *and of* Jeduthan, *who should prophesy with Harps, with Psalteries and with Cymbals.* 1 Chron. 25. 1.

And he appointed certain of the Levites *to minister before the Ark of the Lord, and to record, and to thank and praise the Lord God of* Israel. 1 Chron. 16. 4.

And when the Burnt-Offering began, the Song of the Lord began also with the Trumpets, and with

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with the Instruments ordained by David *King of* Israel. 2 Chron. 29. 27.

Let the Word of Christ dwell in you richly in all Wisdom, teaching and admonishing one another in Psalms, and Hymns, and spiritual Songs, singing with Grace in your Hearts to the Lord. Coloss. 3. 16.

See the Ordinances, and the Texts quoted on the foregoing Article.

Præterea sancimus, ut omnes Clerici per singulas Ecclesias constituti, per seipsos psallant nocturna, & matutina & vespertina, ne ex sola Ecclesiasticarum rerum consumptione Clerici appareant, nomen quidem habentes Clericorum, rem autem non implentes Clerici circa liturgiam Domini Dei. Turpe enim est pro ipsis Scriptos necessitate ipsis inducta psallere. Si enim multi laicorum, ut suæ animæ consulant, ad sanctissimas Ecclesias confluentes studiosi circa psalmodiam ostenduntur, quomodo indecens non fuerit Clericos ad id ordinatos non implere suum munus? quapropter omni modo Clericos psallere jubemus, & ipsos inquiri a Deo amantissimis pro tempore Episcopis & duobus Presbyteris in singulis Ecclesiis, & ab eo qui vocatur Archos vel Exarchos, & ab ecdico sive defensore cujusque sanctissimæ Ecclesiæ: & eos qui inventi non fuerint inculpate in liturgiis perseverantes, extra Clerum constituti. Nam qui constituerunt vel fundarunt sanctissimas Ecclesias pro sua salute & communis Reipublicæ, reliquerunt illis substantias, ut per eas debeant sacræ liturgiæ fieri, & ut in illis a ministrantibus piis Clericis Deus colatur. *l.* 42. §. 10. *C. de Episc. & Cler.*

Qui cum in choro fuerint, gravitatem servent, quam & locus & officium exigunt, non insimul cum aliis fabulantes, seu colloquentes, aut litteras seu scripturas alias legentes, & cum psallendi gratia ibidem conveniant, juncta & clausa labia tenere non debent: sed omnes præsertim qui majori funguntur honore, in psalmis, hymnis & canticis Deo alacriter modulentur——Nemo ibidem dum Horæ in communi publice cantantur, legat, vel dicat privatum Officium, nam non solum obsequium quo obnoxius est choro, subtrahit, sed alios psallentes perturbat. *Conc. Basil. Sess.* 21.

Omnes vero divina per se, & non per substitutos compellantur obire Officia & Episcopo celebranti, aut alia Pontificalia exercenti, adsistere, & inservire, atque in choro ad psallendum instituto, hymnis & canticis Dei nomen reverenter, distincte, devote, laudare. *Conc. Trid. Sess.* 24. *C.* 12. *de Resident.*

V. ibidem Sess. 21. *c.* 3. *V. ibid. Sess.* 24. *de refor. c.* 12.

X.

10. Visitations of Bishops.

Seeing the Episcopal Functions are not confined to the Places of the usual Residence of the Bishops, but extend to all the Places within their Diocesses, and that they ought to inform themselves of the Condition of every Church, and take care that the Pastors and others under their Government do acquit themselves of all their Duties, and that every thing relating to the Administration of the Sacraments and to the whole spiritual Ministry be there in good order; the Duty of Residence implies, with respect to Bishops, that of visiting their Diocesses, which by the antient Canons of the Church, and the Ordinances of *France*, they are obliged to do once a Year, or at least once in two Years if the Diocese be so large that they cannot visit the whole in one Year; and if they cannot visit in Person, they are obliged to visit by their Vicars-General *q*.

q Patriarchæ, Primates, Metropolitani & Episcopi propriam Diœcesim per seipsos, aut si legitime impediti fuerint, per suum generalem Vicarium aut Visitatorem, si quotannis totam, propter ejus latitudinem visitare non poterunt, saltem majorem ejus partem; ita tamen, ut toto biennio per se vel visitatores suos compleatur, visitare non prætermittant. *Conc. Trid. Sess.* 24. *c.* 3. *de reform.*

'All Archbishops, Bishops, and Archdeacons 'shall visit in Person the Churches and Cures of 'their respective Dioceses. *Ordinance of* Orleans '*in* 1560. *Art.* 6. *See Art.* 7.

'The Archbishops and Bishops shall be bound 'to visit in Person, or if they are hinder'd by any 'lawful Impediment, by their Vicars-General, the 'Places of their Diocese every Year; and if by 'reason of the too great Extent of the Diocese the 'Visitation cannot be finished within that time, 'they shall be bound to finish it in two Years time. '*Ordinance of* Blois *in* 1579, *Art.* 32.

[The antient Law of the Bishops Visitations in the Church of *England* was likewise once a Year. *Spelm. Conc. V.* 1. *p.* 246, 293. But the Work of Parochial Visitations, and also that of holding General Synods or Visitations when the Bishop did not visit, having come by degrees to be fixed and established Branches of the Archidiaconal Office, the present Law and Practice in *England* is for the Bishops to visit their Diocesses only once in three Years: So that the Bishop is not only not obliged by Law to visit annually, but is even restrained from it: which Restraint being in itself unreasonable, and having proceeded merely from the Profits which attend the Act of Visiting, the Reformers of our Ecclesiastical Laws were of opinion that it ought to be moderated after this manner; that is, *That the Bishop should visit his whole Diocese every third Year, and receive the usual Procurations; and that it should be lawful for him to visit likewise at other times, as Occasion should require, but at his own Expence, without burdening the Clergy with new Procurations.* Reform. Leg. pag. 99.]

XI.

11. Disinterestedness in Clergymen.

Since one of the Qualities most essential to Clergymen is that of Disinterestedness *r*, in which they ought most particu-

r Not given to filthy Lucre. Tit. 1. 7.

Let your Conversation be without Covetousness. Heb. 13. 5.

Having Food and Raiment, let us be therewith content. But they that will be rich, fall into Temptation, and a Snare, and into many foolish and hurtful Lusts, which drown Men in Destruction and Perdition. For the Love of Money is the Root of all Evil, which while some coveted after, they have erred from the Faith, and pierced themselves through with many Sorrows. Heb. 6. 8, 9, 10.

'If Avarice is a Crime in Laymen, Ecclesiastical Persons ought much more to avoid it.

Omnis a Clericis indebitæ conventionis injuriæ, & iniquæ exactionis repellatur improbitas. Nullaque conventio sit contra eos munerum sordidorum, & cum negotiatores ad aliquam præstationem competentem vocantur, ab his universis istiusmodi strepitus

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particularly to give a good Example to Lay-men; the Laws of Princes have enjoined them the Observance of three essential Rules against the Corruption of Avarice, and which shall be explained in the three following Articles.

pitus conquiescat. Si quid enim vel parsimonia, vel provisione, vel mercatura (honestati tamen conscia) conjecerint, id in usum pauperum atque egentium ministrari oportet. *l.* 2. *in princ. C. de Episc. & Cler.*

I opened my Mouth, and said, Buy her for your selves without Money. Ecclus. 51. 25.

Yea they are greedy Dogs which can never have enough, and they are Shepherds that cannot understand; they all look to their own Way, every one for his Gain, from his Quarter. Isa. 56. 11.

Usuris nequaquam incumbant, neque turpium occupationes lucrorum fraudisque cujusquam studium appetant: amorem pecuniæ quasi materiam cunctorum criminum fugiant. *Dist.* 23. *cap.* 3.

Quoniam quidquid habent Clerici pauperum est: & domus illorum omnibus debent esse communes: susceptioni peregrinorum & auspitium invigilare debent. 17. *q.* 1. *c. ult.*

See *Psal.* 14.

XII.

12. Plurality of Benefices is unlawful.

The first of these Rules is that which forbids Plurality of Benefices, and allows not the having more than one, except in Cases where there is a just Cause for dispensing with it. Which proves the Rule, that except in those Cases one cannot possess more than one Benefice: and this Rule is founded on two very just Motives; one for repressing Avarice, and the other for engaging every one in the Discharge of his Functions *s*.

s Cum Ecclesiasticus ordo pervertatur, quando unus plurium officia occupat Clericorum: sanctè sacris Canonibus cautum fuit, neminem oportere in duabus Ecclesiis conscribi. Verum quoniam multi improbæ cupiditatis affectu seipsos, non Deum, decipientes, ea quæ bene constituta sunt, variis artibus eludere, & plura simul beneficia obtinere non erubescant; sancta Synodus debitam regendis Ecclesiis disciplinam instituere cupiens, præsenti decreto, quod in quibuscunque personis, quocunque titulo, etiam si Cardinalatus honore fulgeant, mandat observari, statuit in posterum unum tantum beneficium Ecclesiasticum singulis conferatur, quod quidem si ad vitam ejus, cui confertur, honeste sustentandam non sufficiat, liceat nihilominus aliud simplex sufficiens, dummodo utrumque personalem residentiam non requirat, eidem conferri, &c. *Conc. Trid. Sess.* 24.

Quicunque de cætero plura curata, aut alias incompatibilia beneficia Ecclesiastica, sive per viam unionis ad vitam, seu commendæ perpetuæ, aut alio quocunque nomine & titulo, contra formam sacrorum Canonum, & præsertim constitutionis Innocentii tertii quæ incipit: De multa, recipere ac simul retinere præsumpserit; beneficiis ipsis juxta ipsius constitutionis dispositionem, ipso jure, etiam præsentis Canonis vigore, privatus existat. *Ibid. Sess.* 27. *cap.* 14.

Clericus ab instanti tempore non connumeretur in duabus Ecclesiis; negotiationis enim hoc est, & turpis lucri proprium, & Ecclesiastica consuetudine penitus alienum. Audivimus enim ex ipsa Dominica voce, quod nemo potest duobus dominis servire: Aut enim unum odio habebit, & alterum diliget; aut unum sustinebit, & alterum contemnet. Unusquisque enim secundum Apostolicam vocem in quo locatus est in hoc debet manere, & in una locari Ecclesia. 21. *q.* 1. *c.* 1.

Non sit Abbas duorum Monasteriorum. *l.* 40. §. 1. *c. de Episc. & Cler.*

'There is the same reason for the other Benefices as for Abbies; for it is natural that the Functions of the several Offices should be divided among several Ministers: and if there are particular Reasons for the Good of the Church, which may make it necessary to join in one Person the Functions of several Offices; Order requires that they should be united into one Benefice, to be filled by one Person. So that naturally it is contrary to Order, that one Person should enjoy more than one Benefice. As to which it is observable, that by Art. 5. of the Ordinance of *Orleans*, on the Subject of Residence; it is added in relation to those who possess more than one Benefice, *That because they hold them by Dispensation, the King ordains provisionally and until it be otherwise regulated, that they shall reside upon one of their Benefices.* It appears plainly that this Ordinance presupposes that it is only by Dispensation that one can have more than one Benefice, and by consequence that the Rule is to have only one; so that one cannot have many Benefices together without a just Cause, which can only be either the Advantage or the Necessity of the Church.

Quod si urgens justaque ratio & major quandoque utilitas postulaverit, cum aliquibus dispensandum esse, id causa cognita ac summa maturitate, atque gratis a quibuscunque ad quos dispensatio pertinebit, erit præstandum, aliterque facta dispensatio subreptitia censeatur. *Conc. Trid. Sess.* 25. *de reform. cap.* 18.

XIII.

13. The Administration of the Sacraments ought to be gratuitous.

The second Rule which Princes have prescribed for restraining of Avarice in the Ecclesiastical Ministry, is the Prohibition of exacting any thing for the Administration of the Sacraments, and other spiritual Functions *t*.

t Freely ye have received, freely give. Mat. 10. 8.

Pro beneficiis medicinæ Dei munera non accipiant. *Dist.* 23. *C.* 3.

'We prohibit all Prelates, Churchmen, and Curates to suffer any thing to be demanded or exacted for the Administration of the holy Sacraments, Burials, and all other spiritual things, notwithstanding the pretended laudable Customs and common Usages, leaving however every one at free liberty to give what in their discretion they shall think fit. *Ordinance of* Orleans, *Art.* 15.

'The Bishops and other ordinary Collators, or their Vicars and Officers, may not take any thing, under any pretext whatsoever, for the Collation of any Orders, the Tonsure of Clergymen, for Letters Dimissory, and Testimonials, &c. *Ordinance of* Blois, *Art.* 20. The 51st Article of the same Ordinance of *Blois*, and the 27th Article of the Edict of *Melun*, have in some measure qualified that Article which we have just now cited, with respect to Oblations and Parochial Duties; which does not change the Spirit of the Rule, nor excuse those Ministers who by their Avarice profane the Holiness of their Ministry, and who make the Functions thereof to depend on the Profit they may reap thereby.

Nullus

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Nullus Episcopus, aut Presbyter, aut Diaconus qui sacram dispensat Communionem, a percipiente gratiam Communionis aliquod pretium exigat. Neque enim venditur gratia, neque pro pretio gratiam Spiritus sancti damus; sed dignis munere sine defraudatione participare concedimus. Si quis vero eorum, qui connumerantur in Clero, ab eo cui sacram Communionem dispensat, aliquod pretium exegerit, deponatur sicut imitator simoniacæ fraudis. *1. q. 1. c. 100.*

Nihil pro collatione quorumcunque ordinum, etiam Clericalis tonsuræ, nec pro litteris dimissoriis, aut testimonialibus, nec pro sigillo, nec alia quacumque de causa, etiam sponte oblatum Episcopi, & aliorum ordinum collatores, aut eorum ministri, quovis prætextu accipiant——Nec Episcopo ex Notarii commodis, aliquod emolumentum ex eisdem ordinum collationibus directe vel indirecte provenire possit: tunc enim gratis operam suam eos præstare omnino teneri decernit. *Conc. Trid. Sess. 21. c. 1.*

V. Cap. 29. de Simonia.

Sed neque Clericum cujuscunque gradus dare aliquid ei a quo ordinatur, aut alii cuilibet personæ permittimus: solas autem præbere eum consuetudines iis qui ordinantium ministrantes sunt, ex consuetudine accipientibus, unius anni emolumenta non transcendentem. In sancta vero Ecclesia, in qua constituitur, sacrum complere ministerium, & nulla penitus propriis Clericis dare pro sua insinuatione: nec ob hanc causam propriis emolumentis, aut aliis portionibus hunc privari. Sed neque xenodochum aut nosocomon, aut prochotrophum, aut alium quemlibet venerabilis domus gubernatorem, aut quamcunque Ecclesiasticam sollicitudinem agentem, dare aliquid illi a quo constituitur, aut alii cuicunque personæ pro commissa sibi gubernatione. Qui vero præter hæc quæ disposuimus, aut dat, aut accipit, aut mediator fit Sacerdotio aut Clero, hujusmodi commissæ sibi cujuscunque gubernationis nudabitur: iis quæ accipiuntur vindicandis venerabili loco cujus talis persona ordinationem, aut sollicitudinem, aut gubernationem accipit. Si autem sæcularis sit qui accipit; aut mediator factus est: quod datum est, duplum repetitur, & venerabili loco in quo talis persona ordinationem, aut gubernationem, aut sollicitudinem susceperit, præbeatur. Si quis autem Clericus cujuslibet gradus, sive gubernator cujuslibet venerabilis domus, aut ante ordinationem commissam sibi cujuscunque gubernationis, aut sollicitudinis, aut postea aliquid voluerit suarum rerum offerre Ecclesiæ in qua ordinatur, aut loco cujus gubernationem aut sollicitudinem suscepit: non solum prohibemus hoc fieri, sed etiam magis invitamus eos talia pro salute animæ suæ facere: nos enim illa solum dari prohibemus, quæ propriis personis, quibusdam præbentur, non quæ sanctis Ecclesiis, aut aliis venerabilibus locis offeruntur. *Nov. 123. cap. 16.*

XIV.

14. A good Use of the Ecclesiastical Revenues.

The third Rule, which the Laws of Princes have established for the execution of the Laws of the Church, in what concerns the Disinterestedness of Clergymen, is that which ordains them to make a good Use of their Revenues, and which distinguishes their own proper Goods from those which come to them by their Ecclesiastical Functions, and obliges them to look upon these as Goods consecrated and devoted to a pious Use, and deposited in their hands in order to their being so employed; which implies two different Duties: The first, to render them worthy by their good Lives, to take out of the Revenues they may have from the Goods of the Church a suitable and decent Maintenance: For it would be impious to imagine that the Church would be willing to maintain them at such a rate as not to allow them Necessaries, and thereby bring Shame upon herself. And the second is, to employ in Works of Charity and Piety, pursuant to the Intentions of the Church, and of the Founders and Benefactors, that which remains over and above their own necessary Maintenance, and cannot be designed for any other than pious and holy Uses *u*.

u Convenit igitur hujusmodi eligi & ordinari Sacerdotes, quibus nec liberi sint, nec nepotes. Etenim fieri vix potest ut vacans hujus quotidianæ vitæ curis, quas liberi creant parentibus maximas, omne studium omnemque cogitationem circa divinam liturgiam & res Ecclesiasticas consumat. Nam cum quidam summa in Deum spe, & ut animæ earum salvæ fiant, ad sanctissimas adcurrant Ecclesias, & eis omnes suas facultates afferant, & derelinquant ut in pauperes & egentes & alios pios usus consumentur, indecens est Episcopos in suum illas auferre lucrum, aut in propriam sobolem & cognatos impendere. Oportet enim Episcopum minime impeditum affectionibus carnalium liberorum, omnium fidelium spiritualem esse patrem. Has igitur ob causas prohibemus habentem natos aut nepotes, ordinari Episcopum. De his vero Episcopis, qui nunc sunt, vel futuri sunt sancimus, nullomodo habere eos facultatem testandi, vel donandi, vel per aliam quamcunque excogitationem alienandi quid de rebus suis; quas, postquam facti fuerint Episcopi, possederint, & acquisierint, vel ex testamentis, vel donationibus vel alia quacunque causa exceptis: duntaxat his, quas ante Episcopatum habuerunt ex quacunque causa, vel quas post Episcopatum a parentibus & theiis, hoc est patruis vel avunculis, & a fratribus ad ipsos pervenerunt, perventuræque sunt. Quæcunque enim post ordinationem ex quacunque causa extra præfatas personas ad ipsos pervenerunt, ea jubemus ad sanctissimam Ecclesiam, cujus Episcopatum tenuerint, pertinere, & ab ea vindicari & evinci: nulla alia persona potestatem habente, ex eo proprium quid auferre lucrum. Quis enim dubitaverit eos qui ipsis proprias res relinquunt aut reliquerint, & si in aliam personam transferunt aut transtulerunt, non potius ipsum Sacerdotium contemplantes quam ejus personam & cogitantes, quia non solum ab ipsis relicta pie insument, sed & suas ipsorum res adjicient id fecisse. *l. 42. §. 1, & 2. C. de Episc. & Cleric.*

Interdicimus sanctissimis Episcopis, res mobiles aut immobiles, sesque moventes; quæcunque post Episcopatum ad eos quoquo modo pervenerint, in proprios cognatos aut in alias quascunque transferri personas. In captivorum vero redemptionem, & egentium pabula, & alias pias causas, aut pro utilitate propriæ Ecclesiæ, & ex his expendere licentiam habeant: & quidquid ex hujusmodi rebus post obitum eorum in ipsorum facultate remanserit, jubemus hoc ad proprietatem Ecclesiarum quarum Sacerdotium habuerunt, competere. In illis enim solum-

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solummodo rebus licentiam eis alienandi aut relinquendi quibus voluerint, damus quas ante Episcopatum probantur habuisse: post Episcopatum vero, quæ ex genere sibi conjuncto ad eos devolutæ sunt, quibus ab intestato usque ad quartum gradum succedere poterunt. *Nov.* 131. *cap.* 13.

‘ We must distinguish in these Laws of *Justinian*, that which he ordained in them, that is not in use with us, from that which they contain that is agreeable to the spirit and intention of the Church, and that is in use at all times, and which was the foundation of the whole Tenour and Disposition of these Laws. He forbad the promoting to the Office of a Bishop Persons who had Children or Grand-children; which was founded on the two Considerations explained in the first of these two Laws: one, that the domestick Care for Children took up the time necessary for the Episcopal Functions; and the other, to prevent the Goods that were destined for the Church, from being diverted to the uses of the Family of him who had the management and distribution of them. And these Laws enacted farther, that the Bishops who were the dispensers of the Goods of the Church, should not be at liberty to dispose of their own proper Goods, except such as they were possessed of before their advancement to the Episcopal Dignity; and that whatever they should acquire after their said promotion, by what Title soever it were, should belong unalterably to their Church, except what should come to them from their Parents, Uncles, or Brothers upon their dying intestate; this Law presuming that no body would give them any thing, except on account of their Ministry, and with an intention that the Gift should go to the Church: To which the same Emperor added this temperament by the said 131st Novel, *c.* 13. That they might likewise enjoy as their own the Successions of their Collateral Relations who should die intestate to the fourth degree. These are the dispositions of the said Laws, which are not agreeable to the usage of our time; and the observance of them would be liable to great difficulties, and to many inconveniences. But the motive of these dispositions, which was the good use of the Revenues of the Church according to its intention, subsists still; and tho it is permitted to all Clergymen to possess Goods and to acquire them after their promotion, yet it can never be lawful for them to apply the Goods of the Church that come into their hands to other uses than those which it prescribes, or permits, and to those which are conformable to the intention of the Founders and Benefactors; that is to say, as it is ordained by these very Laws, for the maintenance of the Poor, redemption of Captives, and other works of Charity which may be useful to the Church, and worthy of the sanctity which the Ministers thereof profess, and whose most essential quality is the being free from all Covetousness; for if all Covetousness be forbidden to mere Laymen *a*, what is the Crime in those who have taken God for their Portion, who ought to be a Light and an Example to all others, and who are in possession of the Goods of the Church, only that they may dispense them according to the Spirit and Intention thereof, and with a Heart in which Covetousness has not the predominancy *b*?

a Take heed and beware of Covetousness. Luk. 12. 15.

Sancta Synodus——non solum jubet, ut Episcopi modesta supellectili, & mensa ac frugali victu contenti sint; verum etiam in reliquo vitæ genere, ac tota eorum domo caveant, ne quid appareat, quod a sancto hoc instituto sit alienum; quodque non simplicitatem, Dei zelum, ac vanitatum contemptum præ se ferat. Omni vero eis interdicit, ne ex redditibus Ecclesiæ consanguineos, familiaresve suos augere studeant: cum & Apostolorum Canones prohibeant, ne res Ecclesiasticas, quæ Dei sunt, consanguineis donent, sed si pauperes sint, iis ut pauperibus distribuant, eas autem non distrahant, nec dissipent illorum causa: imo quam maxime potest, eos sancta Synodus monet, ut omnem humanum hunc erga fratres, nepotes, propinquosque carnis affectum, unde multorum malorum in Ecclesia Seminarium extat, penitus deponant, *&c.* *Sess.* 25. *de reform. c.* 1.

‘ What is said in this Text, ought to be understood of all the Ministers of the Church who enjoy Ecclesiastical Revenues, of which they are only the Depositaries.

Quoniam quidquid habent Clerici, pauperum est: & domus illorum omnibus debent esse communes: susceptioni peregrinorum & hospitum invigilare debent. 17. *q.* 1. *c. ult.*

Let your Conversation be without Covetousness; and be content with such things as you have. Heb. 13. 5.

b Not Covetous. 1 Tim. 3. 3.

They are Shepherds that cannot understand; they all look to their own way, every one for his Gain, from his quarter. Isa. 56. 11.

From the least of them even unto the greatest of them, every one is given to Covetousness; and from the Prophet even unto the Priest, every one dealeth falsly. Jerem. 6. 13.

‘ We have not thought fit to enter here into the question, whether Clergymen possessed of Benefices may with a safe Conscience dispose by Testament, or otherwise, of the fruits of their Benefices, in favour of their Relations; we have only remarked here what the Laws have ordained touching this matter.

‘ We are not to expect to find in the New Testament prohibitions to Ecclesiastical Persons, to make a wrong use of the Goods of the Church. Those who were forbidden to possess any Goods at all *c*, did not stand in need of any such Rule, which is become necessary only since the Discipline of the Church has put into the hands of the Successors of the Apostles and of the Disciples of Jesus Christ, Revenues for their Maintenance, for Alms, and other Works of Piety. But this change hath not made any in the Rule of the dispositions which they ought to have in the Heart; for the changes which the Discipline may make, regard only the external part, and do not dispense with the inward dispositions enjoined by the Law of God in the Gospel. Thus the external manner, of being possess'd of Goods belonging to the Church, does not discharge the Clergy from the Duty of not setting their Hearts upon them, and of making only a good and pious use of them, such as may be the natural effect of a Possession without an inordinate love of Riches. It is in order to promote this pious use of the Goods of the Church, that the Council of *Trent* ordains expresly that the Ministers of the Church should abstain from all superfluous Expences, and gives the Clergy Directions how they should use the Revenues of the Church.

c Provide neither Gold, nor Silver, nor Brass in your Purses. Mat. 10. 9.

See concerning the different Duties of Clergymen, which may be applied to all those mentioned in the preceding Articles, 1 *Cor.* 3. 9. *Heb.* 5. 1, 2, 3, 4, 5. *John* 15. 16. *Mark* 3. 13. *Numb.* 3. 6. *Ps.* 14.

2 *Chron.* 26. 16.

XV.

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XV.

15. *The Duties of Professors of Divinity.*

We must reckon in the number of the Duties of Ecclesiasticks which regard the Publick, those of the Professors and Doctors of Divinity, which have been explained in their proper places *x*.

x See Sect. 2. of the Title of Universities.

TIT. XI.

Of the Persons whose Condition engages them in the Profession of Arms, and of their Duties.

WE must not confound the Subject of this Title with that of the 4th, where we have treated of the Duties of those who are in the Service of the Army. For in that 4th Title mention is made only of the Persons actually in the Service of the War, and of their Duties in that Service, which make up the Military Government; and in this Title we purpose to explain who are the Persons, whose Condition regards the Profession of Arms, whether they serve actually in the War, or whether they be not in actual Service: and this shall be the subject matter of two Sections; the first shall be of the distinctions of those Persons; and the second of their other Duties besides those of Service in the War. So that the subject matter of this Title is altogether different from that of the 4th Title.

SECT. I.

Distinction of the Persons.

The CONTENTS.

1. *The right of imploying Arms resides in the Person of the Prince.*
2. *Princes of the Blood.*
3. *The first Officers who wear Swords, are next to the Princes of the Blood.*
4. *Knights of the King's Orders.*
5. *The King's Vassals.*
6. *Gentlemen.*
7. *Officers of War, and others who belong to the Profession of Arms.*

I.

1. *The right of imploying Arms resides in the Person of the Prince.*

WE cannot consider the Body of a State without distinguishing in it the Prince who is Head thereof, and who in that August Rank is infinitely above the most exalted Conditions, which cannot be filled but with his Subjects, seeing he is the only Person in whom God hath placed the fulness of Authority and Power for the Government, and for the dispensation of Justice, together with the force of Arms to make it reign, not only over his own Subjects by the Empire which Justice ought naturally to have over all Mankind, but also by War against Strangers in the cases where this way becomes necessary *a*. Thus the Prince is the first Person engaged to the Profession of Arms by the Right which puts the use of them into his hands, and which makes him the dispenser of the said use of Arms.

a See Tit. 2. Sect. 2. Art. 2.

II.

2. *Princes of the Blood.*

It is from this Glory and Grandeur of the Prince that the Glory of those Persons proceeds who have the honour of filling the Ranks which are nearest to his own. Thus, in *France*, the first of all are the Princes who are the King's Children; and next to them, the other Princes of his Blood. For besides the singular Dignity of so illustrious a Birth, they may succeed to the Crown, as also their Descendants, when it so falls out. And it is by reason of the elevation of this Rank, and of this Birth, which has the same Original with that of the Prince, that, among other marks of Grandeur and Dignity, they have the first share in the Glory of the Arms which God puts into the hands of the Prince. For as he cannot make use of them but by communicating the use of his Right to other Persons, so this Honour regards in the first place and most naturally the Princes of the Blood, who are not engaged in the Ecclesiastical State *b*.

b 'The first Rank is that of the Persons whom 'their Birth unites most nearly to the Prince.

III.

3. *The first Officers who wear Swords, are next to the Princes of the Blood.*

Next to the Princes of the Blood, the first of those who wear Swords, are the great Officers of this Profession; such as the Admiral, the secular Peers, the other Officers of the Crown, and those of the King's Houshold who belong to this Profession of Arms, the Officers of War whether they serve by Sea or Land, the Governours of Provinces, and of fortified Places *c*.

c 'We do not pretend to mark here the Ranks 'of these Persons, nor even to distinguish their 'several Offices; for that matter comes not with- 'in

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'in the design of this Book: this detail may be 'easily met with elsewhere; and we must only 'remark, that we have distinguished in the Article the Peers, and other Officers of the Crown, 'and of the King's Houshold who wear a Sword. 'For the Bishops who are Peers, and the great 'Almoner do not wear it, nor the Chancellor who 'is an Officer of the Crown.

IV.

4. Knights of the King's Orders.

We must comprehend in the same Order the distinguished Rank of those whom the King honours with the Title of Knights of his Orders, and to whom he gives the particular Badges thereof, which he himself wears on his own Body; and which he gives with this Title to his Children assoon as they are born, giving it to other Persons only out of a particular Consideration of their Services, and as a Recompence of a Merit worthy of this distinction *d*.

d 'We do not here pretend to explain these 'several Orders, and their Privileges; and it sufficeth to mark in general this distinction of the 'Knights of the King's Orders.

V.

5. The King's Vassals.

We ought to distinguish in this Order of the Profession of Arms, the Vassals who have Fiefs of the Crown, Principalities, Dutchies, Counties, Marquisates, and other Lands erected into Titles, which have been given, either originally to the present Possessors, or to those from whom the present Possessors derive their Title as a Fief, on condition to pay Homage and Fealty for them to the King; that is to say, to swear Allegiance to him, that they will be always devoted to his Service, according to the different Conditions of the Fiefs: and the same Order takes in likewise Vassals of an inferior Rank, whether they have Fiefs held in chief, or Mesne-Fiefs, which the first Vassals have dismembred from their own, and given away to others on the same Conditions of paying Homage and Fealty for them. Thus all Vassals or under-Vassals who have superior or inferior Fiefs, are the King's Men to serve him in the War, according to the quality of the Fee they hold; and they are bound to yield this Service whenever required to do it by the Prince's Order, which is called in *France* the Ban and Arrier-Ban *e*.

e 'See the Ordinance of *Charles* VI. and the 'other Ordinances relating to the Ban and Arrier Ban. Every body knows that there are 'Kingdoms held in Fee, and what is the use of 'Fees in general: but this is a matter, the detail whereof ought not to be inserted in this 'Book; for besides that the Rules of this detail 'are different according to the Customs of places, 'the publick Order takes no farther notice of it 'than what is said in this Article.

VI.

6. Gentlemen.

It is likewise to this Order of the Profession of Arms that Gentlemen belong; that is to say, those who are Noble by Birth, and to whom this Name properly belongs, and whose Ancestors have deserved by their Services in the War, the distinction which a Patent of Nobility makes among them. And this Quality engages them to serve in the War, according as occasion may require, in the same manner as Vassals, and gives them also divers Privileges. We must place in this Rank of Gentlemen, those who not having this Quality by Birth, have deserved by their Services in the Wars, to be created Noble. And there are likewise some who by the Privileges of their Offices, or for other Causes, are made Noble, and enter into the Condition and Engagements of those who are Gentlemen by their Services in the Wars, or by those of their Ancestors *f*.

f See the Ordinances cited on the foregoing Article.

VII.

7. Officers of War, and others, who belong to the Profession of Arms.

Lastly, we ought to place in the Order of the Profession of Arms, all Officers of War, Generals, Colonels, Captains, Lieutenants and others; and also the Soldiers, and all Persons whose Functions have relation to the Service of the War by Land or Sea: and this comprehends, besides those who carry Arms, those who serve in the Artillery, in Fortifications, and in all the other Functions of War *g*.

g All these Persons belong to the Profession of Arms.

SECT. II.

Of the other Duties of the Persons mentioned in this Title, besides those of actual Service in the War, according as these Duties have relation to the publick Order.

IT is necessary to distinguish, as has been observed in the Preamble of this Title, two sorts of Duties of Persons whom their Condition engages to the Profession of Arms: the first, of the Duties which regard the actual Service in the War; and the second, of some

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some other Duties which are different, and do severally belong to the Conditions treated of under this Title. The Duties of the first of these two sorts have been explained in the 4th Title; and those of the second sort shall be the Subject matter of this Section, as has been already observed in the same place.

The CONTENTS.

1. *The first Duty, to serve in the Wars, when commanded.*
2. *The other Duties different according to the differences of Conditions.*
3. *Duties of the Princes of the Blood.*
4. *Vertues of the Princes.*
5. *A faithful Affection to the Person and Interests of the Prince.*
6. *Duty of Princes of the Blood who are Members of the Prince's Council.*
7. *Duty of causing Justice to be administred in their own Lands.*
8. *Duty of the great Officers concern'd in the Administration of Justice.*
9. *Duties of Lords of Mannors.*
10. *Duty of chusing good Officers.*
11. *Duty to see that Justice be rightly administred.*
12. *That there be no oppression or vexation in collecting their Dues.*
13. *To avoid Abuses in the use of the Honorary Rights in the Churches.*
14. *Gentlemen ought not to be concern'd in Trade, nor farm any of the Lands or Goods belonging to the Church.*

I.

1. The first Duty, to serve in the Wars, when commanded.

The first Duty common to all, whose distinctions have been explained in the foregoing Section, is that which obliges them to serve in the War, whenever called upon to do it *a*, and there to observe the Rules of the Military Discipline, which have been explained in the 4th Title, according as the said Rules may regard them, whether it be to command, or to obey.

a And ye came near unto me every one of you, and said, we will send Men before us, and they shall search us out the Land, and bring us word again by what way we must go up, and into what Cities we shall come. And the saying pleased me well, and I took twelve Men of you, one of a Tribe, &c. Deut. 1. v. 22, & 23.
See Judges 7.
See the 4th Title.

II.

2. The other Duties different according to the differences of Conditions.

Seeing the other Duties proper to these Persons, regard them differently according to the differences of their Conditions, we shall distinguish them according to their Order by the Articles which follow *b*.

b See the following Articles.

III.

3. Duties of the Princes of the Blood.

The Princes of the Blood being the first in Honour and Dignity by their Birth, and by the Rank which their Birth gives them about the Sovereign, this elevation engages them towards the Publick to give to all a good Example by their zeal and fidelity in the Service of the Prince, and the good of the State; and the same Rank makes it a Duty incumbent on them to embrace and even find out occasions where their Protection may be useful, either to the Church, or to the Order of the Government, or for the Administration of Justice to particular Persons; which comprehends the Duty of using the freedom of access they naturally have to the Prince, for acquitting themselves both towards him and towards the Publick, of what may be necessary to be done on their part for the support of Justice *c* and Truth, according to the Rules explained in the third Title.

c I will set no wicked thing before mine Eyes; I hate the work of them that turn aside. Psal. 101. 3.
Mine Eyes shall be upon the faithful of the Land, that they may dwell with me: he that walketh in a perfect way, he shall serve me. He that worketh deceit, shall not dwell within my House; he that telleth lyes, shall not tarry in my sight. Ps. 101. 6, 7.
See Tit. 3. Sect. 2.
See the Texts quoted on Art. 8. of the same Section.

IV.

4. Vertues of the Princes.

The distinction of the Rank of Princes ought to distinguish also their Vertues, and especially those the exercise whereof regards some publick good. Thus Liberality, which is a Duty common to all great Men, to do the good which their Conditions may require of them when they have opportunities of exercising this quality, ought to be in Princes a Magnificence, which they ought to dispense according to the Rules of Prudence. Thus Courage and Generosity, which are Vertues common to all Persons on occasions where they may be of use, ought to be in Princes a true Magnanimity *d*.

d 'The Vertues of Princes ought to be proportionable to their Elevation.
When thou goest out to Battle against thine Enemies, and seest Horses and Chariots, and a People more than thou, be not afraid of them: for the Lord thy God is with thee, which brought thee up out of the Land of Egypt.——Let not your Hearts faint, fear not and do not tremble; neither be ye terrified because of them. Deut. 20. 1, 3.
And there is no discharge in that War. Eccles. 8. 8.

V.

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V.

5. A faithful Affection to the Person and Interests of the Prince.

Altho the Princes of the Blood, or their Descendants, may in due time succeed to the Crown, yet seeing they are always in the Rank of Subjects of the Prince, it is an essential Duty incumbent on them to join to an uncorrupted Fidelity which this Rank of Subjects demands, a disinterested Affection and Zeal for the Person and Interests of the Prince, which may be proportionable to the Honour they have of being related to him *e*.

e 'Among other great Qualities of *David* which 'shine in all the Actions of his Life, we cannot but 'take notice of and admire his Conduct towards '*Saul*, whom he was to succeed in the Govern-'ment. For on all occasions, and even when '*Saul* was trying all means to destroy him, he 'gave the greatest Marks of his Respect and Zeal 'for that ungrateful Prince, and laid hold on all 'occasions to save his Life.

VI.

6. Duty of Princes of the Blood who are Members of the Prince's Council.

The Princes of the Blood who are Members of the Prince's Council, are bound to the same Duties as others who have that Honour, and especially on such Occasions where Truth or Justice may be concerned, and may stand in need of Protection against the Oppression of Persons who should abuse their Authority, or the Credit they have with the Prince, to hinder the Truth from coming to his knowledge. For in these Cases the Interests of Truth and Justice being the same with those of the Prince, they who have the honour to approach nearest his Person, are singularly obliged by the free Access they have to him, and the Honour they have of being nearly related to his Person, to pay him that important Duty, of acquainting him with the Facts which the Cause of Justice requires he should be informed of, and of embracing the Protection of Justice in a manner worthy of their Rank *f*.

f For by wise Counsel thou shalt make thy War; and in multitude of Counsellors there is Safety. Prov. 24. 6.

How can I my self alone bear your Cumbrance, and your Burden, and your Strife? Take ye wise Men and understanding, and known among your Tribes, and I will make them Rulers over you. And ye answered me, and said, The thing which thou hast spoken is good for us to do. So I took the Chief of your Tribes, Wisemen and known, and made them Heads over you, Captains over thousands, and Captains over Hundreds, and Captains over fifties, and Captains over tens, and Officers among your Tribes. And I charged your Judges at that time, saying, Hear the Causes between your Brethren, and judge righteously between every Man and his Brother, and the Stranger that is with him, &c. Deut. 1. 12, &c.

Excellent Speech becometh not a Fool, much less do lying Lips a Prince. Prov. 17. 7.

See these Duties in Tit. 3. Sect. 2.

See *Prov.* 29. 12. and 20. 18.

'Altho all these Texts have not a precise rela-'tion to this Rule, yet they may all of them be 'applied to it.

See the Text cited on Art. 1.

VII.

7. Duty of causing Justice to be administred in their own Lands.

It is likewise an important Duty incumbent on Princes of the Blood, but what is common to them with all great Lords, and others who have Lands with a Jurisdiction thereto annexed, to take care, as shall be explained in the 10th and other following Articles, that the Officers under them administer Justice in their Courts, and that those to whom they entrust the Care of their Rights, whether they be their Domesticks, or Tenants, or others, do not commit any Act of Violence or Oppression; and that on the contrary all who live under their Jurisdictions may feel the Effects of Protection and Authority, which may maintain every one of them in the Possession of their Rights *g*.

g See Art. 10, &c.

See the Texts cited on Art. 11.

VIII.

8. Duty of the great Officers concerned in the Administration of Justice.

The Duties of the Officers of the Crown and others, of whom mention has been made in Sect. 1. Art. 3. of this Title, are different according to the different Functions of their Offices. And those among them who are called to assist in the Prince's Council, are also obliged to the Duties explained in Tit. 3. Sect. 2. in so far as the same may concern them. And as for the Functions of their Offices, seeing they have all of them some Jurisdiction, and even those Peers who are Judges of the Affairs in which the Crown is any way concerned, they have for general Rules of their Duties in those Functions the Rules of the Officers of Justice, which shall be explained in the second Book, in so far as they may be applicable to them. And every one of them has moreover for his Rules peculiar to his Office those which are prescribed by the Ordinances in *France*. Thus the Admiral, and other Officers of the Crown, the Governours of Provinces and of fortified Places, and the Officers of War have their respective Rules prescribed by the Ordinances. And the Knights of the King's Orders have also there the Rules of their Functions, and of their Duties *h*.

h 'It is a necessary Consequence of Offices, 'and other Imployments, to discharge well the 'Functions thereof.

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IX.

9 *Duties of Lords of Mannors.*

Vassals who have Lands erected into Titles, Principalities, Dutchies, Counties, Marquisates, and all those who hold Lands either immediately or mediately of the Crown, with a Jurisdiction annexed to them, are obliged by this Right of Jurisdiction to several different Duties, which shall be explained in the following Articles. And seeing the Princes of the Blood, the Officers of the Crown, and others mention'd in *Sect.* 1. *Art.* 3. have also the same Right of Jurisdiction in their respective Lands, they are also bound to the same Duties *i*.

i 'The right of Jurisdiction implies essentially 'the general Duty of causing Justice to be administred, and the particular Duties which are the 'Consequences of this primary Duty.

By me Kings reign, and Princes decree Justice. Prov. 8. 15.

See upon this and the following Articles, the Ordinances of *Francis* I. in 1535. Art. 5. in 1515. Art. 21. Of *Charles* VIII. in 1453. Art. 47. Of *Francis* II. 1560. Of *Henry* II. 1550. Ordinance of *Blois*, Art. 65, 66. Of *Moulins*, Art. 13.

X.

10. *Duty of chusing good Officers.*

As these who have Lands with a Jurisdiction annexed to them, have a Right to put in Officers into the places belonging to their Jurisdiction, when they fall void; this Right necessarily implies the Duty of conferring them only on Persons who have both Capacity and Probity sufficient for discharging the Functions thereof. And altho in these Cases the Lords of Mannors who have a Jurisdiction within themselves, have a Right to sell the said Offices, yet that Right is not so absolute but that they are obliged to make a good choice of Persons duly qualified for performing the Functions thereof; and does not extend so far as to leave them at liberty to bestow the said Offices on such as give most for them, if they have not the Qualities necessary for the due Execution of the Office to which they are named. For besides that the Duty of those who have the nomination of Judges, to nominate Persons in all respects duly qualified for the Office, is more antient, more natural, and more essential than their Right to sell the Offices; neither Equity nor good Sense will ever bear that he who has a Right to a Function, for the good of the Publick, should be at liberty to exercise it otherwise than well: which is not to be understood as if all those who have the appointment of Judges, ought to be capable themselves of judging of their Qualities; but only that those who are capable of judging, may use their said capacity so as to make a good Choice for the publick good; and that those who are not able of themselves to make a right Judgment of the Persons, may therein take the advice of wise and disinterested Persons *l*.

l ¶ Altho it be true that the Lords of Mannors who have Courts of Justice within themselves, are not all of them capable of judging of the Qualifications of those whom they appoint to be Judges of the said Courts; and that the Persons named to the said Offices are to be examined by the Judges who are to admit them, in order to be satisfied as to their Capacity, their Religion, Life and Conversation; yet the Duty of these Judges who are to examine the qualifications of the Persons nominated, does not discharge the Lords of the Mannor of their Duty to nominate fit Persons. For besides that they cannot be certain that the Judges who are to examine them will do their Duty therein faithfully, they on their part are under an engagement to make a good choice, if they are capable of doing it by themselves, or to recommend it to Persons in whom they can confide to make this choice for them. For otherwise they make themselves Accomplices in the injustices which may be committed by those whom they appoint Judges, without examining their qualifications for the discharge of that Office. If the Lord of the Mannor were a Person incapable of making this choice, as a Child under Tuition; this Duty would regard the Tutor, who ought to take the measures necessary to preserve on one part the interests of his Minor, and on the other part to do justice to the Publick by making a good choice. And if the Relations whose advice he ought to take in this matter, should refuse to concur in these Measures, he might apply for redress to a Court of Justice; or take such other course as Prudence should direct for the discharge of his Conscience.

It is not the same thing with respect to those who are in possession of venal Offices, and have a right to sell them, as it is with those who have the disposal of the Title of an Office. For these make the Officer, and give him a Salary; but the others do not confer on the purchaser any Title of an Officer, and sell to him only their surrender or resig-

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resignation of the Office, which divests them of the right they had to it, and which they may transmit to any one that will buy it, whether it be to dispose of that Right in favour of other Persons, or to reap the benefit of the Salary or Perquisites belonging to the said Office. Thus nothing obliges those who sell their Offices, whether it be the Officers themselves or their Widows, or Heirs, or others who have their Rights, to make any enquiry into the qualifications of the Purchasers, whom they do not make Officers, and who may perhaps make the purchase for other Persons.

The Ordinance of *Orleans* forbids expresly those who have Lands with a Jurisdiction annexed to them, to sell the Offices or Places of Judicature. *The Lords of Mannors, whether they be Ecclesiastical or Secular Persons, and of what quality soever they be, who shall sell directly or indirectly the Places of Judicature, shall be deprived of their Right of Presentation and Nomination to the said Offices; and in the like manner all other Persons of what Quality soever they are, who shall have the Right of Presentation and Nomination.* Ordinance of *Orleans*, Art. 40. See that of *Blois*, Art. 100, 101.

'[By an Act of Parliament in *England* 5 & 6 '*Edw. VI. cap.* 16. made for the avoiding of 'Corruption in the Administration of Justice, 'and in the execution of Offices of Trust, it is 'enacted, That if any Person shall bargain or sell, 'directly or indirectly, any Office, or Deputation 'of any Office, which shall in any wise touch or 'concern the Administration or Execution of Justice, or the Receipt, Comptrolment or Payment 'of any of the King's Treasure or Revenue, or the 'surveying any of the King's Honours, Castles, Mannors, Lands, Tenements, Woods or Hereditaments, 'or any of the King's Customs, or the keeping 'any of the King's Towns, Castles or Fortresses; 'or which shall concern or touch any Clerkship to 'be occupied in any manner of Court of Record 'wherein Justice is to be administred; That then 'all and every such Person and Persons that shall 'so bargain and sell any of the said Offices, or 'Deputations, shall not only lose and forfeit all 'their Right, Interest and Estate in and to the 'said Offices or Deputations; but likewise the 'Persons purchasing the same shall be adjudged 'disabled Persons in the Law, to all intents and 'purposes, to have, occupy or enjoy the same.

'The like Prohibition we find in the Canon Law, against the Sale of Offices of Ecclesiastical Jurisdiction; by which the Bishop who 'sells any such Office, is disabled to confer the 'same for the future, and the Person who purchases the Office is deprived of it. *Extra. Lib.* 5. '*Tit.* 4. *cap.* 1.]

XI.

11. Duty to see that Justice be rightly administred.

This Right of Jurisdiction which Lords of Mannors have in their Lands, obliges them to see that Justice be duly administred by their Officers, and that recourse be had to the King's Officers in the Cases which are called Royal Cases, and which are not properly cognizable in the Courts of Lords of Mannors, whether it be in Civil matters, such as relate to the publick Taxes, and other Duties belonging to the Crown, which it is not necessary we should enumerate here; or in Criminal matters, such as High-Treason in all its kinds, counterfeiting the Coin, unlawful Assemblies, and many other matters, the cognizance whereof is reserved to the King's Judges. And this Duty of the Lords of Mannors, to see that Justice be duly administred in their Lands, consists in restraining the injustice of their Officers by such ways as their Authority may furnish them with; and even by depriving the Officers of their Places in the case of Misdemeanors which may deserve such a Punishment; in taking due care that Crimes be punished; in protecting the Persons subject to their Jurisdiction against the Oppressions, Violences and other Injustices, whether of their Officers, or other Persons; in maintaining Peace among them as much as possible; in procuring the Rules and Orders relating to the Civil Policy to be observed; in taking care of the good Order of Churches, of Hospitals, and of the relief of the Poor. For all these Functions being part of the Administration of Justice, they particularly concern those who have a Right of Jurisdiction within the bounds of their own Lands. And as the Lords of Mannors have in their Lands the dispensation of Justice, in proportion to what the Prince from whom they derive their Rights has in his Kingdom; and as they have the profits of Confiscations, Fines and other Perquisites of Jurisdiction; so they are also obliged in proportion to do, within the bounds of their Lands, all that lies in their Power, for procuring therein a strict observance of Justice, a compliance with all the Rules and Orders of the Civil Policy, and the advancement of the publick Good *m*.

m 'All these Duties are natural Consequences 'of the Right of Jurisdiction.

Hear therefore, O ye Kings, and understand; learn ye that be Judges of the ends of the Earth; give ear, you that rule the People, and glory in the multitude of Nations: For Power is given you of the Lord, and Sovereignty from the highest, who shall try your Works, and search out your Counsels. Because being Ministers of his Kingdom, you have not judged aright, nor kept the Law, nor walked

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walked after the Counsel of God. Horribly and speedily shall he come upon you; for a sharp Judgment shall be to them that be in high places. For Mercy will soon pardon the meanest, but mighty Men shall be mightily tormented. For he which is Lord over all, shall fear no Man's Person, neither shall he stand in awe of any Man's Greatness; for he hath made the small and great, and careth for all alike. Wisdom of Sol. ch. 6. v. 1, 2, 3, &c.

XII.

12. That there be no oppression or vexation in collecting their Dues.

If the Lords of Mannors are obliged to take care that Justice be administred in their Courts, they are likewise as much obliged, or rather more, not to commit any injustice themselves, nor to convert into Violence, Tyranny and Oppression, an Authority which is put into their hands only for the support of Justice. Thus for their Dues, whether they collect them themselves, or imploy others to do it, or let them out to Farmers; it is their Duty in all these Cases to regulate the collecting of them, so as it may be as little burdensom to the People as possible: whether it be by using mildness and humanity in the Seizures, Executions and other Distresses; or by exacting Payment of their Dues at times when it may be easiest for the People to pay, and especially for the poorer sort; or by not demanding, either as to the quantity or quality of the Grain, or other kinds of things that are due, or for Work and all other Rights that may belong to them, any more than what may be justly due to them by virtue of their Titles *n*.

n Thou shalt not defraud thy Neighbour, neither rob him. Levit. 19. 13.

Behold, here I am, witness against me before the Lord, and before his anointed; whose Ox have I taken? or whose Ass have I taken? or whom have I defrauded? whom have I oppressed? or of whose hand have I received any Bribe, to blind mine Eyes therewith? and I will restore it you. 1 Sam. 12. 3.

See *Amos* 4. 1. *Zeph.* 3. 3.

'We prohibit all Lords, and others, of what condition and quality soever they be, to demand, take, or suffer to be taken or demanded upon their Lands, or from any of the Inhabitants or Possessors thereof, any Sum of Money or other thing not really and truly due, whether it be on account of Taxes, Aids, Work or other thing, under what colour soever it may be; except in the Cases where the Subjects and others are bound by Law, and may be compelled by course of Justice, *&c.* upon pain of being punished according to the rigour of the Ordinances, the penalties of which it shall not be in the power of our Judges to mitigate. *Ordinance of* Blois, *Art.* 280, 283.

'We strictly require and command our Judges to do their Duty, and to administer Justice to all our Subjects, without exception of Persons, of what quality soever they may be; and we require our Advocates and Proctors to see to the due execution of these Presents, and not to suffer our poor Subjects to be vexed and oppressed by the power of their Lords of Mannors, or others, whom we forbid to intimidate and threaten their Vassals who are to pay Duties and Acknowledgments to them: and we require them to carry themselves with humanity towards them, and to sue for their Rights by the ordinary ways of Justice. *Ordinance of* Orleans *Art.* 106.

XIII.

13. To avoid Abuses in the use of the Honorary Rights in the Churches.

Seeing Lords of Mannors have in the Churches situated within their Lands some of those sorts of Rights called Honorary, and which for the greatest part are real Abuses disapproved by the sacred Canons; it is a Duty incumbent on them, and also on those who have in other Churches Rights of the like nature, and a Duty not only of Justice, but also of Religion, to use the said Rights, so as not to transgress in the least against the Dignity and Sanctity of the Churches, the Order of Divine Service, and the Functions of the Pastors, and other Ecclesiastical Persons; and that by paying them the Duty which Religion demands, they may give to others a good Example of a modest and respectful Carriage in the Churches, and of a dutiful Behaviour towards those who exercise any spiritual Function *o*.

o Piæ mentis amplectenda devotio est, qua se Julius nobis in re Juliana sui juris fundasse prohibetur Ecclesiam: quam in honorem sancti Viti Confessoris ejus nomine cupit consecrari. Hanc igitur, frater charissime (si ad tuam diœcesim pertinere non ambigis) ex more convenit dedicari, collata primitus donatione solemni, quam ministris Ecclesiæ destinasse se præfati muneris testatur oblator, scituurus sine dubio præter processionis aditum, qui omni Christiano debetur, nihil ibidem se proprii juris habiturum. 16. *q.* 7. *c.* 26.

Et ideo frater charissime, si ad tuam pertinet Parochiam, benedictionem supra memoratæ basilicæ solemni veneratione depende. Nihil tamen sibi fundator ex hac Basilica noverit vindicandum, nisi processionis aditum, qui Christianis omnibus in commune debetur. *C.* 27. *eod.*

Ut Laici secus altare quando sacra mysteria celebrantur, stare vel sedere inter clericos non præsumant sed pars illa, quæ cancellis ab altari dividitur, tantum psallentibus pateat clericis. Ad orandum vero & communicandum Laicis, & fœminis, (sicut mos est) pateant sancta sanctorum. *Cap.* 1. *extr. de vita & hon. cler.*

XIV.

14. Gentlemen ought not to be concern'd in Trade, nor farm any of the Lands or Goods belonging to the Church.

The Duties of Gentlemen, who are engaged in any Condition or Profession, are the same with those of the other Persons in the same Imployments. And these Duties are explained in their proper places, as has been said in the Preamble of *Tit.* 9. And as for the Gentlemen who have no particular Engagements, either in the Church, or the Administration of Justice, or in the Profession of Arms, the Duty proper to their

their Condition, is to live in it without derogating from their Nobility, that is, to abstain from the exercise of Professions unworthy of this Rank, and not to make a bad use of the Authority they may have. Thus they are prohibited to take to farm, either in their own Name or that of other Persons, Lands or Goods belonging to the Church *p*. And the same Prohibition is likewise extended to Officers. Thus in the same manner Gentlemen and Officers are forbid to carry on any Trade or Commerce, either by themselves or their Servants, or in the name of other Persons *q*, as has been mentioned in another place *r*.

p 'We forbid all Gentlemen and Officers, as 'well those imployed under us, as those belong'ing to Lords and Gentlemen, to take for the fu'ture, or to be any way concerned directly in 'taking Leases or Farms of Church Benefices, 'Tithes, Rents, and other Ecclesiastical Revenues, 'under what colour soever it be, or indirectly by 'using the names of other Persons, and they to 'go sharers with them: And we likewise enjoin 'them to give no manner of disturbance to Ec'clesiastical Persons in the Leases they have al'ready granted, or may hereafter grant, nor to 'intimidate those who are willing to take the Lea'ses, or to advance the Rent; upon pain of being 'declared ignoble, and as such made liable to the 'Taxes, and their Successors after them. *Ordi'nance of* Blois *Art.* 48.

q 'We prohibit all Gentlemen and Officers of 'Justice, to deal in any sort of Merchandise, and 'to take or hold any Farms, either in their own 'Names, or of other Persons; upon pain, as to 'the Gentlemen, of being deprived of their No'bility, and made subject to the Land-Tax, and 'as to the Officers, of being deprived of their 'Offices and Commissions. *Ordinance of* Orleans '*Art.* 109.

See the other Ordinances on the same subject.

r See *Tit.* 7. *Sect.* 4. *Art.* 10. and *Sect.* 1. of the following Title.

Nobiliores natalibus, & honorum luce conspicuos, & patrimonio ditiores, perniciosum urbibus mercimonium exercere prohibemus, ut inter plebeios & negotiatores facilius sit emendi vendendique commercium. *l.* 3. *C. de Commerc.*

TIT. XII.

Of Commerce.

WE have already spoke of Commerce in the 7th Title, but only with respect to the subject matter of that Title, which is of the means of procuring plenty of all things in a Kingdom; so that what has been there said, regards principally the Commerce carried on with Strangers, in order to bring into a Kingdom the Commodities that must be fetched from other Parts. But we have not there treated of what relates in general to the Nature and Use of Commerce, and the Duties of those who make profession of it. And this shall be the subject of this Title: where we shall explain, in the first Section, the Nature and Use of Commerce; and in the second, the Duties of those who exercise it.

SECT. I.

Of the Nature and Use of Commerce.

CONTENTS.

1. *Definition of Commerce.*
2. *Necessity of Commerce.*
3. *This Commerce is not understood of Immoveables.*
4. *Three sorts of Persons who trade differently in several things.*
5. *Those who sell the Produce of their own Lands.*
6. *Artificers who sell their Work.*
7. *Definition of those properly called Merchants.*
8. *It is by Commerce that the Inhabitants of every Country have the use of all things.*
9. *Precautions in favour of Commerce.*
10. *Monopolies forbidden.*
11. *A Jurisdiction peculiar to Merchants for their Commerce.*

I.

1. Definition of Commerce.

WE give the name of Commerce in general to the usage of buying and selling, and bartering, which has been introduced, to the end that every one might have the Things they stand in need of. Thus we may distinguish two manners of Commerce: one by Sale, when a Thing is given for Money; and the other by Exchange, when on both sides a Thing is given, and not Money *a*.

a See Tit. 7. Sect. 2. Art. 2.

II.

2. Necessity of Commerce.

The use of Commerce is a necessary Consequence of the variety of the wants of Mankind. For since no body can have always, and in all places, whatever he stands in need of, it is necessary that he get it from those who have it; which he cannot do but by Commerce, either by bartering Commodity

modity for Commodity, or by purchasing it with Money: for the other ways of applying things to ones use, would not be sufficient to supply this want. Thus altho one may have a Thing, either by Donation, or by a Loan, by hiring it, or otherwise; yet these ways of having Things do not extend to all those Things which one may stand in need of, nor to all the several uses of each Thing without distinction *b*.

b 'It is but few things that are acquired by Donations; and the letting of a thing to hire, and 'the lending the use of it, give only a certain Use 'for a certain Time.

III.

3. This Commerce is not understood of Immoveables.

The Commerce here mentioned, doth not extend to the Sale or Exchange of Immoveables; for tho these sorts of Acquisitions make a kind of Commerce, yet it is of a nature altogether different from that which is the subject of this Title, and which relates only to Sales and Exchanges of moveable Things called Merchandize, whether they be Provisions or other Things which it is necessary to be Master of, in order to have the intire free use of them *c*.

c 'The Commerce mentioned here is understood only of those kinds of Things called Merchandize.

IV.

4. Three sorts of Persons who trade differently in several things.

Altho the name of Merchant is commonly given to those who drive a Trade either in selling or exchanging Goods or Merchandizes; yet it is necessary to distinguish three sorts of Persons who carry on this Commerce, and of which there is only one sort to whom the name of Merchant does properly belong, as will appear by the three Articles which follow *d*.

d See the following Articles.

V.

5. Those who sell the Produce of their own Lands.

The first sort of Persons who carry on a Commerce by selling Goods or Merchandizes, is of those who, let them be of what condition soever they will, have to themselves, and draw from their own Lands, Grain, Fruits, Flax, Hemp, and other Produce; or who have Cattle from which they reap several Profits: For these Persons, without being Merchants, sell or cause to be sold that Grain, those Fruits, those Profits. And it is the same with respect to those who have Leases of the Lands or Estates of other Persons, or who cultivate them for a certain Portion of the Fruits *e*.

e 'We don't call those Merchants, who sell the 'Product of their own Lands.

'It may be proper to remark on this Article, 'what is said in the second Law *ff. de nundinis*, 'which is taken out of the second Book of the Republick of *Plato*; That Husbandmen and Artificers ought not to be so long diverted from their 'Labours, as to tarry in Towns to dispose of what 'they carry there for Sale, and that they ought to 'leave that attendance to other Persons who take 'upon them the charge of selling their Goods.

Si quis ipsos cultores agrorum, vel piscatores deferre utensilia in civitate jusserit, ut ipsi ea distrahant, destituetur annonæ præbitio, cum avocentur ab opere rustici. Qui confestim ubi detulerunt mercem, tradere eam, & ad opera sua reverti debeant. *l.* 2. *ff. de nund.*

'This Regulation would not suit with our Taste, 'nor with our Usage, and would be attended with 'many Inconveniencies. Husbandmen and Tradesmen have business of their own to transact in the 'Fairs and Markets of Towns; and it would cost 'them too dear to have their Affairs transacted by 'those Brokers or Retailers, who might perhaps 'not be faithful enough in the discharge of their 'Trust.

VI.

6. Artificers who sell their Work.

The second sort of Persons who trade in Goods or Merchandizes, are the Handicraftsmen, who sell what their Handicraft produces, and what they manufacture themselves, whether they contribute nothing of their own to it besides their Workmanship, or put into it some Materials of their own *f*.

f 'Handicraftsmen are not properly Merchants.

VII.

7. Definition of those properly called Merchants.

The third sort of Persons who deal in buying and selling Goods or Merchandizes, are those who are properly called Merchants, whose Profession consists in buying for Money, or purchasing with other Goods the Things in which they deal, and in selling them after the same manner, whether they sell by wholesale or retail *g*.

g 'Merchants are distinguished from the Persons who sell the Produce of their own Lands, 'in that they procure from others, either by Sale 'or Exchange, the Things which they sell. And 'they are distinguished from Handicraftsmen, in 'that they do not manufacture the Merchandizes 'which they sell. There are indeed Merchants 'who manufacture the Stuffs or other Merchandizes which they themselves sell: But as they do 'not assist in the Manufacture with their own 'Hands, they are not Handicraftsmen, but true 'Merchants.

VIII.

8. It is by Commerce that the Inhabitants of every Country have the use of all things.

It is by the means of these different sorts of Commerce that there is in every Kingdom, in every Province, in every Place, a ready and present use of the things necessary to all Persons, for Food and Raiment, for Cures, and for all the other Wants and Conveniences of Life; and it is also by this means that the Publick is supplied with the things necessary for War, for Navigation,

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vigation, and in general, with every thing necessary for the subsistence of a Kingdom, and of the Families whereof it is composed. Thus the natural effect of Commerce is to facilitate to every one the use of all Things, and even of those which are to be fetched from the most remote Countries *h*.

h See the 7th Title.

IX.

9. Precautions in favour of Commerce.

It is because of this usefulness, and of this necessity of Commerce, that in order to facilitate the use thereof, the Laws have made divers Regulations about it. Thus the Ordinances in *France* have prohibited Officers to drive any Trade in Merchandizes, to the end not only that they may not be diverted from the exercise of their proper Functions, but also that a Liberty of Commerce may not be left to Persons, who by their Authority might ingross the whole Trade to themselves, and render the condition of the Merchants and Buyers worse. And the same Consideration has procured all manner of Commerce to be prohibited to the Gentry in *France*. And the said Prohibitions extend even to the Commerce which the said Officers and Gentlemen might carry on in the Names of other Persons, for their own behoof *i*.

i Nobiliores natalibus, & honorum luce conspicuos & patrimonio ditiores, perniciosum urbibus mercimonium exercere prohibemus, ut inter plebeios & negotiatores facilius sit emendi vendendique commercium. *l.* 3. *C. de comm. & mercat.*

See the 10th Article of the 4th Section of the 7th Title, and the 14th Article of the 2d Section of the preceding Title.

X.

10. Monopolies forbidden.

It is upon the same Consideration of the Liberty of Commerce, that the Laws have severely prohibited all Monopolies, as has been explained elsewhere *l*.

l See Tit. 7. Sect. 4. Art. 8.

XI.

11. A Jurisdiction peculiar to Merchants for their Commerce.

It is also in order to promote Commerce, that the Kings of *France* have established the Jurisdiction of the Judges and Consuls of Merchants, for determining the differences which may arise among them in relation to their Merchandizes, by a way that is more summary, and of less expence, than the ordinary Proceedings in other Law-Suits. And they have likewise ordained, that the differences among Co-Partners in any Commerce, shall be adjusted by Arbitrators, whom both sides shall agree on *m*.

m See the Ordinances of *Charles* IX. in *November* 1563. and that of 1673. See the Code of the Merchant Law.

SECT. II.

Of the Duties of those who drive any Trade or Commerce.

ALTHO it may seem that the Duties treated of in this Section, regard only the Persons comprehended under the name of Merchants, in the sense explained in the 7th Article of the preceding Section, and that therefore they have no relation to those who sell what is the produce of their own Estates, nor to Handicraftsmen, who are distinguished from Merchants, as has been explained in the 5th and 6th Articles of the same Section; yet seeing these Duties are essential to all Sellers, it is necessary to extend the Rules explained in this Section to all sorts of Sellers, so far as they may be applicable to them. And we must likewise apply to all sorts of Commerce, and to all Sellers, the Rules explained in the Title of *the Contract of Sale* in the *Civil Law in its natural Order*, according as they may be capable of being applied to them.

The CONTENTS.

1. *Commerce an occasion of Injustice; the first Duty is to avoid it.*
2. *Duty of Merchants, to say nothing contrary to Truth.*
3. *Another Duty, not to give one Commodity instead of another.*
4. *Another, to declare the faults of the Merchandize.*
5. *Another, not to hide the faults of the Merchandize.*
6. *Another, to have good Weights and Measures.*
7. *Another, not to make Monopolies, nor to carry on any prohibited Trade.*
8. *Prohibition of Combinations among Merchants not to sell but at a certain Price.*

I.

1. Commerce an occasion of Injustice; the first Duty is to avoid it.

OF all Professions, there is none more exposed to Avarice, and to Injustice which is the Consequence of it, than that of Commerce. For since those

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those who exercise it, draw Profit from the bare trouble of buying in order to sell again; since they have the Liberty of demanding what they please, and the facility to cheat in the price and quality of their Merchandizes, the desire of Gain being joined with a favourable opportunity, leads them easily to the Commission of these Injustices *a*. Thus the first Duty of those who exercise this Profession, is to propose to themselves therein other Views than that barely to make Gain by it *b*, and to confine themselves to an honest Profit, abstaining from all manner of lying, from all unfaithfulness, and to sell the things in which they deal only at a reasonable Price.

a As a Nail sticketh fast between the joinings of the Stones; so doth Sin stick close between buying and selling. Ecclus. 27. 2.

By the multitude of thy Merchandize they have filled the midst of thee with Violence, and thou hast sinned.————Thou hast defiled thy Sanctuaries by the multitude of thine Iniquities, by the iniquity of thy Traffick. Ezek. 28. 16, 18.

b Qui emolumenta negotiationibus captant. *L.* 1. *Cod. de comm. & mercat.*

c That no Man go beyond and defraud his Brother in any matter. 1 Thess. 4. 6.

Qualitas lucri negotiantem aut excusat, aut arguit: quia est & honestus quæstus & turpis———Quia difficile est inter ementis vendentisque commercium non intervenire peccatum. *C. qualitas dist.* 5. *de pœnit.*

II.

2. Duty of Merchants to say nothing contrary to Truth.

This first general Duty of Fidelity in Commerce, and the Duty common to all Men never to transgress the sincerity that is owing to Truth, obliges Merchants of all sorts never to tell a lye concerning the Price they paid for the thing they are about to sell. For they may very well decline telling what the Price of it is, but they ought not to say it is greater than really it is: seeing on one side they transgress against Truth by the lye; and on the other side they cheat, and are guilty of Unfaithfulness, which is near of kin to Theft *d*.

d Keep thee far from a false matter. Exod. 23. 7.

Use not to make any manner of lye; for the custom thereof is not good. Ecclus. 7. 13.

Speak ye every Man the truth to his Neighbour.————Love no false Oath. Zech. 8. 16, 17.

Wherefore putting away lying, speak every Man truth with his Neighbour; for we are Members one of another. Eph. 4. 25. Mat. 5. 37. Jam. 5. 12. Luk. 19. 8. Exod. 20. 7. Levit. 19. 11.

The getting of Treasures by a lying Tongue, is a vanity tossed to and fro of them that seek Death. Prov. 21. 6.

III.

3. Another Duty, not to give one Commodity instead of another.

The same Duty of Fidelity obliges also the Merchants not to give one Merchandize instead of another *e*. For this is likewise a Lye and a Cheat, worse than that of telling a lye about the price of the Purchase; seeing it is much easier not to give Credit to what they say of the Price the thing cost them, than to judge of the quality of the Merchandize: so that this Unfaithfulness comes much nearer to Theft than the other, and even deserves a Punishment which a good Judge would not fail to inflict if the matter were proved.

e Si æs pro auro veneat non valet (venditio) *l.* 14. *in f. ff. de contr. empt.*

Mensam argento coopertam mihi ignoranti pro solida vendidisti imprudens, nulla est emptio pecuniaque eo nomine data condicitur. *l.* 41. §. 1. *eod.*

Si error aliquis intervenit, ut aliud sentiat puta qui emit, aut qui conducit: aliud qui cum his contrahit, nihil valet quod acti sit. *l.* 57. *ff. de obl. & act.*

Si igitur ego me fundum emere putarem Cornelianum, tu mihi te vendere Sempronianum putasti, quia in corpore dissensimus, emptio nulla est. *l.* 9. *ff. de contr. empt.*

See *Sect.* 8. *Art.* 11. of the Contract of Sale in the *Civil Law in its Natural Order.*

'If Error vacates the Sale, altho the Seller had 'acted fairly and honestly; if he had fraudulently 'sold one thing for another, he would be punish'able.

IV.

4. Another, to declare the faults of the Merchandize.

Seeing things are in Commerce only for their use; it is not enough not to give one Commodity instead of another, but it is necessary that the thing given, be of the quality which it ought to be of for the use it ought to yield. And if it has any faults which diminish the value of it, the Merchant is obliged to declare them, if they be such that were they known, he who bargains for the thing would not buy it, or at least not give so great a Price for it *f*.

f Certioresve faciant emptores qui morbi vitiive cuique sit. *l.* 1. §. 1. *ff. de ædil. ed.*

Qui fortasse si hoc cognovisset, vel empturus non esset, vel minoris empturus esset. *l.* 39. *ff. de act. empt. & vend.*

See Sect. 11. of the Contract of Sale in the *Civil Law in its Natural Order.*

Si quis in vendendo prædio confinem celaverit, quem emptor si audisset, empturus non esset; teneri venditorem. *l.* 35. §. *ult. ff. de cont. empt.*

Si quid tale fuerit vitii sive morbi, quod usum ministeriumque hominis impediat, id dabit redhibitioni locum. *l.* 1. §. 8. *ff. de æd. ed.*

V.

5. Another, not to hide the faults of the Merchandize.

It is a Consequence of the Duty of not deceiving in the quality of the Merchandize, to do nothing likewise that

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that may conceal from the Buyers the faults they might otherwise discover in the thing. Thus those who with this View make use of any slight or cunning which may have this effect, offend against this Duty *g*.

g Every one that doth Evil, hateth the Light. John 3. 20.

But they counted our Life a Pastime, and our time here a Market for Gain: for, say they, we must be getting every way, tho it be by evil means. Wisd. of Sol. 15. 12.

He that hasteth to be rich, hath an evil Eye, and considereth not that Poverty shall come upon him. Prov. 28. 22.

VI.

6. Another, to have good Weights and Measures.

The command of not stealing, which is common to all Men, is a Law to all Merchants to keep just Weights and Measures *h*.

h Divers Weights, and divers Measures, both of them are a like abomination to the Lord. Divers Weights are an Abomination unto the Lord, and a false Ballance is not good. Prov. 20. 10, 23.

Thou shalt not have in thy Bag divers Weights, a great and a small. Thou shalt not have in thine house divers Measures, a great and a small. But thou shalt have a perfect and just Weight, a perfect and just Measure shalt thou have——For all that do such things, and all that do unrighteously, are an Abomination unto the Lord thy God. Deut. 25. 13, &c.

Aurum quod infertur a collatoribus, si quis vel solidos voluerit, vel materiam appendere, æqua lance & libramentis paribus suscipiatur. *l.* 1. *c. de pond.*

V. l. 18. §. 3. *ff. de min.* 25. *ann.*

VII.

7. Another, not to make Monopolies, nor to carry on any prohibited Trade.

We may add as a general Duty of Merchants, that of observing the Ordinances *i*, and the Regulations which concern them; particularly those which forbid Monopolies, and the selling of certain things to Strangers *l*.

i Jubemus ne quis cujuscumque vestis vel piscis, vel pectinum forte, aut echini, vel cujuslibet alterius ad victum, vel ad quemcumque usum pertinentis speciem, vel cujuslibet materiæ, pro sua authoritate, vel sacro jam elicito aut in posterum eliciendo rescripto, aut pragmatica sanctione, vel sacra nostræ pietatis adnotatione, monopolium audeat exercere. *l. un. C. de monopol.*

l Nemo alienigenis Barbaris cujuscumque gentis ad hanc urbem sacratissimam sub legationis specie, vel sub quocunque alio colore venientibus, aut in diversis aliis civitatibus vel locis, loricas, scuta, & arcus, sagittas, & spathas, & gladios, vel alterius cujuscunque generis arma audeat venundare. Nulla prorsus iisdem tela, nihil penitus ferri vel facti jam, vel adhuc infecti, ab aliquo distrahatur. *l.* 2. *c. quæ res export. non deb.*

VIII.

8. Prohibition of Combinations among Merchants not to sell but at a certain Price.

The same Justice which forbids Monopolies, forbids also Combinations among Merchants not to sell certain Commodities at a lower Price than what they agree on among themselves *m*.

m Ne quis illicitis habitis conventionibus conjuret, aut paciscatur, ut species diversorum corporum negotiationis, non minoris quam inter se statuerint, venundentur. *l. un. C. de monopol.*

TIT. XIII.

Of Trades and Handicrafts.

WE must not comprehend in the number of Arts treated of here, those which are called Liberal, and which we shall handle under the Title of Universities. For those Liberal Arts have the dignity of Sciences, and are greatly distinguished from these which are the subject of this Title, and which are called Mechanick Arts, because they are exercised by the labour of Hands, and with Tools.

The use of Trades and Handicrafts has been a Consequence of the nature of Man, and of his destination to Society. For by his Nature, he is composed of Senses and of Members made for Labour, and he was destined to it even before his Fall *a*; and by the destination of Men to a sociable Life, which ought to unite them, God has rendred necessary to them the use of an infinite number of Labours for the multitude of different Wants. But tho it be true that Labour was natural to Man, even in the State of Innocence, and that the said Labour during that State had nothing painful in it, yet his Fall having changed his Condition, without changing in his Nature what regards his destination to Labour, God has by a Law enjoined Labour to him as a Punishment; and he has ordained that even the Life of every one should depend on a painful Labour, and that no one should have his Bread but with the sweat of his Brow, and by his exercise in some Occupation that should intitle him to his Nourishment *b*: and he declares all those to be unworthy of eating, who do not earn, or deserve their subsistence by some Labour *c*.

a And the Lord God took the Man and put him into the Garden of Eden, *to dress it, and to keep it.* Gen. 2. 15.

b In the sweat of thy Face shalt thou eat thy Bread. Gen. 3. 19.

c For even when we were with you, this we commanded you, that if any would not work, neither should he eat. 2 Thess. 3. 10. Prov. 6. 6, 7, &c.

'There is no Condition, even those of the 'highest Dignity not excepted, which has not for 'its

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One may easily judge by these Principles, of the necessity of divers Labours in the Society of Men, how enormous the Vice of laziness and idleness is, and how many People whom this Law which enjoins Labour renders unworthy of Life, would be worthy of Death it self, upon the account of the bare abstaining from Labour, if the Justice due to them, were not reserved to another Season, and to other Punishments.

The Labours of Men are of several sorts: and we may distinguish them, first, into those which might be natural before the Fall of Man, such as Husbandry which he was to exercise in the Terrestrial Paradise; and those which were only a Consequence of his Fall, such as the Labours necessary for Clothing and Lodging, of which the innocent Man, being ignorant of his Nakedness, would have had no occasion *d*. And we may place in this second Rank, the Labours of the Mind, which serve to restrain the Injustices of Men, and to contain them within the Order of their Society; which takes in all the different Imployments necessary for the Government, and the Administration of Justice.

All these sorts of Labours, which are necessary in the present state of the Society of Mankind, may be reduced to two general kinds, which comprehend every thing that may employ the Persons both of the one and the other Sex.

The first, to begin with the chief of the Wants of Men, is that of the Labours of Hands which produce some useful Work, whether it be for Nourishment, Lodging, Diet, or for all the other sorts of Wants. And it is this first kind of Labours which imploys those whom we call Artificers and Handicraftsmen, and those who spend their time in tilling the Ground, and looking after Cattle, Labourers, Shepherds and others *e*, who are distinguished from Artificers, altho in reality they do exercise certain kinds of Arts. But because the Labours of these Persons do not produce Works made with Hands, such as the Works of those who build Houses, who make Stuffs, and all the other things which are the different Works of Arts, and of an Industry acquired only by a pretty long study of many Rules, and long Experience, before they can attain to the habit of exercising the Art, we do not place the Labour of Shepherds and Husbandmen in the number of Arts.

The second kind, is that of the Labours of the Mind, which do not produce a Work made with Hands; such are the Labours of those, who have the care of the Government, of those who are concerned in the Administration of Justice, of the Pastors and Teachers of the Church, of the Professors of Sciences, of the Officers of the Revenue, and an infinite number of other different Imployments. And we may reckon among the Labours of the Mind, Writings, Treatises, Books, whether they relate to matters of Religion, or of Sciences, or others, from which the Publick may reap any Advantage: and altho Books and Writings appear to be a Work of the Hands, that which is sensible in the Writing or Printing being without doubt the Handy-work of the Writer or Printer; yet this Work, which is undoubtedly the Product of the Art and of the Artist, is not the Work of the Mind of him

'its essential Character, and for its chief and indispensible Duty, an Engagement to that Work and Labour for which it is established; and those who pretend to be exempted from Labour, are ignorant of their own Nature, they overturn the foundations of Order and Society, they transgress the Law of Nature and the Divine Law; so that it ought to be no surprize to any body what St. *Paul* has said, that he who does not labour is unworthy of Life, which is designed only for Labour; and we learn in the Gospel, that he who leads an unprofitable and idle Life, is not only unworthy of that Life, but even deserves eternal Death. See *Mat.* 25. 30. *Ezek.* 16. 49.

We beseech you, Brethren, that ye encrease more and more; and that ye study to be quiet, and to do your own Business, and to work with your own Hands, as we commanded you. 1 Thess. 4. 10, 11.

See Prov. 19. 24. 1 Cor. 3. 8. Ecclus. 33. 28.

d And the Eyes of them both were opened, and they knew that they were naked; and they sewed Fig-Leaves together, and made themselves Aprons. Gen. 3. 7.

e 'Since it is a natural effect of these Labours, to be painful and burdensome to those who exercise them, one ought not to make them still more so to those poor People, by an unjust keeping back the Wages they may deserve.

The Bread of the needy is their Life: he that defraudeth him thereof is a Man of Blood. He that taketh away his Neighbour's Living, slayeth him; and he that defraudeth the Labourer of his hire, is a Bloodshedder. Ecclus. 34. 21, 22.

Thou shalt not oppress an hired Servant that is poor and needy, whether he be of thy Brethren, or of thy Strangers that are in thy Land within thy Gates. At his Day thou shalt give him his hire, neither shall the Sun go down upon it, for he is poor, and setteth his Heart upon it, lest he cry against thee unto the Lord, and it be Sin unto thee. Deut. 24. 14, 15.

Thou shalt not defraud thy Neighbour, neither rob him: the wages of him that is hired, shall not abide with thee all Night until the Morning. Levit. 19. 13.

See Exod. 22. 25, 26, 27.

Let not the Wages of any Man, which hath wrought for thee, tarry with thee, but give him it out of hand. Tobit 4. 14.

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him who composed the Writing or the Book; but is only a sign of it, invented to supply the want of Speech, which Speech it self is only a sign or indication of the Thought; and it is by the means of this sign of the Book or Writing that the deposit of the Thoughts of the Writer is preserved for those who can understand the Writing, or the Book.

It is easy to judge by this account of the nature of Labour, and by the Law which imposes it on Man, that of all the different Conditions of which Society is composed, there is none to which the observance of this Law is more natural than that of Artificers, whose direct Profession is a continual and painful Application to some Labour of the Body, who earn their Bread with the sweat of their Brow; whereas in the other Conditions, the occasion of Labour is not so continual, and it is easier and more usual to abstain from it: so that upon this Consideration, and that of the usefulness of Trades and Handicrafts, those who exercise them have their merit in the Society, and ought to be accounted as necessary and useful Members of it.

It is not our business here to enter into the detail of the distinctions of the different sorts of Trades and Handicrafts, which we might distinguish under several Views; such as those who work in things necessary for Life, for Health, for Clothing, for Habitation, those who work for other sorts of Necessities or Conveniencies, whether it be for Diversion, as the makers of Instruments of Musick, or for several sorts of Furniture; those whose Labours serve for the uses of the War, in making Arms, Artillery, or for the use of Navigation; those who are distinguished by the value of the Materials in which they work, Gold, Silver, Jewels, and other precious matters; those who are employed in a much greater variety of Works, such as Carpenters, Masons, Iron-mongers, Lock-smiths; and those whose Works, and the Materials they work upon, are more confined, such as Hatters, Glovers, Shoemakers, and others.

It is necessary also to distinguish, under another view, certain Arts which contain as it were two sorts of Professions: one is of those which join to the industry of the Hand, the Art of inventing Works exquisite in their kind; and the other, of those who with little or no Invention, work on what others have invented.

Thus, we give the name of Painters to those who are the most skilful Inventers in the Art of Painting; and the same name is given to those of the same Art who only copy after Originals: and it is the same thing in Sculpture, in Architecture, in Mechanicks. But there is a wide difference between those great Inventers, and the others in these sorts of Arts. For those of the inferior degree are but little more regarded than many other Artificers; but the others have a singular Merit, which even places some of them in the number of illustrious Men, according as they excel in their Art.

It is to be remarked on this subject, that we are not to reckon in the number of Artificers who exercise the different Professions of Trades and Handicrafts, those who for their diversion, imploy themselves, either in designing, or in some handy-work, without making a Trade of it. For this use of Arts, does not make it their Profession, but serves only as an innocent Amusement, and as an Occupation, which some make choice of in obedience to the Law, which enjoins Labour.

Lastly, it is necessary to observe on the subject of Trades and Handicrafts, and in general on all sorts of Professions; that they ought all of them to have the Character of Honesty, and of Usefulness for the publick Good; to be such as may be exercised without any danger to the Order of the Society, and to have nothing in them contrary to the Spirit of Religion, or the Laws of the Church. For no Trade, no Profession whatsoever can be lawful, that has not these Characters.

All the Rules concerning Trades and Handicrafts are reduced to two kinds: one of those which regard in general the Discipline or Policy of Trades and Handicrafts; and the other of the Rules of the Duties of the Persons who exercise them: and these two sorts of Rules shall be the subject matter of the two following Sections.

SECT.

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SECT. I.

Of the Government or Discipline of Trades and Handicrafts.

The CONTENTS.

1. *The Usefulness of cultivating Trades and Handicrafts.*
2. *Freedoms in Trades.*
3. *Companies of Trades.*
4. *The Policy of those Companies.*

I.

1. The Usefulness of cultivating Trades and Handicrafts.

SINCE it is of Importance to the Publick, that every Trade and Handicraft be carried to all the Perfection it is capable of, by all the Ways which may render the Use of it profitable or easy; the Exercise of Trades demands in general, that they improve in every one of them all the old Inventions which have been preserved in memory until our Days, and that they add to them new ones as much as is possible, and particularly that every one of those Persons who exercise Trades and Handicrafts be thorowly instructed in that which he makes Profession of, and that he have, besides the Knowledge of the Rules of his Art, an Experience which may be sufficient to enable him to practise *a*.

a See the following Article, and the Remark there made on it.

And Moses *said unto the Children of* Israel, *See the Lord hath called by Name* Bezaleel *the Son of* Uri, *the Son of* Hur, *of the Tribe of* Judah. *And he hath filled him with the Spirit of God, in Wisdom, in Understanding, and in Knowledge, and in all manner of Workmanship, and to devise curious Works, to work in Gold, and in Silver, and in Brass; and in the cutting of Stones to set them, and in carving of Wood to make any manner of cunning Work. And he hath put in his Heart that he may teach, both he and* Aholiab *the Son of* Ahisamach, *of the Tribe of* Dan. *Them hath he filled with Wisdom of Heart, to work all manner of Work, of the Engraver, and of the cunning Workman, and of the Embroiderer, in Blue and in Purple, in Scarlet, and in fine Linen, and of the Weaver, even of them that do any Work, and of those that devise cunning Work.* Exod. 35. 30, 31, &c.

And Hiram *King of* Tyre *sent Messengers to* David, *and Cedar-Trees, and Carpenters, and Masons, and they built* David *a House.* 2 Sam. 5. 11.

Moreover there are Workmen with thee in abundance, Hewers and Workers of Stone and Timber, and all manner of cunning Men, for every manner of Work: Of the Gold, the Silver, and the Brass, and the Iron, there is no number. 1 Chron. 22. 15, 16.

He built also the House of the Forest of Lebanon, *the Length thereof was a hundred Cubits, and the Breadth thereof was fifty Cubits, and the Height thereof thirty Cubits, upon four Rows of Cedar Pillars, with Cedar Beams upon the Pillars. And it was cover'd with Cedar above upon the Beams, that lay on forty five Pillars, fifteen in a Row,* &c. 1 Kings 7. 2, 3.

See the following Articles.

II.

2. Freedoms in Trades.

It is for this purpose of improving Trades and Handicrafts, that it is not permitted to any to make Profession of them, unless they have spent a sufficient time in acquiring the Knowledge and Habits necessary for practising them; at least in Trades which are of such a Consequence as to demand this Regulation, and in Places where it may be observed *b*.

' *b* It is for this end that Freedoms in Trades ' are established, and Regulations made for Ap- ' prentices.

And for all manner of Work made by the hands of Artificers. 1 Chron. 29. 5.

III.

3. Companies of Trades.

It is for the same purpose that it is permitted to the Masters of each Trade to form a Body, and to meet together for common Affairs, to make Statutes and Regulations, which are to be approved of by the Ordinances, or by a proper Court of Justice, and particularly in what relates to the Policy and good Use of every Trade and Handicraft, for the Improvement of it. And it is for the Observance of those Rules and Orders, that they appoint in the said Companies some of their own number, by the Name of Wardens, Jurates, or other Names, to inspect and visit the Work, and to judge if it is such as it ought to be, and to see that all the Rules of the Company be duly observed *c*.

c Collegia Romæ certa sunt quorum corpus Senatusconsultis atque constitutionibus principalibus confirmatum est: veluti pistorum & quorundam aliorum & naviculatiorum qui (&) in provinciis sunt. *l.* 1. *ff. quod cuj. univ.*

Sodales sunt, qui ejusdem collegii sunt, quam Græci Ἑταιρείαν vocant. His autem potestatem facit lex, pactionem quam velint sibi ferre, dum ne quid ex publica lege corrumpant. *l.* 4. *ff. de colleg. & corp.*

Enimvero ad negotiationem aut quid aliud, quidquid hi disponent, ad invicem firmum sit, nisi hoc publicæ leges prohibuerunt. *d. l. in f.*

IV.

4. The Policy of those Companies.

The Companies of Trades, or other Corporations, have their common Affairs, their Rights, their Privileges and Policy for the Observance of the Statutes and Rules made in order to maintain the good Exercise of the Trade and

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and Handicraft for the Service of the Publick. And they are to be called to account by the Officers of Justice for what they do contrary to the said Regulations *d*.

d Quibus permissum est corpus habere collegii, societatis sive cujusque alterius eorum nomine, proprium est, ad exemplum reipublicæ habere res communes, arcam communem, & actorem sive syndicum per quem tamquam in republica quod communiter agi fierique oporteat, agatur, fiat. *l.* 1. §. 1. *ff. quod cujus un. nom.*

SECT. II.

Of the Duties of Artificers and Handicraftsmen.

The CONTENTS.

1. *The Artificer ought to be skilful in his Art.*
2. *He ought to exercise his Trade faithfully.*
3. *Costs and Damages for Works that are faulty.*
4. *Monopolies and Combinations of Artificers.*
5. *Reports made by skilful Artificers in Courts of Justice.*
6. *General Duty of Artificers, to observe the Regulations prescribed them.*

I.

1. The Artificer ought to be skilful in his Art.

THE first Duty of every one in the Trade he professes, is not to be ignorant of the Rules of it, that he may not cheat the Publick *a*.

a See Sect. 1. Art 2.
Imperitia culpæ adnumeratur. *l.* 132. *ff. de reg. jur.*
Quod per imperitiam commisit imputari ei debet. Prætextu humanæ fragilitatis delictum decipientis in periculo homines innoxium esse non debet. *l.* 6. §. 7. *ff. de off. præs.*
Moreover there are Workmen with thee in abundance, Hewers and Workers of Stone and Timber, and all manner of cunning Men, for every manner of Work: Of the Gold, the Silver and the Brass, and the Iron there is no number. 1 Chron. 22. 15, 16.
Send me now therefore a Man cunning to work in Gold, and in Silver, and in Brass, &c. 2 Chron. 2. 7.

II.

2. He ought to exercise his Trade faithfully.

It is necessary to join to the Knowledge of the Rules of an Art, Fidelity in the Work, to make it such as it ought to be for the Use it is designed for, and according to the Regulations that have been made for Works of that kind *b*.

b Poterit ex locato cum eo agi, qui vitiosum opus fecerit. *l.* 51. §. 1. *ff. locat.*

III.

3. Costs and Damages for Works that are faulty.

If the Work is not such as it ought to be according to the Regulations, or according to the Bargain made about it, the Workman is bound either to take it back, or to abate in the Price, if the Person who bespoke it is willing to take it as it is. And if the Work was such that the Faults of it had Consequences which occasioned some Damage, the Workman or Undertaker of the Work would be liable for it. Thus, an Architect or a Mason is answerable for the Damages done by a Wall that has no good Foundation, or that is ill built, or which may have proceeded from other Faults in Masonry which he had undertaken *c*.

c Celsus imperitiam culpæ adnumerandam, libro octavo digestorum, scripsit. Si quis vitulos pascendos, vel sarciendum quid, poliendumve conduxit, culpam eum præstare debere: & quod imperitiâ peccavit, culpam esse. Quippe ut artifex conduxit. *l.* 9. §. 5. *ff. locat.*
Tenebitur in id quod interest, nec ignorantia ejus erit excusata. *l.* 19. §. 1. *ff. eod.*
'All the Masters of the said Company shall 'be bound and answerable for all Miscarriages, 'Faults and Abuses which shall be found in Works 'marked with their Punchion or Mark. *Ordinance* '*of* Henry II. 1555. *Art.* 6.
'Altho this Ordinance relates only to a certain 'Profession, yet it may be applied here.

IV.

4. Monopolies and Combinations of Artificers.

As there are Monopolies of Merchandize, so there are also Monopolies in Undertakings of Mechanick Works, if the Undertakers to whom application is made, combine together to insist all of them on a certain Price, and engage not to do it at a cheaper rate; and this kind of Monopoly is not less prohibited than that of Merchandize. And the Laws forbid and punish with greater Reason the Combinations of Undertakers who agree among themselves, that none of them shall undertake either to begin or to continue a Work which another of them had begun, or undertaken to do *d*.

d Nullus id proficere prohibeatur, quod ab altero cœptum opus fuerit: quod præsumi cognovimus a quibusdam artificibus vel redemptoribus, nec iis quæ ipsi cœperint, finem imponentibus, nec alios id proficere sinentibus, atque inde damnum intolerabile inferentibus iis, qni domos suas fabricari cupiunt. Qui itaque hoc solo recusat opus perficere, quod ab alio antea inchoatum sit, is eandem pœnam excipiat quam is excepit qui opus reliquit. *l.* 12. §. 8. *C. de opere publ.*
Jubemus——ne quis illicitis habitis conventionibus conjuret, aut paciscatur, ut species diversorum corporum negotiationis, non minoris quam inter se statuerint, venundentur. Ædificiorum quoque artifices

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tifices vel ergolabi, aliorumque diversorum operum professores & balneatores penitus arceantur pacta inter se componere, ut ne quis quod alteri commissum sit opus impleat, aut injunctam alteri sollicitudinem alter intercipiat, data licentia unicuique ab altero inchoatum & derelictum opus per alterum sine aliquo timore dispendii implere: omniaque hujusmodi facinora denuntiandi sine ulla formidine, & sine judiciariis sumptibus. Si quis autem monopolium ausus fuerit exercere, bonis propriis expoliatus, perpetuitate damnetur exilii: cæterarum præterea professionum primates si in posterum, aut super taxandis rerum pretiis, aut super quibuslibet illicitis placitis ausi fuerint convenientes hujusmodi sese pactis constringere, quadraginta librarum auri solutione percelli decernimus. *l. un. C. de monopol.*

'It is likewise a Consequence of this Rule, that 'it is prohibited to Workmen to leave a Work 'they have begun.

Provideat magnificentia tua, ne quis redemptorum, aut fabrorum, aut artificum opus a se inchoatum relinquat imperfectum; sed ut accepta mercede opus quod incepit, perficere cogatur; vel omne damnum quod inde ædificare volens acceperit, & quidquid omnino dispendii sensit ex eo quod opus perfectum non fuerit, sarciat. *l. 12. §. 8. C. de æd. priv.*

V.

5. Reports made by skilful Artificers in Courts of Justice.

Seeing it often happens that there is occasion, either in a Court of Justice between Parties who are at Law together, or extrajudicially by the mutual Consent of Parties, to have Works viewed and examined in order to know whether they be of the Quality they ought to be of, or to make an Estimation of them, or to regulate the Costs and Damages occasioned by faulty Works; and that in order to have these sorts of Views and Estimations, one is obliged to call in Artificers and Handicraftsmen, that they may faithfully report what is within their Knowledge; it is a Duty incumbent on them to make these Reports exactly according to Truth and Justice. For in this Function they hold the Place of Judges, and when these Reports are made judicially, they are also obliged to swear they will make them according to their Conscience *e*.

e Fides bona exigit ut arbitrium tale præstetur quale viro bono convenit. *l. 24. ff. locat.*

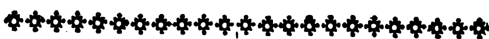
Stari debet sententiæ arbitri, quam de re dixerit. *l. 27. §. 2. de recep. qui arb. recep.*

VI.

6. General Duty of Artificers to observe the Regulations prescrib'd them.

We may set down as a general Duty of Artificers and Handicraftsmen, and which comprehends the Detail of their principal Duties, as to what concerns their Profession, that of observing the Statutes and Regulations of the Art they exercise; and the Policy established by the Ordinances for the Quality and Price of their Works, for their Wages, and for the whole Detail of every thing relating to their Profession *f*.

f See the foregoing Section.



TIT. XIV.

Of Husbandry, and the Care of Cattel.

OF all the Arts and Labours of Men, the first in order of Time, and in the order of Nature, was that of Husbandry; and it was also the first which God commanded of Man, even while he was in the State of Innocence *a*: And after his Fall the Necessity of Food and Raiment made the Care of Cattle necessary, they yielding to Man divers Assistances for these two Wants. And Cattle are likewise in many respects serviceable for Husbandry.

It was these two Labours which the two first Children of the first Man shared between them *b*, and which for many Ages were the Occupation of the Men of the first Rank *c*; as they are at this day the Occupation of the greatest part of Mankind: So that there is not only no one Profession that employs so many Persons as Husbandry and the Care of Cattel, but the number of the Persons employ'd therein, surpasses

a *And the Lord God took the Man and put him into the Garden of* Eden, *to dress it, and to keep it.* Gen. 2. 15.

I am no Prophet, I am an Husbandman; for Man taught me to keep Cattel from my Youth. Zech. 13. 5.

The Earth is satisfy'd with the Fruits of thy Works: He causeth the Grass to grow for the Cattel, and Herb for the Service of Man. Psal. 104. 13, 14.

See the Treatise of Laws, chap. 2. num. 2.

Summæ prudentiæ & authoritatis apud Græcos Plato, cum instituerct, quemadmodum civitas bene beate habitari possit, in primis istos negotiatores necessarios duxit. *l. 2. ff. de nund.*

b *And* Abel *was a Keeper of Sheep, but* Cain *was a Tiller of the Ground.* Gen. 4. 2.

c *And* Noah *began to be an Husbandman.* Gen. 9. 20.

And Pharoah *said unto his Brethren, what is your Occupation? And they said unto* Pharaoh, *Thy Servants are Shepherds, both we and also our Fathers. They said moreover unto* Pharaoh, *for to sojourn in the Land are we come; for thy Servants have no Pasture for their Flocks.* Gen. 47. 3, 4.

Also he built Towers in the Desart, and digged many Wells, for he had much Cattel, both in the low Country and in the Plains; Husbandmen also and Vine-Dressers in the Mountains, and in Carmel; *for he loved Husbandry.* 2 Chron. 26. 10.

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surpasses that of all the other Professions put together.

It is not necessary to explain what is the Necessity and Usefulness of Husbandry and of the Care of Cattel, seeing it is the same as that of Life and of Clothing. We shall only make one bare Reflection on the Difference between these two Professions and all the others, and which seems to have been the Cause of the two singular Advantages God has thought fit to annex both to the one and the other: The first of which is, that they are of all Professions the most necessary, the most natural, and of the most universal Use for Mankind; and the other, which is a Consequence of the first, that they are more removed from, and less exposed to the Occasions which excite the most dangerous Passions, and disturb most the inward Peace and Tranquillity of the Mind. So that if those who are employ'd in these Vocations, had the good fortune to be well instructed in the Principles of Religion, that they might join the Spirit thereof to those Advantages, they would esteem their Condition as one of the happiest, whereas the greatest part of them look upon it as the hardest.

There is this in common to all the Employments which take up the time and Thoughts of Men, and compose the Order of their Society; that they all tend to a publick Good upon this Principle, of the Order and Providence of God, who to unite Men together, renders necessary to all of them the several Labours, which he divides to every one for their own private Use as well as that of others. But of all these Labours, there is none of which the Use is of so large an Extent as that of Husbandry, and of the Care of Cattle, and which could be less spared. Thus, there is no other Labour which is of so great Consequence to the Publick, or serves to so necessary Uses, seeing there is no Person alive who is able to subsist without the help of these two Professions: So that for this reason they are as it were a primary Foundation or Element of the Life of Man.

Seeing we are not to explain in this Book all the particular Rules which relate to the Exercise of Husbandry and the Care of Cattle, no more than the Rules of the other Trades and Handicrafts, and that we consider here in every one of them only the Relation it has to the Publick, and in general its Use in the Society; we shall only explain in this Title two sorts of Rules concerning this Matter: One, of those which regard this Use and this Relation to the publick Order, and that shall be the Subject of the first Section; and the second shall be concerning the Duties of these two Professions with respect to that Order.

SECT. I.

Of the Use of Husbandry, and of the Care of Cattle, with respect to the publick Order.

THE Reader may consult in relation to the Matter treated of in this Section, the 1st Section of the 7th Title.

The CONTENTS.

1. *Definition of Husbandry.*
2. *Wherein the Care of Cattel consists.*
3. *Necessity of these two Professions.*
4. *Good Use of Husbandry.*
5. *Good Use of the Care of Cattle.*

I.

1. Definition of Husbandry.

By Husbandry is meant the Art of tilling the Ground in order to draw from it the several sorts of things which it may produce, and especially that which may serve for the Nourishment of Man, such as Corn, Fruits, and other kinds; or for his Clothing, such as Hemp, Flax, Cotton, and all other things *a*.

'*a* There is an infinite number of things which the Earth produces without Tillage, such as many Plants, many Trees, Minerals, and other things; but it is only by Tillage that we draw from it the things most necessary for Life.'

II.

2. Wherein the care of Cattel consists.

By the Care of Cattle is understood here the looking after those sorts of Animals which serve for the Tillage and Manure of the Ground, and likewise for the Food and Raiment of Man; such as Oxen, Sheep, Horses, and others, which serve differently, some of them for all these Uses, and others only for a part of them *b*.

'*b* No body is ignorant of the different Uses of these several sorts of Animals.'

III.

3. Necessity of these two Professions.

Husbandry and the Care of Cattel are Labours which of their own nature

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ture have a relation to the Publick; for the Labour of every one of those who employ themselves about either the one or the other, is not confined to their own particular Use, but the Labour of one Person alone serves for many, and both the one and the other Profession are essential to the Life of Man. Thus these two Professions are of the greatest Necessity and Usefulness in the Society of Mankind *c*.

' *c* The first and great Necessity is that of Food ' and Raiment.

IV.

4. Good Use of Husbandry.

For the good Use of Husbandry, it is of importance to the general Good of a Kingdom, as well as for the Interest of the particular Proprietors of Lands, that they cultivate therein what the Land is capable of producing that is most necessary and most useful, whether it be things consumed for Nourishment and Clothing, or others of which one may make a more profitable Commerce, whether it be within the Kingdom it self, or with Strangers: and it is the Business of the Government to take care thereof, and to give the proper Directions therein, as there is occasion *d*.

d See Tit. 7. Sect. 1. Art. 2, 3.

V.

5. Good Use of the Care of Cattel.

It is the same thing with respect to the Care of Cattel, which ought to be suited to the Nature of the Country, to breed in it such Cattel as may best succeed in that Climate and Soil, and from which may be drawn the greatest Profit *e*.

' *e* Altho the greatest part of the Animals mentioned in this Title are brought up almost every ' where, yet there are some of them which succeed ' better in some Countries than in others.

SECT. II.

Of the Duties of those who are employed in Husbandry, and looking after Cattel.

The CONTENTS.

1. *A Duty to cultivate the Lands.*
2. *A Duty to use the several Cultures in their proper Seasons.*
3. *The Duty of caring for the Cattel.*

I.

1. A Duty to cultivate the Lands.

THOSE who exercise Husbandry only for their own Use in their own proper Lands, are nevertheless obliged, in regard to the Publick, to cultivate them; not only for this general Reason, that it is the Interest of the Publick that every one should make a good use of that which belongs to him *a*; but also in consideration of the Consequence of Husbandry, and of the Necessity of drawing from the Earth Subsistence for the Life of Man. Thus the Government might oblige the Proprietors of Lands to cultivate them, and in case of their Neglect appoint others to take that Care, both in consideration of gathering from them the Fruits which they may produce, and likewise that they may be able to contribute their Share towards the publick Taxes *b*.

a Expedit enim Reipublicæ ne sua re quis male utatur. §. 2. *inst. de his qui sui vel al. jur. sunt.*

' It was one of the Functions of the Censor at ' *Rome*, to take notice of, and to punish those who ' neglected to cultivate their Lands.

b Qui agros domino cessante desertos vel longe positos vel finitimos ad privatum pariter publicumque compendium excolere festinat, voluntati suæ nostrum noverit adesse responsum: ita tamen, ut si vacanti ac destituto solo novus cultor insederit, ac vetus dominus intra biennium eadem ad suum jus voluerit revocare, restitutis primitus quæ expensa constiterit, facultatem loci proprii consequatur. Nam si biennii fuerit tempus emensum, omnis possessionis & dominii carebit jure qui siluit. *l. 8. c. de om. agr. deserto.*

Si quis authoritate nostri numinis de fundis patrimonialibus steriles sub certi canonis pollicitatione susceperit, firmiter eum volumus possidere: sub ejusdem tamen canonis solutione, quem nostræ majestatis authoritas per annos singulos solvendum esse præscripsit: nullamque eos descriptionem sive adjectionem, aut innovationem in posterum sustinere: quoniam nimis absurdum est eos qui nobis hortantibus fundos inopes atque egenos magno labore (impenso) aut exhausto patrimonio vix forte meliorare potuerunt, utpote deceptos, inopinatum onus suscipere: illudque velut quadam circumventione deposci, quod si se daturos præscissent. fundos minime suscipere aut etiam colere paterentur. *l. 16. eod.*

See the Texts cited in the Preamble of Tit. 9. Sect. 2.

II.

2. A Duty to use the several Cultures in their proper Seasons.

Those who undertake for others to cultivate their Estates, whether it be for Money, or for a Portion of the Fruits, or upon other Conditions, do contract, besides their Obligation towards the Publick, an Engagement to the Owners of the Lands; the Duties whereof oblige them to do every thing necessary for tilling, sowing, and reaping in the proper Seasons, observing the several Cultures according to the Quality

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Quality of the Lands, every one of them in their proper time, and according to Usage and Custom *c*.

c Conductor omnia secundum legem conductionis facere debet, & ante omnia colonus curare debet, ut opera rustica suo quoque tempore faciat: ne intempestiva cultura deteriorem fundum faceret. *l.* 25. §. 3. *ff. locat.*

Divi fratres rescripserunt, in venditionibus fiscalibus fidem & diligentiam a procuratore exigendam —— sicut enim diligenti cura pretia prædiorum ampliantur: ita, si negligentius habita sint, minui ea necesse. *l.* 3. §. 5. *ff. de jure fisc.*

III.

3. Duty of caring for Cattel. The Duties of those who have the Care of Cattel consist in leading them out to Pasture, in watching them, and taking care that they be not stolen; nor go astray, that they do no damage, nor receive any, and in taking all the other care of them as is necessary or usual *d*.

d See in the *Civil Law in its natural Order*, the 2d Section of Damages occasioned by Faults which do not amount to a Crime, nor to an Offence.

TIT. XV.

Of Communities in General.

HAVING explained the Distinctions of the different Orders of Persons, we proceed now to the Consideration of Communities, which are Bodies composed of many Persons for a publick Good, and which are considered in a State as holding the Place of Persons *a*; both because of their Functions which are proper to the whole Body which is formed by the Community, as also because those Bodies of Men have their Goods, their Affairs, their Rights, Burdens, and Privileges in the same manner as particular Persons. Thus Corporations of Towns, the Bodies of Universities, Chapters, Monasteries, and others, are Assemblies of many Persons linked together for certain Functions directed to some publick Good.

The Use of these several sorts of Communities and Corporations was natural in the Society of Mankind, and has had the same Origin and Foundations as the Union of many Families, and of many Nations under one and the same Government of Monarchy, or of a Commonwealth. For as it is the Multitude of the Wants of Men, and the Necessity every one has of the Assistance of many others, that has been the occasion of forming Monarchies and Commonwealths, as has been explained in its Place *b*; so the same Necessities and Wants have made it necessary to have still more close and particular Conjunctions of many Persons together, which might form Companies and Corporations destined to different Uses for the Publick Good.

Seeing there can be no Companies nor Corporations without the Permission of the Prince, as has been explained in its Place *c*, and that they all tend to some publick Good, which makes them in some measure depend on the Temporal Government; these two Considerations are the reason why Ecclesiastical Bodies are comprehended under the Name of Communities, which are treated of in general under this Title: where we purpose to explain the Nature and Use of Communities, and their different Kinds, which shall be the subject Matter of the first Section; and we shall explain in the second the Rules which relate to the Order and Policy of the said Communities.

These two Sections shall contain the Rules common to all sorts of Communities and Corporations; and because there are some of them which have Rules peculiar to them which it is necessary to distinguish, we shall explain what relates to these sorts of Communities in the ensuing Titles.

a See Sect. 2. Art. 2. of this Title.

b See Tit. 1. Sect. 2. Art. 3.

c See Tit. 2. Sect. 2. Art. 14.

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SECT. I.

Of the Nature and Use of Communities, and of their Kinds.

The CONTENTS.

1. *Definition of Communities.*
2. *Three sorts of Communities.*
3. *Use of Communities.*
4. *Communities are a part of the Body of the State; and this Body is not of the number of Communities.*
5. *The Clergy ought not to be put in the number of Communities.*
6. *Three sorts of Ecclesiastical Communities.*
7. *All these Communities have a relation to the Temporal Government.*
8. *Corporations of Towns, and other places.*
9. *Courts of Justice.*
10. *Societies of Advocates.*
11. *Societies of Proctors, Registers and others.*
12. *Other sorts of Companies or Corporations.*

I.

1. Definition of Communities.

COmmunities are Assemblies of many Persons united into one Body, which is formed with the leave of the Prince, distinguished from the other Persons who compose a State, and established for the common good of those who are Members of the said Body, and which hath also a view to the publick Good of the whole Kingdom. Which is the Reason why Communities are perpetual, and which distinguishes them from the Companies or Societies treated of, under the Title of Partnership, in *the Civil Law in its Natural Order*: for those Partnerships are formed only for particular Interests, without any necessity of having the Prince's leave, and only for a certain time, or at most during the Life of the Co-partners *a*.

a Collegia Romæ certa sunt quorum corpus Senatusconsultis atque constitutionibus principalibus confirmatum est. *l. 1. ff. quod cujusqu. univ. nom.*

II.

2. Three sorts of Communities.

These Communities are of three sorts. The first is of those which regard chiefly Religion; such as the Chapters of Cathedral and Collegiate Churches, Monasteries and others *b*. The second is of those which relate to the Temporal Government, as the Corporations of Towns, the Companies of Tradesmen, and others *c*. And the third is of those which concern both Religion and the Temporal Government; as the Universities, which are composed of Professors of Divinity, and of Professors of human Sciences *d*.

b V. tot. Tit. C. de sacrosf. Eccles.

c V. tot. Tit. ff. ad municip. Tit. C. de pistor. & seq. de fabricensibus.

d See hereafter the Title of Universities.

See upon this Article, the last Article of the 2d Section of Persons in *the Civil Law in its Natural Order.*

III.

3. Use of Communities.

The use of Communities is to provide, by the Assembly and Assistance of many Persons, for some good that is useful to the Publick. Thus, in the case of Ecclesiastical Societies, Chapters are established, not only for the common good of the Canons and Prebends, but also for the use of the Publick, which has an Interest in the Offices of the Church. Thus likewise for Communities which relate to Temporal Affairs, the Corporations of Towns are established, not only for the common good of the Inhabitants of the Towns, but also for the publick Good of the Kingdom, which is obtained many ways from that of the Towns, as will be seen in the following Titles. Thus again for the Universities, which have a mixture both of Spiritual and Temporal Concerns, they are useful both for the good of the Church, and for the good of the State, as will appear in the Title of Universities *e*.

e See the following Titles.

IV.

4. Communities are a part of the Body of the State, and this Body is not of the number of Communities.

Since Communities are composed of Persons of the same Order, or of different Orders, yet so as that no one of them comprehends Persons of all Orders; we ought not to place in the number of Communities and Corporations, the Body of the State, which comprehends all the Orders, and takes in every thing which regards the publick Good, whether in the Conduct of particular Persons, or in that of Communities, whereas these have all of them their bounds in some kind of particular Good *f*.

f 'All the Communities here treated of are 'Members of the Body of the State, which consist 'of particular Conjunctions of certain sorts of Per'sons.

V.

5. The Clergy ought not to be put

Altho we may look upon the different Orders of Persons who compose the Body

in the number of Communities.

Body of a State, to be as it were certain Bodies distinguished among themselves, and that some of the said Orders have Affairs belonging to them in common, as the Clergy; yet it is not proper to place them in the number of Communities: for by the word Community is understood only certain Bodies of Persons united together for continual uses, for which they have a right to meet whenever they see good. Thus Chapters, Corporations of Towns, Companies of Merchants, and those of Tradesmen, meet together for their Affairs whenever they please. But the Body of the Clergy does not assemble in the same manner without the leave of the Prince, neither do all the Officers of Justice belonging to the several Courts meet together, altho they be all of one and the same Order; but each Court of Justice makes a Body apart *g*.

g See the following Articles.

VI.

6. Three sorts of Ecclesiastical Communities.

The Ecclesiastical Communities are of three sorts. The first consists of those who are called the secular Clergy, because they are composed of Ecclesiasticks who live in the World among the rest of Mankind, every one on his own Patrimony or Income: and this Kind comprehends the Chapters of the Cathedral and Collegiate Churches, the Canons of which do not belong to any particular Order of Monks. The second is of the regular Communities, which are composed of Monks who make Profession by Vows to spend their days in common together under the direction of Superiors, and according to a Rule prescribed by their Founder, and approved by the Church. The third is that of Communities of Ecclesiasticks, who without taking upon them any Vows live in common together in order to serve the Church in their respective Functions under the Authority of Bishops, such as are some Congregations, and Seminaries for the Instruction of those who are to be promoted to Holy Orders, and of those who are to be imployed in Missions, and other Vocations *h*.

h 'All the Ecclesiastical Commmunities may be 'reduced to these three kinds.

[In *England*, since our Reformation from Popery, and the Dissolution of Monasteries, our Ecclesiastical Communities are reduced to the first sort mentioned in this Article.]

VII.

7. All these Communities have a relation to the Temporal Government.

Altho all these sorts of Ecclesiastical Communities be chiefly intended for the service of Spiritual Affairs, yet they have also a relation to the Temporal Government, and are subject to many of the Rules thereof in several respects; and therefore the distinction of these Communities is a part of the Publick Law *i*.

i See the following Section.

VIII.

8. Corporations of Towns, and other places.

In the order of the Communities which relate only to the Temporal Government, and of which the use is perpetual, the first with respect to the publick Order, and in consideration of the Multitude, are those which are composed of the Inhabitants of a Town, or of another place, for the Affairs which are common to them; and these sorts of Communities shall be the subject of the following Title, which see.

IX.

9. Courts of Justice.

We may place in the number of Companies and Communities of Lay-persons, and that in the first Rank, because of their Dignity, the Judges of the supreme Courts of Justice and others; for the said Courts have every one of them their Chiefs, and Members who compose them, and who are united and linked together, not only by their Functions to render Justice together, but also by their common Interests, which respect their Dignity, their Jurisdiction, their Rights, Privileges, Salaries, and other Affairs; such as to regulate among them the Discipline and Decorum necessary for maintaining their Dignities and Functions, the Times of their sitting, and all other things of the like Nature; and in a word to settle every thing which may concern the Interest and good order of Justice, the Administration of which is committed to them *m*.

m 'The Judges of every Court of Justice make 'a Body, in which they are united by the double 'tie of their Functions to render Justice together, 'and of the Interests which are common to them 'in respect of their Offices.

X.

10. Societies of Advocates.

As the Judges of the Courts of Justice have their common Affairs, and common Interests, which unite them together in Society; so the Advocates who exercise their Profession before the same Judges, have also their

Society

Society for the Affairs which concern them in common *n*.

n Petitionem virorum disertissimorum Advocatorum Alexandrinæ splendidissimæ civitatis, quam de fori sui matricula & fisci patrono obtulerunt, merito admittentes, hac sanctione decernimus quinquaginta statutos haberi: eorumque nomina pro tempore matriculæ conficiendæ inscribi: & eos Advocationis officium in judicio tam viri spectabilis Præfecti augustalis, quam viri spectabilis Ducis Ægyptiaci limitis petentibus adhibere: cæteros vero ultra memoratum numerum constitutos, apud alios judices ejusdem Alexandrinæ civitatis perorare: filiis scilicet statutorum in loco deficientium supernumeratis anteponendis. Egredientem autem post biennium fisci patronum, contemplatione laborum, ex consularis moderatoris provinciæ dignitate decorari; licentia facultateque ei non deneganda, cum usus exegerit. Tam pro se quam pro filiis, parentibus, & uxoribus, nec non etiam personis ex transverso latere usque ad quartum gradum constitutis, patrocinium suum adhibere. Quando autem fisci patronum mori contigerit, gradu eum sequentem sine ulla dilatione in locum ejus subrogari: hæredibus defuncti nihil exinde sibi commodi acquiri posse speraturis, cunctis privilegiis quæ hactenus habuisse noscuntur, nec non his, quæ suggestio tuæ magnitudinis continent, etiam in posterum intactis inviolatisque servandis: quatenus hujusmodi delato eis liberalitate nostræ serenitatis honore possint in otio & tranquillitate reliquum vitæ suæ tempus peragere, nulla eis invitis ingerenda sollicitudine. *l.* 13. *C. de advocat. diver. judicior.*

Jubemus, advocationem fori tui culminis centum quinquaginta (sicut antea constitutum fuerat) advocatis concludi: eundemque numerum, quoties vel professionis fine, vel morte, vel quocumque fuerit casu imminutus, electione magnificæ tuæ sedis impleri; ita ut in præsenti quidem, & hinc usque ad biennium adimpletionem supra definiti numeri subrogandi, sine ulla cohortalis aut cujuslibet deterioris conditionis quæstione succedant: salva videlicet adversus eos apparitoribus, si qua competit, actione: quam certum est postquam fisci patronatum officio impleto exegerint, evanescere. Post lapsum vero biennium foro tuæ magnificæ potestatis inseri postulantes, non aliter, nisi sub gestorum confectione minime eos cohortali conditioni subjacere patefactum fuerit, admittantur. *l.* 17. *eod.*

V. Tot. h. T.

XI.

11. Societies of Proctors, Registers, and others.

The Proctors, belonging to one and the same Court of Justice, have also their Societies and Companies: and it is the same thing with respect to the other Persons who exercise any Function in the Order of the Administration of Justice; such as Registers, Publick Notaries, and others *o*.

o 'These several Offices render common to all 'who exercise them, the Affairs which relate to 'their Functions.

XII.

12. Other sorts of Companies or Corporations.

There are likewise divers other Companies and Corporations of several sorts of Merchants, according to the differences of the Commerce they deal in, and according to the differences of Trades and Handicrafts. There are also divers Bodies of Artificers distinguished into several Companies *p*.

p 'Every one of these Companies or Corpora'tions have their particular Statutes, established or 'approved by the Ordinances.

SECT. II.

Of the Order and Policy of Communities and Corporations.

The CONTENTS.

1. *Communities ought to have the leave of the Prince.*
2. *Communities are in the place of Persons.*
3. *The changes of Persons do not change the Communities.*
4. *Two sorts of Communities.*
5. *Communities have their Rights, their Goods, and Statutes.*
6. *Communities are composed of Persons of certain Orders.*
7. *In what sense one can be a Member only of one Community.*
8. *The Goods and Rights of Communities belong not to the particular Persons who compose them.*
9. *Communities name Syndicks for the management of their Affairs.*
10. *In what manner Communities deliberate about their common Affairs.*

I.

1. Communities ought to have the leave of the Prince.

THE first Rule of the Order of the Policy of Communities and Corporations, is that they be established for a publick Good, and by the Order or Permission of the Prince; for, as has been mentioned in its proper place, all Assemblies of many Persons, without the said Order or Permission, would be unlawful *a*.

a See Tit. 2. Sect. 2. Art. 14, 15.

Quibusdam collegiis, vel corporibus quibus jus coeundi lege permissum est, &c. *l.* 5. §. 12. *ff. de jure imm.*

Sed religionis causa coire non prohibentur, dum tamen per hoc non fiat contra senatusconsultum, quo illicita Collegia coarcentur. *l.* 1. §. 2. *ff. de coll. & corp.*

Collegia si qua fuerint illicita, mandatis, & constitutionibus, & senatusconsultis dissolvuntur. —— In summa autem, nisi ex senatusconsulti authoritate, vel Cæsaris, Collegium vel quodcumque tale corpus coierit, contra senatusconsultum, & mandata, & constitutiones collegium celebrat. *l.* 3. *eod.*

II.

2. Communities are in the place of Persons.

Communities that are lawfully established, are in the place of Persons; and their Union, which renders common to all who are Members of them, their Interests, Rights and Privileges, makes

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makes them to be considered as one single Person. And as every particular Person exercises his Rights, manages his Affairs, and sues in Judgment; so it is the same with Companies and Corporations *b*.

b Personæ vice fungitur municipium & decuria. *l.* 22. *ff. de fidejuss.*

Cum Senatus temporibus Divi Marci permiserit collegiis legare, nulla dubitatio est, quod si corpori cui licet coire, legatum sit, debeatur cui autem non licet, si legetur, non valebit, nisi singulis legetur. Hi enim non quasi collegium, sed quasi certi homines, admittentur ad legatum. *l.* 20. *ff. de reb. dub.*

See Sect. 2. Art. 15. of Persons.

See the Text cited on Art. 6. of this Section.

III.

3. *The Changes of Persons do not change the Communities.*

Communities being established for a publick Good, the Cause of which always subsists, it is of their Nature to last always, so that the said Bodies subsist still the same, and are perpetuated without receiving any alteration, altho all the Persons of which they are composed should happen to be changed *c*. And if it should happen that there remain one Person of a Corporation, he would represent it whilst he continued single, and would exercise the Rights thereof, which might subsist and go to him, until others should fill up the vacant places *d*.

c In decurionibus vel aliis universitatibus nihil refert utrum omnes iidem maneant, an pars maneat, vel omnes immutati sint. *l.* 7. §. 2. *ff. quod cujusq. univers.*

Proponebatur, ex his judicibus, qui in eandem rem dati essent, nonnullos causa audita excusatos esse, inque eorum locum alios esse sumptos, & quærebatur, singulorum judicum mutatio eandem rem, an aliud judicium fecisset. Respondi, non modo si unus, aut alter, sed etsi omnes judices mutati essent, tamen & rem eandem & judicium idem quod antea fuisset, permanere: neque in hoc solum evenire, ut partibus commutatis eadem res esse existimaretur, sed & in multis cæteris rebus: nam & legionem eandem haberi, ex qua multi decessissent, quorum in locum alii subjecti essent: & populum eundem hoc tempore putari, qui abhinc centum annis fuissent, cum ex illis nemo nunc viveret; itemque navem si adeo sæpe refecta esset ut nulla tabula eadem permaneret, quæ non nova fuisset, nihilominus eandem navem esse existimari. Quod si quis putaret partibus commutatis aliam rem fieri, fore ut ex ejus ratione nos ipsi non iidem essemus, qui abhinc anno fuissemus; propterea quod, ut Philosophi dicerent, ex quibus particulis minimis consisteremus, hæ quotidie ex nostro corpore deciderent, aliæque extrinsecus in earundem locum accederent; quapropter, cujus rei eadem species consisteret, rem quoque eandem esse existimari. *l.* 76. *ff. de judiciis & ubi quis.*

d Sed si universitas ad unum redit, magis admittitur posse eum convenire & conveniri, cum jus omnium in unum recierit, & stet nomen universitatis. *l.* 7. *in f. ff. quod cujusq.*

'If all those who compose a Society or Community should chance to die, and it were such a Community as were necessarily to be re-established, the Places would be filled up with Persons who are duly qualified to be Members thereof. Thus, for example, if all the Canons or Prebendaries of a Chapter should happen to die by a Plague, or in a War, their Places would be filled up by those who have the Collation of the Prebends, and the new Prebendaries would compose the same Chapter.'

IV.

4. *Two sorts of Communities.*

It is necessary to distinguish among the Communities those which consist only of Persons who have a right to assist in the Assemblies where their Affairs are to be transacted, and those which, besides the Persons called to assist at their Assemblies, comprehend other Members who have not this right. Thus for example, a Chapter comprehends only the Dignitaries, and the Canons, or Prebendaries, who compose it, and who have all of them a right to deliberate upon their common Affairs, if the defect of Age, or some other Cause does not exclude them. Thus likewise the Corporation of a Town comprehends all the Inhabitants, who are all of them interested in the common Affairs of the Corporation. But it being impossible to assemble together the whole multitude to consult about their Affairs, a certain number is chosen from among them, who represent the whole Body of all the Inhabitants, consult and deliberate about the Affairs of the Community, and direct what they think proper to be done therein, as shall be explained in the following Title *e*.

e 'This is a Consequence of the different Natures of Communities.'

V.

5. *Communities have their Rights, their Goods, and Statutes.*

It is common to all Societies and Communities to have their Rights, their Affairs, their Privileges *f*, and to have also their Statutes and Regulations, whether they have been prescribed to them by the Prince, or that they have a right to make them themselves. But in this last case, they can make no Statutes but what are conformable to the Laws of the Kingdom, and to good Manners, and such as tend to the good of the Community, and to the benefit which the Publick ought to reap from it: and if it be necessary that their Statutes should be confirmed by a Court of Justice

f Quibus permissum est corpus habere collegii societatis, sive cujusque alterius eorum nomine, proprium est, ad exemplum reipublicæ habere res communes, arcam communem. *l.* 1. §. 1. *ff. quod cujusq. univers.*

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tice, they will not have their effect till they have been so confirmed *g*.

g Sodales sunt, qui ejusdem collegii sunt quam Græci ἑταιρείαν vocant, his autem potestatem facit lex pactionem quam velint sibi ferre, dum ne quid ex publica lege corrumpant. *l. ult. ff. de colleg. & corpor.*

Quidquid his disponent ad invicem firmum sit, nisi hoc publicæ leges prohibuerint. *d. l. in f.*

VI.

6. Communities are composed of Persons of certain Orders.

Seeing Communities are established for an end that is common to all who are to be Members thereof, and which regards the good that is to be expected from each respective Community; no Person is capable of being a Member of any of them but such to whom the said end is also common, and who are of that Order or Profession which distinguishes the Members of that Community from others. Thus in order to be a Member of a Community, or of a Company of Tradesmen, one ought to be of the Profession of the same Company; which Company ought to be established by the permission of the Prince *h*.

h Neque societas, neque collegium, neque hujusmodi corpus passim omnibus haberi conceditur. Nam & legibus & senatusconsultis & principalibus constitutionibus ea res coercetur. Paucis admodum in causis concessa sunt hujusmodi corpora: ut ecce vectigalium publicorum sociis permissum est corpus habere, vel aurifodinarum, vel argenti fodinarum & salinarum. Item collegia Romæ certa sunt quorum corpus senatusconsultis atque constitutionibus principalibus confirmatum est, veluti pistorum & quorumdam aliorum, & naviculariorum qui & in provinciis sunt. *l. 1. ff. quod cujus univers.*

Immunitas tribuitur scilicet eis collegiis vel corporibus, in quibus artificii sui causa unusquisque assumitur, ut fabrorum corpus est, & si qua eandem rationem originis habent: id est, idcirco instituta sunt, ut necessariam operam publicis utilitatibus exhiberent. *l. 5. §. 12. ff. de jure imm.*

VII.

7. In what sense one can be a Member only of one Community.

It is not enough for being of the number of those who compose a Community, to be of the Order or Profession of the Persons who compose it; but it is also necessary that he who has a mind to be one of the Members of a Community or Corporation, be not a Member of another Community which may have Rights or Interests opposite to those of the Community into which he would enter, or of which the Deliberations ought to be concealed from other Persons for good Reasons. Thus he who should profess two Trades, could not be a Member of the two Companies, both of the one and the other. But as for Communities whose Interests do not clash, and which are such as that one may without any inconvenience be at the same time a Member both of the one and the other, this Rule ceases. Thus an Officer belonging to a Court of Justice, may be either the Head or one of the Members of the Corporation of a Town; and Merchants, Artificers, and also all others may be of the said Corporation, altho they be Members of others *i*.

i Non licet autem amplius quam unum collegium licitum habere, ut est constitutum & a Divis fratribus, & si quis in duobus fuerit, rescriptum est eligere eum oportere in quo magis esse velit. *l. 1. §. ult. ff. de colleg. & corpor.*

VIII.

8. The Goods and Rights of Communities belong not to the particular Persons who compose them.

The Goods and Rights of a Community or Corporation, belong in such a manner to the Community, that none of the particular Persons who are Members of it have any Right or Property in them, or can any way dispose of them: which is the Reason that seeing the said Communities are perpetual, and always supported for the publick good, their Goods and Rights which are their support, ought always to remain to the Corporation. And 'tis this that makes the said Goods and Rights inalienable *l*. But if the Community were dissolved,

l See the last Article of the 2d Section of Persons, the Remark there made upon it, and the Texts there cited.

Jubemus nulli posthac Archiepiscopo in hac urbe regia sacrosanctæ orthodoxæ Ecclesiæ præsidenti nulli œconomo, cui res Ecclesiastica gubernanda mandatur, esse facultatem fundos vel prædia sive urbana, sive rustica, vel postremo immobiles, aut in his prædiis colonos, vel mancipia constituta, aut annonas civiles cujuscunque suprema vel superstitis voluntate ad religiosas ecclesias devolutas, sub cujusque alienationis specie ad quamcunque transferre personam. Sed ea etiam prædia dividere quidem, colere, augere, & ampliare: nec ulli iisdem prædiis audere cedere. Verum sive testamento quocunque jure facto, seu codicillo, vel sola nuncupatione, legato, seu fideicommisso, aut mortis causa donatione, aut alio quocunque ultimo arbitrio, aut certe inter viventes habita largitate, sive contractu venditionis, sive donationis, aut alio quocunque titulo quisquam ad præfatam venerabilem Ecclesiam patrimonium suum, partemque certam patrimonii in fundis prædiis, sive domibus, vel annonis, mancipiis, & colonis, eorumque peculiis voluerit pertinere: inconcussa ea omnia sine ulla penitus immutatione conserventur. Scientes nulla sibi occasione vel tempore, ad vicissitudem beneficii collocati aut gratiæ referendæ, donandi, vel certe hominibus volentibus emere, alienandi aliquam facultatem permissam: nec si omnes cum religioso Episcopo & œconomo clerici in earum possessionum alienationem consentiunt, ea enim, quæ ad beatissimæ Ecclesiæ jura pertinent, vel posthac forte pervenerint, tanquam ipsam sacrosanctam & religiosam Ecclesiam, intacta convenit venerabiliter custodiri: ut sicut ipsa religionis & fidei mater perpetua est, ita ejus patrimonium jugiter servetur illæsum. *l. 14. C. de sacros. Eccles.*

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dissolved, either by order of the Prince, or otherwise; those who were Members of it, would take out what they had of their own in the said Community *m*.

m Collegia si qua fuerint illicita mandatis & constitutionibus & senatusconsultis dissolvuntur, sed permittitur eis cum dissolvuntur pecunias communes si quas habent dividere, pecuniamque inter se partiri. *l.* 3. *in princip. ff. de colleg. & corp.*

IX.

9. Communities name Syndicks for the Management of their Affairs.

Since those who compose a Community, cannot all act together for their common Affairs, and exercise their Rights, they may chuse some of their own number to whom they may intrust the Direction and Care of their Affairs, under the name of Syndicks, Directors, or other Names, according to the Usage and Quality of the respective Communities: and the said Directors have their Functions regulated by their Nomination, and exercise them pursuant to the Rules explained in the Title of Syndicks, Directors, and other Administrators of Companies and Corporations *n*.

n Quibus permissum est corpus habere collegii, societatis, sive cujusque alterius, eorum nomine proprium est ad exemplum reipublicæ habere res communes; arcam communem, & actorem sive Syndicum per quem tanquam in republica quod communiter agi fierique oporteat, agatur, fiat. *l.* 1. §. 1. *ff. quod cujusq. univers.*
Syndicus fiat. *l.* 1. §. 2. *ff. de muner. & honor.*
See in the *Civil Law in its Natural Order*, the Title of Syndicks.

X.

10. In what manner Communities deliberate about their common Affairs.

The Meetings of Communities, whether for the Nomination of those who are to have the Management of their Affairs, or for other Causes, are held according to their Statutes and Regulations, whether it be in reference to the number of the Persons who are to assist at the said Meetings, or for the number of Votes necessary to form a Resolution, as has been explained in the Title already quoted of Syndicks. We have likewise explained the Rules which relate to the Engagements of Communities by the Ministry of their Governours and Directors, and the other Rules which may regard Communities, besides those which are explained under this Title *o*.

o See in the *Civil Law in its Natural Order*, the Title of Syndicks.

TIT. XVI.

Of the Corporations of Towns, and other Places; of Municipal Offices, and of the Domicil of every Person.

THERE is this Difference between the Corporations of Towns or other Places, and all the other sorts of Communities and Corporations; That whereas all the others are confined to certain Orders of Persons, those of Towns and other Places regard divers Orders of different Professions, Judges, Advocates, Merchants, and others who are Inhabitants of the Towns, and who have all of them their common Affairs, for the dispatch of which they are permitted to assemble together: as for example, to order what relates to the repairing of Market-Places, the paving the Streets, the supplying the Town with Water, the Expence of publick Entertainments for the Bishops or Governours of the Place, and all other sorts of Affairs. But altho these sorts of Interests be common to all the particular Inhabitants of the Places, yet they have not all of them a Share in the Direction of Affairs; but they are transacted by those who are appointed to take this Care, as Mayors, Sheriffs, Aldermen, Common-Council-men, and others, according to the different Usages of the Places.

These are the Offices which are called Municipal, because they cannot be exercised but by the Inhabitants of the Places who are capable of them, and who have no Excuse, and who, for this reason, are called in *Latin*, *Municipes*.

It is because of this variety of Interests and common Affairs of Towns and other Places, that we have distinguished this Matter from that of Communities and Corporations in general, which has been explained in the foregoing Title; and we shall explain in this what is peculiar to Corporations of Towns and other Places: which comprehend, first, the Distinctions of their several sorts of Affairs; and, in the second place, the Distinctions of the

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the Persons intrusted with the Management of them, their Functions and Duties: And this shall be the subject of the two first Sections. And because the Care of those Affairs cannot be committed to any besides the Inhabitants of the Places, who are to be called to that Trust in the manner prescribed by the Regulations and Usages of the Places; we shall explain in a third Section the matter of Domicil, which causes every one to be reckoned an Inhabitant of the Place where he has his Domicil or Abode, and that he ought to bear his Proportion of the Burdens of the said Place *a*. And this Matter of the Domicil, the chief and principal use whereof is in settling and distributing the Burdens and Offices in Towns and other Places, hath also other different Uses: As, for example, that of regulating before what Judge one ought to cite those whom he intends to sue at Law; for it is before the Judge of their Domicil that they ought to be sued. But seeing the Matter of the Domicil of every Person hath its Order more naturally in this Title than in any other, we shall discuss it here; and explain in a fourth and last Section what concerns the Election to Municipal Offices, and the Causes which exclude or exempt Persons from them.

There is likewise another Matter, which is a part of that treated of under this Title, and which might have had a place here, and which some will be of opinion ought not to have been omitted; and that is the Order and Rank of Precedency among Persons called to those Municipal Offices; because Disputes about Precedency in such Cases are very frequent: but seeing we have treated in general of Rank and Precedency in the 3d Section of the 9th Title of the several Orders of Persons, we need not repeat here what has been there said on this Subject.]

a Ejus patriæ oneribus respondere debes cui te attributum esse commemoras. *l.* 1. *C. quemadm. civ. mund. indic.*

SECT. I.

Of the several sorts of common Affairs in Towns and other Places.

The CONTENTS.

1. *The Policy of publick Places.*
2. *Choice of Persons to take care of the publick Places.*
3. *Imposition and levying of Monies for the publick Use.*
4. *Other sorts of common Affairs in Towns.*
5. *Extraordinary Affairs of Towns.*
6. *Government of Hospitals.*
7. *Erecting of Universities and Colleges.*
8. *Establishment of Physicians.*
9. *Divers Officers of Towns, for the several Affairs.*

I.

THE same Cause which has linked Men together in Society, for supplying the Wants of every one by the Concourse and Assistance of many others, has produced the first Societies of Villages, of Boroughs, and of Towns: And the first Business of every one of the said Societies has been to regulate the Order thereof by some Policy, whether the same has been at first established by the Prince, or by the People themselves; and it has been by means of this Policy that they inclosed them with Ditches and Walls, that they built Towers, and erected Guard-Houses for the defence of the Inhabitants, that they built Churches and set apart Church-yards, Market-places, and other Places for publick Uses. So that we may say that the first sort of Affairs of Towns is this Policy, which establishes and preserves these sorts of Places and Conveniences *a*.

1. The Policy of publick Places.

a Tutelæ civitatis instructæ murorum præsidio providebitur. *l. un. C. de expens. lud. publ.*

'In what manner soever a State hath had its 'Origin, and People have begun to build Towns 'and other Places, those who assembled in them 'could not do it but by uniting themselves by a 'Policy which might regulate all those publick 'Conveniences.

II.

These first Wants have been attended with a Necessity of chusing Persons who should take care, either to build or keep in repair, these sorts of Places and Conveniences, and who should find out Funds for defraying the Expences necessary for that purpose. Thus the manner of making this Choice of the Persons to be set over the said Functions, has been a second sort of common Affairs *b*.

2. Choice of Persons to take care of the publick Places.

'*b* The Necessity of publick Places has ren'der'd the Function of taking care of them ne'cessary.

Viarum publicarum cura pertinet ad magistratus. *l.* 2. §. 24. *ne quid in loc. publ.*

Constituti sunt eodem tempore quatuor viri qui curam viarum gererent. *l.* 2. §. 30. *ff. de orig. jur.*

III.

The Necessity of Expences for these first kinds of common Affairs, has made it

3. Imposition and levying of Monies for

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the publick Use.

it necessary to lay Taxes on the Inhabitants, and to have Permission from the Sovereign *c* to regulate and to levy them; and it has been necessary also to impose and levy the publick Taxes for the Expences of the Nation: and the imposing and levying these two kinds of Taxes has made it necessary to employ Persons in that Business *d*, and also in gathering in the Revenues of the Estates belonging to the Communities of Towns, and other Places, which have any Estates belonging to the Community, and which may be called the Patrimony of the said Towns, in order to distinguish it from the Monies levied on the Inhabitants by the Permission of the Prince.

c 'The Necessity of these Expences has made 'these Impositions necessary, which cannot be 'laid on without the Permission of the Prince.

Vectigalia sine Imperatorum praecepto, neque praesidi, neque curatori, neque curiae constituere, nec praecedentia reformare, & his vel addere, vel diminuere licet. *l.* 20. *in princ. ff. de publ. & vectig.*

Vectigalia quaecumque quaelibet civitates sibi ac suis curiis ad angustiarum suarum solatia quaesierunt: sive illa functionibus curialium ordinum profutura sunt, sive quibuscumque aliis earundem civitatum usibus designantur: firma his, atque ad habendum perpetua manere praecipimus, neque ullam contrariam supplicantium super his molestiam formidari. *l.* 10. *C. de vectigal. & comm.*

V. l. 1. *C. vectig. nov.*

d Publicani dicuntur qui publica vectigalia habent conducta. *l.* 12. §. 3. *ff. de public. & vectig.*

V. l. 1. §. 1. *eod.* *l.* 16. *ff. de verb. signif.*

IV.

4. Other sorts of common Affairs in Towns.

All these first kinds of Affairs have been followed by others of a different nature. For it was necessary to repress those who attempted any thing against the publick Places, either by encroaching upon them, causing any damage to them, hindring the use of them, or rendring the same inconvenient or otherwise, which required Regulations of Policy to guard against such Attempts. It was necessary to constrain those who are called to publick Offices to serve in them *f*; or to enquire into their Excuses, if they had any to alledge *g*; to audit the Accounts of those who have collected the publick Monies of the Town, to recover the Remainder that is in their hands *h*, and to apply the same to the publick Service. It was necessary to oblige the particular Inhabitants to pay their Share of the Contributions, to judge of the Exemptions and Privileges of those who should pretend to any without a just Title *i*, to adjust other Affairs arising from these first, to chuse Persons for the constituting of a Council in which all these sorts of Affairs may be examined, and in which they may consult about the means of maintaining the publick Interest; and this Council was necessary likewise for the other Affairs, which shall be mentioned hereafter.

e 'All these sorts of Affairs are necessary Con- 'sequences of the Establishment of Towns and o- 'ther Places.

Praetor ait ne quid in loco publico facias, inve eum locum immittas qua ex re quid illi damnum detur. *l.* 2. *in princ. ff. ne quid in loc. publ.*

V. T. h. T.

f Aediles studeant ut quae secundum civitates sunt viae adaequentur. *l.* 1. *ff. de via publ. & si quid.*

Si quis Magistratus in municipio creatus munere injuncto fungi detractet per praesides munus agnoscere cogendus est. *l.* 9. *ff. de muner. & honor.*

g Qui non habet excusationem etiam invitus cogitur. *l.* 13. §. 2. *ff. de vac. & excus.*

V. l. 12. *ff. de muner. & honor.*

h Reliquatores Vectigalium. *l.* 9. §. 2. *ff. de publ. & vectig.*

V. l. 16. §. 12. *eod.*

V. l. 2. *in princip. C. de debit. civit.*

i Omnis excusatio sua aequitate nititur. Sed si praetendentibus aliquod sine judice credatur, ut passim sine temporis praefinitione prout cuique libuerit permissum fuerit se excusare: non erunt, qui munera necessaria in rebus publicis obeant. Quare & qui liberorum incolumium jure a muneribus civilibus sibi vindicant excusationem, appellationem interponere habent. *l.* 1. *ff. de vacat. & excus. muner.*

V.

5. Extraordinary Affairs of Towns.

Besides the ordinary Affairs mentioned in the preceding Articles, there fall out extraordinary Affairs; as, for example, the Entry of the Prince, or of a Bishop or Governour into a Town; an Order to make Bonefires and other Rejoicings on account of some happy Success to the Publick, it being of service to the publick Good, that the People who ought to feel the Effects of it, should partake also of the Joy; which unites the particular Inhabitants among themselves, and engages them to contribute to the Support of the State. And there happen also Occasions to provide for the Safety of the Inhabitants in times of War *l*, of the Plague, of Famine and Scarcity; which makes it necessary

l 'These extraordinary Affairs are Consequences 'of the Policy of Towns, and of the Affairs of 'the State.

Et nomen & materiam caducorum ex bellis ortam, & auctam civilibus, quae in se populus Romanus movebat, necessarium duximus, patres conscripti, in pacificis nostri imperii temporibus ab orbe Romano recludere: ut quod belli calamitas introduxit, hoc pacis lenitas sopitet. *l.* 1. *C. de caduc. toll.*

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necessary to lay on Impositions for the Subsistence of the Poor. And it is necessary also to make Provision for the passage and quartering of Troops, that those who exercise this Function may take care that the Inhabitants who are subject to this Burden bear it every one in his turn *m*. And all these sorts of extraordinary Affairs require that Persons be appointed to have the Direction of them.

m Eos milites quibus supervenientibus hospitia præberi in civitate oportet, per vices ab omnibus quos id munus contingit, suscipi oportet. *l.* 3. §. 13. *ff. de muner. & honor.*

VI.

6. Government of Hospitals.

We may likewise reckon among the Affairs of Towns, the Foundations and Government of Hospitals of several sorts, those for the Whole as well as the Sick, both of the one and the other Sex, and the choice of Persons to have the Direction of them.

n 'The Foundations and Government of Hospitals belong equally to Religion and to the Civil Government. *See the 18th Title.*

VII.

7. Erecting of Universities and Colleges.

The Care of training up the Youth in Learning and Morality, is likewise an Affair belonging to Towns; and it is for this purpose they have established in Towns, Universities, or Colleges *o*, and that in Places not able to bear the Expence of a College, they invite Preceptors and Professors to settle among them, by granting them Privileges *p*; and the Ordinances of *France* have provided for the maintenance of a Preceptor in the Towns where there are Cathedral or Collegiate Churches, having set apart the Revenue of a Canonship for a Preceptor *q*; which gives the said Towns a Right to see that the said Ordinances be duly observed, and the said Fund applied to the Purposes for which it is intended.

o See the Title of Universities.

p Sed etsi salarium alicui decuriones decreverint, decretum id nonnunquam ullius erit momenti: ut puta si ob liberalem artem fuerit constitutum, vel ob medicinam; ob has enim causas licet constitui salaria. *l.* 4. §. *ultim. ff. de decr. ab ord. fac.*

See the Text cited on the following Article.

Exceptis qui liberalium studiorum antistites sunt, & qui medendi cura funguntur, decurionum decreto immunitas nemini tribui potest. *l.* 1. *C. de decr. decur.*

q 'Besides the Prebend for the maintenance of 'a Divine to read Lectures in Divinity, let there be 'another Prebend for the maintenance of a Preceptor, who shall be obliged, in consideration of that 'Allowance, to teach the young Children of the 'Town. *Ordinance of* Orleans, *Art.* 9.

VIII.

8. Establishment of Physicians.

It is also for the common Good of Towns, and of other Places where there are no Physicians, to engage some of that Profession to come and settle among them, by granting them several sorts of Privileges, such as Exemptions from paying Taxes, or collecting them, or from other Burdens of the like nature, and even by settling Salaries upon them, if the Place is able to be at such Expence *r*.

r Medicos & maxime archiatros, vel ex archiatris Grammaticos & Professores alios litterarum, Doctores legum una cum uxoribus & filiis, necnon & rebus quas in civitatibus suis possident, ab omni functione, & ab omnibus muneribus, vel civilibus vel publicis, immunes esse præcipimus, & neque in provinciis hospites recipere, nec ullo fungi munere, nec ad judicium deduci nec eximi, vel exhiberi, vel injuriam pati: ut si quis eos vexaverit, pœna arbitrio judicis plectatur. Mercedes etiam eis & salaria reddi jubemus, quo facilius liberalibus studiis & memoratis artibus multos instituant. *l.* 6. *C. de Profess. & Med.*

IX.

9. Divers Officers of Towns for the several Affairs.

It is for the direction of all these different sorts of Affairs, and for all others, that they appoint in Towns Persons to take care of them, and distribute those Functions which are called Town-Offices, among several Persons, who may be distinguished by the Name of Town-Officers; and even as to some of them, they may appoint Persons with the bare Name of Commissaries, as for Functions of a short duration, such as those mentioned in the 5th Article; and the Distinctions and Functions of all the said Persons shall be the subject Matter of the ensuing Section *s*.

s Personalia munera. *l.* 1. §. 2. *ff. de muner. & honor.*

See Art. 1. of the following Section.

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SECT. II.

Of the Distinctions of Persons put into Municipal Offices, of their Functions, and of their Duties.

The CONTENTS.

1. *Two sorts of Functions for the Direction of the Affairs of Towns. Functions of the first sort.*
2. *Functions of the second sort.*
3. *Church-Wardens.*
4. *Functions of Mayors and Aldermen.*
5. *General Duties of Mayors and Aldermen.*
6. *General Duties of other Officers in Towns.*
7. *These Offices bind the several Persons imploy'd in them for the Consequences of the whole.*

I.

1. Two sorts of Functions for the Direction of the Affairs of Towns. Functions of the first sort.

THE Functions of the Government of Towns and other Places, are of two sorts: The first, of those which regard in general the Care of the Affairs of the Corporation, and which are managed by the chief Officers of the Towns, the Mayor, Sheriffs, Aldermen, or others, whose Business is to represent the Corporation, to sue for its Interests in a Court of Justice, and to defend it. The second is of the particular Functions explained in the Article which follows *a*.

a Personalia, civilia sunt munera defensio civitatis, id est, ut syndicus fiat, legatio, ad census accipiendum, vel patrimonium scribatus Καμηλασία, id est, *camelorum agitatio*, *exhibitioque* annonæ ac similium, cura prædiorumque publicorum, frumenti comparandi, aquæductus, equorum Circensium spectacula, publicæ viæ munitiones, arcæ frumentariæ, calefactiones thermarum, annonæ divisio, & quæcumque aliæ curæ istis sunt similes. Ex his enim quæ retulimus cætera etiam per leges cujusque civitatis ex consuetudine longa intelligi potuerunt. *l.* 1. §. 2. *ff. de muner. & hon.*

Altho many of the Functions mentioned in this Text be not in use with us, yet the Example of them may be applied to such as are.

See the following Article.

II.

2. Functions of the second sort.

This second sort of Functions comprehends four kinds of them, which it is necessary to distinguish, and which are exercised by four sorts of Officers of the Town. The first is of those who compose the Town-Council, or the Assembly considered as the Body of the whole Inhabitants of the Town, in which their Affairs are taken into deliberation, and in which the Persons are named who are to execute the Offices and Functions belonging to the Town: And this Assembly, which is permitted by the Ordinances *b*, is composed in the manner regulated by the different Usages of the Places. The second is of those who are named Judges of the Policy, and are to decide all Causes relating to the same, in conjunction with the Officers of Justice, the Mayors and Sheriffs *c*. The third is that of Persons employed in the distribution and collecting of the publick Taxes, such as Assessors and Collectors, or even the Sheriffs or Aldermen in the Places where they exercise the said Function *d*. And the fourth takes in all the other Functions mentioned in the preceding Section, according as the different Usages of the Places may distinguish the said Functions, and distribute them to several Persons under different Names *e*.

b See the Edict of *Cremieux* in 1536, Art. 26.
c See Art. 71, 72. of the Ordinance of *Moulins*.
d See Tit. 5. Sect. 3. Art. 9.
e See the Text cited on Art. 1.

III.

3. Church-Wardens.

Among the several Functions of this second sort, we may distinguish those which relate to the Care of the Revenues and Offices of Parish Churches, the collecting of the said Revenues, the Discharge of the said Offices, the making Reparations, the buying, keeping and preserving the Ornaments, the looking after the Affairs of the Parish, whether it be in Courts of Law or elsewhere; and the rendring an Account of what they have received, and what they have expended. And this Function, which is exercised by those who are called Church-Wardens, or by other Names, in Towns, or other Places where there is only one Parish, may be reckoned a Town-Office: but in the Towns where there are more Parishes than one, the Office is limited to every Parish *f*.

f Proinde & si custodiam tabularum æditiuus, vel tabularius suscepit, dicendum est teneri eum interdicto. *l.* 3. §. 3. *ff. de tab. exhib.*

Artia fideicommissum his verbis reliquit: *Quisquis mihi hæres erit, fidei ejus committo, uti det ex reditu cœnaculi mei, & horrei post obitum sacerdoti & hierophylaco & libertis, qui in illo templo erunt, denaria decem die nundinarum, quas ibi posui.*

Quæro utrum his duntaxat, qui eo tempore, quo legabatur, in rebus humanis, & in eo officio fuerint,

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rint, debitum sit, an etiam his, qui in locum eorum successerunt. Respondit, secundum ea quæ proponerentur, ministerium nominatorum designatum, cæterum datum templo. *l.* 2. §. 1. *ff. de ann. leg.*

Oeconomi vasorum sacrorum custodes. *l.* 21. *C. de sacros. Eccl.*

V. Nov. 40. *c.* 1.

Cimeliarchæ. *d. c.*

IV.

4. Functions of Mayors and Aldermen.

The Functions of Mayors, Aldermen, Sheriffs, or others who are placed in the first Rank in Corporations of Towns, consist in general in taking care of all the Affairs of the Corporation, in seeing that other Officers perform their Functions, and giving them all the Assistance and Encouragement they are able; in receiving and laying out the Monies which belong to their Province, and giving an Account thereof *g*; in assembling the Town-Councils as often as there is occasion, whether it be to nominate Persons to the Functions mentioned in the preceding Articles, and in the first Section, or to consult about the several sorts of Affairs; in calling to the said Councils or Assemblies the Officers of Justice who ought to preside therein according to the Ordinances *h*. And seeing the Mayor and Aldermen, and Common Council have the principal Direction of the Affairs of Towns, and that they represent the whole Body, whatever comes to their knowledge in relation to the Affairs of the Town, whether the same be intimated to them by order of the Prince or otherwise, is held to be sufficiently known to the Inhabitants who compose the Towns, and who have intrusted to the said Officers the Administration of their Affairs *i*.

g Proprie municipes appellantur muneris participes, recepti in civitate, ut munera nobiscum facerent. *l.* 1. §. 1. *ff. ad municip.*

Gestum in republica accipere debemus pecuniam publicam tractare, sive erogandam decernere. *l.* 2. §. 1. *eod.*

Vectigalia publica locare. *d. l.* §. 4.

Rempublicam administrare. *l.* 8. *ff. de muner. & honor.*

V. Tot. tit. ff. ad munic. & seq.

h See the Edict of *Cremieux* in 1536. Art. 26. That of *June* in 1559. Art. 7.

i Municipes intelliguntur scire quod sciant hi quibus summa Reipublicæ commissa est. *l.* 14. *ff. ad municip.*

V.

5. General Duties of Mayors and Aldermen.

Those general Functions mentioned in the forgoing Article, oblige those who are charged with them to Duties suitable to the said Ministry; which implies a Vigilance in all the several Affairs, whether they relate to the Government or good Order of the Towns, to the Distribution or levying of the publick Taxes, or to any other sort of Functions; Fidelity in administring Justice without respect of Persons; Obedience to the Orders of the Prince; Execution of the Orders directed to them, as also of the Orders of Courts of Justice, where the Judges who administer Justice may stand in need of the help of their Ministry; Fidelity in voting in the Town-Councils for the common Good; not to give their Votes in the Elections of the Magistrates and Officers of the Town, or of other Persons, to the different Functions that have been explained, except to such as are duly qualified for the same; to maintain the Interest of the Publick against all Attempts of particular Persons, and to promote on all Occasions the common Good: And all this without any Prevarication, either for their own private Interest, or that of their Relations, or other Persons, whose Interests being opposite to those of the Publick might any way concern them, either because of Advantages accruing from thence to themselves, or to those other Persons whose Interest they have at heart; or for fear of incurring the Displeasure of others, or exposing themselves to Consequences hurtful to them. But in the Cases where this Fear may have some just Foundation, which might excuse them from executing their Functions themselves; their Duty would be to abstain from them, and to leave them to those to whom the Care thereof belongs in case of their Default *l*.

l ' All these Duties are natural and necessary ' Consequences of the Functions of the said Offices.

VI.

6. General Duties of other Officers in Towns.

The Duties of all the other Persons mentioned in this and the foregoing Section, consist in exercising their Functions with a View to the publick Good, and in performing every one of them according as the Laws and Rules direct, if there be any particular Laws or Orders relating to the said Functions, and with the Probity and Fidelity which Duties of all kinds demand. Thus they who are charged with distributing and levying the publick Taxes, ought to discharge the said Function according to the Rules explained in Tit. 5. Sect. 8. Thus those who are called to the Functions of the Civil Government, ought to observe in the discharge thereof the Rules

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Rules explained in the preceding Article, and those which concern in general the Duties of Judges, which shall be explained in the second Book *m*.

m 'This is a Consequence of the Functions of 'the said Offices.

VII.

7. These Offices bind the several Persons imployed in them for the Consequences of the whole.

When a Municipal Office, such as that of Sheriff, Alderman, or other, is divided between two or more Persons, who are to execute one and the same Function, such as that of taking care of some particular Affairs, the collecting of Money, or other Business, they are all of them bound jointly and severally to answer to the Corporation for the Care of one another in collecting the Monies, or discharging the other Functions, in case any Neglect or Male-Administration can be imputed to any one of them. For being all of them elected to answer to the Corporation for these Functions, they ought to exercise them together, and to answer for one another. And if they divide the Administration between them, and one of them acquits himself ill of that part he undertook, the other will nevertheless be answerable for the Male-Administration of his Collegue; for he has no body to blame but himself for the Confidence he put in him who has misbehaved in his Trust. But no body can be prosecuted for the Deed of others, till the Person who did act has been first discussed, unless it were that without such Discussion his Insolvency were apparent, and that he became insolvent before his Office was expired, and before the Corporation could sue him; for if he himself, or his Sureties, were solvent at the time he went out of his Office, his Collegues would not be accountable for his Deed. Thus the Engagement of these Offices in the hands of many Persons, is the same with that of a Tutorship in the hands of several Tutors *n*.

n Imperator Titus Antoninus Lentulo vero rescripsit *magistratum officium individuum ac periculum esse commune*, quod sic intelligi oportet, ut ita demum collegæ periculum adscribatur, si neque ab ipso qui gessit, neque ab his qui pro eo intervenerunt, res servari possit & solvendo non fuit, honore deposito, alioquin si persona vel cautio sit idonea, vel solvendo fuit quo tempore conveniri potuit unusquisque in id quod administravit, tenebitur. *l.* 11. *ff. ad municip.*

Et si duobus simul cura pecuniæ civitatis non tamen separatis portionibus mandetur, singuli non pro virili portione, sed in solidum reipublicæ obligantur. Cum autem de indemnitate civitatis ejus quæritur prius ejus bona qui administravit, ac mox si satisfieri non poterit collegæ conveniuntur. *l.* 1. *C. quo quisq. ord.*

'If the Administration of two or more Officers 'in a Town, called to the same Function, be not 'divided; and if it were, for example, to collect 'Monies, and that they ought to make the Col'lection jointly together, their Engagement ought 'undoubtedly to be for the whole, unless one of 'them mistrusting the Circumstances of his Collegue 'should refuse to act with him, and take Measures 'for his own Security: But if the Administra'tion were divided, and one of them, for example, 'were to collect the Monies in one quarter of the 'Town, and the other in another, it would be but 'just that, seeing their Functions have nothing in 'common together, every one should only answer 'for what he himself was charged with, as it is 'regulated in the Case of Tutors.

See Sect. 3. of Tutors, Art. 28, 29.

SECT. III.

Of the Rules whereby to judge of the Domicil of every Person.

CONTENTS.

1. *The place of the Origin is to be distinguished from that of the Domicil.*
2. *Domicil in the place where one executes an Office.*
3. *Domicil in the place where one follows his Studies.*
4. *Principal Domicil of every one.*
5. *The Domicil is independent of the Propriety of the House.*
6. *One can have only one principal Domicil.*
7. *Every one has the Liberty of chusing his own Domicil.*
8. *Every one bears the Charges of the Place where he has his principal Domicil.*
9. *It may happen that one has no Domicil at all.*
10. *The Domicil of a Son who is under his Father's Authority, is that of his Father.*
11. *The Domicil of the Wife is that of the Husband.*
12. *The Widow retains the Domicil of her deceased Husband, unless she changes it.*
13. *Spousals do not change the Domicil of her that is espoused.*
14. *Domicil of Exiles.*

I.

1. The place of the Origin is to be distinguished from that of the Domicil.

It is necessary to distinguish between the place of one's Origin and the place of one's Domicil: we call that the place of one's Origin, where the Father had his Domicil, and this Origin receives no manner of change *a*. And we call the place of one's Abode

a Patris originem unusquisque sequitur. *l.* 36. *C. de decur.*

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Abode or Habitation, a Domicil. And because one may for divers Reasons, and at divers Times, have Habitations in different places, it is necessary to distinguish the Domicils of several sorts, as will appear by the Articles which follow.

II.

2. Domicil in the place where one executes an Office.

Those who have any Dignity, Office, or Imployment, which obliges them to a Residence in a certain place, have in that very place a kind of Domicil, which yet may not be the only one, if out of the times which require Residence they have elsewhere another Habitation *b*. Thus, for example, an Officer of a Court who is obliged to attendance only for the half of the Year, an antient Receiver who is bound to serve by turns with another once every other Year, or once in three Years, and who is obliged to reside in the place of his Receipt during the Year in which he officiates, an Officer of War, or a Soldier, who are in actual Service *c*, have their Domicils, as to their Service in their Offices and Imployments, in the places where they serve, and they may have their ordinary Abode in another place.

b Senatores in sacratissima urbe domicilium dignitatis habere videntur. *l.* 8. *C. de incol. & ubi quisq. dom. hab. vid.*

Senatores licet in urbe domicilium habere videantur, tamen & ibi unde oriundi sunt, habere domicilium intelliguntur: quia dignitas, domicilii adjectionem potius dedisse quam permutasse videtur. *l. penult. ff. de Senat.*

c Miles ibi domicilium habere videtu r ubi meret. *l.* 23. §. 1. *ff. ad mun.*

III.

3. Domicil in the place where one follows his Studies.

Those who follow their Studies in another place than that of their ordinary Abode, as in some University, have also two Habitations or Domicils. For besides their ordinary Domicil, they have that of the place in which they follow their Studies *d*.

d Nec ipsi qui studiorum causa aliquo loco morantur, domicilium ibi habere creduntur, nisi decem annis transactis eo loco sedes sibi constituerint. *l.* 2. *C. de incol.*

'According to the usage in *France*, this Domicil in the place of an University during the time of one's Studies, gives the Students the Privilege of having the Causes in which they are concerned tried before the Judge who is called Conservator of the University, as it is regulated by the Ordinances; which is altogether different from what is contained in this Text of the Roman Law which we have just now quoted.

See the Ordinances of *Lewis* XII. of *August* 1498. and *May* 1499.

IV.

4. Principal Domicil of every one.

The principal Domicil of every one, is that which he makes the seat and center of his Affairs; in which he keeps his Writings, and which he does not leave but on some particular occasions; from whence when he is absent, he is said to be from home, or when he returns to it, he is said to be come home; where he passes the chief Festivals of the Year; where he bears the Charges of the Place, and where he enjoys the Privileges of those who are Inhabitants of it *e*.

e Incolas domicilium facit. *l.* 7. *C. de incol. & ubi quisq.*

Eam domum unicuique nostrum debere existimari (constitutum est) ubi quisque sedes & tabulas haberet, suarumque rerum constitutionem fecisset. *l.* 203. *ff. de verb. signif.*

Si quis negotia sua non in colonia, sed in municipio semper agit, in illo vendit, emit, contrahit, eo in foro balineo spectaculis utitur: ibi festos dies celebrat, omnibus denique municipii commodis, nullis coloniarum fruitur: ibi magis habere domicilium quam ubi colendi causa diversatur. *l.* 27. §. 1. *ff. ad munic.*

In eo loco singulos habere domicilium non ambigitur, ubi quis larem ac fortunarum suarum summam constituit. Unde rursus non sit discessurus si nihil avocet: unde cum profectus est, peregrinari videtur, quo si rediit, peregrinari jam destitit. *l.* 7. *C. de incol. & ubi quisq. dom. hab. vid.*

V.

5. The Domicil is independent of the propriety of the House.

Since the Domicil is the place of one's Residence, it is all one as to the Domicil of a Person, whether he reside or dwell in his own House, or in that of another, which he hires or possesses by some other Title *f*. And for the same Reason that it is the Residence which makes the Domicil, he who has a House of his own in a place where he does not reside, has not for all that his Domicil there *g*.

f Domum accipere debemus non proprietatem domus, sed domicilium. *l.* 5. §. 2. *ff. de injur.*

Sive in propria domo quis habitaverit, sive in conducta vel gratis. *d.* §.

g Sola domus possessio quæ in aliena civitate comparatur, domicilium non facit. *l.* 17. §. 13. *ff. ad municip.*

VI.

6. One can have only one principal Domicil.

According to the definition of Domicil explained in Art. 4. it is difficult for a Person to have two Domicils; for to have two in the meaning of that Definition, it would be necessary that in each of the said Domicils, the Seat and Center of one's Affairs should be divided, so as it might be said he resided equally in the one and in the other, and that it could not be distinguished by this Proof, and the other Proofs explained

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plained in the said 4th Article, which were the principal of the two Domicils *h*. But whether one may have two principal Domicils, or may not, yet one may have two or more Domicils, in the sense of the three first Articles. If the question were about subjecting to the Offices and Charges of a place, him who has or should seem to have two Domicils, one in one place, and another in another place, he could not be made subject to the Offices and Charges but of one Place alone; thus, he could not be named Sheriff or Alderman, nor assessed for his Personal Estate in two several places *i*.

h Celsus libro primo Digestorum tractat: si quis instructus sit duobus locis æqualiter, neque hic quam illic minus frequenter commoretur, ubi domicilium habeat, existimatione animi esse accipiendum. Ego dubito, si utrobique destinato sit animo, an possit quis duobus locis domicilium habere, licet difficile est. *l.* 27. §. 2. *ff. ad municip.*

Viris prudentibus placuit, duobus locis posse aliquem habere domicilium, si utrobique ita se instruxit, ut non ideo minus apud alteros se collocasse videatur. *l.* 6. §. 2. *eod.*

Labeo indicat eum, qui pluribus locis ex æquo negotietur, nusquam domicilium habere. Quosdam autem dicere refert, pluribus locis eum incolam esse, aut domicilium habere: quod verius est. *l.* 5. *eod.*

i 'The Usage in *France* does not allow the imposing of these sorts of Personal Offices and Charges on one and the same Person in two different places, altho' the said Person should have a Domicil in each Place; so that we do not observe the Roman Law in this matter, which subjects Persons to the Offices and Charges of both Domicils.

Incola & his magistratibus parere debet, apud quos incola est: & illis, apud quos civis est. Nec tantum municipali jurisdictioni in utroque municipio subjectus est, verum etiam omnibus publicis muneribus fungi debet. *l.* 29. *ff. ad municip.*

Cum te Biblium origine, incolam autem apud Berytios esse proponas: merito apud utrasque civitates muneribus fungi compelleris. *l.* 1. *C. de municip. & orig.*

VII.

7. Every one has the liberty of chusing his own Domicil.

Every one is at liberty to chuse the place of his Domicil, and to change likewise his Habitation, as he pleases, unless he were prohibited to dwell in some certain place, or that he were by order of the Prince confined to a certain place *l*. But if his Change of Abode were made to avoid the Offices of the place of Domicil, or the payment of Taxes, it ought to be accompanied with two Circumstances; one of a real Translation of Domicil without deceit and fraud *m*; and the other, that this Translation of Domicil had preceded the Nomination to the Office to which one is called *n*, such as that of Sheriff, Alderman, or other, or the Assessment for the Tax, or other Imposition, according as the Laws and Custom of the Country may prescribe the manner of the said Change, either as to the time of making it, or the manner of publishing it *o*.

l Nihil est impedimento quominus quis ubi velit, habeat domicilium quod ei interdictum non sit. *l.* 31. *ff. ad municip.*

m Domicilium re & facto transfertur non nuda contestatione, sicut in his exigitur qui negant se posse ad munera ut incolas vocari. *l.* 20. *ff. eod.*

Incola jam muneribus publicis destinatus nisi perfecto munere incolatui renuntiare non potest. *l.* 34. *eod.*

n Non tibi obest si cum incola esses, aliquod munus suscepisti, modo si antequam ad alios honores vocareris, domicilium transtulisti. *l.* 1. *C. de incol. & ubi quis domic.*

o 'By the Usage in *France* there are several Regulations touching the manner of transferring one's Domicil, and the effect it ought to have, and particularly with regard to those who transfer their Domicil from a place that is subject to Taxes, to a place that is exempt from them.

VIII.

8. Every one bears the Charges of the Place where he has his principal Domicil.

As it is by the fixing one's principal Abode in a Place, that he has there his Domicil; so it is by the said Domicil that he is made an Inhabitant, and becomes subject to the Offices and Charges of the Place *p*.

p Municipes dicimus suæ cujusque civitatis cives. *l.* 1. §. 1. *in f. ff. ad municip. & de incol.*

IX.

9. It may happen that one has no Domicil at all.

Altho one cannot live without being in some place or other, yet one may be without a Domicil; for the Domicil being a fixed Abode in a certain Place during the time it may last, he who should leave his Domicil in order to go and settle another in a remote Place, might during the Voyage by Sea or Land, have no Domicil at all in any Place *q*.

q Difficile est sine domicilio esse quemquam. Puto autem & hoc procedere posse, si quis domicilio relicto naviget, vel iter faciat, quærens quo se conferat, atque ubi constituat: nam hunc puto sine domicilio esse. *l.* 27. §. 2. *ff. ad municip.*

'There are Vagabonds, who without travelling in quest of a Domicil, have really and truly no certain Domicil at all, but go wandering about the Country, seeking for opportunities to pilfer and steal.

X.

10. The Domicil of a Son who is under his Father's Authority, is that of his Father.

There are Persons who are so strictly linked together, that the Domicil of the one is that of the other. Thus the Conjunction which Children have with their Fathers, makes the Domicil of the Children to be the same with that of their Fathers, until the Children be of Age

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Age to settle themselves in some other Place, which they may do, whether they be emancipated or not; for they may have good Reasons for making such a Change *r*.

r Placet etiam filios familias domicilium habere posse, non utique ubi pater habuit, sed ubicunque ipse domicilium constituit. *l.* 3. *& l.* 4. *ff. ad municip.*

See the 5th Article of the 2d Section of the Title of Persons in the *Civil Law in its Natural Order.*

¶ Since the Domicil of the Fathers is the place of the Origin of the Children, as has been said in the first Article, and that the Domicil of Children is also the same with that of their Fathers, if they do not change it, as is said in this Article, it follows that the Children whom their Fathers at their Death leave in Minority, retain their Domicil where that of their Fathers was, and they ought consequently to bear the burdens of that Place, such as Taxes and others, if they are not exempt from them: but since before they attain to the Age of Majority, there may happen Changes which change the Domicil of the Children that are under Age, those to whom such Changes do happen, may notwithstanding their Minority, change their Domicil, and fix it somewhere else. Thus for example, if a Minor gets an Office, or is engaged in an Imployment which he may exercise in his Minority, or with a Dispensation of Age, the Residence which he will be obliged to make in the Place where he is to execute his Office or Imployment, will oblige him to fix his Domicil there. Thus the settlement of a Minor in another place than that of his Origin by means of a Marriage, may be made under Circumstances which demand, and which consequently permit the Change of his Domicil.

XI.

11. The Domicil of the Wife is that of the Husband.

The Conjunction of the Wife with the Husband, making as it were one Person out of the two, the Domicil of the Husband is that of the Wife, and she can have none other, because she is bound to cohabit with him. Thus a Wife who had her Domicil in another place than that which was the Domicil of her Husband, quits her own Domicil by her Marriage *s*.

s Item rescripserunt mulierem quamdiu nupta est, incolam ejusdem civitatis videri, cujus maritus ejus est, & ibi, unde originem trahit, non cogi muneribus fungi. *l. ult.* §. 3. *ff. ad municip.*

Mulieres honore maritorum erigimus, genere nobilitamus, & forum ex eorum persona statuimus & domicilia mutamus. *l.* 13. *C. de dignit. l. ult. C. de incol.*

See the 2d Article of the first Section of the 7th Title of Persons, in the *Civil Law in its Natural Order.*

XII.

12. The Widow retains the Domicil of her deceased Husband, unless she changes it.

Widows retain the Domicil which their Husbands had at the time of their Death, and do not take up again their first Domicil by the bare effect of their Husbands Death, but they may either return to their first Domicil, or chuse another; and if they marry again, their Domicil will be that of the second Husband *t*.

t Vidua mulier amissi mariti domicilium retinet, exemplo clarissimæ personæ per maritum factæ; sed utrumque aliis intervenientibus nuptiis permutatur. *l.* 22. §. 1. *ff. ad municip.*

Sin autem minoris ordinis virum postea sortitæ fuerint, priore dignitate privatæ, posterioris mariti sequentur conditionem & domicilium. *l. ult. C. de incol.*

XIII.

13. Spousals do not change the Domicil of her that is espoused.

Marriage does not change the Domicil of the Wife until it be accomplished. Thus, during the Spousals, the Woman that is betrothed retains still her own Domicil; and if any Cause breaks off the intended Marriage, there is no Change in her Domicil *u*.

u Ea quæ desponsa est, ante contractas nuptias suum non mutat domicilium. *l.* 32. *ff. ad municip.*

XIV.

14. Domicil of Exiles.

Those who are confined to a certain Place by Order of the Prince, do not change their Domicil, and they retain that which they had before their Exile; and if they are subject to Taxes, they continue to pay them in the place where they did formerly reside *x*, but they have in the place to which they are confined another kind of Domicil by the necessity they are under of residing there during the time that is prescribed them *y*.

x Domicilium habere potest & relegatus eo loci unde arcetur, ut Marcellus scribit. *l.* 27. §. *ult. ff. ad municip.*

y Relegatus, in eo loco in quem relegatus est, interim necessarium domicilium habet. *l.* 22. §. 3. *eod.*

SECT.

SECT. IV.

Of the Nomination or Election to Municipal Offices, and of the Causes which exclude or exempt Persons from them.

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I.

1. What are Municipal Offices.

THE Municipal Offices mentioned here, are those which oblige to some publick Functions, such as the Administration of the Affairs of the Corporation, the serving as Assessors or Collectors of the publick Taxes, and other Offices of the like nature, different from those Charges which imply no exercise of a publick Function, but which oblige barely to some Contribution or Expence, and regard the Goods of Persons without relation to any Service the Publick reaps from their Industry; such as the Charges of Contribution to Taxes and other Impositions, those of quartering Soldiers, and others of the like kind *a*.

a Munerum civilium quædam sunt patrimonii, alia personarum. *l. 1. ff. de muner. & honor.*

II.

2. Two sorts of Municipal Offices.

The Municipal Offices, which are the subject matter of this Section, are of two sorts: one of those which have some Dignity annexed to them, such as that of Sheriff; or others which have the Administration of Affairs, whether they engage the Persons who serve in them to any Expence, or to no Expence at all. The other is of those which have only Functions without any Dignity, such as that of collecting the publick Taxes, if it is separated from other Functions *b*.

b Honor municipalis est administratio reipublicæ cum dignitatis gradu, sive cum sumptu, sive sine erogatione

erogatione contingens. *l.* 14. *ff. de mun. & honor.*

Publicum munus dicitur quod in administranda republica cum sumptu sine titulo dignitatis subimus. *d. l.* §. 1.

'One must not expect to find in these Texts, nor 'in the others of the *Roman* Law which regard the 'several sorts of Municipal Offices and their Func- 'tions an exact Conformity to our Usage; for these 'Offices and their Functions are different in our 'Usage from what they are in the *Roman Law*.

III.

3. Difference between Municipal Offices and others.

There is this Difference between the Municipal Offices and the other sorts of Offices, such as those of Judges, of Officers employed about the Revenue, and others called Officers of the Crown; that as the Functions of these are committed to them by the Prince, they have for their Title to their Offices the Patents or Commissions which the Prince gives them; whereas the Functions of Municipal Offices being committed to those who exercise them by the Corporations whom the said Functions concern, they are called to those Offices by the Election of the Persons who have a Right to nominate *c*.

c Observare oportebit Magistratus, ut decurionibus solemniter in curiam convocatis, nominationes ad certa munera faciant. *l.* 2. *C. de decur.*

IV.

4. The Manner of naming to Municipal Offices.

The Election or Nomination to Municipal Offices is made in every Town, and in every Place, not by all the Inhabitants together, for that would cause too great a Confusion, and such a Concourse of People would be unlawful *d*; but by those who according to the Regulations and Usages of the Places are named to compose the Assembly in which the Nomination ought to be made; and the Nomination ought to be by Plurality of Voices, observing therein the Formalities prescribed by the respective Usages and Regulations, whether it be as to the manner of voting, and counting the Plurality of Voices, or as to the number necessary for composing the Assembly: And if the Person named to the Office was one of the Assembly, he may be reckoned to make up the number *e*; for they might have named another Person, and it was uncertain whether he should be named, or another *f*.

d See Tit. 2. Sect. 2. Art. 14.

e Secundùm locorum consuetudinem. *l.* 6. §. 1. *in f. ff. quod cujusq. univ. nom.*

See the Text quoted on the preceding Article.

Plane ut duæ partes decurionum affuerint, is quoque quem decernent, numerari potest. *l.* 4. *eod.*

f 'By the *Roman* Law it was necessary for ma- 'king up the number required to a legal Nomina- 'tion, that there should be two thirds of those 'who ought to make a full Meeting.

Ordo non aliter habeatur quam duabus partibus adhibitis. *l. ff. decret. ab ord. fact.* *l.* 3. *ff. quod cujusq. univ. nom.*

Nominationum forma vacillare non debet, si omnes, qui albo curiæ detinentur, adesse non possunt, ne paucorum absentia, sive necessaria, sive fortuita, debilitet quod a majore parte ordinis salubriter fuerit constitutum: cum duæ partes ordinis in orbe positæ totius curiæ instar exhibeant. *l.* 46. *C. de decur.*

f 'The Number sufficient in Elections depends 'on the Usage of the Place.

V.

5. None called to these Offices but such as are capable, and Inhabitants of the Place.

Seeing the Municipal Offices oblige to Functions which regard the publick Interest of Towns and other Places, it is just to call to them only the Inhabitants of the said Places *g*, and such as are capable of them, observing a due Proportion between the Condition of the Persons, their Estates, their Industry, and the different Functions of the Offices *h*, and calling those who are qualified to serve in them, every one in their turn.

g Ejus patriæ oneribus respondere debes, cui te attributum esse commemoras. *l.* 1. *C. quemad. civ. mun. indic.*

See Art. 25.

h De honoribus sive muneribus gerendis, cum quæritur, in primis consideranda Persona est ejus, cui defertur honor sive muneris administratio: item origo natalium, facultates quoque an sufficere injuncto muneri possint, item lex secundum quam muneribus quisque fungi debeat. *l.* 14. §. 3. *ff. de mun. & honor.*

Ad subeunda patriæ munera dignissimi meritis & facultatibus curiales eligantur, ne tales forte nominentur qui functiones publicas implere non possint. *l.* 46. *C. de decur.*

Civilia munera per ordinem pro modo formarum sustinenda sunt. *l.* 10. *C. de mun. patrim.*

VI.

6. Inhabitants of a Place called to the publick Offices by turns, if they have no Excuse.

Whether we consider in Municipal Offices the Honour and Dignity which may be in them, or the Labour and Expences which their Functions may require, it is but just that the said Inconveniences and Advantages should be divided successively among the Inhabitants, and that they be all called to them every one in their turn, according as they may be capable of them *i*, as has been said

i Vacuatis rescriptis, per quæ munerum civilium nonnullis est vacatio præstita, omnes civilibus necessitatibus aggregentur, ita ut nec consensu civium vel curiæ, præstita cuiquam immunitas valeat: sed omnes

ſaid in the foregoing Article: But we muſt except from this Rule ſome Perſons who cannot be called to the publick Offices, as ſhall be explained by the Articles following.

omnes ad munerum ſocietatem conveniantur. *l.* 19. *C. de decur.*

See Art. 20. and the Texts there cited.

VII.

7. Three Cauſes which exclude or exempt Perſons from publick Offices.

There are three ſorts of Perſons who ought not to be called to publick Offices: Thoſe who are exempt from them *l*; thoſe who are incapable of them thro Infirmities, or by reaſon of other Impediments *m*; and thoſe who are unworthy of them: as ſhall be explain'd by the following Articles.

l See Art. 8, 9, 10.

m See Art. 11, 12, 13, &c. and Art. 26.

VIII.

8. Two ſorts of Exemptions.

There are ſeveral Cauſes of Exemption from Municipal Offices, and they may be reduced to two kinds; one, of the Exemptions by Privilege *n*; and the other is that of the Excuſes which ſerve for obtaining a Diſpenſation *o*.

n See the two following Articles.

o See Art. 11, 12, &c.

IX.

9. Exemptions on account of Privilege.

Privileges are annexed either to the Perſon, or to the Quality. Thus for the Perſon, he who for ſome Merit, or ſome Service, has obtained a Favour of the Prince which may entitle him to this Exemption, either expreſly, or by a Conſequence of ſome general Privilege, cannot be called to theſe kinds of Offices. Thus for the Quality, Gentlemen are exempted from being Collectors of the Taxes *p*.

p Curialibus conſortiis conſulentes, cenſemus ut nemo ſibi blandiatur, & noncertis modis ſeſe liberum eſſe exiſtimet, ſed pro noſtra formâ tantummodo ſciat poſſe libertatem ſibi curialis competere conditionis: omnibus anterioribus modis quos non comprehendit præſens ſanctio, ex præſenti die antiquandis. Si quis igitur vel ſummum patriciatus honorem fuerit conſecutus —— is gaudeat ſe hujuſmodi conditionis eſſe exſortem. *l. ult. C. de decurion.*

Eos qui cum honore comitum nomine Magiſtrorum memoriæ præfuere, vel epiſtolis, vel libellis, item eos qui ibidem peragendis ſignandiſque reſponſis noſtræ manſuetudinis obſecundant: omnium civilium munerum fieri jubemus exſortes. Igitur qui ex eo gradu palatio noſtro adhæſerint, adeſſe ſibi competentia privilegia glorientur: qui vero ſuperioribus dignitatibus creverint, nihilominus ejus loci privilegia præſto ſibi fuiſſe lætentur. *l.* 11. *C. de excuſ. mun.*

X.

10. Exemptions granted by Towns.

We may place in the number of Perſons exempt by Privilege, thoſe who have ſettled in any Town or other Place, to exerciſe their Profeſſion there; as Phyſicians, or Perſons who make Profeſſion of teaching ſome Art or Science, or of ſetting up an Academy for Riding, Fencing, or other Exerciſes; if their Settlement there was upon that condition, that they ſhould enjoy the ſaid Exemption *q*.

q See Tit. 5. Sect. 7. Art. 6. of this firſt Book. See Sect. 1. Art. 8. of this Title, and the Texts there cited.

XI.

11. Exemption becauſe of Minority.

The Excuſes which exempt from Municipal Offices, are of ſeveral ſorts; and we may ſet down as the firſt, Minority becauſe of the Weakneſs of Age, which not allowing Minors to have the Management of their own Affairs, ought with much more reaſon to exempt them from taking care of the Affairs of others, and is in them a kind of Incapacity, which does not ſuffer that the publick Intereſt be entruſted to their Management *r*. But if the Municipal Office to be diſpoſed of were ſuch as had only ſome Honour or Dignity annexed to it without any Adminiſtration, it would be ſufficient if he who is called to it was paſt the Age of four and twenty, and entred into his five and twentieth Year, at which Age he may enter upon the Exerciſe of an Office of this kind *s*.

r Ad Rempublicam adminiſtrandam ante viceſimum quintum annum, vel ad munera quæ non patrimonii ſunt vel honores, minores admitti non oportet. *l.* 8. *ff. de muner. & honor.*

s Annus viceſimus quintus cœptus pro pleno habetur. Hoc enim in honoribus favoris cauſa conſtitutum eſt, ut pro plenis inchoatos accipiamus: ſed in his honoribus in quibus Reipublicæ quid eis non committitur. Cæterum cum damno publico honorem ei committi, non eſt dicendum etiam cum ipſius pernicie minoris. *l.* 8. *ff. de mun. & hon.*

XII.

12. Exemption on account of old Age.

The ſame Cauſe of Weakneſs of Age which ought to exempt Minors from Municipal Offices, ought alſo to exempt thoſe who are paſt ſeventy Years of Age. For at that Age, bodily Weakneſs, and the Infirmities and Inconveniences which attend it, are a juſt Cauſe for being exempted from ſerving in Offices whoſe Functions do not ſuit with Perſons of that Age, which even of

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of itself, without any other Infirmities, renders those who are so far advanced in Years incapable of Business *t*.

t Si ultra septuagesimum ætatis annum patrem tuum esse præses provinciæ perspexerit, eum personalium munerum vacatione perfrui providebit. *l.* 10. *C. de decur.*

Majores septuaginta annis a tutelis & muneribus personalibus vacant, sed qui ingressus est septuagesimum annum nondum egressus hac vacatione non utetur, quia non videtur major esse septuaginta annis qui annum agit septuagesimum. *l.* 3. *ff. de jure immun.*

XIII.

13. Diseases that excuse from these Offices.

Those who labour under habitual Diseases, or other Infirmities which suffer them not to act even in their own proper Affairs, and who could not possibly bestow that Vigilance, Application and particular Care which Municipal Offices require, are excused from them, and even incapable of them. Thus the Blind, the Deaf, the Dumb, the Consumptive, and those who labour under other Distempers of the like nature, cannot be called to these Offices; but the Gout is not reckoned among the Infirmities which serve as an Excuse, unless the same be in such a degree as to hinder one from acting as the Business would require, and that it would be reckoned inhuman not to admit of such a one's Excuse *x*.

u Si ea cœcitate pater tuus oppressus est, ut utriusque oculi aciem prorsus amiserit, levamentum personalium munerum sentiet. *l.* 1. *C. qui morbo se excus.*

Cum auriculari morbo debilitatum te esse dicas, juxta juris publici authoritatem a personalibus muneribus vacationem habebis. *l.* 2. *eod.*

Luminibus captus, aut surdus, aut mutus, aut furiosus, *aut perpetua valetudine tentus*, tutelæ seu curæ excusationem habet. *l.* 1. *C. qui morbo se excus.*

'Altho this last Text regards only an Exemption 'from a Tutorship, yet the same Equity requires that 'perpetual Infirmities should be sustained as a good 'Excuse for not serving in Municipal Offices.

x Podagræ quidem valetudo nec ad personalium munerum prodest excusationem: verum cum ita te valetudine pedum afflictum dicas ut rebus propriis intercessum commodare non possis, rector Provinciæ si allegationibus tuis fidem adesse perspexerit, ad personalia munera te vocari non patietur. *l.* 3. *C. qui morb. se excus.*

¶ We have not set down in the Article what is said in this last Text in relation to the Gout, that it does not excuse except when it is such, that he who labours under it is not able to act in his own Affairs. For besides that People are willing to undergo Inconveniences in their own proper Concerns, which it would not be just to expect they should be willing to bear with in the Affairs of others; a Man has always a Facility and Willingness to act in his own Affairs, altho he be indisposed: and there are many Persons whose proper Affairs are less cumbersom than the Functions of Municipal Offices. So that it would seem that this Text ought to be understood only of those who have not long and frequent Fits of the Gout, and who in their long Intervals from Pain may be able to act freely; which has induced us to think that it is by Prudence and Humanity that we ought to judge of the Effect which the Excuse founded on this Distemper ought to have.

XIV.

14. Excuse because of the number of Children.

The Number of Children is likewise a Ground of Excuse; for besides that this domestick Charge may render the Exercise of a Municipal Office too inconvenient, it is just to favour those who have many Children, in consideration of the Advantage the State reaps from the Multitude of the Persons who compose it. Thus, those who have many Children are justly dispensed with from bearing Municipal Offices, whether we judge of the Effect which this Excuse ought to have by the Circumstances of the number of Children, of the Condition of the Persons, of their Estates, and by other Considerations, according as it should appear equitable to have regard to this Ground of Excuse, altho there were no Rule that fixed the number of Children necessary to serve as an Excuse, or that the number were fixed by some Rule or Usage, as we see it differently regulated in divers Places, in some Places fixed at a greater number, and in others at a lesser *y*; but to make up the Number of Chil-

y Eos qui cujuscumque sexus liberos quinque habeant impetrata semel vacatione potiri convenit. *l. ult. C. de his qui num. lib.*

Patribus qui filios vel filias quinque habuerint, promissa legibus immunitate servanda. *d. l.*

Cura extruendi vel reficiendi operis in civitate, munus publicum est, a quo quinque liberorum incolumium pater excusetur. *l.* 4. *ff. de mun. & hon.*

Si quis decurio pater sit duodecim liberorum, honoratissima munerum quiete donetur. *l.* 24. *C. de decur. & fil. eor.*

Demonstratur varie nec absciisse, numerum liberorum ad excusationem municipalium munerum prodesse, ex rescriptis divi Elvii Pertinacis. Namque Sylvio Candido in hæc verba rescripsit: Εἰ καὶ μὴ πασῶν λειτουργιῶν ἀφίησιν, τοὺς πατέρας ὁ τῶν τέκνων ἀριθμός· ἀλλ' οὖν ἐπειδὴ ἑκκαίδεκα παῖδας ἔχειν διὰ τοῦ βιβλίου ἐδήλωσας, οὐκ ἔστιν ἄλογον ὥστε συγχωρῆσαι σχολάζειν τῇ παιδοτροφίᾳ, καὶ ἀνεῖσθαι τῶν λειτουργιῶν; id est, *Etsi non ab omnibus muneribus dimittit patrem natorum numerus: quia sedecim pueros habere te per libellum notificasti, non* est

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Children, we reckon only those who are living at the time of alledging the Excuse z; and those who are born after the Admission into the Office do not serve as an Excuse.

est irrationabile, ut concedamus filiorum eductione remitti sibi munera. l. 5. §. 2. ff. de jure immun.

'It is none of our Business here to reconcile 'these different Texts about the number of Children necessary for procuring an Exemption 'from Municipal Offices; it would seem by 'this last Text that it was arbitrary to judge of 'it according to the Circumstances, since it is 'said there that the Number of Children does 'not excuse indifferently and absolutely from 'Municipal Offices: and Equity would seem to 'require that it should be so, seeing there are 'Persons to whom a small number of Children 'is very burdensom, and there are others to 'whom a much greater number is not inconvenient. But since there are Usages of Places 'which have differently regulated the number of 'Children necessary for this Exemption, we have 'couched the Article in Terms which may agree, 'both to the Rule of Equity we have just now 'taken notice of in this last Text, and to the several Usages of Places, which in all probability 'have been a Consequence of the Diversity of 'those other Texts.

z Qui ad munera vocantur, vivorum se liberorum numerum habere tempore, quo propter eos excusari desiderant, probare debent. Numerus enim liberorum postea impletus susceptis antea muneribus non liberat. *l.* 2. §. 3. *ff. de vacat. mun.*

Hoc circa vacationes dicendum est: ut si ante quis ad munera municipalia vocatus sit quam negotiari inciperet, vel antequam in collegium adsumeretur, quod immunitatem pariat, vel antequam sepmagenarius fieret, vel antequam publice profiteretur, vel antequam liberos susciperet, compellatur ad honorem gerendum. *l.* 5. §. 7. *ff. de jure immun.*

Ad excusationem munerum defunctus filius non prosit, preterquam in bello amissus. *l. ult. eod.*

Sed si in bello amissi sint quæsitum est an prosint? & constat eos solos prodesse qui in acie amittuntur. Hi enim qui pro Republica ceciderunt, in perpetuum per gloriam vivere intelliguntur. *Inst. de excus. tut.*

'Altho this last Text relates only to the Exemption from a Tutorship, yet it may be applied to 'this Case, and would have its Equity therein, 'altho it seems not to suit with our Usage.

XV.

15. The Grand-Children represent their Fathers, to serve as an Excuse.

If there were only Grand-Children in the room of one or more Children already deceased, the number would be supplied by the said Grand-Children, those of every Son coming into the Place of their Father *a*.

a Nepotes loco parentum succedentes vice eorum prodesse consueverint, ideoque, si quinque numerus liberorum ex amissorum filiorum nepotibus suppletur, a muneribus personalibus is, quem patrem eorum esse dicis, juxta constitutam excusatur. *l.* 3. *C. de his qui num. lib.*

Quotcumque autem nepotes fuerint ex uno filio pro uno filio numerantur. *l.* 2. §. 7. *ff. de excus.*

XVI.

16. Excuse on account of actual Service in the Army.

Those who are in actual Service in the Army are likewise exempt from Municipal Offices, and they are dispensed with from serving in them in consideration of that other Service they render to the Publick, and from which they would be diverted by serving in the Municipal Offices *b*: But he who to avoid a Municipal Office which he has been nominated to, should engage himself in the Service of the War, would not on that score be discharged from the said Office *c*.

b His qui castris operam dant, nullum municipale munus injungi potest. *l.* 3. §. 1. *ff. de muner. & honor.*

c Qui obnoxius muneribus suæ civitatis fuit, nomen militiæ defugiendi oneris municipalis gratia dedit, deteriorem causam reipublicæ facere non potuit. *l.* 4. §. *ult. ff. de mun. & honor.*

XVII.

17. Excuse by reason of Poverty.

We may reckon in the number of Excuses for declining a Municipal Office that of Poverty, if it be such as to render the Person incapable of serving in it *d*; for on the part of him who is in this condition, it would be just not to lay a Burden on him which he was not able to bear: and besides, it would be for the Interest of the Corporation to put this Administration into surer hands, especially if it were an Office which any way concerned the Receipt and Disbursement of Money; in which case if there should happen any Loss of the publick Money by the Insolvency of the Person appointed to receive it, this Loss would fall on the Corporation which had named him *e*.

d Quod si quis propter censum tenuiorem, vacationem meruerit, atque hoc probaverit, beneficio potiatur; si propter rerum angustias ad personalia vocatur obsequia. *l. ult. c. de his qui num. lib.*

Paupertas sane dat excusationem si quis imparem se oneri injuncto possit probare, idque divorum fratrum rescripto continetur. *l.* 7. *ff. de excusat.*

Cum facultates tuas omnes in filium tuum contulisse te, nec quicquam habere proponas: respectu patrimonii ejus quod tuum desiit, muneribus civilibus non adstringeris. *l.* 4. *C. de his qui num. lib.*

Paupertas, quæ operi & oneri tutelæ impar est, solet tribuere vacationem. *l.* 40. *ff. eod.*

'Altho this last Text concerns only Tutorships, 'yet it may be applied for the same Reasons to the 'Rule explained in this Article.

e Juxta inveteratas leges nominatores susceptorum & eorum qui ad præpositionem horreorum & pagorum creantur, obnoxii teneantur, si minus idonei sint qui ab eisdem fuerint nominati. *l.* 2. *de suscept. præpos. & arcar.*

'We have not set down in this Article, that the 'Loss would fall upon the Persons who nominated, 'but

'but that it would fall upon the Corporation 'which had made the Nomination; because it is 'the Corporation that is answerable for the publick 'Money, and for those who collect and receive it; 'and that the Persons who compose the Assembly 'in which the Nominations are made, represent 'the Corporation, and are accountable in their own 'Names only for what they may be charged with 'of fraudulent Dealing and Male-Administration: 'and this is the Usage in *France*; whereas by the 'Roman Law, the Persons who made the Nomination, were answerable for the Conduct of those 'whom they named.

Exactores vel susceptores in celeberrimo cœtu curiæ consensu & judicio omnium sub actorum testificatione firmentur: provinciarumque rectores eorum nomina, qui ad publicum munus officii editi atque obligati fuerint, innotescant, & animadvertant quicumque nominaverint, ad discrimen suum universa quæ illi gesserint, redundare. *l.* 8. *C. eod.*

'And there were even some Offices, in which 'the Persons who were in actual possession of the 'Office named their Successors, and were answerable for them.

In eum, qui successorem suo periculo nominavit, si finito magistratu successor idoneus fuit, actionem dari non oportet. *l.* 15. §. 1. *ff. ad municip.* *V. T. C. de peric. nom.*

XVIII.

18. Other grounds of Excuse according to Equity.

If besides the Grounds of Excuse we have just now explained, there should be any other just Cause for discharging him who should be nominated to a Municipal Office, it would be equitable to have regard to it; as if some extraordinary Event had occasioned him a great Loss, intangled him in some great Affair, or put him out of a Condition of being able to exercise such Office: for in these Cases Equity and Humanity ought to supply the want of written Rules, and indeed it is the primary and fundamental Rule in this matter, that as it is upon Equity that all the grounds of Excuses which the Laws receive are founded, so the same Equity requires that we should admit those grounds of Excuse which particular Circumstances may render just *f*, altho the Laws have not foreseen them.

f Omnis excusatio sua æquitate nititur. *l.* 1. *ff. de vacat. & excus. mun.*

See the following Article, and the Remark upon it.

XIX.

19. Two imperfect Excuses are not sufficient to make a perfect one.

Seeing old Age excuses only those who have attained seventy Years; and that Children excuse only when they are of the Number regulated by the Laws, it would not be sufficient that he who should desire to be dispensed with from serving in a Municipal Office were sixty five Years of Age and had three Children; for each of these Excuses not being sufficient separately, what is wanting to them when divided, is not supplied by the joining of two imperfect Excuses together *g*.

g Quamvis sexaginta quinque annorum aliquis sit, & tres liberos incolumes habeat, a muneribus tamen civilibus propter has causas non liberatur. *l.* 1. §. *ult. ff. de vacat. & excus. mun.*

'If he who has sixty five Years of Age together 'with three Children, were moreover afflicted 'with some Disease, had a great deal of Business, 'and but a small Estate, or that he laboured under 'other inconveniencies, none of which alone 'would be sufficient to discharge him, but which 'being all of them joined together would be as 'great an Obstacle as any single Excuse that is al'lowed to be sufficient; it would be just to dis'charge him by the Rule explained in the preceding 'Article.

XX.

20. One is not called more than once to the same Office, but in case of Necessity.

Since the Municipal Offices ought to be born by the Inhabitants every one in their turn successively, those who have once served in one of the said Offices in the places where there is a sufficient number of Inhabitants, cannot be named again for the same Office *h*: but in the places where the small number of Inhabitants should make it necessary to name the same Persons more than once to the same Offices, it might be done by observing the Rule that is explained in the following Article *i*.

h Civilia munera per ordinem pro modo fortunarum sustinenda sunt. *l.* 1. *C. de mun. patrim.*

Præses provinciæ provideat munera & honores in civitatibus æqualiter per vices secundum ætates & dignitates, ut gradus munerum honorumque, qui antiquitus statuti sunt, injungi: ne sine discrimine & frequenter iisdem oppressis, simul viris & viribus respublicæ destituamur. *l.* 8. §. 15. *ff. de muner. & hon.*

Quis tam inveniri iniquus arbiter rerum potest, qui in urbibus magnifico statu præditis ac votiva curialium numerositate locupletibus, ad iterationem quempiam transacti oneris compellat: ut cum alii necdum pene initiati curiæ sacris fuerint, alios & continuatio & repetitæ sæpe functiones afficiant. *l.* 52. *C. de decur.*

i Defensionem reipublicæ amplius quam semel suscipere nemo cogitur, nisi id fieri necessitas postulat. *l.* 16. §. *ult. ff. de mun. & honor.*

Cum te omnibus muneribus functum esse adseveres, ad eadem munera, si aliorum civium copia est qui obsequiis civilibus fungi possunt, præses Provinciæ devocari te non permittet. *l.* 3. *C. quemadm. civ. mun. indic.*

XXI.

21. He who has served in an Office, cannot be named to the same, nor to another Office, except after a cer-

One cannot oblige the same Persons to exercise the same Offices but after an interval of five Years; and if those who have served in one Office, should be called to another different Office, an interval of three Years would be necessary; which ought to be understood as well of Offices which have some Honour

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tain interval of time. Honour or some Dignity annexed to them, as of those which are only burdensome *l*.

l Ab honoribus ad honores eosdem quinquennii datur vacatio, triennii vero ad alios. *l.* 2. *C. de muner. & honor. non contin.*

Navicularii, & mercatores olearii, qui magnam partem patrimonii ei rei contulerunt, intra quinquennium muneris publici vacationem habent. *l.* 5. *ff. de mun. & honor.*

XXII.

22. The Interval is voluntary for Offices that are burdensome, but not for Dignities.

The Intervals spoken of in the preceding Article, are granted for burdensome Offices to those who being called to them against their Will would avoid them, and it is free for them to renounce the benefit of the said Intervals; but as for the Offices which have only Dignity and Honour without any Burden, the Interval ought to be observed without regard to the Consent of him who is called to the Office *m*.

m Divus Severus rescripsit, intervalla temporum in continuandis oneribus invitis, non etiam volentibus concessa, dum ne quis continuet honorem. *l.* 18. *ff. ad municip.*

Gerendorum honorum non promiscua facultas est, sed ordo certus huic rei adhibitus est. Nam neque prius majorem magistratum quisquam, nisi minorem susceperit, gerere potest: neque ab omni ætate, neque continuare quisque honores potest. *l.* 14. §. 5. *ff. de muner. & honor.*

XXIII.

23. The same Office is not continued from Father to Son, nor from Son to Father.

Those Intervals are observed with respect to the Father, and to the Son living under the Father's Authority and Jurisdiction; for they being considered as one and the same Person, the Service of the one in an Office frees the other from it during the said Intervals; and the same Office cannot be continued from the one to the other, nor can they be called one after another, either to the same Offices, or to others of a different nature, without observing the delays of those Intervals *n*.

n Honores & munera cum pater & filius decuriones sint, in eadem domo continuari non oportet. *l.* 1. *C. de muner. & honor. non contin.*

XXIV.

24. It is not the same thing between Brothers, altho they have their Goods in common.

The Rule explained in the preceding Article, is limited to the Persons of the Father and Son, and does not extend to Brothers who may have their Estates in common together, for every one of them would have his separate Right therein, and thev would be tw[illegible] Heads of Famil[illegible] [illegible] them would [illegible] sides t[illegible] of t[illegible] had served, and the Service of the one would be of no use to the other *o*.

o Intervalla temporum quæ in unius persona locum habent, fratribus (licet communia possideant bona) minime prodesse frequenter constitutum est. *l. ult. C. de muner. & honor. non contin.*

Licet indivisa bona fratres habent, nihilominus tamen singuli suo nomine civilibus tenentur muneribus. *l.* 7. *C. de decur.*

XXV.

25. Offices are imposed only on Inhabitants, and such as have not transferred their Domicil.

Seeing Municipal Offices can be exercised only by the Inhabitants of the Places *p*; those who have transferred their Domicil from one Place to another, cannot be called to the Offices of the Place from which they have removed; but this Exemption takes place only in the Case of those who have transferred their Domicil before they are nominated to an Office in the Place from whence they remove, and not in the Case of those who being named to an Office in the Place of their Domicil, would for that Reason change it *q*.

p Ejus patriæ oneribus respondere debes, cui te attributum esse commemoras. *l.* 1. *C. quemadm. civ. mun. indic.*

See the 5th Article.

q Incola jam muneribus publicis destinatus nisi perfecto munere incolatui renuntiare non potest. *l.* 34. *ff. ad municip.*

'There are Regulations and Usages of Places as 'to the time and manner of the Translation of the 'Domicil, both with respect to the Nomination to 'Municipal Offices, and to Assessments for Perso-'nal Estates, and especially when any one trans-'fers his Domicil from a Place that is subject to 'the Tax to a Place that is exempt from it.

See the 7th Article of the 3d Section, and the Remark that is there made upon it.

XXVI.

26. Exclusion from Offices because of unworthiness.

Besides the Causes that have been just now explained, which exclude or excuse from Municipal Offices, there are other Causes which render Persons unworthy of them. Thus they who have been judicially condemned to some Punishment for some Crime or Offence, cannot be called to these sorts of Offices, especially to such as have some Dignity annexed to them *r*. But this incapacity or unworthiness ought to be Personal, and the Son whose Father had incurred the said incapacity because of some Crime which he had been convicted of, could not for this Reason be ex[illegible] from serving in these sorts of [illegible] in such as have some [illegible] them *s*.

r [illegible] gatus est, si decurio sit, [illegible] *ff. de decur.*

s N[illegible] delictum innocenti filio pœnæ est. [illegible] rionum, aut cæteris honoribus

honoribus propter ejusmodi causam prohibetur. *l.* 2. §. 7. *ff. de decur.*

Crimen vel pœna paterna nullam maculam filio infligere potest, namque unusquisque ex suo admisso sorti subjicitur: nec alieni criminis successor constituitur. *l.* 26. *ff. de pœnis.*

Sancimus ibi esse pœnam ubi & noxia est. Propinquos, notos, familiares procul à calumnia submovemus, quos reos sceleris societas non facit. Nec enim adfinitas vel amicitia nefarium crimen admittunt. Peccata igitur suos teneant auctores, nec ulterius progrediatur metus, quam reperiatur delictum. *l.* 22. *C. de pœnis.*

Quod pater in reatu criminis alicujus est, filiis impedimento ad honores esse non debet. *l.* 3. §. 9. *ff. de muner. & honor.*

XXVII.

27. The scarcity of Inhabitants makes the Excuses and the Intervals to cease.

All the Excuses, and all the Intervals have their effect in Places where there is a sufficient number of Inhabitants to fill the Offices: but if the scarcity of Inhabitants should make it necessary to name the same Persons again without observing the usual Intervals of time, or to name those who have a lawful Excuse; it is equitable, according to the Circumstances, to dispense in that Case with the said Rules; observing nevertheless an equitable Temperament in granting always some ease to those whose Excuses are most favourable, and who ought to be least burdened *t*.

t Si alii non sint qui honores gerant, eosdem compellendos qui gesserint, complurimis constitutionibus cavetur. Divus etiam Hadrianus de iterandis muneribus rescripsit in hæc verba: illud consentio, ut si alii non erunt idonei qui hoc munere fungantur ex his qui jam functi sunt, creentur. *l.* 14. §. *ult. ff. de muner. & honor.*

XXVIII.

28. Offices that are compatible.

Offices that are burdensome cannot be imposed on those who have already others, even altho those other Offices in which they actually serve, should oblige them only to the performance of some Function which were only Honorary without any Burden. But an Office of Dignity may be conferred on him who serves in an Office that is burdensome *u*.

u Honorem sustinenti munus imponi non potest: munus sustinenti honor deferri potest. *l.* 10. *ff. de muner. & honor.*

XXIX.

29. Persons are called to the highest Offices by degrees.

The natural Order of calling Persons to Offices which have some Dignity annexed to them, is to observe the degrees of their Differences, and to call to the highest Offices only those who have first served in the lowest, unless there be some just Cause for varying from this Order *x*.

x Ut gradatim honores deferantur, Edicto, & ut a minoribus ad majores perveniatur Epistola Divi Pii ad Titianum exprimitur. *l.* 11. *ff. de muner. & honor.*

Gerendorum honorum non promiscua facultas est, sed ordo certus huic rei adhibitus est: nam neque prius majorem magistratum quisquam, nisi minorem susceperit, gerere potest. *l.* 14. §. *penult. eod.*

'Altho this Rule be equitable, yet it is not always strictly observed; for there may be just Reasons why this Order should not always be followed.

XXX.

30. The Nomination to Offices ought to be made some time before the Persons nominated are to enter to the exercise of them.

Since after the Nomination to Municipal Offices, the Persons who have been named may be discharged, if they have just Reasons to offer why they should be discharged; and that before a second Nomination be made, the time for which the Officers who are in actual Service were elected may expire, and the Functions of the said Offices come to cease; it is therefore for the Interest of the Publick, that in order to prevent this Inconvenience, the Nomination should be made some time before the Persons who are named are to enter upon the Exercise of their Offices; and that their Nomination be intimated to them, that there may be a time sufficient to examine the validity of their Excuses, if they alledge any, and to name other Persons, in case upon their Appeal from their Nomination they should be discharged *y*.

y Decuriones ad magistratum vel exactionem annonarum ante tres menses vel amplius nominari debent. Ut si querimonia eorum videatur justa, sine impedimento, in absolvendi locum alius subrogetur. *l.* 1. *C. de magistr. municip.*

Observare oportebit magistratus, ut decurionibus solemniter in curiam convocatis, nominationem ad certa munera faciant, eamque statim in notitiam ejus qui fuerit nominatus, per officialem publicum perferri curent. Habituro appellandi, si voluerit, atque agendi facultatem apud præsidem causam suam jure consueto. Quem si constiterit nominari minime debuisse, sumptum litis eidem a nominatore restitui oportebit. *l.* 2. *C. de decurion.*

XXXI.

31. Persons named to Offices are compelled to serve in them, if they are not excused.

If the Persons who have been named, having no lawful Excuse, should refuse to serve the Office, they would be constrained to do it by the Course of Justice, according to the Circumstances *z*.

z Si quis magistratus in municipio creatus munere injuncto fungi detrectet, per præsides munus agnoscere cogendus est remediis quibus tutores quoque solent cogi ad munus quod injunctum est, agnoscendum. *l.* 9. *ff. de muner. & honor.*

Si ad magistratum nominati aufugerint, requirantur. Et si pertinaci (eos) animo latere patuerit, his ipsorum bona permittantur, qui præsenti tempore in locum eorum ad duumviratus munera vocabuntur: ita ut si postea reperti fuerint, biennio integro onera duumviratus cogantur agnoscere. Omnes enim qui obsequia publicorum munerum tentaverint

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verint declinare, simili conditione teneri oportet. *l.* 18. *C. de decur.*

XXXII.

32. He who does not insist on his Exemption, does not lose his right in another Case.

If he who having an Exemption might have got himself discharged from a Municipal Office, did accept of it, whether it were with a View to serve his Country, or for some other Cause, he would not by that have lost his Exemption: and if he were called to another Office, he might insist on his Privilege *a*.

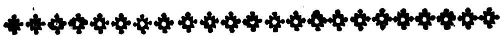
a Qui publici muneris vacationem habet, si aliquem honorem, excepto decurionatu, sponte susceperit, ob id quod patriæ suæ utilitatibus cesserit, vel gloriæ cupiditate paulisper jus publicum relaxaverit, competens privilegium non amittit. *l.* 2. *C. de iis qui sponte mun. suscep.*
V. l. 2. *ff. de jur. immun.*

XXXIII.

33. The Office does not go to the Heir of him who dies before he enters upon the exercise of it.

If he who was called to a Municipal Office happens to die before he entred on the exercise of it, he transmits no Engagement on that score to his Heirs; for the Engagement to the Functions of the Office was personal *b*.

b Si ante diem subeundi honoris atque muneris pater tuus defunctus est, conveniri eo nomine hæredes ejus non oportere Præses Provinciæ minime ambiget. *l.* 1. *C. si post creat. quis decess.*



TIT. XVII.

Of Universities, Colleges and Academies, and of the Use of Sciences and Liberal Arts, with respect to the Publick.

THE erecting of Universities has been a Consequence of the Necessity of the several Sciences that are there taught; and this Necessity of Sciences in a State, is a Consequence of the Order of the Society of Mankind, which requires the Use of them for the Publick Good. So that to judge of the End that has been proposed by the erecting of Universities, of Colleges, of Academies, and of the Advantage that is to be reaped from them, it is necessary to consider in those Sciences, the relation which they may have to the Order of Society, and to the Publick Good.

All the Sciences have in the first place this Usefulness in general, that they convey to the Mind of Man the Knowledge of Truths of several Natures, which adds to the natural Lights of Reason, a Facility and a Habit of judging better of all Things than it is possible for Persons to do who have only the bare use of Reason without that Knowledge, and to reason and explain their Thoughts concerning them in a better Order, with greater Clearness, greater Exactness, greater Steddiness, and greater Politeness: and altho this Advantage of being versed in the Sciences be not always such in all Persons as that every one attains by his Study this soundness of Reason, which the Principles and the detail of Truths which are contained in the Sciences ought naturally to produce; yet the Study of the Sciences has nevertheless its usefulness by the good Use that many People make of it: and if it often happens that because the Liberty of Study is free and open to all sorts of Persons without distinction, and that there are many whose Genius is of so narrow Bounds, and so little Penetration, of so little Exactness, and of so little Judgment, that they acquire by their Study only an imperfect confused Knowledge of Things, and mixed with false Ideas, and in whom instead of Light and Order, which ought to be the fruit of Study, we see on the contrary only Darkness and Confusion; yet this inconvenience does not take away the Necessity and the Usefulness of teaching the Sciences.

But besides this general Advantage which we have just now remarked, the Sciences have other Advantages of much greater Importance, and more essential to the Publick Order, whether it be in what relates to Religion, or in what concerns the Temporal Affairs; and both the one and the other of these two Matters demand the Use of several Sciences. So that it is of infinite Consequence to the Publick, that the Sciences which relate to Religion be preserved in their Purity, with all the Precautions that are possible for maintaining in all Places, and to future Ages, the true and uncorrupted Knowledge of their Principles and of their Detail: and it is likewise of a very great Importance to cultivate, as much as is possible, the other Sciences which concern the Temporal Affairs; and the rather because they are all of them of some Use in Religion, as will appear hereafter.

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As to the Sciences, the Use whereof tends directly to the Service of Religion, seeing they consist in disposing Men to the Worship of God, and to the Observance of the Law which he has given them: The first Science which Religion demands, is that which ought to teach us the Worship of God; and the second is that which teaches us the Divine Law.

The Science of the Worship of God implies the Knowledge we ought to have of the God to whom we owe this Worship; and it implies likewise the Manner in which it is his Pleasure that this Worship should be paid him: And the Science of the Precepts of his Law comprehends the Knowledge of the Letter of those Precepts, and that of the Spirit which ought to animate the Works thereof.

The Knowledge of God cannot be acquired by any of the Senses in the manner that sensible Objects are known; for his Nature is of an Order that is infinitely above their Capacity, and beyond their reach. It is true, the Knowledge of sensible Objects may lead Man to discover in them the Workmanship of an infinite Artificer, the Author of so many Wonders; and it does not seem even to be possible to open the Eyes, and to see and consider the Universe, enlightned with the Light of the Sun, the Heavens, the Stars, the regular Order of the Days, the Nights, the Months and the Years, the vast extent of the Earth, and of the Seas that environ it, the multitude and infinite variety of Plants, Trees, Minerals and Animals; and, lastly, Man, composed of a Body of a divine Structure, animated with an intellectual Faculty, without being at the same time raised into the highest Admiration of those great Works, the least of which by its bare Existence proves a Cause which produces it, and every one of which by its Structure proves alone the infinite Power and Wisdom of that Cause; which is still more clearly and evidently proved by the Disposition of that innumerable multitude of Beings of all kinds in so great order. But this Proof, how natural and how certain soever it appears, has never led any Person to the true Knowledge which Man ought to have of God, and to the true Worship which he ought to render him; and it does not even make the least Impression on the Minds of many Persons, since we have seen some that have not believed in a Deity; so that this natural Ignorance in which Men are born of Religion, and of the Worship which they owe to their Creator, and the contrary Bent which carries them to what he forbids by his Law, is an undeniable Proof, that Man is fallen into a State, which could not be natural to a Creature capable of knowing and loving his God, if he had continued such as he came out of the hands of his Creator. This Truth, which is sufficiently proved by this Ignorance, and this Propensity to Evil, is still more confirmed by the infinite multitude of Miseries which are the Consequences thereof.

Since therefore it is true, that the Knowledge of God, and of the Worship which we owe him, cannot be acquired either by the Senses or by Reason, without other Helps; it is by some other way that we are to be led to it: and the only way is that which God has made use of for that purpose, he having been willing to teach us himself what he thought proper for us to know of his Nature, and the Manner in which it is his Pleasure we should serve him; and this way is so different from the manner of knowing God in his Creatures by the use of the Senses and of Reason, that he has counted this way for nothing. For besides that this way would furnish even to the most discerning Persons only Proofs to convince them that there is a God, but which would not lead them to the Knowledge of his Nature, nor of the Duties he requires from a reasonable Creature; it is not only to the Wise and the Learned that God is willing to manifest himself, he communicates himself to all sorts of Persons, without any regard to their Capacity or Incapacity, and to all the other natural Qualities. And this is what he has done by the great train of Miracles and Prodigies with which he has accompanied the Knowledge he has been pleased to give to Men of the Mysteries and Truths of the Religion in which he desires to be served, and where he teaches Men the sublime Science which discovers to us the Cause of our Fall, of our Ignorance, of our Inclination to Evil, and of all the Miseries which are the Consequences thereof, and the Remedies which he has made use of, to draw us out of them, and to bring us back to know him and to serve him. But as for this manner of knowing him naturally in his Creatures,

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he has taught us by the Ministers, who are the Dispensers of the Knowledge of the Truths and Mysteries of Religion, that it has served only to those who have had some Knowledge of the Deity by the Creatures, to make them guilty of making a bad use of the said Knowledge, and of Ingratitude towards him whom they have by the help of the said Knowledge discovered to be the Creator and Author of all things; they not having paid him the Honour and Worship which they owed him, and having on the contrary put into his place Creatures whom they have adored *a*.

It is therefore only by the Truths which God himself has been pleased to teach unto Men, that they are able to know him, and to serve him in the Religion which he has established; and consequently it is the Science of that Religion which is the first of all the Sciences, and which is infinitely above all the others. And it was likewise principally on account of this first Science, that Universities have been founded, in order to preserve the same, and to teach it in its Purity.

This Science of Religion comprehends three Parts: The First is of the Mysteries and of the Truths of the Faith which God has revealed to his Church; as that which concerns his divine Nature, the Distinction of the three Persons in one God, their Attributes, the Creation of Angels, the Fall of one part of them, the Creation of Man, his Fall into the Bondage of Satan and of Sin, his Redemption by the Mystery of the Incarnation, the Sacraments, the Unity of the Church, the Extent thereof unto all Nations, its Perpetuity, the Mission of the Apostles, and of their Successors the Pastors and Ministers of the Church, their Functions for the said Ministry, and the other Truths of the like nature.

The second part of this Science is the Doctrine of Manners, which is composed of the Precepts of the Divine Law that were taught unto Men under the first Covenant by the Ministry of *Moses*, and under the second by Jesus Christ, who instead of the Letter of this Law, which the first Covenant gave only, has taught the Spirit, and given the Accomplishment of it by his Gospel.

a *Because that when they knew God, they glorified him not as God, neither were thankful, but became vain in their Imaginations, and their foolish Heart was darken'd.* Rom. 1. 21.
See the 2d of the *Wisdom of* Solomon, ch. 13.

The third is the Ecclesiastical Discipline, which is as it were the Policy of the Church for all things which are not essential, either to Faith or to Manners; such as the Ceremonies of the Divine Worship, those of the Administration of the Sacraments, the Manners of assembling Councils, and of holding them, the Ways of filling Bishopricks, Cures, and other Benefices, the Establishment of Chapters, and the other Matters of the like nature, of which some Rules may be different in divers Places, and subject to Changes.

It was in order to preserve in the Church the Rules of this Science of Religion in these three Parts, of Faith, Manners and Discipline, that after the first Mission of the Apostles they and their Successors held Councils as there was occasion, to purge the Church of Abuses, of Errors, and of Heresies *b*; and the Popes made likewise many Decrees and Constitutions. So that the infinite multitude of Heresies, of Errors and Abuses which have sprung up in all Ages and in divers Places, having made it necessary to have a great number of Decisions and Rules, in order to preserve the Purity of the Faith and of Manners, and to maintain the good Order of Discipline, the said Decisions and Rules have furnished matter for composing a Science, the Importance and Extent of which has made it necessary to have the Assistance of able Persons who are thoroughly versed in the said Rules in their Purity, and who may be faithful in teaching and expounding them to others.

It was for this purpose, that besides the antient Councils, in the first Ages of Christianity, God gave to his Church holy Men, to be Doctors and Teachers, who have merited the Name of its Fathers by their Doctrine and Holiness of Life; and it is for the same end, that in all the Ages ever since God has presided over the several Councils which it has been necessary to assemble on account of the new Heresies, new Errors, and new Abuses that crept into the Church by degrees. So that all these things relating to the Church have furnished Matter for a Science which comprehends the Doctrine of Faith, and of Manners, and the Rule of Discipline; all which are deposited with the Church in the Books of the Holy Scripture, in the Councils, in the Writings of the

b Acts 15.

Fathers,

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Fathers, and in the sacred Canons which are composed of the said Doctrines, gather'd from the Holy Scripture, from the Councils, from the Writings of the Fathers, and the Constitutions of the Popes. And it is for the Study of this Science that Universities have been established, the Professors of which are bound to have the Character of a publick Testimony of their Capacity, and a Title which gives them a Right to profess and to teach the Parts of this Science which are committed to them; such as are the Matters of that part which is called Theology or Divinity, the Interpretation of the Holy Scriptures, and the others which are differently distinguished according to the several Usages of Places.

Next unto this Science of Religion among all the others which are called Human Sciences, to distinguish them from this first, that which is most necessary and of greatest Importance in the Order of the Society of Mankind, and which likewise is of greatest Dignity, is the Science of the Laws, which regulate the Justice Men owe to one another in all the sorts of Affairs, which the Ties, the Engagements, and the other Consequences of their Society may produce; and this comprehends the Rules of the Administration of that Justice, and the Rules of the Functions and Duties of those who partake in the said Administration. It is these Laws which are called the Civil Law, and which consists chiefly of the Rules of Natural Equity, of which the Books of the *Roman* Law contain an ample Detail; concerning which the Reader may see what has been said on this Subject in the Preface to the *Civil Law in its Natural Order*, and in the Treatise of Laws which follows the said Preface. It is for the teaching of this Science that Professors of Civil Law are established in the Universities; and there being a great Affinity between the Canon and the Civil Law, both the one and the other being composed of Laws, and in such a manner as that many of the said Laws are common both to the one and to the other, the same Professors teach both.

Altho these first Sciences of which we have just now spoken, regard in several respects the Advantage of the particular Persons who compose the Society, yet they have moreover a relation to the general Order of that Society, some of them for the spiritual Affairs, and others for the temporal; and they contain many Rules which relate to the said Order, and which contribute to form and to maintain it. They teach also in the Universities other Sciences which have not the same relation to that general Order, and which do not contain any Rule whereof the Use has any direct tendency to the said Order. But seeing the said Sciences are useful to the particular Persons who study them, and that the common Good of the particular Persons who are Members of the Body of the Society, ought to be considered as a publick Good, it is for the Interest and general Order of the Society that the said Sciences be cultivated in it.

Of all these Sciences that which has the Object of the greatest Importance is Physick, invented for the greatest of all temporal Blessings, which is Health. It is by the Principles of this Science that Men endeavour to discover the Nature, the Causes, and the Remedies of the different sorts of Diseases: which implies the Necessity of knowing the Structure of the human Body, the Use of the several Parts which compose it, the Blood and the other Humours, in order to discover the divers Effects of Distempers on the Parts of the Body which are affected by them, and on the whole Body. This Science comprehends the Knowledge of the Remedies which Experience has discover'd by the Use of Plants, of Minerals, and of the other simple Remedies, and of those which are compounded; including also the Knowledge of the Diet that is suitable to the different Distempers; the Use of Surgery for an infinite number of different Operations according to the several sorts of Evils, and especially for Wounds, Fractures, Luxations or Dislocations, and other the like Evils. It is these two Parts of the Art of curing Diseases which are called Pharmacy and Surgery, which comprehend all sorts of Remedies and Helps for the preservation and restoration of Health, and of which the Science of Physick teaches the Principles, and regulates the Use; so that it has been necessary to establish in the Universities Professors of this Science.

None of the Sciences, of which we have just now given these general Ideas, can be acquired, neither ought any one to engage in the Study of them, till he has first acquired the Knowledge of other Matters preparatory to the Study of the said Sciences, and which con-

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contain as it were the Principles and the Elements of them. And it is for this reason that the said Principles and Elements are taught in the Universities under the Name of Arts, to distinguish them from those first Sciences to which the said Rank is given because of their Dignity; altho some of the said Arts have always had, and still have, the Name of Sciences given them.

Those kinds of Arts called Liberal Arts, Grammar, the Knowledge of the Classick Authors, Rhetorick, Logick, Physick, Metaphysicks, are the Parts of Philosophy, which are and may justly be placed in the number of Sciences, since they consist in the Theory of many Principles and of many Truths, which have their Certainty, and the other Character of Sciences, altho there be joined with them, especially in Physick, things which have not that degree of Certainty.

All those several Arts have their Order with respect to one another, and they have all of them together their relation to those first Sciences which have been mentioned: Grammar hath its Use in teaching the Languages, and especially the antient ones, which are the Languages of the Authors of the Books in which is preserved the Deposit both of Sciences and of Arts; among which Languages the most necessary are the *Greek* and the *Latin*, which are the original Languages of those Authors, and which have these Advantages, that the *Greek* is the original Language of the Holy Scriptures, and of all the most antient Authors of Sciences, including under this Name that also of Liberal Arts; which is the reason that the greatest part of the Words of those Sciences are of the *Greek* Language. And as for the *Latin*, it is at this day the Language of the Church of *Rome*, and it has been also that of the greatest part of all sorts of good Authors; and we have likewise translated into this Language all the antient Books of the other Languages.

Besides this first Usefulness of Grammar in teaching the antient Languages, it has also that of containing the Elements and Principles of all the Languages. For it is by Grammar that we learn to distinguish in all Languages the several sorts of Words, the Use whereof is necessary for composing them; such as the Names of Persons and Things which are called Substantive Names, those which are termed Adjectives which distinguish the Qualities, and every thing that diversifies both the Persons and the Things; the Verbs, which mark the Dispositions, the Actions, the Motions, and every thing that one would express relating to the Condition in which one considers all things animate or inanimate; and the rest which one learns by Grammar, which takes in the Elements and the Foundations of all manners of Expression, and the first Principles of the Art of Speaking, and of the Propriety of Speech. So that Grammar is of use in Languages, even in the vulgar Languages which every one speaks; since it is by the help of these Principles of Grammar that we dispose for use the Words and the Expressions: which is common to all the Languages in general.

Seeing the Precepts of Grammar are not sufficient for acquiring the Knowledge of all Books, we ought to join therewith the Study of such *Greek* and *Latin* Authors as have writ best in these two Languages, in order to obtain a Habit of understanding them well, and of explaining all sorts of Books; and because the Authors which are most proper to be read for getting a true Knowledge of the *Greek* and *Latin* Tongues, are almost all of them Pagans, who have writ in a manner altogether human, without any Knowledge of Religion, and on different sorts of Matters, but all of them within the Bounds of human Learning, the Study of the said Books is called the Study of human or classical Learning, which, besides the Agreeableness thereof, has also its Usefulness by the Politeness and Elegancy of the Style of those Authors, by many Sentences, witty Expressions, and other Ornaments and Matters of Learning which are very useful, whether it be in writing or speaking, or even in bare Conversation, and for other Uses. So that this Study of the human or classick Learning, and the reading of those Heathen Authors is allowed, as well because of the Necessity of learning from them the antient Languages, as because of the other Benefits which may be gathered from them: but Religion and good Manners require that we should not put into the hands of the Youth such Passages of the said Books as may seduce them to Profaneness and Irreligion.

Since among those Authors that are read in the Study of the human or classical Learning, there are many of them

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them which are Historians and Cosmographers, others that are Poets, some *Greek* and some *Latin*; we learn in the said Books the antient Histories, some Principles of Geometry and Cosmography, and also the Rules of the *Greek* and *Latin* Poetry: all which Studies have their Usefulness, which shall be explained hereafter.

After having studied Grammar and some of the classick Authors, the next Study is that of Rhetorick, which is likewise accompanied with the Study of the classick Authors: and there one learns the Elements and the Precepts of the Art of Eloquence; which consists in some Rules drawn from Remarks which have been made by some Authors on the natural ways of speaking agreeably and with efficacy so as to persuade, mixing sometimes in Discourse figurative Expressions of several sorts, according to the different Subjects, and the Use which the Discourse is designed to have, whether it be to set some Truth in its true Light, or to excite some Passion, or for other ends. But since all those Figures and all the other Ornaments of Discourse are useful only in so far as they are essential to the respective Subjects, and agreeable only in so far as they are natural, and that many of those who have studied this Rhetorick do not know how to adapt it to its proper Use, but search for Ornaments where none ought to be used, and do not give to those which may be necessary, the natural Air which ought to make their whole Beauty; the servile Use which they make of those Ornaments after having studied Rhetorick, and which they employ without distinguishing the Matters to which they are applicable, and the Manners of placing and turning them, has had this Effect, that the said Abuse, which is so common, hath brought into discredit the Name of Rhetorick, from whence those Figures and Ornaments are drawn. For whereas the Art of speaking well ought to raise the Mind to a solid and judicious Eloquence, suited to the several Subjects, and of which the Ornaments should have all their Grace and all their Beauty placed in the lively and natural ways of enlightning, of touching, of moving the Mind and the Heart; the bad use of the Figures and other Ornaments of Rhetorick, deviating from the natural Turns of Expression, and substituting in their Place that affected Air of perverting the Rules, produces an Effect wholly contrary to Eloquence, which ought to draw all its Beauty from Nature it self. And altho it be true that by Nature, without any use of Art, one cannot speak so well as by the help of Art, yet this Help ought not to appear, and the Art consists in hiding it, and in displaying only the natural Graces in the same manner as if Nature herself, were she in her Perfection, would display them; for it is she that is the Source of them. Thus the more that Art is concerned in giving to Nature its Perfection, the less it ought to appear; and the more there appears any thing of a servile Study and Labour of Art, the less it appears beautiful, according as Nature appears to have the less Share in it.

We make here this Remark on the Abuse which may be made of Rhetorick, because it is for the publick Interest that those whose Professions demand the Use of Eloquence, should abstain from that false Rhetorick, and make use of an Eloquence suited to their Subjects; and that they should retain with the Grace of the Ornaments which the Matters may demand, that Force and that Dignity that are proper for their Ends, whether it be for speaking in publick, or for composing Works which deserve to be writ in an elegant Style. For the publick Order renders it necessary to the Ministerial Function of several Professions, every one of which has occasion for its Eloquence to touch the Mind or the Heart. Some stand in need of it for setting Truths, whether they be Facts or others, in their proper light, and establishing the Proofs of them by the Strength of Reason, and by Reflections on every thing that may contribute towards it, and by a methodical Order, and the other Characters proper to this kind of persuading, and enlightening the Mind with the Light of Truth. Others have occasion for it, to excite the Passions or Sentiments, of Esteem, Aversion, Tenderness, Indignation, Zeal, Generosity, and the other Sentiments which the several Subjects and Occasions may demand, according to the different sorts of Impressions which the different Characters of the several Objects ought to make; whether it be by their Charms, as Justice, Virtue, Truth; or by their opposite Qualities, as Injustice, Error, Vice. Thus, the Presidents or Chiefs of a Court of Justice have occasion to speak

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in publick, to make Remonstrances or Harangues of another nature, either in favour of some useful Establishment, or for the Reformation of some Abuses; and their Dignity, and the Matters about which they are to speak demand an Eloquence that is grave and worthy of their Rank. Thus the King's Council in the said Courts of Justice have occasion to make Harangues, Remonstrances, and other Discourses of different kinds, which have their different Characters, and which require an Eloquence suitable to their Function: and altho their Pleadings on those Occasions may seem to be of the same kind with those of the Council for the Parties, having for their Subject the Defence of Justice and of Equity in behalf of the Parties who have the good Cause; yet they ought to be distinguished from those of the Council for the Parties by the manner of the Defence. For whereas the Advocates for the contending Parties having only the Interest of one of the Parties to defend, they may restrain themselves to what concerns the Interest for which they are of Counsel, and aim only at touching the Minds and Hearts of the Judges with the Sentiments and Passions which the Quality of their Causes may render necessary; so that the Exaggerations, and the other Figures of Expression adapted to the State of the Causes, may in their Mouths be natural to the Eloquence of their Profession: whereas the Duty of defending Justice being joined in the Mouth of the King's Council to the Dignity and Authority of their Offices, whose Functions are to bear Testimony to the Truth of the Facts, and to protect the Party who has Justice on his side, they ought to weigh the Interests and the Arguments on both sides, and to defend the just Cause in such a manner as to embrace only the Cause of Truth and of Justice; which banishes from their Eloquence the Figures and Ornaments which might give occasion to People to suspect they favoured the Interest of one Party more than the other, upon some other Consideration besides that of Equity which demands their Protection, and in defence of which alone they ought to employ the Force and Dignity of their Eloquence, which is consecrated to Truth and to Justice.

We may likewise place in the number of the Persons whose Professions or Imployments may require the Use of Eloquence, those who preside in Assemblies, whether Ecclesiastical or Secular, Ambassadors, Generals of Armies, and others who may have occasions of speaking in publick; and every one of the said Professions or Imployments hath its peculiar manner of Eloquence. But of all the sorts of Eloquence, there is none of so great Importance to the Publick as that of the Persons whose Business it is to preach the Word of God to the People, Bishops, Pastors, and others who have the honour to be called to this Function; the Ministry whereof demands a sort of Eloquence proportioned to it by singular Characters, and such as may distinguish it from all other sorts of Eloquence, according as its End and its Use is different from theirs. For whereas all the other Uses of Eloquence are to persuade the Mind of some Truths, or to stir up in the Heart some Sentiments which may naturally become agreeable both to the Mind and to the Heart of the Persons whom we are desirous to move and to persuade, whether it be that they have no Interest at all of their own in the Matter, or whether their Interest be any way concerned; the Use of the Eloquence which ought to accompany the Word of God, is to enlighten the Mind with Truths, and to touch the Hearts with Sentiments and Motions, which tho essential to their greatest Interest, yet being far from being naturally agreeable to them, meet with nothing in the greatest part of Mankind but Opposition, and a Resistance which God alone can vanquish. The Persons to whom the Word of God is to be preached, are blind Men whose Eyes are to be open'd, deaf Men who must be made to hear, Persons afflicted with the Palsy who are to be put in motion, Lovers of their Pleasures, of their Interests, and Slaves to their Passions, who are to be taught and persuaded to abandon what they love, and to set their Affections on Objects which they despise, and whose Charms must render insipid and even horrible to them all the Objects of their Passions. So that this Work, which is next to a Miracle, cannot be effected but by virtue of an Eloquence which has the divine Character of the Truths which it teaches, and of the Sentiments which it ought to produce; and this Character is nothing else but the Light which shows those Truths in their true Colours, in order to persuade the Mind of them, and the Charm which inspires the Love of them into the Heart.

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It is easy to judge that an Eloquence destined to such an use, ought to have for its primary Rule, that it be the Spirit of God which rules and actuates every thing that goes towards the forming of it: and altho God permits that the Ministers of his Word who preach it with another Spirit do nevertheless instruct and move some of their Hearers, either because of the good Dispositions of those who go to hear them, or by the Effect of a particular Providence of God over them; yet it remains always true, that he who preaches the Word of God being bound to endeavour to elevate the Minds of his Hearers towards God, ought to have for his Principle that Spirit of God which ought to animate his Spirit, and to pass from his Mouth and from his Heart to the Ears and to the Hearts of his Hearers.

According to this Principle, which we may suppose to be well established, and of which we need not bring here any more ample Proofs, every thing which those who preach the Word of God mix of their own that does not agree with the Spirit of God, cannot be proper for their Eloquence; and it will have on the contrary its Perfection by having the Characters of the Divine Spirit, since it is God that is to speak by their Mouth. Thus the Scriptures being God's own proper Language, it is chiefly from that Fountain that the Preachers of the Word of God ought to draw the Foundations and the Ornaments of their Eloquence; neither can they propose to themselves for a Pattern any Eloquence which comes up to that of the Holy Scriptures, not only in their own kind, but even in any other. So that it is somewhat strange that some pious Authors have been of opinion, that we ought not to search for Eloquence in the Scriptures, having been persuaded that their Character of Simplicity is quite opposite to it; whereas the Heathenish Authors themselves have discovered in this Simplicity of the Scriptures, Beauties and Nobleness of Expression which they have given as an Example of that kind of Eloquence which is called the Sublime. And we see also in all the Books of Scripture, that this Character of Simplicity is nothing else but an Effect of its being the Holy Ghost himself who expresses himself there, and who alone is able to inspire Expressions suitable to the Truths which he alone teaches, and of which he alone can give just Ideas; which is the reason that we see in many Places of the Scripture Strokes of such an Eloquence as that the Character of it marks clearly that it is God who speaks, and such as no Man could ever have been able to attain to: For what Man, for example, could have ever thought of saying, *He is that He is*, if God himself had not taught *Moses* that Expression, defining himself by these Words, *I am that I am?* d What Man could have been able to express the manner in which God created all things, if this divine Historian of the Origin of the World, who has had the Attestation of God himself, had not learned of him what he teaches us by a divine Expression, which marks that it was one bare Word of the Will of God which produced out of nothing all that he created? This is what is meant by these Words of *Moses*, *Let there be Light and there was Light* e, and by this Expression of another Prophet, *He commanded and they were made* f.

We might give Instances here of many Expressions of this divine Eloquence of the Holy Scriptures, both in the Old and New Testament, whether it be for speaking to the Mind, or for touching the Heart. For in the Old Testament one may more especially admire the Eloquence of the Books of *Moses*, and of the other Prophets, who all of them preached the Word of God to the People; and also the Eloquence of the Book of *Psalms*. And it may be said of the New Testament, that nothing is comparable to the Eloquence of the Words of Jesus Christ, who in a Simplicity of Expression, and in a wonderful Justness of Parables, and in all his other Ways of instructing Men, displays such a Grandeur and Comprehension of Truths, that none but God alone was capable of teaching after that manner, and which made even those whom his Enemies had sent to lay hold of him, say, that never Man spake as he did g.

May we not add as a Stroke of his divine Eloquence, that which shines in his Silence before *Pilate*, who was much more surprized and touched with the Meaning of the Silence of such a Man in those Circumstances h, than one could be with any Words whatsoever: So that this very

d Exod. 3. 14.
e Gen. 1. 3, 6, 14.
f Psal. 148. 5.
g *Never Man spake like this Man.* John 7. 46.
h Mat 27. 14.

Silence

Silence was an Expression which had the Character of an Eloquence that was truly Divine. We shall only add concerning this Eloquence of the Holy Scriptures, that altho the Works of St. *Paul* have not that Regularity in the Composition, which may seem to be the first and most necessary part of Eloquence, yet however he takes in all the Grandeur, all the Dignity, and all the Efficacy of the most sublime Eloquence, by the short and lively manner in which he heaps together the Treasures of the most important Truths, those which are the most capital and the most essential to Religion, which he scatters out of his Fulness, as if it were a Torrent of Jewels which he gives to be ranged and set in order by those who read him, and who study him with that Application which one ought to have in reading Works endited by the Holy Ghost.

It is true, that the Simplicity and the Brevity of the Expressions of Scripture in explaining all the things which it teaches us of the highest and most exalted Nature, containing in a few Words Truths and Instructions which are essential, capital and fundamental, and which are the Principles and the copious Sources of that infinite Detail of every thing that concerns our Conduct and all our Duties; it is neither possible for the Preacher to imitate the Character of that divine Eloquence, nor easy for the Hearer to comprehend by the bare Pronunciation all the Substance, all the Extent, all the Grandeur, and all the Beauty of it; so that the use of this Sublimity of Eloquence in the Holy Scriptures is rather the Matter and the Object of a long and profound Meditation on the Truths which it teaches, and on the different Instructions which its Fruitfulness does contain, than an Example of Style to be imitated.

It is on the Reading and Study of those divine Writings, that the Persons whose business it is to instruct the People, ought to found all their Knowledge and all their Eloquence; for it is in this Treasure alone that are contained the inexhaustible Sources of all the Truths with which they are to enlighten and instruct the Minds of those who hear them, and of all the Sentiments with which they are to touch their Hearts. And we see likewise this Grandeur, this Beauty, this Fruitfulness of the Eloquence of the Holy Scriptures, by two Effects which are two sensible Proofs of it; one of the constant Use of the Word of God in the Service of the Church, where those who have the Taste of this Eloquence discover infinite new Beauties in the same Words; and the other of the Distinction of those Preachers who make the Scriptures their chief Study, and who fill their Minds and their Hearts with them, and of the Difference between the Success of their Sermons and that of the Discourses of others; which is an Effect of their being persuaded themselves of the Truths, and penetrated with the Sentiments which they endeavour to teach and to inspire into others. For if it is true, that in human Eloquence he who would raise any Passion or Sentiment in his Hearer ought to be touched with it himself, as a Heathen Author has observed *i*. This Rule is more essential to those who speaking on the part and in the Name of God, ought to speak only for the Use of their Mission, which consists in enlightning the Minds with the Light, and enflaming the Hearts with the Heat of that Fire which he who sends them has said he was come to kindle in the World *l*: and seeing it is only Fire that can kindle Fire, and that they are the first who ought to be enflamed themselves with that Fire with which they are to enflame others, their first Rule without doubt is, that they ought to have first of all in their own Minds and Hearts that Fire which they are to kindle in the Minds and Hearts of their Hearers. It was to denote the Character which their Eloquence ought to have of this Celestial Fire, that when God sent the Holy Ghost to the Apostles and to the other Disciples, to fill them with the Gifts of their Ministry, and especially with that of preaching his Word, the Holy Ghost which was to animate them appeared on them in the shape of Tongues of Fire *m*; and the first Effect of the Light and of the Ardour of that Fire in their Words was to kindle it in the Hearts of their Hearers *n*, as he who sent them had a few days before enlightned and enflamed by his Words the Minds and the Hearts

i Si vis me flere, dolendum est primum ipsi tibi. *Horat. de art. poet.*

l Luke 12. 49.

m Acts 2. 3.

n When they heard this, they were pricked in the Heart. Acts 2. 37.

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Hearts of two of his Disciples, to confirm them in the Truths of his Mysteries o.

Those are most certainly the Models which Preachers ought to imitate, those are the Examples which they are to follow, and those Truths are the essential Principles of the Eloquence which they owe to the Publick. If they imitate those Models, if they are persuaded of those Principles, and if they endeavour to make them their Rules, they will be eloquent without the Pomp and Show of the Rules of Rhetorick: and if on the contrary they confine themselves to please the Mind by the Use of this Human Eloquence, they render themselves unworthy of the Sacred Ministry which they profane; by preferring to the essential Character of natural Eloquence, to this Divine Ministry which is to elevate the Minds of Men to God, the opposite Character of the Art of pleasing them in order to draw them to themselves. This we do not say with any View to condemn in the Ministry of the Word of God, the Use of all Ornaments: for all that we have just now said excludes from this Ministry only such Ornaments as do not suit with its Dignity and with its Spirit, and which are more proper to divert the Auditors, and to beget in them an Esteem of the Preacher, than to elevate them to the Love of God. But there is an infinite Number of Ornaments which are both delightful and have a Nobleness and a Dignity in them, and which it is very useful to make use of in preaching the Word of God, altho they be strokes of natural Eloquence, and even of that from whence the Rules of the Beauty of Discourse have been drawn. For since the said Rules are gathered from what has been observed in Nature to be proper for pleasing the Mind and for touching the Heart, and that Nature is the Work of God, whatever the natural ways of speaking in Publick, or of Writing, may have in them that is beautiful, noble, solid, and proper to insinuate into the Minds and into the Hearts of People an Esteem and a Love of the Truths of Re-Religion, will be proper for the Eloquence of Preachers; and they are only to reject such of those natural Ornaments as would fall into the Vice of pleasing bare Curiosity, or into other Faults which the Corruption of Nature might mix with what it has retained of good; but they may wisely and prudently imploy in their Sermons the Ornaments which may be proper and adapted to please the Mind, not for the Mind it self, which would serve only to satisfy Curiosity, but to make way thro the Mind into the bottom of the Heart, for the Charms of the Truths that are worthy to be preached on the part of God, and by his Word.

It is not a difficult thing to discover by these Principles the manner in which those who are called to the august Ministry of preaching the Word of God ought to prepare themselves, and out of what Ornaments they ought to form an Eloquence, into the Composition of which nothing is worthy to enter that is not a Light and a Charm of the Spirit of God; so that an Eloquence which has the essential Parts of this Character with ever so little a share of the Art of pleasing, will be able to persuade more efficaciously than any other Eloquence whatsoever that should be without this Character, that is so essentially necessary for persuading and convincing.

Besides this Necessity of Grammar, of Classical Learning, and of Eloquence, for the several purposes which we have just now explained, one has occasion in several Professions for the Study of Philosophy, and especially in the Professions of Divines, Lawyers, Magistrates, Physicians, and others who may require the Use of some Science. It is this Philosophy which in the Universities is ranked among the Arts, and which is distinguished into four different Parts, which are Logick, Physick, Metaphysicks, and Moral Philosophy.

Altho these four parts of Philosophy seem not to have all of them a relation to all those Professions, and that for example, Physick seems to be but little necessary for the Use of Law, it is however certain that they have all of them this double Usefulness for the Study of all sorts of Sciences, That every one of them may have by some of its Matters and Rules some relation or other to some part of each Science, and that all of them together have in general the Effect of forming the Mind, and accustoming it to the understanding of all sorts of Matters, of inuring it

o *Did not our Heart burn within us, while he talked with us by the way, and while he opened to us the Scriptures?* Luk. 24. 32.

Thy Word is very pure; therefore thy Servant loveth it. Psal. 119. 140.

Every Word of God is pure; he is a Shield unto them that put their Trust in him. Prov. 30. 5.

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it to form exact and precise Ideas of all sorts of Objects, and especially of those which do not fall under the Senses, and of confirming it in the just ways of apprehending and reasoning: for the Objects of Logick, of Metaphysicks, of Moral Philosophy, and many Objects likewise of Physick, are matters which the Mind apprehends independently of the Senses, which accustoms it to think likewise, and to reason without the help of the Senses, and to be able to discover in all matters that which they have that is most spiritual and most proper to be the Object of the Mind, as will appear by the general Ideas which shall be given here of the Use of every one of these parts of Philosophy.

Logick is the first which opens the way not only to the other Parts of Philosophy, but also to all the other Sciences, as to Divinity, to Law, to Physick, and to the others: for besides this general Use, which we have just now remarked, of accustoming the Mind to Objects that are purely Spiritual, which the other parts of Philosophy have in common with Logick, it is properly the Art of guiding and directing the Mind to form just and precise Ideas of all Things, especially of those which are only the object of the Understanding, and in which the Senses have no share. It is for this Use that this Science considers in all things independently of the Senses, that which is common to them all, such as their Being; or common only to many and not to all, as the Animal Life, which is common to Men and to all sorts of Animals; and that which is common only to a few sorts and kinds of Things, such as the Understanding, that is common to Angels and to Men: and at the same time Logick considers what the different Kinds have peculiar to them, that distinguishes the one from the other. Thus among the Things which have the Animal Life common to them, the Understanding distinguishes Man from the Animals which have this Life in common with him. It is by these Views of what is general and common, either to all sorts of Things, or to many sorts, or to some, and of what each sort has peculiar to it self, that we distinguish that which is called Kinds and Species, which have more or less extent according as the Characters which distinguish them are more or less general, and agree to more or fewer sorts of Things; and it is by the means of those Characters which make the Kinds and the Species, that Logick gives the Method of distinguishing, of dividing, of defining, that is to say, of conceiving the Order of the Things which have between them some affinity by reason of Characters that are common to them, of ranging every one with those that belong to its Rank, and of separating the one from the others; of giving the precise Ideas of their Natures, which consist in those Characters which they have in common with others, and in those which distinguish them. And for the more exact observance of this justness, this Science teaches Persons to give the definition of the Names of Things before they proceed to define their Natures, the better to avoid Obscurities and Ambiguities in the Expression.

Logick considers the several Qualities which naturally follow the relation that every thing may have to others, such as a Cause to its Effect, a greater thing to a lesser, a Sign to that which it signifies; and it is by these Views, and others of the like nature, of what the Mind is able to distinguish both in the Substance and in the Qualities of all things, that it uses and accustoms it self to apprehend aright and to reason justly, receiving nothing for Truth but Principles that are certain, or Consequences justly drawn from the said Principles. It is also to prevent the drawing from good Principles any other Consequences than what naturally and most certainly follow from them, that Logick gives the Method which it has invented to place the Reasonings in such a regular Order, that the Rules of this Method being observed, it is impossible that the Conclusion of the Reasoning should not convince unanswerably, if the Propositions from whence it is drawn be allowed to be true: and this Certainty is the bare effect of placing those Propositions in a right Order, which makes that the Consequence drawn from them is necessarily linked to them, when those Rules are duly observed.

Of the other three parts of Philosophy, that which has the greatest affinity to Logick, is the Metaphysicks, because they consider Things independently of the Senses, and those very things which are corporeal and sensible. Thus Metaphysicks consider in all things their Subsistence, their Existence, the essential Properties which God has given to all Beings, and which are in every one its

its Unity, its Verity, its Goodness: for these three Characters are necessarily in every Thing, and every Being is one in its Nature, altho it may be composed of many different Parts, as a Plant or an Animal: Every Being is true by its Existence, which renders it conformable to the Principle of its Nature; and every Being is good by the bare Effect of its being the Work of God *p*.

It is likewise this Science that considers the different Kinds of Causes and of Principles, and the several manners in which one Thing may be the Cause or Principle of another; that distinguishes also the Spiritual Principles of the several Sciences which lead us to the Knowledge of Truth, such as those of Geometry, of which we shall speak hereafter, which are called Axioms; those of the Moral Philosophy, which are termed Maxims, and those of the other Sciences: and the Science of Metaphysicks has also its own Principles, such as this for example, that it is impossible that the same Thing should be and not be at the same time, and other Principles of the like nature. Thus we distinguish in the Metaphysicks the Causes which produce the Effects, as the Sun which produces Heat, which is called the efficient Cause; the Principles which make us to act, as the End which we propose to our selves, which is termed the final Cause; the Example which we imitate, and the others.

It is also this Science which raises it self to the Knowledge of the Nature of Angels, and of God, and of the Divine Attributes, not in the manner reserved to the Science of Theology or Divinity, which joins to the natural Reasoning the Principles of Faith, but by the bare Lights of Nature, which furnish several Proofs of the Being of a God, and which imply the Necessity of his Existence, of his Independency, of his Unchangeableness, of his Omnipotence, of his Providence, and of his other Attributes.

Physick differs from Logick and Metaphysicks, not only by the distinction of its Object, but also by the manner in which it treats of it: for it has for its Object only Bodies, and it considers in them principally what they have that is material and sensible; their Qualities, their Generation, their Corruption, their Construction, that is, the manner in which they are composed, that which makes and distinguishes the different sorts of Matters, the Conjunction of the little Particles of which all Bodies are composed, the nature of its Parts, that of the several Qualities of Bodies, Colours and others, and of the Light which makes them visible, the Causes of the Motions which is made in Bodies by that which is called Weight, and of those Motions made by the Impression that one Body may receive from another, what that Weight is, what that Impression is, what it is that produces that other sort of Motion; of the Dilatation of liquid Bodies that are heated, which is called Rarefaction; the divers Causes and Effects of that which is named Fermentation, and the other matters of the like nature, which have all of them almost a Character of Obscurity, which makes that they are rather the object of a Labour of the Mind and of a fruitless Study, than of a Science that attains to a clear and certain Knowledge of Things. For it may be said of this kind of Physick, that hitherto it has discovered almost nothing, and that in all appearance it will discover but a very few Things, which will give perfect Satisfaction to a reasonable Mind touching all the matters that it treats of; such as those which have been just now taken Notice of, and others of the like nature. Concerning which it may be said, that as God has given to Men the use of Sciences only for their Wants, he has imparted to them only the Knowledge which they may acquire by Reason and Experience of what may be necessary for the supplying of those Wants; and has hidden from them, as has been said in another place *q*, what would only be the Object of Curiosity; rendring himself equally admirable, both by the Order and Beauty of that which we know of his Works, and by the impenetrability of that which it is not his pleasure that we should know.

Physick has nevertheless its Use; for besides that it teaches some certain Truths, as for example, that which it borrows

p And God saw every thing that he had made, and behold it was very good. Gen. 1. 31.

q See the Treatise of Laws, *Chap.* 1. *Art.* 3.
He hath made every thing beautiful in his time; also he hath set the World in their Heart, so that no Man can find out the Work that God maketh from the beginning to the end. Eccles. 3. 11.
As thou knowest not what is the way of the Spirit, nor how the Bones do grow in the Womb of her that is with Child, even so thou knowest not the Works of God who maketh all. Eccles. 11. 5.

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borrows from Geometry, concerning the impossibility of coming to a final Division of the least Particles of every Body; that which it takes from Astronomy, for the Sphere, and the Motions either of the Heavens or of the Earth, which make the Days and the Years, and that in some other Matters it discovers several Truths: The Study even of the obscurest Matters in Physick, hath its usefulness in exercising the Minds of the Students by divers Reasonings. This very Physick hath also its Usefulness, in that it leads to another Physick, the Use of which is of great Necessity and Advantage to the Publick, and which hath for its Object the Discovery, by Reasoning and by Experiments on the several Kinds of Bodies and of Matters of all sorts, Animals, Trees, Plants, Minerals and others, of what Qualities they may have that may serve for the Use of Remedies for the several Distempers, and for an infinite number of other Uses in all the Arts: for their great Extent requires that there should be imployed in them an infinite number of divers matters which are necessary, either by their bare natural Qualities, or by the several Preparations which the Study of Experience for many Ages has discovered, and which may always be multiplied and brought to greater Perfection by cultivating this Study in the manner as it now is in *France*.

The fourth and last part of Philosophy, which is the Moral Philosophy, hath that in common with Logick and Metaphysicks, that its Object and its Principles are independent of the Senses: for it hath for its Object every thing that relates to Manners, the Nature and the Characters of human Actions, that is to say, of those of a free Will which acts for some End, and which are capable of Good or of Evil, the Nature and the Characters of this Liberty, the several Passions of Man, his Affections, his Habits, the Ends which he proposes to himself, his Inclination to Good and to Happiness either real or apparent; the Virtues which are called Moral, Prudence, Justice, Fortitude, Temperance; the Laws and other the like Matters, which are explained in this Science, in the manner that the Metaphysicks explain what relates to God and to his Attributes, that is, by Reasonings drawn from natural Lights. And we see likewise that many Heathen Authors have treated of this Science. As to which, it is necessary to remark the Consequence of the good Use of its Principles and of the particular Doctrines taught in it, that the Principles of Human Philosophy may not be extended so far as to destroy those of Religion, but that the Principles of Religion may always stand as the prime and fundamental Rules; and that all the Moral Philosophy may have its Spirit, its Source, and its Foundation in the Spirit of Religion, and in the Doctrines of Faith which ought to reign in every thing that we learn there.

Since the Consequence of the Integrity and Purity of Manners, and of all the Rules which relate to the matters that are taught in this Human Science of Moral Philosophy, has obliged us to make this last Remark, that no Use ought to be made of it to destroy the Principles of Religion, and the Doctrines of Faith; we may observe also on the three other Parts of Philosophy, Logick, Metaphysicks and Physick, that it is of importance not only that nothing be mixed with them, and that none of their Principles be turned to the subversion of the Doctrines of Faith, but that care ought also to be taken to avoid in all sorts of Reasonings, upon any matter whatsoever, not only the Subtilties and the useless Curiosities which some mix with what is necessary and useful in those Sciences, but also the bad Use even of their Principles and of their Rules: for altho their Principles and their Rules have their Foundation in Nature, and that therefore a solid Judgment may make an Use of them which may appear to be without Art and wholly natural, yet some Persons use them in their Discourses and Writings in such a manner as shews the Method and Air of the Schools, as it happens to those who make the like bad use of Rhetorick; whereas the good use of all the Principles and of all the Rules of Rhetorick, of Logick, and of Metaphysicks, being drawn from Nature, ought to be the Effect of conceiving and of reasoning naturally. So that we ought to use the Principles and the Rules of these Parts of Philosophy, only after the same manner that we use those of Grammar, which we observe naturally without making Reflection, either on the different Nature of the Nouns, the Verbs, the Participles, and the other Words which compose all the Lan-

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Languages, or on the Moods and Tenses of Verbs; which must be understood in proportion to the different Uses of all these several Arts, and to the different Manners in which the Habits of them may be acquired.

Before we proceed to the other Arts or Sciences that are taught in the publick Schools, and the chief of which is Geometry, it is necessary to call to mind here the Reflection which has been already made on Physick; That altho that Science hath for its object Bodies and sensible Matters, the Nature of the Parts which compose them, that of their Qualities, and the other Things of the like nature which it considers; yet it gives us but a very little Knowledge of them that has any thing of certainty in it: whereas Geometry, which hath also for its object Bodies and sensible Matters, but which it considers under other Views, teaches nothing about them, which not only is not most certain, but which does not carry with it such an Evidence as that every Mind that is capable of this Science is convinced of every thing which it advances, in the same manner as every one is assured that the Whole is greater than its Part.

This difference between Geometry and Physick, is a natural Effect of the difference of the ways in which the one and the other consider Bodies, and the Matters which are their Object: for whereas Physick ought to consider in Bodies their Causes, their Qualities, in order to discover what is their Nature, which is invisible to the Senses; Geometry does not consider either their Causes, or their Qualities, but only their Quantity, which it considers independently of the Nature of the several sorts of Bodies and of all their Qualities, restraining it self to the bare Consideration of that which enters into the Idea of Quantity. It distinguishes Quantity into two Kinds; one of the Extent of that which is contained, and which consists either barely in length, as Lines, the Points of which make the Extremities; or in length and breadth together, which make the extremities of the Bodies, and which is called their Surface; or in length, breadth and depth, which make solid Bodies: the other Kind is of Numbers, which make the quantity of distinct Things. And because the Duration of Time and the Motions of Bodies make also a kind of Quantity, Geometry has likewise its Use in them, according as the said Duration, and the said Motions are considered under this Idea of Quantity. Thus Geometry considers the several sorts of Lines, strait, crooked, spiral Lines, and others; the several sorts of Angles which those Lines make when they meet in a Point; the Figures of Triangles, of Circles, of Squares and other Surfaces, Pyramids, Cubes, Globes, and other solid Bodies; the Parts of Duration and of Motion: and in every one of all these different Objects, Geometry considers their Nature, their Properties, the Relation that one of them has to others of the same Kind, and their Differences, as whether one is greater than the other; the manner in which one is contained within the other, which is called Reason; the Comparison of the Reason of one to the other, and of another Reason of another Object to another, which is called Proportion; and beginning with the Definitions of the Terms and of the Things which they signify, with the Rules which establish indisputable Principles, such as these, *That two Things equal to a third, are equal among themselves*; that *if to every one of two equal Quantities other equal Quantities are added, the whole will be equal*; and others of the like Nature; with demands or *postulata* which cannot be refused, such as *that leave be given to draw a Line from one Point to another*; they discover by this Progression an infinite sequel of Truths, the first of which are evident by their necessary Connexion with the Definitions, the Principles and the Suppositions which have preceded. And from these first Truths which become of themselves Principles by reason of their Evidence, one proceeds to others successively, in such a manner as that nothing be advanced which has not the Evidence of a Definition or of a Principle, or which is not demonstrated with the same certainty as Principles have.

It is by this Chain of Definitions, of Principles and of Demonstrations which depend one upon another, that we discover in Geometry an infinite number of Truths which seem to be impenetrable, and some of them which even pass the bounds of all imagination; as for example, that there are Lines, Surfaces and solid Bodies, which compared with other Bodies of the same Kind, can have no common Measure, how little soever it be: and these are called incommensurable Quantities, which

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which cannot be compared with one another, as one Number may be with another Number; for all Numbers have for their common Measure at least Unity. But should we divide those Quantities into Particles even to an infinite Number, we could never come at a Particle small enough to serve as a common Measure to those Quantities, as Unity is a Measure common to all Numbers; and all the smallest Particles that one can ever come at by dividing always, will be all of them too great to measure exactly those two sorts of Quantities; in the same manner as the number two is too great to be a common Measure of three and of four, or of ten and eleven.

It is not proper to enlarge any more here, either on the matters which are the Object of Geometry, or on the several Manners that are there used to form the most difficult Demonstrations, as in that part of Geometry called Algebra; but it was necessary to make these few Remarks, in order to explain in general the Order of the Method which Geometry takes to prove that which she teaches. And as in Logick we have explained in general its Use for rightly apprehending all sorts of Objects and Reasoning about them; so we ought likewise to remark in the Method of Geometry the Order which it observes for the same use, and to consider at the same time the difference between the Object and Method of Geometry, and the Object and Method of Logick.

This difference consists, as to the Object, in this, that the matters of which Logick treats are of a Kind of which the Truth is not so sensible as the Truths of the Matters treated of in Geometry, and that the Ideas of them are more abstracted. And as for the Method, the difference is this, that the Method of Logick, which is the Art of Syllogism, is susceptible of those false Reasonings called Paralogisms, by which one imposes on those who do not know sufficiently the Rules, or who are not clear-sighted enough to perceive the false Reasoning: but one can never abuse the Method of Geometry, to lead into Error, or to surprize at any time Persons of the shallowest Understanding, if they are at all capable of this Science; since they need only to examine at every step whether every thing is so clear and certain, that there remains no doubt nor obscurity in it; and whether the Truth of it be evident, either of it self, or by its Connexion with those that have been proved.

It is by this Method of Geometry, that those who have the Knowledge of it ought to form their Reasonings upon all matters, in so far as it is capable of being applied to them: for this manner of Reasoning is more simple, more natural, and more easy than that of Logick, which comprehends many more Rules, the most of which are abstruse, and of which all Understandings are not capable. So that this Method of Geometry is more within the reach of all Capacities, and it is likewise more proper to set every thing that ought to enter into a Discourse of Reasoning in its proper Order, in its true Light, and in its full Force, and to discover all the defects of justness in the Reasoning. This Method may be reduced to two simple Rules; one, not to admit any thing for true which is not either evident of it self, or demonstrated; and the other is to range all the particular Truths which one intends to prove, according as they follow the one from the other. And it is in observance of these two Rules, that the Geometricians begin with defining the Words and the Things of which they intend to speak, with establishing the Principles on which depend the Truths which they are going to prove, and with drawing from those Definitions and from those Principles the Consequences of the Propositions which they shall advance; laying down always in the first place those Propositions that are most nearly linked to the said Definitions and Principles, and then laying down afterwards those Propositions which depend on the first.

And altho it be true, that all sorts of Matters about which one may reason or discourse, do not consist in Truths that are capable of the evidence or Certainty of those of Geometry, yet its Method is nevertheless useful in them: for it is natural to all sorts of Reasonings, of Proofs and of Discourses of what nature soever, whether they be intended for teaching or for other Uses, to begin with that which is clearest, easiest, and most certain; and to observe the natural Order of the Cohesion and Connexion which the Things of which one intends to speak have among themselves.

It is upon the account of this Method, which is so natural and so proper

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per to lead the Mind to the knowledge of Truths, and because of the certainty of the Truths that are taught in Geometry, that those who invented this Science, gave it the name of Mathematicks, which signifies Science; distinguishing it from all the other Sciences by its Characters of Order and of Certainty: for which Reason they taught it at the first entring upon the Study of the other Sciences, the better to dispose the Mind for them by this Method. But our Usage has extended this word of Mathematicks, not only to Geometry and to its Parts, such as Arithmetick and Algebra, which consist only in Theory, but also to the Arts which in their practice use the Principles and Rules of Geometry, such as that which is called Mechanicks, the Art of Fortification, and such like practised by Engineers.

This great Usefulness of Geometry is not the only one; it hath another Advantage of very great Importance to the Publick: for it is from this Science that are drawn the Principles and many Rules of other Sciences and of several Arts, which are not only very useful, but all of them most necessary; for besides Arithmetick, the Principles of which are a part of Geometry, it is likewise from this Science that are drawn the Principles of Cosmography, of Astronomy, of Chronology, of the Computation of Times, of Geography, of Mechanicks, of the Use of moving Force for an infinity of Machines and Instruments necessary in all sorts of Arts, of Architecture, of Sculpture, of Fortification, of Opticks, of Perspective, and of the Art of representing in a Plan the several Objects of sight, which is the foundation of Painting.

It is also in Geometry, that we have the Theoretick Principles of Musick, whether it be that of Human Voices or of Instruments. For it is an Art which consists in dividing the degrees of the elevation and falling of the Voice, which make the different Sounds, in regulating their Order and the Duration of every one of them, which is called Measure; and likewise the Extent of the Intervals when it is necessary to have any between two Sounds, and in distinguishing the Voices or the Instruments which are to bear a part in the Musick into different Parts suited to the Nature of the Voices and of the Instruments; in order to form by the variety of the Voices, and of the divers Sounds of each Voice, and by the different Measures of those Sounds and of those Intervals, the several Combinations which may make an agreeable Harmony, and which may answer to the sense of the Words that are to be sung, conveying to the Heart the Impressions of Tenderness, of Joy, or of other Sentiments and Motions which one desires to raise.

And seeing the Church hath established the Use of Musick in Divine Service, in order to move the Hearts, and to elevate them to the Sentiment which the holy Words which it directs to be sung ought to inspire; and that the said Words require such a Musick as is both grave, moving and easy; that the Use of it may be common to all the faithful, it has ordained in all the Churches where the faithful assemble together for the Worship of God, the Use of a certain manner of Singing composed of Sounds of the same Duration, and of Combinations less figured than those of ordinary Musick. This manner of Singing is for this Reason wholly consecrated to the Church, as being proper by its Gravity to inspire the Spirit of the Words which compose the said Divine Office, and especially of the Psalms, which are the chief and principal Part thereof, and which have been composed in order to be sung. But this Church-Musick loses its Use which was intended by the Church, if those who celebrate and sing the Divine Service, do not observe in it that Gravity, that Modesty, that proper Slowness and Attention that is becoming the Dignity of that Musick which is to express Words inspired by the Spirit of God, and which are addressed to him, either to praise him, or to pray to him, and of Musick which is to make a part of the Divine Worship, in which every thing ought to be solemn and august.

Besides this ordinary Use of Musick in the singing of Psalms which the Church has established for the Celebration of Divine Service, it hath also received the Use of other Musick, and of Instruments. But the vast Liberty of Ornaments in Musick, makes that those who compose Hymns for the Church, not having always the View of proportioning them to its Use according to the Holiness and Dignity of the Words which are to be sung, and of the Sentiments which ought to be inspired, they mix often in their Compositions Ornaments of a Musick

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Musick that is but little suited to this Dignity, and to the Gravity which the Spirit of the Church requires; and this would seem to deserve some Reformation, there being some very antient Churches which have intirely laid aside the Use of this sort of Musick in the Divine Office.

The Use of Musick brings to mind here that of Poetry, the Principles of which are taught with the Classick Learning, as has been already remarked: this Use of Poetry is such, that it hath not only its Usefulness but also its Dignity even in the Church, and we see Examples of it in the Holy Writings, where we have Poems inspired by the Holy Ghost, and especially the Psalms which are a kind of Poetry; and the Church approves also of the Use of it for other sorts of Poems, which are the Hymns composed at several Times. For, as has been said of Musick in Divine Worship, that it is of great Usefulness therein by the Effect of the Motions and of the Sentiments which are raised in the Heart by a Musick proportioned to so Holy an Use; so Poetry hath its Beauty and its Dignity by the Elevation of its lively, sublime and rhetorical Expressions, and by their being ranged in such a Measure and Cadency as makes upon the Mind the same Impressions as Musick does on the Heart. It is for this Reason that we give to the figured Language of Poetry the name of Song, which has this double Usefulness, that the politeness and elegancy of its Expressions, and its other Beauties, make an agreeable Diversion and Entertainment, and that we gather from the Works of the antient and modern Poets many different Instructions, by Sentences of all kinds, by divers Truths of some Sciences, and even by having from thence Rules of speaking and writing well, by the Facility of acquiring a habit of getting things by heart, and by other ways. But care ought to be taken not to put into the hands of unguarded Youth such Passages of any of the said Poets as contain any thing which may tend to seduce unthinking Minds to Irreligion and Immorality, as has been already observed.

It has been necessary to give these general Ideas of the Sciences and of the Liberal Arts, that are taught in the Universities, Colleges and Schools, to shew, by the relation which these Sciences and Liberal Arts have to the publick good of the Society, what is the Necessity and Usefulness of them, and by consequence what is the Necessity and Usefulness of having an Establishment of Professors to teach them.

This first Use of Universities, to teach Human Learning, the Sciences and Liberal Arts, which we have been now speaking of, has been followed by a second Use, which is that of giving a kind of Title, which is called a Degree, to those who after having spent a certain limited time in their Studies, have given Proofs of their Capacity by authentick and publick Acts. And the said Degrees are distinguished in two manners; one, from whence this word Degree has been derived, and which consists in this, that they are given one after another in proportion to the length of time that has been spent in Study, and to the greatness of Capacity; the first which is called Master of Arts, the second Batchelor, the third Licentiate, and the fourth that of Doctor.

The other distinction of Degrees is taken from the several sorts of Studies of the Sciences of Divinity, of the Canon and Civil Law, or of Physick. The Degree of Master of Arts, is given after the Study of Philosophy, and is necessary only to those who are willing to rest at that Degree, or to proceed further to the Study of Divinity, to take therein the Degrees of Batchelor and others, if they incline to it, and render themselves fit for it. The Degrees of Batchelor, Licentiate and Doctor are given in Divinity, in the Canon and Civil Law, and in Physick; that is to say, for one of these three Studies; so that there are in the Universities four sorts of Studies, which are called Faculties. The first of Divinity; the second of the Canon and Civil Law, both which make only one Faculty, for one cannot take the Degree in one without the other; the third, is of Physick: and in every one of the said three Faculties there are the three Degrees of Batchelor, Licentiate and Doctor. The fourth is the Faculty of Arts, in which in the Universities of *France* there is only one single Degree, which is that of Master of Arts.

The Use of the said Degrees is to give to those who have them, the right of exercising Functions, which require a Capacity in some one of those Faculties, or of filling places, whether it be in the Church, or in the Temporal Order

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Order of the Society, such as the Offices of Judicature, and the Professions of an Advocate, or Physician.

Seeing our View of treating here of Universities is only with respect to the Publick Law, to show what the Use of them is in a Kingdom, and with respect to what concerns in general the Policy or Government of the said Societies, and the Duties of those who are Members of them; it was not proper to explain here at large the Origin of Universities, the Progress of their Establishment, and other Historical Facts relating to this Subject; for these would be Digressions very remote from the design of this Book. We shall only observe in a few words, the resemblance there is between our Universities, Colleges and publick Schools, in which there are several Professors, and those publick Schools *a* which were kept at *Rome* in the Capitol *b*, and likewise at *Constantinople*, where they taught Grammar, Rhetorick or Eloquence, Philosophy, and the Laws *c*.

Since all Towns cannot have Universities, there are established in most of them Colleges and publick Schools, as is to be seen in many of the Towns of *France*: and it is even ordained by the 24th Article of the Ordinance of *Blois*, that the Archbishops and Bishops shall establish within their Dioceses Seminaries and Colleges for the Instruction of the Youth, both in matters of Learning *d*, and the Service of God. But in all the said Colleges, there is only the bare assistance in Studies, without any right to confer any Degrees.

Besides the Universities and Colleges for the teaching of Sciences and Liberal Arts, there are likewise Academies for teaching the Exercises of Riding and Fencing, and likewise those Parts of Mathematicks which relate to Fortification, to Encampments, the ranging of an Army in Battel-Array, and other matters necessary to be known in the Profession of Arms. There are likewise other sorts of Academies for the Study of Arts, such as those of Painting, Sculpture, Architecture and others. But all these sorts of Academies, altho composed of divers Masters for the several Studies and Exercises, are not of the number of Corporations and Communities, unless they be established as such by the Authority of the Prince. And as for the Colleges, they are a part of the Body of the University to which they belong; as in the Towns where there are Universities composed of several Colleges; and the other Colleges which are separated from the Universities, may form Communities, if they be established as such by Letters Patent of the Prince.

All the Rules which concern Universities, Colleges and Academies, are of two sorts; one of those which relate to the Government or Discipline of those Houses, and which may regard their Rights, their Affairs, their Privileges; and the other of those which concern the Duties of the Persons who compose them, in so far as their Functions have relation to the Publick: and these two sorts of Rules shall be the subject Matter of the two following Sections.

a In publicis Magistrationibus. *l. un. C. de stud. liberal. urb. Rom. & Constantinop.*

b Intra Capitolii auditorium constituti. *d. l.*

c Grammaticos tam Græcos quam Latinos, Sophistas, & Jurisperitos in hac regia urbe professionem suam exercentes, & inter statutos commemoratos. *l. 1. C. de profess. qui in urb. Constant. doc. ex ex. leg. mer. comit.*

Habeat igitur auditorium specialiter nostrum in his primum, quos Romanæ eloquentiæ doctrina commendat, oratores quidem tres numero, Grammaticos vero decem, in his etiam qui facundia gravitatis pollere noscuntur, quinque numero sicut Sophistæ, & Grammatici æque decem. Et quoniam non his artibus tantum adolescentiam gloriosam optamus institui; profundioris quoque scientiæ atque doctrinæ memoratis magistris sociamus auctores. Unum igitur adjungi cæteris volumus qui Philosophiæ arcana rimetur, duos quoque qui juris ac legum voluntates pandant. *d. l. un. in f. Cod. de stud. liberal. urb. Rom. & Const.*

d Magistros studiorum Doctoresque excellere oportet moribus primum, deinde facundia. Sed quia singulis civitatibus adesse ipse non possum, jubeo, quisque docere vult, non repente nec temere prosiliat ad hoc munus, sed judicio ordinis probatus, &c. *C. Theod. de med. & profess.*

Avoiding profane and vain Bablings, and Oppositions of Science, falsly so called. 1 Tim. 6. 20.

Be not carried about with divers and strange Doctrines. Heb. 13. 9.

There is one that sheweth Wisdom in Words, and is hated; he shall be destitute of all Food. For Grace is not given him from the Lord: because he is deprived of all Wisdom. Ecclus. 37. 23, 24.

See the 2d Article of the 2d Section, and the Articles that are there cited.

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SECT. I.

Of the Rules which relate to the Government and Discipline of Universities and Colleges.

The CONTENTS.

1. *Universities are partly Ecclesiastical and partly Secular.*
2. *Two sorts of Rules for the Government of Universities, Colleges and Schools.*
3. *Rules which relate to the Administration of these Communities.*
4. *Rules concerning the Duties of those who are Members of the Universities.*

I.

1. Universities are partly Ecclesiastical and partly Secular.

UNiversities are mixed Bodies, partly Ecclesiastical, and partly Secular; for the Profession of the Faculty of Divinity is an Ecclesiastical Ministry, and that of Law and Physick is a Secular Ministry: Thus, the Body of the University is composed of other distinct Bodies, each Faculty forming its own Body, and having its peculiar Rights and Functions separated from the others; and they have all of them together Rights and Affairs which are common to them all, and which out of the said different Bodies form one which comprehends them all *a*.

a 'The Faculty of Divinity hath its Functions 'which relate to the Church, and it can be com'posed only of Ecclesiasticks; and the Faculties 'of Law and of Physick respect the Temporal State, 'and may be exercised by Lay-men. But it may 'be observed as to the Faculty of Law, that altho 'the Canon Law, which is a part of it, contains 'many Matters that are purely Ecclesiastical and 'Spiritual, the Profession of teaching them may 'be exercised by Lay-men: which has been esta'blished most probably on this account, because 'the Ecclesiastical and Spiritual matters of the 'Canon Law are there mixed with an infinite 'number of Temporal Matters which belong to 'the Civil Law.

II.

2. Two sorts of Rules for the Government of Universities, Colleges and Schools.

The Government of Universities, of Colleges, of Schools, in the same manner as that of the Corporations of Towns, hath its Order proportioned to the Use and to the Functions peculiar to those Kinds of Communities; which comprehends two sorts of Regulations necessary for forming the said Order: the first is of those which relate to the Administration and the Preservation of the Goods, the Rights and the Privileges *b* by which the said Bodies subsist, and the Discipline that is necessary to be observed in them for keeping them in Order; and the second, which regards the Duty of those who compose these sorts of Bodies.

b Hac lege decernimus, ut qui in singulis scholis militant, quique post emensa stipendiorum curricula ad primiceriorum gradum perveniunt, & adorata nostræ divinitatis purpura, virorum clarissimorum comitum meruerint dignitatem: tam cingulo quam privilegiis omnibus sibimet competentibus perfruantur: ac deinceps usque ad finem vitæ foro tuæ celsitudinis tantummodo subjaceant: nec ex alterius cujuslibet sententia civile subire litigium compellantur. In criminalibus sane controversiis & in publicis tributis ita etiam adversus tales viros provincias moderantium congruam jurisdictionem volumus observari, ne sub prætextu concessi privilegii, vel flagitiorum crescat authoritas, vel publica vacillet utilitas. *l. 2. C. de privil. Schol.*

See the following Article, and the Text there quoted on it.

III.

3. Rules which relate to the Administration of these Communities.

As to what concerns the Administration and the Preservation of the Goods, the Rights and the Privileges of Universities, Colleges *c* and Schools, and the other Interests of these sorts of Communities, and the Discipline which is to maintain Order in them,

c Habita quidem super hoc diligenti inquisitione Episcoporum, Abbatum, Ducum, omnium judicum & aliorum procerum sacri nostri palatii examinatione, omnibus, qui causa studiorum peregrinantur, scholaribus, & maxime divinarum atque sacrarum legum professoribus, hoc nostræ pietatis beneficium indulgemus, ut ad loca, in quibus literarum exercentur studia, tam ipsi quam eorum nuntii veniant, & in eis secure habitent. Dignum namque existimamus, ut cum omnes bona facientes, nostram laudem & protectionem omnimodo mereantur, quorum scientia totius illuminatur mundus, & ad obediendum Deo & nobis ejus ministris vita subjectorum informatur: quadam speciali dilectione eos ab omni injuria defendamus. Quis enim eorum non misereatur, qui amore scientiæ exules, facti de divitibus pauperes, semetipsos exinaniunt, vitam suam multis periculis exponunt, & a vilissimis sæpe hominibus (quod graviter ferendum est) corporales injurias sine causa perferunt? hac igitur generali & in perpetuum valitura lege decernimus, ut nullus de cætero tam audax inveniatur, qui aliquam scholaribus injuriam inferre præsumat, nec ob alterius cujuscumque provinciæ delictum sive debitum (quod aliquando ex perversa consuetudine factum audivimus) aliquod damnum eis inferat; scituris hujusmodi sacræ constitutionis temeratoribus, & etiam ipsis locorum rectoribus, qui hoc vindicare neglexerint, restitutione rerum ablatarum ab omnibus exigendam in quadruplum: notaque infamiæ eis ipso jure irroganda, dignitate sua se carituros in perpetuum. Verumtamen si litem eis quispiam super aliquo negotio movere voluerit, hujus rei optione data scholaribus, eos coram domino vel magistro suo vel ipsius civitatis episcopo, quibus hanc jurisdictionem dedimus conveniat. Qui vero ad alium judicem eos trahere tentaverit, etiamsi causa justissima fuerit, a tali conamine cadat. *Auth. habita C. ne filius pro patr.*

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they have their Rules established or approved by the Ordinances of the Kingdom, and by their own peculiar Statutes; whether it be in relation to the manner of electing the Persons who are to look to the Observance of the said Discipline, and who are to take care of their Affairs, and of the Preservation of their Privileges; or of appointing those who are to exercise the several Functions of the Community, in every thing that relates to the Administration, the Discipline, and the Order of the said Houses: and besides the Rules which are peculiar to those Houses, they have in general the Rules which have been explained in the 2d Section of the Title of Communities.

IV.

4. Rules concerning the Duties of those who are Members of the Universities.

As to the Duties of those who compose the Universities, the Colleges, and Schools, every one of the said Bodies hath its peculiar Rules, which are of two sorts; one is of those which concern the Duties of the Persons who have the Direction of the Government and Discipline of the said Houses, in so far as they relate to that Function; and the other is of the Rules of the Manners and Duties of the Governours and Professors, in what concerns their Functions which have a relation to the Publick. Thus in the Universities they have Statutes which regulate the Order and Administration of them, and the Duties of the Persons who are appointed to take care of the said Order and Administration: the Statutes contain likewise the Rules peculiar to each Faculty, as to the time required for finishing the Studies thereof, the manner of examining the Students, and that of conferring Degrees; they contain also the Rules of the Manners and particular Duties of those who have Offices, and of those who are Professors. And seeing these sorts of Rules are almost all of them arbitrary, and that they are to be met with in the Statutes of the Universities, and in the Ordinances which confirm them, it is not proper to set them down here; but we shall explain such of those Rules as are of natural Equity, immutable and indispensible; and they shall be the subject matter of the following Section *d*.

d See the particular Statutes of the Universities, and the following Section.

SECT. II.

Of the Duties of those who are Members of Universities, Colleges, Academies; and of all Professors of Sciences and Liberal Arts.

BY the Duties treated of here, we are to understand those which relate to the Functions in which the Publick is concerned; and according to this View it is necessary to distinguish two sorts of Persons in the Universities, Colleges and Schools: the first is of those who are set over the said Societies as Heads or Governors, to see that the Order and Discipline thereof be duly observed; and the second is of those who under those Governors profess the Sciences and Arts of which the Studies are there established. Thus the Universities and Colleges are under the direction of those who exercise the different Offices under different Names, according to the several Usages, whether it be that of Rectors, Deans, Syndicks, Principals, Provisors, or others. Thus there are in those Societies Professors of Arts and Sciences; and we may take in under this name of Professors, as to what concerns the Rules of their Duties, those who instruct Youth *a*, and who teach them out of the Universities and Colleges, either some Art or some Science, at a publick School; and even those who teach the Exercises belonging to the Profession of Arms.

a Ut pueri juvenesque in divino cultu ab idoneis & piis magistris & sacerdotibus recte instituantur, & singulis diebus, horis consuetis pro more institutoque majorum res divina peragatur, eique non solum diebus dominicis & festis, sed etiam aliis intersint Scholastici. *Art. 2. of the Statutes of the Faculty of Arts.*

Videant magistri, ne vitiis Scholasticorum, sive in moribus, sive in disciplina, indulgeant; sed in eos pro delicti ratione animadvertant. *Art. 9. ibid.*

My Son, gather Instruction from thy Youth up; so shalt thou find Wisdom till thine old Age. Ecclus. 6. 18.

My Son, despise not the chastening of the Lord; neither be weary of his Correction. For whom the Lord loveth, he correcteth, even as a Father the Son, in whom he delighteth. Prov. 3. 11, 12.

How have I hated Instruction, and my Heart despised Reproof? and have not obeyed the Voice of my Teachers, nor inclined mine Ear to them that instructed me? Prov. 5. 12, 13.

He that refuseth Instruction, despiseth his own Soul: but he that heareth Reproof, getteth Understanding. Prov. 15. 32.

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2. *The Duty of those who are the Heads and Governours of those Societies.*
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I.

1. The first Duty, to observe the Statutes.

SINCE the Universities, Colleges and Schools have their Statutes and their Regulations established or approved by the Ordinances of the Kingdom, and that the said Statutes are the Foundations of the Order and Discipline of those Houses, and regulate the Duties of the Persons who compose them; we may set down for the first of the said Duties, that of observing the Statutes and the Regulations *a*.

a 'The Edicts and Ordinances of the Kings our 'Predecessors in relation to Universities, shall be 'kept and observed, together with the Statutes, 'Regulations and Decrees, made concerning the 'same. *Ordinance of* Lewis XIII. *in* 1614.

See the Ordinances relating to this matter. It is by the observance of these Regulations that the said Bodies are to be kept in Order.

See the Texts quoted in the Preamble of the said Section.

II.

2. The Duty of those who are the Heads and Governours of those Societies.

As to the Duties of those to whom the Care and Direction of Universities and Colleges is committed, the most important of those which concern more directly the publick Good, is that of watching over the Conduct, the Manners and the Doctrine of the Professors; and taking care that the Professors of Divinity do not advance or teach any thing which may impugn any Doctrine of the Church, whether it be in matter of Faith, or of Manners, or of the Church Discipline; and that the same Professors and others also teach nothing contrary to Law and to good Manners; but that on the contrary they inspire into their Disciples, both by their Example and by their Doctrine, good Principles of Morality, and of the several Duties incumbent on them, even those of good Subjects, such as the Duty of Obedience to the Prince, and to the Orders of the Courts of Justice *b*.

b Pueri juvenesque qui instituuntur, imprimis Regi Christianissimo bene precari & obedire, & magistratibus parere doceantur. *Art. 6. of the Statutes of the Faculty of Arts.*

Ad docendam & regendam juventutem magistros probatæ vitæ & doctrinæ recipiant, qui suo munere recte fungi noverint: quorum mores imprimis spectandi, ut pueri ab his & litteras simul discant & bonis moribus imbuantur. *Art. 1. ibid.*

Lustrent cubicula & libros Scholasticorum, ut certiores fiant an apud illos sint libri improbatæ doctrinæ, &c. *Art. 20. ibid.*

I opened my Mouth, and said, Buy her for your selves without Money. Put your Neck under the Yoke, and let your Soul receive Instruction, she is hard at hand to find. Ecclus. 51. 25, 26.

The Rod and Reproof give Wisdom. Prov. 29. 15.

Bow down his Neck while he is young, and beat him on the sides while he is a Child, lest he wax stubborn, and be disobedient unto thee, and so bring sorrow to thine Heart. Chastise thy Son, and hold him to Labour. Ecclus. 30. 12, 13.

'Altho these Texts have not all of them a precise relation to the Rule, yet they may be applied 'to it, since they naturally agree to the Functions 'of those who have the Government and Direction of Universities, Colleges and Schools.

III.

3. The first Duty of Professors, is Capacity.

As for the Professors of Sciences and Liberal Arts, their first Duty is to know them well, and to have the Gift of teaching them well, by the Facility of expressing themselves clearly and in proper terms, by observing the Order and the Method which agree to each Art and each Science, by setting things that are obscure in a clear Light, by discerning and picking out all that is essential, useful and necessary, and by cutting

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cutting off what is useless and superfluous. And if the Persons who offer themselves to this Imployment should fail in their Duty to do Justice to themselves, by offering to engage in this Function without the necessary Capacity, it is the Duty of those whose business it is to elect or to admit them, to judge of their Qualifications *c*.

c Cum omnium regnorum, & populorum felicitas, tum maxime reipublicæ Christianæ salus a recta juventutis institutione pendeat; quæ quidem rudes adhuc animos ad humanitatem flectit; steriles alioquin & infructuosos, reipublicæ muniis idoneos & utiles reddit, Dei cultum in parentes & patriam pietatem erga magistratus reverentiam & obedientiam promovet. *Art.* 32. *of the Statutes of the Faculty of Arts.*

Grammaticos tam Græcos quam Latinos, Sophistas, Jurisperitos in hac regia urbe professionem suam exercentes, & inter statutos connumeratos, *si laudabilem in se probis moribus vitam esse monstraverint, si docendi peritiam, facundiam dicendi, interpretandi subtilitatem, copiamque disserendi se habere patefecerent, & cœtu amplissimo judicante digni fuerint æstimati?* Cum ad viginti annos observatione jugi ac sedulo docendi labore pervenerint, placuit honorari, & his qui sunt ex vicaria dignitate connumerari. *l. un. de profess. qui in urb. Const.*

Sed quia singulis civitatibus adesse ipse non possum, jubeo, quisquis docere vult, non repente nec temere prosiliat ad hoc munus, sed judicio ordinis probatus decretum curialium mereatur, optimorum conspirante consensu. *l.* 7. *C. de profess. & med.*

'Altho the last words of this Text have not an 'exact relation to our Usage, yet it was not proper 'to leave them out, because of the sense which 'they contain, and also because this long Service 'deserves some Recompence, or some Considera'tion, particularly with regard to Manners.

See the following Article.

IV.

4. Another Duty, Purity of Doctrine, and a good Life and Conversation.

The first Duty of Capacity implies that of not mixing in their Writings and in their Lectures any Principle, or any Doctrine which may be contrary either to Religion, or to the Civil Government, to the Laws, or to good Manners; and that of joining to the Purity of their Doctrine, and to the Art of teaching well, a Probity without blemish, and a good Example of Life and Conversation, that they may imprint on the Minds and Hearts of their Disciples the Principles and the Sentiments of all their Duties, with as much or rather more Care than what they take to teach them the Principles and Maxims of Arts and Sciences *d*.

d Magistros studiorum Doctoresque excellere oportet moribus primum, deinde facundia. *l.* 7. *C. de profess. & med.*

Qui ad Theologiæ studium accedit, prius Deum invocet, ut illi tribuat animi submissionem nihil suo judicio tribuat. *Art.* 1. *of the Statutes of the Faculty of Divinity.*

Doctores morum integritate, vitæ probitate, & exemplo præ cæteris perluceant, ut suæ professionis expectationem sustineant. *Ibid. Art.* 38.

Nihil a doctrina Christiana alienum, nihil contra Patrum orthodoxorum decreta, nihil contra regis, regnique Gallici jura, & dignitatem disputetur aut proponatur: si secus fecerint, & Syndicus & præses & respondens extra ordinem puniantur. *Ibid. Art.* 23.

Quoniam interest nostra animum liberorum nostrorum non corrumpi. *l.* 14. §. 1. *in f. ff. de servo corrupto.*

'Strictly enjoining and prohibiting all Batchelors, 'Licentiates, Doctors and other Persons, of what 'Quality and Condition soever, to defend and 'maintain, read and teach, directly or indirectly, 'either in the publick Schools, or elsewhere, any 'Propositions contrary to that of the Declaration 'of the said Faculty of Divinity, or to compose 'any Writing contrary thereto, upon pain of ex'emplary Punishment; and to the Syndicks of the 'Universities, and to the Doctors who shall preside 'at the Acts, to suffer any thing contrary thereto 'to be inserted in any Thesis, upon pain of an'swering for it in their own Names, and to be 'prosecuted for the same in an extraordinary way. '*King's Edict of* Aug. 4. 1663.

V.

5. Another Duty, not to confer Degrees on Persons that are incapable of them.

Seeing the Duties proper to each Profession are Consequences of the Functions that are exercised in it, and ought to be proportioned to them, and that one of the principal Functions of the Universities is to confer the Degrees in each Faculty on those who have acquired a Capacity to deserve them; it is a capital Duty of the Professors and of those who are appointed to be Examiners and Judges of the Capacity of the Students who apply for Degrees in any one of the Faculties, not to grant them except to those who are worthy of them, and to refuse them to such as are unworthy. For the easiness of granting Degrees to those who want Capacity for them, destroys the intention of the Laws which require a Capacity in the Persons, and which intrust to those Professors and Examiners the Right to judge of the Capacity of the Person, and to bear witness of it; which Testimony of theirs, by reason of too great a facility, becomes Perjury against the Laws and Statutes which they have sworn to observe; and by this means they let into the Church and into the State unfit Persons, who by reason of their Degrees are admitted into Posts of great importance, of which they are altogether unworthy. This Abuse is still greater, if they join to the Testimony of Capacity in those who have it not, the Testimony also of their having finished the time required

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required for the Study, in favour of those who neither have Capacity, nor are of sufficient standing to take their Degrees: for one cannot give this Testimony of having finished the time appointed for the Study, not even in favour of those who in a less time than is required by the Statutes shall have render'd themselves capable of the Degree, seeing it is lawful in no case to bear witness against the Truth *e*.

e Doctores, qui jus habebunt ferendi suffragii, solemni jurejurando se obstringant, se nihil gratiæ, nihil favori daturos, sed veritati fidele testimonium laturos. *Art.* 32. *of the Statutes of the Faculty of Divinity.*

Neither lye one to another. Lev. 19. 11.

He that speaketh Truth sheweth forth Righteousness; but a false Witness Deceit. Prov. 12. 17.

Wherefore putting away lying, speak every Man Truth to his Neighbour: for we are Members one of another. Eph. 4. 25.

'It is in order to prove the Capacity of the Persons, that Laws demand the Testimony of the Universities by the Degrees which they confer: so that the Injustice of conferring them on Persons who are incapable, is a manifest Disobedience to the Laws, and has the same Character that a Declaration would have which should be made by those who give Degrees to Persons incapable of them, that altho they know them to be such, yet they think they ought to be admitted to Places whereof their Incapacity would render them unworthy. And tho by the 75th Article of the Ordinance of *Moulins*, the Bishops are impower'd to examine Graduates, as in the Case of Law-Suits touching the Possession of Benefices, yet the Bishops Examinations are not decisive; and the said Ordinance does not discharge those who have the Power of conferring Degrees, from the Obligation they are under of a faithful discharge of their Duty, from which nothing can exempt them. And it is the same with respect to the Degrees necessary for being admitted to Offices of Judicature, tho in order to their Admission they are to undergo another previous Examination by the Judges who are to admit them. For all those Persons, Bishops, Magistrates and Professors have their distinct Duties, which are independent one of another, so that every one is to render an account of his own Duty.

'To which Degrees no Person shall be received, unless he shall have studied for the space of three Years in the said University, or in some other, for some part of the said time, or in the said University for the Surplus, of which he shall bring a sufficient Certificate, and unless he has performed a publick Exercise, upon pain of forfeiture of the Salaries of the said Doctors, and of Nullity of the said Letters. And we likewise prohibit the said Doctors and others to grant or deliver any Letters of Degrees except to Persons who are present, and have given the aforesaid Proof of their Capacity in their Presence, and publickly in the said University.' *Ordinance of* Lewis XIII. *in* 1614. *Art.* 46.

VI.

6. Duty in giving Opinions about matters of Faith and Discipline.

It is also one of the Functions of Universities, peculiar to the Faculty of Divinity, to give Opinions touching Doctrines relating to Matters of Faith or Manners, or to the Discipline of the Church, on such occasions as the interposing of their Authority may be of use; and this Function makes it a Duty incumbent on them to give their Opinions agreeable to the Purity of the Laws of the Church *f*.

f And what cause soever shall come to you of your Brethren that dwell in their Cities, between Blood and Blood, between Law and Commandment, Statutes and Judgments, ye shall even warn them that they trespass not against the Lord, and so Wrath come upon you, and upon your Brethren: This do, and ye shall not trespass. 2 Chron. 19. 10.

And my Speech and my Preaching was not with enticing Words of Man's Wisdom, but in Demonstration of the Spirit and of Power. 1 Cor. 2. 4, 5.

Take heed unto thyself, and unto thy Doctrine. 1 Tim. 4. 16.

See 2 *Pet.* 1. 20, 21.

Be stedfast in thy Understanding, and let thy Word be the same. Be swift to hear, and let thy Life be sincere, and with Patience give answer. If thou hast understanding, answer thy Neighbour; if not, lay thy Hand upon thy Mouth. Honour and Shame is in Talk, and the Tongue of Man is his Fall. Ecclus. 5. 10, 11, &c.

Wisdom that is hid, and Treasure that is hoarded up, what Profit is in them both? Ecclus. 20. 30.

He that worketh Mischief, it shall fall upon him, and he shall not know whence it cometh. Ecclus. 27. 27.

'The Doctors who give Opinions in Matters of Faith and Discipline, exercise a kind of Function of Witnesses, by the Testimony which they ought to render of the Doctrine of the Church; and they exercise also a kind of Function of Judges; for their Opinions are as it were Decisions. So that we may consider them under both these Views, as Testimonies and as Judgments; and altho the Function of a Witness be different from that of a Judge, yet the bearing Testimony to Truths of this nature, which are not Facts but Doctrines, is not so much a bare Testimony as a Judgment, to which recourse ought to be had in Cases that may deserve it.

Stand in the multitude of the Elders, and cleave unto him that is wise. Be willing to hear every godly Discourse, and let not the Parables of Understanding escape thee. Ecclus. 6. 34, 35.

Counsel in the Heart of Man is like deep Water, but a Man of Understanding will draw it out. Prov. 20. 5.

Without Counsel Purposes are disappointed; but in the multitude of Counsellors they are established. Prov. 15. 22.

See the Texts cited on the 8th Article of this Section, which may be applied to this Rule.

VII.

7. Duty of those who are appointed to license the printing of Books.

Since it is of infinite Consequence not to suffer Books to be printed which concern either the Faith, or the Rules of Christian Piety, or the Discipline of the Church, without an Examination, and an Approbation which may assure the Publick of the Purity of the Doctrines of the said Books, and that they

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they contain neither Heresy, nor Errors, nor any thing that may instil into the Minds of those that read them false Principles; it is a Duty incumbent on those Doctors of Divinity who are appointed in the Universities to license Books, to examine, and to approve, reject, correct or censure those sorts of Books: and this Duty obliges the Censors or Licensers to read over the Books carefully, that they may be able to give a true Judgment, such as the Consequence of the Approbation, which they are to give, demands *g*.

g Nullus magistrorum, inconsulta facultate, libros approbet, sub poena privationis a juribus & honoribus Facultatis. *Art. 1. of the Statutes of the Faculty of Divinity.*

Quod de caetero perpetuis futuris temporibus nullus librum aliquem, seu aliam quamcumque scripturam, tam in urbe nostra quam in aliis quibusvis civitatibus & dioecesibus, imprimere seu imprimi facere praesumat, nisi prius in urbe per vicarium nostrum & sacri palatii magistrum, in aliis vero civitatibus & dioecesibus, per Episcopum, vel alium habentem peritiam scientiae libri seu scripturae hujusmodi imprimendae, ab eodem Episcopo ad id deputandum: ac inquisitorem haereticae pravitatis, in quibus librorum impressio hujusmodi fieret, diligenter examinentur, & per eorum manus proprie subscriptionem, sub excommunicationis sententia gratis & sine dilatione imponendam, approbentur. Qui autem secus facere praesumpserit, ultra librorum impressorum amissionem, & illorum publicam combustionem, ac centum ducentorum fabricae basilicae primorum Apostolorum de urbe, sine spe remissionis, solutionem, ac omnis exercitii impressionis suspensionem excommunicationis sententia innodatus existat. *Concil. Bas. sess. 4. sub Leone X. ann.* 1515.

Quoniam vero pervenit ad pias nostras aures, quod quidam doctrinas quasdam conscripserunt & ediderunt ambiguas, & non per omnia ac precise congruentes expositae orthodoxae fidei nostrae a sancta Synodo eorum sanctorum Patrum qui Nicaeae & Ephesi convenerunt, & a Cyrillo piae memoriae qui fuerat magnae Alexandriae civitatis Episcopus; jubemus, facta hujusmodi scripta sive antea, sive nunc (potissimum autem ea quae Nestorii sunt) comburi & perfectissimo interitui mancipari, ita ut in nullius cognitionem venire possint. His, qui talia scripta aut tales libros habere aut legere sustinuerint, ultimum supplicium experturis de caetero nulli patente licentia, praeter expositam fidem (ut diximus) tam Nicaeae quam Ephesi, aliud quid vel dicere vel docere transgressoribus nimirum hujus nostri divini praecepti, ei poenae quae continetur lata adversus impiam Nestorii fidem lege subjiciendis. *l.* 3. §. 3. *C. de sum. Trinit.*

See the Ordinance of *Hen.* II. of *December* 11. 1547.

VIII.

8. Duty of those who are consulted about Cases of Conscience.

The Difficulties which happen to all sorts of Persons in their Conduct and in their Affairs, for steering a right Course between their Duties and their Interest, which very often are opposite one to the other, oblige those who happen to be in this Condition, and who are desirous to do just and equitable things, to have recourse to a faithful Counsel for a Solution of those Difficulties; and the way is to chuse Persons who by their Learning, their Understanding, their Experience and Probity, may be able to decide those sorts of Doubts which are called Cases of Conscience; and it is for this end that People naturally address themselves to those Doctors, who ought to have that Knowledge which is called in the Style of the Gospel the Knowledge of the Kingdom of Heaven. So that this Function makes it a Duty incumbent on them to know exactly the divine and human Laws, and the other Rules on which the Decisions of the Difficulties about which they are consulted may depend, to apply themselves with diligence to understand thorowly the Facts and the Questions, and to give their Opinion out of a sincere love of Truth and Justice, without complying with the Interests and Passions of those who consult them, and without using any Severity or other Rigour than that which is indispensible in the Eye of Justice. For it is Justice herself which ought to decide by the Spirit of her Rules, which being made not for any one Person in particular, but for all Men in general, ought to be applied according to their genuine Use, without any regard to Favour, or respect of Persons, and without distinguishing the Interest of the Person who consults from the opposite Interest of the other Party; because it is as it were a Judgment that is render'd between them, and in which it is necessary to maintain the Right both of the one and of the other *h*.

h Every Scribe which is instructed unto the Kingdom of Heaven. Mat. 13. 52.

To give Knowledge of Salvation unto his People. Luke 1. 77.

Because they have seduced my People, saying, Peace, and there was no Peace. Ezek. 13. 10.

Moreover this was not enough for them, that they erred in the Knowledge of God, but whereas they lived in the great War of Ignorance, those so great Plagues called they Peace. Wisdom of Solomon, 14. 22.

Wo unto them who call Evil Good, and Good Evil; who put Darkness for Light, and Light for Darkness. Isaiah 5. 20.

He that saith unto the wicked thou art righteous, him shall the People curse, Nations shall abhor him. But to them that rebuke him shall be Delight, and a good Blessing shall come upon them. Every Man shall kiss his Lips that giveth a right Answer. Prov. 24. 24, 25, 26.

'The Decisions of those who solve Cases of 'Conscience ought to have nothing in them contrary to the Spirit of Religion, nor any thing that 'may be inconsistent with the Dignity and the Respect that is due to the Prince.

9 The

5 The Doctors who resolve Cases of Conscience, and those who give Opinions in Matters of Faith, of Manners, and of Church-Discipline, of whom mention has been made in the sixth Article, are obliged, in order to acquit themselves worthily of this Duty towards the Publick, to draw the Knowledge of these Matters from the Fountains themselves, that they may be the better able to resolve the Difficulties that shall be proposed to them. Those Fountains are the Truths dispersed in the Holy Scriptures; so that the Doctors and others who are consulted in Cases of Conscience, and who give Opinions in Matters of Doctrine, ought to have recourse to those Books inspir'd by the Holy Ghost, where they will perceive in the Truths which are there expressed in a plain Style, the Grandure and the Majesty of the Divine Wisdom which reveals them unto us, and his Goodness in laying them before us in a manner suited to our Weakness: and they will there discover the Light of those Truths whereby to enlighten the Understanding, and a Charm wherewithal to move the Heart. Thus they ought to look upon the Books of the Holy Scripture as a *Depositum* in which the Spirit of Jesus Christ resides. The Doctors exercise in the said Functions the Office of Pastors of Souls; and Jesus Christ being the true Pastor, it is of him that they ought to learn the Rules by which they may be able to acquit themselves worthily of so great a Ministry *a*, and which may also be of very great use to the Publick, seeing on those occasions they exercise a kind of Function of Judges, and may by this way, which is so holy and so natural, terminate by the Prudence of their Counsel, and the Equity of their Decisions, the Differences which may arise between particular Persons.

a The Spirit of the Lord God is upon me, because the Lord hath anointed me to preach good Tidings unto the Meek; he hath sent me to bind up the Broken-hearted, to proclaim Liberty to the Captives, and the opening of the Prisons to them that are bound; to proclaim the acceptable Year of the Lord, and the Day of Vengeance of our God; to comfort all that mourn. Isa. 61. 1,2.

For in his Hand are both we and our Words; all Wisdom also and Knowledge of Workmanship. For he hath given me certain Knowledge of the things that are, &c. Wisdom of Solomon 7. *ver.* 16, 17.

For as the Rain cometh down, and the Snow from Heaven, and returneth not thither, but watereth the Earth, and maketh it bring forth and bud, that it may give Seed to the Sower, and Bread to the Eater: So shall my Word be that goeth forth out of my Mouth; it shall not return unto me void, but it shall accomplish that which I please, and it shall prosper the thing whereto I sent it. Isa. 55. 10, 11.

IX.

9. The subject matter of the following Articles.

Of the Rules which have been already explained in this Section, those of the five first Articles belong to all the four Faculties, and the Rules of the three last Articles concern only the Faculty of Divinity; but there are other Rules peculiar to those who having received Degrees in the Faculties of Law and Physick, exercise the Profession of them; and these Duties are to be distinguished from those which we have just now explained, as shall be said in the Article which follows *i*.

i See the Article which immediately follows, and also the others which come after.

X.

10. Professors whose Functions have no relation to Temporal Affairs.

There is this difference between the Faculties of which there are Professors in the Universities, that those who are barely Graduates in the Faculty of Divinity and in that of Arts, do not exercise their Profession in publick in any Matter which has a direct tendency or relation to temporal Concerns, for the use of any Persons in particular, to whom the said Exercise of their Profession may be useful or hurtful; whereas those who are Graduates in the Faculties of Law or Physick, may exercise their Professions in Matters relating to the temporal Interest of particular Persons, and in which they may be either useful or hurtful to them. Thus Judges and Advocates exercise a Profession, of which the good or bad Use affects the temporal Interest of the particular Persons whose Affairs are in their hands. Thus Physicians exercise a Profession, upon the good or bad Use of which depends the Health, nay the very Life of the particular Persons who call for their Assistance. So that the Persons who exercise the said Professions, are engaged to other Duties than those who teach them; and those Duties have their Rules, which it is necessary to explain, as being a Part of the Publick Law: And as the Rules of the Duties of Judges, and of Advocates, are to be explained in their proper place, in the second Book; those concerning the Duties of Physicians have their Place here, and shall be the subject

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ject Matter of the following Articles; pre-supposing for the first of their Duties, that they have render'd themselves fit for the exercise of their Profession, and that they have deserved the Degrees they have received, after having finished their Studies in the said Faculty *l*.

l 'By the *Roman* Law those who executed the 'Municipal Offices in Towns, chose a certain num-'ber of Physicians, and were obliged to inform them-'selves of their Manners, and of their Capacity.

Medicorum intra numerum præfinitum constituendorum arbitrium non Præsidi Provinciæ commissum est, sed ordini et possessoribus cujusque civitatis: ut certi de probitate morum, et peritia artis eligant ipsi, quibus se liberosque suos in ægritudine corporum committant. *l.* 1. *ff. de decret. ab ord. fac.*

Si quis in Archiatri defuncti locum est promotionis meritis aggregandus, non ante eorum particeps fiat, quam primis qui in ordine reperiuntur septem, vel eo amplius judicantibus idoneus adprobetur. *l.* 10. *C. de Profess. & Med.*

'But altho the Physicians had been approved of, 'they were nevertheless to answer for the Faults 'which they might commit against the Rules of 'their Professions: for altho it be true, that we 'ought not to impute to Physicians the Death of 'their Patients, yet they ought to be made answe-'rable for the Evil which they occasion by their Ig-'norance; and the Pretext of human Infirmity 'ought not to skreen those from Punishment who 'cheat and impose upon Mankind in a danger of 'so great Consequence as is that of Life.

Sicuti medico imputari eventus mortalitatis non debet, ita quod per imperitiam commisit imputari ei debet, prætextu humanæ fragilitatis delictum decipientis in periculo homines innoxium esse non debet. *l.* 6. §. 7. *ff. de off. præs.*

Imperitia quoque culpæ adnumeratur, veluti si medicus ideo servum tuum occiderit, quia male eum secuerit, aut perperam ei medicamentum dederit, §. 7. *inst. de lege Aquil.*

Si medicus servum imperite secuerit, vel ex locato, vel ex lege Aquilia competere actionem. *l.* 7. §. *ult. ff. eod.*

'It appears by this last Text, that in those Days 'the Physicians practised Surgery. According to 'the Usage in *France*, the Capacity of Physicians 'is proved by the Degree of Doctor, which they 'ought to have before they can regularly practise 'Physick, as it has been regulated by the 87th 'Article of the Ordinance of *Blois*.

'It had been before ordained by an Ordinance 'of *Charles* VI. of *August* 7. 1390. that Infor-'mation should be given against Physicians and 'Surgeons who had not Knowledge and Capacity 'sufficient for the Exercise of their Profession; 'and they were forbid to practise, until they should 'be found capable by the Persons whose Business 'it was to judge thereof. *See the Ordinance of* Lewis XIII. *at* Paris 1616. *in relation to the different Examinations they are obliged to undergo.*

XI.

11. Physicians and Surgeons ought to finish the Cures they have begun.

It is the Duty of a Physician who has begun to cure one of a Distemper, to continue his Attendance on him while the Distemper lasts, especially in Cases where there is any Danger, unless he have some just Excuse for not doing it; and it is with much more rea-

son that Surgeons are bound to continue to dress the Wounds, and the other Sores which require the Use of Surgery *m*.

m Qui bene secuerit & dereliquit curationem, securus non erit, sed culpæ reus intelligitur. *l.* 8. *ff. ad leg. Aquil.*

Præterea si medicus qui servum tuum secuit, & dereliquerit curationem ejus, & ob id mortuus fuerit servus, culpæ reus erit, imperitia quoque culpæ adnumeratur: veluti si medicus ideo servum tuum occiderit, quia male eum secuerit aut perperam ei medicamentum dederit. §. 6. & 7. *eod.*

XII.

12. Those who have Persons under Cure, ought not to exact any Composition for their Payment.

If any one not having the Probity and the Honour that ought to accompany the Profession of Physick, exercising Functions or Operations of Surgery, should demand from the Patient himself, or his Relations, some Composition of a Reward, which the Danger would oblige them to promise him; he might be justly condemned, not only to make restitution of what he had exacted in this manner, but likewise to undergo other Punishments which the Quality of the Fact and the Circumstances may deserve; and much more so, if he himself had made the Wound or the Sore worse, on purpose to oblige the Patient to promise him this Reward *n*.

n Si medicus, cui curandos suos oculos qui eis laborabat commiserat, periculum amittendorum eorum per adversa medicamenta inferendo compulit, ut ei possessiones suas contra fidem bonam æger venderet, incivile factum præses Provinciæ coerceat, remque restitui jubeat. *l.* 3. *ff. de var. & extraord. cognit.*

Ea patimur (*Archiatros*) accipere, quæ sani offerunt pro obsequiis, non ea quæ periclitantes pro salute promittunt. *l.* 9. *C. de Profess. & Med.*

XIII.

13. They ought to keep the Secrets of their Patients.

Since Physicians, Surgeons and Apothecaries have frequent Occasions in which the Secrets of sick Persons themselves, or of their Families, are discovered to them, whether it be out of a Confidence that they place in them, or because of the Conjunctures which render their Presence necessary at the time that they are speaking of Affairs, or doing other things which require Secrecy; it is one of their Duties not to abuse the Confidence that is put in them, and to keep exactly and faithfully the Secret of things that are come to their Knowledge, and which ought to be kept secret *o*.

o See on the 16th Article the End of *Hippocrates*'s Oath.

'This Secrecy is enjoined by an Article of the 'Statutes of the Faculty of Physick: *Ægrorum ar-* '*cana,*

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'*cana, visa, audita, intellecta, nemo eliminet.*
'Art. 19. Appendicis ad reformationem Facultatis
'Medicinæ.

XIV.

14. Physicians ought to be united among themselves in the Cure of their Patients.

Union among Persons of all sorts of Professions is a Duty incumbent on them: and altho in some Professions their Division may be useful to the Publick by the Advantages that may be drawn from the Discoveries and Improvements made in the Science by those who set up in opposition to one another, and from the Light which may be had by comparing different Sentiments; yet Disunion among Physicians who have the same Patients under their Care, or who are consulted about their Distempers, cannot but be of prejudice to the sick Persons, and is a breach of one of the most essential Duties of those who practise Physick; since it may lead them to be of opposite Sentiments merely out of a Spirit of Contradiction: and therefore it is, that to prevent this Inconvenience, and to oblige them to communicate reciprocally to one another their Skill and Knowledge, the Rules of their Profession enjoin them not only not to fall out among themselves, but even to be in strict Friendship with one another *p*.

p Scholæ Medicæ Doctores amicitiam inter se colant. *Art.* 13. *appendicis ad reformationem Facultatis Medicinæ.*

Speak not evil one of another, Brethren. He that speaketh evil of his Brother, and judgeth his Brother, speaketh evil of the Law, and judgeth the Law. James 4. 11.

Withhold not Good from them to whom it is due, when it is in the power of thine hand to do it. Prov. 3. 27.

And let none of you imagine Evil in your Hearts against his Neighbour. Zech. 8. 17.

XV.

15. They ought to acquaint their Patients, or Relations, with the Danger of their Distemper.

The Consequence of making known, either to the sick Persons themselves, or to the Pastors who have the Care of their Souls, the Danger in which they are, that they may give order about what is necessary to be done in that Condition for settling their spiritual and temporal Concerns, makes it also a Duty on Physicians and others who have sick Persons under Cure, to give notice of the Danger they may be in to the Persons who are the most proper to acquaint the sick Person himself with it *q*. And the same Reason which obliges Physicians to this Duty, obliges them also to prescribe no Remedy, the Use whereof may be contrary to the Spirit of Religion, and to good Manners.

q Cum infirmitas corporalis nonnunquam ex peccato proveniat, dicente domino languido quem sanaverat; Vale, & amplius noli peccare, ne deterius aliquid tibi contingat. Præsenti decreto statuimus, & districte præcipimus medicis corporum, ut cum eos ad infirmos vocari contigerit, ipsos ante omnia moneant, & inducant, ut medicos advocent animarum: ut postquam fuerit infirmo de spirituali salute provisum, ad corporalis medicinæ remedium salubrius procedatur: cum causa cessante, cesset effectus. Hoc quidem inter alia huic causam dedit edicto, quod quidam in ægritudinis lecto jacentes cum eis a medicis suadetur, ut de animarum salute disponant, in desperationis articulum incidunt: unde facilius mortis periculum incurrunt.

Si quis autem medicorum hujus nostræ constitutionis, postquam per Prælatos locorum fuerit publicata, transgressor extiterit, tamdiu ab ingressu Ecclesiæ arceatur, donec pro transgressione hujusmodi satisfecerit competenter.

Cæterum cum anima sit multo pretiosior corpore, sub interminatione anathematis prohibemus, ne quis medicorum pro corporali salute aliquid ægroto suadeat, quod in periculum animæ convertatur. *Cap.* 13. *de pœnit. & remiss.*

XVI.

16. They ought to be faithful in the Reports which they make in a Court of Justice touching the Condition of sick Persons.

Seeing it often happens to be necessary for Courts of Justice to have Information of the Condition of Persons, either sick or wounded, and of the Causes of their Distempers, or of their Wounds; they therefore oblige Physicians and Surgeons to make a Report to them of what they know of the Matter, and to make Oath that they will speak the Truth. This therefore is another of their Duties, to make faithful Reports on such occasions; as for example, if any one being obliged to appear in a Court of Justice happens to be under an Indisposition which hinders him from making his Appearance; if Information is given against Persons who have wounded or cruelly beaten him that complains; in these Cases, and others of the like nature, the Court directs the Physicians or Surgeons, or both together, who have already visited the sick Person, or who shall go and visit him by order of the Judge, to make their Report of the Condition of the Person, and of the Causes of his Illness *r*.

r Semel causaria missis militibus, instauratio non solet concedi obtentu recuperatæ valetudinis melioris quando non temerè dimittantur, nisi quos constet medicis denuntiantibus, & judice competente diligenter examinante, vitium contraxisse. *l.* 6. *c. de re milit.*

Juramento affirmo, teste Apolline, medicorum præside, & Æsculapio, Hygea ac Panacea, deabus diisque omnibus me, quantum viribus & judicio assequi possum, inviolatum hoc jusjurandum hancque stipulationem præstiturum.

Sancte

Sancte itaque promitto, me loco parentum habiturum hunc, qui me hanc artem docuit, nutriciumque me ei præstiturum, & quibus eget benigne impertiturum, progeniem ejus germanorum loco reputaturum: & hanc artem si discere ejus posteri voluerint, sine mercede & absque stipulatione me illos docturum. Præceptorum & narrationum, & reliquæ universæ artis benigne & fideliter participes facturum meos, & præceptoris mei liberos, imo & reliquos qui scripto stipulati fuere, ac ex lege medica jusjurandum interposuere: alium præter hos nullum. Cæterum in tractandis ægris, diœta, quantum viribus & ingenio assequar, ex ægrorum commodo utar: a veneno autem imbuta, & sanitati injuria illos arcebo. Nec unquam, aut prece aut præmio victus, pharmacum calamitosum propinabo cuiquam; nec nefarii hujus consilii auctor ero unquam. Ita nusquam ingravidatæ mulieri pessum abortiferum porrigam. Vitam artemque meam caste & sancte ducam. Nec unquam ex calculo laborantes ipse secabo: sed his qui se totos huic operi dicarunt, hoc officium permittam. Quascumque ingrediar ædes, in his ægrorum commodis studebo; studioseque ulla injuria a me ne prudenter eveniat cavebo; & ab omni corruptela, cum alia, tum maxime venerea me continebo, sive corporibus fœmineis, masculis, liberis aut servilibus medicinam fecero. Quæ autem inter curandum visu aut auditu notavero, vel extra medendi arenam in communi hominum vita percepero, quæ non decet enuntiare, silentio involvam, & tanquam arcana illa æstimabo. Itaque inviolata integritate, sancte si hoc jusjurandum præstitero, nec fallo, eveniat mihi feliciter vita & hæc ars, atque perpetuo gloria mea toto splendeat orbe: sin perjurus fefellero fidem, his votis adversa eveniant omnia. *Jusjur. Hippocr.*

XVII.

17. They ought to serve the Poor gratis.

Of all the Professions that have relation to the Publick Order of the Society, and to the Service of particular Persons, there is none whose Functions are of a more universal Necessity for all sorts of Persons without exception, than that of Physicians and Surgeons, for Diseases, Wounds, Dislocations, and all the other different Distempers; which obliges them to assist in the way of their Profession, as Occasion offers, as far as they are able, and for nothing *s*, those who standing in need of their Help have not wherewithal to recompense them. And this Duty is more indispensibly incumbent on those who are settled where they are allowed Salaries, and other Advantages, to engage them to exercise their Profession there *t*. For the Laws require that those Men should prefer their Duty of attending the Poor to the Profit they might make by serving the Rich.

s And he gave every Man Commandment concerning his Neighbour. Ecclus. 17. 12.

Archiatri scientes annonaria sibi commoda a populi commodis (ministrari) honeste obsequi tenuioribus malint, quam turpiter servire divitibus. *l. 9. C. de Profess. & Med.*

Honour a Physician with the Honour due unto him, for the Uses which you may have of him; for the Lord hath created him. For of the most High cometh Healing, and he shall receive Honour of the King. The Skill of the Physician shall lift up his Head, and in the sight of great Men he shall be in admiration. The Lord hath created Medicines out of the Earth, and he that is wise will not abhor them. Was not the Water made sweet with Wood, that the Virtue thereof might be known? And he hath given Men Skill, that he might be honoured in his marvellous Works. With such doth he heal Men, and take away their Pains. Of such doth the Apothecary make a Confection, and of his Works there is no end, and from him is Peace over all the Earth. Ecclus. 38. 1, 2, &c.

t Medicos, grammaticos & professores alios literarum immunes esse, cum rebus quas in civitatibus suis possident, præcipimus, & honoribus fungi, in jus etiam vocari eos, vel pati injuriam prohibemus: ita ut si quis eos vexaverit, centum millium nummorum ærario inferat a magistratibus——mercedes etiam eorum & salaria reddi præcipimus. Quoniam gravissimis dignitatibus, vel parentes, vel domini, vel tutores esse non debent, fungi eos honoribus volentes permittimus, invitos non cogimus. *l. 1. C. Theod. de Med. & Profess.*

XVIII.

18. The Duty of private Tutors and Preceptors.

Seeing we explain in this Section the Duties not only of the Professors in the Universities, Colleges and Academies; but likewise of those who teach in private, which takes in the Masters of private Schools, and all those who are any way concerned in the Instruction of Youth, both of the one and the other Sex; we may add here as to the said Persons, that their Duties are the same with those of Professors in the Universities, in so far as they are applicable to them in their Stations, and especially in what concerns the Care of the Manners of those whom they instruct; as has been explained in the fourth Article *u*.

u Ad docendam & regendam juventutem magistros probatæ vitæ & doctrinæ recipiant, qui suo munere recte fungi noverint: quorum mores in primis spectandi, ut pueri ab his, & litteras simul discant, & bonis moribus imbuantur. *Statutes of the Faculty, Art. 1.*

Foolishness is bound in the Heart of a Child; but the Rod of Correction shall drive it far from him. Prov. 22. 15.

Withhold not Correction from the Child; for if thou beatest him with the Rod, he shall not die. Thou shalt beat him with the Rod, and shalt deliver his Soul from Hell. Prov. 23. 13, 14.

My Son, gather Instruction from thy Youth up; so shalt thou find Wisdom in thine old Age. Ecclus. 6. 18.

My Son, hearken unto me, and learn Knowledge, and mark my Words with thy Heart. I will shew forth Doctrine in Weight, and declare his Knowledge exactly. The Works of the Lord are done in Judgment from the beginning; and from the time he made them, he disposed the Parts thereof. He garnished his Works forever, and in his hand are the chief of them unto all Generations; they neither labour, nor are weary, nor cease from their Works. Ecclus. 16. 24, 25, &c.

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Bring them up in the Nurture and Admonition of the Lord. Ephes. 6. 4.

See Deuter. 11. 19. *and* Psal. 24. 4, 5.

Cum omnium regnorum & populorum felicitas, tum maxime reipublicæ christianæ salus, a recta juventutis institutione pendeat, quæ quidem rudes adhuc animos ad humanitatem flectit; steriles alioquin & infructuosos, reipublicæ muniis idoneos & utiles reddit; Dei cultum, in parentes & patriam pietatem, erga magistratus reverentiam & obedientiam promovet. *Art.* 1. *of the Statutes of the Faculty of Arts.*

TIT. XVIII.

Of Hospitals.

THE erecting of Hospitals is equally agreeable to the Spirit of Religion, and to the Order of Temporal Government; for they are useful with respect to the one and to the other.

Religion obliges us to exercise towards the Poor the double Charity of relieving them in their Wants, and of rescuing them out of the Temptations to Vice, which is the Consequence of Poverty; and this Duty, which is common to all Persons who are in a condition to assist the Poor, is more especially natural unto Princes: But with respect to Princes, this Duty is not limited to the Relief of those poor Persons in particular whose Necessities they may chance to hear of; for there are but few who are able to approach them: but their Charity ought to extend to all Persons, and make provision in general for the Relief of their Necessities by all possible ways, in proportion to the means they have of doing it by their Sovereign Authority, and the Greatness of their Revenue *a*. It is owing to this pious Use which the great St. *Lewis* made of those two Appennages of the Sovereigns, that there are in the Kingdom of *France* divers Hospitals of his Foundation; and many other Kings, both before and since him, have made many such like Establishments.

It is easy to judge of the Usefulness of Hospitals in what concerns Religion; seeing those Houses are Sanctuaries, in which the Poor being provided with the Necessaries of Life, and with Christian Instruction, are not only out of the Temptations to Vice, but in a condition to apply themselves wholly to the great Concern of all Men, which is the Salvation of their Souls.

The Temporal Government hath also its Advantage in the erecting of Hospitals, in that they are a Receptacle for those who are reduced to the Necessity of wandering about to beg their Bread, and who for want of Imployment are obliged to spend their time in Idleness, which multiplies Thefts, Robberies, and Murders. And Hospitals, especially those which are called general Hospitals, have further this Usefulness both with respect to Religion and to the Civil Government, that the Alms are more usefully employ'd, that the Poor are better looked after than they can be in any other Places in which their Poverty may allow them to take Retreat; and that being by this means prevented from wandering about the Country, they are much less burdensom to the Publick *b*.

We may add to these several Considerations

a Provinciales egestate victus atque alimoniæ inopia laborantes liberos suos vendere vel obpignorare cognovimus. Quisquis igitur hujusmodi reperietur qui nulla rei familiaris substantia fultus est, quique liberos suos ægre ac difficile sustentet: per fiscum nostrum antequam fiat calamitati obnoxius, adjuvetur: ita, ut proconsules, præsidesque & rationales per universam Africam habeant potestatem, & universis quos adverterint, in egestate miserabili constitutos, stipem necessariam largiantur: atque ex horreis substantiam protinus tribuant competentem. Abhorret enim nostris moribus, ut quemquam fame confici vel ad indignum facinus prorumpere concedamus. *Cod. Theod. de alimentis quæ in op. par. de publ. pet. deb.*

b Cunctis quos in publicum quæstum incerta mendicitas vocaverit, inspectis, exploretur in singulis & integritas corporum, & robur annorum: atque inertibus & absque ulla debilitate miserandis necessitas inferatur, ut eorum quidem quos retinet conditio servilis proditor studiosus & diligens dominium consequatur: eorum vero quos natalium sola libertas persequitur, colonatu perpetuo fulciatur quisquis hujusmodi lenitudinem prodiderit ac probaverit. *l. un. c. de mend. val.*

Si vero hujus terræ fuerint, & corporibus quidem validis utantur, vitæ autem eis decens non est occasio: hos non frustra esse terræ onus permittere, sed tradere citius eos operum publicorum attinet artificibus, ad ministerium, & præpositis panificantium stationum, & hortos operantibus, aliisque diversis artibus, aut operibus in quibus valet simul quidem laborare, simul autem ali: & segnem ita ad meliorem mutare vitam. Si vero aliqui noluerint observire operibus quibus traditi sunt, hos secludi hac regia civitate. Parcentes enim eis, hoc sancimus, ut non segnitie eos ad illicitos actus impellente, leges eos abripiant ad pœnas, nostris tradentes judicibus. Læsos autem aut læsas corpore, aut canitie graves, hos sine molestia esse jubemus in hac nostra civitate, aut pie agere volentibus adscribendos: & aliorum singulos interrogare qua venerint gratia: & inquisitis, quæ digna sunt super eis agere, ut non pigri hic sedeant, sed competentia agentes, ad proprias revertantur provincias. *Nov.* 80. *c.* 5. *V. cap.* 4. *eod.*

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derations touching the Usefulness of Hospitals, both to Religion and to Civil Government, that they have been necessary on the account of another Advantage which is common to the one and to the other.

Every Body knows that God hath placed all Men in a Society which makes a Body, of which every one is a Member; from whence it follows, that all the Goods being destined by his Providence to supply their Wants, it is for the good of Religion and of the Temporal Government of every State, that each Member thereof should have what is necessary for his Subsistence. For altho all the Goods be not common to all Men, and that a Community of Goods among all Men be neither just nor possible, as has been observed in the Preface to the Second Part of the *Civil Law in its Natural Order*; yet it is always just and necessary that every one should have some share in Goods which are destined for the Use of all, and that no body should be excluded from having out of them at least what is necessary for Habitation, Food and Raiment; that all Persons may be in the Condition of Members of the Body of the Society, and that they may be able to subsist under the Ties which Society demands, and which are more especially necessary for the different Duties of Religion.

But since Poverty puts those who are reduced to it under an Incapacity of those Ties and Engagements, and renders it impracticable for them to perform those Duties, if others do not help them out of that State; there are only two Ways to provide against it: one is to take the Poor into Hospitals; and the other is the Assistance which all the particular Persons who are in a condition to relieve their Wants ought to give them.

By the Establishment of Hospitals we put those who are received into them into a Capacity of those Ties and Engagements which Religion demands, and in a Condition of performing the Duties of it to which they are bound. But because it is not possible that all the Poor should be received into Hospitals, either because there are not Hospitals sufficient to contain them all, or because many are excluded out of them by reason of several Obstacles; the same divine Providence, which hath formed the Society of Mankind, and which hath laid the natural Foundation of it in the Union, which Religion ought to establish among them, makes that they being all of them Members of one and the same Body, are by consequence Members one of another *c*; and that therefore every Man is to every other Man his Neighbour *d*. So that as every Member of the Body hath its Use for every one of the other Members, according as its Functions may have relation to them; so is every Man engaged towards every other Man in Duties which the Conjunctures may demand: and this Engagement having for its Principle an Union among all Men, like to that of the Members of one Body; every Man has for the Rule of his Duties towards others, that which he owes unto himself, as every Member of the Body exercises its Functions in behalf of the other Members, in the same manner as it exercises them for its own Use; and if the Good of the Body requires that one Member should expose it self to save another, nothing restrains it, nothing hinders it from performing that Function: so in the same manner Men owe reciprocally to one another mutual Assistance in all their Wants, as far as they are able; and they ought, even as occasion offers, to prefer the essential Good of others to their own proper Good, which is of another nature, and of less importance, according to the Rules of Religion, of which it is not necessary to speak here. But we could not omit mentioning here that which is still wanting in the Establishment of Hospitals for the Relief of the Poor; for since those Houses cannot possibly contain all the Poor, and that even the greatest part of Hospitals have not a sufficient Fund of Revenue by their Foundation, the Duty of contributing to the Relief of the Poor, whether it be of those who are in the Hospitals, or of all the other Poor, will never cease, according to the Word of God, which teaches us, that we have always the Poor with us. So that all the Relief which the Poor can receive in Hospitals, does not discharge any Person from the Duty of assisting them *e*. It

c For as we have many Members in one Body, and all Members have not the same Office, so we being many are one Body in Christ, and every one Members one of another. Rom. 12. 4, 5.
For we are Members one of another. Eph. 4. 25.
d See *Luke* 10. 29.
e For ye have the Poor always with you. Mat. 26. 11.

Beware

It follows from these Principles, that those who are in want of things absolutely necessary for Life, and who are out of a condition of acquiring them by their Labour, have a Title and a natural Right which appropriates to them such a Share as is necessary for their Wants out of the Goods which God has given unto others; and seeing it is not lawful for them to take this Share unless it is given them, it is an indispensable Obligation on those who are able to relieve the Poor, to give them of the said Share which they have a right to, so much of it as is in their hands, and to acquit themselves of this Duty *f*.

Since Hospitals are founded with an intent to relieve the Necessities of the Poor, and that their Necessities are of many sorts, there are therefore erected different sorts of Hospitals. Some are for receiving sick Persons *g*, who labour under Diseases which are curable, and those are for every poor Man or Woman only for a certain time; others are for Diseases that are incurable: there are some for Foundlings, for Orphans *h*, and for other sorts of Children *i*, till they arrive at a certain Age, for Maids, for Widows, for old Men *l*, for Passengers *m*, and for other sorts of Poor *n*. For as the Causes of Poverty are infinite, it extends it self many ways to all sorts of Ages and Conditions of both Sexes.

It is by the Variety of these Hospitals that Endeavours have been used to provide, as much as was possible, for the different sorts of Poor; but it was not possible to have Hospitals enough to receive all the Poor in general: for besides that there are many Places where they are not able to build Hospitals, it appears sufficiently that even in those Places where there are Hospitals of several sorts, they are not sufficient for all the Poor. Thus there are Persons of good Condition who are to be assisted out of Hospitals. Thus a Husband and a Wife having a great many Children, and who may be able by their Labour to provide a Part of the Necessaries for their Family, ought not to be taken from their Families, to be put into an Hospital, but they ought to be assisted in their Houses. Thus there are Diseases of which People cannot be conveniently cured in Hospitals; and many other Obstacles exclude several Persons from being received into them.

Since Hospitals are founded with a View to promote Religion, and to serve the State, and that they have their Use both in the one and in the other, as has been already explained; it is essential to all Foundations of Hospitals, that the Poor be there assisted with what they stand in need of both for their Spiritual and Temporal Concerns. And it is for this reason that this Order hath been established in almost all Hospitals, that for the spiritual Affairs there should be Churches or Chappels, and Churchmen appointed to administer the Sacraments there, to instruct the Poor, and to exercise towards them all the other Functions of their Ministry; and for their Temporal Concerns, that there should be sufficient Room and convenient Lodging for the Poor, according to their number, and as the Apart-

Beware that there be not a Thought in thy wicked Heart, saying, The seventh Year, the Year of Release is at hand, and thine Eye be evil against thy poor Brother, and thou givest him nought, and he cry unto the Lord against thee, and it be Sin unto thee. Thou shalt surely give him, and thy Heart shall not be grieved when thou givest unto him: because that for this thing the Lord thy God shall bless thee in all thy Works, and in all that thou puttest thy Hand unto. For the Poor shall never cease out of the Land; therefore I command thee, saying, Thou shalt open thine Hand wide unto thy Brother, to thy Poor, and to thy Needy, in thy Land. Deuter. 15. 9, 10, 11.

Save when there shall be no Poor among you; for the Lord shall greatly bless thee in the Land which the Lord thy God giveth thee for an Inheritance to possess it. Deuter. 15. 4.

He that giveth unto the Poor shall not lack; but he that hideth his Eyes shall have many a Curse. Prov. 28. 27.

f And six Years shalt thou sow thy Land, and shalt gather in the Fruits thereof; but the seventh Year thou shalt let it rest, and lie still, that the Poor of thy People may eat, and what they leave the Beasts of the Field shall eat. In like manner thou shalt deal with thy Vineyard and with thy Olive-Yard. Exod. 23. 10, 11.

If there be among you a poor Man of one of thy Brethren within any of thy Gates in thy Land which the Lord thy God giveth thee, thou shalt not harden thy Heart, nor shut thine Hand for thy poor Brother; but shalt open thine Hand wide unto him, and shalt surely lend him sufficient for his Need, in that which he wanteth. Deut. 15. 7, 8.

Give Alms of thy Substance, and when thou givest Alms let not thine Eye be envious, neither turn thy Face from any Poor, and the Face of God shall not be turned away from thee. Tob. 4. 7. See 1 *Sam.* 2. 7.

He that oppresseth the Poor, reproacheth his Maker; but he that honoureth him, hath Mercy on the Poor. Prov. 14. 31.

He that hath Pity upon the Poor lendeth unto the Lord, and that which he hath given will he pay him again. Prov. 19. 17.

g Nosocomia. *l.* 19. C. *de Sacr. Eccl.*

h Orphanotrophia. *d. l.*

i Brephotrophia. *d. l.*

l Gerontocomia. *d. l.*

m Xenodochia. *d. l.*

n Ptochotrophia. *d. l.*

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Apartments ought to be diſpoſed for their Uſe, whether it be for the Diſtinction of Sexes, or for employing them in ſome Work in the Hoſpitals which are deſigned for receiving the Poor that are able to work. There ought alſo to be in them convenient Lodging for the Perſons who are appointed to ſupply the Spiritual Functions, and to aſſiſt the Poor in their Temporal Concerns; and to the end that thoſe Houſes may be maintain'd in the good Order in which they ought to be, there ſhould be ſome Revenues allotted to them, and they ought to have ſtanding Regulations and Orders, both for the Functions of the Perſons appointed to aſſiſt and attend the Poor in their ſpiritual and temporal Neceſſities, as alſo for the Duties of the Poor: And in order to have the ſaid Regulations punctually obſerved, to have the Oeconomy of the Houſe well looked after, and care taken of the receiving and diſburſing of the Revenues belonging to the Hoſpitals, there is occaſion for Governours and Overſeers, who may divide among them the Functions neceſſary for the Adminiſtration and Oeconomy of the Hoſpitals.

It follows from this Uſefulneſs of Hoſpitals, both to Religion, and to the State, that they ought always to remain the ſame, as the Neceſſities for which they are eſtabliſhed never ceaſe, and conſequently that their Goods ought to be inalienable, as much or rather more than thoſe belonging to Communities [o].

We may alſo conſider Hoſpitals as being a kind of Communities [p]; but of a Character different from the others. For whereas all other Communities are compoſed of Perſons who form a Body, of which every one is a Member, and out of which he cannot be excluded without ſome juſt Cauſe, as for ſome Offence, and in which he has his Share in the Rights and Privileges belonging to the whole Body, and may be named to ſerve Offices therein; Hoſpitals on the contrary are Communities in which the Poor, for whoſe behoof they are eſtabliſhed, have no other ſhare beſides the Uſe of the Favour which is done them by receiving them into the Hoſpital, and they may be excluded from it; and as for the Adminiſtration of the Revenues, of the Rights, and of the Affairs of the Hoſpital, they cannot be employed therein. For this Adminiſtration is not committed to the Poor who are in the ſaid Houſes; but is placed in the hands of other Perſons, ſuch as the Magiſtrates and Burgeſſes of Towns, and others, according to the Nature and Foundations of the ſeveral Hoſpitals. And there are ſome Hoſpitals which are regular Communities of Men or Women, who make profeſſion to ſerve the Poor out of their own Goods, or thoſe of the Foundation, or out of other Goods put into their hands for that purpoſe. And in this kind of Hoſpitals the Adminiſtration of the Goods, and the Affairs thereof, and the Direction of the manner of ſerving the Poor, is in the hands of the Superiors of the ſaid Communities; unleſs the ſaid Houſes had been eſtabliſhed in ſuch a manner as that the Monks or Nuns were to have their Community apart to themſelves, and were to ſerve the Poor out of the Revenues of the Hoſpitals, which were to be managed by other Perſons. But there is this belongs in common to all ſorts of Hoſpitals, that as to their Goods, their Rights, their Affairs, they are conſider'd as Communities which are in the

[o] Jubemus, nulli poſthac Archiepiſcopo in hac urbe regia ſacroſanctæ orthodoxæ Eccleſiæ præſidenti nulli œconomo, cui res Eccleſiaſtica gubernanda mandatur, eſſe facultatem, fundos vel prædia, ſive urbana ſive ruſtica, res poſtremo immobiles aut in his prædiis, colonos, vel mancipia conſtituta, aut annonas civiles, cujuſcunque ſuprema vel ſuperſtitis voluntate, ad religioſas eccleſias devolutas, ſub cujuſque alienationis ſpecie, ad quamcunque transferri perſonam. Sed ea etiam prædia dividere quidem, colere, augere, & ampliare: nec ulli eiſdem prædiis audere cedere verum, ſive teſtamento quocunque jure facto, ſeu codicillo vel ſola nuncupatione legato, ſeu fideicommiſſo, aut mortis cauſa donatione, aut alio quocunque ultimo arbitrio, aut certe inter viventes habita largitate, ſive contractu, venditionis ſive donationis, aut alio quocumque titulo quiſquam ad præfatam venerabilem eccleſiam patrimonium ſuum, partemque certam patrimonii in fundis, prædiis, ſive domibus, vel annonis, mancipiis, & colonis, eorumque peculiis voluerit pertinere: inconcuſſa ea omnia ſine ulla penitus immutatione conſerventur. Scientes nulla ſibi occaſione, vel tempore, ad viciſſitudinem beneficii collocati aut gratiæ referendæ, donandi, vel certe hominibus volentibus emere, alienandi aliquam facultatem permiſſam; nec ſi omnes cum religioſo epiſcopo & œconomo clerici in earum poſſeſſionum alienationem conſentiant; ea enim quæ ad beatiſſimæ eccleſiæ jura pertinent, vel poſthac pervenerint, tanquam ipſam ſacroſanctam & religioſam eccleſiam intacta convenit venerabiliter cuſtodiri: ut ſicut ipſa religionis & fidei mater perpetua eſt; ita ejus patrimonium jugiter ſervetur illæſum. *l. 14. c. de ſacroſanct. Eccl.*

[p] Id quod pauperibus teſtamento vel codicillis relinquitur, non ut incertis perſonis relictum evaneſcat, ſed omnibus modis ratum firmumque conſiſtat. *l. 24. c. de Epiſc. & Cler.*

place

place of Persons, and which may acquire and possess Goods, and sue in Courts of Justice; so that they are as it were Persons represented by those who have the Government and Administration of them, as has been explained in *the Civil Law in its Natural Order q*.

It follows from all that has been said in relation to Hospitals, that the subject matter of this Title may be reduced to two Parts, which shall be explained in two Sections. The first, of that which relates to the Government of Hospitals; the second of the Functions and Duties of those who have the Government or Administration of them.

q Id quod pauperibus testamento vel codicillis relinquitur, non ut incertis personis relictum evanescat, sed omnibus modis ratum firmumque consistat. *l.* 24. *eod. de Episc. & Cler.*

Sed etsi pauperes quidem scripserit hæredes, & non inveniatur certum ptochotrophium, vel certæ ecclesiæ pauperes de quibus testator cogitaverit: sed sub incerto vocabulo pauperes fuerint hæredes instituti; simili modo & hujusmodi institutionem valere decernimus. *l.* 49. §. *eod.*

Nulli licere decernimus, sive testamento hæres sit institutus, sive ab intestato succedat, sive fideicommissarius vel legatarius inveniatur, dispositiones pii testatoris infringere, vel improba mente violare, adserendo incertum esse legatum vel fideicommissum, quod redemptioni captivorum relinquitur: sed modis omnibus exactum, pro voluntate testatoris, piæ rei negotio proficere. *l.* 28. *eod.*

See the 15th Article of the 2d Section of Persons, in the *Civil Law in its Natural Order*.

SECT. I.

Of the Government of Hospitals.

The CONTENTS.

1. *Divers Uses of Hospitals.*
2. *The Government of Hospitals.*
3. *Governours of Hospitals.*
4. *Regulation for the Expences of Hospitals.*
5. *Nomination of the Governours.*

I.

1. Divers Uses of Hospitals.

THE first Rule of the Government of Hospitals, is to make them serve for the Use to which they are destined, and to receive in them only the Poor for whom they are established. Thus, in Hospitals that are founded for sick Persons, they do not receive any Poor that are strong and well in health; nor do they admit sick Persons into Hospitals which are founded only for the Poor that are to be employed at work *a*.

a 'Every Hospital hath its Use regulated by its 'Establishment and Foundation.

II.

2. The Government of Hospitals.

Seeing the End for which Hospitals are founded, is that the Poor may be there subsisted, and that they may be there kept in good Order, it is part of the Government of every Hospital, to have Orders and Regulations suited to their different Uses, whether they be intended for the relief of the Sick or of the Whole; to have in every one of them the Helps that are necessary to the Poor for their spiritual and temporal Concerns; to have Overseers appointed to take care of the Functions both of the one and of the other *b*.

b 'Since Hospitals are founded for a Publick 'Good, and for the Interest both of Religion and 'of the State, they ought to be regulated in such 'a manner as that the Poor may be assisted both 'in their spiritual and temporal Wants.

III.

3. Governours of Hospitals.

Hospitals having their own proper Goods, their Rights, their Affairs, their Privileges *c*, it is necessary for the good Government of those Houses, that the management of all their Affairs be put into the hands of Persons who may take care of them; and the same Order of Government requires also that there should be some Body appointed to gather in the Revenues of the Hospital, and to receive the Alms that are given to it, and that the said Person be able to find sufficient Security for his Administration.

c 'The Ordinances of *France* have made provision for this Administration or Government of 'Hospitals, and the Nomination of the Persons 'who are to be charged therewith, and to take 'care of their Affairs, and of their Privileges.

Sancimus res ad venerabiles ecclesias, vel xenones, vel monasteria, vel orphanotrophia, vel gerontocomia, vel ptochotrophia, vel nosocomia, vel brephotrophia, vel denique ad aliud tale consortium descendentes, ex qualicunque liberalitate, sive inter vivos, sive mortis causa, sive in ultimis voluntatibus habita, a lucrativorum inscriptionibus liberas immunesque esse, lege scilicet quæ super hujusmodi inscriptionibus posita est, in aliis quidem personis suum robur obtinente. *l.* 22. *C. de sacros. Eccl.*

IV.

4. Regulation for the Expences of Hospitals.

The Fund of the Revenues belonging to the Hospital, and of the Alms given to it, being set apart for the different necessary Expences in Hospitals, whether it be for the Persons of the Poor, or for the Salaries and Maintenance

tenance of the Domesticks, the Reparations of the Building, or for the other occasions of all sorts, all these Expences ought to be regulated by the Governours in proportion to the Wants and to the Revenues *d*.

d ' This Oeconomy is a part of the Administra-' tion of Hospitals.

V.

5. Nomination of the Governours.

Seeing Hospitals are founded in Towns, and in other Places for a common good, and that it is the interest of Towns that they subsist, and that they be well regulated, the Establishment of Hospitals is therefore a part of the Policy of the said Towns, and the Inhabitants in their Assemblies or Town-Councils make provision for what concerns the Government and Administration of the said Houses. They have likewise the Nomination of the Governours thereof, if there be no other ways appointed for the same, according to the Usage of the Place, and Nature of the Foundations *e*.

e See the Ordinances of *France*.

SECT. II.

Of the Duties of those who are appointed Governours of Hospitals.

The CONTENTS.

1. *Duties of the Governours of Hospitals with respect to the Domestick Discipline.*
2. *Care of the Revenues and of the Affairs.*
3. *Receivers of the Rents.*
4. *The Receivers are to give an Account.*
5. *Those who are imployed in the Service of Hospitals, have their Duties prescribed to them by the Rules of the House.*
6. *It is only those who are real Objects of Charity that ought to be received into Hospitals.*

I.

1. Duties of the Governours of Hospitals with respect to the domestick Discipline.

The Duties of the Governours of Hospitals in what relates to the Discipline of the House, is Vigilance, and Application in every one of them to the Functions committed to their Care: and this implies in general the Care of seeing that all the Orders and Regulations be punctually observed, of visiting the Places, and of informing themselves of the Conduct of the Poor, and of the Domesticks, of giving the necessary Corrections with the Temperament of Moderation and Resolution which the said Function may require, and to make a Report to their Superiors or Visitors of what may deserve to be laid before them in order to have the same redressed, and to take care in general and in particular of all the Functions of the said Administration *a*.

a ' It is in these Functions that the Duties of ' Governours consist, with regard to the Govern-' ment and Discipline of Hospitals.

II.

2. Care of the Revenues and of the Affairs.

As to what concerns the Oeconomy, the Administration of the Revenues, the Care of the Affairs, the Preservation of the Privileges, the Persons who are charged with the said Functions ought to have the Inventaries of the Goods, the Writings relating to the Affairs and to the Law-suits if there be any, and the Instructions touching every thing that any way relates to the said Oeconomy and Administration, and they ought to apply themselves with diligence to every thing belonging to it: which implies the viewing of the Buildings, of the Lands, the care of cultivating, letting or farming out the Lands, the Houses and other Goods, of seeing that the Rents be duly paid, of defending the Poor in their Law-suits, suing for their Rights, preserving their Privileges to them, informing themselves of the Charities left to the Poor that are under their Care by Testaments, and other Dispositions, that they may procure Payment thereof, and in general to use all possible diligence to have the Oeconomy and the Affairs of the Hospital kept in a good Condition *b*.

b ' It is in all these Cares that the preservation ' of the Goods and of the Rights of Hospitals does ' consist.

Necessarium quoque esse credidimus, etiam super his aliquid definire, qui curam susceperunt, seu susceperint venerabilium xenonum, & nosocomiorum, & ptochotrophiorum, & orphanotrophiorum, & brephotrophiorum. Nam & ipsis omnem licentiam auferimus, de adquisitis rebus post susceptas hujusmodi curationes, vel per testamentum, vel per aliam quamlibet modum vel machinationem quicquam in alios transferri, exceptis iis quæ prius habuerant, vel postea a parentibus, vel theiis, vel fratribus ad ipsos pervenerunt. Omnia enim quæcumque ad sancta pertinent loca, vel quæ ad ipsorum præpositos post susceptam hujusmodi curam pervenerunt, vel pervenerint, ipsa venerabilia pertinebunt loca, eaque pie in ea distribui & erogari volumus qui in illis locis sunt, vel curantur. Manifestum enim est, quod quisquis derelinquit vel donat, sive in scriptis, sive sine scriptis xenodocho, vel nosocomo, vel ptochotropho, vel orphanotropho, ideirco dat, ut pie per ipsum dispensetur: ut qui multam de eorum pietate præsumptionem & occasionem habeat, qui iis locis præfecti sunt. Neque vero justum est, ip-

3. Receivers of the Rents.

4. The Receivers are to give an Account.

sum ea, quæ sub prætextu eorum qui sub ejus cura sunt accipit, non in ipsos vel pro ipsis impendere, sed in propriam personam auferre, & proprio lucro applicare, timore Dei contempto: quis enim tali curæ præpositum non existimet iddirco eam suscepisse, ut non solum quæ extrinsecus ad eum pervenient, sed etiam omnia, quæ habere eum contigerit, in eam rem impendat. *l.* 42. §. 6. *c. de Episc. & Cler.*

Amplius id quoque jubemus, ut quæcunque post necessariam erogationem in eos, qui eorum curæ commissi sunt, & debitam curationem rerum & ædificiorum superesse contigerit, ea ad redituum comparationem proficiant. Undique enim noster scopus nostraque intentio est, ad amplificationem & augmentum adducere res ad pios usus segregatas. Sic enim quisquis pro sua anima quidquam facere volet, promptius erogabit: si crediderit, ea quæ ab ipso data fuerint pie administranda esse. *d. l.* §. 7.

III.

3. Receivers of the Rents.

Those who are intrusted with receiving the Rents, the Alms, and the other Funds destined for the subsistence of the Poor, and for defraying the other Charges of the Hospitals, ought to be diligent in getting in the Monies which they are to receive, whether it be from Farmers, Debtors, or others; but without using any harsh or rigorous means for procuring Payment, except in the Cases where it is absolutely necessary; and even in that Case they ought not to proceed to those Extremities without first acquainting those who are the Directors and Governours of the Hospital; and this Moderation is more especially necessary with regard to Benefactors, and their Heirs, not only because of the Consideration that is to be had for those Persons, but also for the interest of the Hospitals themselves, lest such rigorous Proceedings should alienate the Minds of Persons disposed to leave Charities to them *c*.

c ' It is by the Care of receiving what belongs ' and what is left to Hospitals, that Provision is ' made for the subsistence of the Poor, and for ' the other Charges of the Hospitals.

See the preceding Article, and the Texts there cited.

IV.

4. The Receivers are to give an Account.

The same Officers who are appointed to receive the Rents and other Incomes of the Hospitals, are obliged to give an account thereof to the Persons whose business it is to examine and audit their Accounts, according to the Usages and the Regulations; whether it be once a Year, or after the Term for their serving in that Office is expired, or otherwise, according to the same Usages and Regulations of the Hospitals *d*.

d Orphanotrophos hujus inclytæ urbis (nulla subtilitate juris obsistente) qui quidem pupillorum sunt quasi tutores, adolescentium vero quasi curatores: sine ullo fidejussionis gravamine in emergentibus causis tam in judicio quam extra judicium, ut opus exegerit ad similitudinem tutoris & curatoris, personas & negotia eorum, si quas possint habere, defendere ac vindicare jubemus, ita videlicet, ut præsentibus publicis personis, id est tabulariis, aut intervenientibus gestis in hac quidem inclyta urbe apud virum perfectissimum magistrum census, in Provinciis vero apud moderatores earum, vel defensores locorum: res eorum eis tradantur, a quibus sunt custodiendæ: ut si quas earundem rerum, propter fœnus forsitan, vel aliam urgentem causam, vel eo quod servari non possunt, alienandas esse perspexerint prius habita æstimatione, liceat eis alienationis inire contractum, & pretia earum, quæ exinde colliguntur ab eisdem personis custodiantur: hujusmodi autem pium atque religiosum officium pro tempore orphanotrophos ita peragere convenit, ut minime ratiociniis tutelaribus seu curationibus obnoxii sint: grave enim atque iniquum est callidis quorundam, si ita contigerit, machinationibus eos vexari, qui propter timorem Dei parentibus atque substantia destitutos minores sustentare, atque velut affectione paterna educare festinant. *l.* 32. *C. de Episc. & Cler.*

Si autem contigerit aliquem ab administratione sua cessare, quam accepit: sancimus, eum qui in ejus locum constitutus est, cum timore Domini rationem redditioni subjici gestæ sub eo administrationis, sicut divina nostra lege committitur sciente eo, qui post ipsum constitutus est, quod Domino Deo pro his rationem reddet. *l.* 42. §. 8. *C. eod.*

' Touching the Account to be rendred by Go- ' vernours of Hospitals in *France*, or other Per- ' sons imployed in receiving and disbursing the ' Monies thereto belonging, see the Ordinance of ' *Francis* I. 1545. and that of *Charles* IX. 1561. ' Art. I.

By the 123*d Novel of* Justinian *Chap.* 23. *these sorts of Officers were bound to make up their Accounts in presence of the Bishop: which seemed to be very just, since the Bishops ought to be Protectors of the Poor, and that they are their Fathers.* Oeconomos autem & xenodochos, nosocomos, ptochotrophos, & aliorum venerabilium locorum gubernatores, & alios omnes clericos jubemus pro creditis sibi gubernationibus, apud proprium Episcopum cui subjacent conveniri, & rationem suæ gubernationis facere, & exigi quod ex ipsis debentes ostenduntur illi venerabili reddendum domui ex cujus ordinatione debitores apparuerint. Si vero putaverint se gravari, post repetitionem metropolita causam examinet. Si vero metropolita fuerit contra quampiam prædictarum personarum hujusmodi causas examinans, & debitum exegerit, & exactus putaverit se gravatum, Diœceseos illi beatissimus Patriarcha causam determinet. Non enim concedimus prædictis personis pro memoratis causis ante examinationem & exactionem debiti propter Episcopos declinare, & ad alia venire judicia. Si quis autem ex Ecclesiasticis cui aliqua talis dispensatio credita est, ante rationum expositionem & debitorum solutionem moritur, jubemus ejus hæredes simili modo & rationibus & exactionibus subjacere. *Nov.* 123. *Cap.* 23.

V.

5. Those imployed in the service of Hospitals, have their Duties prescribed by the Rules of the House.

All the other Persons who are appointed to serve the Hospitals in their different Functions, Clergymen and others, have their Duties prescribed to them, according to their Functions, by the Orders and Rules of every House *e*.

e ' It is in this that the Order of the Functions ' of those Persons does consist.

VI.

VI.

6. *It is only these who are real Objects of Charity that ought to be received into Hospitals.*

Since Hospitals are founded only for the benefit of the Poor, it is the Duty of those who have the Government of them to receive no Persons into them that can get their subsistence some other way, especially not to receive Persons who are able to work, and who labour under no other Infirmity but that of Idleness; unless their want of Age, or some other Consideration, should induce the Governours to take them into those kinds of Hospitals, which are erected as Work-houses for imploying the poorer sort of People of both Sexes *f*.

f We ought not to encourage the idle Life of sturdy Beggars. Exploretur in singulis & integritas corporum & robur annorum. *L. un. C. de Mendic. & valid.*

'It may be remarked here on all that has been 'said touching the Government and Administration of Hospitals, that the design of relieving the 'Necessities of the Poor, who are in those Houses, 'and the express command of the Law of God to 'give Alms, ought to engage particular Persons to 'be as charitable as they possibly can.

Give Alms of thy Substance; and when thou givest Alms, let not thine Eye be envious, neither turn thy Face from any Poor, and the Face of God shall not be turned away from thee. If thou hast abundance, give Alms accordingly: if thou have but a little, be not afraid to give according to that little. For thou layest up a good Treasure for thy self against the Day of Necessity. Because that Alms do deliver from Death, and suffereth not to come into Darkness. For Alms is a good Gift unto all that give it, in the sight of the most High. Tob. 4. 7, &c.

My Son, defraud not the Poor of his Living, and make not the needy Eyes to wait long. Make not an hungry Soul sorrowful, neither provoke a Man in his distress. Add not more Trouble to an Heart that is vexed, and defer not to give to him that is in need. Reject not the Supplication of the afflicted, neither turn away thy Face from a poor Man. Ecclus. 4. 1, 2, &c.

TIT. XIX.

Of the Use of the Temporal Power in what regards the Church.

SEEING Religion is the Foundation of the Order of the Society of Mankind, and that it is for the maintenance of the said Order, that God hath given to Princes the Power that is necessary for the several Uses of Government, their first Duty is to maintain Religion *a*; which implies the Power of imploying their Authority to support that of the Church.

It is of this essential Duty of directing to the Glory of God the whole exercise of Government, that an Emperor has said, that it ought to be the Beginning, the Progress, and the End of it *b*. For the Government and Policy which are to regulate the external Order of Human Society, ought to aim at the same end which the Divine Providence had in forming it, and which was only that he might thereby unite Men in his Service by the Spirit of Religion, which raises their Minds and Affections towards him.

It follows from this View which Divine Providence had in forming the Society of Mankind, and from this Use which Princes ought to make of the Power which he has given them over it, that there is a most strict Union between the Spiritual Powers which God establishes for the Ministry of his Church, and the Temporal Powers to whom he commits the Temporal Government of the said Society; seeing these two sorts of Powers have for their common end, the maintaining of Order in the Society, and the uniting of Men in the Worship of God, and in the observance of all the Duties which

a Decere arbitramur nostrum imperium subditos nostros de Religione commonefacere, ita enim & pleniorem adquiri Dei ac salvatoris nostri Jesu Christi benignitatem possibile esse existimamus, si quando & nos pro viribus ipsi placere studuerimus, & nostros subditos ad eam rem instituerimus. *L. 3. C. de sum. Trin.*

Sancta Synodus —— admonet imperatorem, reges, respublicas, principes, & omnes, & singulos cujuscumque status & dignitatis extiterint, ut, quo largius bonis temporalibus, atque in alios potestate sunt ornati, eo sanctius, quæ Ecclesiastici juris sunt tanquam Dei præcipua, ejusque patrocinio tecta, venerentur, nec ab ullis baronibus, domicellis, rectoribus, aliisve dominis temporalibus, seu magistratibus, maximeque ministris ipsorum principum, lædi patiantur; sed severe in eos, qui illius libertatem, immunitatem, atque jurisdictionem impediunt, animadvertant; quibus etiam ipsimet exemplo ad pietatem, Religionem Ecclesiarumque protectionem existant, &c. *Conc. Trid. sess.* 25. *cap.* 20. *de reform.*

b Unam nobis esse in omni nostræ reipublicæ & imperii vita in Deo spem credimus, scientes quia hæc nobis & animæ & imperii dat salutem. Unde & legislationes nostras inde pendere competit, & in eam respicere, & hoc eis principium esse & medium & terminum. *Novel.* 109. *in præfat.*

Cum sancta atque irreprehensibilis fides, quam prædicat sancta Dei Catholica Apostolica Ecclesia, nullo modo innovationem recipiat: nos sequentes sanctorum Apostolorum, & eorum qui post eos in sanctis Dei Ecclesiis conversati sunt, dogmata, justum fore existimavimus, cunctis manifestum facere qualiter de fide quæ in nobis est, sentiamus insistentes, & adhærentes traditioni & confessioni sanctæ Dei Ecclesiæ Catholicæ. *L.* 5. *C. de sum. Trin.*

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Religion prescribes unto them. So that it is a natural Effect of the Union which the Divine Providence has formed between the Spiritual and Temporal Powers, that they should agree among themselves, and that they should mutually support one another, to the end that every thing which may depend on the Temporal Government may be directed to the support of the spiritual Authority, and that they may both of them draw one from the other the Use which may be necessary for the Publick Good. And altho these two sorts of Powers have their distinct Uses in the manner that has been explained in the 10th Chapter of the Treatise of Laws; yet the just Dispensation of the one and the other within the bounds of their Extent, reconciles and unites them together perfectly well, and they cannot be divided but by the division of those who exercise the Ministerial Functions of them, and by the Encroachments of the one upon the other, when they have a mind to give to their Ministry an Extent that does not agree to it.

It belongs to the Power of Princes, and it is their Duty, to give to the Church within their Dominions, all the Protection, and all the Assistance that it may stand in need of. It is for this end that the Christian Princes have made many Laws to enforce the Observance and Execution of the Laws of the Church, as may be seen in the Codes of the Christian Emperors *Theodosius* and *Justinian*, and in the Ordinances of *France*, wherein are comprehended a great number of Laws relating to Religion; which they have not done with a View to establish Rules for the Church, or to set themselves up for Lawgivers or Judges in Spiritual Affairs, as if their Power reached to govern in the Church, in the same manner as they may do in the State; but only to enforce the observance of the Laws which the Church her self, and the Spiritual Powers to whom God has committed the Care of her have established, and to protect and maintain the Execution of those Laws *c*, in what they contain relating to the external Order, and where the Temporal Authority may be of Use. Thus, for example, Princes do not determine what are the Matters of Faith which God has revealed to his Church, neither do they compose the Canons of Ecclesiastical Discipline, but presupposing that to be true which the Church places in the number of the Articles of Religion, and that which she ordains to be the spiritual Discipline and Policy, they add to the Authority of the Laws of the Church, that which God has put into their hands; enjoining, as to what concerns the Articles of Faith, their Subjects to submit themselves to the Doctrine of the Church, prohibiting all Persons to preach or to teach any thing contrary thereto, and enacting Punishments against Hereticks. And as to the Discipline, they do not regulate, for example, what belongs to the Celebration of the Festivals, and the Ceremonies of Divine Worship; but they forbid the profanation of the Festivals, and punish those who do not observe them, as also those who disturb the established Order of Worship *d*; they enact likewise Punishments against the Ministers of the Church who disturb the said Order *e*.

c Necessarium igitur esse putavimus, tam hæreticorum vaniloquia & mendacia dissipare, quam omnibus insinuare, quomodo, aut sentiat sacta Dei Catholica & Apostolica Ecclesia, aut prædicent sanctissimi ejus sacerdotes. Quos & nos sequuti, manifesta constituimus ea quæ fidei nostræ sunt: non quidem innovantes fidem (quod absit) sed coarguentes eorum insaniam, qui eadem cum impiis hæreticis sentiunt. Quod quidem & nos in nostri imperii primordiis pridem satagente cunctis fecimus manifestum. *l.* 6. *C. de sum. Trin.*

Cunctos populos, quos clementiæ nostræ regit temperamentum, in tali volumus religione versari, quam divinum Petrum Apostolum tradidisse Romanis, religio usque nunc ab ipso insinuata declarat, quamque Pontificem Damasum sequi claret & Petrum Alexandriæ Episcopum virum Apostolicæ sanctitatis, hoc est, ut secundum Apostolicam disciplinam Evangelicamque doctrinam Patris & Filii, & Spiritus sancti unam deitatem, sub parili majestate, & sub pia Trinitate credamus. Hanc legem sequentes Christianorum Catholicorum nomen jubemus amplecti. *l.* 2. *C. Theod. de fid. cath.*

d Si quis in hoc genus sacrilegii proruperit, ut in Ecclesias Catholicas irruens, sacerdotibus & ministris, vel ipsi cultui, locoque aliquid importet injuriæ: quod geritur, a Provinciæ rectoribus animadvertatur, atque ita Provinciæ moderator sacerdotum & Catholicæ Ecclesiæ ministrorum, loci quoque ipsius, & divini cultus injuriam capitali, in convictos sive confessos reos sententia noverit vindicandum: nec expectet, ut Episcopus injuriæ propriæ ultionem deposcat cui sanctitas ignoscendi gloriam dereliquit, sitque cunctis laudabile factas atroces sacerdotibus aut ministris injurias veluti crimen publicum persequi ac de talibus reis ultionem mereri. Quod si multitudo violenta a civilis apparitoris executione & adminiculo ordinum vel ordinatorum possessorumve non poterit flagitari quod se armis aut locorum difficultate tueatur: Præsides Provinciarum etiam militari auxilio per publicas litteras appetito competentem vindictam tali excessui imponere non morentur. *L.* 10. *C. de Epis. & Cler.*

e Sane cum hactenus canones observati non recte fuerint, diversas ex eo passi sumus interpellationes contra clericos & monachos, & quosdam Episcopos;

Since these sorts of Laws of Princes regard the general Order of Society, and the common good of the Faithful, we ought not to consider them as Laws of the Church, which have the Character of the spiritual Authority of the Powers who have the Government thereof; but as Temporal Laws, which the Religion of Princes, and their Zeal for the Church, obliges them to enact, for protecting within their Dominions the execution and observance of the Laws of Religion, and for maintaining the free exercise of it.

It may be observed concerning this Use of the Temporal Power to enforce the observance of the Laws of the Church, that it is an effect of the difference which distinguishes the present state of the true Religion in the Countries where it is received, from that in which it was at the time of its Infancy in the Country where the Government was an Enemy to it: which difference consists in this, that whereas Religion subsists free and unmolested in Christian Countries by means of the protection of the Temporal Powers; it happened on the contrary that when it was established in the Countries where it met with Opposition from the Civil Magistrate, it did, notwithstanding the Persecution it suffered from those Princes who endeavoured to smother it in its Infancy, gather strength daily from the blood of the Apostles and Martyrs who were sacrificed to the Fury of the Princes who persecuted it: and by this way, which would have destroyed all other Establishments of what nature soever, it not only supported it self under the Oppression of the most cruel Persecutions, but it was more holy and more flourishing in that State, than it has been in the state of Peace which it has enjoyed by the favour of Christian Princes: for it was in the Tranquillity of that peaceable State that the Decay of Christian Piety first took its rise. So that whereas it is by Peace in a State that the good Order of the Civil Government is maintained in it; that very Peace may on the contrary be an occasion of disorder to those who do not know how to support themselves in the Spirit of Religion against that Softness and Luxury to which Peace and Tranquillity usually exposes Men. And this difference between this effect of Peace in Religion, so opposite to the effect of the same Peace in the Temporal Government, is an effect of the difference between the Spirit of the one, and that of the other: which it is of importance to remark, in order to discover the Spirit of the different Kinds of the Laws of Religion, and of Civil Government, and the Characters which distinguish them, and to be the better able to judge of the Principles of the Conduct which those Persons ought to hold who have the Government of the one and of the other, by the different Views of the Ends for which they were instituted.

This difference between the Spirit of Religion and that of the Civil Government of a State, consists in this, that the Spirit of Religion tends to form between all Men a perfect Order, and a solid Peace which may be the effect of an Union of Hearts, and of such a Love of every one towards others, that every Man may love all other Men in the same manner as he is obliged to love himself; that is to say, with that Love which raises the Mind to the sole desire and search after the Sovereign Good, by taking it off from the love of Temporal Goods, of which the Spirit of Religion inspires into the Minds of all those who are animated with it a sincere Contempt, and such as allows only a sober and moderate Use of them. So that we are obliged to use them only with a Disposition of Mind to part freely with them, rather than do any thing that may be inconsistent with the sole and transcendent Love of the Sovereign Good. Thus, it is natural to these Characters of the Spirit of Religion, that it should maintain it self under the state of Persecution, which stripping the Faithful of the Riches which they ought to despise, brings them back again to their Duty, and elevates their Minds to the love of the Sovereign Good, which they are bound to love, and from which nothing ought to

pos; ut qui secundum divinos canones non viverent, & quidam etiam inter eos invenirentur, qui nec ipsam quidem vel sanctæ oblationis, vel sancti baptismatis orationem tenerint aut scirent. *Nov. 137. in præfat. circa finem.*

Jubemus autem & Provinciarum Præsides, si quid neglectum ex his quæ statuimus invenerint, primum quidem cogant Metropolitas & alios Episcopos dictas Synodos congregare, & omnia implere quæcunque de Synodis per præsentem legem jussimus: si vera eos morantes noverint & remissos, tunc nobis indicent, ut ad competentem protinus correctionem procedamus contra detrectantes Synodos celebrare: scituris vero ipsis Præsidibus, & obedientibus ipsis officiis, quod si quidem ista non servaverint, extremis subjicientur suppliciis; confirmamus autem & per præsentem legem a nobis diversis legibus sancita de Episcopis & Presbyteris & cæteris clericis. *Ibid. cap. 6. in f.*

to be capable of separating them.

But the Spirit of the Temporal Government not consisting in the regulation of what passes in the secret corners of Mens Hearts, and regarding on the contrary only what passes in their outward Behaviour, the order of which it is to regulate independently of the good or bad Dispositions of the Heart; the Temporal Government is to take notice only of this external Behaviour of Men, and to see that the same be orderly and peaceable.

One may be able to judge by this difference between the Spirit of Religion and that of the Civil Government, what ought to be the Views of those who exercise any Ministerial Function in either of them; and that as their Ends are different, their Conduct ought to be so likewise. But the distinction between the Spirit of Religion and that of the Temporal Government is no hindrance why they may not agree mutually with one another, since the Ministry of the one does not engage those who exercise it to do any thing in breach of their Duties towards the other. Thus when those who have the Temporal Government in their Hands, or who exercise any Function thereof, procure in a Kingdom plenty of all things that are useful in the Society of Mankind, they do nothing that is contrary to the Spirit of Religion, which teaches us to despise all earthly Goods; but they exercise a Duty of their Ministry: for if on the one part no body is dispensed with from observing the Law which enjoins the Contempt of earthly Goods, it is certain on the other, that plenty of all Things is necessary in a Kingdom for the several wants, both of the Prince and of the State, and for the wants of particular Persons, which may be greater or less, according to the qualities of the Persons and their Employments, which renders necessary to one what would be superfluous to another.

Thus, when Princes establish Courts of Justice, and in order to have Justice therein administred to their Subjects, they chuse for Judges such Persons as they believe to have both Capacity and Integrity, they do not in this do any thing contrary to the Spirit of Religion. For altho St. *Paul* teaches us, that the Spirit of Religion disposes us to suffer Injustice, and to depart from our Interests, rather than to defend them by Law-suits *f*; and that by the same Principle of despising worldly Goods, this holy Apostle advises the Faithful to take for Judges of the differences which they may have with one another about Temporal Goods the least among themselves *g*, that they might avoid going to Law before the Heathen Judges under whom they lived; yet it is nevertheless true that Christian Princes are bound to administer Justice to their Subjects, whether they love or whether they despise worldly Goods; and the disorder would be exceeding great, if under the pretext of the general Duty of the contempt of worldly Goods, Princes should leave the Administration of Justice in the hands of Persons who are ignorant of the Laws, and who are incapable of the Cares which that Administration requires.

It follows from these Remarks which have been made on the Laws of Religion, the observance of which may stand in need of the assistance of Temporal Princes, that the Laws of Princes, which serve to protect and maintain the Policy of the Church, having a relation to the publick Order of a Christian State, it is necessary to comprehend under this Title, the Principles which concern the Affinity that is between the Policy of the State and that of the Church. The Reader may consult on this Subject, what has been said in the Preface touching the different Kinds of Unions and Conjunctions which make the Society of Mankind to subsist throughout the whole World.

It is easy to judge by the Remarks already made, what Rules this Title will contain relating to Religion; and that we ought here to confine our selves to those Rules, the Violation of which might

f Recompense to no Man Evil for Evil. Provide things honest in the sight of all Men. If it be possible, as much as lieth in you, live peaceably with all Men. Avenge not your selves. Rom. 12. 17, 18, 19.

Now therefore there is utterly a fault among you, because ye go to Law with one another: why do ye not rather take wrong? why do ye not rather suffer your selves to be defrauded? 1 Cor. 6. 7.

And if any Man will sue thee at the Law, and take away thy Coat, let him have thy Cloke also. Mat. 5. 40. See Luk. 6. 29.

g If then ye have Judgment of things pertaining to this Life, set them to judge who are least esteemed in the Church. I speak to your shame. Is it so, that there is not a wise Man among you? no not one that shall be able to judge between his Brethren? But Brother goeth to Law with Brother, and that before the Unbelievers. 1 Cor. 6. 4, 5, 6.

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might affect the Publick, by disturbing or destroying the Order thereof, and of which the Observance ought for this Reason to be enforced by the Authority of the Civil Powers. Thus, for example, the Church forbids the preaching of Heretical Doctrines; she enjoins the Celebration of the Festivals by abstinence from the Works that are prohibited on those Holy-days; she commands abstinence from Flesh in Lent; and the Christian Princes authorize the Prohibitions of preaching Heresies, and punish those who transgress the same. They establish also certain Punishments against Hereticks *b*: they forbid the holding of Fairs and Markets on Holy-days, as also the Works that profane them; and they prohibit in Lent the publick Sale of Flesh, the eating of which is forbid by the Church during that solemn Fast.

It is to enforce the observance of these sorts of Laws of the Church, and of many others of the like nature, that the Christian Emperors and our Kings have made an infinite number of Laws relating to the Ecclesiastical Policy, in order to support the same, as has been already remarked. And since those Laws of the Princes make a part of the Publick Law, we shall comprehend under this Title only the general Principles and the essential Rules that are contained in the said Laws, on which depends the detail of the others: but we shall not here take in that whole detail, there being an ample Collection of them in the Ordinances of *France*, where it is easy to see them, and to compare them with the Rules of this Kind which are collected together in the Codes of the Emperors *Theodosius* and *Justinian*; where it is necessary to distinguish such of the said Laws as are not in use with us, which it will be easy to perceive by the bare reading of them.

These are the bounds within which we have thought fit to restrain the Rules concerning the Ecclesiastical Policy, which we intend to comprehend under this Title. But as for all the matters of this Policy which are purely Spiritual, altho they have a relation to the publick Order, and that for that Reason they make a part of the Publick Law, such as the Articles of Faith, the Hierarchy of the Church, the distinctions of the several Degrees of Holy Orders, and those of Prelates, the Ecclesiastical Jurisdiction in matters purely Spiritual, and other matters of the like nature, the Character which they may have of being a part of the Publick Law, and their Affinity to the matters of the Ecclesiastical Policy, do not make it necessary to join them with it, and to comprehend therein in general every thing of Religion which may have the Character of being a part of the Publick Law.

Some may be apt to think, that since those who have collected the Laws of the Church in that Collection which is called the Canon Law, have inserted therein an infinite number of Rules which relate only to Temporal Affairs, and many of which have been taken from the Heathen Authors of the Roman Laws touching the matters of Sale, Exchange, Letting and Hiring, Deposits, Donations, Mortgages, Successions, and other matters purely Temporal; so likewise we might take in here the Rules of the Church which concern only Spiritual Affairs: but this Example does not carry with it any such Consequence. For those who were the Compilers of the Body of the Canon Law may have had Reasons for inserting in it those Temporal Laws, which Reasons would only justify the mixing of Ecclesiastical Laws in a Body of Publick Law, which relates only to the Civil Government. Thus, they may have imagined that those Temporal Laws which are mixed in the Body of the Canon Law, might be considered as Rules for the Conduct of particular Persons in their Temporal Concerns, and as Principles of the Duties of Conscience, which oblige them to do Justice to one another in their Dealings, and in the several Affairs which they may have with one another. So that those Temporal Laws may be considered under this View, as Accessories to the Laws of Religion, and such as might be useful to the Ministers of the Church for deciding Cases of Conscience. Thus those Compilers may

b Omnes hæreticos utriusque sexus, quocumque nomine censeantur, perpetua damnamus infamia, diffidamus, atque bannimus: censentes, ut omnia bona talium confiscentur, nec ad eos ulterius revertantur, ita quod filii eorum ad successionem eorum pervenire non possint; cum longe gravius sit, æternam, quam temporalem offendere majestatem. Qui autem inventi fuerint sola suspicione notabiles, nisi ad mandatum Ecclesiæ juxta considerationem suspicionis, qualitatemque personæ, propriam innocentiam congrua purgatione monstraverint; tanquam infames & banniti ab omnibus habeantur. *l.* 19. *C. de hæret. & manich.*

See the 4th Article of the 1st Section of the first Title that follows.

may have been induced to make this mixture in consideration of the double Authority of the Popes in the Church, and in their Dominions, of which they are the Temporal Princes, having a right to make Temporal Laws therein; and they may likewise have proposed to themselves the Example of the Divine Law in the Old Testament, which God himself endited unto *Moses*, and where he added to the Laws of Religion many Rules for Temporal Affairs; because he himself exercised in a visible manner, both the Spiritual and Temporal Government over the elect People to whom he gave those Laws.

They may also have had in view the Ecclesiastical Jurisdiction, in which there may fall out differences touching all matters, which was more common when the said Jurisdiction was less restrained than it is at present in *France*: but seeing our design of digesting into Order the Rules of the Publick Law reaches no farther than to the Temporal Government, we cannot here take in as Accessories the Laws of Religion; and the mixing together of these two sorts of Laws under one and the same Title, would be injurious to the Dignity and Holiness of the Laws of Religion, and to the distinguished Character of Authority which they receive from the Spirit of God who has inspired them, and who by the said Laws governs and guides the Church in a manner very different from that in which God governed it under the antient Covenant. For under the New Covenant, Jesus Christ who is the Lawgiver, has not only not made any Laws for the Temporal Government, but he would not so much as make himself a Judge of a difference at the request of the Parties; and as for every thing which regards the Temporal Affairs, he has left the direction thereof to the Temporal Powers, teaching, both himself and by his Disciples, the Obedience that is due to them, and informing us of the Dispositions that are necessary for the right Use of worldly Goods.

One may be able to judge by all these Reflections, in what manner the Spiritual and Temporal Powers agree and are reconciled together; it remains only to consider what Use ought to be made of the Temporal Power in matters relating to the Church, and what is, in relation to the said Use, the Power, and also the Duty of Princes.

As it is the Duty of those who exercise the Spiritual Ministry, to teach and to inculcate on all Men the Duty of Obedience to the Civil Powers, and the observance of the Laws and Orders of their Princes; so it is in the same manner the Duty of those who exercise the Ministry of the Temporal Government, to enjoin all those who are subject to them, to be obedient to the Spiritual Powers, and to oblige them to the performance of the Duties which that Obedience requires, by all the means which may depend on the Use of the Temporal Power; which implies a Right to support, protect and enforce the execution of the Laws of the Church, to punish those who transgress them in such a manner as thereby to disturb the Publick Order, and even to enact Laws for the support and defence of the Laws of the Church, and of the Ecclesiastical Discipline. Thus for example, seeing the Laws of the Church ordain the Celebration of Sundays and Holy-days, by a Cessation from Labours which are a violation of the Solemnity of them, and that the Ministers of the Church can inflict no other Punishments but Spiritual Corrections and Penances, the Accomplishment whereof does often depend on the will of those to whom they are enjoined, and which moreover do not always repair the publick Scandal that is given by the profanation of the Festivals; Princes therefore ordain Punishments against those who do not celebrate them as they ought, condemning them in Fines, and other Penalties, according to the quality of the Facts and the Circumstances. Thus for another example, the Laws of the Church oblige to Residence, Pastors and others whose Functions require their Presence for the exercise of their Ministry and discharge of their Duty; and if they disobey the said Laws, it is the Duty of the Prince, and he has Authority to constrain them to it by ways that depend on his Temporal Power, such as the Seizure of their Revenues [l] and the Kings of *France* have made divers Regulations on this Head.

It is therefore to enforce the Observance of the Laws of the Church, and

Luke 12. 13, 14.

See the 10th Chapter of the Treatise of Laws, Nᵒ 6.

l See the 8th Article of the 2d Section of the Duties of the Clergy, with respect to the publick Order in the tenth Title of the Clergy, and the Texts and Ordinances which are there quoted.

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to oblige the Clergy to pay a due Obedience to them, that Princes have a Right to make Laws and Regulations for putting them in execution: and this is what has been practised by the Christian Emperors, and by the Kings of *France*, who have made several Laws to enforce the Observance of the Laws of the Church, as may be seen by the Collections of the Constitutions of the Emperors in their Codes, by many Novels of the Emperor *Justinian*, and by the Ordinances of the Kings of *France*, who call what they ordain concerning Matters which relate to the Church, Political Laws *m*, and stile themselves therein *Protectors*, *Guardians*, *Conservators* and *Executors* of what the Church teaches and enjoins *n*.

It appears by this Use of the Temporal Authority in what relates to the Church, that the temporal Power makes no Encroachment on the spiritual Authority, and that it only conforms it self thereto, and enforces the Execution of what the Church has already decreed: and it is only to procure Obedience to be paid to the Laws of the Church, that Princes give their helping Hand; and this Service which they render to the Church is a part of the temporal Government, the Order whereof demands that the Laws of the Church be observed in it.

This Duty and Power of Princes to enforce the Observance of the Laws of the Church, obliges them also not to suffer them to be violated by the Ministers of the Church themselves, or by the Ecclesiastical Judges, who should attempt any thing contrary to the Discipline of the Church; and in the Cases of Attempts of this nature an effectual Remedy is to be applied by the Temporal Power of the Prince in the manner that is practised in his Dominions. Thus in *France* there lies an Appeal from what has been decreed contrary to the Rules of the Church; and these sorts of Appeals are called Appeals from Abuses, because they tend to reform the Abuse which the Ministers and Ecclesiastical Judges have made of their Authority by the said Encroachments. This extends even to the Briefs of Popes which may interfere with the Laws of the Church. And the said Appeals are interposed, either by the particular Persons who have an Interest therein, or by the King's Sollicitors General in the Parliaments of *France*, which the Kings have vested with the Power of deciding these sorts of Appeals, in order to maintain the Discipline of the Church in its Purity against the said Abuses. But when it is a Brief of the Pope that is complained of, such respect is paid to the Holy See, that they do not appeal from the Brief itself, but from the Execution thereof, which is called Fulmination.

It is this Purity of the Ecclesiastical Discipline, which is called in *France* the Liberties of the *Gallican* Church; not by virtue of any particular Privilege which exempts the Church of *France* from the Laws of the Universal Church, but by an inviolable Attachment to that Purity of Discipline which consists in that which is the Antient and Common Law of the Universal Church *o*. Thus, when the Authority of the Temporal Power restrains those Encroachments, it does nothing but preserve to the Church of *France* the free Use of the Ecclesiastical Discipline in its Purity, and give in effect to the Church that Liberty which is agreeable to its Spiritual Reign, which ought to restrain the Abuses and Encroachments that disturb the Order thereof.

m *Charles* IX. *July* 17. 1561.

n *Francis* I. *July* 1543.

Cupiens sancta Synodus Ecclesiasticam disciplinam in Christiano populo non solum restitui, sed etiam perpetuo sartam, tectam a quibuscunque impedimentis conservari; prætereaque de Ecclesiasticis personis constituit, sæculares quoque principes officii sui admonendos esse censuit, confidens eos, ut catholicos, quos deus sanctæ fidei ecclesiæque protectores esse voluit, jus suum Ecclesiæ restitui, non tantum esse concessuros, sed etiam subditos suos omnes ad debitam erga clerum, parochos & superiores ordines reverentiam revocaturos; nec permissuros ut officiales, aut inferiores magistratus, ecclesiæ & personarum ecclesiasticarum immunitatem, dei ordinatione & Canonicis sanctionibus constitutam, aliquo cupiditatis studio, seu in consideratione aliqua violent, sed una cum ipsis principibus debitam sacris summorum Pontificum, & conciliorum constitutionibus observantiam præstent, &c. *Conc. Trid. Sess.* 25. c. 20.

o ¶ 'We have made use of this Expression of the *antient and common Law* of the Universal Church, because of the Diversity of Sentiments among the Authors who have writ on this Subject of the Liberties of the *Gallican* Church, some of them having confined to the four first Councils the Laws of the Church, which the Liberties of the *Gallican* Church preserve in their Purity, and others having comprehended under the said Laws the Decrees of the Popes, even those of the latest Reign, with this Qualification, that none of the said Decrees of the Popes should

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'should be consider'd as having the force 'of Laws in *France*, except such of them 'as have been there received in Use, 'which is very just. For on one part 'there are a great many of the said 'Decrees which are very just and equi'table, and which we observe: and on 'the other part, not only are there 'some of them which we do not ob'serve, because we keep close to other 'Rules of the Church, and to Tradi'tion in such Matters wherein the Dis'cipline cannot vary according to 'Times and Places; but there are some 'of them which we reject, as not pre'serving that Purity, and there is one 'of them which we look upon to be 'erroneous and contrary to the Spirit 'of the Church, which is the Extrava'gant *Unam Sanctam* of *Boniface* VIII. 'who declares himself to be superior 'to Kings in Matters Temporal, and 'claims a Right to depose them. Eve'ry body knows the History of what 'past between the Pope and King *Phi'lip* the *Fair*, and that the said Decre'tal was a Consequence thereof.

Unam sanctam Ecclesiam Catholicam, & ipsam Apostolicam urgente fide credere cogimur, & tenere. Nosque hanc firmiter credimus, & simpliciter confitemur; extra quam nec salus est, nec remissio peccatorum, sponso in canticis proclamante (una est columba mea, perfecta mea. Una est matri suæ, electa genitrici suæ) quæ unum corpus mysticum repræsentat, cujus caput Christus: Christi vero Deus. In qua unus Dominus, una Fides, unum Baptisma. Una nempe fuit diluvii tempore Arca Noe, unam Ecclesiam præfigurans, quæ in uno cubito consummata, unum (Noe videlicet) gubernatorem habuit, & rectorem, extra quam omnia subsistentia super terram legimus fuisse deleta. Hanc autem veneramur & unicam dicente Domino in Propheta, (erue a framea Deus animam meam, & de manu canis unicam meam) pro anima enim, id est, pro seipso capite simul oravit, & corpore: quod corpus unicam scilicet Ecclesiam nominavit, propter sponsi fidei, sacramentorum, & charitatis Ecclesiæ unitatem. Hæc est tunica illa Domini inconsutilis, quæ scissa non fuit, sed sorte provenit. Igitur, Ecclesia unius, & unica unum corpus, unum caput, non duo capita, quasi monstrum, Christus videlicet & Christi Vicarius Petrus, Petrique successor: dicente Domino ipsi Petro (pasce oves meas) meas, inquit, & generaliter, non singulariter has, vel illas, per quod commisisse sibi intelligitur universas. Sive ergo Græci, sive alii se dicant Petro, ejusque successoribus non esse commissos, fateantur necesse se de ovibus Christi non esse: dicente Domino in Joanne, unum ovile, & unicum esse pastorem. In hac ejusque potestate duos esse gladios, spiritualem videlicet, & temporalem Evangelicis dictis instruimur. Nam dicentibus Apostolis (ecce gladii duo hic) in Ecclesia scilicet, cum Apostoli loquerentur, non respondit Dominus nimis esse sed satis. Certe qui in potestate Petri temporalem gladium esse negat, male verbum attendit Domini proferentis (converte gladium tuum in vagina.) Uterque ergo est in potestate Ecclesiæ, spiritualis scilicet gladius & materialis. Sed is quidem pro Ecclesia, ille vero ab Ecclesia exercendus. Ille sacerdotis, is manu regum & militum, sed ad nutum, & patientiam sacerdotis. Oportet autem gladium esse sub gladio, & temporalem auctoritatem spirituali subjici potestati: nam cum dicat Apostolus; Non est potestas nisi a Deo, quæ autem sunt a Deo ordinata sunt; *non autem ordinata essent, nisi gladius esset sub gladio, & tamquam inferior reduceretur per alium in suprema. Nam secundum beatum Dionysium, lex divinitatis est infima per media in suprema reduci. Non ergo secundum ordinem universi omnia æque, ac immediate, sed infima per media, & inferiora per superiora ad ordinem reducuntur. Spiritualem autem & dignitate, & nobilitate terrenam quamlibet præcellere potestatem, oportet tanto clarius nos fateri, quanto spiritualia temporalia antecellunt. Quod etiam ex decimarum donatione, & benedictione, & sanctificatione ex ipsius potestatis acceptatione, ex ipsarum rerum gubernatione claris occulis intuemur. Nam veritate testante, spiritualis potestas terrenam potestatem instituere habet, & judicare, si bona non fuerit: sic de Ecclesia & Ecclesiastica potestate verificatur vaticinium Jeremiæ (Ecce constitui te hodie super gentes, & regna) & cætera quæ sequuntur. Ergo si deviat terrena potestas, judicabitur a potestate spirituali; sed si deviat spiritualis minor, a suo superiori: si vero suprema, a solo Deo, non ab homine poterit judicari; testante Apostolo,* Spiritualis homo judicat omnia, ipse autem a nemine judicatur. *Est autem hæc auctoritas (etsi data sit homini, & exerceatur per hominem) non humana, sed potius divina, ore divino Petro data, sibique, suisque successoribus in ipso, quem confessus fuit; Petra firmata: dicente Domino ipsi Petro,* Quodcumque ligaveris, &c. *Quicumque igitur huic potestati a Deo sic ordinatæ resistit, Dei ordinationi resistit, nisi duo (sicut Manichæus) fingat esse principia; quod falsum & hæreticum judicamus: quia testante Moyse, non in principiis sed in principio cœlum Deus creavit, & terram. Porro subesse Romano Pon-*

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Pontifici omni humanæ creaturæ declaramus, dicimus, definimus, & pronuntiamus omnino esse de necessitate salutis. Extravag. Unam. sanctam.

Besides this Use of the temporal Power in maintaining the Laws of the Church, it extends also to the Use of defending it self against the Attempts of the Ministers of the Church, who should encroach upon any of the Rights and Functions which the Civil Magistrate holds of God. And as it is just that Princes should maintain the Laws of the Church, and protect it in the Exercise of all its Rights; so it is equally just, that they should see to the Observance of their own Laws, and maintain themselves in the exercise of the Rights which belong to them by virtue of the Power which they derive from God. It is by virtue of this Right, that as our Princes give order for reforming the Abuses that Ministers of the Church, and Ecclesiastical Judges may make of their Authority in breach of the Laws of the Church, so also they reform in the same manner whatever Encroachments may be made by the Ministers of the Church, or by Ecclesiastical Judges, on the Laws of the State, or on the Rights of the Sovereign. And by doing themselves this Justice, they are so far from breaking in on the Laws of the Church, that they observe on the contrary one of the chiefest and most capital of them, and which is not only a Law of the Church, but of God himself, which has ordained the Ministers of the Church themselves to pay Obedience to the temporal Powers in Matters belonging to their Functions.

We must also take notice of a third Use of the temporal Power in what concerns the Church, and which consists in the Right which Princes have over whatever is in the Discipline of the Church relating to temporal Affairs; as for example, the Possession of Goods given to the Church, all her Right to which she professes to hold of the Princes *o*.

These are the several Uses of the temporal Power in Matters relating to the Church, which shall be the subject Matter of this Title, which we shall divide into three Sections: The First shall be of the Use of the temporal Power in Matters relating to the Church; the Second, of the Use of the same Power, for restraining the Encroachments of the Ministers of the Church on the Rights of Princes, and of Appeals on account of such Encroachments; and the Third, of the Use of the same Power in Matters which are temporal, in the Ecclesiastical Policy.

It is necessary to observe touching all the Matters that are to be treated of in this Title, that we do not intend to enlarge on the Detail of any one of them; for it not being the Design of this Book to treat of Matters relating to the Church, we have inserted here this last Title, only to give general Ideas of some Matters which relate to the Policy of the Church, and where the Spiritual Authority stands in need of Assistance from the temporal Power of Princes. But it was not our business to explain the Detail of the Rules concerning these Matters; for what is spiritual in the said Rules does not come within the Design of this Book; and what they contain relating to temporal Affairs, consists in arbitrary Rules which the Ordinances, the Agreements and other Laws of the Church, and Usage have established; and which for this reason do not come within the Design of this Book, but are to be met with in their proper Places, and in the Collections which have been made of them; and those among others which have been made by several Authors touching Matters which relate to the Liberties of the *Gallican* Church, Appeals from Abuses, and the Right of the Regale *p*.

o Quo jure defendis villas Ecclesiæ, divino an humano? Divinum jus in scripturis habemus: humanum jus in legibus Regum. Unde quisque possidet, quod possidet? Nonne jure humano? *Dist.* 8. *Can.* 1.

Jura autem humana jura imperatorum sunt. Quare? Quia ipsa jura humana per Imperatores & Reges sæculi Deus distribuit generi humano. *Ibid.*

p See the last Article of Sect. 2.

SECT. I.

Of the Use of the Temporal Power in Matters relating to the Church.

The CONTENTS.

1. *There are two sorts of Duties which require the Use of two sorts of Powers.*
2. *Use of the spiritual Powers.*
3. *Use of the temporal Powers.*
4. *Penalties against Hereticks.*
5. *Penalties against those who transgress the Laws of the Church.*

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6. *Punishment of Crimes which are injurious to the Majesty of God in a more especial manner.*
7. *Laws of temporal Princes to enforce the Observance of the Laws of the Church.*
8. *The Use of the temporal Power for executing the Sentences of Ecclesiastical Judges.*
9. *The Right of the Regale.*

I.

1. There are two sorts of Duties which require the use of two sorts of Powers.

THE Duties which Religion enjoins are of two sorts: One is, of those which relate to the inward Dispositions of the Mind and of the Heart of every Person, and which demand in the Mind the Knowledge and Belief of the Mysteries and Truths it teaches us, and in the Heart a Respect and Love of the said Mysteries and Truths. The other is, a sincere and faithful Observance of all its Laws, whether they be limited to what passes inwardly in the Mind and in the Heart, or whether they enjoin any Duties to be performed outwardly, and which have a relation to other Persons, or even to the Publick. It is of this second sort of Duties that those are which demand on some occasions the Use of the temporal Power: which distinguishes them from the other Duties, in which the temporal Power can be of no use, and which must be maintained and enforced by the spiritual Powers alone *a*.

a. See the Articles which follow.

II.

2. Use of the spiritual Powers.

As to what passes inwardly in the Mind and Heart of Man, the Church hath its own proper Ways for bringing back to their Duty those who go astray from it; but without any occasion for the Assistance of the temporal Power, and it employs in this Particular only its own Power. This Power which is peculiar to the Church, consists in the Power of binding and loosing, by the Ministry which is called the Power of the Keys, which were put into the hands of St. *Peter*, the Head of the Church, and his Successors, and which is by them communicated to those who have a Share in the said Ministry and Power, which they exercise in the Administration of the Sacraments, and by the Ways which bind and which loose, and who by this double Function open or shut the Gates of Heaven; and in this the temporal Power has no manner of right, nor any share *b*.

b And the Lord spake unto Moses, *saying, Bring the Tribe of* Levi *near, and present them before* Aaron *the Priest, that they may minister unto him. And they shall keep his Charge, and the Charge of the whole Congregation before the Tabernacle of the Congregation, to do the Service of the Tabernacle.* Numb. 3. 5, 6, 7.

And thou shalt appoint Aaron *and his Sons, and they shall wait on their Priests Office: And the Stranger that cometh nigh, shall be put to Death.* Numb. 3. 10.

And I say also unto thee, that thou art Peter, *and upon this Rock I will build my Church, and the Gates of Hell shall not prevail against it. And I will give unto thee the Keys of the Kingdom of Heaven; and whatsoever thou shalt bind on Earth, shall be bound in Heaven; and whatsoever thou shalt loose on Earth, shall be loosed in Heaven.* Mat. 16. 18, 19. Mat. 18. 18. *See* John 20. 22.

III.

3. Use of the temporal Powers.

As to the external Actions of Man, which may have some relation to the publick Order of the Society, every thing that violates or transgresses any Duty of Religion, and tends likewise to disturb the publick Order of the Society, is restrained by the Authority of the temporal Power, which inflicts the Punishments that the Nature of the Fact may deserve, according to the Circumstances. Thus, as to what concerns the first Duties of Religion; seeing the Rules of a sincere and true Belief of the Mysteries and Articles of Faith, imply the Duty of making a publick Profession of that Faith, and of teaching and publishing nothing that is contrary to it; it belongs to the Power of Princes, and it is their Duty to restrain and punish those who transgress the said Rules, and who teach or propagate false and erroneous Doctrines contrary to the established Faith of the Church: and Princes acquit themselves of this Duty, not by judging of the Doctrine, which belongs only to the Church herself, and to her Ministers, but by causing false and erroneous Doctrines to be examined by the Ministers of the Church, and by inflicting on those who after having maintained and defended the said Errors, refuse to retract them, the Punishments which they may deserve on account of their Rebellion to the Church, and of the Trouble which they cause in the publick Order of the Society, where Divisions about Matters of Faith may be attended with Seditions, or other great Inconveniencies. It is to fulfil this Duty of Princes, that the Kings of *France*, after the Example of the first Christian Emperors, have caused to be transcribed in their Ordinances, the Articles of Faith drawn out of the Councils, and have enjoined the Observance of them, forbidding the preaching of any thing that may be directly or indirectly contrary

to

to them, and puniſhing Hereticks, and thoſe who preach or teach falſe and erroneous Doctrines contrary to the Faith, even with corporal Puniſhments *c*.

c Nemo clericus, vel militaris, vel alterius cujuſlibet conditionis, de fide chriſtiana, publice turbis coadunatis & audientibus, tractare conetur in poſterum ex hoc tumultus & perfidiæ occaſionem requirens. Nam & injuriam facit judicio reverendiſſimæ Synodi, ſi quis ſemel judicata ac recte diſpoſita revolvere & publice diſputare contenderit: cum ea quæ nunc de chriſtiana fide a ſacerdotibus, qui Chalcedone convenerunt, per noſtra præcepta ſtatuta ſunt, juxta Apoſtolicas expoſitiones & inſtituta ſanctorum patrum trecentorum decem & octo in Nicæa, & centum quinquaginta in hac regia urbe definita eſſe noſcantur. Nam in contemptores hujus legis pœna non deerit: quia non ſolum contra fidem vere expoſitam veniunt, ſed etiam Judæis & Paganis ex hujuſmodi certamine profanant veneranda myſteria. Igitur ſi clericus erit, qui publice tractare de religione auſus fuerit a conſortio clericorum removebitur, ſi vero militia præditus ſit, cingulo ſpoliabitur. Cæteri autem hujus criminis rei, ſi quidem liberi ſint, de hac ſacratiſſima urbe expellentur, pro vigore judiciario etiam competentibus ſuppliciis ſubjugandi: ſi vero ſervi, ſeveriſſimis animadverſionibus plectentur. *l.* 4. *c. de ſum. Trin.*

Cum recta atque irreprehenſibilis fides quam prædicat ſancta dei catholica & apoſtolica eccleſia, nullo modo innovationem recipiat: nos frequentes ſanctorum Apoſtolorum, & eorum qui poſt eos in ſanctis Dei eccleſiis converſati ſunt dogmata, juſtum fore exiſtimavimus, cunctis manifeſtum facere qualiter de fide quæ in nobis eſt, ſentiamus inſiſtentes & adhærentes traditioni & confeſſioni ſanctæ dei eccleſiæ catholicæ, &c. *l.* 5. *in prima. eod.*

Si enim aliqui poſt hanc noſtram præmonitionem certo & liquido id cognoſcentibus & competentibus locorum epiſcopis deo amantiſſimis; inventi fuerint poſthac in contraria his opinione eſſe: hi nullius indulgentiæ expectent veniam. Jubemus enim tales, tanquam confeſſos hæreticos, competenti animadverſioni ſubjugari. *d. l.* §. *ult.*

See the Ordinances of *Francis* I. in *July* 1543. of *Henry* II. the 17th and 23d of *June*, 1551.

See the following Article, and the Texts there quoted.

IV.

4. *Penalties againſt Hereticks.*

It is by the ſame Policy which ought to maintain Religion, that Catholick Princes prohibit within their Dominions Diviſions touching Matters of Religion, Schiſms, and the Exerciſe of any other Religion except the Catholick alone, and exclude all Hereticks from it, by inflicting Penalties againſt them as there is occaſion *d*.

d Cunctos populos quos clementiæ noſtræ regit imperium, in tali volumus religione verſari quam divum Petrum Apoſtolum tradidiſſe Romanis religio uſque adhuc ab ipſo inſinuata declarat. *l.* 1. *C. de ſumm. Trin.*

Hanc legem ſequentes chriſtianorum catholicorum nomen jubemus amplecti: reliquos vero dementes, veſanoſque judicantes, hæretici dogmatis infamiam ſuſtinere, divina primum vindicta, poſt etiam motus animi noſtri quem ex cæleſti arbitrio ſumpſerimus ultione plectendos. *d. l.* 1. §. 1.

Nullus hæreticis miniſteriorum locus, nulla ad exercendam animi obſtinatioris dementiam pateat occaſio. Sciant omnes, etiam ſi quid ſpeciali quolibet reſcripto per fraudem elicito ab hujuſmodi hominum genere impetratum ſit, non valere. Arceantur cunctorum hæreticorum ab illicitis congregationibus turbæ: unius & ſummi Dei nomen ubique celebretur. Nicænæ fidei dudum a majoribus traditæ, & divinæ religionis teſtimonio atque aſſertione firmatæ obſervantia ſemper manſura teneat. *l.* 2. *eod.*

Qui vero non iiſdem inſerviunt, deſinant affectatis dolis alienum veræ Religionis nomen aſſumere, & ſuis apertis criminibus denotentur, atque ab omni ſubmoti Eccleſiarum limine penitus arceantur: cum omnes hæreticos illicitas agere inter oppida congregationes vetemus. At ſi quid eruptio factioſa tentaverit, ab ipſis etiam urbium mœnibus exterminato furore propelli jubemus, ut cunctis orthodoxis epiſcopis qui Nicænam fidem tenent catholicæ eccleſiæ toto orbe reddantur. *d. l.* §. 2.

Primum eſſe & maximum bonum omnibus hominibus credidimus, veræ & immaculatæ Chriſtianorum fidei rectam confeſſionem: ut per omnia hæc roboretur, & omnis orbis terrarum ſanctiſſimi ſacerdotes ad concordiam copulentur, & conſone immaculatam Chriſtianorum confeſſionem prædicent, & omnem occaſionem quæ ab hæreticis invenitur auferant, quod oſtenditur ex diverſis conſcriptis a nobis libris & edictis. Sed quoniam hæretici neque Dei cogitant timorem, neque interminatas talibus pœnas ex legum ſeveritate conſiderantes, diaboli opus implent, & quoſdam ſimplicium ſeducentes ſanctæ fidei catholicæ & apoſtolicæ eccleſiæ, adulteras collectas, & adultera baptiſmata latenter faciunt: pietatis exiſtimavimus, per præſens noſtrum edictum monere eos qui tales ſunt, quatenus & ipſi recedant ab hæretica veſania, & nec aliorum animas per ſimplicitatem perdant, ſed magis concurrant ad ſanctam dei eccleſiam: in qua recta prædicantur dogmata, & omnes hæreſes cum principibus ſuis anathematizantur. Noſſe enim volumus omnes quia ſi de cætero aliqui inveniantur aut contrarias collectas facientes, aut apud ſemetipſos collectionem: nequaquam omnino eos ferimus; ſed domos quidem ubi aliquid delinquitur ſanctæ aſſignamus eccleſiæ: his autem qui colligunt, aut apud ſe colliguntur, ex conſtitutionibus pœnas inferri omnibus modis jubemus. *Nov.* 132.

Hæc igitur ſunt in quibus per divinum noſtrum edictum hæreticos coarguimus, cui divino edicto, vel omnes reperti hic veriſſimi epiſcopi & reverendiſſimi archimandritæ cum tua ſanctitate ſubſcripſerunt, &c. *l.* 7. §. 3. *c. de ſumm. Trin.*

'According to the Ordinances of *France* a Proſecution is carried on againſt Hereticks, and upon 'Conviction they are condemned to undergo the 'Puniſhments of ſeditious Perſons, Schiſmaticks and 'Diſturbers of the publick Peace and Tranquillity.

See the Ordinance of the 27th of *June* 1551, Art. 1. and of the 29th of *January* 1534, and of *July* 1543. and others.

['By the antient Law of *England* he that was 'duly convict of Hereſy, and refuſed to abjure the 'ſame, was to be burnt to Death. *Coke* 3. *Inſt.* '*cap.* 5. But by *Stat.* 29. *Car.* 2. *Cap.* 9. the 'Writ *de hæretico comburendo* was taken away, and 'all Puniſhment by Death, in purſuance of any Eccleſiaſtical Cenſures, utterly aboliſhed; in which 'Statute there is a ſaving of the Juriſdiction of the 'Eccleſiaſtical Courts, that in Caſes of Atheiſm, Blaſphemy, Hereſy or Schiſm, and other damnable 'Doctrines and Opinions, they may proceed to puniſh the ſame according to his Majeſties Eccleſiaſtical Laws, by Excommunication, Deprivation, Degradation, and other Eccleſiaſtical Cenſures.

'The Law in *England* has likewiſe received an 'Alteration of late Years in relation to the Penalties which thoſe who ſeparated themſelves from 'the Communion of the Church of *England* were 'formerly

'formerly liable to; all Protestant Dissenters being 'at present exempt from the said Penalties, and 'being allowed the free Exercise of their Worship 'in their publick Meetings, under certain Restric-'tions and Limitations. *Stat.* 1. *Gul.* & *Mar.* '*Sess.* 1. *cap.* 18.]

V.

5. Penalties against those who transgress the Laws of the Church.

As to what concerns the Manners of the People, and the Discipline of the Church, the Civil Magistrate has Power, and it is likewise his Duty to employ his Authority for enforcing the Observance of the Laws of the Church, in so far as they contain Rules about Manners which may regard the publick Order. Thus, by their Laws they exhort their Subjects to attend diligently on the divine Service, particularly on Holy-Days. Thus they prohibit the Profanation of Places consecrated to God's Worship, and every thing that is contrary to the Celebration of the great Festivals of the Church; such as the holding of Fairs and Markets, the working upon those Holy-Days, and every thing that might disturb the solemn Observance of them. Thus they prohibit the Sale of Meat during the time of *Lent*, except it be for the Sick in Hospitals, and for other sick Persons, in cases of Necessity; and they punish by Fines and other Penalties, according to the Quality of the Facts, the Persons who transgress the said Order *e*.

e See the Ordinances of *Orleans*, Art. 23. of *Blois*, Art. 38. and the other Ordinances touching these Matters.

VI.

6. Punishment of Crimes which are injurious to the Majesty of God in a more especial manner.

The Temporal Government which restrains and punishes every thing that may disturb the publick Worship of God, or the Solemnization of the great Festivals of the Church, and other the like Disobediences to the Laws of the Church, restrains and punishes with much more Reason, and by more severe Penalties, Crimes which wound Religion in a more sensible manner, such as the Crimes of High Treason against the Divine Majesty, Sacrilege, Blasphemy, Impiety, Simony, Sorcery, Witchcraft, Fortune-telling, and other Crimes against Religion *f*.

f Si quis in hoc genus sacrilegii proruperit, ut in ecclesias catholicas irruens, sacerdotibus & ministris, vel ipsi cultui, locoque aliquid importet injuriæ, quod geritur, a Provinciæ rectoribus animadvertatur: atque ita provinciæ moderator, sacerdotum & catholicæ ecclesiæ ministrorum, loci quoque ipsius, & divini cultus injuriam capitali in convictos seu confessos reos sententia noverit vindicandum, nec expectet, ut Episcopus injuriæ propriæ ultionem deposcat, cui sanctitas ignoscendi gloriam dereliquit. Sitque cunctis laudabile, factas atroces sacerdotibus, aut ministris injurias, veluti crimen publicum persequi, ac de talibus reis ultionem mereri: quod si multitudo violenta, a civilis apparitoris executione & adminiculo ordinum (vel ordinatorum) possessorumve non poterit flagitari, quod se armis aut locorum difficultate tueatur: præsides provinciarum etiam militari auxilio, per publicas literas appetito, competentem vindictam tali excessui imponere non morentur. *l.* 10. *C. de Episc. & Cler.*

Si quis cum sacra ministeria celebrantur, in sanctam ecclesiam ingrediens, episcopo, aut clericis, aut ministris aliis ecclesiæ injuriam aliquam inferat; jubemus hunc verbera sustinere & in exilium mitti. Si vero hæc sacra ministeria conturbaverit, aut celebrare prohibuerit, capitaliter puniatur. *Nov.* 123. *cap.* 31.

VII.

7. Laws of temporal Princes to enforce the Observance of the Laws of the Church.

It is by virtue of this Right and Duty of Princes to maintain and protect the Discipline of the Church, that the first Christian Emperors, and after their example, our Kings, have made divers Regulations concerning the Election and Duties of Bishops and other Ministers of the Church, enjoining them Residence and Application to their Functions, as for example, the Visitations to be made by Bishops of their Dioceses, commanding them to abstain from profane Shews and Spectacles, from Games of Hazard, and other things misbecoming their Character. It is by virtue of this Right that the Kings of *France* have made many Ordinances touching the Collation of Benefices, touching Elections with respect to those Benefices which are elective, the appropriating of the Benefices to Graduates, and the manner in which the Universities ought to confer Degrees, the Age that is required for making Profession of a Religious Order, the Duties of the Heads of Orders, and other Superiors, to see that the Rules of the Order be duly observed; the erecting of Seminaries in the respective Dioceses, the holding of Provincial Councils, and other Matters of the like nature, which relate to the Observance of the Ecclesiastical Discipline: and in all the said Laws and Regulations they have only joined the temporal Authority to that of the Church, to enforce the Observance of the Rules thereof, and to give Directions conformable to the sacred Decrees and Councils, as it is expressly mentioned in the said Ordinances *g*.

g Sancimus igitur sacras per omnia sequentes regulas, dum quispiam sequenti omni tempore ad ordinationem Episcopatus adducitur, considerari prius ejus vitam secundum sanctum apostolum, si honesta & inculpabilis & undique irreprehensibilis sit, & in bonis testimonium habeat, & sacerdotem decens——neque enim idiota, ex iis qui vocantur laici existens, ita mox ad Episcopatum ascendat: nec

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nec imaginariam suscipiat ordinationem tamquam modo quidem idiota, mox autem clericus, deinde parvum aliquod tempus præteriens Episcopus appareat, &c. *Nov.* 6. *C.* 1.

Hæc autem de amabilibus Episcopis secundum divinas constituentes regulas, & Religiosos clericos cum multa fieri inquisitione secundum divinas regulas, & boni testimonii viros ordinari sancimus, litteras omnino scientes & eruditos constituros. Litteras enim ignorantes, omnino nolumus, neque unum ordinem suscipere clericorum videlicet, presbyterorum, & diaconorum, tam sacras orationes docentium quam Ecclesiarum & Canonum legentium libros ordinationem sine querela, & inculpabilem & sine aliqua contradictione & datione pecuniarum aut rerum suscipientes. Neque autem eos volumus omnino officiales aut curiales constitutos suscipere ordinationem nisi secundum leges quas super his posuimus pridem quas & hic nunc confirmamus: ipsos autem ordinatos sacra præcepta in conspectu totius populi suscipere, propter has ipsas causas propter quas hoc ipsum agi etiam super Deo amabilibus episcopis sancivimus. *Nov.* 6. *C.* 4.

Cassa & irrita esse denuntiari per totam Italiam præcipimus omnia statuta & consuetudines contra libertatem Ecclesiæ ejusque personas inductas adversus Canonicas & imperiales sanctiones, & ea de capitularibus penitus aboleri mandat nova constitutio: & de cætero similia attentata ipso jure nulla esse decernit. Si quid contra fiat, pœnæ quæ statutæ sunt, imminebunt. Sed si per annum hujus novellæ constitutionis aliqui inventi fuerint contemptores, bona eorum per totum nostrum imperium impune ab omnibus occupentur. *l.* 12. *Cod. de sacros. Eccl.*

See the several Ordinances concerning these matters.

V. tot. Tit. C. de Epist. & Cler. & de Episcop. Aud.

'There is an infinite number of Constitutions 'of the first Christian Emperors, and of Ordinances 'of the Kings of *France* concerning all the matters mentioned in this Article, and many others 'relating to the Church, the detail of all which it 'would be superfluous to set down here. We have 'not distinguished in the Article what is enjoined 'by the Constitutions of the Emperors, from that 'which is enjoined by the Ordinances of *France*; 'but those who are desirous to know all the particulars more distinctly, may read the first Titles 'of the Code, and the Ordinances relating to these 'matters.

VIII.

8. The Use of the Temporal Power for executing the Sentences of Ecclesiastical Judges.

The same Duty of Princes, which obliges them to maintain by their Laws those of the Church, obliges them also to employ their Authority, not only to enforce the observance of the Laws of the Church, but likewise to give all the assistance and protection to its Ministers in the discharge of their Functions that they may stand in need of from the Temporal Power. Thus when the Sentences of Ecclesiastical Judges cannot be executed but by the Temporal Power, it is usual to have recourse to it, which is called imploring the Secular Arm: and in these Cases the King's Judges are obliged by the Ordinances in *France* to give a helping hand for the execution of those Sentences, without enquiring into the Justice or Equity of the Judgment or Decree: but if there was in the Sentence any one of the Abuses, which shall be mentioned in the following Section, the Parties, who think they have Cause of Complaint, may appeal from the Sentence as an Abuse, as shall be said in the following Section *h*.

h See the Ordinance called the Edict of *Melun* in 1580. Art. 24.
See that of *Orleans*, Art. 55. of *Blois*, Art. 100.

IX.

9. The Right of the Regale.

Besides these Rights of the Temporal Power in what relates to the Church, the Kings of *France* have a Right, which is called the Regale, which gives unto the King the Revenues of a Bishoprick which falls void, and the Collation of Benefices to which the Bishop had the Right to collate *i*.

i See the Ordinances of *France* touching this matter, and the last Remark on the Preamble of this Title.

['As to the Right which the Kings of *England* 'have on the Revenues of Ecclesiastical Dignities 'and Benefices, see *Stat.* 26. *H.* 8. *cap.* 3. by 'which the first Fruits and annual Tenths of all 'Spiritual Dignities, Benefices, Offices or Promotions were granted unto the said King, his Heirs 'and Successors. But her late Majesty Queen '*Anne*, considering the slender Provision that is 'made for many of the inferiour Clergy, did out of 'her singular Zeal for the support of the Clergy of 'the Church of *England* as by Law established, by 'and with the Consent of Parliament, appropriate 'all the said first Fruits and Annual Tenths for the 'better maintenance of the inferiour Clergy. *Stat.* 2 & 3. *Anna cap.* 11.]

SECT. II.

Of the Use of the Temporal Power, for restraining the Encroachments of the Ministers of the Church on the Rights of the Prince, and of Appeals on account of such Encroachments.

The CONTENTS.

1. *Distinction of the Spiritual and Temporal Powers.*
2. *The Encroachments of one Power upon the other, destroy the Order of Things which God has established in the World.*
3. *The Right of Princes to maintain their Authority.*
4. *Use of Appeals from Abuses.*
5. *Who may appeal from the said Abuses.*
6. *Cases where an Appeal from Abuses may lie.*

7. Other

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7. *Other Cases of Abuses.*
8. *Liberties of the* Gallican *Church.*

I.

1. Distinction of the Spiritual and Temporal Powers.

SEEING it is immediately from God, that Temporal Princes derive their Power, they have the Use of it independently of the Spiritual Power, even of that which the first Ministers of the Church, Successors of Jesus Christ, hold likewise immediately of God. And these two Powers having between them an essential Union, which unites them to their common Origin, that is to God, whose Worship they are bound both of them to maintain each in its proper way, are distinct and independent one of another in the Functions that are peculiar to every one. Thus the Ministers of the Church have on their part a Right to exercise their Functions, without any disturbance from those who have the Temporal Government in their hands, who ought on the contrary to afford them all the assistance and protection that may be necessary from the Secular Power. Thus those who are vested with the Supreme Power in Civil Matters, have on their part a Right to exercise the Functions of the Civil Government, in which the Ministers of the Church have no right to oppose them, but ought on the contrary to exhort People to pay Obedience, and the other Duties they owe to the Princes whom God has established over Temporal Affairs *a*.

a See the 6th Article of the 1st Section of the 1st Title, and the 1st Article of the 2d Section of the same Title.

II.

2. The Encroachments of one Power upon the other, destroy the Order of things which God has established in the World.

It follows from the Rule explained in the preceding Article, that as the Encroachments of Temporal Princes on the Functions of the Spiritual Powers, are attempts, which wound Religion, and break in on the Order of Things which God has established in the World; so the Encroachments of the Ministers of the Spiritual Power on the Functions of Temporal Princes, are also attempts, which being in the same manner a subversion of the Order established by God, are likewise contrary to Religion *b*.

b 'This is a Consequence of the Truth explained in the foregoing Article.

III.

3. The Right of Princes to maintain their Authority.

It follows likewise from these Truths, that as there is no visible Power on Earth which has a common Superiority over those who fill the chief Posts in the Church, and in the State, and that no Person has a Right to revenge the Encroachments which the Ministers of the Church may make on the Rights of Temporal Princes; it is the Right of those whom God has vested with the Temporal Power to maintain their Authority against all attempts whatsoever; and the exercise of this Right is in their hands a Function which they hold of God *c*.

c 'This is a Consequence of the same Truth explained in the first Article.

IV.

4. Use of Appeals from Abuses.

According to these Principles, if those who have in their hands the exercise of the Spiritual Power should ordain or attempt any thing contrary to the Right of the Prince in Temporal Affairs, or which might tend to disturb the publick Order and Tranquillity which the Prince is bound to maintain; he might in such cases imploy his Authority to restrain attempts of this kind. And seeing these sorts of Encroachments are not made by forcible means, so that it should be necessary to oppose Force to Force, as is usual in Quarrels that happen between Princes; but that they are made by Constitutions, Rescripts, Sentences, or other Acts, which have the form of Justice; the way of redressing such Abuses, is likewise the way of Justice; and this is what is done in *France* by the means of Appeals from Abuses, which are determined by the Parliaments, the Kings of *France* having lodged with them the Cognizance of such Appeals *d*.

d 'This is a Consequence of the preceding Articles.

See the last Remark of the Preamble of this Title.

['In *England*, many Acts of Parliament have been made to redress Abuses of this kind, and to guard against the daily Encroachments that were made by the Popes on the Sovereignty of our Kings. See the Statute of Provisors 25 *Edw.* III. the Statute of Præmunire 16 *R.* II. *cap.* 5. And in the first Year of Q. *Elizabeth*, an Act was made to restore to the Crown the antient Jurisdiction over the Estate Ecclesiastical and Spiritual, and abolish all Foreign Powers repugnant to the same.]

V.

5. Who may appeal from the said Abuses.

If those sorts of Encroachments or Injustices which give occasion for these Appeals from Abuses do likewise affect the Interest of particular Persons, the Parties aggrieved have a Right to appeal from them; and if either the King or the Publick have an Interest to see the said Abuses redressed, the Appeal would

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would be interposed by the King's Solicitors General in the Parliaments of *France*, or by their Substitutes in the inferior Courts, in order to have the same decided by the Parliament which has the cognizance of it: for it is the Function of those Officers to act as Parties in any thing where the publick Interest is concerned, as shall be shewn in its proper place in the second Book *e*.

e This is the Usage in *France*, which is a Consequence of the Rules explain'd in the foregoing Articles.

VI.

6. Cases where an Appeal from Abuses may lie.

Appeals from Abuses lie in all Cases where the Right and Interest of the Publick are encroached on, whether it be that the Temporal Power is thereby directly invaded, as if it were an Encroachment on some Right of the Prince, or that the business were only to protect and maintain the publick Order of the Ecclesiastical Discipline, which had been violated by some attempt of the Ministers of the Church; as if an Election to some Ecclesiastical Dignity, a Collation to a Benefice, or to some Office in the spiritual Ministry, should appear to be made contrary to the Discipline and Practice of the Church, and contrary to publick Agreements; for in all these Cases, it is for the common Interest of the Church and of the State, to restrain Attempts of this nature, and to have the Discipline of the Church kept up in its Purity *f*.

f All these Cases are comprehended in the Rule concerning the Right of Temporal Princes to maintain their own Authority and that of the Church.

VII.

7. Other Cases of Abuses.

We must reckon in the number of the Cases wherein Appeals from Abuses are to take place, the Encroachments of Ecclesiastical Judges on the Temporal Jurisdiction, when they decree beyond what they have Power to do, and when they take cognizance of what belongs wholly to the Temporal Jurisdiction, or when even in matters belonging to the Spiritual Jurisdiction they do not observe the Proceedings regulated by the Ordinances of the Kingdom; for in these Cases they encroach on the Temporal Power, and fall into the Abuse which the Temporal Power has a right to reform and to redress *g*.

g This Rule follows from the same Principles.

VIII.

8. Liberties of the Gallican Church.

It is by the means of these Appeals from Abuses, that Princes maintain the Rights of their own Temporal Authority, and preserve the Discipline of the Church in its primitive Purity; and it is the defence of that Purity which is called in *France* the Liberties of the *Gallican* Church; which consist, not in the Privileges of the said Church, but in the common Right of the Universal Church, as the same has been explained in the Preamble of this Title *h*.

h See what has been said touching this matter in the Preamble, and the last Remark there made upon it.

SECT. III.

Of the Use of the Temporal Power in Matters which are Temporal in the Ecclesiastical Policy.

The CONTENTS.

1. *Two sorts of Powers, one for Spiritual Affairs, the other for Temporal.*
2. *Every State has a dependence on the two Powers.*
3. *The Right of Princes over the Temporalities of the Church.*
4. *First Fruits and other Taxes paid by the Clergy.*
5. *No Ecclesiastical Communities can be established without the Prince's leave.*
6. *Aliens cannot possess Benefices in the Kingdom without the King's leave.*
7. *The King's Right to judge of the Possession of Benefices.*
8. *Policy about Marriages.*
9. *Officers of the Crown cannot be excommunicated for the discharge of their Offices.*
10. *The Clergy cannot direct Moneys to be levied on the Temporalities of Benefices without the King's leave.*
11. *Other matters of the same Character with these mentioned in this Title.*

I.

1. Two sorts of Powers, one for Spiritual Affairs, the other for Temporal.

ALL Kingdoms in which the true Religion is professed, are governed by two sorts of Powers, the Spiritual and the Temporal, which God has established for regulating their Order; and since both the one and the other have their distinct Functions, and that they hold their Authority immediately of God, they are independent one of the other; but in such a manner, that altho those who have the Administration of one of these two Powers, may exercise it independently of those who have the Administration of the other, yet they ought however to be reciprocally subject to the Ministry one of another

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another in what depends on their respective Powers. Thus the Temporal Princes ought to be subject to the Spiritual Powers in Spiritual Matters, and the Ministers of the Church ought also on their part to be subject to the Power of the Temporal Princes in what relates to Temporal Affairs: And because this Truth is of Divine Authority, and that it is God himself that has taught it to Mankind *a*, it has been equally acknowledged for true, both on the part of those who have exercised the Spiritual Ministry *b*, and on the part of the Princes who have had the Temporal Government *c*.

a See the Preamble of this Title.

Take unto thee Aaron *thy Brother, and his Sons with him, from among the Children of* Israel, *that he may minister unto me in the Priests Office.* Exod. 28. 1.

And behold Amariah *the Chief Priest is over you in all matters of the Lord.* 2 Chron. 19. 11.

For every High Priest taken from among Men, is ordained for Men in Things pertaining to God. Heb. 5. 1.

Let a Man so account of us, as of the Ministers of Christ, and Stewards of the Mysteries of God. 1 Cor. 4. 1.

As my Father hath sent me, even so send I you. Joh. 20. 21.

'When Jesus Christ gives unto his Apostles the 'same Mission with that which he had received of 'his Father, he does not give them any Right to 'exercise the Temporal Power, since he himself 'who might have exercised it, did not do it, but 'paid Obedience to the Laws of the Princes, both 'at the time of his Birth and during his Life, being 'born in a place, where he was obliged, in obedience 'to a Law of the Emperor *Augustus*, to pay Tribute, which he did willingly, and taught himself 'and enjoined his Apostles to preach Obedience to 'the Laws of Princes, as unto an Order of God, 'of whom they hold their Authority; and when 'he gave unto the Apostles their Mission, he comprehended in it only Spiritual Affairs, without 'granting them any Right or Power over Temporal 'Affairs, which he left unto the Princes.

Let every Soul be subject unto the higher Powers: for there is no Power, but of God. The Powers that be are ordained of God. Rom. 13. 1.

Render therefore unto Cesar *the Things which are* Cesar's. Mat. 22. 21.

Quoniam idem mediator Dei & hominum homo Christus Jesus, sic actibus propriis, & dignitatibus distinctis officia potestatis utriusque discrevit propria, ——— ut & Christiani Imperatores pro æterna vita Pontificibus indigerent, & Pontifices pro cursu temporalium tantummodo rerum imperialibus legibus uterentur, quatenus spiritualis actio a carnalibus distaret incursibus, & ideo militans Deo minime se negotiis sæcularibus implicaret, ac vicissim non ille rebus divinis præsidere videretur, qui esset negotiis sæcularibus implicatus. *Dist.* 10. *c.* 8.

Duo sunt quibus principaliter mundus hic regitur, autoritas sacra Pontificum, & regalis potestas. *Dist.* 96. *c.* 10.

b See the Text cited at the end of the Preamble of this Title.

c Maxima quidem in hominibus sunt dona Dei a superna collata clementia *sacerdotium & imperium*: & illud quidem divinis ministrans, hoc autem humanis præsidens ac diligentiam exhibens ex uno eodemque principe utraque procedentia humanam exornant vitam. *Novel.* 6. *in præfat.*

II.

2. Every State has a dependance on the two Powers.

It follows from this Origin of the two sorts of Powers Spiritual and Temporal which come from God, that as those who exercise one of them ought to be subject to the Ministry of the other in what depends on it, as has been explained in the preceding Article; so all particular Persons, whether they be Church-men or Lay-men, ought to be subject to the Ministry of both those Powers; and that therefore it is a Duty common to them to be faithful in every thing which they owe reciprocally to the one and to the other of the said Powers: which obliges those who exercise the Ministry of those Powers to keep every one within his own, and to require of particular Persons nothing that may be inconsistent with their Duty to the other Power *d*.

d 'This is a Consequence of the preceding Article.

III.

3. The Right of Princes over the Temporalities of the Church.

It is because of the Right which Princes have over Temporal Affairs, that every thing of this nature in the Society of Mankind, such as matters relating to Trade, Successions, the several sorts of Covenants, Possession of Goods, and the other matters of the like nature, are regulated by the Authority of Princes and by their Laws; and it is by the same Laws, and by the same Authority, that the Church and its Ministers possess their Temporal Goods *e*. Thus the Rights which Church-men have in their Goods make no alteration in the Rights which the Temporal Princes have over them; for they retain the Right of raising out of the Goods of the Clergy, the supplies which the occasions and wants of their States may render necessary; and it is only by Favour and Privilege that Princes have granted unto them the Right of enjoying many Exemptions *f*.

e Quo jure defendis villas Ecclesiæ, &c.

See this Text at the end of the Preamble of this Title.

f 'The Exemptions from Taxes, which the Clergy enjoy, are mere Favours which the Princes 'have granted unto them. For altho their sacred 'Function may seem to require this distinction, 'yet it is only by the Concession of the Prince 'that they enjoy it. And the Apostles, after the 'Example of Jesus Christ, having taught the Duty 'of paying Tribute unto Princes, made exception 'of no Person, no more than Jesus Christ excepted St. *Peter*, or even himself from paying 'Tribute, altho being King of Kings and Lord of 'Lords, he was really exempt: but to avoid giv-

'ing

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'ing of Scandal he would pay Tribute, and wrought 'a Miracle that he might have wherewithal to pay 'for himself and for St. *Peter*; in the same manner as he taught those who were sent to him by 'the Priests, that it behoved them to render unto '*Cesar* what was *Cesar's*, without excepting any 'Person from this Duty. See *Luke* 20. 25. See '*Rom.* 13.

IV.

4. First-Fruits and other Taxes paid by the Clergy.

It is by virtue of this Right which Princes have over the Temporalities of the Church, that our Kings have not so far exempted the Clergy from all manner of Contributions, but that they raise even out of the Lands belonging to the Benefices Supplies for the Wants of the State. Thus the King takes the Tenths of the Temporal Revenues of the Benefices, altho they be destined for the use of the Churches; and they draw likewise from them other different Aids and Supplies according as the occasions of the State require *g*.

g 'These Duties are legally due from Ecclesiasticks, because of the Temporal Goods which they 'enjoy, and of the Interest which they have in the 'welfare of the State.

V.

5. No Ecclesiastical Communities can be established without the Prince's leave.

Besides these Rights which Kings have over the Temporal Goods of the Church, the Temporal Power gives them likewise other different Rights of several natures in what relates to the Church. Thus in general, as it is by virtue of the Temporal Power that Princes have a Right to regulate the Temporal Policy of their Dominions, so every thing that depends on this Policy is subject to the said Power. Thus in particular, as it is part of the Order of the Temporal Policy that there should be no Assemblies of many Persons who compose a Society and Community without leave from the Prince, as has been explained in its place *h*; so there can be no Ecclesiastical Society or Community, nor any Orders of Religion, Monasteries or other regular Houses, established within the Kingdom without the King's Letters Patent.

h Neque societas, neque collegium, neque hujusmodi corpus passim omnibus habere conceditur. Nam & legibus & senatusconsultis, & principalibus constitutionibus ea res coercetur. Paucis admodum in causis concessa sunt hujusmodi corpora: ut ecce vectigalium publicorum sociis permissum est corpus habere, vel aurifodinarum, vel argentifodinarum, & salinarum. Item Collegia Romæ certa sunt, quorum corpus senatusconsultis atque constitutionibus principalibus confirmatum est, veluti pistorum & quorundam aliorum & naviculariorum. *l.* 1. *ff. quod cui un. nom.*

See the 14th Article of the 2d Section of the 2d Title.

VI.

6. Aliens cannot possess Benefices in the Kingdom without the King's leave.

It is because of this Temporal Policy, that it is the Interest of the King and of the State, that Strangers are not capable of possessing either Ecclesiastical Offices, or Benefices, or even of exercising publick Functions without the King's leave: for besides that such Persons may be suspected on account of the Interests of their Princes, or Magistrates, the surety of obliging Incumbents to Residence, and the preference of Natives to Strangers, are just Causes for excluding them from Benefices; and the Ordinances of *France* have so established it with respect to Archbishopricks, Bishopricks, Abbies, and for all other Benefices *i*.

i 'It is our Will and Pleasure, that henceforward no Person shall be admitted to any Archbishoprick, Bishoprick, or Abby belonging to 'the Chief of any Order, whether by Resignation, 'or otherwise, unless he be a natural born *Frenchman*. *Ordinance of* Blois, *Art.* 4.

See the Ordinance of *Charles* VII. of the tenth of *March* 1431.

[In *England*, several Acts of Parliament have been made, prohibiting Aliens to enjoy, or occupy any Benefices within the Kingdom. *Stat.* 3. R. *II. c.* 3. 7 R. *II. c.* 12. 1 H. *V. c.* 7. And upon consideration of the said Statutes, it has been resolved, that if an Alien or Stranger born be presented to a Benefice, the Bishop ought not to admit him, but may lawfully refuse him. *Coke* 4. *Inst. pag.* 338.]

VII.

7. The King's Right to judge of the Possession of Benefices.

In this matter of Church-Benefices, the Temporal Policy has given to the King a Right of another nature, the exercise whereof is approved by the Church it self, which is the Right to cause the differences about the Possession of Benefices to be decided by his Temporal Judges: for seeing the Right to possess demands that the Person who has the Right be maintained in his Possession, which implies a Right to hinder all Persons from disturbing him in his Possession, and to restrain by the use of Force all Acts of Violence; and seeing the said Force can be no where else but in the hands of the Temporal Power, the Spiritual Authority having no such Weapons; it is necessary, in order to maintain Possessors against those who would attempt to disturb them in their Possession, to have recourse to the Temporal Authority. Thus when the Controversy is merely about the Possession of Benefices, it is only the King's Judges who have the Cognizance thereof *l*.

l Possessio facti est. *l.* 1. §. 15. *ff. si is qui testam. lib. esse juss. er.*

Cur

Cur ad arma & rixam procedere patiatur prætor quos potest jurisdictione sua componere? *l.* 13. §. 3. *ff. de usufr.*

See the Statutes relating to this matter.

'When the question is about the Right to a Benefice, and not about the Possession; it is the Ecclesiastical Judge who is to have the cognizance of it.

VIII.

8. Policy about Marriages.

It is also by virtue of the Power of Princes over the Temporal Policy, that in other matters, which in their nature have relation to Spiritual Affairs, Kings have established Rules in relation to what is of Temporal concern in those Spiritual Matters. Thus, altho the Celebration of Marriages be a Spiritual matter which relates to a Sacrament of the Church, yet the Kings of *France* have made several Regulations as to what is of Temporal concern therein; such as the necessity of the consent of Parents to the Marriage of their Children till they arrive at a certain Age; as also the necessity of publishing the Banns of Marriage *m*.

m See the Ordinances concerning this matter.

IX.

9. Officers of the Crown cannot be excommunicated for the discharge of their Offices.

We may likewise reckon this as an effect of the Temporal Power which Princes have in Spiritual Matters, in so far as they relate to things Temporal, that the Officers of the Crown cannot be excommunicated for what they do in the execution of their Offices; which in *France* is a Consequence of the Liberties of the *Gallican* Church: for if such Excommunications were tolerated, it would be a means to destroy the said Liberties, and to disturb the Temporal Policy which defends them *n*.

n 'This is one of the Heads of the Liberties of the *Gallican* Church, and a Consequence of the Authority of the Temporal Power.

X.

10. The Clergy cannot direct Moneys to be levied on the Temporalities of Benefices without the King's leave.

It is also a Consequence of the Power of the King in Temporals, that the Ministers of the Church cannot levy any Moneys within the Kingdom, not even on the Temporalities of Benefices, upon any pretence whatsoever, without the Authority of the King, who has the sole Power and Direction in matters of this kind *o*.

o 'This is likewise one of the Heads of the Liberties of the *Gallican* Church, and a Consequence of the Power of the Prince in Temporal matters.

XI.

11. Other matters of the same Character with these mentioned in this Title.

One may be able to judge by the Nature of these several matters, of which mention has been made in this Title, of the Character which distinguishes in every one of them that which relates to the Spiritual Power, and that which depends on the Temporal; and to discern likewise in other matters of the like nature, which it is not necessary to enumerate here at large, what they may contain that is subject to the Temporal Policy. And since it is only this Character which is in the said matters, that has obliged us to collect what is here said of them under this Title, pursuant to the design we have proposed in this Book, we have been obliged to confine our selves here to these few Rules for the Reasons that have been explained in their proper place *p*. For these Rules suffice to show the essential Principles of the Rights of the King in these matters, and in all others of the like nature; and the detail of the other Rules relating to all these several matters is to be met with in the Ordinances, in the Agreements, in the other Laws of the Church, and in the Usages, as has been already observed in the Preamble of this Title *q*.

p See the Preface to this Book.

q See the Preamble of this Title.

THE

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THE PUBLICK LAW: BEING A SUPPLEMENT TO THE CIVIL LAW IN ITS NATURAL ORDER.

BOOK II.

Of the OFFICERS and other PERSONS, who are employed in the Publick Functions.

HAVING explained in the First Book, the general Order of the Government and Policy which regulates in a State every thing that relates to the common Good of the Society of Mankind; we must in the next place proceed to what concerns the Administration of Justice to the persons who compose the said Society, in order to contain them all within their duties towards the Publick, and to maintain among them in particular, Peace and Tranquillity, which ought to be the fruit of the Order of Government.

This Administration of Justice con-

sists in restraining and punishing those who disturb the publick Order and Tranquillity, by Attempts, Offences, and Crimes; and in regulating the differences which set persons at variance together, and disturb the quiet of Families.

It is for the obtaining of these Ends, that it has been necessary to establish Judges, that they might be Protectors of the Laws, in order to impose the Yoke thereof on such as do not voluntarily submit themselves to them, and by enforcing the observance of what they prescribe, to maintain the publick Order and Tranquillity, which is the sole end of the Laws of the Temporal Policy; and it is for this reason that there have been always Judges in all States, but differently; for as in all States there is always this in common, that the Sovereign is the first Judge, and the only one who derives his Power immediately from God, and who not being able to exercise this Function in all its particular branches, substitutes persons in his stead, to whom he gives a right to judge, and with whom he intrusts his Authority; so that the Prince may dispense to whom he pleases the Right of judging. We read likewise in the Holy Scriptures, which contain the most ancient History of the World, that *Moses* who had the sole Government of the *Jewish* Nation, not being able by himself alone to decide all the particular Affairs that came before him, made choice, by the advice of his Father-in-Law, of persons to whom he committed this Function, giving them power to judge only of the lesser Affairs of the People, and reserving to himself the Cognizance of every thing of greater importance [a]. Thus in all other States, it has been necessary to establish Judges; and because in States of a large extent, the multitude of Affairs has given rise to an infinite number of disputes of several sorts, and has occasioned the multiplicity of Laws and of Matters, it has made it necessary to have Judges, who besides the knowledge of the Rules of Natural Equity, should be well versed in the said Laws, and in the detail of the said Matters. And they have allotted to the said Judges, their Dignity, their Authority, and have distinguished even their Functions, by establishing different Jurisdictions for deciding the different sorts of Matters.

[a] *Exod.* xviii. 17.

Thus we see in the *Roman* Law a great number of different Magistrates, whose Jurisdictions were distinct, and some of whom had the power of appointing Judges, whom they themselves chose to determine the differences that might arise between particular persons.

One may judge by that variety of Magistrates, of which we see the Names and different Functions in the *Roman* Law; that the different Jurisdictions which we see in *France* are no novelty.

It is therefore to punish Crimes and Offences, and to decide Law-Suits, that Judges have been appointed, and likewise other Functions established, which are necessary for the Administration of Justice, as shall be shewn hereafter. And altho' it would seem as if the Administration of Justice, and the Cognizance of Crimes, of Offences, and of Law-Suits were restrained to the Functions of those Officers who are properly called Officers of Justice, who are distinguished from the Officers of the Civil Policy, and of the Revenue, yet all these sorts of Officers have a share in the Administration of Justice, and take Cognizance of certain Crimes, of certain Offences, of certain Law-Suits; and there are likewise other sorts of Officers, who have their Jurisdiction, and a right to judge of certain Differences, and of certain Crimes; such as the chief Officers of the King's Houshold, the Officers of War, and others. Thus, altho' this second Book relates chiefly to the Officers who are called Officers of Justice, yet we may apply to all the other Officers who have any sort of Administration of Justice, the Rules which shall be explained in this Book, in so far as they are applicable to them.

Since all the Functions of the Administration of Justice relate to Crimes, to Offences, to Law-Suits, and to every thing that may demand the use of the Authority of Justice, some persons may be apt to think that the Matter of Crimes and Offences, and that of the Order of Judicial Proceedings, which shall be treated of in the third and fourth Books, ought to have preceded the matters relating to Officers; seeing they are established only for the punishment of Crimes and Offences, and for judging Law-Suits and Differences: but because the establishment of Officers, is a necessary consequence of that of Government, and because every thing which relates in general to Government, supposes the necessity of obliging Men to perform their duties towards the Publick,

Publick, and the duties they owe to one another, and not to disturb the Tranquillity which ought to unite the Society which they all compose; the same reason which induced us to explain every thing relating to Government in general, before we should proceed to Crimes, requires that we should explain likewise what concerns Officers, before we come to this detail, seeing their Functions and their Duties make a part of the Order of the Government.

The Administration of Justice which has made the establishment of Judges necessary, has made it necessary likewise to have the Ministry of Persons who should explain to the Judges the Rights of the Parties, whether it be because there are few persons who are capable to explain distinctly to others their Rights, and that many do not understand them themselves, or because it is for the dignity of Justice to remove from its Tribunal, the indecency, the confusion, and the other inconveniences which would follow from the granting a liberty indifferently to all parties to explain themselves their demands, or their defences, as well on account of their incapacity as because of the transports of their passions. It is upon these considerations, that the use of the Ministry of Advocates is established, as also that of Proctors. And as for these last, there is likewise another reason which has rendred their Functions necessary, because the manners of proceeding in Justice for instructing a Cause, have been regulated to certain forms, the use of which is necessary, and which cannot be observed unless each party have a Proctor to represent him, who may appear in all the steps and proceedings of the Cause. But as for the Advocates, their Ministry is not required in the ordinary steps of the proceedings in the Cause, and is restrained to what shall be explained hereafter.

The same Administration of Justice, demands likewise other Functions, such as those of Registers, to take down in writing, and sign the Orders of the Court, the Sentences, the Decrees, and the other Judicial Acts, and to be Depositaries of them; as also those of Apparitors and Bailiffs, for the execution of the Orders and Decrees of the Courts of Justice.

We may set down in the Order of this Administration of Justice, the manner in which it is rendred voluntarily between the Parties by Arbitrators, whom the Parties chuse to be their Judges; and those who exercise this Function, have their proper Duties, which ought to make a part of the Matters of this Book. As to which it is necessary to observe, that since people may take for Arbitrators, Advocates and other persons who have not the quality of Judges, this Function of Arbitrators implies a kind of Administration of Justice, which hath its Authority from the Laws, and from the Ordinances, which permit References, and even enjoin them, in certain matters [b]. And it is for this reason that we have comprehended in the Title of this second Book, other persons besides Officers, who are employed in the Functions of Justice, which takes in likewise the Judges and Consuls of Merchants in *France*, who without having any Commission from the King, or Title of Office, have by the Ordinances the power of deciding the differences which belong to their Cognizance; and it is the same thing with respect to those who exercise Municipal Offices, such as those of Sheriff, Alderman, and others who have a share in the Civil Policy, and in the Functions of Justice which depend on it; for these have not the Title of Officers [c].

[b] *See the Ordinances.*

[c] *See concerning the nature of Offices, the Preamble of the first Title of this Book.*

Since the reflections which we have just now made on the Subject Matter of this Second Book, relate, not only to Officers of Justice, but also to other persons who without the Title of Office render Justice, as has been just now observed, and that they regard likewise other persons, who without an Office, and without the quality of Judges, exercise some Ministerial Function, which has relation to the Order of the Administration of Justice, such as Advocates, and Arbitrators; we shall comprehend in this Book, the Functions and the Duties both of Judges, and of the other persons, who have any share in the Functions of Justice; so that the Rules which shall be explained here may be applied to all these sorts of persons, Judges, and others, according as they may be applicable to the Functions of every one, and to their Duties; which is to be understood of the Rules which are within the design of this Book, and we shall here confine our selves to the essential Principles, and to the Rules of Natural

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Natural Equity, whether they be comprehended in the Laws and Ordinances, or that they be part of the divine Law: for it is upon these Principles, and upon these Rules, that all the duties of the persons who exercise Functions of the Administration of Justice, or Functions which have any relation to it, are founded.

Seeing the Matters relating to the Functions and Duties of the Officers of Justice, and the other persons of whom we are to treat in this Book, have a connection with the Matters which relate to the Authority, the Dignity, the Rights, the Rank, and the Privileges annexed to those Functions; and that we are obliged to explain the Principles and the general Rules of these other matters; we shall give in the first Title the general Ideas of the several Natures of Offices: we shall explain in the second, that which relates also in general to the Authority, the Dignity, the Rights, the Privileges, and the Ranks which Offices and other Charges give: the third Title shall be of the Duties of those who exercise them: the fourth, of the Duties of the Officers of Justice: the fifth, of the Functions and Duties of some other Officers besides Judges, whose Ministry makes a part of the Administration of Justice: the sixth, of Advocates: and the seventh and last, of Arbitrators.

TITLE I.

Of the several sorts of OFFICES, and other CHARGES.

BEfore we distinguish the different sorts of Offices and Officers, it is agreeable to Method and Order, that we should first give the definition of what we properly call Office, and Officer. An Office is a Title given by the Letters of the Prince, which are called a Patent, or Commission, and which confer the power, and impose the duty of exercising some publick Functions; and the Officers are those who are provided of the said Offices. We reckon also in the number of Officers, those of Lords of Mannors, because they have a right to give Commissions to their Officers of Justice, according to the power which they have from the King so to do. There are other Officers of a lesser rank, who have their Titles from some superior Officers, to whom the King gives likewise the right to confer these small Offices.

It is by this Title of a Commission, that Offices are distinguished in *France* from several Charges, which engage persons to some publick Functions, such as, for example, those which are called Municipal Offices, those of the Judge and Consuls of Merchants, those of Receivers of the publick Money, and of others who are imployed in other Functions, which are all of them only for a time, whereas the Offices are for life; so that in *France* the word *Charges* is a general name which is common to Offices, and to those other Functions.

We may distinguish the different sorts of Offices and Officers, by divers views, which make different Orders of them; for there are Officers of Justice, of Policy, of the Revenue, of War, of the King's Houshold, and of many other different sorts.

All the different manners of distinguishing the several sorts of Charges and Offices, may be reduced to two principal distinctions: one, which distinguishes them by their different natures, and by certain characters peculiar to every one of them; and the other, which distinguishes them by the different Functions of those who exercise them. It is necessary to make these distinctions, because they have their essential differences, and because there are different sorts of Officers, whose Functions are the same, altho' their Charges be distinguished by characters wholly different; and that on the contrary there are Officers of several sorts, whose Functions are different, altho' their Charges be of the same nature. Thus, there are Offices of Judicature, which are Royal Offices, that is, of the King's Nomination, others which are given by Lords of Mannors; others which are in the Gift of Bishops, and are Ecclesiastical Offices: but altho' these Offices be of a nature altogether different, yet the greatest part of their Functions are common to them all, and the Officers, who execute the said Offices, render Justice to particular persons in several matters, which belong to the Jurisdiction of every one of the said Tribunals. Thus on the contrary, there are Offices of the same nature, whose Functions are altogether different; for in the same Tribunals the

Functions

Functions of the King's Council in Royal Jurisdictions, those of Fiscals in the Courts of Lords of Mannors, and those of the Promoters of the Office of the Judge in Ecclesiastical Jurisdictions, are all of them different from those of the Judges.

It is because of these distinctions of Offices and Charges, by the different characters of their Nature, and by their several Functions, that we have divided this Title into two Sections: the first, of the distinction of Offices by their Natures and different Characters: and the second, of the distinction of Offices by the Functions peculiar to every one of them.

SECT. I.

Distinction of Charges and Offices, by their Natures, and their different Characters.

The CONTENTS.

1. *Difference between Charges and Offices.*
2. *All publick Functions are Charges, but all the said Charges have not the Title of Office.*
3. *Municipal Charges are for a certain time; Offices for life; Commissions for an indefinite time.*
4. *Three sorts of Judges, those named by the King, those appointed by Lords of Mannors, and those named by Bishops.*
5. *Extent of the Jurisdiction of the Officers of Lords of Mannors.*
6. *Ecclesiastical Officers in the Officialities.*
7. *The Ecclesiastical Officers have two sorts of Jurisdiction, the Spiritual and Temporal.*
8. *The Officers belonging to Officialities, and those of Lords of Mannors, are Officers of Justice.*
9. *Different sorts of Offices held of the King.*
10. *The King disposes of the Offices mentioned in the foregoing Article, which distinguishes them from the other sorts of Offices.*
11. *Lands erected into Titles and Peerages, which give the quality of Peers.*
12. *Ecclesiastical Offices besides those of the Officialities.*
13. *Two sorts of Offices, those which are Venal, and those which are not.*
14. *The King's Commission for Royal Offices, those which are Venal, and others.*
15. *Divers Combinations of the Functions of Justice, Policy, and the Revenue.*
16. *Offices whose Functions are mixed, consisting partly of Justice, and partly of Policy.*
17. *Offices of Justice without any Function of Policy.*
18. *Offices which have a Mixture of the Functions of Justice, and of the Revenue; and some which relate both to Justice, the Revenue, and to Policy.*
19. *Offices in the Revenue, without Functions of Justice, or of Policy.*
20. *Functions of Policy imply Functions of Justice.*
21. *The Great Council.*
22. *Judges of Privileged Persons.*
23. *Judges of the Merchants.*
24. *Registers.*
25. *Proctors.*
26. *Tip-staves and Apparitors.*
27. *Sergeants and Bailiffs.*
28. *Two sorts of Jurisdiction, Voluntary and Contentious.*
29. *Publick Notaries.*
30. *Distinction of Offices Compatible, and of those which are Incompatible.*
31. *Other Offices, besides those of Justice, Policy, and the Revenue.*
32. *Difference between Offices and Commissions.*

I.

1. Difference between Charges, and Offices.

ALtho' in *France* they give commonly and without distinction the name of *Charge* to all sorts of Offices, because in effect every Office is a Charge, yet we must not confound together the sense of these two words; for, as has been remarked in the Preamble of this Title, the word *Charge* is a general name; which besides the Offices, takes in other different Imployments which are distinguished from Offices, in that those other Imployments or Charges are exercised without any Commission, and only for a time; whereas for Offices, it is necessary to have Letters Patent from the Prince, which ascertain the Title thereof to the Officers during their life-time, unless they render themselves unworthy thereof, or resign them voluntarily. Thus the Charges in the Parliaments of *France*, and in the other supreme Courts of Justice, and those of the Presidial Courts, and of the Courts within the precincts of Bailiffs and Seneschals, are Offices. Thus, the Charges of Sheriffs and Aldermen, and the other Municipal Charges, and those of the Judge and Consuls of Merchants, are

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are not Offices, and those who are called to them, exercise them only for a time, without any other Title besides that of their Election. So that we may place for a first distinction of Charges, those which are erected by the Title of Office, and which give to those who execute them the quality of Officers, and those which without that quality give the right to exercise some publick Function, whether it be that of Justice or other[a].

[a] *See the Preamble of this Title, and the following Articles.*

II.

2. All publick Functions are Charges, but all the said Charges have not the Title of Office.

According to this first distinction of Charges and Offices, we may take in under the name of Charges all kinds of publick Imployments, which have not the Title of Office. Thus, besides the Municipal Charges, and those of the Judge and Consuls of Merchants in *France*, of which mention has been made in the foregoing Article, and which are a kind of Charges, the Commissions which the King gives are another kind; for altho' they do not give them in particular the name of Charges, they have in effect the character of them, which is to impose the Charge of a publick Imployment, whether it be in relation to the Administration of Justice, or other Imployment. Thus Embassies, the Governments of Provinces, the Courts which consist of persons nominated by the King to judge of certain Affairs, the Courts of Justice, and many other Imployments in the Administration of Justice, the Civil Policy, the Revenue, the War, and others, are Commissions, and make it a Charge to those whom the King nominates to them, to exercise a publick Function without the Title of Office[b].

[b] *This is a consequence of the foregoing Article.*

III.

3. Municipal Charges are for a certain time; Offices for Life; Commissions for an indefinite time.

There is this difference between the Commissions, which have been just now mentioned in the foregoing Article, and the Municipal Charges, and those of the Judges and Consuls of Merchants; that Commissions are for an indefinite time, and determine whenever the King is pleased to revoke them; whereas those other sorts of Charges have their duration for a time that is certain and fixed. Thus we must distinguish in all Charges, Offices and Commissions, three different Rules of their duration. For Offices are for life; Municipal Charges, and those of the Judges and Consuls of Merchants in *France* are for a certain time; and Commissions are for an indefinite time, such as the King pleases; so that whereas those who execute Commissions may be removed without any cause, those who execute Offices have them for their life, and cannot be removed, without some cause which may deserve it. It is the same thing with respect to those who execute those other Charges of Judge and Consuls, or Municipal Charges; for they cannot be removed or deprived during the time that the exercise of their Imployment ought to last, unless they are guilty of some misdemeanor[c].

[c] *This is the difference that is to be made between Municipal Charges, Offices and Commissions.*

IV.

4. Three sorts of Judges, those named by the King, those appointed by Lords of Mannors, and those named by Bishops.

As to Offices, they may be distinguished in the first place into three different kinds: The first, of Royal Offices; that is to say, of which the King has the Nomination: the second, of Offices disposed of by Lords of Mannors, who have the right of giving Commissions for exercising these sorts of Offices of Judicature which are annexed to their Lands, pursuant to the power which they have from the Sovereign so to do, by the Grant of the Rights of Jurisdiction[d]: the third, of Ecclesiastical Offices, of which Bishops give the Titles and Commissions, for administring Justice in matters which are cognizable in their Officialities.

[d] *The Lords of Mannors, who have the Right of Jurisdiction in their Lands, have likewise that of chusing and naming those who are to exercise the Offices of Judicature within their Districts, and they give them their Commissions; that is to say, the Title to possess the said Offices, and to execute them. Thus the Bishops who had only a Spiritual Jurisdiction, having obtained the privilege of the Temporal Jurisdiction with respect to the Clergy, they have the right to name Judges, who are called Officials, who besides the Spiritual Jurisdiction, have likewise by vertue of this privilege, which the Kings of* France *have granted unto the Church, the Temporal Jurisdiction for taking cognizance of matters belonging to this Jurisdiction, in so far as the same is limited by the Grant of the said Jurisdiction.*

V.

5. Extent of the Jurisdiction of the Officers of Lords of Mannors.

The Officers appointed by Lords of Mannors are every where the same for the exercise of the ordinary Justice, and of the Civil Policy in the Lands belonging to their District; where they judge of all Civil Matters, except some which are reserved to the King's Judges: they take cognizance likewise of all Crimes, except some, which are called Royal Cases, or Pleas of the Crown;

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Crown; and the said Officers are the Judges and Fiscals who perform in the said Courts of Lords of Mannors the Functions which the King's Judges and Council perform in the King's Courts. The Lords of Mannors have also in the Courts belonging to their Jurisdictions, Registers, Notaries, and Bailiffs[e].

[e] *It is not our Business to explain here, what are the Matters which the Judges of the Courts of Lords of Mannors cannot take cognizance of; those matters are sufficiently known.*

VI.

6. Ecclesiastical Officers in the Officialities.

The Ecclesiastical Officers in the Officialities, are the Officials, their Vicegerents or Surrogates; that is to say, the Lieutenants of the Officials, the Promoters, who exercise in the Spiritual Courts the Functions which the King's Council do in the Royal Courts. We must likewise place in the number of Officers, whose Ministry relates to the Ecclesiastical Jurisdiction, Registers, Apostolical Notaries, and Apparitors who exercise the Functions of Tipstaves and Bailiffs[f].

[f] *We must not reckon in this number of Ecclesiastical Officers, the Ecclesiastical Persons who are Judges in the Temporal Courts of Justice in* France, *and who are called Ecclesiastical Counsellors or Judges; for these are of the number of the King's Judges, and have no share in the Spiritual Jurisdiction of Officials, of which we shall treat in the following Article.*

VII.

7. The Ecclesiastical Officers have two sorts of Jurisdiction, the Spiritual and Temporal.

These Ecclesiastical Officers, Officials, their Vicegerents or Surrogates, and Promoters, have two sorts of Jurisdiction, which are of a character altogether different: One for spiritual matters, of which they are the proper and natural Judges, such as Heresy, and what relates to the Sacraments, and other Spiritual Matters; and they take cognizance of these matters, not only between Ecclesiasticks, but also between Laymen; such as, for example, that concerning the validity of a Marriage. The other Jurisdiction which they have by vertue of a Privilege which the Kings of *France* have granted unto the Church in favour of the Clergy, the cognizance of all Causes, in which Clergymen are concerned, even altho' they relate to Temporal Matters, being granted to the Ecclesiastical Courts, that they may judge not only between Ecclesiasticks, but also between a Clergyman and a Layman, of Matters which are not reserved to the King's Judges[g].

[g] *The Vicegerents or Surrogates, are as it were the Lieutenants of the Officials; and the Promoters are they who perform in the Courts of Officials the Functions which the King's Proctors or Sollicitors perform in the Temporal Courts.*

VIII.

8. The Officers belonging to Officialities, and those of Lords of Mannors, are Officers of Justice.

These two sorts of Officers; to wit, those belonging to Officialities[h], and those of the Courts of Lords of Mannors, are all of them Officers of Justice, whose Functions relate to the Administration of Justice; and the Officers belonging to the Courts of Lords of Mannors have moreover Functions relating to the Civil Policy, as being a part of the ordinary Jurisdiction; and they have one and all of them their Functions limited, as has been explained in the preceding Articles: but the Officers of the Crown have their Functions in a more eminent degree, and in a larger extent, as will appear from the Articles which follow.

[h] *There is this difference between Officials, and the Ecclesiastical Counsellors who are of the number of Judges in the Temporal Courts in* France, *of whom mention shall be made in the twelfth Article of this Section, that the said Ecclesiastical Counsellors or Judges have no share in the Spiritual Jurisdiction, and are only Judges of Matters Temporal in the Parliaments and Presidial Courts, which are Lay-Tribunals; and that the Officials have two Jurisdictions, one, which is natural to them, and which they derive from the Bishops, in what relates to Spiritual Matters; and the other, for Temporal Affairs, which they have only by concession.*

It is the usage in France, *that the Lords of Mannors have their proper Judges in their Lands, as in the Dutchies, Counties, Marquisdoms, and other Lands which the Lords of Mannors have with a Grant of Jurisdiction, and where they name their Officers, for the administration of Justice.*

See the remarks which have been made on the fourth Article of this Section.

[*As to the constitution of the Courts of Lords of Mannors in* England, *it may not be improper to observe here that this Court is of two Natures. The first is by the Common Law, and is called a Court Baron, as some have conjectured, for that it is the Freeholders, or Freemens Court, (for Barons in one sense signify Freemen,) and of that Court the Freeholders, being Suitors, be Judges. The second is a Customary Court, and that doth concern Copyholders, and therein the Lord of the Mannor, or his Steward, is the Judge. Now as there can be no Court Baron without Freeholders, so there cannot be this kind of Customary Court without Copyholders, or Customaryholders. And as there may be a Court Baron of Freeholders only, without Copyholders, and then is the Steward the Register; so there may be a Customary Court of Copyholders only, without Freeholders, and then is the Lord, or his Steward, the Judge. And when the Court Baron is of this double nature, the Court-Roll containeth as well matters appertaining to the Customary Court, as to the Court Baron.* Coke 1 Instit. fol. 58. *.]

IX.

9. Different sorts of Offices held of the King.

In order to distinguish the several sorts of Officers who hold their Offices of the King, it is necessary to consider the different Orders of them, which have been explained in the IXth Title of the First Book. For we may place in this rank all those who exercise Offices, the

I Title

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Title to which they derive from the King's Authority, and which gives them the name and quality of the King's Officers; which takes in all the several kinds of Offices from the greatest, which in *France* are called rather Charges than Offices, to the least. Thus the Charges of the Officers of the Crown, the Charges of the Officers of the King's Houshold, and those of the Officers of War, of which mention has been made in the third Article of the second Section of the ninth Title of the First Book, are three kinds of Offices that are held of the King. Thus the Charges of all the Officers of Justice, of the Civil Policy, of the Revenue, of the Mint, of Mines, of Forests, and all the others mentioned in the third Section of the same ninth Title, are also kinds of Offices whereof the Title is conferred by the King's Authority.

[i] *In order to know the different characters of Offices whereof the King confers the Title, the Reader may consult the ninth Title of the First Book.*

X.

10. The King disposes of the Offices mentioned in the foregoing Article, which distinguishes them from the other sorts of Offices.

All these different sorts of Offices which have been mentioned in the preceding Article, have this in common, that they are held of the King: which distinguishes them from the Offices belonging to the Spiritual Courts, and to the Courts of Lords of Mannors, as also from Municipal Offices, and from those of the Judge and Consuls of Merchants, for altho' it is only by vertue of the King's Authority that the said Officers exercise their Functions, yet they exercise them without any Commission, and without any other Title besides that of their Election; and this Title distinguishes them from all Offices held by Commission. But it is necessary to observe with respect to the said Offices, that they are not only distinguished by their Natures from the other Offices mentioned in the preceding Articles, but that they are also distinguished among themselves by Characters which give them different Natures independently of their Functions; which are the foundation of the other distinctions thereof which shall be explained in the following Section[l].

[l] *This is a consequence of the preceding Articles.*

XI.

11. Lands erected into Titles and Peerages, which give the quality of Peers.

Among the distinctions between the said Charges in *France*, the most remarkable is that which arises from a character that is peculiar to the sole Dignity of the Peers, as they are distinguished from all other Officers, even those of the Crown; in regard that the said Dignity, which makes of the Peerages Offices of the Crown, is annexed, with respect to the Spiritual Peers, to their Bishopricks, to which are united the Dutchies or Counties which give them the Title of Peers; and as for the Temporal Peers, their Dignity is annexed to Lands which have Titles, and are erected into Peerages, for which all the Temporal Peers, as well as the Spiritual, take an Oath of Fidelity to the King; whereas all the other Offices without exception, are independent of all manner of Union to any Land whatsoever.

XII.

12. Ecclesiastical Offices besides those of the Officialities.

We may observe as another distinction between all the Charges of all the Officers of the Crown without distinction, that of the Ecclesiastical Offices, which are different from those of the Officialities. Thus the Charge of King's Almoner, and the others under him, are Ecclesiastical Offices; and we must place in the same rank the Charges of the Ecclesiastical Counsellors, or Judges in the Temporal Courts of Justice; which appropriates the said Charges to Ecclesiastical persons, and by that means gives them a character which distinguishes them from all the other Charges which belong properly to Laymen. In relation to which we must take notice of this difference between the Charges of the Lord Almoner, and others whereof the Functions relate to the Spiritual Ministry, and those of the Ecclesiastical Counsellors or Judges, that the former are naturally Ecclesiastical Offices in respect of their Functions, altho' they be appropriated to the Service of the Prince; and that the latter, to wit the Offices of the Ecclesiastical Counsellors or Judges in the Temporal Courts, where they judge of Temporal Affairs between all Lay Persons and others, are appropriated to Ecclesiastical persons, only by vertue of a privilege granted in favour of the Church, for the honour of the Ecclesiastical State, and for maintaining in the said Tribunals the Liberties and Immunities of the Church.

XIII.

13. Two sorts of Offices, those which are venal, and those which are not.

We must likewise take notice of another distinction of all the Charges which are held of the King, whereby they are distinguished into two kinds. One is of those which are venal; and the other is of those which are not venal.

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nal. Thus the Offices of the Crown are not venal; and as touching those of the King's Houshold, and those of the Army, many of them are venal, and the chief of them are not. Thus the Offices belonging to the Administration of Justice, and to the Revenue, excepting a very small number, are all of them venal[m].

[m] ☞ It would be superfluous to make a more particular distinction of the Offices which are venal, and those which are not; but we cannot forbear observing with respect to the venality of the Offices belonging to the Administration of Justice, which are called Offices of Judicature, as they are termed in the Ordinances, that the Sale thereof had been very strictly prohibited in *France*, by a great number of Ordinances.

We, pursuant to the Ordinances of our Predecessors, prohibit all our Officers and Counsellors, and all our Subjects, that from henceforward our Officers and Counsellors do not accept of any promise, or reward, for procuring or obtaining for any one any of the said Offices, upon pain for our Officers and Counsellors to pay unto us the quadruple of what shall have been promised or given to them, and to incur our displeasure, and to be otherwise severely punished; and as to our Subjects, upon pain of forfeiting the Office which they shall have obtained in this manner, and of being deprived of all Royal Offices, and of paying likewise unto us the quadruple of what they shall have paid for procuring the said Office. And it is our will and pleasure, that these our Offices be given and conferred upon fit and able persons, freely, by our favour, and without any fee or reward, to the end that the said Officers may administer Justice unto our Subjects, without demanding or taking any reward for the same. *Ordinance of* Charles VII. *of the Month of* April, 1453. *Art.* 84.

See *the Ordinances of* Charles VIII. *in* July, 1493. *Art.* 68. *of* Lewis XII. *in* March, 1498. *Art.* 40. *of* Francis I. *in* October, 1535. *Chap.* 1. *Art.* 2. *of the Estates of* Orleans, *Art.* 39, 40. *of* Moulins, *Art.* 11. *and of* Blois, *Art.* 100, 104.

These Ordinances were conformable to the Laws made by *Justinian*, for prohibiting the Sale of Offices of Judicature.

Ad hanc sacram venimus legem, per quam sancimus, neque proconsulariam ullam, neque hactenùs vocatam vicariam, neque comitem orientis, neque aliam quamlibet administrationem, neque proconsularem, neque præsidalem, (quam consularitias & correctivas vocant) quarum expressim meminit subjecta huic sacræ legi nostræ descriptio, quasq; solas sub hac lege ducimus, dare aliquod suffragium, neque pro administratione quamlibet donationem neque judici ulli, neque horum qui circa administrationem sunt alicui, neque alteri per occasionem patrocinii: sed gratis quidem sumere administrationes. Novel. 8. cap. 1.

Cogitatio igitur nobis facta est, quod agentes omnia quæcunque in nostris provinciis sunt, uno actu communi ad meliora migraremus. Hoc enim omninò eventurum credimus, si præsides gentium quicunque civiles administrationes provinciarum habent, puris *procuremus uti* manibus, *& ab omni abstinere acceptione pro illis solis contentos eis quæ à fisco dantur, quod non aliter fiet, nisi & ipsi cingula sine mercede percipiant, nihil omninò dantes nec occasione suffragiorum, neque iis qui cingula habent, nec alii omnium ulli. Consideravimus enim, quia licet quæstus immodicus imminuitur imperio, attamen nostri subjecti incrementum maximum percipient, si indemnes à judicibus conserventur:* & imperium & fiscus abundabit utens subjectis locupletibus; *& uno introducto ordine; plurima rerum & innumera erit ubertas.* Nov. 8. in Præfat.

Volentes enim inhonesta hæc & servilia furta perimere, & nostros subjectos in quiete à provincialibus judicibus conservare: propterea festinavimus gratis administrationes eis dare, ut nec ipsis liceat delinquere, & abripere subjectis, quorum causâ omnem perferimus laborem, dedignantes imitari eos qui ante nos imperaverunt, qui pecuniis ordinabant administrationes sibimetipsis auferentes licentiam administratoribus nocentibus increpandi justè, & ipsi ea quæ percipiebant, celando, justi putati & proprios collatores propter hoc abripere à malis judicibus non valentes: unde nec ipsis judicibus increpare poterant agere castè, occasione prædictæ causæ. Nos autem sufficientem imperio quæstum esse putamus, ut collatores sola fiscalia conferant tributa, & nihil aliud extrinsecùs quæratur quod subjectis omnem commoveat vitam. Nov. 8. c. 11.

Oportet igitur, ut qui hunc magistratum suscipit semper autem gratis eum & absq; ulla datione pecuniæ ipsi conferimus, ut & ipse per omnia sordibus abstineat, & his solis quæ ex publico solvuntur, contentus sit, id quod etiam prima nostra lex dicit, justè & purè, & cum quadam asperitate humaniter se erga subditos gerat quemadmodum in priore lege disposuimus. Novel. 24. c. 2.

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But the example of the ancient venality of Offices, and the pressing necessities of the State in the latter Ages, made people begin to derogate from the said Laws and Ordinances, and the venality of Offices came to be established in *France* insensibly in the manner in which it now is. So that this Abuse, which is so highly condemned by all the said Laws, by all the said Ordinances, came to be a stated and a fixed Usage, and has been authorized by other subsequent Ordinances.

See the Ordinance of the 1st of *December* in 1567, and the Edict of the 28th of *December* 1604. So that it has not any longer the odious name of Abuse; and perhaps it may not be attended with much greater inconveniences than even the most natural ways of filling the said Offices may have.

Every body knows that the most natural way of filling these sorts of Offices, and all others, is that the Prince himself names the Officers; and as it is he that regulates their Functions, and gives them their Authority, so it is likewise he who ought to make choice of the persons. But seeing it is impossible that the Sovereign of large Dominions can spare time to provide for the filling up of all the vacant Offices, nor to make an exact enquiry into the characters of the Persons, in order to fill all the Offices by his own proper choice; it is absolutely necessary that he should restrain himself to a few Officers, the Nomination of whom he reserves to himself, and that he should intrust the Nomination of the greatest part of them to other persons.

It is for this reason that we see in the Ordinances of *France*, that it was provided that the Offices of Judicature should be filled by Elections made by the Courts of Justice themselves, who made choice of some persons, one of which number the King named to succeed in the vacant Office. And the said Elections were differently regulated by the Ordinances, as by those of *Philip the Fair*, in 1302. Art. 22. Of *Charles* VI. in 1388. Of *Charles* VII. in 1406. in 1446. Art. 1. in 1453. Art. 83. Of *Lewis* XII. in *March*, 1498. Art. 47. in *November*, 1507. Art. 208. in *June*, 1510. Art. 41. Of *Francis* I. in *June*, 1536. Art. 30. Of the Estates of *Orleans*, Art. 39. Of those of *Moulins*, Art. 11. and of those of *Blois*, Art. 104.

Yet nevertheless this way which is so just and so regular, was not without its inconveniences; for interest, favour, caballing, the authority of great Persons, and other motives, made the Election to fall often on persons who were not worthy. And it may be said of that way of Election, and of all the others that can be imagined, that every thing which depends upon Men, especially upon a great number, is liable to depend often upon Principles which are very remote from Justice and Reason; and that if there is on one side the publick Interest alone, it is easily over-balanced by other views which are more sensible, and which lead to what is directly contrary to the said publick Good. And for that reason we may even comfort our selves under the present state, and be contented with this way of filling the Offices, and perhaps it may be said of it, that it gives to the Publick Persons less unworthy for supplying the said Offices, than were provided by the way of Election. For whereas Elections are occasions to great Lords, and others in Power, to imploy their Credit and Authority, for procuring the Election to fall upon Persons to whom they owe some recompence, or whom they are induced to countenance upon other motives, and who perhaps may be persons without merit, without probity, and without capacity; and that the Electors have likewise their private views, their interests, and their passions, which make them prefer to those who deserve to be named, their Relations, and their Friends, whether they be capable or not; whereas the persons who have wherewithal to purchase Offices for their Children, endeavour to give them an education which may render them capable thereof; and notwithstanding the venality of Offices, we see a great many Magistrates who have very great merit, and who, together with a great stock of Knowledge and Learning, have an Integrity that is proof against all bribery and corruption. It is true that the generality of them have not this merit; but to do justice to the Truth, it must be owned, that it is not the venality of Offices alone, which is the cause of it, and that there is another cause thereof, which we have much more reason to lament, and that is the great facility in admitting Persons into Offices which relate to the Administration of Justice. For if even in the times when Offices of Judicature were not venal, and when the Judges were chosen with so great precaution, the Ordinances directed that neverthe-

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less a strict enquiry should be made into the life and conversation of those who were nominated by the King, after the solemn Election which had been made by the Courts of Justice, and that they should be strictly examined as to their capacity, as may be seen by the Ordinances of *Lewis* XII. in *March*, 1498. Art. 32. Of *Francis* I. in *October*, 1535. Chap. 1. Art. 1. Of the Estates of *Orleans*, Art. 4. Art. 10. Of *Moulins*, Art. 9. Art. 71. And of *Blois*, Art. 102. Art. 107. and 108.

We ought with much more reason now, when the Examination of the persons who are to be received Judges is the only proof of their capacity, to make it such as that the Examiners should look upon themselves to be, as really and truly they are, the Cautions and Sureties to the Publick for the capacity of those whom they admit. But on the contrary, that Examination is so slight, that there is scarce an instance of any one that is rejected for want of capacity; whereas if it were performed in a rigorous manner, and such as might suffice for making a right Judgment of the understanding and capacity of the Person who is to be received into the Office, it would repair the inconvenience of the venality of the Offices, by rendring that commerce fruitless to those who should be found not to be duly qualified for the Office.

We must observe here on the subject of the venality of Offices, that as the Title to the Office, and the Right to execute it, consist in the Commission which the King gives for the same, who is the only person that can make Officers, and that the said Right is annexed to the person, and cannot be bought or sold: so that when an Officer sells his Office, in order to put the purchaser into his place to execute the same, the effect of the Sale is to give unto the Purchaser a Surrender of the Office into the King's hands, for the use and benefit of the Purchaser, that he may be put into possession thereof by vertue of the said Surrender, which is made by a Proxy or Letter of Attorney, for resigning the Office; and if the Officer dies without having disposed of his Office, the Surrender is made by his Heirs. And it is in this manner that we are to understand the effect of the venality of Offices. As to which we must likewise observe, that the Heirs of the Officer have had this right no longer than since the establishment of the Annual Duty, by the Edict of *Henry* IV. of the 12th of *December*, 1604; for before that time the death of the Officer deprived his Heirs of the Office; but by the establishment of the Annual Duty, the Officer who has paid it within a year before his death, retains the right to resign in his Succession, and transmits it to his Heirs. But altho' the payment of the Annual Duty makes the right which the Officer had to resign the Office, to pass to the Heirs of the Officer, yet that does not give to the said Offices the quality of Hereditary Offices, because they are not such in their nature, for the Reasons which have been explained. But these Offices are distinguished from those which are commonly called Hereditary, such as are those Offices which are otherwise called Offices of the Demesnes, not subject to the Annual Duty, as the Offices of Registers which are distinguished from the other Offices, in that they are a part of the King's Demesnes, by reason of the profits which arise from them, and which pass from the Purchasers of the said Offices of Registers to their Heirs, in the same manner as the other Goods of the Demesne which are alienated by Contract; whereas the other Offices which are not Hereditary, yield no other Revenue to the King, besides the Annual Duty, which is not a Fruit or Perquisite of the Office, as the said Profits are a Fruit or Perquisite of the Registers Places.

But it would seem that it might be said of this distinction, which calls the Offices of the Demesne Hereditary, that what is of Inheritance in the said Offices is not the Office it self, which gives the right to exercise the functions thereof, but that it is only the right to receive this Revenue, which is a right that is separable from the Office; and so far separable, that when the Register dies, his Heirs, who shall be found incapable of discharging the Functions of this Office, as if they are Minors or Women, will nevertheless be intitled to this Revenue; but they will be obliged to substitute a Register, to do the duty of the Office for a Salary; and it will be this acting Register who will be in the place of the Officer, without having any right to this Revenue. So that in these Offices it is neither the Quality, nor the Function of the Register, which is Hereditary; but it is only the right to the Perquisites which may be separated from the Function. Thus, seeing it is only the Function that makes the Officer, it is not, strictly speaking,

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speaking, the Office that is Hereditary; and it is for this reason that we have not placed in the number of the distinctions of Offices, which have been explained in this Section, that of Hereditary Offices and those belonging to the Demesne.

By the *Roman* Law there were even some of those Offices belonging to the Houshold of the Prince, which were called *Militiæ*, which were venal.

Inter venditorem & emptorem militiæ, ita convenit, ut salarium, quod debebatur ab illa persona, emptori cederet. Quæsitum est: Emptor militiæ quam quantitatem à quo exigere (debet) & quid ex ejusmodi pacto venditor emptori præstare debeat. Respondit: Venditorem actiones extraordinarias eo nomine, quas haberet præstare debere. l. 52. §. 2. ff. de act. empt. & vend.

Super hypothecis, quas argenti distractores vel metaxarii, vel alii quarumque specierum negotiatores pecunias sibi credentibus dare solent, hoc specialiter super amputanda omni machinatione sancimus, ut si post hujusmodi contractum liberis suis, vel alio modo cognatis, quamcunque militiam iidem negotiatores acquisierint (eam tamen quæ vendi vel ad hæredes sub certa definitione transmitti potest) liceat creditoribus eorum etiam non probantibus ex pecuniis eorumdem negotiatorum liberos eorum vel cognatos militasse (dum tamen contrarium non probetur, alios ex suo patrimonio dedisse pecunias) creditum ab his qui militarint exigere: vel tantum eos efflagitare quanti vendi eadem militia possit. Quod ita obtinere sancimus, & si extraneis quibusdam iidem negotiatores de suis pecuniis hujusmodi militiam acquisisse probentur: ut quod generaliter in ipsis debitoribus militantibus talem militiam, quæ vendi vel ad hæredes transmitti potest, permissum est, ut liceat creditoribus & adhuc viventium debitorum jure hypothecæ vindicare militias, nisi sibi satisfiat: & post mortem eorum exigere quod pro hisdem militiis pro tenore communis militantium placiti, vel divinæ sanctionis tale præstantis beneficium, dari solet: hoc in negotiatorum personis, licet ipsi militantes minimè debito obnoxii sint, integrum creditoribus eorum servetur. l. ult. C. de pignor. & hypoth.

Propterea igitur sancimus ea quæ appellantur ex casu, non omnibus promptè subjacere: nisi tamen creditor fuerit qui ad hoc ipsum mutavit, ut militia illi meretur. Alioqui filiis creditoribus non promptè damus hoc: sed siquidem alii fuerint aut uxor defuncti, istos omnibus præponimus modis, ut adeant nos: & secundùm jussionem nostram hoc habeant non tanquam paternam hæreditatem si in aliis inops sit, sed tanquam imperialem munificentiam: ut & substantiam relinquentibus, & non habentibus, meritò solatium præbeamus. Si vero nullus eis neque filius neque uxor fuerit, neque creditor qui ad ipsam militiam mutuarit: tunc & aliis creditoribus præbemus hoc, ne videamur inhumanum aliquid facere, & non propter piam & Deo placentem actionem ponere legem: de militia quippè spectabilium silentiariorum propriè datis & largitis eis privilegiis in sua virtute manentibus. Nov. 53. cap. 5.

Vide Novel. 97. cap. 4.

[' In *England* there is an express Act of Parliament against the buying and selling of Offices, ' which do in any way touch or concern the Administration or Execution of Justice, or the Receipt, Comptrolment, or Payment of the King's ' Revenue, or the Keeping of any of his Majesty's ' Towns, Castles, or Fortresses; upon pain to the ' Sellers, to lose and forfeit all their Right, Interest and Estate, which they may have in and to ' any of the said Offices; and to the Buyers, of being adjudged disabled persons in Law, to all intents and purposes, to have, occupy, or enjoy ' the said Offices, or any part of them, for which ' they shall have given, or paid, or promised, any ' Sum of Money, Fee, or Reward. *Stat.* 5 & 6 ' Ed. VI. *cap.* 16. Coke 3. *Inst. p.* 148.]

XIV.

14. *The King's Commission for Royal Offices, those which are venal, and others.*

As to all these Offices which are of the King's Nomination, whether they be venal or others, there is only one single way of having the Title to possess and execute them, and that Title consists in the Letters Patents or Commission which the King grants; for as it is the King alone that can create Offices, so it is only he that can dispose of them, and give the quality of Officer which is conferred by the said Letters. But there is this difference between venal Offices, and those which are not venal; that as to these it is the King who nominates to Offices such persons as he thinks fit, without any thing previous to their Title besides the choice which he makes to dispose of them to such persons as he judges worthy of them. And as for the venal Offices, he gives the Commissions for them without distinction of persons to those in whose favours they are resigned; whether it be that the Resignation is made by the Officer himself, or by his Heirs, to whom his Right had descended; and as to the enquiry that is to be made into the manners and capacity of the persons whom he names to the Offices, whether they be venal Offices or others, he leaves that to the Officers to whom he intrusts the care of their admission.

It

☞ It may be remarked on this Article, that altho' there be but one way by which the King confers the Title of an Office, and which consists in the Patent or Commission, yet there are many different cases which diversify the manners of acquiring Offices, and of transmitting the Title from one person to another. Thus with regard to the Offices which are not venal, when the King erects any Offices of this nature, he gives them to such persons as he nominates of his own free choice; and if one of the said Offices happens to become vacant, either by the death of the Officer, or by his resignation into the King's hands, that he may dispose thereof, the King grants it to another: and it would be the same thing if the Office were void by the deprivation of the Officer, who had been guilty of some Misdemeanour which had rendred him unworthy of the Office, and which deserved that he should be deprived for the same. Thus, as to Offices which are venal, when the King creates any of this sort, as it is in order to draw from thence a Revenue, so they who pay the stated price are nominated to the Office: and if one of the said Offices, whether it be of the ancient or new Creation, happens to fall void by the death of him who is in actual possession, and who had not paid the annual duty, the King grants it unto him who pays the Price at which the Office is taxed; and if the Officer is turned out, the King puts in another person in his stead, either in consideration of the Money that it is taxed at, or by favour, if it is his pleasure to give it. And if the Officer resigns his Office, or that he being dead after having paid the annual duty, his Heirs resign it, the person in whose favour the resignation is made, is named to succeed him. It is because of these ways by which Offices become void, that is, which make that the Office ceases to be possessed by him who has the Title, that it is said that Offices become void three ways, by Death, by Surrender, and by Forfeiture, that is to say, by the Offence of the Officer, who has deserved to be turned out; for the Officer cannot be turned out, unless he has committed some Offence, as has been said in the third Article.

XV.

15. Divers combinations of the Functions of Justice, Policy, and the Revenue.

There are some Offices whose Functions are mixed, consisting partly of Justice, and partly of Policy; others which have only Functions of Justice without Policy; and there are some likewise whose Functions are mixed, and consist partly of Justice, and partly of the Revenue; and others which together with some Functions of Justice, and of the Revenue, have also some Functions of Policy; and others again have only Functions relating to the Revenue, without any Administration of Justice, or Function of Policy: but there is no Office which has the direction of the Policy, or Civil Government, without some share in the Administration of Justice; for the Rules and Orders of the Civil Policy cannot be observed without the Ministry of the Authority that properly belongs to Justice. The Reader will see in the following Articles Offices of all these sorts[o].

[o] *One may be able to judge of these several Combinations of the Functions of Justice, Policy, and the Revenue, by the Articles which follow.*

XVI.

16. Offices whose Functions are mixed, consisting partly of Justice, and partly of Policy.

The Offices whose Functions are of a mixt nature, consisting partly of Justice, and partly of Policy, are those of the Parliaments in *France*, of Bailiffs, Seneschals, and other the like Officers of the Crown, who render Justice in all matters, and who for that reason are called the Judges in Ordinary; and the Officers of the Courts of Lords of Mannors have also the direction of the Policy, together with the Administration of Justice, in the Lands belonging to the Mannor[p].

[p] *All these sorts of Offices have the Administration of Justice and of the Civil Policy, because they have an universal Jurisdiction in all matters, except some that have been reserved to other Officers.*
See the following Article.

XVII.

17. Offices of Justice without any Function of Policy.

The Offices which have only Functions of Justice, without any share in the Civil Policy, are those of the Courts of Aids in *France*, of the Mint, of the Elections, of the Magazines of Salt, and other Officers who have the Administration of Justice in matters belonging to their cognizance, and whose Functions do not extend to any thing relating to the Civil Policy[q].

[q] *The Officers mentioned in this Article not having the Administration of the Ordinary Justice in its full extent, and the Functions of Policy not being committed to them, they take no cognizance of it.*

XVIII.

18. Offices which have a mixture of the Functions of Jus-

The Offices which have a mixture of the Functions of Justice, and of the Revenue, are the same Offices which have been mentioned in the foregoing Article,

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tice and of the Revenue, and some which relate both to Justice, the Revenue, and to Policy.

cle, to wit, those of the Courts of Aids, of the Elections, of the Magazines of Salt; for in the said Courts they exercise even the Functions of Justice between particular persons in relation to matters which belong to their Cognizance, and which are matters touching the Revenue; and they likewise take cognizance there of other matters of ordinary Jurisdiction which come before them, as in Orders touching Goods seized by their Authority, where there may arise questions of all kinds in the disputes touching the Title of Nobility, on which is founded an Exemption from Taxes, and others of the like Nature; and the Offices of the Chambers of Accompts, and those of the Treasurers of *France*, are likewise of a mixed kind, having Functions relating to Justice and to the Revenue; and the Treasurers of *France* have moreover Functions of Policy for keeping in repair the High-ways, Causeys, Bridges, Pavements, Ports and Passages, which are committed to them by the Ordinances. Thus the Treasurers of *France* have joined together Functions relating to Justice, to the Revenue, and to Policy [r].

[r] *These different Jurisdictions of the said Offices are an effect of the Appropriations thereof which have been made by the Ordinances.*

See the remark which has been made on the thirteenth Article of the following Section.

XIX.

19. Offices in the Revenue, without Functions of Justice, or of Policy.

The Offices which have only Functions relating to the Revenue, without Administration of Justice, or Functions of Policy, are those of the Receivers general and particular of the Taxes, and other Officers of the like nature, whose Functions are limited, either to receive the Monies payable into their Receipt, and to give an Account thereof, or to other Functions restrained to the Revenue alone [s].

[s] *This is the Nature of these Offices.*

XX.

20. Functions of Policy imply Functions of Justice.

We give here no instances of Offices which have only Functions of Policy, without any Function of Justice; for, as has been said in the ninth Article, the Administration of the Policy implies the use of the Authority of Justice. Thus the Offices, even the Municipal Offices, one of the Functions whereof relates to the Policy of the Towns which the Municipal Officers have the direction of in conjunction with the Bailiffs, Seneschals, and other Officers of the Crown, as has been mentioned in its proper place [t], have also committed to them the Function of deciding the differences which arise between particular persons in relation to matters of Policy, and to make together with the Officers of the Crown the necessary Regulations, and to enforce the Observance of them, which are so many Functions of Justice.

[t] *See the second Article of the second Section of the ninth Title of the first Book.*

XXI.

21. The Great Council.

Among the Charges of the Officers of Justice, we must distinguish one Company which has a peculiar Dignity and Authority, which is that of the Great Council, which is one of the Supreme Courts of Justice, and which is the only one of the kind in *France*, and judges of matters which relate to the Archbishopricks, Bishopricks, Abbies, and other Benefices, the Cognizance of which is appropriated to the said Council, of Indults, or Grants from the Pope, of the Causes which concern certain Persons, and certain Orders, of Disputes touching Jurisdiction between the Parliaments and Presidial Courts, of the contrarieties in the Judgments of the several Courts of Justice, and of other matters of this kind [u].

[u] *This Tribunal hath its Functions regulated by the Ordinances, and other Regulations.*

[' Among the several Functions which are peculiarly reserved to this great Tribunal mentioned in this Article, I cannot forbear taking notice of one which contributes much to the Peace and Quiet of the Subjects in *France*, and that is, the power it has to determine disputes in point of Jurisdiction between the several Courts of Justice. It is not left to any of the Courts themselves to determine how far their own Jurisdiction extends, which would be to make them Judges in their own Cause, contrary to all the Rules of Justice. And therefore to avoid this Absurdity, and to prevent the Subject from being harassed and tossed from one Court to another, to the great delay and hindrance of Justice, an indifferent Court is established, which has no interest one way or other in the matter in controversy, to determine and settle the point of Jurisdiction between the several Courts. If such an Establishment had been in other Countries, it would have preserved the antient Jurisdiction of every Court within its proper bounds, and not suffered one Court to encroach upon another; which has rendred the Law touching the Jurisdiction of Courts so precarious and uncertain, that it is become a difficult matter how to fix it.']

XXII.

22. Judges of privileged persons.

There are likewise other peculiar Jurisdictions established in favour of privileged persons, who have for Judges in their Causes, the Officers of the said Courts. Thus the Courts of Requests

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of the *Hôtel*, and those of the Palace in *France*, have been established to hear and determine the Causes wherein the Officers of the King's Houshold are concerned, and other persons who have that Right which is called *Committimus*, which allows them to remove their Causes from all other Courts, in order to have them decided in the said Tribunals, in so far as belongs to their Cognizance, according as the same is regulated by the Ordinances. And we may place in this rank of Judges of Privileges, the Conservators of the Privileges of the Universities, and other Officers, to whom the Kings have granted the like Jurisdiction in favour of some persons [x].

[x] *These Jurisdictions are distinguished by the Ordinances which have established them, and by the Regulations.*

XXIII.

23. *Judges of the Merchants.*

We may place in the number of extraordinary Jurisdictions that of the Judges of Merchants in *France*, who are called Judge and Consuls of the Merchants, whose Functions and Charges are not properly speaking Offices; for they have not their Commissions from the King; but the Ordinances have permitted the Merchants to name every year some of their own number to take cognizance of the differences that may arise among them in matters of Commerce, as the same is regulated by the said Ordinances. And this Jurisdiction hath its usefulness by the great dispatch which it gives in the determination of such matters; the nature whereof is such, that even the Merchants themselves may be Judges of them [y].

[y] *See the Ordinances of* November 1563, *of May 1566, and others which relate to the Establishment and Jurisdiction of the said Judges.*

XXIV.

24. *Registers.*

In all the Jurisdictions, it is necessary to distinguish another sort of Offices, which are those of Registers, whose business it is to put down in writing the Decrees, the Sentences, the Judgments, and the Orders of the Judges, and the other Acts that are done in Courts of Justice. It is likewise another Function of Registers, to be Depositaries of the Acts which are to be preserved, and to give out authentick Copies of them, signed by them, to such persons as may have a right to demand them; and these Copies being signed by the Registers, carry along with them the proof of their Truth [z].

[z] *See the first Section of the fifth Title.*

XXV.

25. *Proctors.*

We must likewise distinguish in all Courts, the Offices of Proctors, who are established, to represent the Parties in Judgment, to make prayers and requests in their behalf, and to instruct and prepare the Cause for Sentence [a].

[a] *See the second Section of the fifth Title.*

XXVI.

26. *Tip-staves and Apparitors.*

There is also another distinction of Offices necessary in all Jurisdictions, which are those of Tip-staves, or Apparitors, whose business is to attend and assist the Judges in the discharge of their Offices, as there is occasion, to be diligent in their attendance on this Service, at the Places where Justice is administred, and on occasions of publick Ceremony: The Functions of Tipstaves and Apparitors consist likewise in calling the Parties, and their Proctors, to appear in Court, and in executing the Decrees and Sentences of the Judges, and all the other Orders of the Court [b].

[b] *See the third Section of the fifth Title.*

XXVII.

27. *Sergeants and Bailiffs.*

The Offices of Sergeants and Bailiffs, are also distinguished from the other Offices mentioned in the foregoing Articles; and their principal Function is to execute, in the same manner as Tipstaves and Apparitors, the Decrees, the Sentences, and other Orders of the Court [c].

[c] *See the third Section of the fifth Title.*

XXVIII.

28. *Two sorts of Jurisdiction, voluntary and contentious.*

We might likewise distinguish the Offices of Justice by the difference that is to be made of two sorts of Jurisdiction: One, which is called voluntary, which is exercised without contestation between Parties, by the power of making Regulations, and by a direction of a great many particular Affairs belonging to the Cognizance of those who exercise the said Jurisdiction; and the other, which is called contentious, which is exercised between Parties who have Law-Suits one with another. Thus the Chambers of Accompts, and the Treasurers of *France*, and other Officers of the Revenue, have a voluntary Jurisdiction, and a power of giving directions in the said matters, whether it be in making general or particular Regulations, or in auditing the Accompts of

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of Officers that are accountable, or for other Functions of the like nature. Thus the several Parliaments in *France*, the Courts of Aid, the Bailiffs and Seneschals, and all other Officers of Justice, who have power to determine the differences between particular persons, have a contentious Jurisdiction. But this distinction of a voluntary and of a contentious Jurisdiction, which hath a reasonable and just foundation for distinguishing these two kinds of Functions, hath not the same reason and justice for the distinction of Offices; for altho' the principal Functions of the Offices of the Chambers of Accompts[d], and of the Treasurers of *France*, do consist of those of a voluntary Jurisdiction, yet they have likewise some of a contentious Jurisdiction; and on the contrary, altho' the ordinary Functions of the Parliaments of *France*, of the Bailiffs and Seneschals, and other Officers of Justice, consist of those of a contentious Jurisdiction, yet they have also Functions of a voluntary Jurisdiction, whether it be for the making of Rules and Orders, or for speeding Acts of Justice, which belong to the said Jurisdiction; such as the admission of Officers, the sealing up of Effects which are in danger of being imbezzeled, the appointment of Tutors and Guardians, the exhibiting of Inventaries, and many others of the like kind. Thus, it may be said of all Offices in general, that some of them have their most ordinary Functions consisting in the voluntary Jurisdiction; and that others have their most common Functions in matters pertaining to the contentious Jurisdiction[e].

[d] *Altho' the principal Functions of the Officers of the Chambers of Accompts, and of the Treasurers of* France, *are those which relate to the voluntary Jurisdiction, yet they have likewise some Functions of the contentious Jurisdiction, which come in as incidents to the matters belonging to their Cognizance; and the Treasurers of* France *have a Jurisdiction in matters pertaining to the Demesnes, and to the repairing of the Highways, which gives them a power to judge of disputes between particular persons, as the same has been explained in its proper place.*

[e] Omnes proconsules statim quam urbem egressi sunt habent jurisdictionem, sed non contentiosam, sed voluntariam ut ecce manumitti apud eos possunt tam liberi quàm servi & adoptiones fieri. *l. 2. D. de officio Proc. & leg.*

See the tenth Article of the second Section.

XXIX.

29. Publick Notaries.

This distinction between a voluntary and a contentious Jurisdiction, obliges us to take notice of a particular kind of Officers, whose Functions are of a very great and very frequent use, and who have a kind of voluntary Jurisdiction, without any share of the contentious Jurisdiction, which are the Publick Notaries: for the Functions of Notaries imply two characters of a voluntary Jurisdiction: the first consists in this, that their Presence and their Signature serves as a proof of the truth of the Acts which are sped in their presence; and that whereas in the Writings, which are called private, that is to say, which are signed only by the Parties, their Signatures being unknown in Courts of Justice, it is necessary to verify them, if they are called in question, the Signatures of Notaries, who are Publick Officers, carry along with them the proof of the truth of the Acts which they sign: and the second of these characters consists in this, that the Acts which contain some Obligation of one party towards another, being signed by a Notary Publick, give a Right of Mortgage on the Estate of the person who is bound, which a private Bond or Obligation, signed only by the Party, would not give. And since it is in *France* the Authority of Justice that gives the Mortgage, it is by vertue of a kind of Jurisdiction that Notaries have this Function, that a Mortgage is acquired by the means of their Signature; and it is because of this voluntary Jurisdiction, that in some of the Provinces of *France* it is usual for the Notaries to insert in the Acts sped in their presence, that those who are Parties to them *have duly submitted themselves, and are condemned to perform what they promise.* By which words they intend to signify this voluntary Jurisdiction, to which the contracting parties submit themselves[f].

[f] *The Function of Notaries implies this kind of Jurisdiction, which is signified by the Royal Seal, of which they are the Depositaries for sealing the Acts; and this Seal is presupposed in the Acts which are not sealed.*

See the second Article, and the following Articles of the fifth Section of the fifth Title.

XXX.

30. Distinction of Offices compatible, and of those which are incompatible.

We may likewise remark in the different kinds of Offices another character, which makes another sort of distinction of those which are incompatible; that is to say, which cannot be held and exercised by one and the same person, and of those which are compatible, and which one and the same person may enjoy and exercise together. Thus all the Offices of Justice are incompatible; for besides that the Order of the Society of Mankind requires, that the Imployments therein should be divided,

divided, and that every one should have his own Employment distinct from the others, every one of the said Offices demands such a constant application, whether it be to Study, or to the discharge of the particular Functions thereof, that it does not allow time for the exercise of other Imployments; and the same reasons, which make two Offices of Justice incompatible, are good against the holding at the same time an Office of Justice, and an Office in the Revenue. Thus on the contrary, seeing the Offices of the Receivers may be executed by Clerks, and that one and the same Officer may take care of two different Receipts, these sorts of Offices are not incompatible with one another; and one may be at the same time a Receiver of the Tenths, and likewise a Receiver of the Taxes [g].

[g] *See the Ordinance of the 17th of July, 1554.*

Nemo ex his, qui advocati causarum constituti sunt vel fuerint etiam in hac regia urbe, in quocumque judicio deputati, & in aliis omnibus provinciis nostro subjectis imperio, audeat in uno eodemque tempore tam advocatione uti, quàm consiliarii cujuscunque magistratibus, quibus respublica gerenda committitur curam arripere: cùm satis abundeque sufficiat, vel per advocationem causis perfectissimè patrocinari, vel adsessoris officio fungi: ne, cum ad utrumque festinat, neutrum benè peragat: sed sive advocatus esse maluerit, hoc cùm debita solertia adimplere possit: vel si adsessionem elegerit, in ea videlicet permaneat. Ita tamen ut, post consiliarii sollicitudinem depositam, liceat ei ad munus advocationis reverti. Nec sit concessum cuiquam duobus magistratibus adsidere & utriusque judicii curam peragere: (Neque enim facilè credendum est etiam duabus necessariis rebus unum sufficere. Nam, cum uni judicio adsuerit, alteri abstrahi necesse est: sicque nulli eorum idoneum in totum inveniri,) sed altera adsessione penitùs semotâ unius magistratus esse contentum judicio. *l. 14. de adsessor.*

His quidem quibus indultum hactenùs demonstratur, quo binis aut ternis, pluribusve mereantur singulis non conjunctis ex prisca consuetudine, sed abjectis atque discrepantibus, detur electio quem retinendum sibi potiùs censeant, quem deserendum cognoscant. Ut in eo quod optaverint, firmiter maneant: eò quòd despexerint, sine dubitatione repellantur. In posterùm verò nemini prorsùs facultas pateat eodem tempore plus quam unius ordinis nomen affectare: interdicendis in commune cunctis (ut dictum est) binis pluribusve militiis, nec dignitatem conjungere cuilibet alii cingulo concedendis: ut & qui supplicandum de re vetita nobis existimaverint, pœna decem librarum auri pro temeritate quamvis infructuosa plectantur. *l. 5. C. qui milit. poss.*

XXXI.

31. Other Offices, besides those of Justice, Policy, and the Revenue.

Besides the Offices of Justice, of Policy, and of the Revenue, there are other different sorts, such as the Offices of the King's Houshold, distinguished by an infinite number of different Functions, whether it be about the King's person, or for other services of several natures, the Military Offices by Land and by Sea, in the Troops, in the Artillery, and for other sorts of Military Functions, the Offices of the Mint, of the Mines, and others [h].

[h] *The Functions of these sorts of Offices have different characters from those of Justice, Policy, and the Revenue, altho' in one sense some of these Offices have a kind of Administration of Justice, and of Policy in matters belonging to them. Thus the Officers of War exercise Functions of Justice and of Policy in the Army; but they are not called Officers of Justice; because the exercise of Justice is not their principal Function.*

XXXII.

32. Difference between Offices and Commissions.

As it is necessary to distinguish in every one of the different sorts of Offices which have been here explained, their natures, their characters, and their uses, so it is necessary likewise to remark in them all that which they have in common, and that which distinguishes them from those sorts of Imployments or Functions which are called Commissions; which difference consists in this, that the King gives sometimes to those who have only Commissions, the authority to exercise certain Functions, the same often as those of the Offices. Thus, for example, the Intendancies or Governments of the Provinces in *France* are Commissions, and not Offices, and their Functions consist in a mixture of those of Justice, Policy, and the Revenue, and have the extent or limits which the King thinks fit to give them. So that it is not by the Functions, nor by the exercise of Authority, that the said Commissions and all others are distinguished from Offices; but there is this difference between Offices and Commissions, that Offices are either for a certain time, as the Municipal Offices, or perpetual, as are all the others; and altho' some of them have an interruption in their Functions during stated Intervals of time, such as the Courts of Justice which sit only six months in the year, those of the Officers who serve by quarter, and of the Receivers who execute by turns the same Office of Receipt, they remain still Officers, and cannot be turned out of their Offices, unless they have been guilty of some misdemeanor, not even the Municipal Officers, before the stated time of their Office is expired; whereas Commissions are neither perpetual, nor for any certain time that is fixed and stated: but they are for an indefinite time, and continue or determine according to the will and pleasure of him who gave the Commission, and he may revoke it whenever he thinks fit [i].

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[l] *It is a standing Rule in the Kingdom, that the King does not dispose of any Office, which has been given to any one, unless the Office is void by his death, or by his resignation, or unless he has been deprived of it, by having forfeited the same. But Commissions do not give any Title or Right to exercise the Functions thereof, but during the pleasure of the King, or other Person, who has the right to nominate.*

See the Ordinance of the 21st of October, 1467.

SECT. II.

Distinctions of Officers by their different Functions.

The CONTENTS.

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15. *Jurisdiction Ordinary and Extraordinary.*
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20. *The Judges who hear and determine Appeals, have likewise another Jurisdiction.*
21. *Judges of the Causes of Privileged Persons.*
22. *Courts universal for the whole Kingdom.*
23. *Offices of the King's Council.*
24. *Functions of some Officers necessary in all the Jurisdictions.*
25. *Jurisdiction of the Chancellor of* France.

I.

1. The Functions of Officers must be otherwise distinguished, than by the nature of their Offices.

WE must not confound the ways of distinguishing Officers by their Functions, with the ways of distinguishing Offices by the characters which have been the subject matter of the first Section; for, as has been observed in another place[a], there are Officers who exercise Functions of the same nature, altho' their Offices be distinguished by different characters; and there are likewise some Officers who exercise Functions of a nature altogether different, altho' their Offices have the same characters. Thus, for example, the Offices of the Judges of the King's Courts who administer the Ordinary Justice, have other characters than the Offices of the Judges of the Spiritual Courts; for these Offices are Ecclesiastical, and are conferred by the Bishops, and are not venal; and the others are Lay-Offices, which are conferred by the King, and are allowed in *France* to be bought and sold; but yet the Judges of the Spiritual Courts in *France* are authorized to take cognizance of several matters of the same nature with those which the King's Judges have cognizance of; and the Officers of the Lords of Mannors have still more Functions that are common to them with the King's Judges, altho' their Offices be of another nature. Thus, on the contrary, the Offices of all the Parliaments in *France* are of the same nature; but the Parliament of *Paris* has Functions which the other Parliaments have not, such as the cognizance of the Causes of the Peers of the Kingdom, and those relating to the Regale. Thus, in the Parliaments, and all the other Courts of Justice in *France*, the Offices of the Presidents, and the other Chiefs, those of the Judges, and those of the King's Council, have their Functions altogether different; altho' all the said Offices are of the same nature, being Royal Offices of Judicature, and belonging to the same Jurisdiction. So that it is by other views than by the diver-

diversity of the Offices, that we are to distinguish the different Functions which are here mentioned, as shall be explained in the Articles which follow.

[a] *See the end of the Preamble of this Title.*

II.

2. Three general kinds of Functions of Offices.

There is this belongs in common to all the Functions of all Officers whatsoever, that they tend to the publick Good: but seeing the publick Good consists of many parts, the said Functions relate differently to divers uses which may be distinguished into three sorts, which divide the said Functions into so many kinds: the first, of those which regard directly and in general the Good of the State, and the Service of the Prince who is the Head of it. The second, of those which relate to the Service of the Person of the Prince: And the third, of those which respect in the common Good of the Society that which more especially concerns the Persons who compose it, and who are Members of it [b].

[b] *There is no Function of any Office whatsoever which has not one of these three uses.*

III.

3. First kind, Functions which relate to the State.

The Functions which regard directly and in general the Good of the State, and the Service of the Prince, who is the Head of it, are of many sorts: the first is that of the persons whom the King is pleased to call to assist in his Council, for the Government of the State, and to whom he may differently intrust the Affairs relating to the Government, whether they be Officers, such as those of the Crown, or Secretaries of State, or others, or Ministers whom he honours with this Function; and we may place in this first Order of Functions which relate to the State, those of the Peers of the Kingdom, who assist at the Coronation of the King [c].

[c] *These Functions are the first, because of the consequence of the Good of the State.*

Of all the things which may be directed to the Good of the State, according to the three different views explained in the preceding Article, it is natural to place in the first Rank, the Functions which relate to the Good of the State, and to the Service of the Prince, who is the Head of it, and by and thro' whom it is that the Body and the Members are to receive their share of this common Good.

IV.

4. The Functions of Officers of War are of this kind.

It is in the same Rank of Functions relating to the Good of the State, that we are to place those of the Officers of War, who serve either by Land or by Sea, and who by their Conduct and Courage carry on, under the direction of the Prince, the Enterprizes against the Enemies of the Kingdom, and resist the attempts of Enemies by their vigilance in taking advantage of all opportunities, and by a prudent ordering or disposing of the Troops, whether it be for Marches, or for Encampments, for Sieges, Battels, Retreats, and for all warlike Expeditions; and the Officers who have this honour, serve the Prince and the State in the greatest and most glorious of all the Functions, which is that of exposing their Lives [d].

[d] *The Functions of War are the support of the State, as those of the Council of the Prince are the foundations of it.*

V.

5. As also the Functions of the Governors of Provinces.

We must likewise set down in this first Rank of Functions which relate to the Good of the State, those of the Governors of the Provinces, who, as occasion requires, and pursuant to the Orders of the Prince, maintain in each Province the publick peace and tranquillity, the fidelity of the Subjects to the Prince, and every thing relating to the King's Service, and to the Publick Good [e].

[e] *These Functions have a relation to the publick tranquillity.*

VI.

6. Second kind, Functions which relate to the Service of the Person of the Prince.

The second kind of Functions, which is of those that relate to the Service of the Person of the Prince, comprehends many Functions of several sorts; but they may be all reduced here into one Article, including in that kind of Functions, those of all the Officers of the King's Houshold, from the highest to the lowest, whether it be for Services performed about his own Person, or for other Functions of his Service, or even for the execution of the particular Orders which the King may give to the several sorts of Officers who are about him [f].

[f] *Altho' these Functions do not so precisely relate to the Good of the State as those of the first kind, yet they have a relation to it, and the consequence of them is very great; for what concerns the Head, concerns also the Body.*

VII.

7. Third kind, Functions which respect the Good of particular persons.

The third sort of Functions are those which have relation to the common Good of the Society; in such a manner as that they do not so precisely relate to the Good of the State, as those of the first sort; nor to the Service of the Person of the Prince, as those of the second; but they regard the Good of the

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the Society in the Members who compose it, and relate to the particular persons who are Members of the Society, whether it be to maintain them in the use and free possession of their Goods against the attempts of those who should offer to molest them, or to revenge the Crimes and Offences committed against their Honour, their Life, their Estate, or to regulate the differences that set them at variance one against another, or for other uses; and these Functions of this third sort, which are chiefly exercised by the Officers of Justice, and those of Policy, the Revenue, and others, have also some Jurisdiction over particular persons, such as the Officers of the King's Houshold, the Officers of War, and others have[g].

[g] *These Functions do still less regard the Good of the State, than those of the second kind, but still they have some relation to it; for what relates to the Members, relates to the Body.*

VIII.

8. Another distinction of four general kinds of Functions of Officers.

Since we have distinguished in the first Article of the foregoing Section, four different sorts of Offices; those which the King disposes of, those of the Officers of Lords of Mannors, those of the Officials or Ecclesiastical Judges, and those which are called Municipal Offices; we may begin the distinctions of the Functions of Officers by four kinds, which comprehend them all: the first takes in all the Functions of the several sorts of Officers named by the Sovereign, comprehending under them the Functions that have been explained in the third, fourth, and fifth Articles, and those which shall be explained in the Articles which follow: the second, is of the Functions of Officers belonging to the Courts of Lords of Mannors, which are the same with the Functions of the King's Judges who exercise the Ordinary Jurisdiction, of which we shall speak in the fifteenth Article; for the Officers of Lords of Mannors take cognizance of matters of Policy, and of all other matters, except some that are reserved to the King's Judges: the third is that of the Functions of the Judges of Ecclesiastical Courts[h], which have been explained in the sixth Article of the preceding Section: and the fourth is that of the Functions of Municipal Officers, which have been explained in the second Section of the ninth Title of the first Book.

[h] *See the other Articles quoted in this Article.*

IX.

9. Distinction of the Functions of Justice, of Policy, and of the Revenue.

As for the Functions of the different sorts of Officers of the King's Nomination, seeing we have explained in the preceding Articles, those which relate to the State and to the service of the Person of the Prince; it remains only now that we should explain the Functions which relate to particular persons, as has been said in the seventh Article; and these are the Functions which are commonly divided into these three kinds that are so well known, the Functions of Justice, those of Policy, and those of the Revenue[i].

[i] *These three kinds comprehend all the Functions, of which the several sorts remain yet to be explained in the Articles which follow.*

X.

10. All the Functions of Justice, relate either to the voluntary Jurisdiction, or to the contentious Jurisdiction.

We must comprehend under the Functions of Justice, all those which are a part of the Administration of Justice, whether the said Functions be exercis'd by a voluntary Jurisdiction, or by a contentious Jurisdiction. Thus the Regulations which many Judges have a right to make in things pertaining to their Cognizance, the admissions of Officers, and many others, are Functions of Justice, and of a voluntary Jurisdiction common to several sorts of Officers; and the Administration of Justice for the contentious Jurisdiction between Parties, makes another kind of Functions of Justice which are common to all those who have this kind of Jurisdiction[l].

[l] *All the Functions of Justice are Acts of Jurisdiction, and consequently they belong either to the one or the other of the two sorts of Jurisdiction. See the eighteenth Article of the first Section.*

It is necessary to distinguish in the Functions of Justice two kinds of Jurisdictions; one which is called voluntary, and the other that is called contentious. The voluntary Jurisdiction is that which is exercised when there is before the Judge no matter of dispute or contest between the Parties, which the Judge has to determine: and the contentious Jurisdiction is that which regulates between particular persons their differences which they bring into Judgment. Thus the Admission of an Officer, his Examination, his Oath, his Installation, the Nomination of a Guardian to Minors, an Order of Court containing some Regulation touching matters of Policy, either about the Highways, the Streets, or Market-places, the auditing the Accounts of a Receiver, the Assessment of particular persons for their respective proportions towards the publick Taxes, the management of the publick Revenue, and many other such like Acts, are of the voluntary Jurisdiction. Thus the Judgments given in Law-Suits, and in all differences between particular persons, belong to the contentious Jurisdiction. The Reader will be able to judge of this distinction between the voluntary and contentious Jurisdiction by the Articles which follow.

XI. The

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XI.

11. *And likewise the Functions of Policy.*

The Functions of Policy are also of two sorts; one of those of the voluntary Jurisdiction, and the other of those of the contentious Jurisdiction. Thus the Regulations which the Officers of Policy have a right to make in matters of that nature, the fining of particular persons who have transgressed the Rules of Policy, such as those who have built a House, or some other Edifice too far out into the Street, those who do not keep the Street clean before their Houses, and other Nusances of the like nature, are Functions of the voluntary Jurisdiction: and the Judgments given between particular persons upon disputes arising about matters of Policy; as if one man complains of another for having thrown out of a window something on him as he was passing in the Street, or for other matters, which are the occasion of quarrels and disputes; the proofs and the determination of these sorts of differences, are Functions belonging to the contentious Jurisdiction [m].

[m] *These Functions, in the same manner as those of Justice, are Acts of Jurisdiction, and consequently either of the voluntary, or of the contentious Jurisdiction.*

XII.

12. *Divers Officers who have a kind of Policy.*

These two sorts of Functions of Policy are common to several sorts of Officers; for besides the Officers of Justice who have also a Jurisdiction in matters of Policy, and the Officers of Lords of Mannors who have the same Authority within the bounds of their Mannors, and the Municipal Officers who have it likewise within their Districts, there are also other Officers who have a kind of Policy, as the Treasurers of *France*, in relation to the repair of the Highways, Bridges, and Causeys; and the Officers of War have likewise their Policy peculiar to them, for regulating what concerns the Provisions and Forrage necessary for the subsistence of the Army, the Order and Cleanliness in the Camps, and other Functions of the Military Government. There are also other Officers, who in the matters belonging to their Cognizance have Functions of this nature [n].

[n] *As Policy is that part of Justice which regulates the several Functions of the publick Order, so there are many kinds of Policy exercised by different sorts of Officers, as the same is regulated by several Ordinances touching the Policy of the High-ways, Bridges, and Causeys, and the Policy of the Army.*

XIII.

13. *There are in the Revenue Functions of two sorts of Jurisdiction; voluntary and contentious.*

The Functions relating to the Revenue, in the same manner as those of Justice and of Policy, are also of two sorts; the one of those of the voluntary Jurisdiction, and the other of those of the contentious Jurisdiction. Thus the Regulations made by the Officers of the Revenue who have a right to make any, the auditing the Accounts of the Receivers, their admission, and the swearing of them, and other acts of the like nature, are Functions of the voluntary Jurisdiction; and the judging of differences about matters of the Revenue, as between a Receiver general and a particular Receiver in things belonging to their Offices, between a Receiver and his Clerk, and other acts of the like nature, are Functions which belong to the contentious Jurisdiction [o].

[o] ☞ It is necessary to distinguish in the matters of the Revenue three sorts of Functions of the Officers who are imployed about it. The first in order of time, is that of the Functions which relate to the imposing and collecting of the several Branches of the Revenue, by what names soever distinguished, whether it be the Tax on Real and Personal Estates, Subsistence, Tenths, Poll-Tax, Aids, Customs, the Duty on Salt, and all other Impositions whatsoever. The second, is that of watching over the conduct of those who are charged with the collecting of the Revenue, and who are to render an Account of what comes to their hands, of verifying the Accounts of their Receipts, and of the disbursements which they are impowered to make, such as Salaries to Officers, and other Payments, which they are charged to make out of the Monies belonging to their Receipt, and of auditing and examining their final Accounts. The third, comprehends the Functions which relate to differences between particular persons in matters of the Revenue, whether it be between those who are the Collectors of it, and the particular debtors, or whether it be in relation to Privileges and Exemptions, or otherwise.

The Functions which relate to the Imposition and Collecting of the several Branches of the Revenue, are Functions of the voluntary Jurisdiction; and consist in what relates to the execution of the Orders of the Prince for imposing and levying the said Duties, for settling the proportions that every one is to pay of

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of the Land-Tax, or of the Poll-Tax, the Regulations touching the manner of recovering not only the Monies due by vertue of the said Taxes, but likewise those arising from the Duties on Salt, from the Excise, and the Customs, and in general every thing which any way concerns the direction and management of the Revenue, and the several Regulations which compose the Order thereof. The Administration of the chief and most important of these Functions is put into the hands of the first and principal Officers of the Treasury, who have the direction of the Revenue, and of other persons, whether they be Ministers, or Officers, with whom the Prince advises touching these matters in his Council; and as for the detail of the manner of laying on and distributing the Taxes, the making the Assessments, and levying the Money, the Functions of this kind are executed by the Officers who are impowered to make a distribution of the Taxes, and the Assessments, and by the Receivers and other persons who are appointed to collect them, as has been explained in its proper place.

The Functions which respect the duties of the Receivers, Collectors, or others appointed to receive or collect the several sorts of Monies belonging to the Revenue, and the comptrolling of their Accompts, are also Functions of the voluntary Jurisdiction, exercised on the spot by the Treasurers of *France*; and it is to the Chambers of Accompts that the Officers who are accountable are to deliver up their final Accompts. The third sort of Functions, which relate to the differences arising between particular persons upon occasion of imposing and collecting the Monies of the Revenue, belong to the contentious Jurisdiction, and these matters are cognizable, in the first instance, before the Officers of the Elections, and of the Duties upon Salt, according to their respective Jurisdictions, and from them there lies an Appeal to the Courts of Aids, who are Judges in the last resort. Thus the Officers of the Courts of Aids are not only Officers of the Revenue, in respect of the nature of the matters belonging to the Revenue, which they have the cognizance of, but they are Officers of Justice, and judge of all matters of the ordinary Jurisdiction, which come in by way of Incident in the Affairs which properly belong to their Cognizance. Thus, for Example, although it naturally belongs to the ordinary Judges to determine disputes that may arise touching the quality of a Gentleman, and if the matter in dispute were concerning the Right to an Office, or to a Benefice appropriated to a Gentleman, or to one whose quality of Gentleman is called in question, it is the Ordinary Judge who ought to decide it. But when the question is touching an Exemption from Taxes, founded on the quality of Nobility claimed by the person who is assessed, and which is denied, it belongs to the Courts of Aids to decide that point. Thus in the Decrees or Orders made by the Courts of Aids, for the Sale of the Goods of Persons who are accountable for the Publick Monies, they decide all questions touching Mortgages, Preferences, Legacies, Substitutions, Donations, and all others which arise as Incidents in the Matters which are before them in Judgment. For although the principal Functions of the Officers of the Chambers of Accompts, and of the Treasurers of *France*, be part of the voluntary Jurisdiction, yet they have likewise some of the Functions of the contentious Jurisdiction which are incidental to the matters which are properly of their Cognizance.

XIV.

14. Other distinctions of Jurisdiction.

Besides these general distinctions of the Functions of Justice, of Policy, and of the Revenue, there are other distinctions peculiar to the Functions of Justice, which are likewise of a much larger extent than those of Policy and of the Revenue, and which are also of different sorts, which it is necessary to distinguish; and because that which makes the diversity of those Functions, makes at the same time the diversity of Jurisdictions, we shall make use in the following Articles of the word Jurisdiction, in order to explain the distinctions of the said Functions [p].

[p] *See the Articles which follow.*

XV.

15. Jurisdiction Ordinary and Extraordinary.

The first of these distinctions of Jurisdictions is, that of the Officers who take Cognizance of all matters Civil, Criminal, Beneficial, and all others without distinction, except some which have been appropriated to other Judges; and it is for this reason that this Jurisdiction is called Ordinary, to distinguish it from the Jurisdiction of those other Judges, which is for this reason called Extraordinary. Thus the Parliaments in *France*, the Bailiffs, the Seneschals, and the other Officers of this kind, exercise the Ordinary Jurisdiction; and the other Jurisdictions of Officers who have the

Cognizance

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Cognizance in matters of the Revenue, the Land-Tax, the Aids, or Subſidies, the Duty upon Salt, the Mint, and other matters ſeparate from the Ordinary Juriſdiction, are in this ſenſe Juriſdictions extraordinary, diſtinguiſhed among themſelves according to the matters peculiar to every one of them, and which make ſo many different ſorts of Juriſdictions and Functions of Juſtice [q].

[q] ☞ It may be remarked here, that the firſt antient Judges, who had naturally the Cognizance of all theſe Affairs, were thoſe who exerciſed this general Juriſdiction, which is called at this day the Ordinary Juriſdiction, ſuch as is that of the Parliaments in *France*, and of the inferior Courts ſubordinate to them. This Juriſdiction is called by the name of Ordinary, to diſtinguiſh it from the other Juriſdictions which are eſtabliſhed to judge of ſome matters that are ſpecially aſſigned to them, and which without this ſpecial Aſſignment would have belonged to the Tribunal of this Ordinary Juriſdiction. Thus the Ordinary Judges are thoſe who have naturally the Cognizance of all matters, without any other exception beſides that of thoſe matters which have been expreſly appropriated to other Judges. Thus we muſt place in this rank the Bailiffs, the Stewards, the Provoſts, and others who adminiſter Juſtice within their reſpective Diſtricts, and exerciſe therein this general and Ordinary Juriſdiction, except in ſuch matters as have been diſmembred from their Juriſdiction. Theſe Juriſdictions are diſtinguiſhed by the different matters that belong to their Cognizance. Since the fulneſs of the Authority of Juſtice reſides in the Perſon of the Prince, and that he has alſo the plenitude both of the Ordinary and Extraordinary Juriſdiction, and likewiſe the Right to judge of all ſorts of Affairs without diſtinction; if there were in a Kingdom only one Order of Judges, veſted with both Juriſdictions for all matters, there would be only one kind of Tribunals, which would have every one within its own Precinct the entire Adminiſtration of Juſtice; and the firſt Judges which the firſt Princes eſtabliſhed may have had naturally this general Adminiſtration divided among them, not according to the ſeveral natures of Affairs, but according to the reſpective bounds of their Diſtricts. Thus *Moſes* having named Judges to adminiſter Juſtice to the people, gave to all of them indifferently a Right to judge of all ſorts of Affairs, reſerving to himſelf ſuch matters of all ſorts as might be of ſuch importance as to deſerve his taking Cognizance of them himſelf; but in proceſs of time, the extent of Dominions, and the multiplicity of the ſeveral kinds of Affairs has made it neceſſary to diſtinguiſh different Juriſdictions, voluntary as well as contentious; ſo that there has been taken off from the antient Juriſdictions divers Tribunals, to which has been aſſigned the Cognizance of Matters which might have been decided by thoſe firſt Judges who had Cognizance naturally of all matters whatſoever. It is not our buſineſs to explain here the Origin of thoſe antient Judges; that would be to exceed the bounds of this preſent deſign: we have thought that it would be ſufficient to make here theſe Remarks.

XVI.

16. Juriſdiction in Civil and Criminal Matters.

We may diſtinguiſh under another general view two ſorts of Functions of Juſtice, or Juriſdictions, which are exerciſed by the ſame Judges; one for Civil matters, and the other for Criminal [r]; and this Juriſdiction is veſted not only in all the ordinary Courts of Juſtice, but alſo in the others. For, as for inſtance, the Courts of Aids, the Court of the Mint, and other Tribunals have the cognizance of certain Crimes within their reſpective Juriſdictions; and the Chambers of Accompts have likewiſe a Juriſdiction in Criminal Matters which are there to be determined, as it is regulated by the Ordinances [s].

[r] *In the Courts which have the Ordinary Juriſdiction, the Civil and Criminal Juriſdiction have their different Functions: and there are even within the Diſtricts of Bailiffs and Stewards, Officers whoſe Juriſdiction is limited to Criminal matters, ſuch as that of the Lieutenant Criminals.*

[s] *See the Ordinances of* February 1566, *Art.* 4. *and* 5. *and that of* May 1567.

XVII.

17. Diſtinction of Ordinary Judges from whom there lies an Appeal, and of thoſe from whom there lies none.

It is neceſſary alſo to diſtinguiſh the Functions of Juſtice, or Juriſdictions, in another general manner into two kinds. One of the Juriſdictions from which there lies an Appeal; and the other of thoſe from which there lies no Appeal. Thus for Civil matters in *France*, there lies an Appeal from all the Sentences of Bailiffs, Seneſchals, and of all other Royal Judges; and there lies no Appeal from the Preſidial Courts, when the Sentences are within the caſes which the Ordinances give them power to decide finally without Appeal. Thus as for Criminal matters, the Bailiffs, the

Seneſchals,

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Seneſchals, and the Preſidial Courts judge without Appeal, when there is a certain number of Judges preſent, in certain Crimes, whether it be becauſe of the conſequence of a ſpeedy puniſhment, as in the caſe of a Riot, or becauſe of the quality of the perſons who are accuſed, as if they are Vagabonds, or perſons of no certain habitation, or upon other conſiderations of the quality of the crimes, as it is regulated by the Ordinances[t].

[t] *The uſe of Appeals makes two different diſtinctions of Juriſdiction; one, whereof mention has been made in this Article, which diſtinguiſhes among the firſt Judges between thoſe from whom one may appeal, and thoſe from whoſe Sentence there lies no Appeal: And the ſecond, which diſtinguiſhes between the inferior Judges, from whom there lies an Appeal, and the ſuperior Judges who determine Appeals, as ſhall be ſhewn in the nineteenth Article.*

XVIII.

18. Other Officers, beſides the Ordinary Judges, from whom there lies no Appeal.

It may be remarked concerning the Juriſdictions from which there lies no Appeal, that beſides that of the Ordinary Judges mentioned in the foregoing Article, there are other Officers who judge without Appeal; ſuch as the Officers of War, for matters relating to the War; and the Provoſts of the Mareſchals of *France*, who are the natural Judges of Crimes committed by perſons belonging to the Army, have likewiſe the Cognizance, which is granted to them, of ſeveral Crimes committed by other perſons beſides thoſe who belong to the Army, and which they determine finally without Appeal, as the ſame is regulated by the Ordinances[u].

[u] *The Provoſts of the Mareſchals of* France *do not take cognizance of theſe ſorts of Crimes by themſelves, but in conjunction with the Judges of the Preſidial Courts, and others of the King's Judges, conſiſting of a ſtated number, after their Juriſdiction therein has been allowed, purſuant to the Regulations made touching the ſame by the Ordinances.*

The Bailiffs and Seneſchals, and the Preſidial Courts in France *give final Definitive Sentences, from which there lies no Appeal, in many Crimes, which the Provoſts of the Mareſchals of* France *have likewiſe Cognizance of, and the Ordinances give unto all of them the Right of Concurrence and Prevention, or Priority of Suit; that is to ſay, that thoſe who have firſt taken cognizance of the Crime, exclude the others from meddling with it.*

XIX.

19. Diſtinction between the Judges from whom there lies an Appeal, and thoſe who judge of Appeals.

The Juriſdictions from which there lies an Appeal, make another diſtinction of thoſe which are inferior, and from which the Appeal lies, whether it be in Civil or Criminal matters; and of thoſe which are ſuperior, and who judge of Appeals: which goes ſometimes thro' ſeveral degrees of Appeals to ſeveral Tribunals which are ſuperior the one to the other; but the Judges of the laſt Reſort are the Parliaments in *France*, and the other Supreme Courts of Juſtice, from which there lies no Appeal[x].

[x] *It is juſt that there ſhould be leave for perſons to appeal, unleſs it be in caſes that are excepted; and it is juſt likewiſe that the degrees of Appeals be limited.*

[' By the Conſtitution of our Government in ' *Great Britain*, the Houſe of Lords in Parliament ' are Judges in the laſt Reſort of all Cauſes that ' come before them either by Appeal, or Writ of Er- ' ror, from the Court of *Chancery*, or Court of *King's* ' *Bench* in *England*. *Coke* 4 *Inſtit. cap.* 1. As alſo of ' Appeals from the Decrees of the Lords of Seſſion ' in *Scotland*, ſince the Union of the two Kingdoms. ' But in Eccleſiaſtical matters, and in Cauſes Civil ' and Maritime, the Supreme Court of Appeals in ' *England* is a Court of Delegates, who are ap- ' pointed by a Commiſſion under the Great Seal to ' hear and to determine finally the reſpective Cau- ' ſes which are referred to them by the ſaid Com- ' miſſion. See *Stat.* 25 Hen. VIII. *cap.* 19. 8 *Eliz.* ' *cap.* 5. In matters relating to Prizes taken in ' time of War, the Appeal lies from the High Court ' of Admiralty in *England* to the King in Council, ' where all Cauſes touching Prizes are finally de- ' termined, the ſame being frequently interwoven ' with matters of State, which regard the Intereſts ' of Foreign Princes and States. *Stat.* 6 *Annæ,* ' *cap.* 37. § 8.]

XX.

20. The Judges who hear and determine Appeals, have likewiſe another Juriſdiction.

The Judges who have Cognizance of Appeals, have two Juriſdictions which may be likewiſe diſtinguiſhed, that of hearing and determining Appeals, and that of judging in the firſt inſtance of matters belonging to their Cognizance; for in *France* there are no Judges who have barely the Function of judging of Appeals. Thus the Parliaments in *France* have their proper Juriſdiction for Cauſes that are brought before them in the firſt inſtance, whether it be on account of the quality of the perſons, or becauſe of the nature of the matters; ſuch as for example, the Cauſes relating to Peers of the Kingdom, and to the Regale, of which the Parliament of *Paris* hath the ſole Cognizance[y].

[y] *All the Sovereign Courts of Juſtice have other Functions of Juriſdiction beſides the cognizance of Appeals; ſuch as the Regiſtring of the Ordinances, Edicts, and Declarations, and other Functions of the voluntary Juriſdiction; and likewiſe Functions of the contentious Juriſdiction in matters which they have cognizance of in the firſt Inſtance, whether it be on account of the quality of the Affairs, or becauſe of the Privileges of the Perſons.*

XXI.

21. Judges of the Cauſes of privileged perſons.

We may likewiſe diſtinguiſh the Juriſdictions of Judges who are appointed to hear and determine the Cauſes of perſons privileged, which diſtinguiſhes theſe Juriſdictions from all the others: Thus the Court of Requeſts of the Palace, that of the Requeſts of the *Hôtel*, and the other Tribunals, of which mention has been made in the ſixteenth and ſe-

venteenth

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venteenth Articles of the first Section, have their proper Jurisdiction, which is restrained within the bounds settled by the Ordinances to the Causes of such persons as have the privilege to have them for their Judges. But we must take notice, with respect to these Jurisdictions, of this difference between that of the Requests of the *Hôtel*, and all the others, that besides the Causes of the persons who have the privilege to have them tried in the Court of Requests of the *Hôtel*, that Tribunal has cognizance of some matters independently of all manner of privilege of the parties to the Suit; such as are, for example, the Causes where the matter in dispute is concerning the Title of Royal Offices which cannot be decided any where else, as it is regulated by the Ordinances [z].

[z] *These Jurisdictions have been established for the purposes here mentioned.*

XXII.

22. *Courts universal for the whole Kingdom.*

We may distinguish among all the other Jurisdictions, those of some Tribunals which are the only Tribunals of the kind for the whole Kingdom; such is the Privy Council for all matters of which it may take cognizance, which comprehends all sorts of matters without distinction; for there is not any one matter but what may be brought before it, and of which it may not take some Cognizance, either to retain the Cause, or to remit it to other Judges; or to give Judgment in the Causes, where the question is about the reversal of Decrees of the Parliaments in *France*, and of the other Supreme Courts in all matters. The Great Council hath likewise its peculiar [a] and universal Jurisdiction throughout the whole Kingdom touching matters which belong to its Cognizance [a]. The Court of the Mint hath likewise its Jurisdiction in the same manner [b]; and there are moreover some other Jurisdictions of Officers whose Functions extend to the whole Kingdom, such as that of the Officers of War, and that of the Mines, and others.

[a] *See the seventh Article of the first Section.*
[b] *See the fifteenth Article of the first Section.*

XXIII.

23. *Offices of the King's Council.*

Besides these distinctions of the different Functions of Officers, it is necessary to distinguish the Functions of the Advocates and Procurators General in the Supreme Courts of Justice, and the King's Advocates and Procurators in the Courts of Bailiffs, Seneschals, Presidials, and other Jurisdictions: these are the Officers who are called the King's Council in the Courts of Justice, and in all the King's Courts; because their Functions are to take care of the publick Interest, which is that of the King, to bring Offenders to condign punishment, even when there is no Party appears to carry on the Prosecution, and when there is a Party that prosecutes, it is the business of the King's Council to see that every thing be done for the Good of the Publick, both in carrying on the Prosecution, and in obtaining Judgment, and to move the Court, that the Punishments which the Crimes deserve may be inflicted; for the Parties having a right to demand only that they may be indemnified as to the damage which they have sustained, and not to sue for Vengeance of the Crimes; it is the Function of the King's Council to appear as Parties for the Publick Interest, both in these sorts of Affairs, and in all others where the King and the Publick have any concern, as in the Causes where the interest of the Church is concerned, and in other Causes which it is not necessary that we should enumerate here. And seeing this Function of the King's Council is necessary likewise in the Courts of Ecclesiastical Jurisdiction, and of Lords of Mannors, it is exercised in the Courts of Lords of Mannors, by Officers who are called Procurators Fiscal, and in some places, Procurators of the Office; and in the Ecclesiastical Courts, by Promoters of the Office [c]. We may likewise distinguish in the Functions of the King's Council, those of the Advocate General, from those of the Procurator General; as also those of the King's Advocate, from those of the King's Proctor; and this distinction is sufficiently known.

[c] *Seeing these Functions cannot be exercised by the Judges, it has been necessary to appoint other Officers for the discharge of them.*

XXIV.

24. *Functions of some Officers necessary in all the Jurisdictions.*

In all those different Jurisdictions, there are other Functions distinct from those which have been just now explained, and which are of necessary use therein; and the said Functions, which are for different purposes, are also exercised by Officers of different Orders; which are the Registers, Proctors, Apparitors or Tip-staves, and Bailiffs, whom we have distinguished according

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to the nature of their Offices in the preceding Section[d].

[d] *See the eighteenth, nineteenth, twentieth and twenty first Articles of the foregoing Section.*

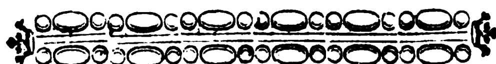
XXV.

25. Jurisdiction of the Chancellor of France.

It is necessary in the last place to distinguish the singular Jurisdiction of the first of all the Magistrates, who is the Chancellor of *France*, the Head of Justice, who presides in the King's Council, and in all the Sovereign Courts of Justice, where he sits, who gives the Form, and puts the Seal to all Edicts, Declarations, and Ordinances, who gives Patents and Commissions to all Officers, and who exercises all the other known Functions of this first and most important of all the Offices[e].

[e] *See the seventh Article of the first Section.*

[' The Lord Chancellor of *Great Britain* is the ' first Officer of Justice, next unto the Prince, and ' has a very great extent of Power in matters of ' Justice. For whereas all other Justices are tied ' to the Law, and may not swerve from it in ' Judgment, the Chancellor hath in this the King's ' absolute Power to moderate and temper the written Law, subjecting himself only to the Law of ' Nature and Conscience, ordering all things according to Equity. And therefore *Stamford* in ' his Prerogative, *chap.* 20. *fol.* 65. saith, That the ' Chancellor hath two Powers; one Absolute, ' the other Ordinary: Meaning, that tho' by his ' Ordinary Power, in some cases, he must observe ' the Form of Proceeding, as other Ordinary ' Judges; yet that in his absolute Power he is not ' limited by the written Law, but by Conscience ' and Equity, according to the circumstances of ' the Matter in question. This High Office is an ' Office of great Antiquity in *England*; it being ' certain, that both the *British* and *Saxon* Kings ' had their Chancellors, and Court of Chancery. ' *Coke* 4 *Instit. cap.* 8.]



TITLE II.

*Of the Authority, Dignity, Rights and Privileges of OFFICERS**.

* *See in relation to this Title, the ninth Title of the first Book.*

As it is chiefly by the Functions of the Offices, that the Officers are distinguished from other persons, so they are distinguished among themselves by the differences of their Functions; and according as those Functions are of more or less consequence, have more or less of Dignity and Authority, the Offices are proportionably of greater or lesser importance and consideration.

According to this principle, the Offices of the Crown having Functions which regard directly the general Good of the State, they are the first, the most considerable, the most important; and all the others have their Rank after them, proportioned to the Order of their Functions; but in such a manner, that altho' it be true that there are some kinds of Functions, which in their nature have more of Dignity than some other Functions have, yet it does not follow, that the least of the Kind which has the greatest dignity have their Rank above all those of a Kind which has less dignity, and that, for example, all Officers of Justice have their Rank above all Officers of the Revenue: for when we descend from the first Officers of an Order, to those who possess the middling places, and the lowest places of the same Order, the consequence, the extent and the dignity of the Functions diminish in proportion, and in such a manner, that by comparing those who exercise the middling or the lowest Functions in one Order, with those who exercise the first Functions in another inferior Order, there are formed combinations of differences of Dignity between Officers of divers Orders, which have occasioned their Ranks to be regulated by other views than those of the Dignity which every Order in general receives from the nature of its Functions which are superior to the Functions of other lesser Orders; and this is what makes these differences of Precedency between Officers of all Orders, and that we find in every Order some Officers who have the Rank before many Officers of the other Orders: Thus, the first Officers of the Revenue have the Precedency of an infinite number of Officers of Justice; and it is the same thing in general with regard to all the sorts of Officers, not only of Justice, of Policy, and of the Revenue, but of those of the King's Houshold, of Officers of War, and of all others without distinction.

Besides the disputes which may happen about Precedency between Officers of divers Orders, the like disputes happen also between Officers of the same Order, whether they be Officers of Justice, of the Revenue, or others; and the Precedency in these cases is likewise determined according to the differences of the consequence and extent of the Functions, and by the other distinctions

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ons which may give some advantage to one Officer above another, as shall be explained in the third Section.

It is not our business here to explain the Order of Precedency among Officers; and it is sufficient that we point out here the general Principles on which the Rules of Precedency depend, and that we observe, that as it is the Prince who creates Offices, and distinguishes the Functions thereof, and who has the nomination of the persons who execute them, it is likewise the Prince who regulates the Precedency among Officers who have no other common superior Judges, who can take Cognizance thereof. Thus the Precedency between Officers of Justice and of the Revenue, is properly cognizable by the King in Council; and the disputes about Precedency between Officers of the same Order, who have common Superiors, such as the Officers belonging to the Parliaments in *France*, and the Courts of Aids, are decided in the said Courts.

No body is ignorant of the infinite multitude of disputes of this kind that have arisen, and of the Regulations which have been made for settling the Rank and Precedency of Officers: so that it would seem that there remain only a few questions of this nature undetermined; but there arises nevertheless daily new questions in the cases wherein persons can find any way to distinguish them from those which have been decided; neither is it strange that the diversity and the great number of Officers has given occasion to this multitude of disputes, by the different combinations of the comparisons of one Office with another, and by the value which Men set upon the Rank of Honour which places some above others; as to which it must be confessed, that altho' ambition and vanity may have, and often have the greatest share in these disputes; yet there may happen disputes to persons who have no other motive than the good of the publick Order, and solid considerations, which have in view the usefulness of preserving to their Offices the Authority which truly belongs to them, that they may be able to make the better use thereof.

One sees by these Remarks on the Functions of Officers, that it is on the said Functions that the Dignity, the Authority, and the other Characters which make the different Rights and Advantages that are annexed unto Offices, and which are the subject matter of this Title, do depend.

The Authority of Offices is nothing else but the Right which Officers have to exercise the Functions of their Ministry independently of the will of those whom they concern, and to compel those to Obedience who do not voluntarily submit themselves.

The Dignity of Offices is nothing else but the Rank of Honour which they give, and this Honour consists in the Respect and Obedience that is due unto Officers according to the quality of their Ministry: for since they are established for the exercise of Functions which no man would have right to exercise over another, if he had not a power so to do, implied in that which God gives to the Prince, and which the Prince communicates to his Officers; it is this Power that we are bound to revere in the hands of Officers by a sincere respect to the Orders of God; and it is to these Orders that we owe the Obedience which we are bound to pay to those who execute them [a].

[a] There is no power but of God; the powers that be, are ordained of God. *Rom.* xiii. 1.

For Power is given you of the Lord, and Sovereignty from the Highest. *Wisd. of Sol.* vi. 3.

Submit your selves to every Ordinance of Man for the Lord's sake, whether it be to the King, as supreme, or unto Governors, as unto them that are sent by him for the punishment of evil doers, and for the praise of them that do well. 1 *Pet.* ii. 13, 14.

Whosoever therefore resisteth the Power, resisteth the Ordinance of God: and they that resist, shall receive to themselves damnation. For Rulers are not a Terror to good works, but to the evil: wilt thou then not be afraid of the Power? do that which is good, and thou shalt have praise of the same. For he is the Minister of God to thee for good; but if thou do that which is evil, be afraid; for he beareth not the sword in vain; for he is the Minister of God, a revenger to execute wrath upon him that doth evil. *Rom.* xiii. 2, 3, 4.

See in relation to this Title, and touching the Rank of Precedency, that of the several Orders of Persons, in the first Book.

See concerning this matter, the Title of the several Orders of Persons, where we have given the definition of Honour, of Dignity, of Authority, and of the rest.

Seeing the Dignity and the Authority of Offices are consequences of their Functions, every Office hath its Dignity, its Honour, and its Rank, according to the quality of its Functions, and the proportions that ought to be observed between the one and the other, whether it be in the same Order of Functions, or between those of one Order, and those of another, as has been already observed: which makes the different degrees of the Dignity and Authority of the several Offices which have both the one and the other; for there

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there are some Offices whose Functions are without Dignity, altho' there be none whose Functions do not imply the use of the Authority that is necessary in all of them for execution. Thus the lowest Ministers of Justice, of Policy, of Revenue, and of the other Orders of Offices, may perhaps have no degree of Dignity; but they have all of them this use of Authority, that altho' they cannot ordain any thing, yet they have power to execute the Orders that are put into their hands, whether it be by the Prince, or by his Officers: and it is upon the account of the said Orders that people ought to consider in the least Ministerial Functions of Officers, the Dignity and the Authority of Justice that arms them with its force, and the divine Providence which hath established the said Authority; which procures to those Officers the consideration which their Functions deserve, which of themselves, and of their own nature, command respect and obedience from those on whom they are exercised: and this is so true, that even that Function which raises a contempt and an aversion against those who exercise it, and who are called Hangmen, or Executioners of Justice, is nevertheless in reality such in itself, and by its nature, that in the manner that it was exercised in the first Ages, it was so far from having any thing odious or contemptible in it, that it had a sort of Honour or Dignity that accompanied it; for, it was either they themselves who had the Power of Life and Death that took away the Lives of Offenders who might deserve such a Punishment, or it was done by Officers who had the honour to approach near the Person of the Prince, or the whole Body of the People armed themselves with zeal, and strove who should be the first to execute Justice on the Offender. Thus *Moses* animated with the Spirit of God killed the *Egyptian*[b]; thus *Phinehas* was the revenger of the crime of the *Israelite* with the *Midianitish* woman[c]; thus, after his example, the People, by the command of *Moses* slew four and twenty thousand of their brethren, who had joined themselves unto *Baal-peor*[d]; thus *David* caused the person who gloried in his having killed *Saul*, to be put to death in his own presence[e]; thus the whole Body of the People were Executioners of the Sentences of Death pronounced by the divine Law, and every one armed himself with a zeal for Justice to stone those on whom the Law inflicted that punishment[f]. So that all these ways of executing Sentences of Death had nothing odious or despicable in them, but had on the contrary, the glory of the Zeal of God and of Justice, and the character of Works of Religion and Piety; and there have been some Governments in which, altho' they were ignorant of the true Religion, yet the bare consideration of the Authority of Justice gave a Rank of Honour to those who exercised this Function[g]; but when the persons who exercise it have no other view in laying their hands on Criminals to make them suffer the Punishments to which they are condemned, than barely the reward which they receive for doing it, these Executions in their hands have neither the glory of a Zeal for Justice, nor the honour of Authority; but this is no hindrance why those who exercise this Function, may not have other more generous motives than that of the small profit which they make by being the Executioners of Justice.

[b] And it came to pass in those days, when *Moses* was grown, that he went out unto his brethren, and looked on their burdens; and he spied an Egyptian smiting an Hebrew, one of his brethren. And he looked this way and that way, and when he saw that there was no man, he slew the Egyptian, and hid him in the sand. *Exod.* ii. 11, 12.

And seeing one of them suffer wrong, he defended him, and avenged him that was oppressed, and smote the Egyptian. For he supposed his brethren would have understood, how that God by his hand would deliver them, but they understood not. *Acts* vii. 24, 25.

[c] And when Phinehas the son of Eleazar, the son of Aaron the Priest, saw it, he rose up from amongst the congregation, and took a javelin in his hand; and he went after the man of Israel into the tent, and thrust both of them through. *Numb.* xxv. 7, 8.

[d] And Moses said unto the Judges of Israel, Slay ye every one his men, that were joined unto Baal-peor. *Numb.* xxv. 5.

And those that died in the plague, were twenty and four thousand. *Numb.* xxv. 9.

[e] And David called one of the young men, and said, Go near, and fall upon him. And he smote him that he died. 2 *Sam.* i. 15.

[f] Bring forth him that hath cursed, without the camp, and let all that heard him, lay their hands upon his head, and let all the congregation stone him. And thou shalt speak unto the children of Israel, saying, Whosoever curseth his God, shall bear his sin. *Levit.* xxiv. 14, 15.

And thou shalt stone him with stones, that he die; because he hath sought to thrust thee away from the Lord thy God, which brought thee out of the land of Egypt, from the house of bondage. *Deut.* xiii. 10.

Then shalt thou bring forth that man, or that woman, which have committed that wicked thing, unto thy gates, even that man or that woman, and shalt stone them with stones, till they die. *Deut.* xvii. 5.

Then they shall bring out the damsel to the door of

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of her father's house, and the men of her city shall stone her with stones that she die; because she hath wrought folly in *Israel*, to play the whore in her father's house; so shalt thou put evil away from among you. *Deut.* xxii. 21.

[g] *See Aristotle 6. Politic. cap. ult.*

It is in these two first characters of the Dignity and Authority of Offices, that the distinction between Officers and private persons does chiefly consist; for it is by the Authority and by the Dignity or Honour annexed to Offices, that they have a rank of Distinction, every one in his Order, in the manner that has been remarked, and which procures to them a respect proportionable to this Rank, and to the quality of their Functions, that they may be able to execute them with that power and liberty which the publick Order requires, and which subsists merely by the free exercise and right use of all the Offices.

Besides these two first characters of Dignity and Authority which the Functions of Officers give to their Offices, they give them likewise Rights which are consequences of them, and which may be reduced to two kinds; the one of the Recompences or Profits belonging to those Functions; and the other of some Privileges, or other Advantages.

The Recompences or Profits are of two sorts; the Salaries, and the Perquisites. We give one or other of these names to the gains which Officers may make by their Functions; but these Profits, these Privileges, and these Advantages do not belong indifferently to all Officers in general; and it is necessary to make different distinctions of them according as they have these different Rights; for some of them have both Salaries, Perquisites, and Privileges; others have neither Salaries, nor Perquisites, nor Privileges; others again have Privileges without Salaries, or other Gains; there are some who have Perquisites without Salaries, and without Privileges; and there are some who have Salaries and Privileges, but no Perquisites. We shall see these different combinations in the second Section of this Title, which shall be of the Rights and Privileges of Officers, and of their Rank; and we shall first explain in the first Section that which relates to the different sorts of Dignity and Authority annexed to the several Offices.

SECT. I.

Of the different sorts of Dignity and Authority annexed to Offices.

The CONTENTS.

1. *Definition of Dignity.*
2. *Definition of Authority.*
3. *Respect is due to Officers without any regard to their personal merit.*
4. *Different degrees of Dignity and Authority, and divers uses both of the one and of the other.*
5. *Divers combinations of Dignity and Authority of the several sorts of Offices.*
6. *Use of Dignity and Authority in Offices which seem to have neither of them.*
7. *The use of Authority demands the use of Force.*

I.

1. Definition of Dignity.

WE generally call by the name of Dignity of Offices the Honour which their Functions procure; and this Dignity may be considered, either in the persons of the Officers who execute the Offices, or in the Offices themselves, which are sometimes called barely by the name of Dignities [a].

[a] *We say of an Office, that it gives a Dignity, and that the Officer hath the Dignity which his Office gives him; and it is likewise said, that an Office is a Dignity; and sometimes in Courts of Justice they distinguish by the name of Dignity certain Offices, which are above the others; such as are in* France *in the Jurisdictions of Bailiffs and Seneschals, the Offices of Lieutenant General, of Lieutenant Criminal, and others; in the same manner as in the Chapters of Churches, they give the name of Dignities to the first, and chief Titles of Dean, Provost, and others.*

II.

2. Definition of Authority.

The Authority of Offices is the Power which Officers have to exercise the Functions thereof, and to compel those whom they concern to submit to them, whether they will, or not [b].

[b] *It is a natural consequence of the use of Offices, that those who execute them should have the Power and Authority to perform the Functions thereof.*

III.

3. Respect is due to Officers without any regard to their personal merit.

Seeing Authority and Dignity are annexed unto Offices without any regard to the personal qualities of the Officers, and that the same Respect and Obedience is due to their Functions that is due to the Orders of God, which they execute;

cute; this duty obliges us to respect and obey even those Officers who have not the merit with which they ought to accompany the exercise of their Functions [c].

[c] *See the fourth and the sixth Articles of the second Section of the first Title of the first Book.*

IV.

4. *Different degrees of Dignity and Authority, and divers uses both of the one and of the other.*

Dignity and Authority being annexed to the Functions of Offices, we ought to distinguish not only different degrees of Dignity and Authority, according to the differences of the Functions; but because in some there appears neither Dignity nor Authority, it is necessary to distinguish in them the manner in which both the one and the other have their use: these two sorts of distinctions will appear by the Articles which follow [d].

[d] *See the following Articles.*

V.

5. *Divers combinations of Dignity and Authority of the several sorts of Offices.*

As for the distinction of the Dignity and Authority of Offices by the differences of their Functions, we may reduce to two general Views all the ways of making this distinction; the first, by considering the divers kinds of Offices, and their several Orders, and by comparing the Offices of one Order with those of another; and the second by comparing in each Order the superior Offices with the inferior: Thus by the first of these Views, the Dignity and Authority of the first Magistrates of Justice is above those of the first Officers of the Revenue, because the Functions of Justice have by their nature more Dignity and more Authority than the Functions of the Revenue ought to have; and by the second, the Officers of the Parliaments in *France* have more Dignity and Authority, than the Officers of the Jurisdictions of Bailiffs and Seneschals: and it is by comparing under these two views every Office with all others, whether of the same Order, or of different Orders, that we ought to distinguish their Dignity and their Authority by the consequence of their Functions, not only in Offices of Justice, of Policy, and of the Revenue; but also in Offices belonging to the King's Houshold, in Offices of War, and in all others; observing the proportions between one Order and another, and between Offices of one and the same Order, and between the different degrees of one Order compared with the different degrees of other Orders; for all these proportions diversify both the Dignity, the Authority, and the Rank of Offices, and of the Officers [e].

[e] *See the third Section of this Title. The Reader must consult touching the differences of the Dignity of the Offices of the several Orders, what has been said of them in the Preamble of this Title.*

VI.

6. *Use of Dignity and Authority in Offices which seem to have neither of them.*

In order to distinguish the ways in which Dignity and Authority have their use even in those Offices and Functions which seem to have neither of them, it is necessary to remark that since all the Functions of all Offices have a relation to the publick Order, there is not any one of them of which the Ministry does not make a part of the general Administration of Justice, and of the Policy, which regulates every thing that composes the Order of the State; so that the least of those Functions have the characters of Dignity and Authority which suit with them, and which extend to all that the said Administration may require, for inculcating respect and obedience on all those whom the said Functions may any way concern, and who on their part ought to reverence in all the said Functions the divine Providence that subjects them thereto [f].

[f] *See concerning this Article that which has been said of it a little before the end of the Preamble of this Title.*

VII.

7. *The use of Authority demands the use of Force.*

Since the use of the Dignity and Authority of Offices is to keep within bounds, by Respect and Obedience, all those whom the several Functions of the Offices may any way concern, to the end that no body may transgress in any thing the Order which is to preserve the publick peace and quiet; this Obedience and this Respect are duties independent of the will of those whom they oblige; so that Dignity and Authority, which upon the good have of themselves their entire effect, would be useless with regard to others, if Force were not joined to the one and to the other, to make them effectual against the rebellious; and every Office ought to have the use of the Force that is necessary for the exercise of its Functions, and even the use of Arms, if the resistance to the Order be such as that it is necessary to have recourse thereto. Thus the Orders of Justice, as well as those of War, are put in execution by force of Arms by the Ministers, who exercise this Function against those who by their disobedience draw upon themselves

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serves this violence; and it is also the natural use of Arms, and of all Force on Men, to subject them to obedience in what relates to the external Order of the Society, and to repress every thing that disturbs it; for Wars even against Enemies ought to be nothing else but Justice armed in order to compel them to submit to its Rules[g].

[g] *See the first Section of the third Title of the first Book.*

SECT. II.

Of the Rights and Privileges of Officers.

The CONTENTS.

1. *The Right and duty of exercising the Functions of Offices.*
2. *The duty of Officers to execute their Offices, implies that of receiving a recompence for the same.*
3. *The Functions of the Offices of Towns, which are called Municipal Offices, are exercised without wages.*
4. *The Judges of differences among Merchants exercise their Functions without Salaries.*
5. *Officials exercise their Functions without Salaries.*
6. *Many Officers of Justice have not Salaries proportionable to their Functions.*
7. *Two sorts of recompence which Officers have, the Profits and the Privileges.*
8. *The Privileges of Officers are different, according as the Prince has been pleased to grant them.*
9. *The Rights of the Veteran Officers.*
10. *Offices which entitle the Officers to have their Causes tried in certain Courts.*
11. *The Privileges of Officers consist chiefly in divers Exemptions.*
12. *The Quality, the Rank, and the Privileges of Officers pass to their Wives.*
13. *None of the Privileges of Officers go to their Children, except that of Nobility.*
14. *The Rights and the Privileges are differently distributed among the Officers.*

I.

1. The Right and Duty of exercising the Functions of Offices.

WE may consider as the first of the Rights of Officers, that which they all have to exercise the Functions of their respective Offices; for it is for that end that they are established; so that this Right is joined in them to the necessity of exercising it, and becomes a duty to them, of which we shall speak in the following Title[a].

[a] *The Right which Officers have to exercise their Offices, is founded on the duty which obliges them to it; and that they may be able to execute this duty, the Publick ought to put into their hands this Authority.*

Cui jurisdictio data est ea quoque concessa esse videntur, sine quibus jurisdictio explicari non potest. *l. 2. ff. de jurisd.*

Mandatam sibi jurisdictionem mandare alteri non posse manifestum est. Mandata jurisdictione privato etiam imperium quod non est merum, videtur mandari, quia jurisdictio, sine modica coercitione nulla est. *l. ult. ff. de off. ejus cui mand. est jurisdic.*

II.

2. The Duty of Officers to execute their Offices implies that of receiving a recompence for the same.

The right and the duty of Officers to execute their Offices for the good of the Publick, implies the right of reaping from thence the recompence which the Services that they render may deserve[b]; and it is the duty of the Prince to put Officers in a condition to execute their Offices without rendring them burdensome to themselves and to their Families; and this is what makes the several recompences, which the Prince gives to the different sorts of Officers, whether it by the name of Pension, Salary, Stipend, or other fixed Revenue, or by rewards suited to the occasions and to the services; but this Rule hath its exceptions, which shall be explained in the following Articles.

[b] The labourer is worthy of his hire. *Luke* x. 7. 1 *Tim*. v. 18.

If those who serve in the Ministry of the Priesthood have a right to draw their Subsistence from it, much more may all those do so who exercise other Functions. Matth. x. 10.

Have we not power to eat and drink? 1 *Corinth.* ix. 4.

Who goeth a warfare at any time at his own Charges? Who planteth a vineyard, and eateth not of the fruit thereof? Or who feedeth a flock, and eateth not of the milk of the flock? 1 *Cor.* ix. 7.

If we have sown unto you spiritual things, is it a great thing if we shall reap your carnal things? 1 *Cor.* ix. 11.

Do not ye know, that they which minister about holy things, live of the things of the temple? and they which wait at the altar, are partakers with the altar? Even so hath the Lord ordained, that they which preach the Gospel should live of the Gospel. 1 *Cor.* ix. 13, 14.

III.

3. The Functions of the Offices of Towns, which are called Municipal Offices, are exercised without wages.

Seeing the Functions of the Offices of Towns, which are called Municipal Offices, relate to the common good of the Inhabitants, and that they are called to the exercise of them, as if they were their own proper Affairs, every one in his turn, and for a short time; this service is due by the bare effect of the reciprocal duty that is between the said Inhabitants to bear those Offices for their common good, according as they are capable of them. Thus those Functions

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tions are exercised without wages [c], whether it be that they have any Dignity, any Authority annexed to them, as those of Sheriffs, Consuls, and others, or that they consist barely in collecting the publick Monies, or in other Functions of the like nature; but for the levying of the publick Monies, there is allowed, instead of Salary, so much in the Pound out of the Monies that are to be levied.

[c] *This is an exception to the preceding Article in respect of the Officers of Towns, who exercise their Functions without wages.*

IV.

4. The Judges of differences among Merchants exercise their Functions without Salaries.

The Judges appointed in *France* to determine differences between Merchant and Merchant, in relation to their mercantile affairs, have no Salary for the exercise of their Functions, and that for the same reason why no Salaries are appointed for Municipal Offices; for the said Judges are elected by the Company of Merchants, to exercise this Function in their respective turns, according as they are capable thereof, and to exercise the same only for a short time [d].

[d] *This is a consequence of the foregoing Articles.*

V.

5. Officials exercise their Functions without Salaries.

The Functions of Officials are exercised without Salaries; for as to what concerns the Spiritual Jurisdiction, the Church has no Exchequer out of which the said Salaries may be issued, and the Spiritual Functions are to be exercised without any fee or reward; and as for the Temporal Jurisdiction which the Kings have granted unto the Church over Ecclesiastical persons, the same is a privilege which does not extend so far as to set apart out of the Exchequer a Fund for the Salaries of Officials; but as for the other Ecclesiastical Officers who are Counsellors, or Judges [e] in the Ordinary Courts of Justice; of whom mention has been made in the foregoing Title; as they are Officers of the King, and Judges between Lay persons, and of temporal concerns; they have their Salaries in the same manner as the other Judges of the said Courts.

[e] *This is likewise another Exception with regard to Officials.*

VI.

6. Many Officers of Justice have not Salaries proportionable to their Functions.

We may likewise remark as a kind of exception to the Rule explained in the second Article, that many Officers, especially those of Justice, have not Salaries proportionable to their Functions, and that the greater part have them so very inconsiderable, that a very small share of their Functions might justly deserve them. But this exception is founded upon two reasons; one is, that the said Offices have their Salaries regulated upon the foot of the Revenue which they yielded to the King, and not on the foot of the Price which they are sold at; for that Price rises in consideration of the honour and other advantages which those who purchase the Offices regard in them; and the other is, that the permission which they have to take for the exercise of the Functions of the said Offices, those emoluments which are called Perquisites, is to them in lieu of a Salary [f].

[f] ☞ *It would be agreeable to the Order of Nature, that the Officers of Justice should administer it without any fee or reward from the parties, and that consequently they ought to have sufficient Salaries from the Publick which they serve; but the infinite multitude of Law-Suits, and the strange multiplicity of proceedings in every one of them having increased the number of Officers in Courts of Justice, or the multitude of Officers having multiplied Law-Suits and the Proceedings therein (for each of these multiplicities is naturally the cause and the effect of the other;) it is come to that pass by the present condition of things, that the Publick would be too much burdened, if it gave to all the Officers of Justice sufficient Salaries to oblige them to render it gratis, without taking any Fees or Perquisites: so that it seems to be for the good of the State, to continue the use thereof, but under three conditions, to be inviolably observed by all Officers of Justice. The first is, not to reckon that those Perquisites ought to be such, as to supply what they may judge to be wanting to make up their Salaries such as they may fancy their Offices to deserve upon the foot that they are sold at; but only such as their labour may seem reasonably to deserve, and that in proportion to the nature of the Affairs, and the circumstances of the Parties. The second is, not to omit the Functions which are part of the duty of the Officers of Justice, altho' they reap no benefit thereby; such as are, for example, the Functions of the King's Procurators, in cases where the Publick is concerned, and where they are the only Parties, and where the Judges have also on their part the duty of their Functions. And the third, that with regard to the Affairs in which there are Parties concerned, and of whom the Officers might lawfully take Fees and Perquisites, they do not refuse to render Justice to the Parties, who are poor and unable to pay the usual Fees of Court; for Justice is due to them as much, or rather more than to others, and they cannot expect it, unless it be from those who have the Administration of it.*

It is under these three conditions that the use of Fees and Perquisites is permitted, and the Publick may perhaps find its account better therein with respect to some Judges than if they had sufficient Salaries settled on them; for there are some who by reason of the facility of bearing Offices, and drawing from them the advantages which may be had without their giving themselves much trouble in executing them, would be soon wearied of the trouble of looking into Processes, and of giving a due attendance in Court, and to whom the allurement of profit is instead of a zeal to do Justice.

We may add here in relation to the use of Fees and Perquisites for Sentences in Causes, that the Emperor Justinian *allowed them to two sorts of Judges; to those who were called Defenders of the Towns, and to those who were called Pedaneous Judges, who were allowed to take to the amount of a certain Sum, in the same*

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fame manner as he had regulated it in favour of the Defenders of Towns.

Quia verò etiam defensores civitatum extrà omne commodum fiunt: & pro decretis eorum, si quidem civitates majores sunt, quatuor solummodo dabuntur aurei foro tuæ sublimitatis: si verò minores, tres: sicut jamdudum nostris constitutum est legibus. Si verò quædam salaria habent publica, etiam hæc secundùm consuetudinem percipient. *Nov. 15. c. 6.*

Ne autem circà hæc labor sine mercede nostris fiat pedaneis, sancimus eos in unaquaque dicta apud eos causa, vel si divinitus fuerit deputata, duos quidem aureos ab utraque parte in contestatione litis accipere, & duos in fine negotii, & ultra hoc nihil (quod etiam prædecessores nostri definierunt) sed his contentos esse solis: privilegiis quippe quæ in deminutione sumptuum quibusdam concessa sunt, omnibus integris secundùm suum ordinem conservandis. Hoc autem dicimus in litibus transcendentibus quantitatem aureorum centum. Si enim usque ad hoc mensura fuerit litium: nihil eos audientiæ causa volumus exigi. Qui enim ita parvæ quantitati exactionem facit, pro maxima parte victoria sic pauperem fraudat. Et neque in hoc solùm modo stamus, sed etiam de proprio ipsi largimur. Volumus enim unumquemque istiusmodi pedeanorum, annis singulis à mensa tuæ celsitudinis percipere duas libras auri, & his esse contentum solis, & neque redimi: & aurum omnino despicere. Propterea enim eligimus fiscum minuere, quatenus horum unusquisque contentus nostrâ largitate, & quaternis aureis puras & Deo & nobis & legi custodiat manus, cogitans quæ à prioribus legislatoribus de his definita sunt. *Nov. 82. c. 9.*

VII.

7. Two sorts of recompence which Officers have, the Profits, and the Privileges.

These Rights of Offices, to draw from them Salaries, Pensions, Perquisites, or other Profits; for some Offices have other sorts of Rights, and that by Law too, which are certain small advantages which it would be needless to mention here, are the first kind of Recompence of the service of Officers; and the Privileges which they enjoy are the second kind; and we do not reckon here for a third kind the Honour which accrues to Officers from the exercise of their Functions: for if we understand by this Honour, Dignity and Authority, it is not a recompence of the Services of Officers; but it is on the contrary, an engagement which obliges them to it; and if we mean by Honour, the esteem and the respect which Officers acquire by discharging worthily their Offices, this Honour is not so much a recompence of their Services, as the natural fruit of the merit of those who distinguish themselves by their capacity, their probity, and the other qualities which make this merit in them.

VIII.

8. The Privileges of Officers are different, according as the Prince has been pleased to grant them.

The Privileges of Officers are of many sorts, according as the Kings have granted them differently to the several natures of Offices; thus some have the privilege of ennobling those who enjoy them, if they keep them till their death; others do confer Nobility, but not on the first Possessor, but only on him whose Father or Grandfather died possessed of the Office, or have served in it the time which gives the quality of Veteran, of which we shall take notice in the following Article; and there are even some Towns in *France* where the Office of Sheriff ennobles the persons who serve in it [g].

[g] Charles VIII. *by an Edict dated at* Lyons, *in the Month of* December, 1495, *granted the Privilege of Nobility to twelve Sheriffs of the Town of* Lyons. Henry IV. *by an Edict of the Month of* December, 1595, *reduced them to the number of four. There are other Towns which have the same Privileges.*

IX.

9. The Rights of Veteran Officers.

We call those Officers Veterans, who have served twenty years in their Offices; and this consideration entitles those who after the said Service lay down their Offices, to retain the Quality, and even the Rights, the Rank, and the Privileges annexed to them; which are confirmed to them by the King's Letters Patents; but they have neither Salary nor Perquisites. Thus the Officers who are Veterans, have by reason of this quality a kind of Privilege, which hath this effect with regard to the Officers of Justice, that they may assist in giving Judgment on Law-Suits, and have their Votes therein, in the same manner as they had whilst they were actual Judges; but they cannot preside in that quality, altho' they retain the other Privileges of the Offices, according as the Usage, and the Letters which they procure from the Prince, may regulate them [h].

[h] *This word* Veterans *hath its Origine in the* Roman *Law, where they gave the name of Veteran to Soldiers who had served twenty years; which long Service was rewarded with some Exemption; as is to be seen in the Title of the Code* de Veteranis; *and the like Service Required also to other Functions certain Privileges.*

Grammaticos tam Græcos quam Latinos, Sophistas & Jurisperitos, in hac regia urbe professionem suam exercentes, & inter statutos connumeratos, si laudabilem in se probis moribus vitam esse monstraverint, si docendi peritiam, facundiam dicendi, interpretandi subtilitatem, copiamque disserendi se habere patefecerint & cœtu amplissimo indicante digni fuerint æstimati: cum ad viginti annos observatione jugi ac sedulo docendi labore pervenerint placuit honorari, & his qui sunt ex vicaria dignitate connumerati. *l. un. C. de Profess. qui in urb. Const.*

Qui militiam vel advocationem impleverunt, præter ea privilegia quæ jam adepti sunt, nec frumenti aut olei comparandi curam, vel inspectionem operum, vel ratiocinium, vel defensionem civitatis vel patris civitatis munus, vel curationem Reipublicæ, vel curationem annonæ exerceant, sed & habitent ubi voluerint, nec Præsidibus, ultra portas

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occurrere cogantur, nec ad curias sive collegia vocentur inviti, vel nominentur, vel nominent, nec descriptiones præbeant consuetudinum, vel spectaculorum nomine. Unam quoque domum habeant liberam onere suscipiendorum militum supervenientium: iis qui in locis versantur dignitate aliqua præditis suam immunitatem obtinentibus. Hæc enim constitutio priora beneficia auget non minuit. At fiscalia tamen præbeant, & honorem præsides, ac vicissim honorentur ab eis. *l. 1. c. quib. muner. excus. hi qui post impl. mit. V. T. C.* de Veteranis.

X.

10. Offices which entitle the Officers to have their Causes tried in certain Courts.

It is also a privilege of many Offices, to give to the Officers the Right to have the Causes in which they are concerned tryed in the Courts to which they belong, which is called the Right of *Committimus*, and of which mention has been made in the sixteenth Article of the first Section of the foregoing Title[i].

[i] *See the said sixteenth Article.*

XI.

11. The Privileges of Officers consist chiefly in divers Exemptions.

The other Privileges of Officers consist principally of several Exemptions granted differently to divers Offices. Thus, some Offices give an exemption from the Tax on Real and Personal Estates; others from all the publick Duties, such as that laid on Salt, the Excise, the Customs: some exempt persons from Town Offices, and from Tutorships: others excuse persons from serving in the Militia, from the Watch, and from other Services: others entitle persons to an exemption from the Fees of the Registries in the King's Courts; and many have in this manner several Exemptions, but differently; for there are some which have all these sorts of Exemptions, and others have only some part of them, more or less, according to the Grants which have been made thereof[l].

[l] *The greatest part of those who procure to themselves certain Offices, do it only that they may enjoy the Privileges and Exemptions which are annexed to them.*

XII.

12. The Quality, the Rank, and the Privileges of Officers pass to their Wives.

It is likewise a Right belonging to Offices, that the Quality, the Rank, and the Privileges of Officers go to their Wives, and remain with them whilst they continue in the state of Widowhood; for the Husband and the Wife are only as it were one and the same Person, so that the Wife derives from her Husband all that can go to her Sex; but the Widow who marries again follows the condition of the second Husband[m].

[m] *See the second Article of the third Chapter of the Treatise of Laws.*

Consulari fœminæ utique consularem virum præferendum nemo ambigit. Sed vir præfectorius an consulari fœminæ præferatur, videndum? Putem præferri: *quia major dignitas est in sexu virili.* Consulares autem fœminas dicimus consularium uxores. Adjicit Saturninus etiam matres. Quod nec usquam relatum est, nec unquam receptum. *l. 1. ff. de Senat.*

Fœminæ nuptæ clarissimis personis, clarissimarum personarum appellatione continentur. Clarissimarum fœminarum nomine Senatorum filiæ, nisi quæ viros clarissimos sortitæ sunt, non habentur. Fœminis enim dignitatem clarissimam mariti tribuunt: parentes verò donec plebeii nuptiis fuerint copulatæ. Tamdiu igitur clarissima fœmina erit, quamdiu Senatori nupta est, vel clarissimo, aut separata ab eo, alii inferioris dignitatis non nupsit. *l. 8. eodem.*

Mulieres honore maritorum erigimus, genere nobilitamus, & forum ex eorum persona statuimus, & domicilia mutamus. Si autem minoris ordinis virum postea sortitæ fuerint: priore dignitate privatæ posterioris mariti sequentur conditionem. *l. 13. C. de dignit.*

Jubemus, salvo honore qui per revocationem sacræ revocatoriæ defertur, durante, licere cunctis tam minoribus quam majoribus potestatem gerentibus, nec non etiam honorariis illustribus, sive ex hac regia urbe, principali videlicet præcedente consensu, profecti fuerint, sive in provinciis habitantes sacratissimum (suis scilicet poscentibus negotiis) petere maluerint comitatum: sine sacra quoque revocatoria ad hanc regiam urbem pervenire. *l. ult. C. eod.*

XIII.

13. None of the Privileges of Officers go to their Children, except that of Nobility.

Of all the Rights and Privileges of Officers, there is none that passes to their Children, except the Nobility which Offices may give; for Nobility is principally granted for the Descendants; and even the Children who were born before the Nobility was acquired, or even before the admission to the Office, are made Noble as well as those who are born afterwards; but the Children of other Officers may have the Quality which the Rank of their Fathers may give them[n].

[n] Nec interest jam in senatoria dignitate constitutus eum susceperit an ante dignitatem senatoriam. *l. 5. in f. ff. de Senat.*

XIV.

14. The Rights and the Privileges are differently distributed among the Officers.

The Rights and the Privileges which have been just now explained, are differently distributed among the Officers, and in such a manner, that some Officers have both Salaries, Perquisites, and Privileges, as the Officers of the Parliaments in *France*, of the Chambers of Accompts, of the Courts of Aids, and of the other Courts of Justice, and many other Officers of Justice, and of the Revenue, the King's Secretaries and others; and there are some who have neither Salaries, nor Perquisites, nor Privileges, such as the Municipal Officers of Towns, excepting some Towns in which the Office of Sheriff confers Nobility;

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Nobility; and those have a Privilege without a Salary, or Perquisites; and others have only Perquisites without a Salary, and without Privileges, such as Proctors, Registers, and Notaries Publick; and there are others who have Salaries or Pensions, and Privileges, without Perquisites, such as the Officers of the Crown, and some of the chief Officers of Justice[a].

[a] *One may easily judge of these different Rights and Privileges by the Examples which have been here mentioned.*

SECT. III.

Of the Rank of Officers.

The CONTENTS.

1. *Definition of Rank.*
2. *Definition of Precedency.*
3. *The Rank and Precedency are settled by different views.*
4. *Among Officers of the same Court, the Chiefs take place of the others.*
5. *The others take place according to the time of their Admission.*
6. *The lowest Officers of a superior Court, take place of the first Officers of an inferior Court.*
7. *Order of Precedency between Officers of different Jurisdictions which are not subordinate to one another.*
8. *If the Ranks of Officers are not fixed, they ought to be regulated by the Dignity, the Authority, the Functions, and the Privileges of their Offices.*
9. *The Officer has the Rank which the King gives him.*

I.

1. Definition of Rank.

BY the Rank of Officers is meant, their situation in the Order of the Places which every one has in vertue of his Office, either above or below others; for there cannot be two Persons in the same Rank, no more than two Bodies in one and the same place; but every Officer being compared with all other Officers, has of necessity his Rank before or after the others, otherwise there would be a dispute between them concerning the Precedency[a].

[a] *The Reader may consult in relation to this Section, the third Section of the ninth Title of the First Book, of the several Orders of persons who compose a State.*

II.

2. Definition of Precedency.

This Rank of Officers is called likewise by the name of Place or Seat; especially among Officers who have their Seats in the same Court, or between Officers of different Courts, who meet in common Assemblies, or upon Functions of publick Ceremony; and the Right which one has to take place of the others, is called by the name of Precedency.

III.

3. The Rank and Precedency are settled by different views.

The Rank or Place, and the Precedency among Officers are regulated by several views, according to the different ways of distinguishing them, as will appear by the Articles which follow[b].

[b] *See the following Articles.*

IV.

4. Among Officers of the same Court, the Chiefs take place of the others.

Among Officers belonging to one and the same Court, those who are Chiefs or Presidents of the Court, or who are distinguished by Titles of Dignity, take place of the others. Thus in the Parliaments, and other Courts of Justice in *France*, the Presidents take place of the Counsellors or Judges; thus in the Jurisdictions of the Bailiffs and Seneschals, the Lieutenants General and Lieutenants Civil are the first in Rank; the Lieutenants Criminal, the Particular Lieutenants, and the Assessors, come next in order, and take place of the Counsellors or Judges[c].

[c] *It is natural that in each Court the Chiefs should take place of the others.*

Nihil est tam injuriosum in conservandis & custodiendis gradibus dignitatum, quam usurpationis ambitio. Perit enim omnis prærogativa meritorum, si absque respectu & contemplatione vel qualitate etiam provectionis emeritæ custodiendi honoris locus præsumitur potius quam tenetur, ut aut potioribus eripiatur id quod est debitum, aut inferioribus prosit quod videtur indebitum. *Cod. Theod. ut dign. ord. serv.*

V.

5. The others take place according to the time of their Admission.

Among Officers of one and the same Court, who are not distinguished by Dignities, and who have only the same Title, such as the Counsellors or Judges of the Parliaments, and other Courts of Justice in *France*, their Seats or Places are regulated according to the time of their Admission, and those who are first admitted and installed, that is to say, put into possession, take place of the others; for it would not be just that the new comers should make the others go back, and besides there would be too great inconveniences in distinguishing them after any other manner[d].

[d] Antiquitùs statutum est consularibus viris cæteros

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terms quidem honoratos ipsius trabeæ summitate, pares vero insulis, consideratione tantum temporis anteire. Quis enim in uno eodemque genere dignitatis prior esse debuerat, nisi qui prior meruit dignitatem? Cum posterior etiam si ejusdem honoris prætendat auspicia, cedere tamen illius temporis consuli debeat, quo ipse non fuerit: hoc observando & si iterata vice fastigia consulatus aliquis ascenderit repetiti etenim fasces, virtutes sæpe meriti comprobant, non augent, quia nihil altius dignitate. Quod si quis prior consul posteriori consuli eidemque patricio posthabitus, patriciatum postea consequatur: vinci eum oportet: qui prior meruit patriciatum, postquam iste honore patriciæ dignitatis decoratus est. *l. 1. C. de Conf. & non.*

VI.

6. The lowest Officers of a superior Court, take place of the first Officers of an inferior Court.

Among the Officers belonging to different Courts, which are subordinate the one to the other, the lowest Officers of the superior Courts take place of the first Officers of the inferior Courts; thus the lowest Officers of the Parliaments in *France* take place of the first Officers of the Presidials; and the lowest Officers in the Courts of Aids take place before the first Officers of the Elections [e].

[e] Potioris gradus judicibus ab inferioribus competens reverentia tribuatur. *l. 5. C. de offic. Rector. Prov.*

Altho' this text hath not a direct relation to this Rule, yet it may be applied to it, seeing it shews the Precedency of superior Judges before inferior ones.

VII.

7. Order of Precedency between Officers of different Jurisdictions which are not subordinate to one another.

Among Officers belonging to different Jurisdictions, which are not in a degree of subordination one to the other, the first Officers of the superior Jurisdictions, whose Functions have most Dignity in them, take place of the first Officers of superior Jurisdictions whose Functions have less Dignity in them; thus the first of the supreme Courts of Ordinary Justice, which are the Parliaments in *France*, take place of the first of the Chambers of Accompts, and of the Courts of Aids.

VIII.

8. If the Ranks of Officers are not fixed, they ought to be regulated by the Dignity, the Authority, the Functions, and the Privileges of their Offices.

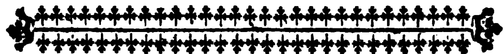
Among all Officers of Justice, Policy, Revenue, and all others of what nature soever, whose Rank is not fixed by the Rules which have been just now explained, it is regulated by the different regards which ought to be had to the several causes which give the Rank; and seeing the said causes are the Dignity, the Authority, the Functions, the Rights and Privileges of the Offices, and seeing they fall in together differently, and in divers degrees in the different kinds of Offices, which makes an infinite number of combinations; it is by the views of these different combinations that the Precedency is settled. Thus, for example, altho' the Ordinary Justice hath in its own nature more Dignity than the other Jurisdictions have, the Officers of the Courts of Aids in *France* take place before the Officers of the Presidial Courts, because in their Order they have more Authority than the Presidial Courts have, and because they have likewise more Privileges; and it is by views of the like nature, and by the like proportions, that the Ranks of all the Offices are settled [f].

[f] *See what has been said concerning this subject, in the beginning of the Preamble of this Title.*

IX.

9. The Officer has the Rank which the King gives him.

If the Rank of an Office is regulated by the will of the King, the Officer is intitled to the Rank which the said Title gives him.



TITLE III.

Of the DUTIES in general, of those who execute OFFICES.

THE Dignity, the Authority, the Rights and the Privileges of Officers are given them only in consideration of the Service which they owe to the Publick; thus the general duty of all Officers, is to render that Service by a faithful discharge of their Functions.

This general duty, which is common to all Officers, obliges them to look upon themselves as placed in their Offices by the hand of God, that they may therein discharge the particular duties of their Functions towards the Publick, and towards the persons whom the said duties may any way concern; and to consider that their Offices oblige them to the performance of those Functions, and that they are tied by their Ministry to a faithful performance of them all: From whence it follows most evidently, that it is a gross and capital error to imagine, as many Officers are apt to do, that they have the said Rank only for themselves, and to direct their Functions only to their own proper benefit; so that they do not perform them but according as they find therein their own profit and advantage; or neglect their Functions

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Functions altogether, or discharge them with less care and exactness, if they perceive that no other advantage will accrue thereby, besides what is for the Interest of the Publick, or that of other persons.

This error, or abuse, is more or less frequent, and of more or less importance in some Offices than others; for it is necessary to distinguish two sorts of Offices, those whereof the Functions are such that the fortune of the Officer depends on his application to discharge them, and those which the Officer may neglect, and yet find his account therein. Thus the Officers of the King's Houshold, the Officers of the Army in time of War, Receivers, Proctors, Notaries Publick, and many other sorts of Officers cannot, without prejudice to their Fortunes, abandon or neglect the exercise of their Functions; thus on the contrary, the Officers of Justice who are not concerned in the carrying on or management of Law-Suits, have Functions which they may neglect, and yet not suffer any prejudice thereby; and according to this difference of these two kinds of Offices, it seldom happens that the Officers of the first of these two sorts, whose interest obliges them to be careful in the discharge of their Functions, fail to apply themselves thereto, and they have only to take care that they do not prevaricate, or be guilty of any fraud or covin in the discharge thereof; but on the contrary, those of the second sort not finding always in the exercise of their Functions the allurement of their own private gain, it is easier for them to be tempted to abandon and neglect their duty.

This first general duty of Officers, which obliges them to the exercise of their Functions, implies three duties, Capacity, Probity, and Application; for to execute any Office well, it is necessary to understand the Functions thereof, to have a sincere intention to perform them faithfully, and to be assiduous and diligent whenever there is occasion to exercise them. Without Capacity, one falls into faults that are often criminal, and which do prejudice to those whom the Functions may concern; without Probity, one prevaricates and commits many injustices; and without Application, one runs the hazard of failing in his duty, and of making others suffer by his neglect.

These three duties of Officers, Capacity, Probity, and Application, shall be the subject matter of three Sections of this Title, in which shall be comprehended all that remains to be explained of the said Duties, excepting the duties of Officers of Justice, which shall be the subject of the ensuing Title: For as to the duties of all the other sorts of Officers, the Rules relating to them will be found either in this Title, or in other preceding Titles: Thus the duties of Officers of War have been explained in the second Section of the third Title of the first Book. Thus those of Municipal Officers have been explained in the second Section of the ninth Title of the same Book; and many Rules touching the duty of the Officers of the Revenue, and all others, have been explained in divers Titles of the first Book, according as the matters there treated of had any relation to them.

SECT. I.

Of the Capacity of Officers.

The CONTENTS.

1. *What is meant by the Capacity of an Officer.*
2. *He ought to have a sound Judgment, enlightned with the knowledge of the Laws and Ordinances.*
3. *Wherein consists the Capacity of Officers of Policy.*
4. *The Capacity of the Officers of the Revenue consists chiefly in the knowledge of the Ordinances and Regulations touching that matter.*
5. *Capacity of Officers of the Army.*
6. *Wherein consists in general the Capacity of all sorts of Officers.*

I.

1. What is meant by the Capacity of an Officer.

BY the Capacity of an Officer, is meant the qualifications that are proportionable to his Functions; so that the Capacity of Officers is different according to their different Functions.

II.

2. He ought to have a sound Judgment, enlightned with the knowledge of the Laws and Ordinances.

The Capacity of an Officer of Justice consists in a sound Judgment, enlightned with the knowledge of the Laws [a] and Ordinances, and of the other Rules according to the quality of his Functions; thus Registers, altho' they be Officers of Justice, yet they are not obliged to know the Laws; and even among Judges, the inferior sort of them who hold the Courts of Lords of Mannors, are likewise dispensed with in that

that respect; for they are allowed, and not only so but enjoined to take counsel and advice in determining the Law-Suits, when the difficulties which arise therein require a more exact knowledge of the Laws.

[a] Turpe esse patricio, & nobili, & causas oranti, jus in quo versaretur ignorare. *l.* 2. §. 43. *ff. de orig. jur.*

III.

3. Wherein consists the Capacity of Officers of Policy.

The Capacity of the Officers of Policy who are not Officers of Justice, consists in a sound Judgment instructed in the Regulations and Orders which they are to see put in execution.

IV.

4. The Capacity of the Officers of the Revenue consists chiefly in the knowledge of the Ordinances and Regulations touching that matter.

The Capacity of the Officers of the Revenue is different according to the differences of their Functions; thus those who have the direction of the Revenue ought to be well versed in the Ordinances and Regulations relating to that matter; and those who are intrusted with the Receipt of any part of the Publick Money, ought to know the Regulations which concern their Functions; and their being solvent, or able to pay, makes a part of their Capacity for the security of the Publick Money; and some of those Officers are obliged to give Security before they are admitted to execute their Offices[b].

[b] Constitutiones principum nec ignorare quemquam nec dissimulare permittimus. *l.* 12. *C. de jur. & fact. ign.*

V.

5. Capacity of Officers of the Army.

The Capacity of Officers of the Army consists in Courage, and in Experience in Military Affairs.

VI.

6. Wherein consists in general the Capacity of all sorts of Officers.

The Capacity of all other sorts of Officers, consists in general in the knowledge of the things necessary to their Functions, and in the qualifications which are required for the due exercise of them.

SECT. II.

Of the Probity of Officers.

The CONTENTS.

1. *What is meant by the Probity of an Officer.*
2. *It ought to have more or less extent, according to the differences of the Functions of the Offices.*
3. *The Probity of the Officers of Justice ought to be of a distinguished Character.*
4. *Probity of the Officers of Policy.*
5. *Probity of the Officers of the Revenue.*
6. *The Probity of Collectors and Receivers of the Publick Monies consists chiefly in Humanity.*
7. *Probity of Officers of the Army.*
8. *Wherein consists in general the Probity of all sorts of Officers.*

I.

1. What is meant by the Probity of an Officer.

BY Probity of an Officer, is meant the disposition of the Mind and Heart, in which he ought to be for acquitting himself worthily of his Functions, and a firm resolution of putting the said disposition in practice whenever the occasion offers.

II.

2. It ought to have more or less extent, according to the differences of the Functions of the Offices.

As the use of Probity is of more or less extent and consequence, according to the differences of the Functions of the several kinds of Offices, so every Office demands a degree of Probity proportionable to its Functions, according to the order which shall be explained in the articles which follow.

III.

3. The Probity of the Officers of Justice ought to be of a distinguished character.

The consequence, and the importance of the Functions of Justice are such, that they require a Probity of a distinct character from that which may suffice for the Functions of the other kinds of Offices; and it is to point out this distinction, that the names of Courage and Integrity are given to the Probity that is necessary to Officers of Justice; we shall see in the following Title wherein this Courage and Integrity ought to consist.

IV.

4. Probity of the Officers of Policy.

The Probity of the Officers of Policy consists in a steddy resolution to enforce a strict observance, without regard to persons, of all the Regulations and Orders which they are impowered to put in execution.

V.

5. Probity of the Officers of the Revenue.

The Probity of the Officers of the Revenue, who have the direction of it, but do not touch any of the Monies, consists in a Spirit of Equity to support and maintain on one part the interest of the

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the Prince, and to proportion, on the other part, the Taxes to the Riches of the Provinces, the Towns, and the particular Persons in making the distribution of the Taxes and the Assessments, and levying the same in a manner easy to the Subject, by regulating the ways of enforcing Payment, and by applying suitable means to supply the exigencies of the State, and not to lay too heavy a burden on the Subject.

VI.

6. The Probity of Collectors and Receivers of the Publick Monies, consists chiefly in Humanity.

As to the Officers of the Revenue, who are imployed in collecting and receiving the Publick Monies, whether it be the Land-Tax, Customs, Excise, or any other Duties, their Probity consists in mixing all possible Humanity with the ways of constraint which their Functions may oblige them to have recourse to in levying the Publick Monies; in exercising their Functions at proper times and seasons, so as to facilitate on one part the recovery of payment, and on the other part to make it easy for those who are to pay; in exacting no more than what is due; in laying out no more Charges than what is absolutely necessary; in taking of every one no more than the share which they ought to contribute; and in general in abstaining from all manner of exaction, from all violence, and from all other unfair and unjust practices.

VII.

7. Probity of Officers of the Army.

The Probity of Officers of the Army, consists in using discreetly and moderately the Force which they have in their hands, and according as the Service of the Prince may require of them in their Functions; which implies the duty of abstaining from all manner of concussion, whether it be in their Marches, or in their Quarters, whether it be in Garrison or out of Garrison; as also the duty of paying an exact and faithful obedience to the Orders of the Prince, and of those who have the Command under him; and in general a punctual observance of all their several duties.

VIII.

8. Wherein consists in general the Probity of all sorts of Officers.

The Probity of all the other sorts of Officers consists in discharging their Functions, every one in its proper time, and according to the Rules prescribed for it; so as that they may do the Services which they are bound to by their Engagements, and without doing wrong to any person whatsoever.

SECT. III.

Of the Application of Officers to their Functions.

The CONTENTS.

1. *Application to the Functions of Offices.*
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I.

1. Application to the Functions of Offices.

APplication to the Functions of an Office, consists in a disposition and readiness to exercise them in the place, and at the time, wheresoever and whensoever the same is necessary to be done.

II.

2. There are some Functions which ought to be performed by the Officer himself, and others which he may commit to other persons.

The duty of the application of Officers to their Functions, is different according to two different kinds of Offices which it is necessary to distinguish; one, of those Offices whereof the Functions are to be performed by the Officer himself; and the other, of those Offices whereof the Functions may be delegated by the Officers to other persons to exercise them for them. Thus Judges ought to do the Functions of their Offices themselves; thus Receivers may substitute other persons to act for them.

III.

3. What ought to be the Application of Officers who imploy others to officiate in their stead.

The Application of Officers who may imploy others to execute their Offices for them, consists in taking care to imploy such persons as will discharge the Functions of the Office in the same manner as they would be bound to do if they executed the Office themselves; and they are answerable for the neglect and other faults of their Substitutes, as much as if it were their own act and deed.

IV. The

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IV.

4. What ought to be the Application of those who are obliged to exercise their Offices themselves.

The Officers who cannot depute others to execute their Offices for them, ought to be careful and diligent in performing the Functions thereof themselves: which requires their presence, and the actual exercise of their Functions, at the times, and in the places where the same is necessary.

V.

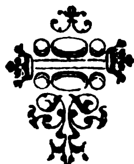
5. These Officers are bound to Residence.

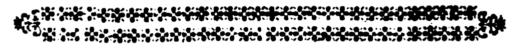
It follows from this duty of the Application of Officers to their Functions, that those who are obliged to execute their Offices in person, are tied to Residence in the places, and during the time that their Ministry may require it.

VI.

6. They cannot dispense with their Residence, except for just causes.

Since it is not possible for Officers to give so close and diligent an attendance as never to be absent from their duty, and that they cannot be always in a readiness to perform their Functions on all occasions that offer, seeing many just causes may sometimes interrupt and hinder, not only their Application to some particular Functions, but likewise their Residence; this duty of Residence is confined to a reasonable Attendance, such as the Officer cannot dispense with except for just reasons, of which every one is to be judge himself, governing himself therein according to Prudence, which ought to determine between the regard that is to be had to the consequence of the affairs which require the exercise of his Ministry, and to the consequence of the causes which may require his presence in another place; retaining always a disposition to be as punctual in the discharge of this duty of Residence as is possible, and never to suffer himself to be diverted from it, except where there is just cause.





TITLE IV.

Of the Duties of OFFICERS of JUSTICE.

WE have explained in the foregoing Title the duties of Officers in general, and in other places the duties peculiar to some Officers in particular, as has been remarked at the end of the Preamble of the said Title; and in this Title we consider separately the duties of the Officers of Justice, because of the variety and consequence of their Functions; for the duty of every Officer consists in his acquitting himself diligently of his Functions.

As the duties of Officers in general are reduced to Capacity, Probity, and Application to their Functions, so the duties of Officers of Justice are divided after the same manner; so that these three sorts of duties shall be the subject matter of three Sections.

Whatever shall be said in this Title concerning the duties of Justice, must be understood of all sorts of Officers who administer Justice, whether it be in the Ordinary Jurisdictions, or in the Revenue, or in the Ecclesiastical Courts.

SECT. I.

Of the Capacity of Officers of Justice.

The CONTENTS.

1. *Capacity of Officers of Justice.*
2. *They ought to have a Capacity suitable to the extent of their Functions.*
3. *They ought to know the Laws, the Ordinances, and the Customs of the places where they are to exercise their Ministry.*
4. *Good Sense and Learning are necessary to find out the true point of Justice.*
5. *Causes of difficulties which arise in all sorts of Questions.*

I. THE

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I.

1. Capacity of Officers of Justice.

THE Capacity of Officers of Justice consists in having a good Stock of Natural Sense, together with the Knowledge of the Rules of their Functions; and as they are different according to the Offices, so the Capacity ought to be different also, as shall be explained in the Articles which follow [a].

[a] *See the second Article of the first Section of the preceding Title.*

II.

2. They ought to have a Capacity suitable to the extent of their Functions.

The Officers of Justice whose Functions are of the largest extent, ought to have in proportion a greater degree of Capacity: Thus the Officers of the Courts belonging to the Jurisdiction of Bailiffs and Seneschals, ought to have a greater degree of Capacity than the petty Officers of the inferior Jurisdictions, who are even dispensed with as to an exact Knowledge of the Laws, as has been already observed in the second Article of the first Section of the preceding Title. Thus the Officials of Ecclesiastical Jurisdictions ought to have the Knowledge of the Spiritual and Temporal Matters which belong to their Cognizance; and it is the same thing with other different Offices in proportion [b].

[b] Give therefore thy servant an understanding heart, to judge thy people, that I may discern between good and bad; for who is able to judge this thy so great a people? 1 *Kings* iii. 9.

III.

3. They ought to know the Laws, the Ordinances, and the Customs of the places where they are to exercise their Ministry.

The Capacity of the Officers of Justice who are bound to know the Laws, consists in a Stock of good Sense, together with a degree of Understanding and a Genius that is capable of that Science, which consists in a clear, solid and methodical Knowledge of the definitions of the Principles, and of the Rules relating to the several matters of the Law, that they may comprehend the connexion between the Rules and their Principles, and that they may know how to apply them to the Questions which are to be decided; and they ought likewise to have the Knowledge of the Ordinances which have relation to their Functions, as also that of the Customs of the Places where their Ministry is to be exercised; for without good Sense, Understanding, and a proper Genius, one cannot have that true Knowledge, and what Knowledge they may chance to acquire would be only confusion, which is often more hurtful than a total want of Learning; but without this Science the best Sense would not be sufficient for understanding and deciding the doubts which arise, or supplying the want of the Knowledge of many Rules, which being wholly arbitrary, must be learnt and precisely followed; so that mere good Sense can never teach us what is regulated by the said Arbitrary Laws [c].

[c] Constitutiones Principum nec ignorare quemquam nec dissimulare permittimus. *l.* 12. *C. de jur. & fact. ignor.*

Scire leges non hoc est verba earum tenere, sed vim ac potestatem. *l.* 17. *ff. de legib.*

☞ *It may be remarked here, that what is established by an ancient Custom, and observed for a long tract of years, is as it were a tacit Agreement of the People, and ought to be maintained as much as a written Law; and that is even a considerable Authority of a Custom, that it has met with such an universal approbation, so that it was not necessary to establish it by a written Law.*

Sed & ea, quæ longa consuetudine comprobata sunt, ac per annos plurimos observata, velut tacita civium conventio, non minus, quam ea, quæ scripta sunt, jura servantur. *l.* 35. *ff. de leg. senat.*

Imò magnæ auctoritatis hoc jus habetur, quod in tantum probatum est, ut non fuerit necesse scripto id comprehendere. *l.* 36. *ibid.*

But if there should happen any difficulty about the interpretation of a Law, we ought chiefly to consider what has been determined in the like cases in times past, and what has been the Usage of the place; for Custom is the best interpreter of the intention of the Laws; and the Emperor Severus *hath declared in a Rescript of his, that in doubts which arise touching the true meaning of Laws, Custom, and the Authority of Judgments which have been uniform, ought to serve as a Law.*

Si de interpretatione legis quæratur; in primis inspiciendum est, quo jure civitas retro in ejusmodi casibus ipsa usa fuisset; optima enim est legum interpres consuetudo. *Ibid. l.* 37.

Nam imperator noster Severus rescripsit, in ambiguitatibus, quæ ex legibus proficiscuntur, consuetudinem, aut rerum perpetuo similiter judicatarum auctoritatem, vim legis obtinere debere. *ibid.* 38.

When the question is to know, whether a Custom of a Town, or of a Province, which one party affirms and the other denies,

nies, be in use or not, it is necessary in the first place to consider whether there be any Judgments, in Cases which were contested, confirming this Custom, and declaring what the Usage is.

Cùm de consuetudine civitatis, vel Provinciæ confidere quis videtur: primum quidem illud explorandum arbitror, an etiam contradicto aliquando judicio consuetudo firmata sit. *ibid.* 34.

It may be remarked in the last place, that in matters concerning which there are no written Laws, it is necessary to observe that which Custom and Usage have established therein; and if there fall out any Cases which happen not to be determined by any Custom or Usage, it is necessary to regulate them by the consequences which may be naturally drawn from established Customs, and in case that even that gives no light towards settling the difficulty, recourse ought to be had to what is observed in the Capital City of the Kingdom.

De quibus causis scriptis legibus non utimur, id custodiri oportet, quod moribus & consuetudine introductum est, & si qua in re hoc deficeret, tunc quod proximum & consequens ei est; si nec id quidem appareat, tunc jus, quo urbs Roma utitur servari oportet. Inveterata consuetudo pro lege non immerito custoditur. *l.* 32. *ibid.*

IV.

4. Good Sense and Learning are necessary to find out the true point of Justice.

It is by the use of good Sense and Learning, that the Judges are to discern in questions which come before them, what it is that gives rise to the difficulty, and to find out the causes of the doubts; for since each of the two contending parties hath some foundation which makes the doubt, and that this doubt cannot proceed from an equality of Justice and Truth on both sides; seeing there cannot be two Justices, nor two Truths, contrary the one to the other, and that nothing puts the two parties in an equal balance with one another, but the want of the sight of the true point of Justice and of Equity, which can be only in one of the two, it is by the discovery of this point that we cease to doubt, and to be in suspence; and in order to find it out, it is necessary to have both good Sense and Learning, and to observe the Rule which follows.

V.

5. Causes of difficulties which arise in all sorts of Questions.

Seeing the difficulties in all sorts of Questions arise, either from the apparent opposition of one Rule to another, of a Principle of Equity to the literal meaning of a written Law, of the strict Rigour of the Law, to a Temperament which Equity may seem to demand, of one general Maxim to another which may be an Exception to it, or from the application of a Rule peculiar to one matter, to another matter which hath other Rules altogether different, or from the favour which each party may draw from the considerations of Equity that may be on the one side and the other; whether it be on account of the quality of the parties, as in the case between a Donor and a Donee, a Father and a Son, or because of the nature of the several opposite pretensions, as for example, if the dispute be in relation to a considerable loss on one side, and only profit to be made on the other side, and because of other the like combinations of opposite motives which create doubts and difficulties of several natures; there is no other way of deciding them, but by the different views of the several sorts of Rules, in order to distinguish which are the Rules that agree to all matters, and which are those that are confined to some particular matters, which are the Rules of Natural Equity, and which are those that are called Arbitrary, what Rules are general, and if they admit of Exceptions, or not, and what are the Exceptions to those Rules which admit of any, what are the cases in which it is necessary to follow the Rigour of the Law, and when it may be mitigated by Temperaments of Equity, what is the effect of new Laws with respect to times past, and what are the cases in which they regulate equally both the time past and that to come, and those where they have their effect only for the time to come, what are the Rules and the different manners of interpreting obscurities and other difficulties in Covenants, in Dispositions made in prospect of death, in the Favours and Grants of Princes: and in order to make a right use of the Knowledge of these several matters, which it is absolutely necessary to know, it is necessary to have an Understanding of great capacity, and clearness of apprehension, in order to judge by all these views of the several regards that ought to be had to every one of them, and to know how to decide the matter in dispute by the Principles and Rules which have the truest relation to the Facts, and to the circumstances [d].

[d] *See the whole Title of the Rules of Law in general, in* The Civil Law in its Natural Order.

SECT.

SECT. II.

Of the Probity or Integrity of Officers of Justice.

IT is not without reason that we have distinguished the Probity of Judges from that of the other sorts of Officers, by the peculiar Name of Integrity, seeing in reality they ought to have a character of Probity so pure, so delicate, and so entire, that it ought to exceed far the character of Probity which may be required in all other sorts of Offices; for whereas with respect to all other Offices, whether they be in the Army, or the Revenue, it sufficeth that the Officer be a good man, that is, a man of a good and fair character with regard to the Functions of his Office, and that he discharge them faithfully, without doing wrong to any person: so that, for example, it sufficeth for the Probity of a Receiver in what relates purely to the Functions of his Office, that he be guilty of no Extortion, that he execute his Office with that moderation which Humanity may require[a]; and it is enough for Officers of War, as to what relates to Probity, that they commit no Violence or Injustice, and that they content themselves with the Allowance which they have from the King[b]. It is not the same thing with respect to Officers of Justice; for they are not only obliged to commit no Extortion or Violence, and to be contented with their Salaries, and the Perquisites which are allowed them; but they ought moreover to have at least the qualities that were required in those whom *Moses* made choice of to determine the most trivial differences of the People; that is to say, they ought to have the Resolution and Courage necessary for their Functions, the fear of God, the knowledge and love of Truth, and such an aversion to Avarice as even to hate it[c]; and we may say that these qualities comprehend every thing that may be necessary to make a good Judge, and that no person can be a good Judge who wants any one of them.

[a] *See the sixth Article of the third Section of this Title.*

[b] Do violence to no man, neither accuse any falsly, and be content with your wages. *Luke* iii. 14.

[c] Moreover, thou shalt provide out of all the people, able men, such as fear God, men of truth, hating covetousness; and place such over them, to be rulers of thousands, and rulers of hundreds, rulers of fifties, and rulers of tens. And let them judge the people at all seasons: and it shall be that every great matter they shall bring unto thee, but every small matter they shall judge. *Exod.* xviii. 21, 22.

Optamus ut omnes judices nostri secundùm voluntatem & timorem Dei, & nostram electionem atque ordinationem sic suas administrationes gubernare studeant, ut nullus eorum, aut cupiditati sit deditus, &c. *l.* 1. §. 5. *C. de offic. pref. prat. Afr.*

It may be observed in relation to these qualities, that they consist chiefly in the disposition of the Heart, and that the Mind has the least share in them; and that altho' they comprehend equally that which relates to the Capacity of Judges, and that which regards their Integrity, yet they make the most essential of their duties to consist in the dispositions of the Heart, which make the Integrity, and reduce what concerns the Capacity, to their being *Men of Truth*; that is to say, Men having such a fulness of Truth as that they may be always in a disposition to practise it. As to which it is necessary to remark, that when *Moses* chose Judges to ease himself in his Ministerial Function of Judge of the People, there were at that time no other Laws besides the Laws of Nature, nor differences that required any other Rule for deciding them; so that the Capacity of those Judges was to consist in knowing that Equity, the knowledge and love of which makes this duty which is to be understood by that of being *Men of Truth*. But seeing now-a-days the multiplication of Laws obliges the Judges not only to have a Spirit of Truth, which the Judges chosen by *Moses* were bound to have; but moreover the knowledge of all the particular Laws and Rules which are in use at this day; their capacity ought to be of a larger extent: and as for their Integrity, it ought to be at least the same in these times, as it was in the days of those Judges; and perhaps it may be necessary that it should be greater, since the obstacles to the duty of Integrity are now much greater than they were in those days; for the Judges in those times had neither a Fortune to make, nor had they occasion to stand in awe or fear of any person, they having in their hands the Divine Authority, which displayed it self visibly in the Ministry of the Government, and the Administration of Justice, which *Moses* shared with them.

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It is therefore at least to these qualities necessary to Judges of Affairs of the smallest consequence, that the Integrity spoken of here ought to be reduced; and it is easy to perceive the reasons thereof, and what are the causes which demand these dispositions in the heart of a Judge; That he should fear God; that he should have Courage and Resolution; that he should love Truth, and that he should abhor Covetousness.

The first and chief of these Qualities is without doubt the fear of God, seeing it is the foundation of the others, and comprehends them all; for if the fear of God is a duty common to all persons of all sorts of conditions, no body is more strictly obliged to it than those, who being in his place over others, are to give him an account of the use which they shall have made of the power which he has intrusted to them; and it is to this Rank of Dignity and of Authority, that the duties of those persons who are the Depositaries thereof ought to be proportioned, whose Functions are to maintain the said Dignity, and to exercise the said Authority.

Seeing Judges are in the place of God, it is for this reason that he himself calls them Gods[d]. For since the Function of judging Men, whom Nature makes all alike equal, is not natural to any one of them, and that all Authority of one Man over another is a participation of the Authority of God, the Function of judging is a Function which in this sense may be called Divine, seeing one exercises thereby a Power which is natural to none but God, and that we are taught by Scripture that the Judgment which Judges give, is not the Judgment of Man, but of God himself[e]; and if the Functions of the Priesthood have a Dignity which for other reasons is far above that of Judges, the Dignity of Judges has this advantage, that whereas the Function of making intercession for the People, which is essential to the Priesthood, implies Subjection and Dependance, and cannot be lodged but in a nature inferior to that to whom the Priest or Pontiff makes intercession[f], that of judging implies a Superiority, and the character of Divine Authority, which alone has of it self the Right of judging.

[d] God standeth in the congregation of the mighty: he judgeth among the Gods. I have said, Ye are Gods, and all of you are children of the most High. *Psal.* lxxxii. 1, 6.

Is it not written in your Law, I said, ye are Gods? If he called them Gods, unto whom the word of God came; and the Scripture cannot be broken. *John* x. 34, 35.

I have made thee a God to *Pharaoh*. *Exod.* vii. 1.

[e] And said to the Judges, Take heed what ye do; for ye judge not for man, but for the Lord. 2 *Chron.* xix. 6.

[f] For every High Priest taken from among men, is ordained for men in things pertaining to God, that he may offer both gifts and sacrifices for sins. *Heb.* v. 1.

Since therefore the Function which Judges exercise is a Divine Function, and that it is the Judgments of God himself which they are to pronounce, it is a chief and principal duty incumbent on them, to fear lest there should be wanting to their Judgments any one of the essential characters which ought to render them worthy of this Name; and this is the first sentiment which this fear of God ought to inspire into them, and which ought also to engrave on their hearts a dreadful expectation of the weighty Judgment which God will pass on theirs, and of the punishments which he prepares for those who shall not have made that use of the Power he put into their hands which he required of them[g].

[g] Judices Romani juris disceptatores, non aliter litium primordium accipere, nisi prius ante sedem judicialem sacrosanctæ deponantur scripturæ, & hæ permaneant non solùm in principio litis, sed etiam in omnibus cognitionibus usque ad ipsum terminum, & definitivæ sententiæ recitationem. Sic etenim attendentes ad sacrosanctas scripturas, & Dei præsentia consecrati, ex majore præsidio lites diriment, scituri quod non magis alios judicant, quàm ipsi judicantur: cum etiam ipsis magis quam partibus terribile judicium est. Si quidem litigatores sub hominibus, ipsi autem Deo inspectore adhibito causas proferunt trutinandas. *L.* 14. *in fine, C. de Jud.*

For ye judge not for man, but for the Lord, who is with you in the judgment. 2 *Chron.* xix. 6.

Give ear, you that rule the people, and glory in the multitude of nations. For power is given you of the Lord, and Sovereignty from the Highest, who shall try your works, and search out your counsels. Because being Ministers of his Kingdom, you have not judged aright, nor kept the Law, nor walked after the counsel of God. Horribly and speedily shall he come upon you; for a sharp judgment shall be to them that be in high places. For mercy will soon pardon the meanest; but mighty men shall be mightily tormented. *Wisd. of Sol.* vi. 2, 3, &c.

The second of these qualities which Judges ought to have, is Courage and Resolution, which follow naturally from the first quality, which is that of the Fear of God; for the natural effect which this Fear produces is Firmness and Intrepidity with respect to every thing that may come from Man[h]; and the use of this Courage is to resist all solici-

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solicitations, recommendations, and other impressions from Men in power, or who are capable of doing harm, and to support and protect Justice and Truth at the peril of every thing[i], and especially on occasions where Justice is to be rendred to those who have no other recommendation besides their lowness of Condition, or their Poverty[l]: it is because of the necessity of this Courage and Resolution for discharging the Functions of a Judge, that God forbids those who have not these qualifications to engage in this Ministry, lest their respect for any person in power should byass them to do some Injustice[m].

[h] In the fear of the Lord is strong confidence. *Prov.* xiv. 26.

Whoso feareth the Lord, shall not fear nor be afraid, for he is his hope. *Ecclus.* xxxiv. 14.

The fear of man bringeth a snare. *Prov.* xxix. 25.

[i] Strive for the truth unto death, and the Lord shall fight for thee. *Ecclus.* iv. 28,

[l] Wo unto them that decree unrighteous decrees, and that write grievousness which they have prescribed. To turn aside the needy from judgment, and to take away the right from the poor of my people, that widows may be their prey, and that they may rob the fatherless. *Isaiah* x. 1, 2.

How long will ye judge unjustly, and accept the persons of the wicked? Defend the poor and fatherless; do justice to the afflicted and needy. *Psal.* lxxxii. 2, 3.

Let it not grieve thee to bow down thine ear to the poor, and give him a friendly answer with meekness. Deliver him that suffereth wrong from the hand of the oppressor, and be not fainthearted when thou sittest in judgment. Be as a father unto the fatherless, and instead of a husband unto their mother; so shalt thou be as the Son of the most High, and he shall love thee more than thy mother doth. *Ecclus.* iv. 8, 9, 10.

Rob not the poor, because he is poor; neither oppress the afflicted in the gate. For the Lord will plead their cause, and spoil the soul of those that spoiled them. *Prov.* xxii. 22, 23.

Open thy mouth, judge righteously, and plead the cause of the poor and needy. *Prov.* xxxi. 9.

The righteous considereth the cause of the poor. *Prov.* xxix. 7.

[m] Seek not to be judge, being not able to take away iniquity, lest at any time thou fear the person of the mighty, and lay a stumbling block in the way of thy uprightness. *Ecclus.* vii. 6.

The third quality which God requires in Judges, is to have in themselves Truth, that is to say, to have it both in the Mind and in the Heart, to know it and to love it; for it is in the knowledge and love of Truth that the Wisdom and principal Science of a Judge does consist, and it is the Fear of God which gives this Science and this Wisdom[n]. It is by the Light of Truth that a Judge discerns on every occasion what is his duty, and it is by the Love of Truth that he is inclined to do his duty, and that he embraces it with all his force[o]; for every body knows that Love is the only Principle of our Motions, of our Actions, and of our Conduct; and that as we cannot act without some End or View that draws us, so it is towards this Object that all our Motions tend, as a Weight does to the Center, and it is the biass of this Weight which is called Love: so that if a Judge does not feel a charm or allurement in Truth and in Justice, and if his Weight hath its biass towards some other Object, he will be led by other charms to do acts of Injustice, and will be without any motion or disposition to do Justice on occasions where it is not accompanied with some charm to engage him.

[n] The fear of the Lord is wisdom and instruction. *Ecclus.* i. 27.

The fear of the Lord is the beginning of wisdom. *Psal.* iii. 10.

[o] Love righteousness, ye that be judges of the earth. *Wisd. of Sol.* i. 1.

Give therefore thy servant an understanding heart, to judge thy people, that I may discern between good and bad. 1 *Kings* iii. 9.

Cui enim non est cognitum, antiquos judices non aliter judicialem calculum accepisse, nisi priùs sacramentum præstitissent, omnimodò sese cum *veritate* & legum observatione judicium esse disposituros? *l.* 14. *C. de judiciis.*

The fourth quality necessary to Judges is an aversion to Covetousness, and this quality, as well as the others, is a consequence of the Fear of God, who has declared that there is not a more wicked thing than a covetous man[p], and consequently that nothing is more opposite to his Nature; for a covetous man plunges his heart into a Love that is directly opposite to the Love commanded by the two primary Laws, and which overthrows those two Foundations of all manner of Justice, seeing it engages the covetous man in Idolatry, which is the Source of all Evils[q].

[p] There is not a more wicked thing than a covetous man. *Ecclus.* x. 9.

[q] Covetousness, which is idolatry. *Coloss.* iii. 5. *Ephes.* v. 5.

But they that will be rich, fall into temptation, and a snare, and into many foolish and hurtful lusts, which drown men in destruction and perdition. For the love of money is the root of all evil. 1 *Tim.* vi. 9, 10. See *Col.* iii. 5.

☞ *If Covetousness in the use of Temporal Goods be so great a Crime, that it is called Idolatry, and even the Source of all Evils, what name may one give to the Covetousness of Judges in the Divine Ministry of the Dispensation of Justice; seeing*

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ing this Crime with regard to them is not a bare violation of the common and mutual duties of Men towards one another, but moreover a prevarication against the universal Order of Society, and against the duty of that Service, and of that publick Ministry, to which Judges are particularly destined by their Functions? And this Avarice in Judges is so much the more criminal than the Avarice of particular persons, in that particular persons do not exercise their Avarice but by ways which carry the appearance and character of Iniquity, and which may be restrained by the Authority of the Judges; whereas the Avarice of Judges is exercised under the colour of Authority it self, which establishes Injustice by the Ministry of Justice.

We shall take notice here of two effects of Avarice, which are the most ordinary in the Ministry of Justice, and which appear to be the least criminal.

The first is to take larger Perquisites than ought to be taken, or to take any in cases where none are due. People are apt to flatter themselves in the commission of this Injustice, and many circumstances contribute to it; the smallness of each prevarication, and use make them insensible of it, and a real profit being joined with Impunity, Avarice extends it self without bounds to all manner of unlawful and criminal advantages.

The second of these two effects of Avarice in the person of Judges, is that of ceasing to exercise the Functions of Justice, when there is no other party concerned but the Publick, and in the Causes of poor persons, who sue for Justice, and who are not able, because of their poverty, to reward the Judges for their labour. We ought to place in the same rank the publick Interest, where no party is concerned, and the Interest of the poor, because both the one and the other are of equal importance, and are equally abandoned.

See the Texts quoted in the beginning of this Preamble, in relation to the duty of Judges to administer Justice to the poor.

Thus a covetous Judge extinguisheth in his heart the love of Truth and of Justice, and is disposed either to abandon it, or to neglect it, in case he does not find his own interest joined with it, or even to prevaricate, if his Avarice goes to that excess as to sell Injustice for Money; but it is not enough that a Judge be free from such an inclination to Avarice, as may tempt him to prevaricate; he ought moreover to have a hatred to the least disposition to this Vice, even to that degree as to make his own interest give way always to the Duties which may demand this preference; and one of the uses of this hatred is that of never receiving Presents of any kind whatsoever; for this meanness of Spirit can proceed from nothing else but Avarice, and it implies two Injustices directly opposite to the Integrity, which ought to reign in the Heart of a Judge; one, that it engages, or at least endangers even the wisest Judges, to favour the person of whom they receive the present, and consequently to prevaricate, giving themselves up to another Inclination than that of the Love of Truth and of Justice, which ought to be their only Principle; and the other, that they cannot receive a Present without approving the conduct of the person who offers it, nor consequently without letting him see that by approving his view of mollifying them by the Present, they join therein, and in some measure countenance and encourage the Commerce which he pretends to carry on, by procuring the favour of the Judge as a Recompence for his Present[r].

[r] Thou shalt take no gift; for the gift blindeth the wise, and perverteth the words of the righteous. *Exod.* xxiii. 8.

Thou shalt not wrest judgment, thou shalt not respect persons, neither take a gift: for a gift doth blind the eyes of the wise, and pervert the words of the righteous. *Deut.* xvi. 19.

Presents and gifts blind the eyes of the wise, and stop up his mouth that he cannot reprove. *Ecclus.* xx. 29.

The Lord your God is God of Gods, and Lord of Lords, a great God, a mighty and a terrible, which regardeth not persons, nor taketh reward. He doth execute the judgment of the fatherless and widow, and loveth the stranger, in giving him food and raiment. *Deut.* x. 17, 18.

A gift in secret pacifieth anger; and a reward in the bosom, strong wrath. *Prov.* xxi. 14.

A wicked man taketh a gift out of the bosom to pervert the ways of judgment. *Prov.* xvii. 23.

Which justify the wicked for reward, and take away the righteousness of the righteous from him. *Isaiah* v. 23.

See in relation to Presents the Remark at the end of this Preamble.

Since therefore it is only by this Courage and this Resolution, by this Knowledge and this Love of Truth and of Justice, and by this aversion to Covetousness, that one can be a good Judge, and that these qualities are not to be found in the degree that is necessary, unless they are accompanied with a fear of offending God by failing in our duty towards him; it is this fear which is the foundation of the integrity of Judges, and those who have it not, cannot

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cannot but fall into Injustices; and it is for this reason that we see in the Gospel, that the character of a bad Judge is, not to have the fear of God[f].

[f] There was in a City a Judge, which feared not God, nor regarded man. And there was a widow in that City, and she came unto him saying, Avenge me of mine adversary. And he would not for a while. *Luke* xviii. 2, 3, 4.

Some may be apt to think that there have been Judges among the Heathens, who without having the fear of God have rendred Justice, and that in the present Age many of those who have the knowledge of God without the fear of him, are nevertheless reputed to be good Judges; and that there are some of them whom one would chuse for Judges, even with this defect, rather than others who seem to have this fear of God. This objection deserves undoubtedly an answer; for altho' it would be sufficient to destroy the force of the objection by answering to it, that no reason can balance the Authority of the Word of God, even although the reasons thereof do not appear, and that consequently the Truths which we have just now explained being so expresly declared in Scripture, we ought to be convinced of them. However, it is not difficult to make it appear, that they are so certain that nothing is more unquestionable.

We grant that there have been Judges and Officers in the time of Paganism[t], who were preferable to some of the Judges of the present times as well as of the times past; but there is no motive to induce us to believe, that during the time that people lived in ignorance of the true Religion, there were Judges who without the Light of the Gospel had so perfect an integrity, as to render Justice in the manner that God is willing it should be rendred, and with that uprightness and fidelity which he demands; for to render it in that manner, it is necessary to have an ardent and generous love of Truth and of Justice, a clearness of Understanding in order to find it out, an opposition to all manner of Injustice, to all unfair ways, to all manner of Deceit, a resolution and firmness of mind to support and protect constantly on all occasions Justice and Truth against all obstacles of what nature soever; a disinterestedness which prefers to all other considerations that of the duty of doing Justice; a diligent and faithful application to the dispatch of Justice; and all these qualities presuppose the Empire of Reason over Interest, over Passions, over Remisness, over Negligence, and over all the other Frailties which may tempt Judges either to do some act of Injustice, or to omit some Duty that God requires of them; and it is not possible but that Judges will want some one of these dispositions, if they have not engraven upon their hearts, as a Principle of their Conduct in their Duties, a love and a zeal for Truth, and for Justice founded upon the Fear of God. For unless this Principle be so rooted in them as it is not possible to make them depart from it, an Uniformity in all the duties cannot subsist; and the Judge who has not this Principle rooted in him, will fall either into a neglect of his duty, or into some weakness in the execution of it, or into some other much greater faults against his duty, according as his interest, his passions, and other different views which he may have may divert and distract him from it: and as it is well known that in the times of darkness under Heathenism, Mens Actions were influenced only by the motions of their Passions, and that the greatest Virtues of the *Romans* themselves were only Ambition and Vanity, of which Avarice is an Instrument; so these Vices were so common in *Rome*, and Avarice it self so common among the Officers of Justice, that one of the first Fathers of the Church has remarked it as a certain proof of this Avarice, the excess of the Corruption and Extortions of the Officers of Justice, which gave occasion for a Law to be made on purpose to restrain them[u]; but that very Law, which did not proceed from the Spirit of God, did not sufficiently provide against this disorder in a manner suitable to the dignity of true Justice, seeing it did not absolutely forbid the Magistrates of the Town to take any Presents at all, but forbid them only to take more than a hundred Pieces of Gold, which that Law allowed them to take in a year's time[x]; which it was very difficult to controul, and did not hinder an Officer who might be willing to keep within the bounds prescribed, and yet not willing to lose the advantage of a Present that was well concerted for his advantage, from taking all at once the hundred Pieces of Gold for an Injustice that might deserve them: and as for the Magistrates in the Provinces, the Proconsuls and Presidents who were the Governors thereof, and who exercised the Function of Judges in some particular

particular affairs, they had had permission by other Laws to take Presents of Things which were eatable and drinkable, provided they were no more than what might be consumed in a few days time[y].

It appears from these Laws, that not only the Judges among the *Romans*, but even their Lawgivers themselves, were far from having that Knowledge which the Christian Religion gives us of the iniquity of those Judges who take any sort of Presents, because they had not sufficiently enquired into the flexibility of the Mind to the Heart, and into that of the Heart to Presents, and because they had not even sufficiently felt the natural effects which we have already observed to be made by Presents, or if they were sensible thereof, they were very unjust in countenancing so licentious a practice by such Laws.

We might make other Reflections, both on the Principles of Religion, and on other unjust Laws of the *Romans*, to shew that without the knowledge of the true Religion, there is no perfect Justice; and it was only by the Light of the Gospel, and by the Knowledge of the Divine Law, that the practice of making Presents to Judges was abolished by a Law of the Emperor *Constantine*, who forbad even those Officers of Justice whom the said Laws allowed to take those small Presents, called *Xenia*, to take any Present at all, upon pain of death[z]; and the Kings of *France* have in the same manner prohibited all Judges to take Presents of any kind whatsoever, eatables and drinkables, and have prohibited under severe penalties the taking of any Presents at all, let them be never so inconsiderable.

[r] ☞ *It is necessary to distinguish between Judges and Officers in the* Roman *Law; the Officers, or Magistrates, were those who had Authority and Jurisdiction, and they did not give to them the bare name of Judges, altho' they had the right of judging; but they had the power to delegate their Jurisdiction, and to name Judges for deciding the differences of particular persons: Thus the Pretor and the Prefect of the Pretorium, the Proconsuls, and the Presidents, who were the Governours of the Provinces, and other Magistrates, had their proper Jurisdictions, and might judge; but they had likewise the power of appointing Judges to decide the differences between particular persons.*

Ad vicem magistri equitum Præfectos prætorio antiquitùs institutos esse, a quibusdam scriptoribus traditum est. Nam cùm apud veteres dictatoribus ad tempus summa potestas crederetur, & magistros equitum sibi eligerent, qui adsociati participales cura (admilitiæ gratia) secundam post eos potestatem gererent: regimentis reipublicæ ad imperatores perpetuos translatis, ad similitudinem magistrorum equitum Præfecti prætorio à principibus electi sunt. Data est plenior licentia ad disciplinæ publicæ emendationem . . . . . . credidit enim princeps, eos, qui ob singularem industriam, explorata eorum fide, & gravitate, ad hujus officii magnitudinem adhiberentur, non aliter judicaturos esse pro sapientia ac luce dignitatis suæ, quam ipse foret judicaturus. *l.* 1. *&* §. 1. *ff. de off. Præf. Præt.*

V. tot. hunc tit. & seq. de offic. Præf. urb.

V. tit. Cod. de offic Præf. Prætor. de offic. Præf. urb. &c.

[s] Lex Julia repetundarum pertinet ad eas pecunias, quas quis in magistratu, potestate, ratione, legatione, vel quo alio officio, munere, ministeriove publico cepit, vel cum ex cohorte cujus eorum est. *l.* 1. *ff. ad leg. jul. repet.*

Eadem lege tenentur, qui ob denuntiandum, vel non denuntiandum testimonium, pecuniam acceperint. Hac lege damnatus, testimonium publicè dicere, aut judex esse postulareve prohibetur. *l.* 6. *&* §. 1. *ff. eod. V. hunc titul. & tit. C. de lege Jul. repet.*

It is of this Law that St. Jerome *hath said in his Comment on the thirteenth Chapter of* Isaiah, *that it was a most certain proof of the Avarice of the* Romans; *and it is observable on this subject, that the same Father hath said in the beginning of his Commentaries on* Genesis, *that* Cicero *had been accused by the* Greeks *of Extortion, he who is known to have said of himself, that he was so strict and punctual in the matter of Presents, that he did not take even those which the Law allowed him to take.* V. Cicer. 5. ad action. 20.

[x] Lege Julia repetundarum cavetur . . . utq; urbani magistratus ab omni sorde se abstineant: neve plus doni muneris in anno accipiant quam quod sit aureorum centum. *l.* 6. *in f. ff. ad leg. Jul. repet.*

[y] Plebiscito continetur, ut ne quis præsidum, munus donum caperet: nisi esculentum, potulentumve, quod intra dies proximos prodigatur. *l.* 18. *ff. de off. Præsidis.*

Jubemus igitur, quoties apud quoscunque judicantes aut administratores, lites aut appellationes examinantur: præ omnibus principales litigantium personas, aut illos ad quos in medium negotium forte migraverit, in præsentia judicum tangentes sancta Evangelia, jurare, quod nihil penitus judicibus, aut patrocinii causa ipsis vel alii cuicunque personæ pro hac causa quolibet modo dederunt, aut promiserunt, aut postea dabunt vel per se, vel per aliam quamcunque mediam personam: exceptis iis quæ propriis advocatis pro patrocinio præstant, aliisque personis quibus nostræ leges dari disposuerunt. *Nov.* 124. *c.* 1.

See the Remark which has been just now made on the Avarice of Judges in the Ministry of the Dispensation of Justice, and the texts of Scripture there quoted.

[z] Si qui eorum qui in diversis agunt officiis principatus xenia aut munuscula quæ canonica ex more fecerunt extorserit, vel etiam sponte oblata non

non refutaverit, sublatis omnibus facultatibus ultimo subjugetur exitio. *Cod. Theod. ne dam. Provinc. infig.*

☞ *It is observable that* Tribonian *has not inserted this Law into the Code of* Justinian; *which may help to confirm what is said of him, that he took Bribes, and committed greater Extortions, as has been taken notice of in another place**. *By the doing of which he prevaricated, not only against the Divine Law, against the Law of Nature, and against this Law of the Emperor* Constantine; *but likewise against another Law of the Emperor* Justinian, *which is that of the seventeenth Novel directed to himself; seeing by that Law he was commanded to execute his Office with an integrity which might surpass that of all other Officers, and to keep his hands so clean with regard to God, to the Emperor, and to the Law, as to take no manner of profit, no gain, great or small, but what he should receive from the Prince out of the Publick Monies, and that in the Execution of his Office he should be guilty of no misdemeanour. If this Law was penned by* Tribonian *himself, as there is some ground to think that it was, it is hard to believe, if he was such as he is represented, that he was serious in these last expressions.*

Oportet igitur, te purè sumentem administrationem, & sine omni suffragio, præ omnibus aliis mundas servare Deo nobisque & legi manus, & nullum contingere lucrum, neque majus, neque minus: neque captiosum quiddam contra subjectos facere negotiatione: sed contentum solis à fisco ministratis, & tam per te quàm per eos qui circa te sunt purum eis undique servare jus: & festinare, primùm quidem fiscalia tributa exigi vigilanter, nihil diminuens circa publicam curam requirere, ne fortè fiscus indè minuatur, & salvare ei undique quæ propria sunt. Sicut enim privatos injustitiam passos adjuvamus, sic & publicum illæsum manere volumus. Collatores namque omni aliâ calumniâ liberi conservati, facile & in promptu solvent tributa: & qui in furta priùs dantes manebant debentes adhuc fiscalia, ex nunc ipsis fiscalibus exsolventes liberabunt facile se tributis. *Nov.* 17. *c.* 1.

* *See the Preamble of the third Title of the third Book of Successions, in the first Tome of the Civil Law in its Natural Order.*

Cogitatio igitur nobis facta est, quòd agentes omnia quæcunque in nostris provinciis sunt, uno actu communi ad meliora migraremus. Hoc enim omninò eventurum credimus, si præsides gentium quicunque civiles administrationes provinciarum habent, puris procuremus uti manibus & ab omni abstinere acceptione pro illis, solis contentos eis quæ à fisco dantur. Quòd non aliter fiet, nisi & ipsi cingula sine mercede percipiant, nihil omninò dantes nec occasione suffragiorum, neque iis qui cingula habent, nec alii omnium ulli. Consideravimus enim, quia licet quæstus immodicus imminuitur imperio, attamen nostri subjecti incrementum maximum percipient, si indemnes à judicibus conserventur: & imperium & fiscus abundabit utens subjectis locupletibus: & uno hoc introducto ordine, plurima rerum & innumera erit ubertas. An certè non omnibus manifestum est, quoniam qui aurum dat, & ita administrationem emit: non dat hoc solùm quantum occasione adinventum est suffragiorum, sed & aliud extrinsecùs addit amplius occasione commodi administrationem aut dantibus aut spondentibus, & sic uno principio illicito dato plurimas necesse est manus circumire eum qui donationem facit: & hoc non de suo fortè præbere, sed mutuatum, & ut mutuare possit, damnificatum: & computare apud se, quia convenit eum tantùm ex provincia percipere, quantum liberet quidem ei debita, sortes & usuras, & damna pro ipso mutuo, computabit autem & in medio expensas largiores, jam & judici, & qui circa ipsum sunt, convenientes: & quemdam etiam sibimet recondet quæstum in tempore sequenti, in quo fortè non administrabit. *Nov.* 8. *in Præfat.*

Altho' this Novel relates to the Venality of Offices, yet it may be applied here.

See the Ordinance of October 28th, 1446. *Art.* 6. *that of* April 1453, *Art.* 118, 119, 120; *that of* July 1493, *Art.* 16. *and the following Articles; that of* 1535, *Ch.* 1. *Art.* 53; *that of* Orleans, *Art.* 43, &c. *that of* Blois, *Art.* 114.

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I.

1. First Rule of the integrity of Judges.

SEeing Judges derive their Power from God, thro' the hands of the Prince who intrusts them with it [a], and that it is the Judgment of God himself which they are to render [b]; the first Rule of their Integrity, is that it be proportioned to the divine Function of judging [c], and that they join to the qualification of Capacity, of which mention has been made in the foregoing Section, the other qualities which shall be explained in the Articles which follow; that not only they may avoid committing any sort of misdemeanor, but that they may administer Justice in a manner suitable to a Function of this character.

[a] For power is given you of the Lord. *Wisd. of Sol.* vi. 3.

Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be, are ordained of God. Whosoever therefore resisteth the power, resisteth the ordinance of God. *Rom.* xiii. 1, 2.

[b] And said to the Judges, Take heed what ye do: for ye judge not for man, but for the Lord. 2 *Chron.* xix. 6.

[c] That ye might walk worthy of the Lord. *Col.* i. 10.

II.

2. They ought to have a fear of not being faithful enough in the discharge of their Ministry.

The first of the qualities which are required to compose the integrity of a Judge, is a faithful remembrance in all his Functions, of what may be justly expected from him in the exercise of a Ministry wherein he holds the place of God, and where every step of his proceedings lays a duty on him, of which he must expect to give a severe account: which obliges him to take for the first Rule of all his duties, that of a fear of not being faithful enough in observing the divine will and pleasure [d].

[d] For ye judge not for man, but for the Lord, who is with you in the judgment. Wherefore now, let the fear of the Lord be upon you. 2 *Chr.* xix. 6, 7.

For power is given you of the Lord, and sovereignty from the Highest, who shall try your works, and search out your counsels. Because being Ministers of his Kingdom, you have not judged aright, nor kept the Law, nor walked after the counsel of God. Horribly and speedily shall he come upon you: for a sharp judgment shall be to them that be in high places. For mercy will soon pardon the meanest: but mighty men shall be mightily tormented. *Wisd. of Sol.* vi. 3, 4, &c.

See Psal. cxix. 120.

Optamus, ut omnes judices nostri secundùm voluntatem & timorem Dei, & nostram electionem atque ordinationem sic suas administrationes gubernare studeant: ut nullus eorum aut cupiditati sit deditus, aut violentias aliquas vel ipse inferat, vel judicibus, aut officiis eorum aut quibuscumque aliis collateribus inferre permittat. *l.* 1. §. 5. *C. de offic. Praef. Praet. Afric.*

☞ *The fear which Judges ought to have, consists in their looking upon themselves to be Depositaries of the Power which is intrusted to them, and not to imagine that it is their own Power, that they may use it as knowing that they must one day give a strict account of it. The Judges who have not this fear in them, make themselves Masters and Usurpers of that Authority of which they are only Depositaries; and instead of maintaining among unjust men the interest of Justice, which is that of God himself who commits to them the dispensation of it, they imploy their Authority in the Administration of Justice, only to make it subservient to their own interests and passions, and use it even against Justice it self. And if Injustice and Oppression in private persons raise anger and indignation in those who behold it, what can one say of such an abominable perverting of Justice, when they see the Force that belongs to Authority and Justice imployed against it self?*

III.

3. They ought to have Courage and Resolution to support Justice and Truth.

The second quality of a Judge is Courage and Resolution to maintain and to protect on all occasions Justice and Truth [e], and especially in the cases where the Widow and the Fatherless, the poor and persons of a low condition groan under Oppression: so that if it depends on the Judge to put a stop to that Injustice, he ought to imploy his Authority for that end without

out any respect of persons[f]; and in case his Ministry is not extensive enough to restrain the said Injustice, he ought to be careful not to take part in the Oppression which he has not sufficient power to conquer, and ought to shew by his Conduct that no consideration whatsoever influences him against his duty, and that no power is capable of making him deviate from it.

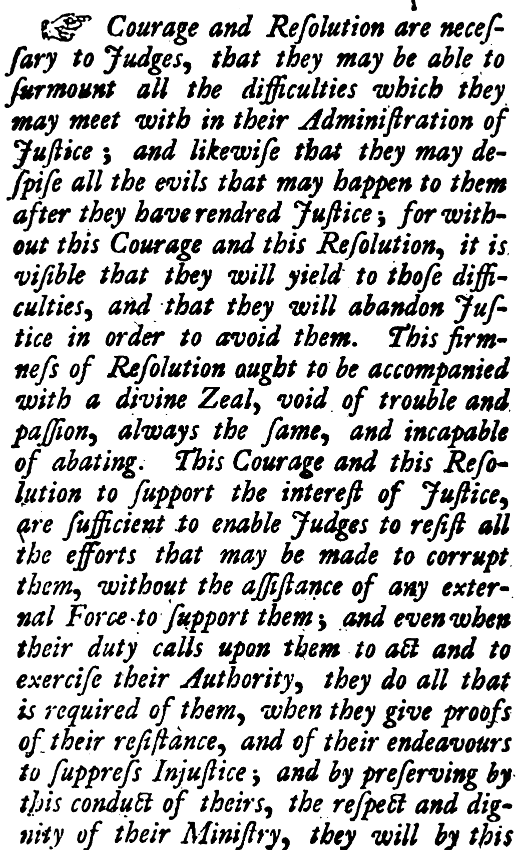
[e] Seek not to be judge, being not able to take away iniquity, lest at any time thou fear the person of the mighty, and lay a stumbling block in the way of thy uprightness. *Ecclus*. vii. 6.

Strive for the truth unto death, and the Lord shall fight for thee. *Chap*. iv. 28.

[f] Defend the poor and fatherless, do justice to the afflicted and needy. Deliver the poor and needy; rid them out of the hand of the wicked. *Psal*. lxxxii. 3, 4.

Hear the causes between your brethren, and judge righteously between every man and his brother, and the stranger that is with him. Ye shall not respect persons in judgment, but you shall hear the small as well as the great; you shall not be afraid of the face of man, for the judgment is God's. *Deut*. i. 16, 17.

When the ear heard me, then it blessed me, and when the eye saw me, it gave witness to me: because I delivered the poor that cried, and the fatherless, and him that had none to help him. The blessing of him that was ready to perish, came upon me; and I caused the widows heart to sing for joy. I put on righteousness, and it clothed me; my judgment was a robe and a diadem. I was eyes to the blind, and feet was I to the lame; I was a father to the poor, and the cause which I knew not, I searched out. And I brake the jaws of the wicked, and pluckt the spoil out of his teeth. *Job* xxix. 11, 12, &c.



☞ *Courage and Resolution are necessary to Judges, that they may be able to surmount all the difficulties which they may meet with in their Administration of Justice; and likewise that they may despise all the evils that may happen to them after they have rendred Justice; for without this Courage and this Resolution, it is visible that they will yield to those difficulties, and that they will abandon Justice in order to avoid them. This firmness of Resolution ought to be accompanied with a divine Zeal, void of trouble and passion, always the same, and incapable of abating. This Courage and this Resolution to support the interest of Justice, are sufficient to enable Judges to resist all the efforts that may be made to corrupt them, without the assistance of any external Force to support them; and even when their duty calls upon them to act and to exercise their Authority, they do all that is required of them, when they give proofs of their resistance, and of their endeavours to suppress Injustice; and by preserving by this conduct of theirs, the respect and dignity of their Ministry, they will by this means prevent many Injustices. But those who are destitute of this Virtue, what Dignity and what external Force soever they may have otherwise, instead of being, as they ought to be, a living Image of the Divinity which they represent in their Functions, they will be, according to the saying of a Prophet, only a Statue without Arms, and without Eyes; and instead of gaining to themselves respect, they will fall into scorn and contempt*[a].

[a] Zech. xi. 17.

It is not our business to enumerate here all the occasions, in which Judges stand in need of Courage and Resolution, to enable them to surmount all the difficulties they may meet with in the exercise of their Functions. It sufficeth to remark, that all Judges ought to animate themselves with this Virtue on all occasions, where Justice is oppressed; when the rich oppress the poor, when the strong oppress the weak, when Lords of Mannors abuse the power which they have over their Vassals and Tenants, and on every occasion, where the inequality and disproportion between the condition of the Parties at variance may tend to support Injustice against Justice.

And it is only for these sorts of occasions that Judges are established, and God gives them his place, for no other end but to raise them above others by the Character and Authority which he communicates to them, that they may likewise by their Courage and Resolution raise Justice above the force of Injustice.

Some may perhaps be apt to imagine, that this Courage is a Virtue not so very necessary to Judges of inferior Jurisdictions; but it may be said on the contrary, that it is more necessary to them than to the other Judges who are in a higher Station, because they meet frequently with difficulties and obstructions; and they being destitute of that splendor and dignity which environs and supports the other superior Judges, they are not able to support by their Virtue the character of Dignity, which the Title of Judges gives them, and they ought at least to display their Courage, if they are not able to exert their Authority; and it is the duty of those who are vested with Authority, to protect these inferior Judges against the oppression and violence of those who should attempt to disturb them in the exercise of their Functions, that they may, by the means of their own Resolution and Courage, backed with the protection of the superior Judges, have all the Force and Authority that is necessary for the Administration of Justice.

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It may not be amiss likewise to observe here in relation to the Courage and Resolution necessary to Judges, that by the Roman *Law one could not exercise the Functions of Justice in the Province where they were born; nay, not so much as the Function of an Assessor, whose business was to assist and give counsel to the Magistrates in giving Judgments, lest the regard which they might have for Relations and Friends should engage them to commit some Injustice.*

Si eadem provincia postea divisa, sub duobus præsidibus constituta est, velut Germania Mysia; ex altera ortus in altera adolebit. *l.* 3. *ff. de off. Adsess.*

Ne quis sine sacrilegii crimine desiderandum intelligat gerendæ ac suscipiendæ administrationis officium intra eam provinciam in qua provincialis & civis habetur: nisi hoc cuiquam ultronea liberalitate per divinos affatus Imperator indulgeat. *l. ult. C. de crim. sacr.*

These Prohibitions not being in use with us, the liberty which people have of serving in Offices of Justice in their own native Country, makes it still the more necessary for them to be armed with Courage and Resolution; and it is in order to excite the Judges to this duty, that the Ordinances of France *have forbidden them to have any regard to the King's Letters Manual in the discharge of their Functions: which teaches them that no consideration whatsoever ought to be put into the Scales with that of Justice, which they are obliged to render. See the eighty first Article of the Ordinance of* Moulins, *which contains the same prohibitions, excepting only the execution of the Orders of the Prince, which do not infringe the right of any person, or Pardons for Crimes.*

It may be observed in relation to the same subject, that it was heretofore one of the Rules and Orders of the Parliament of Paris, *for the more effectual preserving this Courage and Integrity in the Judges, that none of the Officers belonging to that Body should frequent the houses of Princes, and that they should not so much as go to the* Louvre, *the King's Palace, unless they were sent for by the King.*

IV.

4. They ought to render Justice, without respect of persons.

Seeing the firmness and resolution of the Judge ought to be only for the support of Justice, and without respect of persons, he ought to consider in the poor and in the needy, only the Oppression which they may chance to labour under by reason of some Injustice, and to imploy his Authority for removing the said Oppression; but if the Cause of the Poor, of the Widow, and of the Orphan, be not accompanied with Justice, he ought not to let himself be overcome by tenderness and compassion, but he ought to administer Justice impartially, without respect to those persons no more than to others [g].

[g] Neither shalt thou countenance a poor man in his cause. *Exod.* xxiii. 3.

Ye shall not respect persons in judgment, but you shall hear the small as well as the great; you shall not be afraid of the face of man, for the judgment is Gods. *Deut.* i. 17.

It is not good to have respect of persons in judgment. *Prov.* xxiv. 23.

To have respect of persons, is not good: for, for a piece of bread that man will transgress. *Prov.* xxviii. 21.

The King that faithfully judgeth the poor, his throne shall be established for ever. *Prov.* xxix. 14.

Give the King thy judgments, O God, and thy righteousness unto the King's son. He shall judge thy people with righteousness, and thy poor with judgment. *Psal.* lxxii. 1, 2.

V.

5. They ought to have in their hearts a love and a zeal for Truth and for Justice.

The third quality of a Judge is a love and a zeal for Truth and for Justice [h]; for the heart is flexible only to what it loves, and the heart of a Judge cannot be bent upon the performance of his duty, unless it be moved thereto by the weight and biass of the love of Justice; and very often the want of this love hinders Judges from discerning between what is just or unjust, and leads them to commit injustices which they would avoid if they had that light which the ardour of this love ought to give them [i].

[h] Love righteousness, ye that be judges of the earth. *Wisd. of Sol.* i. 1.

☞ *All the duties of Judges depend so much on this love and on this zeal for Justice and for Truth, that* Solomon *asking of God the qualifications necessary for judging his People, asked of him nothing else but a good disposition of heart, because he knew that he could not render justice, unless he had a love for it, and unless he had a heart flexible to all the motions of the love of Justice, and that the said love was an universal Principle, which would lead him into the whole detail of his duties. The love of Justice is the principle of the Conduct of Judges; and consequently it is also a divine Truth, that the most learned and the ablest Judges are unworthy of this Rank, and that all their Learning is nothing but a faint and unprofitable Light, if it is not animated with an active Love, which engages them to apply themselves to all their duties. There is nothing therefore of greater importance than to know thoroughly,* and

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and to observe diligently this Law that is so essential to the duties of Judges; *and in order to comprehend this Law of the Love of Justice in its full force, and in its full extent, it is necessary to consider it in its Foundations, which are the same with those of the general Law, which commands Mankind to love one another reciprocally*; *and it is also the same Spirit which makes the force and the justice both of the one and of the other.* See the second Chapter of the Treatise of Laws, in the Civil Law in its Natural Order.

It is by this Love of Justice that the Judges apply themselves to all the Functions of their Ministry; *it is this Love that makes them diligent in searching out and punishing Crimes and Offences, which disturb the Order of the Society of Mankind*; *it is by the means of this Love for Justice that they prefer Justice to all other considerations whatsoever, and that the interest of their Friends, and of their Relations, and even their own interest, does not any ways biass them when they are contrary to their duties*: *it is this Love for Justice that makes them despise presents, promises, threatnings, and all sorts of events, and makes that nothing can hinder them from doing Justice*: *it is by virtue of this Love that they render Justice equally on all sorts of occasions without respect of persons, and with a zeal suitable to their Functions, and such as the state of things may demand*; *and lastly it is by this love that Judges apply themselves diligently to the Study that is necessary for their acquitting themselves worthily of their Ministry*; *and it is that which makes them careful and exact in examining all the facts, and all the circumstances of the Affairs which come before them in Judgment.*

[1] Give therefore thy servant an understanding heart, to judge thy people, that I may discern between good and bad. 1 *Kings* iii. 9.

O ye kings of the people, honour wisdom. *Wisd. of Sol.* vi. 21.

Wisdom is easily seen of them that love her, and found of such as seek her; she preventeth them that desire her, in making her self first known unto them. *Wisd. of Sol.* vi. 12, 13.

As it is in general the Love of the End which one proposes to himself, which is the Principle of all the Actions and of all the Duties of Mankind, so it is the Love of Truth and of Justice that is the Principle of the Duty of Judges, and that Love ought to mount to the degree of Zeal; *for seeing the Functions of Justice which they exercise in the Body of the Society, are intended to restrain injustices, violences, oppressions, to maintain Justice, to punish Crimes, and for the discharge of other Duties, which require the use of Authority, of Courage, and of Resolution, they cannot discharge them aright, unless they have in their hearts a love and a zeal for Truth and for Justice, which is the Principle of that Resolution and of that Courage which is more especially necessary to Judges and Magistrates, and of which notice shall be taken in the following Article.*

VI.

6. The Judges who have the care of the Publick Good, ought to have the same zeal for Justice, altho' there be no party who demands it.

This zeal for Justice that is so necessary to all Judges without distinction, is more especially requisite in Officers whose Functions do not consist barely in rendring Justice to the Parties who demand it of them; but who are obliged moreover to render it on occasions where the Publick Interest may require it, and where no party appears to pray it. Thus the Officers who have the direction of the Policy, and the punishment of Crimes, owe those Functions to the Publick, altho' there be no party to demand Justice, and altho' they may reap no profit by it themselves: so that there is nothing but a love and a zeal for Justice, that can engage them to embrace always all occasions of this sort, and to act in every one of them with all that diligence, with all that application, and with all that fidelity which God requires of them[1].

[1] *Judges being chiefly instituted for the defence of the poor and needy, who are most exposed to violence and injustice, it follows that the Judges are obliged not only to render Justice to the poor, but that they ought also to dispense it to them gratis*; *for otherwise it might be pretended that Justice is not due to the poor, seeing it may be supposed that being poor they have not the means to demand it unless it be freely granted them. And besides, there is no excuse to palliate so crying an injustice as that of denying Justice to the poor.*

VII.

7. Vigilance of the Officers who are called the King's Council.

Seeing the Administration of Justice in the Affairs of Policy, and the punishing of Crimes require two sorts of Functions; one of those who are to give Judgment, and the other of those who are to appear as Parties to pray Judgment against those who transgress the Rules and Orders of Policy, and commit Crimes, and that the Judges cannot exercise both these Functions, that of taking care that the Rules and Orders of Policy be duly observed, and that Offenders be brought to condign punishment, is the duty of those Officers who are called the Kings Council, of whom mention has been made in the proper place; and this duty obliges them particularly to have such a zeal for Justice, as may animate them against Injustice, and may stir them up to a continual vigilance in the discharge of all their Functions, without neglecting any one of them, and engage them to perform their Functions without any biass to interest, and with a resolution and

and stedfastness suitable to their Ministry [m].

[m] *See the twenty third Article of the second Section of the first Title of this second Book.*

Justinian *has made many Laws, to exhort Judges to apply themselves with great care and diligence to the punishing of all Crimes which go to that excess, as to disturb the publick Order of the Society, and the interest of particular persons.*

Ad hæc diligenter ibi ipsum locorum prospicere volumus, ut omnes qui latrocinia exercent, qui alienas substantias, aut etiam uxores rapiunt, qui alia denique patrant crimina persequatur, comprehendat, & competentibus suppliciis subdat, & omnem prorsus injustitiam reprimat: neque committat ut in aliquo probiores & mansuetiores injuriis afficiant, ne aliis denuo talium persecutoribus opus habeamus, cogamurque rursus violentiarum repressores, latrunculatores, & alia id genus tolerare nomina, simul & negotia quæ nos aversati ipsum ad hunc ordinem produximus. *Nov.* 29. *c.* 5.

Adulteria vero & raptus virginum, & immoderatas illicitasque, & augendæ rei suæ causa comparatas circumscriptiones, neque non homicidia, & si quid ejusmodi delictorum est, ita acerbe punito, ut paucorum hominum supplicio omnes reliquos continuè castiges: estoque secundùm legem exquisitus delinquentium castigator: neque enim inhumanitas hoc, sed potiùs summa quædam humanitas est, cum multi paucorum animadversione salvantur. Quod si quem hoc nomine in crimen vocatum sustineat, qui vel cinguli vel dignitatis, vel sacerdotii, vel ejusmodi alio prætextu speret ex illius se manibus ereptum iri: certo sciat quod nostro judicio indignus videbitur: nemo enim quacunque potentia sua fretus quodcunque alienum prætendens patrocinium in talibus delictis severitatem legis effugiet. *Nov.* 30. *c.* 11.

VIII.

8. Disinterestedness enjoined to Judges.

The fourth qualification which God enjoins to Judges is, a disinterestedness and an aversion to Covetousness; for this passion alienates mens affections so much from God, that in stead of a Fear of him, it substitutes Idolatry [n], and is the root of all evil [o]; and when it reigns in the heart of a Judge, it is there a principle of a thousand injustices, as will appear from the Articles which follow.

[n] Covetous man who is an idolater. *Ephes.* v. 5.
[o] The love of money is the root of all evil. 1 *Tim.* vi. 10.

Est quoque hoc sacrorum eloquiorum mirabile & verum, quòd avaritia omnium sit mater malorum, maximè quando non privatorum, sed judicum inhæret animabus. Quis enim sine periculo non furetur, quis non latrocinabitur sine reatu ad administratorem respiciens? Illum namque videns omnia auro vendentem, & præsumens quia quicquid egerit illicitum, hoc pecunias dando redimet: hinc homicidium, & adulterium, & invasiones, & vulnera, & raptus virginum, & commerciorum confusio, & contemptus legum & judicum, omnibus hæc venalia præposita esse putantibus, tanquam aliquod vilium mancipiorum. *Nov.* 8. *in Præfat. in fine.*

IX.

9. They ought to restrain the proceedings in a Cause to that which is necessary to prepare it for Judgment.

The Judges whose business it is to regulate what relates to the instruction of Causes, ought to have no other views besides that of directing the proceedings therein after such a manner as that the truth may be set in a clear light, and that the Rights of the several parties may be known; which makes it a duty incumbent on them to restrain the said proceedings to what is necessary for that end according to the direction of the Ordinances, or according as Equity may require in particular circumstances: but seeing it depends on the Judges to shorten or to lengthen the proceedings, and that they have Perquisites arising from the greatest part of the Decrees which they give, those who set their hearts on nothing but Covetousness, commit on such occasions two sorts of injustices; one is, that of multiplying the proceedings in a Cause without necessity; and the other is, that of taxing their Fees or Perquisites beyond what they may lawfully take; and by these two Injustices they become guilty of two Extortions; one, in that they take more than what is just for the proceedings that ought to be in the Cause; and the other is, in the profits which accrue to them from the proceedings which they ordain without necessity; and besides, by this means they render themselves accountable before God for the consequences of the delay of Justice that is due to the parties.

X.

10. The Officers who by their Offices are bound to perform Functions of Justice for the service of the Publick, ought carefully to perform them, altho' they reap no profit thereby.

The Officers who by their Offices are obliged to perform Functions of Justice for the service of the Publick, in cases where there is no party to carry on the Suit, whether it be for the execution of the Orders of Policy, or for the punishment of Crimes, altho' they have in these cases no perquisite for the discharge of their Functions, yet they ought carefully to perform them merely out of regard to their duty, and in consideration of the interest which the Publick has that Justice be administred; but if they are of a covetous temper, the want of the allurement of profit will make them faint and languid in the discharge of their Functions, and they will be apt to abandon or neglect their duty in proportion to the degree of their Avarice, and according as it may counter balance the shame and the other consequences which they may have reason to fear if they should fail in the discharge of Functions of this kind. The Reader may consult on this Article what has been already said in the sixth Article of this Section [p].

[p] *See the sixth Article of this Section.*

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XI.

11. Judges in the exercise of their Functions are restrained to the giving of Judgment in Causes.

The Judges whose Functions are restrained to the deciding of Law-Suits, whether it be that they report the Causes to the other Judges, or that they only assist in giving their opinion upon the decision of the Cause, and who, either for the Report which they make, or for their presence, have the Fees which are allowed them, are obliged to perform the said Functions, and to tax moderately their fees, perquisites, or other dues which the Reporters may be entitled to for reporting the Cause; but if they happen to be of a covetous temper, they will not fail to tax at an immoderate rate the said perquisites and other dues.

XII.

12. Covetous Judges are apt to neglect the Functions from which they reap no profit.

It is likewise another Injustice in Judges who are of a covetous temper, that they abandon or neglect the Functions from which they reap no manner of profit; and altho' they are obliged by vertue of their Offices to the Application which shall be spoken of in the following Section, nevertheless covetousness makes them neglect those Functions from which there accrues no manner of profit: thus covetous Judges dispensing with their duty to render Justice to the poor, are careless in attending when their Causes are to be decided, because they expect no profit from thence; and they likewise neglect to attend at the Informations in Causes, unless they be drawn thither by some other view; and some of them are even so great slaves to Avarice, as to hinder parties from adjusting their differences in a friendly way [q].

[q] *See the texts cited on the following Article.*

XIII.

13. Presents corrupt Judges.

Avarice disposes Judges to suffer themselves to be corrupted by presents, and this passion is so strong in some, that it blinds them to that degree, that they do not comprehend that every present hath this effect on the heart of a Judge, that it extinguishes the zeal or indignation which he may have against Injustice, that it captivates the soul of him who receives it, that it engages him to favour the person who gives it, that he deceives him if he does otherwise, and whatever use he may make of it, he prevaricates against Human Laws, and commits a capital crime against the Laws of God [r].

[r] *Avarice in taking bribes has nothing in it that appears outwardly to be contrary to Humane Nature; it finds there its Object, without any pains or toil, and without violence it offers it self secretly full of charms, and in a manner so surprizing, that the Scripture says, that the wise themselves are blinded by it.*

Thou shalt not wrest judgment, thou shalt not respect persons, neither take a gift: for a gift doth blind the eyes of the wise, and pervert the words of the righteous. That which is altogether just shalt thou follow. *Deut.* xvi. 19, 20.

Presents and gifts blind the eyes of the wise, and stop up his mouth that he cannot reprove. *Ecclus.* xx. 29.

A gift in secret pacifieth anger: and a reward in the bosom, strong wrath. *Prov.* xxi. 14.

A man's gift maketh room for him, and bringeth him before great men. *Prov.* xviii. 16.

And thou shalt take no gift: for the gift blindeth the wise, and perverteth the words of the righteous. *Exod.* xxiii. 8.

Thy Princes are rebellious, and companions of thieves: every one loveth gifts, and followeth after rewards; they judge not the fatherless, neither doth the cause of the widow come unto them. *Isai.* i. 23.

See what has been said of Presents in the Preamble of this Section, and the Ordinances quoted at the end of the said Preamble.

XIV.

14. They ought to abstain from hearing certain Causes.

The most perfect integrity that can be in Judges, is no hindrance why the Parties who have Causes depending before them, may not challenge them, or except against them, and why they ought not of their own accord to abstain from hearing Causes in which they may have some interest, or where there may be some just ground for suspecting them; and they themselves are obliged to declare the causes which may render them suspected, if the Parties are ignorant of them: for altho' a Judge may be above the weakness of suffering himself to be biassed or corrupted, and may have resolution enough to render Justice against his own Relations, and in the other cases where it may be lawful for the Parties to except against the Judges, yet they ought to mistrust themselves, and not draw upon themselves the just reproach of a rash proceeding, which would in effect be a real misdemeanor [s].

[[s] *By the Civil Law the Parties are at liberty to challenge or except against the Judges, when there is just reason to suspect their partiality to one side more than the other.* Apertissimi juris est, licere litigatoribus judices delegatos, antequam lis inchoetur, recusare. *l. 16. Cod. de judiciis. But according to the Law of England, Judges or Justices cannot be challenged.* Coke 1 Inst. fol. 294.]

SECT.

SECT. III.

Of the Application of Officers of Justice in the discharge of their Functions.

THere is no Condition whatsoever, without excepting even those of the highest Rank, which hath not for its essential character, and for its chief and indispensible duty, an Application to the Functions for which it is established: and those who should pretend to an exemption from this engagement, would subvert the Order of Society, and transgress both the Law of Nature, and the Law of God. For it is equally true both according to Religion, and according to the Law of Nature, that Man is born unto Labour, and that it is for Labour [a] that this Life is given unto him. Since therefore it is true, that an Application to some Function is the essential duty of every Condition of Life, Judges who are in an Employment of a very great consequence, are bound to give such an Application as a Profession of that importance does deserve; and in order to be fully convinced of the necessity of this Application, it behoveth us only to make reflection on what the Holy Scripture teacheth us of the grandeur and of the importance of the Ministry of Judges, of the exactness and diligence with which they ought to discharge their Functions, and of the account which they must give of all the faults which they commit in the exercise of their Functions, as also of all those faults into which they fall by reason of their not having acquired by their application the Knowledge that is necessary for their acquitting themselves worthily of their Ministry.

[a] Man is born to trouble, as the sparks fly upwards. *Job* v. 7.

One single passage in the Holy Scriptures informs us of all these Truths, which are scattered up and down in all the other places which teach us what are the duties of Judges; it is an instruction which the Holy Ghost gives by the mouth of a holy King to all the Judges of the Kingdom of *Juda:* Take heed of the holiness and of the grandeur of the Ministry which you exercise; for it is not the Judgment of Man that you are to render, but it is the Judgment of God [b]; remember that you are to give an account of all that you shall have judged, and that your faults will light upon your own heads, and bring you your selves into Judgment; frame therefore all your Judgments in the presence and in the fear of the Lord, for whom you judge, and who will himself pass judgment on all the Sentences which you shall give; and therefore in order to prevent his enquiry and his just severity, be careful to judge with so great exactness, diligence, and application, that your Judgments may be free from all iniquity, because there is no iniquity in God, in whose stead you are, and that they may be full of the light of Equity and of Justice as God's Judgments are; because it is the Judgments of God that you ought to render. Every body sees that this is the true sense and meaning of that instruction, reduced into a few words according to the admirable force of the divine and inimitable Eloquence of the Holy Scripture, which by teaching us that the people were to seek the Law at the mouth of the Priest [c], informs us at the same time, that the people ought to seek for the judgment of God at the mouth of the Judge: This is what *Moses* taught, when, as he was judging the smallest differences of the people, he said that the people came to him to ask of him the Judgments of God [d]; it was for this reason that *David* asked of God for himself and for *Solomon* his Judgment and his Justice, to enable them to judge his people, and *Solomon* asked of him Wisdom; because he knew that he could not render the Judgment of God without that Wisdom, and that it is Wisdom which is the only Principle of Justice and of the knowledge of the Laws, and of Equity, as he has observed in the same place; and that without it, the most able and learned Judges cannot avoid falling into error, and going astray out of the paths of Justice; and seeing the said Wisdom is not given to all persons in the same measure and fullness, the only way that is common and necessary to all Judges, for acquiring the said Wisdom according to their wants and the extent of their Functions, is to apply themselves to the search of it in the manner and degree that is proportionable to their wants.

[b] And he set judges in the land, throughout all the fenced cities in *Judah*, city by city. And said to the judges, Take heed what ye do: for ye judge not for man, but for the Lord, who is with you

you in the judgment. Wherefore now let the fear of the Lord be upon you, take heed and do it: for there is no iniquity with the Lord our God, nor respect of persons, nor taking of gifts. 2 *Chron.* xix. 5, 6.

[c] The law of truth was in his mouth, and iniquity was not found in his lips: he walked with me in peace and equity, and did turn many away from iniquity. For the priests lips should keep knowledge, and they should seek the law at his mouth. *Malach.* ii. 6, 7.

[d] The people come unto me to enquire of God. When they have a matter they come unto me, and I judge between one and another, and I do make them know the statutes of God and his Laws. *Exod.* xviii. 15, 16.

It is necessary therefore that Judges should labour, and that with diligence and care, to understand their Profession well; and their Application to this labour consists in the actual exercise of all their Functions, which are different according to the Offices; some ought to apply themselves to the punishing of Crimes and Offences, others to the judging of Law-Suits, and some to both these Functions together; but they are all of them equally bound to apply themselves to all their respective Functions, and to attend them with that diligence and application which this divine Imployment requires; and it is of importance to shew what is the motive which ought to induce Judges to give this application to their Functions, and what are the causes which divert them from it.

In order to undertake any Work, it is necessary to love it, because the heart, which is the principle of all our actions, cannot act but for what it loves; as has been already observed in the Preamble of the foregoing Section; and in order to have a love for the Work, it is necessary that there should be some charm to attract and engage us to it; and because we ought always to be in a disposition to apply our selves on all occasions to the Work which Justice demands of us, it is necessary that the charm which allures us to it, should be a perpetual charm which lasts always, and which draws us on all occasions; and there can be no other charm of this nature besides Justice, she is immortal, as the wise man saith [e]; and it is she who presents her self on all occasions where the duty of Judges calls upon them, and it is likewise Justice which is the sole and natural end that God has prescribed to the labour and work of Judges. Those who love Justice, and who propose to themselves no other end besides it, are always in a readiness to apply themselves to render Justice, because this charm never fails to engage them; but on the contrary those who act upon other views, are always in a disposition, or in hazard, to deviate from Justice, and to neglect the application which they owe to the Functions of their Ministry.

[e] *Wisd. of Sol.* i. 15.

The love of ease, which makes people idle, hinders some from giving this application; others neglect it because of the allurement of pleasure which carries their thoughts to other objects; many grow weary of it because they see no profit attend it, which is the chief thing that allures them; and when Justice alone is on the side of the Widow and the Orphan, they are abandoned and left under oppression. The greater part apply themselves to the Functions of Justice; but with other views than that of promoting Justice; there are some who apply themselves with vigour to the punishing of Crimes, when they meet with a convenient opportunity to revenge themselves, or find some other particular advantage therein, but they sit still when the business is barely to render Justice; some exercise their Authority that they may have a free scope for their ambition, and they shamefully abandon the most essential duties, if Justice is opposite to their own proper interests; it is upon these and other the like motives that many Judges neglect the attendance and application which they owe to their Offices.

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6. *Other duties of Officers of Justice.*
7. *One Officer may discharge the Functions of another in case of absence.*

I.

1. Officers of Justice ought to join to capacity and integrity,

Capacity and Integrity in Officers of Justice would be altogether useless, if they did not apply themselves to the exercise of their Functions; for if it is an indispensible duty incumbent on them

application to their Functions.

them to discharge their Functions according to the Rules prescribed to them by the Laws of God and Man, most certainly it is a duty required of them, and that in the first place too, to exercise their Functions, which implies a diligent and faithful application to their Functions, and an obligation to perform every one of them.

II.

2. They ought to reside in the place where their Functions are to be exercised.

The first Rule of this Application which Officers of Justice owe to their Offices, is that which obliges them to residence in the place where their Functions are to be exercised; and as there are some Courts of Justice in *France*, where the Officers do the duty by turns, for the space of six months at a time, so the Officers appointed for each six months ought to be personally resident during that time.

III.

3. They ought not to absent themselves except when there is just cause.

Residence consists in a continual abode in the place where it is due; so that the Officer give diligent attendance there, and do not absent himself except for some just cause, of which he himself is to judge, and which he ought to weigh in the balance of the account which God will require at his hands of the discharge of his Office.

IV.

4. Residence is one of the principal duties of those who have the direction of the Proceedings in Causes.

This duty of Residence is more especially incumbent on those whose business it is to regulate the proceedings in Causes, and this duty being strongly enough recommended to them by their interest not to lose the perquisites which may accrue to them by the said attendance, it is but seldom that they fail in that duty; but they who are obliged to be present only at the time of giving Sentence in Causes, not finding the same advantage therein, have no other motive that obliges them to a constant attendance, besides the indispensible engagement they are under to be present, altho' they reap no manner of profit or other advantage thereby; so that it is in order to acquit themselves of this obligation that they are induced to be punctual in their Residence.

V.

5. They ought to join to Residence, a diligent attendance on their Functions.

Seeing Residence is necessary only to facilitate a diligent attendance on the several Functions wherein the presence of the Officer is necessary, the duty of Application obliges him to join to his Residence a diligent attendance on every one of his Functions; and even those Judges who are not to give Sentence singly by themselves, such as the Judges of the Courts of Justice which consist of several Members, and who may therefore fancy that their absence will be no hindrance why Justice may not be very well rendred by the other Judges, are not for all that dispensed with from being present at the Report and final Decision of Causes; for this duty is common to them all, and every one of them ought to fear lest his absence should be prejudicial to a good Cause; for that every one ought to contribute with his skill and knowledge to the rendring of Justice impartially, and ought not to excuse himself from this duty by relying on the integrity and capacity of the other Judges; for, without entertaining any bad thoughts of them, he may be allowed to fear lest Justice and Truth should not be sufficiently defended, seeing very often the ablest and the clearest sighted persons may be mistaken, either in the facts, or in the reasoning, and that the views and notions which other less skilful persons have of the matter, do sometimes bring them over to sentiments which before they did not approve of: Thus, every Judge ought to give a diligent attendance to his Function, for the discharge of which it is to be presumed that he is capable; for if he wanted capacity, it would be his duty to betake himself to some other Profession rather than that of a Judge.

VI.

6. Other duties of Officers of Justice.

Besides the Residence and diligent Attendance which Judges are obliged to on account of their Functions, they are bound to apply themselves with great exactness to the performance of every one of them in particular, so as to discharge them in the manner that their duty requires of them: which consists in general in a right understanding of the facts of which they are to judge, in weighing the circumstances, in balancing the reasons on one side and on the other, and in giving that attention and patience in the discharge of their Functions which the duty of rendring Justice demands of them. This vigilance, this attention, and this patience, are more especially necessary to those who are the Reporters of Causes; for they are obliged to look into all the Writings and Papers exhibited in the Cause, and

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to inform themselves exactly of the rights of the parties; and in fine they ought to be careful never to do any thing that may be of prejudice either to the interest of particular persons, or to that of the Publick [a].

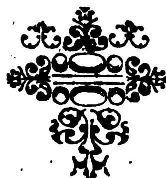
[*For explaining what is mentioned in this Article of Reporters of Causes, it is necessary to observe, that in the Courts of Justice in* France, *which consist of many Judges, it is the practice, for the greater dispatch of Justice, for the Judges to appoint one of their number to examine the proofs that have been made on both sides, in a Cause depending before them, and to report the merits thereof to the whole Bench, that they may give a Definitive Sentence thereon. And the Judge who is so appointed, is called the Reporter of the said Cause. This practice is in use in the supreme Court of Justice in* Scotland, *which consists of fifteen Judges, and which in its first Institution was modelled much after the manner of the Courts of Justice in* France. *So that the Causes depending before the Court of Session in* Scotland, *are distributed among the Lords of Session, who have their several Causes to report to the whole Bench.* *Stairs* Inst. of the Law of *Scotland*, lib. 4. tit. 2.

[a] Omnis cujuscumque majoris vel minoris administrationis universæ nostræ reipublicæ judices monemus, ut nullum rescriptum, nullam pragmaticam sanctionem, nullam sacram adnotationem, quæ generali juri vel utilitati publicæ adversa esse videatur, in disceptationem cujuslibet litigii patiantur proferre: sed generales sacras constitutiones modis omnibus non dubitent observandas, *l. ult. ff. si contr. jus.*

VII.

7. One Officer may discharge the Functions of another, in case of absence.

Since it often happens that Judges cannot attend punctually on all their Functions, and that they may be hindered from it by a necessary absence on some other occasion, and by other lawful impediments, the Laws have therefore taken care to have their absence supplied; for there is no Officer whose Functions another person may not exercise in his absence, according to the Order and Regulations that are prescribed in such cases: and as for the causes which may serve as a lawful excuse, either for Non-Residence, or for the non-performance of some Functions, the Reader may consult the Rule explained in the sixth Article of the third Section of the foregoing Title.



TITLE V.

Of the FUNCTIONS and DUTIES of some other Officers of Justice, besides JUDGES, whose Ministry is a part of the Administration of Justice.

THE Administration of Justice implies the use of many sorts of Functions besides those of Judges; for what they decree would be to no purpose, if there were not Ministers to put their decrees in execution: and in order to have them executed, it is necessary that they should be taken down in writing, and that they should be deposited in the hands of other persons than the Judges themselves. Thus as to the Voluntary Jurisdiction, whatever is ordained for regulating the Administration of Justice, the Policy, and other Matters, requires the use of these two sorts of Functions; and they are also necessary for what relates to the Contentious Jurisdiction, and to Decrees and Sentences between parties. It is for this Function of taking down in writing, and of keeping the Orders, the Decrees and Sentences, and other Acts of Courts of Judicature, which are to be preserved, that Registers have been established; and in order to put them in execution, it was necessary to have Apparitors and Bailiffs: And seeing both in the voluntary and contentious Jurisdiction, there was occasion for publick Prisons for the keeping of Prisoners, whether they were arrested for Debt, or for Crimes, or Offences; it was likewise necessary that there should be persons charged with the custody of the Prisoners; and this is the Function of those Officers called Jailers. But as for the contentious Jurisdiction, seeing Justice is rendered only to those who desire it, and that it is for the dignity thereof that the demands, the defences, and the other proceedings, which are to be made in the presence

presence of the Judges, be made with that order and respect that is due to their character, and which would be often violated by the parties themselves, who besides are generally ignorant of the method of Judicial Proceedings, Proctors have been established, who represent the Parties in Judgment, make prayers and requests in their names, carry on the proceedings in the Cause, and perform the other Functions belonging to their Offices.

Besides these Functions which are necessary for the Administration of Justice in all sorts of Affairs, small or great, without distinction, there are other Functions, whereby the Rights of the Parties are to be deduced, and supported by Principles of Law, whether it be by Argument at the Bar, or Pleadings in writing, which Functions have required the Ministry of persons capable thereof, and are exercised by Advocates. But there is this difference between this Ministry and all the others of the several Functions of the Administration of Justice, that whereas for the discharge of the other Functions particular Officers have been established, that of Advocates has been left free for all persons who have obtained the Degrees of Batchelor and Licentiate in the Civil and Canon Law, and who have taken the Oath of an Advocate in a Sovereign Court of Justice; for, as shall be hereafter explained in the sixth Title, the Functions of Advocates are of such a nature, that their Ministry could not be erected into an Office.

It is in consideration of this peculiar quality of the Function of Advocates, which does not require that their Profession should be erected into an Office, as it is necessary for all the other Functions which are required in the Administration of Justice, that we have not inserted in the foregoing Titles, and that we shall not put down in this Title, that which relates to the Ministry and Functions of Advocates, and that we have reserved them for a Title apart, which is the Title that immdiately follows.

Besides these sorts of Functions of Registers, of Proctors, of Apparitors, of Bailiffs, and of Jail-keepers, which are necessary in the Administration of Justice, there is another sort of Functions which belongs to the Order of this Administration, but in a manner altogether different; and that is the Functions of Publick Notaries, who are established for two principal uses which the Acts that are passed before them have; one is, that their Signature serves as a proof of the truth of the Acts which they sign; and the other, that their Presence and their Signature gives to those to whom others oblige themselves by Acts signed by them, a Right of Mortgage; which they would not have by a private Act or Writing, signed only by the Party: and this makes a Function of Voluntary Jurisdiction which is annexed to their Offices, as the same has been explained in the twenty third Article of the first Section of the first Title.

Seeing these Functions of Publick Notaries are a matter of too narrow an extent, to require a distinct Title to themselves; and that, as we have just now observed, they are a part of the Order of the Administration of Justice; we shall explain them under this Title, together with the Functions of Registers, and other persons, whose Ministry makes a part of this Administration. So that this Title shall be divided into five Sections: the first, shall be of Registers; the second, of Proctors; the third of Apparitors, and Bailiffs; the fourth, of Jailers; and the fifth, of Publick Notaries.

SECT. I.

Of the Functions and Duties of Registers.

Of all the Functions which belong to the Order of the Administration of Justice, there are none which have so great a connexion with those of Judges, as the Functions of Registers; for it is their business to write down what is dictated or pronounced by the Judges, and to be Depositaries of the Decrees, Sentences, and other Acts, which are to be preserved, and to give Exemplifications of them to the parties; and it is their Signature that is the proof of the truth of what they sign. So that next to the Functions of Judges, those of Registers are the first in the Order of the Administration of Justice.

We shall not here give the definition of the Office of a Register, that we may avoid repeating what has been said thereof

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thereof in the eighteenth Article of the first Section of the first Title; neither shall we attempt to explain all the several Functions of Registers which are different according to the different Offices, and which in *France* are distributed among several Offices, and among several Registers, such as those for Presentations, for the Distribution of Causes, those where the Minutes of the Court are deposited, those which have the custody of the Decrees, Sentences, and other Acts of Court, the Registers of Deeds, and others; which detail is sufficiently known and regulated by the Ordinances, and does not come within the design of this Book: and we shall confine our selves in this Section, to the general Rules of their Functions, and the Duties which are consequences thereof.

The CONTENTS.

1. *Definition of Registers.*
2. *The chief duty of Registers.*
3. *They are obliged to secrecy.*
4. *It is their duty to take care of the things deposited in their hands.*
5. *Other duties of Registers.*

I.

1. Definition of Registers.

REgisters are Officers appointed to take down in writing, by the direction of the Judges, the Decrees, Sentences, Judgments, and the other Acts which are sped Judicially, to remain Depositaries of that which ought to be preserved, and to give out Exemplifications thereof to such as have an interest therein[a].

[a] *See the eighteenth Article of the first Section of the first Title.*

II.

2. The chief duty of Registers.

Seeing the principal Function of Registers is to set down in writing that which is pronounced, or dictated by the Judges, their principal duty is to write the same exactly and faithfully: for altho' what they write ought to be revised by the Judges, who ought to sign it, yet for want of due exactness, and much more for want of fidelity in the writer, some words may be easily altered, expressions may be added or left out, and by errors of this kind, or surprizes, occasion may be given to injustices, which may escape being taken notice of by such Judges, as happen to be either not very clear sighted, or not very attentive.

III.

3. They are obliged to secrecy.

The Registers having often knowledge of what is transacted privately in the Courts of Justice, before the final Resolutions be taken; and being the Depositaries of what is decreed, and which ought not to be made known to the parties till the due time, they are obliged to the duty of secrecy, not only as to what passes before Judgment, and which requires secrecy, but also as to what is decreed, until the time comes that it is to be made known to the parties.

IV.

4. It is their duty to take care of the things deposited in their hands.

The Function of Registers, which makes them Depositaries of the Decrees, Sentences, and other Acts, and of the Register-Books which are to remain in the Office, makes it a duty incumbent on them to be careful in preserving those Records whilst they continue in their hands, and till they are removed from their Office into the publick Archives, where they are to remain for ever.

V.

5. Other duties of Registers.

The other duties of Registers are reduced in general to a capacity for their Functions, to probity in the discharge of them, integrity and fidelity which are required in every one of them, to be guilty of no manner of Extortion, and to be contented with the common and ordinary Fees.

SECT. II.

Of the Functions and Duties of Proctors.

WE give the general name of Procurators or Attornies, to those who manage some affairs for other persons, having a power from them so to do; and the reciprocal Engagements between the said Procurators and those who constitute them, that is to say, who nominate them, and commit their Affairs to them, have been explained in the Title of Proxies in the Civil Law in its Natural Order. Thus it is not of those

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those Procurators in general that we treat here, but of those who have this quality under the Title of an Office, that they may exercise that Function in Law-Suits for the Parties who impower them. For it is the usage with us, that whereas it was naturally lawful for the Parties themselves to explain to the Judges their Rights and their Pretensions, or to chuse, in their absence, Proctors who should perform that office for them, and that this was also the usage in the *Roman* Law; one is obliged in *France* to have a Proctor in all sorts of Causes, and they can chuse only out of the number of those who have this quality under the Title of an Office; and this usage hath had its Origine from two causes, which rendred it necessary, as has been observed in the Preamble of this Book: For on one part, the liberty which the Parties themselves had to explain their Rights before the Judges, was attended with passion, confusion, noise, and with an irreverent behaviour, which violated the respect due to Justice, and disturbed the Order thereof: And on the other part, the proceedings necessary for the carrying on of Causes to a final Sentence have made it necessary to make use of Proctors who understand them, and who may be obliged to observe the Order of Judicial Proceedings, which the greatest part of Parties are ignorant of, and which cannot be observed without the assistance of such persons as are daily conversant in those matters. Thus for example, it is necessary for carrying on a Law-suit, that he who is summoned should appear to the Citation, and that he and his adverse Party should explain to one another their mutual demands and pretensions, and communicate to each other their Proofs, their Writings, and their Exhibits; which makes it necessary that Proctors should be resident in the place where the Law-suit is to be carried on, for otherwise it would be necessary that for every Assignation, or Act sped in the Cause, the Parties who may chance to live in places remote from the seat of Justice, should be put to great charges, and suffer great delays, in summoning and warning each other to give their presence at the speeding of the several Acts; and this would likewise be attended with many other inconveniencies, which it is not necessary to mention here.

One may be able to judge by this general Idea of the Ministry of Proctors, what their Functions are, and at the same time what their Duties likewise are, seeing they ought to be proportioned to the use for which they are established, as will appear by the Rules which follow.

The CONTENTS.

1. *Definition of Proctors.*
2. *The use and primary duty of Proctors.*
3. *They ought to abstain from all unfair practices, which the interest of their Clients may stand in need of.*
4. *They ought to exercise their Ministry with moderation, and to abstain from all manner of surprize.*
5. *They ought not to protract the proceedings, the length of which often proves the ruine of all the parties.*
6. *The Office of Proctors implies Functions, which in the Order of the Administration of Justice are to be performed even in unjust Causes.*
7. *Sequel of the foregoing Article.*
8. *Proctors are not allowed to draw up the Writings which serve to establish and found the Right of their Clients.*
9. *Other duties of Proctors.*

I.

1. Definition of Proctors.

PRoctors are Officers established to represent in Judgment the Parties who impower them to appear for them, to explain their Rights, to manage and instruct their Cause, and to demand Judgment[a].

[a] *See the nineteenth Article of the first Section of the first Title.*

II.

2. The use and primary duty of Proctors.

Seeing the use of Proctors has been established in order to remove from Tribunals the liberty which parties had to vent their passions, their anger, and to commit irreverences and other abuses, which are consequences of the want of the respect that is due to Judges, the primary Function of Proctors, and their chief duty is, to look upon themselves as having espoused the interest of their Clients, in order to defend them so far as Justice may demand, and as if they themselves were the Parties concerned, but free from their passions, and capable of demanding Justice with that respect and decency that is due to the Tribunal thereof[b].

b See

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[b] *See what has been said touching this use of Proctors in the Preamble of this Section.*

III.

3. They ought to abstain from all unfair practices which the interest of their Clients may stand in need of.

It follows from this first duty of Proctors, that seeing they are bound to defend their Clients only in what is just, and without passion, they ought to abstain from all unfair practices which the interest of their Clients may perhaps stand in need of; and if their Clients should require such assistance from them, the quality of being their Proctor would be so far from obliging them to render them such services, that it obliges them on the contrary to gainsay and oppose such practices, and rather to abandon the defence of their Clients than to be aiding to them in any unlawful courses, which they ought to hinder by all ways that Justice and Prudence may require [c].

[c] *See the Ordinances of* Charles VII. *in* 1446. *Art.* 34. *and of* Francis I. *in* 1535. *Art.* 10. *and others relating to this matter.*

IV.

4. They ought to exercise their Ministry with moderation, and to abstain from all manner of surprize.

This duty of Proctors to espouse the interest of their Clients without their passions, obliges them to exercise their Ministry with that moderation, that mildness, and that civility, which is reciprocally due among persons whose Profession is to demand only Justice, without any private Interest; and this duty implies with much more reason that of an upright fidelity in abstaining from all manner of surprize [d].

[d] *See the Ordinance of* Charles VII. *in* 1446. *Art.* 18. *quoted on the last Article of this Section. Altho' this Ordinance hath not a direct relation to this Rule, yet it may be applied to it.*

V.

5. They ought not to protract the proceedings, the length of which often proves the ruine of all the parties.

If Proctors, in the exercise of their Office, are obliged to abstain totally from the passions and injustices of their Clients, much more are they obliged not to substitute their own passions in the room of those of their Clients, and not to deprave the integrity of their Ministry, by mixing with it views of their own proper interest, which it is easy for them to favour in the exercise of their Functions, whether it be by protracting the Law-suits, that they may reap the advantage of a superfluous number of Proceedings and Writings, or by using other unfair means which we see practised by some, and which are of greater or lesser consequence, and more or less criminal, according to the nature of the Affairs, the variety of Incidents which may happen to be joined with them, and the occasions given thereto by the confusion which follows from that multiplicity of proceedings, such as in Seizures of Goods, Decrees and Orders touching the Sale of them, and the stating the claims of Creditors, and in other affairs of the like nature; where the injustices of multiplying and protracting the proceedings, and other acts of greater oppression, do often end in nothing less than the ruin of many Families, both on the part of the Debtors, and on that of the Creditors [e].

[e] Nemo ex industria protrahat judicium. *l.* 6. §. 4. *Cod. de postul.*

It is in order to prevent the multitude of proceedings, that they are expresly prohibited to make any new Writings, or to add any thing to the Process after the Cause is determined.

We forbid Proctors and all others to make any new Writings, or to augment the Rolls therewith after the cause has been adjudged, under the penalty of four times the value, to be paid by him who transgresses the said Order; which Penalty it shall not be in the power of our Judges to mitigate, and the Offenders shall moreover be suspended from the execution of their Offices, &c. *Ordinance of* Lewis XIV. *in* 1667. *Art.* 11. *of Costs.*

See the tenth Article of the same Title.

VI.

6. The office of Proctors implies Functions, which in the Order of the Administration of Justice are to be performed even in unjust Causes.

Altho' it be the duty of Proctors not to espouse the injustice of their Clients, and that it would seem for this reason that a Proctor ought not, no more than an Advocate, to engage in the defence of an unjust Cause, yet nevertheless their Office implies Functions which in the Order of the Administration of Justice are necessary to be performed even in unjust Causes. Thus for instance, it is a Rule in the Order of Judicial Proceedings, that those who are cited to appear ought to give an appearance, and to constitute a Proctor with whom the Plaintiff may carry on his Cause, and bring it to Judgment; and if he who is cited does not appear, a default is decreed against him, whereof he must pay the costs: which obliges the Proctor who is imployed by a Defendant against a demand that is highly just to present himself in Judgment, that is, to appear for his Client, that he may prevent the taking of a default against him; and how unjust soever the Cause of this Defendant may be, yet the Proctor, who should know it to be such, would nevertheless be obliged to appear [f];

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pear [f]; for his appearance may perhaps produce a very good effect, by putting an end to the Law-Suit.

[f] *See the Ordinance of, 67, Title 4. of Presentations.*

VII.

7. *Sequel of the foregoing Article.*

Besides the Functions of the nature of those which have been explained in the foregoing Article, Proctors may likewise exercise the Functions of their Office in behalf of unjust Causes in another sense, and that even in cases where it would not be justifiable for Advocates to exercise theirs. For whereas the Function of Advocates being to give counsel to the Parties, it obliges them to discern between pretensions that are just, and those that are not, and not to undertake the defence of unjust Causes, Proctors may be ignorant of the Rights of the Parties, and are not bound to examine into the Questions of Law. Thus they are not bound to abstain from serving their Clients, except in cases of a crying injustice, or where the injustice is known to them; for in these cases they would make themselves accomplices in an Injustice, by praying or soliciting for their Clients, what they are persuaded their Clients themselves ought not in conscience to demand, and what it would be unjust to grant them [g].

[g] *See the preceding Article.*

VIII.

8. *Proctors are not allowed to draw up the Writings which serve to establish and found the Right of their Clients.*

Seeing the Functions of Proctors are limited to what relates to the Proceedings or Assignations in Court, and the instruction of the Cause, and that it is no part of their Ministry to write, or to argue at the Bar for their Clients, except in so far as relates to their Functions; they are prohibited by the Ordinances of *France*, to draw up Writings which may serve to establish and found the Rights of their Clients; and these sorts of Writings ought to be drawn up and signed by Advocates [h].

[h] *See the Ordinance of* Francis I. *of the twelfth of* February 1519. *Art.* 19.

Altho' it is not necessary that Proctors should have a capacity to establish and found the Rights of their Clients, yet they ought to have a capacity for their Office that is publickly approved of.

No person shall be admitted a Proctor in our Court, until he has been duly examined by our said Court, and found capable. *Ordinance of* Charles *the Seventh in* 1446, *Art.* 47.

IX.

9. *Other duties of Proctors.*

The other duties of Proctors consist in acquiring a thorough Knowledge of the Rules of their Profession, in applying themselves to the Affairs committed to their charge, with such a vigilance, diligence, and care, as that their Clients may not be any way surprized, and that their Causes be carried on without any delay; and likewise on their part that they observe with respect to the adverse Party every thing which the Order of Justice and a fair upright dealing may require. They are to content themselves with the ordinary Fees and Perquisites of their Office, without exacting any more than what is settled by the Rules and Orders of the Court; they are to serve the poor for nothing, as they are required to do by Law; they are to serve those who by reason of their poverty, or because of the power of their adversaries, are forced to apply to the Judge to have a Proctor assigned them: they are obliged to abstain from all manner of Extortion, and to beware especially of the crime of compounding with their Clients for what may be made of the Causes with which they are charged, or for a share of it, and of treating with them in any manner, which may directly or indirectly have the like effect [i].

[i] Præterea nullum cum litigatore contractum quem in propriam recipit fidem ineat advocatus, nullam conferat pactionem. *l.* 6. §. 2. *C. de postul.*

See the fifth Article of the second Section of the following Title.

See in relation to the capacity required in those persons who exercise these Functions, the Ordinance of Charles *the Seventh in* 1446. *Art.* 47, *quoted on the foregoing Article. See that of* Lewis XII. *in* 1507, *Art.* 118, *and of* Henry II. *in* 1551. *Art.* 9.

See the Ordinance of Charles V. *in* 1364, *Art.* 7.

See the Ordinance of the 30th *of* August 1536, *Chap.* 1. *Art.* 38.

SECT. III.

Of the Functions and Duties of Apparitors and Bailiffs.

ALtho' Bailiffs have not altogether the same Functions as Apparitors or Tip-staves, and that for instance, the Intimations touching the proceedings in a Cause are made to the respective Proctors by the Apparitors, and not by Bailiffs; and that it is the Apparitors who

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who call the Causes at the time of Hearing; yet seeing Apparitors do likewise exercise several Functions in common with Bailiffs, as for example, Executions, Orders of Court, Seizures of Goods, Imprisonments, and others; it was proper to comprize under one and the same Section the Rules which are common to these two sorts of Officers, to avoid the making two Sections of Rules that are altogether the same: which will be of no manner of prejudice to the distinctions which are made between them on account of their Name, their Rank, and of some other Functions which may distinguish them, such as those of Apparitors for the services which they do about the persons of the Judges, whether it be in the Court where they administer Justice, or on occasions of Ceremony, or otherwise.

[*We must observe here, that the word* Apparitor, *in its proper Acceptation in* England, *is meant only of such Officers as attend the Spiritual Courts, to serve the Processes thereof, and to perform the other inferior Ministerial Acts which are requisite for the due Administration of Justice therein. The Officers who attend the Execution of Justice in the Temporal Courts in* England, *are distinguished by the names of* Bailiffs, Sergeants, *or* Tip-staves.]

The CONTENTS.

1. *Definition of these two sorts of Officers.*
2. *Two principal Functions of Apparitors and Bailiffs; Intimations and Executions.*
3. *Intimations.*
4. *Executions.*
5. *Other duties of Apparitors and Bailiffs.*

I.

1. Definition of these two sorts of Officers.

APparitors are Officers appointed for executing the Orders of the Courts of Justice; which implies the Functions of making the necessary intimations, either for carrying on the Causes, in order to obtain Sentence, or for putting the Sentence in execution, and compelling the several persons that may be any way concerned, by the usual ways, to a compliance with whatsoever the Order of the Administration of Justice may render necessary; and Bailiffs are also Officers, who under another Title exercise the same Functions as Apparitors[a].

[a] *See the twentieth and twenty first Articles of the first Section of the first Title.*

II.

2. Two principal Functions of Apparitors and Bailiffs; Intimations and Executions.

These Functions of Apparitors and Bailiffs may be reduced to two principal Functions; one, of Intimations, or Citations; and the other, of Executions and Constraints; and each of these sorts of Functions obliges them to the duties which are suited to them, and which shall be explained in the Rules which follow[b].

[b] *See the following Articles.*

III.

3. Intimations.

As for Intimations, or Citations, the duty of this Function consists in giving to the persons to whom the Intimations are made, Copies of the Orders or Acts of Court which they intimate to them; for it is in order to let them know the tenour of them that the intimation is necessary; and they ought to leave the said Copies either with the persons themselves, or in their absence with some of their servants, and to return a Certificate of the day on which they served the Process, and to mention therein the very hour of the Service, in such cases wherein that exactness is required[c].

[c] *The Returns, or Certificates, made by Sergeants, in relation to any Execution, Seizure, or Arrest, shall mention the days and the time of the day, whether before or after noon, that the same have been made; and the said Sergeants shall set down at the bottom of their Returns what they took for their Fees, and sign the same, &c.* The States of Blois, Art. 173.

See touching this matter the Ordinance of Francis I. *Art.* 12.

IV.

4. Executions.

As to Constraints, Seizures, Executions, Imprisonments, and other the like Functions, the duties thereof consist in exercising them with the necessary force, but without violence, and with that moderation and humanity which the Ministry of Justice does demand[d], in seizing only the Moveables which are liable to be attached, leaving to the Debtors such things as the Law does not allow to be taken from them by Execution, in making an exact Inventary of the Goods which they seize, and in not charging the persons into whose hands the things are deposited with more than what is really delivered to them; and when there is any resistance made to them in the execution of their Office, either by the Parties themselves,

 or

or other persons, they ought to make a faithful Report thereof without adding any thing to the truth.

[d] *As to the moderation and humanity which those persons ought to have who execute these sorts of Offices, see the Edict of* Amboise, *art. 6. which strictly prohibits Sergeants to use any arrogant or insolent language in the Executions wherein they happen to be imployed, upon pain of Corporal Punishment to those who disobey.*

V.

5. Other duties of Apparitors, and Bailiffs.

All the other duties of Apparitors and Bailiffs are reduced to their being well instructed in the duties of their Functions, and the executing them with that uprightness and fidelity which the Order of Justice requires, not to be guilty of any Extortion, and to rest satisfied with what may be lawfully due to them according to the Usages and Regulations of the several Courts, and in doubtful cases, with what the Judges shall order them for their labour and pains [e].

[e] *We enjoin our Sovereign Courts of Justice, as well as all other inferior Courts, to regulate the Fees of Registers and Sergeants, and other Ministers of Justice.* States of Blois, Art. 159, 160.

This Order does likewise carry, that if they take greater Fees than those which have been regulated by the Judges, they shall be punished with death.

As to all the other duties of Apparitors or Sergeants, see the Ordinances of Philip IV. *in* 1302. *art.* 18. *art.* 27. *of* Francis I. *in* 1535. *chap.* 6. *art.* 10. *and in* 1536. *chap* 20. *art.* 3. *and that of* Charles VIII. *in* 1490. *art.* 3.

SECT. IV.

Of the Functions and Duties of Jailers.

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1. *Definition of Jailers.*
2. *They ought to be appointed by Authority of Justice.*
3. *Two different sorts of duties of Jailers.*
4. *They ought to have a watchful eye on the prisoners.*
5. *They ought to be more particularly watchful over Criminals.*
6. *Besides the care of watching the prisoners, they ought to treat them with as much humanity as it is lawful for them to shew them.*

I.

1. Definition of Jailers.

Jailers are the Keepers of the persons of Prisoners, whether they be committed for Crimes, or for other causes.

II.

2. They ought to be appointed by Authority of Justice.

The interest which the Publick hath in the safe custody of Prisoners, does not allow that there should be any other Prisons besides those in publick places, which are set apart for that use; and this charge of Prisoners is a publick Function which a bare private person cannot exercise. Thus the Keeper of the Jail ought to be nominated to this Function by the Authority of Justice; and it is an Office which the King has the disposal of [a].

[a] Jubemus nemini penitus licere per Alexandrinam splendidissimam civitatem vel Ægyptiacam diœcesim, aut in quibuslibet imperii nostri provinciis, vel in agris suis aut ubicumque domi privati carceris exercere custodiam. *l. C. de priv. carc. inhib.*

[*In* England, *the Custody of the County Jails is incident to the Office of the Sheriff, and inseparable from it, except in some particular cases, as in the Prisons of the* King's-Bench, *and* Marshalsea *in* Surrey; *the Custody whereof is particularly excepted from the Sheriff, and reserved to the proper Officers who have the Grant thereof. And altho' the Jail it self does belong to the King, and is to be repaired at the common charge of the County, yet it belongs to the Sheriff to put in such Jaylers or Keepers as he will answer for, and from whom he ought to take good Security to indemnify him.* Stat. 14 Ed. 3. ch. 10. 19 H. 7. ch. 10.]

III.

3. Two different sorts of duties of Jailers.

This Function of Jailers implies two different sorts of duties; the one is of those which respect the Publick, and the persons who are interested in the safe custody of the Prisoners; and the other of those which relate to the Prisoners themselves; and these two sorts of duties are reduced to the following Rules.

IV.

4. They ought to have a watchful eye on the prisoners.

The duty of Jailers towards the Publick, and the persons who are interested in the safe custody of prisoners, consists in having a watchful eye over them; so that they are to be answerable for the Escapes of the Prisoners, except where they are rescued by force, which cannot be imputed to them.

V.

5. They ought to be

Besides the care of watching the Prisoners, to prevent their escape, for what

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more particularly watchful over Criminals.

what cause soever it be that they are committed to prison, the care of Prisoners accused of Crimes obliges moreover the Jailers to keep the said Criminals in Irons and Dungeons, when it is so ordered by a Court of Justice. They ought further to take care that those Offenders, and all others who are charged with Crimes, for whose Trial and Conviction it may be necessary that no person should have any access to them, be kept strictly pursuant to the Order that is given, and that nothing be delivered into their hands until it be first duly visited and examined, whether it be any thing that may serve as an Instruction to the Criminals, to help them to elude the proofs of the truth, or some instrument of death, or poison, to those of whom there may be ground to fear lest despair should move them to anticipate their Condemnation by a voluntary death.

VI.

6. Besides the care of watching the prisoners, they ought to treat them with as much humanity as it is lawful for them to shew them.

The duty of Jailers towards the prisoners, obliges them to join to the safe custody of their persons, all manner of humanity[b] that is consistent therewith, whether it be in what relates to their Lodging[c], and the Furniture thereof, their Diet, if they have the charge of it, the receiving visits from their Friends, when that may be granted them, and the other civilities and kindnesses of the like nature.

[b] In quacunque causa reo exhibito, sive accusator existat, sive eum publicæ sollicitudinis cura produxerit, statim debet quæstio fieri, ut noxius puniatur, innocens absolvatur. Quod si accusator aberit ad tempus, aut sociorum præsentia necessaria videatur: id quidem debet quàm celerrimè procurari. Interea vero reum exhibitum non per ferreas manicas & inhærentes ossibus mitti oportet, sed prolixiores catenas, si criminis qualitas etiam catenarum acerbitatem postulaverit, ut & cruciatio desit, & permaneat sub fida custodia. Nec vero sedis intimæ tenebras pati debebit inclusus, sed usurpata luce vegetari, ac sublevari: & ubi nox geminaverit custodiam, in vestibulis carcerum, & salubribus locis recipi: ac revertente iterum die, ad primum solis ortum illico ad publicum lumen educi, ne pœnis carceris perimatur: quod innocentibus miserum noxiis non satis severum esse dignoscitur. Illud etiam observabitur, ut neque his qui stratorum funguntur officio, neque ministris eorum liceat crudelitatem suam accusatoribus vendere: & innocentes intra carcerum septa letho dare, aut subtractos audientiæ longa tabe consumere, non enim existimationis tantum, sed etiam periculi metus judici imminebit, si aliquem ultra debitum tempus inedia, aut quocunque modo aliquis stratorum exhauserit, & non statim eum penes quem officium custodiæ est, atque ejus ministros capitali pœnæ subjecerit. *l. 1. C. de custod. Reor.*

[c] Quoniam unum carceris conclave permixtos secum criminosos includit: hac lege sancimus, ut etiam si pœnæ qualitas permixtione jungenda est, sexu tamen dispares diversa claustrorum habere tutamina jubeantur. *l. 3. C. eod.*

SECT. V.

Of the Functions and Duties of Publick Notaries.

THE Functions of Registers and Proctors, and those of Apparitors and Bailiffs, are exercised either for the Administration of Justice in the Supreme Courts of Justice, or elsewhere, for executing the Orders thereof, and are thereby distinguished from the Functions of Notaries, which are exercised out of the Courts of Justice, and without any necessity of their having a particular order or warrant for executing them: but their Ministry is exercised voluntarily, to engage either by Covenants, or otherwise, those who are willing to give to their Obligations, or other Acts, the publick Form which renders them authentick; which is the proof of their truth, and which gives to them a full and perfect execution, as has been already remarked at the end of the Preamble of this Title, and which shall be hereafter explained in this Section.

The CONTENTS.

1. *Definition of Notaries.*
2. *Different sorts of Functions of Notaries.*
3. *They ought not to go beyond the bounds of their Function.*
4. *They are obliged to keep carefully and diligently the Original Minutes which are deposited with them.*
5. *The consequence of the Acts which they speed obliges them to great secrecy.*
6. *Other duties of Notaries.*

I.

1. Definition of Notaries.

NOtaries are Officers established, to give to Acts which are sped in their presence the character of the publick form, and of the Authority of Justice, which makes that those Acts carry along with them the proof of their truth; for whereas private Acts which are signed only by the parties themselves, are liable to be called in question, un-

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til they be verified, and proof made that they have been signed by the persons whose names they bear; and altho' the truth of the said private Acts should be confessed or proved, yet they do not give a Right of Mortgage on the Estates of those who bind themselves; whereas the same Acts sped before Notaries, whether there be only one Notary with Witnesses, or that there be two Notaries without Witnesses, according to the different Usages of places, are Authentick, and have this effect, that their truth is proved by the Signature of the Notaries, and that they give a Right of Mortgage. Thus the Function of Notaries implies a kind of Authority, and voluntary Jurisdiction, which they have by vertue of the Title of their Offices for these two effects.

II.

2. Different sorts of Functions of Notaries.

Seeing it is necessary in an infinite number of divers Acts, that they should be Authentick, and that they should have this character of the publick Form for either of the effects mentioned in the preceding Article, the Functions of Notaries extend to all sorts of Acts, where this formality may be necessary, such as Contracts of Marriage, Testaments, Deeds of Gift, Partnerships, Sales, Exchanges, Contracts of hiring and letting to hire, Leases, Transactions, Compromises, Obligations, Proxies, or Letters of Attorney, Assignments, Delegations, Acquittances, Tenders of Money for a Payment that is refused, or for a Power of Redemption, and all other Acts. Notaries may also make Inventaries of the Goods of Successions, where the Heirs are Minors, or where the Heirs are desirous to enjoy the benefit of an Inventary, or in the cases of Successions that are abandoned, of the Effects belonging to Bankrupts, or others, according as they may be called to the said Functions by the Parties concerned, or may be appointed to do it by an Order of the Judge, as sometimes Registers are; for this Function is a part of the Ministry of Justice, and the Judges themselves do often exercise it.

III.

3. They ought not to go beyond the bounds of their Function.

These different Functions of Notaries, and whatever else may belong to their Office, oblige them in the first place to have a capacity for exercising them, and to know how to distinguish in the Acts, where there may be occasion for their Ministry, between those whereof the forms are sufficiently known to them, and those which are of such consequence as to demand more skill and learning than is requisite in their Profession, especially in places where Notaries are less skilful, and in affairs where the difficulties require the advice of Advocates; for altho' it is the business of the Parties themselves to take good advice, yet it is prudent for Notaries not to undertake a thing that is beyond their capacity, and at least to acquaint the Parties of the difficulties which they are not able to understand, and which it is necessary to have adjusted, as in Transactions and other Treaties.

IV.

4. They are obliged to keep carefully and diligently the original Minutes which are deposited with them.

Seeing there are many Acts past before Notaries, of which the Originals, which are called Minutes, ought to be preserved for ever, such as Contracts of Marriage, Deeds of Gift, Contracts of Sale, Testaments which Testators leave in their custody, or which after their death are deposited in the hands of a Notary, and divers other acts; it is the duty of Notaries to preserve carefully, faithfully, and in good order all those Original Minutes, and to grant Exemplifications of them to the Parties, and other persons who ought to have them, or who have a right to demand them; and they ought to take for drawing up the Acts, and for delivering out authentick Copies of them, no more than what is due by Law.

V.

5. The consequence of the Acts which they sped obliges them to great secrecy.

The consequence of keeping secret many Acts which are past before Notaries, makes it a duty incumbent on them to keep inviolably the secret, not only of what passes between the Parties before the Acts are signed, but also of the Acts themselves after they are finished; for if Notaries are bound to secrecy even in relation to Acts which in their own nature are such, that the keeping of them secret is of no great importance, seeing they owe this fidelity to the intention of the Parties, which they cannot violate without prevaricating: the want of this secrecy in Testaments, and other Acts of all kinds, would tend to disturb the peace of Families,

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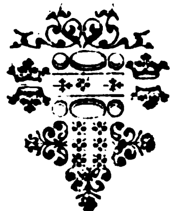
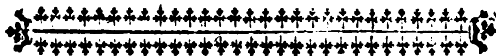
milies, and would occasion other great Inconveniencies, for which their infidelity or indiscretion would make them answerable, both towards God and towards the Publick, according to the quality of the facts and the circumstances.

VI.

6. Other duties of Notaries.

All the other duties of Notaries are reduced to the having such an entire fidelity, and taking all possible care to avoid in the discharge of their Functions every thing that may be contrary to Justice and to Truth, so that not only they may commit on their part nothing against either of them, for that would be to violate in the highest degree their first and chief duty; but that they have no hand in any fraud, in any surprize, and that they even oppose all such ways if the Parties should offer to make use of them; and that in fine they make themselves instruments of promoting Justice and Peace between the Parties, on which depends the quiet of Families, the security of their Estates, the validity of Engagements, the ties of Partnerships, and of all sorts of Commerce of the greatest moment; and that they mediate and negotiate affairs of the greatest consequence to all persons, in a manner that is suitable to Functions that are so necessary and of so great importance; and they ought to proportion the profits or recompence which they may pretend, not to this great consequence of their Ministry, but to that which Usage, the Regulations of the places, and an upright integrity altogether void of interest will allow them to take, and moderating even the Fees which they may justly claim with respect to persons who are not able to pay them according to their labour; and that in consideration that they receive frequently Gratuities from other persons far above what they could reasonably expect for their labour.





TITLE VI.

Of ADVOCATES.

Ltho' Advocates are not of the number of Officers, as all those are who exercise in the Order of the Administration of Justice the Functions which we have been speaking of hitherto; yet seeing the design of this Book is to explain the Functions and Duties, not only of the Officers, but also of the other persons who partake in the publick Functions; and that those of Advocates respect the Publick, and are a part of the Order of the Administration of Justice; they are likewise a part of the subject matter of this Book: so that it is necessary to explain here what are the Functions of Advocates, and what are the duties which are consequences thereof.

The profession of Advocates, is to give counsel in Affairs that are proposed to them, and to plead and write for the Parties who intrust them with the management of their Causes, if they find them to be just. And seeing there are few persons who do not some time or other stand in need of the assistance of those Functions, that many are obliged to have frequent recourse to them, and that often for Affairs which concern their Honour, their Estates, the state and condition of their Persons, the peace and quiet of their Families, and where their dearest and most important interests are at stake, the consequence of this Ministry of Advocates gives them in the Publick so considerable a Rank of Honour, that we know that at the time that the Commonwealth of *Rome* was in its most flourishing condition, the persons who occupied the first Dignities in the State distinguished themselves likewise by the Function of defending in Courts of Justice the Causes of those who made choice of them for their Patrons and Defenders, and whom they called their Clients; and they embraced that imployment, that they might thereby have an occasion to give proof on one hand of their Courage in Causes which engaged them to stand up in defence of Justice oppressed

oppressed by persons in Power and Authority; and on the other hand to display their Learning and their Eloquence; and by these two ways they endeavoured to acquire at the same time the universal esteem of the whole Republick, and the love and affection of all those who had been their Clients. It was because of this singular Honour annexed to a Profession which had all these advantages, that it was exercised without any fee or reward, and that some Advocates having begun to take of their Clients, either presents, or some other payments, one of the Tribunes of the people, *Cincius* by name, caused a Law to be made, which was called after his name the *Cincian* Law, by which this Commerce was prohibited; but in process of time people began to think, that such a Commerce was just and reasonable; and it certainly is so according to the general reason, that every Service deserves a Recompence, either from the Publick, if the Functions which are exercised regard the Publick, or from particular persons, if the Services which are rendred be of such a nature, as that they would be chargeable to those who render them, when the persons who receive them would reap a considerable profit thereby, without making a grateful return for them: and since it is just that the Ministers of the Gospel, who are bound to serve the Church without Covetousness, and upon other views than that of their private interest, should not be without a Subsistence [a], and that care should be taken to give it them, altho' they should be negligent in demanding it; it is likewise just that every lawful Profession should yield to him who exercises it a recompence suitable to his labour, and to the service which he renders. So that altho' the Profession of Advocates be not exercised now-a-days without a recompence, and that it hath not that dignity annexed to it which it had at *Rome* when it was there exercis'd *gratis*, and by the chief persons in the Republick; yet it has still the essential characters of Honour annexed to Functions, which in their nature imply the use of the first qualities of the Mind, and of the chief vertues of the Heart. For as to the Faculties of the Mind, it is requisite that an Advocate should have them in perfection, and that he should join to a clear Understanding and a solid Judgment the Knowledge of the Sciences of his Profession, and the Art of writing and speaking well: And as for the Heart, he ought to have it upright, and to join to the uprightness of his intention a charitable disposition to defend his Clients, and especially the Poor, the Widows, the Orphans, and other persons who groan under oppression, and he ought to be armed with a Resolution, a Courage, and a Zeal that may animate him against Injustice, and stir him up to defend Justice and Truth against all persons whatsoever without distinction. It is by the help of these qualities that an Advocate may acquire an Honour far superior to that which those persons acquired who exercised this Profession at *Rome*, who had nothing else in view besides their own glory, and whose merit was chiefly owing to their Ambition.

[a] If we have sown unto you spiritual things, is it a great thing if we shall reap your carnal things? 1 *Cor.* ix. 11.

Do ye not know, that they which minister about holy things, live of the things of the temple? and they which wait at the altar, are partakers with the altar? Even so hath the Lord ordained, that those which preach the gospel, should live of the gospel. *Ibid.* ver. 13, 14.

It is because of the nature of these Functions of Advocates, which are so frequent and so necessary to all persons, and which are of so great consequence, that it is reasonable that every one should chuse an Advocate according to his mind, who may have the endowments which he desires; and the importance of this Profession makes it necessary that there should be Advocates of a great capacity, and of a long experience, and who may be endowed with singular talents for Causes of the greatest moment, especially in the supreme Courts of Judicature, which afford frequent occasions of speaking in publick of other matters besides Law, where their Ministry is necessary, and where they ought to display the ornaments of Learning and Eloquence. Thus it was just to leave all persons at liberty to engage in a Profession of this nature, according as they find that they have talents for succeeding in it, and in which those who are inferior to others in riches and wealth, may strive to outdo them by an improvement of their natural parts; which makes it reasonable that the Profession of Advocates should be open to all persons who have the necessary qualifications for being admitted into it, and not confined

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to any particular set of Officers, who should have the sole right of exercising the Functions thereof, exclusive of others. Thus in *France*, for exercising the Functions of an Advocate, the only qualification that is required, is that of having the Degrees of Batchelor and Licentiate in the Faculties of the Canon and Civil Law in some University, and of taking an Oath in a proper Court of Justice to execute faithfully and diligently the Functions of his Profession.

It is upon these grounds of the Nature of the Ministry of Advocates, that we must judge of the detail of their Functions, and of their several Duties: which shall be the subject matter of two Sections; one relating to their Functions, and the other concerning their Duties.

SECT. I.

Of the Functions of Advocates.

The CONTENTS.

1. *The first Function of Advocates.*
2. *The second Function of Advocates, to undertake the defence of Causes, if they find them to be just.*
3. *The third Function of Advocates, to draw up the Writings.*
4. *Particular Functions of Advocates in certain Courts.*
5. *Affinity between the Functions of Advocates and Proctors.*

I.

1. The first Function of Advocates.

THE first Function of Advocates, is to give their advice concerning affairs, about which they are consulted; such as to know if he who asks counsel ought to undertake a Law-Suit; if he ought to submit to a demand that is made to him, or if he ought to defend himself against it; if he ought to appeal from a Sentence, or acquiesce in it; if he ought to present a Request or Petition against a Decree, or comply with it; how he ought to regulate the dispositions of his Testament, the conditions of a Marriage Settlement, of an Agreement; and how he ought to carry himself in other difficulties of the like nature, in affairs of all kinds [a].

[a] *The consequence and dignity of this Function was formerly so great that it was exercised by persons of the highest Rank in the Commonwealth of* Rome, *at the time that it was in its greatest splendor; and even at this day it procures a very great Honour to all those who exercise it pursuant to the Rules which shall be explained.*

II.

2. The second Function of Advocates, to undertake the defence of Causes, if they find them to be just.

The second Function of Advocates, is to undertake the defence of Causes that are put into their hands, if they find them to be just, in order to plead them in the Courts where they exercise their Profession, whether it be the merits of the Cause it self, if it is ripe for Sentence, or the Incidents which may deserve to be argued by Council [b].

[b] Qui laborantium spem, vitam, & posteros defendunt. *l.* 14. *C. de advoc. diver. judicior.*

This duty of Advocates to undertake the defence of Causes which they find to be just, implies that of abandoning them, if afterwards they should happen to discover any injustice in them.

The Ministry of Advocates implies two different Functions, which are the foundations both of the dignity of their Profession, and of the Rules of their duties; that of the Counsel or Advice which they ought to give to the Parties who consult them, and that of the defence of the Causes which they have advised to be undertaken. In giving Counsel or Advice, they perform the Function of Judges towards their Clients; and in the defence of Causes they represent their Clients before the Judges. As Judges, and the first Judges which their Clients have, they are bound to declare unto them Justice and Truth, as pronouncing to them the Judgment of God himself; and as their Defenders, they ought to represent their Clients divested of all their passions, and to defend them before the Judges as in the presence of God. So that Advocates are as it were the Mediators of Truth and Justice between the Judges and their Clients; for they are the dispensers of Truth and Justice in respect of the Clients, and they are the defenders thereof with regard to the Judges. It is this dignity of their Ministry which gives them this advantage, that as the Holy Scripture hath given the name of God to those to whom God commits this Authority, by making them Judges of other Men, so it has given the name of Advocate to him who has been made choice of to be both the Mediator towards God, and the Judge of all Men.

III.

3. The third Function of Advocates, to draw up the Writings.

The third Function of Advocates, is to draw up the Writings that are necessary for carrying on the Cause, in order to establish the pretensions of their Clients, whether it be by Arguments deduced from the Law, or proofs of Facts, arising from Deeds, or the examination of Witnesses, or otherwise, and to confute the contrary pretensions of the adverse Party by the same ways, and in general, to draw up all the several Writings, Demands, Defences, Replications,

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plications, to prepare Arguments on points of Law, and others, which may require the assistance of their Ministry[c].

[c] By the Ordinance of Charles V. in 1364, art. 3. of Charles VII. in 1446. art. 24. and 37. and by that of Charles VIII. in 1490. art. 92. they are required to draw their Writings in as concise a manner as is possible.

IV.

4. Particular Functions of Advocates in certain Courts.

There are other Functions of Advocates, which are peculiar to some Courts of Justice, and not common to all. Thus in *France*, in some Courts it is the business of an Advocate to pray that Letters Patents or Commissions for the principal Offices in the State be there registred, and to make an Harangue on that occasion. Thus in the Royal Courts, where there is not a sufficient number of Judges, to try Offenders, who are to be there tried without Appeal, by the Provosts of the Mareschals of *France*, the Ordinances direct Advocates to be taken, to supply the number of the Judges[d]. Thus in the same Courts, and other inferior Courts, the senior Advocate, in the absence of the Judges, sits upon the Bench, and performs the other Functions of a Judge, as the same is likewise directed by the Ordinances[e]. Thus in the Jurisdictions of some Seneschals, and in some Presidial Courts, the Advocates exercise the Profession of Proctors, and perform the Functions both of an Advocate and of a Proctor[f].

[d] See the Ordinances of the 20th of March, 1533. of the 5th of February, 1549. art. 2. and others.

[e] See the Ordinances of the 11th of April, 1519. art. 2. and of December, 1540. art. 19. in default of Advocates, the senior Proctor exercises the Function of Advocate in the small Jurisdictions.

[f] The Usage of the Towns where the Advocates do the business of Proctors, is approved of by the 58th Article of the Ordinance of Orleans, which permits Advocates to exercise the Function both of Advocate and Proctor.

V.

5. Affinity between the Functions of Advocates and Proctors.

All the Functions of Advocates in the Ministry of Justice, and which are exercised for the support and defence of the interests of their Clients, have this in common with the Functions of Proctors, that they represent their Clients divested of their passions. Thus it is essential to those Functions, that they be exercised only in the defence of Justice, and that they defend it only by ways that are worthy of it: which obliges Advocates to the duties which shall be explained in the following Section[d].

[d] See the following Section.

SECT. II.

Of the Duties of Advocates.

The CONTENTS.

1. *First duty of Advocates.*
2. *Advocates who are named Arbitrators, ought to have the capacity of Judges.*
3. *They ought to defend their Causes by the force of Truth and Justice, and not by falshood, transports of passion, injurious words,* &c.
4. *They are prohibited to maintain or defend unjust Causes.*
5. *They ought not to exercise their Functions out of a motive of Gain.*

I.

1. First duty of Advocates.

THE first duty of Advocates, is to render themselves capable of their Profession[a], not in such a manner as that they should be obliged before they enter upon the exercise of their Profession to be capable of all the Functions of it, of pleading all sorts of Causes, and of giving counsel and advice; but they ought not to undertake any Function, unless they have a capacity for it, nor engage themselves any farther than in proportion to the Experience which they have acquired; for there is this difference between the capacity of Advocates, and that which is necessary to Judges, that Advocates engage themselves voluntarily in their Functions, according as they are willing to embrace the occasions thereof; but Judges cannot enter upon the exercise of their Office, until they have first acquired a capacity for it; so that they ought from the very first beginning, to have a degree of capacity answerable to their Ministry.

It is for this reason that the Kings of France *have made Ordinances, which prohibit those to exercise the Function of an Advocate, who have not taken the proper Degrees, which are a proof of their capacity for the said Profession.*

See

See the Ordinance of Francis I. *in* 1535. *art.* 1.
[*In* England, *no person is admitted to practice as an Advocate in the Court of Arches, and other supreme Courts of Ecclesiastical Jurisdiction, or in the High Court of Admiralty, until they have regularly taken the Degree of Doctor of the Civil and Canon Law in one of the Universities.*]

II.

2. Advocates who are named Arbitrators, ought to have the capacity of Judges.

In the cases where Advocates are called to exercise the Functions of Judges, as has been said in the fourth Article of the preceding Section, they are obliged to the same duties of capacity, integrity, and application, as Judges are, according as has been explained in the fourth Title [b].

[b] *See the fourth Article of the preceding Section.*

III.

3. They ought to defend their Causes by the force of Truth and Justice, and not by falsities, transports of passion, injurious words, &c.

As Advocates are to represent their Clients without their passions [c], so they ought to imploy in the defence of the most just Causes, nothing else but Justice and Truth, and to abstain not only from advancing untruths in matters of fact, from all disingenuity, from all manner of surprize in their reasonings, and from all other unfair practices, but likewise from giving ill language, from transports of passion, and from every thing which may be inconsistent not only with Justice, but even with the decorum and respect that is due to the Seat of Judgment [d].

[c] *See the last Article of the foregoing Section.*

[d] Ante omnia autem universi advocati ita præbeant patrocinia jurgantibus: ut non ultra, quàm litium poscit utilitas, in licentiam conviciandi, & maledicendi temeritatem prorumpant. Agant, quod causa desiderat, temperent se ab injuria. Non si quis adeò procax fuerit, ut non ratione, sed probris putet esse certandum: opinionis suæ imminutionem patietur. Nec enim conniventia commodanda est: ut quisquam, negotio derelicto, in adversarii (sui,) contumeliam aut palam pergat, aut subdolè. Præterea nullum cum eo litigatore contractum, quem in propriam recipit fidem, ineat advocatus: nullam conferat pactionem. *l.* 6. §. 1. & 2. *C. de postul.*

The Ordinances of France *contain the same prohibitions both to Advocates and Proctors, upon pain of suspension from their Office, and of a Fine at discretion.* See the Ordinance of *Charles* VII. in *April*, 1453. art. 54.

IV.

4. They are prohibited to maintain or defend unjust Causes.

If it is not lawful for Advocates to defend Justice by any unfair means, much less is it lawful for them to maintain or defend unjust Causes; and those who transgress this duty render themselves accomplices of the injustice of their Clients, and guilty of perjury by breach of their Oath; for by their Oath they swear to observe the Ordinances, and they prohibit them to maintain or defend bad Causes; enforcing the said prohibition under the penalty of making good to the Parties all their Costs and Damages [e].

[e] *See the fifty eighth Article of the Ordinance of* Orleans.

It would be very strange if Advocates should be allowed to defend a Cause that is manifestly unjust; for it would be to erect the Tribunals of Justice into Sanctuaries for Robbers.

☞ *By the* Roman *Law this Oath was reiterated in every Cause, where the Advocates after Contestation of Suit were obliged to swear upon the Holy Gospels, that they would defend with all their force what they should judge to be true and just; and that they would abandon the defence of the Cause which they should find at first to be unjust, or of which they should afterwards discover the Injustice.*

Patroni autem causarum, qui utrique parti suum præstantes auxilium ingrediuntur, cùm lis fuerit contestata, post narrationem propositam, & contradictionem objectam, in qualicumque judicio majore, vel minore, vel apud arbitros, sive ex compromisso, sive aliter datos, vel electos, sacro-sanctis Evangeliis tactis juramentum præstent, quod omni quidem virtute suâ, omnique ope, quod verum & justum existimaverint, clientibus suis inferre procurabunt, nihil studii relinquentes, quod sibi possibile est: non autem creditâ sibi causâ cognitâ, quòd improba sit, vel penitùs desperata, & ex mendacibus allegationibus composita, ipsi scientes prudentesque malâ conscientiâ liti patrocinabuntur, sed & si certamine procedente aliquid tale sibi cognitum fuerit, à causa recedent, ab hujusmodi communione sese penitùs separantes. *l.* 14. §. 1. *C. de judic.*

This Oath was not only taken by Advocates; but all sorts of Judges, and even Arbitrators, were likewise obliged to take it.

Sancimus omnes judices, sive majores, sive minores, qui in administrationibus positi sunt, vel in hac regia civitate, vel in orbe terrarum, qui nostris gubernaculis regitur, sive eos quibus nos audientiam committimus, vel qui à majoribus judicibus dantur, vel qui ex jurisdictione sua judicandi habent facultatem,

cultatem, vel qui ex recepto, id est compromisso (quòd judicium imitatur) causas dirimendas suscipiunt, vel qui arbitrium peragunt, vel ex authoritate sententiarum & partium consensu electi sunt, & generaliter omnes omninò judices Romani juris disceptatores, non aliter litium primordium accipere, nisi priùs ante sedem judicialem sacro-sanctæ deponantur scripturæ, & hæ permaneant non solùm in principio litis, sed etiam in omnibus cognitionibus usque ad ipsum terminum, & definitivæ sententiæ recitationem; sic enim attendentes ad sacro-sanctas scripturas, & Dei præsentia consecrati, ex majore præsidio lites diriment, scituri, quòd non magis alios judicant, quam ipsi judicantur: cùm etiam ipsis magis, quàm partibus, terribile judicium est. Siquidem litigatores sub hominibus, ipsi autem Deo inspectore adhibito causas proferunt trutinandas. Et hoc quidem jusjurandum judiciale omnibus notum sit, & Romanis legibus optimum à nobis accedat incrementum, & ab omnibus judicibus observandum: &, si prætereatur, contemptoribus periculosum sit. *l.* 14. *C. de judic.*

V.

5. They ought not to exercise their Functions out of a motive of gain.

The Honour of the Profession of Advocates engages them not only to maintain and defend Justice and Truth [f], and to make use of no unfair practices in the exercise of their Ministry; but the said Honour demands moreover, that they should embrace their Functions upon other views than that of gain [g], and that not only they should abstain from all manner of prevarication [h], from purchasing the Rights of their Clients, or bargaining with them for a share of what they shall recover [i], from protracting the Law-suits [l], from giving counsel to both Parties [m], from acting as Judges in Causes wherein they have been concerned as Advocates [n], and from all other sort of misdemeanour; but they ought also to abstain from all manner of covetousness, and from the sordidness of being too difficult to be pleased in their Fees: but they ought to rest satisfied with a moderate recompence according to their labour, and in proportion to the nature of the Affairs, the condition of the Clients, and their circumstances [o], abstaining in their Writings from all things that are useless and superfluous [p]; and they ought to serve the poor *gratis*, as they are enjoined to do by the Ordinances [q], which oblige the Judges to assign Council to those persons who by reason of their poverty, or the credit and interest of their Adversaries, would be able to find none [r]; and it is on such occasions as these, in the Causes of poor and mean persons, of Widows, of Orphans, and of those who suffer any oppression by the power and authority of their adversaries, that Advocates ought to signalize themselves in the exercise of their Functions by a generous defence of Truth and Justice against persons of the greatest power and interest [f].

[f] Juramentum præstent, quod omni quidem virtute suâ, omnique ope, quod verum & justum existimaverint, clientibus suis inferre procurabunt. *l.* 14. §. 1. *C. de judic.*

[g] Apud urbem autem Romanam etiam honoratis qui hoc officium putaverint eligendum, eo usque liceat orare, quousque maluerint, videlicet ut non ad turpe compendium stipemque deformem hæc arripiatur occasio, sed laudis per eam augmenta quærantur. Nam si lucro pecuniaque capiantur, velut abjecti atque degeneres, inter vilissimos numerabuntur. *l.* 6. §. 5. *C. de postul.*

[h] Si patronum causæ prævaricatum putas, & impleveris accusationem, non deerit adversus eum pro temeritate commissi sententia: atque ita de principali causâ denuò quæratur. Quòd si non docueris prævaricatum; & calumnia notaberis, & rebus judicatis, à quibus non est provocatum stabitur. *l.* 1. *C. de Advocat. divers. judicior.*

[i] Litis causâ malo more pecuniam tibi promissam ipse quoque profiteris, sed hoc ita jus est si suspensâ lite societatem futuri emolumenti cautio pollicetur. *l.* 1. §. 12. *ff. de extraord. cognit.*

Si qui advocatorum existimationi suæ immensa atque illicita compendia prætulisse sub nomine honorariorum ex ipsis negotiis quæ tuenda susceperint, emolumenta sibi certæ partis cum gravi damno litigatoris & deprædatione poscentes fuerint inventi, placuit ut omnes qui in hujusmodi sævitate permanserint ab hac professione penitùs arceantur. *l.* 5. *C. de postul.*

[l] Nemo ex industria protrahat jurgium. *l.* 6. §. 4. *C. de postul.*

[m] *See the Ordinance of* Octob. *in* 1535. *Chap.* 4. *Art.* 35.

[n] Quisquis vult esse causidicus, non idem, in eodem negotio sit advocatus & judex: quoniam aliquem inter arbitros & patronos oportet esse delectum. *l.* 6. *C. de postul.*

See the Ordinance of October 1535. *Chap.* 4. *Art.* 16.

This Rule, which forbids Advocates to act as Judges in Causes wherein they have appeared as Advocates, is to be understood only of such Causes where those who have been Advocates in them are appointed Judges by the Judges themselves, and not of those Causes where the Parties agree to take their Advocates for their Judges and Arbitrators, as shall be shewn in the following Title.

[o] Nemo ex his, quos licebit accipere, vel decebit, aspernanter habeat, quod sibi semel officii gratia

tia libero arbitrio obtulerit litigator. *l. 6. §. 3. C. de postul.*

Nam si lucro pecuniâque capiantur, velut abjecti atque degeneres, inter vilissimos numerabuntur. *d. l. §. 5. in f.*

See the Ordinance of April *in* 1453. *Art.* 45.

[p] *V. Basilic. l. 2. t. 33. art. 3.*

See the Ordinances of King John *in* 1363; *of the twenty eighth of* October 1446, *Art.* 37; *of* April 1453, *Art.* 53; *of* October 1535, *Chap.* 4. *Art.* 4. *and the following Articles, and several other Ordinances.*

[q] *See the Ordinance of* Charles V. *of* 1364, *Article the seventh.*

[r] Observare itaque eum oportet, ut sit ordo aliquis postulationum, scilicet ut omnium desideria audiantur, ne fortè, dum honori postulantium datur, vel improbitati ceditur, mediocres desideria sua non proferant: qui aut omnino non adhibuerunt, aut minus frequentes, neque in aliqua dignitate positos advocatos sibi prospexerunt. Advocatos quoque petentibus debebit indulgere (*proconsul*) plerumque fœminis, vel pupillis, vel aliis debilibus, vel his qui suæ mentis non sunt, si quis eis petat: vel si nemo sit, qui petat, ultrò eis dare debebit. Sed, si qui per potentiam adversarii non invenire se advocatum dicat, æque oportebit ei advocatum dare. Cæterùm opprimi aliquem per adversarii sui potentiam non oportet; hoc enim etiam ad invidiam ejus, qui provinciæ præest, spectat, si quis tam impotenter se gerat, ut omnes metuant adversus eum advocationem suscipere. *l. 9. §. 4 & 5. ff. de off. Proc. & leg.*

See the Ordinance of the thirtieth of August 1536, *Chap.* 1. *Art.* 38.

[s] Advocati qui dirimunt ambigua fata causarum, suæque defensionis viribus in rebus sæpè publicis ac privatis lapsa erigunt, fatigata reparant, non minus provideant humano generi, quam si præliis atque vulneribus patriam parentesque salvarent. *l. 14. C. de advocat. diver. judic. laborantium spem & posteros defendunt. d. l. in f.*

It was because of this Honour which attends the Functions of Advocates, that their Functions are preferred in one of the Roman *Laws to that of judging Causes; for the Ministry of Advocates demands, not only the capacity and integrity which are necessary to Judges, but likewise a much larger extent of Learning, together with the gift and art of speaking in publick, and of joining the Ornaments of a solid Eloquence to the force of Reason, and a Knowledge of the Laws; and because at the time of enacting the said Law, those who judged Causes were not always the Magistrates themselves, but persons whom they made choice of to judge by themselves, or whom they called to assist them with their counsel and advice, and that the Function of Advocates might be exercised by persons of a more considerable Rank than that of those Judges; the quality of Advocate was more considerable than that of the said Judges, who might, without derogating from their Honour, quit the Function of a Judge, to put themselves in the Rank of Advocates.* Quisquis igitur ex his quos agere permisimus vult esse causidicus, eam solum quam sumet tempore agendi, sibi sciat esse personam quousque causidicus est. Nec putet quisquam honori suo aliquid esse detractum, cùm ipse necessitatem elegerit standi, & contempserit jus sedendi. *l. 6. §. ult. C. de postul.*

It may be remarked here on all that has been said in this Title concerning the duties of Advocates, that there are three sorts of Causes in which they are imployed; one sort is, of those that are notoriously unjust; others are manifestly just; and there is a third sort that are doubtful.

As for the Causes which are notoriously unjust, whether they be contrary to the Law of Nature, or against the Positive Law, it is never lawful to defend them, in the same manner as it is never lawful to steal, nor to defend an unjust act. And if the Parties themselves cannot carry on these sorts of Causes without abandoning the Rules of their Conscience, and committing a most enormous crime, which is odious in the eye of Man, and still more abominable before God, because they use his Authority to make it serve as an instrument of their Injustice; the Advocates who defend and maintain those Causes, are so much the more guilty and criminal, in that they make themselves accomplices in the malice of their Clients, and prevaricate in the exercise of their Function, and in the most essential duty belonging to it, which is that of diswading their Clients from prosecuting Causes that are unjust. But those who undertake the defence of such Causes against poor and indigent persons, make themselves accessaries to a Crime, the enormity of which can hardly be well expressed. The Holy Scripture compares the offering of him who offers to God the goods of the poor as an Alms or Sacrifice, to the Oblation which one would make to a Father by sacrificing his Son before his eyes [a]. *By what words therefore could it describe the action of those who present themselves before the Tribunal, not of the Mercy, but of the Justice of God, not to offer to him the Goods of other people, and to divest themselves of them, but to wrest them out of the Possession of the right Owners, and to appropriate them to themselves, and who have the boldness to invocate the Judges to be Executors of this Injustice.*

[a] Whoso bringeth an offering of the goods of the poor, doth as one that killeth the son before his father's eyes. *Ecclesiasticus* xxxiv. 20.

As for Causes that are just and equitable, the only Rule is to defend them by no other ways than what are just, without lying, and without trick; for if Actions that are just of themselves, become unjust when they are not performed with the circumstances of Justice, according to the saying of the Wise man [b], *much more ought the actions of Justice it self to be accompanied with Truth and with Justice; and*

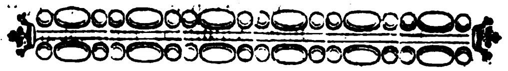
and if all men owe to one another, in all their actions, truth and godly sincerity, according to the expression of St. Paul, they owe it infinitely more to God himself, and in his Tribunal, which is the Seat of Justice [c].

[b] For they that keep holiness holily, shall be judged holy. *Wisd. of Sol.* vi. 10.

[c] For our rejoicing is this, the testimony of our conscience, that in simplicity and godly sincerity, not with fleshly wisdom, but by the grace of God, we have had our conversation in the world, and more abundantly to youwards. 2 *Cor.* i. 12.

As for Causes that are doubtful, the chief Rule whereby Advocates are to govern themselves therein is not to take those Causes for doubtful, which may be rendred such by covering Injustice with the appearances of Justice; but to take sincerely all those for doubtful whose Decisions are uncertain, whether it be on account of the circumstances of the facts, or by reason of the obscurity of the Law, or because of other considerations, which makes Justice doubtful in such sorts of Causes; and Advocates ought to determine themselves therein according to their own Knowledge and Conscience, and they ought neither to engage in them, nor to defend them in any other manner, nor by any other means than such as are lawful in the defence of Causes that are just.

All these Rules of the duties of Advocates may be reduced to two Maxims; one, never to defend a Cause that is unjust; and the other, not to defend just Causes but by the ways of Justice and Truth; and these two Maxims are so essential to the duties of Advocates, and so indispensibly necessary, that altho' they seem to be rather Maxims of Religion, they are however in proper terms expressed in the Laws of the Code *and* Digest.



TITLE VII.

Of ARBITRATORS.

ALL the matters which have been treated of hitherto, are in their nature so much a part of the Publick Law, that there is not any one of them that does belong to the Private Law, and which has come under our consideration in the Book of the Civil Law in its Natural Order; but the subject of this Title is of such a nature, that it has relation to both: so that it contains some Rules which are a part of the Private Law, and others which belong to the Publick Law; which proceeds from the nature of Arbitrations, and from the quality of the power which Arbitrators have to judge of differences of which they are chosen Judges. For it is necessary to consider two things in Arbitrations: the first, is the Agreement of the Parties, which is called a Compromise, by which those who are desirous to make an end of a Law-suit depending between them, or to prevent their going to Law, give power to certain persons whom they make choice of to examine their pretensions, and to decide them, and oblige themselves to perform whatever shall be awarded by those whom they take for Judges: and the second is, the Function of the Arbitrators chosen by the Parties, and the duties which are consequences thereof. What relates to the Agreement of the Parties, is a matter that belongs properly to the Private Law, and it has been discussed in the first Tome of the Civil Law in its Natural Order, together with the other sorts of Covenants, and under the the Title of *Compromises:* and what concerns the Function and Duties of the Arbitrators is a matter of the Publick Law, seeing it is a kind of Administration of Justice. Thus, altho' we have already explained under the Title of *Compromises* the quality of the Power which Arbitrators have to judge by the effect of the consent of the Parties, yet we have not there explained the Rules of their Functions and Duties: and what has been said in that Title of

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Compromises touching the Power of Arbitrators, relates only to the effect which the Compromise ought to have, in order to give to the said Power the extent, or the limits which the Parties intend it should have. Thus we shall explain in this Title that which concerns the Functions and Duties of Arbitrators with respect to the Function of administring Justice, which belongs to the matters of the Publick Law, and which we shall make the subject of two Sections; one, of the Functions of Arbitrators, and their Power; and the other, of their Duties.

SECT. I.

Of the Functions of Arbitrators, and their Power.

The CONTENTS.

1. *Arbitrators have the same power as Judges, altho' they are not Judges, by a Title which gives them that quality.*
2. *The Function of Arbitrators determines by their definitive Sentence.*
3. *Arbitrators being Mediators, are not obliged to judge according to the rigour of the Law.*
4. *The Ordinances of* France *oblige the Parties to refer some affairs to Arbitration.*
5. *The power of the Arbitrators extends only to the affairs mentioned in the Compromise.*
6. *There are some matters which cannot be referred to Arbitration.*
7. *The Sentences of Arbitrators have not the same effect as those of Judges.*
8. *There lies an Appeal from the Awards of Arbitrators.*
9. *If the Award is not pronounced within the time limited by the Compromise, it remains without effect.*
10. *Persons who are incapable of being Arbitrators.*

I.

1. Arbitrators have the same power as Judges, altho' they are not Judges, by a Title which gives them that quality.

ALtho' Arbitrators are not Judges by vertue of a Title which gives them absolutely that quality, and that they are Judges only of the Parties who have named them, to determine that which is referred to their Judgment by the Compromise, yet they exercise the same Functions as Judges would do if the Parties were pleading in Judgment. Thus, Arbitrators may direct the proceedings in the Causes which they are to judge, may give Interlocutory Sentences, may grant Delays, may examine Witnesses, and after a full information may pronounce a Definitive Sentence, which may put an end to the differences, whereof they were chosen Judges[a].

[a] Compromissum ad similitudinem judiciorum redigitur, & ad finiendas lites pertinet. *l. 1. ff. de recept.*

Tametsi neminem prætor cogat arbitrium recipere, (quoniam hæc res libera & soluta est, & extra necessitatem jurisdictionis posita:) attamen ubi semel quis in se receperit arbitrium, ad curam, & sollicitudinem suam hanc rem pertinere prætor putat: non tantum quod studeret lites finiri: verum quoniam non deberent decipi, qui eum quasi virum bonum disceptatorem inter se elegerunt. Finge enim, post causam jam semel, atque iterum tractatam, post nudata utriusque intima, & secreta negotii aperta, arbitrum vel gratiæ dantem, vel sordibus corruptum: vel alia qua ex causa nolle sententiam dicere: quisquam potest negare, æquissimum fore prætorem interponere debuisse; ut officium quod in se recepit, impleret. *l. 3. §. 1. ff. de recep. l. 14. §. 1. C. de judic.*

II.

2. The Function of Arbitrators determines by their definitive Sentence.

After the Arbitrators have pronounced a Definitive Sentence, their Functions are at an end, and they have not so much as the power to put it in execution, even although there should lie no Appeal from their Sentence; but the Party who intends to sue for the effect of the Sentence, ought to apply himself to the Judges in Ordinary, that he may obtain their Order against him who refuses to execute it, to oblige him either to acquiesce in the Award, or to pay the Penalty stipulated by the Compromise[b].

[b] Ex compromisso placet exceptionem non nasci, sed pœnæ persecutionem. *l. 2. ff. de recept.*

According to the usage in France, *he who desires to have the Award put in execution, applies to have it ratified, that is, confirmed by the Judge in Ordinary; and if there lies an Appeal from the Award, the same is determined in the manner as shall be explained in the eighth Article.*

III.

3. Arbitrators being Mediators, are not obliged to judge according to the rigour of the Law.

Seeing Arbitrators are chosen, in order to accommodate as much as to judge the affairs that are put into their hands, and that for this reason they are as it were Mediators, to whom the Ordinances of *France* give the names of *Arbiters*, Arbitrators and amicable Compounders, their Functions are not restrained to the same severity, nor to the same exactness as that of Judges: but

but whereas Judges ought to regulate their Sentences according to the Rights of the Parties, without any other mitigation than what the Laws allow of, according to the quality of the Affairs, and according as the facts and circumstances may require, pursuant to the Rules which have been explained in their proper place; the very nature of Compromises pointing out to the Arbitrators that each Party is willing to abate something of what they might hope for in Justice, and for the love of peace to forego a part of their interests, this disposition of persons, who instead of the Ordinary Judges make choice of Arbitrators, impowers those whom they chuse to prefer the considerations of peace and quiet to the rigour of Justice, which might leave still occasions of strife and contention. Thus we see sometimes that in doubtful cases, where the Judges are obliged to decide in favour of one or other of the Parties without any medium, Arbitrators make use of expedients and temperaments, such as the Parties themselves would do, if instead of a Sentence they should take the way of terminating their differences by an amicable Agreement [c].

[c] *See the Ordinance of* June 1510, *Art.* 34.

IV.

4. The Ordinances of France *oblige the parties to refer some affairs to Arbitration.*

The motive of preserving peace between the Parties being more especially favourable in the case of near Relations, and in Family Affairs, the Ordinances in *France* oblige those who have differences touching the Partitions of Inheritances among near Relations, Accompts of Guardianships and other Administrations, the Restitution of a Marriage Portion, and of a Dower, to refer the same to Arbitrators; and they ordain that in case any of the parties refuse to name Arbitrators on their part, the Judge shall name them. And the Ordinances do likewise direct, that all differences among Merchants in relation to their Trade, and among Partners in relation to their Partnership, be determined by Arbitrators: which gives unto the Arbitrators who are named for all these sorts of differences, a right to terminate them with all possible diligence, in order to avoid the delays of Judicial Proceedings; and also a right to qualify the Awards which they give on Affairs of that kind with such temperaments of Equity, as they shall find that the facts and circumstances may deserve [d].

[d] *See the Ordinance of* August 1560, *Art.* 2, 3, *and* 4; *and that of* Moulins, *Art.* 83; *and of* 1673, *Chap. of Partnerships, Art.* 9, *and the following Articles.*

[*Although in* England *there is no particular obligation laid on parties to refer their differences to Arbitration, as the custom is in* France *in some cases; yet our Statutes recommend References to the Subject, and more particularly to Merchants and Traders, as an useful Expedient to end their differences with the greater ease and expedition. And in order to give the greater force and efficacy to the Awards of Arbitrators, the parties are allowed to agree among themselves that their Submission of the Suit to the Award or Umpirage of any person or persons, may be made a Rule of any of his Majesty's Courts of Record, that the Parties may be thereby finally concluded.* Stat. 9 & 10 Gul. III. cap. 15. *entitled,* An Act for determining differences by Arbitration.]

V.

5. The power of the Arbitrators extends only to the affairs mentioned in the Compromise.

The power of the Arbitrators is regulated by the Compromise, as to what concerns the differences which they are to determine, and whatever they may decree beyond that, in relation to matters which are not comprehended in the Compromise [e], will be without effect: and as to the differences of which the Compromise makes them Judges, they have power to exercise therein the Functions which have been just now explained, and what else may be regulated by the Compromise.

[e] De officio Arbitri tractantibus sciendum est omnem tractatum ex ipso compromisso sumendum: nec enim aliud illi licebit, quam quod ibi, ut efficere possit, cautum est, non ergo quodlibet statuere arbiter poterit, nec in re qualibet: nisi de qua re compromissum est. *l.* 32. §. 15. *ff. de recept.*

☞ *There are two sorts of causes which make it impracticable for certain Affairs to be referred to Arbitration: one relates to the Affairs in which the Publick has an interest; thus as the Publick is concerned that Crimes should be punished, it would be altogether fruitless to refer them to Arbitration, and the Reference it self would be a proof of the Crimes: and the other cause regards the Affairs where the honour of the Parties who should refer them to Arbitration would be engaged; for whereas one may with decency refer to Arbitration any common interest, it would be contrary to good manners to expose to the Judgment of Arbitrators an interest of Honour, seeing that would be wilfully to hazard the loss of it, which cannot be imputed to those who defend their Honour before the Ordinary Judges, because they are under a necessity to*

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to take them for Judges; thus he whose Legitimacy is called in question, or whose Nobility is controverted, or against whom any dispute of the like nature is started, cannot refer such a matter to the decision of Arbitrators. Thus it is commonly said of Affairs which persons look upon to be dear and of importance to them, that they do not submit them to Arbitration: which confirms the Remark that has been already made, that those who refer their differences to Arbitration, agree to depart from some of their Rights for peace and quiet sake; and which one ought not to do in an Affair which concerns his Honour; such as is the Question which relates to one's State, to know whether he is a Bastard or a legitimate Son, Noble or Ignoble; for in these sorts of Causes it is necessary to have for Judges those who have naturally Authority and Dignity joined with the Right of judging.

De liberali causa compromisso facto, rectè non compelletur Arbiter sententiam dicere: quia favor libertatis est ut majores judices habere debeat. *l. 32. §. 7. ff. de recept. qui arb.*

In litibus, in quibus, utrum ingenuus, an libertinus sit aliquis, quæritur, quinquennii præscriptionem (post quod divino adjutorio opus esse veteres leges præcipiebant) in posterum cessare sancimus: & hujusmodi lites etiam post memoratum tempus, ad exemplum cæterarum, vel in provinciis apud earum moderatores, vel in hac alma urbe apud competentes maximos judices examinari. Quod etiam si clarissima persona super tali conditione vel etiam servili quæstionem patiatur, tenere censemus. *l. ult. C. ubi caus. stat. ag. deb.*

See the seventh and eighth Articles of the first Section of Compromises.

VI.

6. There are some matters which cannot be referred to Arbitration.

The power of Arbitrators is circumscribed to such matters as the parties are at liberty to refer to Arbitration; and if the Compromise should happen not to be within these bounds, the Arbitrators would give judgment to no purpose, and they would even render themselves guilty of disobedience to the Law: Thus, for example, it being for the interest of the Publick that Crimes should be judicially punished, one cannot compromise a Crime [f]; and there are other matters which cannot be referred to the judgment of Arbitrators, as has been explained in the Title of Compromises, and in the Remark on the preceding Article.

[f] Julianus indistinctè scribit: si per errorem de famoso delicto ad arbitrum itum est: vel de ea re de qua publicum judicium sit constitutum, veluti de adulteriis, sicariis, & similibus: vetare debet prætor sententiam dicere nec dare dictæ executionem. *l. 32. §. 6. ff. de recept. qui arb.*

VII.

7. The Sentences of Arbitrators have not the same effect as those of Judges.

The Sentences of Arbitrators have not the same effect as those of Judges; for they oblige those who refuse to execute them no further than to pay the Penalty stipulated in the Compromise: so that if he who finds himself aggrieved by the Award of Arbitrators chuses rather to pay the Penalty, than to submit to the said Award, it will remain without any other effect than that of intitling the other party to recover the Penalty [g].

[g] Ex compromisso placet exceptionem non nasci, sed pœnæ petitionem. *l. 2. ff. de recept.*

VIII.

8. There lies an Appeal from the Awards of Arbitrators.

The favour of Awards given by Arbitrators, does not hinder the parties aggrieved from appealing from them; and in *France* the Appeals from those Awards go directly to the supreme Courts of Justice, from whence there lies no Appeal, whether it be to the Parliament, or to the Presidial Courts in matters which come under their Jurisdiction.

[h] *See the Ordinance of* August, 1560. *art.* 1.

IX.

9. If the Award is not pronounced within the time limited by the Compromise, it remains without effect.

If there is an Appeal entred from an Award, or if the Award not having been given within the time limited by the Compromise, it remains without effect, one of the parties refusing to prorogue it, that is, to renew it, and to grant to the Arbitrators another delay, or time for giving their Award, the Acts which shall appear to have been sped in execution of the Compromise for preparing the Cause for Judgment, will subsist for the effect which they ought to have. Thus, for example, if any of the parties had confessed the truth of a fact that was in dispute, or if proof had been made thereof before the Arbitrators, those Acts might be produced in Court, and the Judges would

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would have that regard to them, as the quality and form of the said Acts might deserve[i].

[i] Ad hæc generaliter sancimus, in his quæ apud compromissarios facta sunt, si aliquid in factum respiciens, vel professum est vel attestatum, posse eo & in ordinariis uti judiciis. *l. penul. in f. C. de recept. arb.*

X.

10. Persons who are incapable of being Arbitrators.

All these Functions of Arbitrators which have been just now explained, agreeing only to persons in whom there is no obstacle which renders them incapable thereof, one cannot take for Arbitrators persons in whom there are any such obstacles. Thus Women, persons that are deaf, or dumb, and others who labour under the like incapacities, cannot be Arbitrators.

[l] Sancimus, mulieres suæ pudicitiæ memores, & operum, quæ eis natura permisit, & à quibus eas jussit abstinere, licet summæ atque optimæ opinionis constitutæ in se arbitrium susceperint, vel, si fuerint patronæ, etiam si inter libertos suam interposuerint audientiam: ab omni judiciali agmine separari, ut ex earum electione nulla pœna, nulla pacti exceptio adversus justos earum contemptores habeatur. *l. ult. C. de recept.*

Neque in pupillum, neque in furiosum, aut surdum, aut mutum, compromittitur. *l. 9. §. 1. ff. eod.*

It would seem by this text that it is only Infants under fourteen years of age, that are incapable of being Arbitrators, and that an Adult may exercise this Function after having attained the age of fourteen: but it is said in the forty first Law of the same Title, that it is necessary to have attained twenty years of age: it is a difficult matter for such cases to happen, but if it should so fall out that a young man under twenty years of age, of an extraordinary capacity, had been named an Arbitrator, and had given an Award in the matter referred to him, it would not be null by the Usage in France, *as it would have been at* Rome *by the forementioned Law, and there was no other remedy but that of an Appeal. For according to the Usage in* France, *the Acts in which there are Nullities, are not null until they are declared to be so by a Court of Justice, which is the reason why it is said that Nullities do not take place in* France. *For we have no particular Law that settles the age at which persons may take upon them the Office of an Umpire.*

Cùm lege Julia cautum sit, *ne minor viginti annis judicare cogatur*: nemini licere minorem viginti annis compromissarium judicem eligere, ideòque pœna ex sententia ejus nullo modo committitur. Majori tamen viginti annis, si minor viginti quinque annis sit, ex hac causa succurrendum, si temerè auditorium receperit multi dixerunt. *l. 41. ff. de recept.*

Sons living under the Jurisdiction of their Fathers may be Arbitrators.

Sed & filius familias compelletur. *l. 5. ff. de recept.*

SECT. II.

Of the Duties of Arbitrators.

IT is to be remarked here touching the duties of Arbitrators, that we do not observe some Rules relating to the said duties which were established by the *Roman* Law[a], and among others three of those that are the most remarkable.

[a] Tametsi neminem prætor cogat arbitrium recipere (quoniam hæc res libera & soluta est, & extra necessitatem jurisdictionis posita:) attamen, ubi semel quis in se receperit arbitrium, ad curam & sollicitudinem suam hanc rem pertinere prætor putat: non tantum quòd studeret lites finiri: verum quoniam non deberent decipi, qui eum quasi virum bonum, disceptatorem inter se elegerunt. Finge enim, post causam jam semel, atque iterùm tractatam, post nudata utriusque intima, & secreta negotii aperta arbitrum vel gratiæ dantem, vel sordibus corruptum, vel alia qua ex causa nolle sententiam dicere: quisquam potest negare æquissimum fore, prætorem interponere se debuisse, ut officium, quod in se recepit, impleret. Ait prætor, *qui arbitrium pecunia compromissa receperit.* Tractemus de personis Arbitrantium: & quidem arbitrum cujuscunque dignitatis coget, officio, quod susceperit, perfungi: etiam si sit consularis: nisi fortè sit in aliquo magistratu positus, vel potestate, consul fortè, vel prætor: quoniam in hoc imperium non habet. *l. 3. §. 1. ff. de recept. qui arb.*

The first, which obliged Arbitrators, after they had promised to the Parties to decide their differences, to give their Award, and they might even be compelled by Law to do it, and that for this reason, that it might so happen that an Arbitrator having dived into the bottom of an Affair, and discovered the secrets of the Parties,

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ties, and all their proofs, and intending to favour the bad Cause, being either corrupted by bribery, or by some recommendation, should refuse to give his Award, and by that means should do prejudice to the good Cause.

According to our Usage, no such necessity is imposed on Arbitrators, and if the Arbitrator were capable of being corrupted in that manner, it would be of no great service to force him to give an Award under such dispositions; and besides, seeing there may happen causes which may oblige an Arbitrator to abstain from giving his Award, altho' he had promised to do it, and even causes which he ought not to be obliged to declare in open Court, altho' he were incapable of these sorts of corruptions, we leave Arbitrators at liberty to exercise, or not to exercise that Function, which ought to be free, and by that means we avoid the inconveniences which it is easy to perceive; but Arbitrators do not engage themselves, nor do they accept of the Compromise, but when they do some Function relating to the matter that is referred to them, and it is always with a liberty to abstain from it whenever they shall think fit so to do.

The second Rule of the *Roman* Law, which made a second duty unto Arbitrators, and which is not received in use with us, was that which in the cases where there were only two Arbitrators named by the Compromise, ordained that they should be compelled by the Magistrate to chuse a third person, whose Sentiment was to be the Award, in case the two Arbitrators could not agree [b]: which would not be approved by our Usage, and which would be even contrary to Equity; for those who agree to refer their differences, mean to have no other Judges but those whom they themselves make choice of, and if the Arbitrators will have a third person joined with them, that cannot be but by consent of the Parties: and when Arbitrators are named in an equal number, if power is granted them to take in a third person, it is always upon condition that the said third person be not any ways suspected by the Parties; which presupposes that they are to approve of his Nomination.

[b] Principaliter (quæramus) si in duos arbitros sit compromissum: an cogere eos prætor debeat, sententiam dicere: quia res fere sine exitu futura est propter naturalem hominum ad dissentiendum facilitatem. In impari enim numero idcirco compromissum admittitur. Non quoniam consentire omnes facile est: sed quia, etsi dissentiant, invenitur pars major, cujus arbitrio stabitur. Sed usitatum est etiam in duos compromitti & debet prætor cogere arbitros si non consentiant tertiam certam eligere personam, cujus authoritati pareatur. *l.* 17. §. 6. *eod.*

The third of the said Rules, is that which declares, that he who ought to be Judge of a Law-Suit, cannot be Arbitrator of it [c]. It is true, that the dignity and duty of a Judge require that he should not abstain from the exercise of his Functions, nor put himself out of a condition of rendring Justice whenever any occasion for the exercise of his Ministry should present it self; and that therefore a Judge, who ought naturally to have the determination of a difference in the quality of Judge, and not as an Arbitrator, ought to remain in that State, and not run the hazard of being disabled afterwards to administer Justice, by reason of his engagements in a Compromise, which might oblige him to abstain from his Functions of Judge, either on account of his being excepted against, or by reason of other consequences of the Compromise: so that this Rule is highly just. And there is even an Ordinance in *France*, which forbids the Presidents and Judges to take upon themselves the Arbitrations of matters depending before the Courts, or before the inferior Judges [d]: which seemed to be less necessary than under the *Roman* Law, where each Affair had not the same number of Judges as there are in *France*, where the Courts of Justice are composed of many Judges; but the said Ordinance is not observed; and it is permitted in *France*, to make choice of some of the Judges of a Court of Justice, to be Arbitrators of Law-Suits, of which they ought to be the Judges, and they prefer to that Rule of the *Roman* Law, the good of Agreements; and although the Parties take care to make choice of the ablest Judges to be their Arbitrators, and that it may so happen that the intended Accommodation not taking effect, the Affair may come to be decided without them, yet they who chose them for their Arbitrators have no

no body to blame for it but themselves, and they will have for their Judges the others of the Bench who remain. Thus, if we consider this Usage with a view only to the publick Good, it does not seem to be any ways inconsistent with it; and the favour of amicable Agreements may justify the said Usage.

[c] Si quis judex sit, arbitrium recipere ejus rei, de qua judex est, in re se compromitti jubere prohibetur lege Julia, & si sententiam dixerit non est danda pœnæ persecutio. *l.* 9. §. 2. *eod.*

[d] *See the Ordinance of* October, 1535. *chap.* 1. *art.* 75.

We shall not put down in this Section, among the Rules of the Engagements of Arbitrators, that of Capacity; for although it be true that in order to judge of a difference, it is necessary to know the Rules of the matter in question, yet it being for the interest of the persons who chuse the Arbitrators, that they should be capable of judging of the matter, they seldom fail to chuse those whom they esteem the most capable; thus they usually make choice of Judges or Advocates: but if for the decision of a Question in Law, the Parties had made choice of other persons in consideration of their good sense and probity, the said Arbitrators might either abstain from judging, if they found themselves incapable thereof, or take information touching the difficulties, that they might be able to understand them in such a manner as that the Parties might have reason to be satisfied with their knowledge, and ground to expect from them an equitable Award, which the said Arbitrators might form, either of their own knowledge, according as they might receive light from the several pretensions of the Parties, or by the assistance of persons whom the Parties should agree that they should advise with; and such a choice of Arbitrators as this might be justified by the counsel of St. *Paul* himself, who for so trivial a thing as a Temporal Good, advises the faithful to chuse some of the least among themselves for Judges, rather than carry before the Tribunals of Infidels, pretentions whereof none can be of so great consequence as the Peace which ought to unite them: thus there does not appear to be any inconvenience in chusing a Citizen, a Gentleman, or other person of good sense and probity, for an Arbitrator of Questions in Law.

[e] Dare any of you, having a matter against another, go to law before the unjust, and not before the Saints? Do ye not know that the Saints shall judge the world? and if the world shall be judged by you, are ye unworthy to judge the smallest matters? Know ye not that we shall judge Angels? how much more things that pertain to this life? If then ye have judgments of things pertaining to this life, set them to judge who are least esteemed in the Church. I speak to your shame. Is it so that there is not a wise man amongst you? no not one that shall be able to judge between his brethren? but brother goeth to law with brother, and that before the unbelievers. 1 *Cor.* i. 2, *&c.*

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I.

1. Arbitrators ought not to take upon them to judge of matters above their capacity.

ALthough the choice of the Parties who name the Arbitrators is instead of a proof that they are capable of judging the Affairs which are put into their hands, yet it is a duty incumbent on those who find themselves named Arbitrators by a Compromise, not to take upon them the charge of judging matters which are above their capacity, and to signify to the Parties the distrust they have of their own abilities, or to excuse themselves by some other way[a], unless that after their declaration the Parties do still insist on having them for Judges, and that they take the proper measures to be instructed in the Cause, and regulate the differences by such temperaments of Equity as

as the Rights of the Parties, and the good of Peace may demand.

[a] And the cause that is too hard for you, bring it unto me, and I will hear it. *Deut.* i. 17.

Although this passage relates to Judges, yet it may be applied here.

II.

2. They are obliged to distinguish the Rights of the Parties without respect of persons.

Seeing it often happens that in Compromises each Party names his Arbitrator, and looks upon him not so much as being his Judge, but rather as his Advocate, engaged to defend his interests, and that for this reason they name supernumerary Arbitrators, this intention of the Parties does not hinder the persons whom they name from being really and truly Arbitrators, nor exempt them from the obligation of distinguishing justly between the Rights of the one and the other Party, and of forming conscientiously their sentiments in relation to the differences which they have to determine; Thus it is their duty not to look upon themselves as Arbitrators for one Party only, and obliged to judge rather in his favour than in the favour of the other; but they ought to consider themselves as Mediators of peace between the Parties, which obliges them, in their choice of expedients for accommodating the differences, not to incline, out of respect to the persons[b], to diminish the Rights of one of the Parties rather than those of the other, but to have the same regard to both Parties alike, and not to have any other view in curtailing the Rights of one of the Parties rather than those of the other, except the difference that may be between their Rights, such as indifferent persons to whom the Parties are altogether unknown would have regard to; for this distinction of persons would be an injustice, which the liberty allowed to Arbitrators to accommodate matters by temperaments of Equity cannot excuse.

[b] Thou shalt not respect persons. *Deut.* xvi. 19.

Judge righteously between every man and his brother, and the stranger that is with him. *Deut.* i. 16.

That which is altogether just shalt thou follow. *Deut.* xvi. 20.

Ye shall not respect persons in judgment, but you shall hear the small as well as the great; you shall not be afraid of the face of man, for the judgment is God's. *Deut.* i. 17.

Ye shall do no unrighteousness in judgment; thou shalt not respect the person of the poor, nor honour the person of the mighty: but in righteousness shalt thou judge thy neighbour. *Levit.* xix. 15.

He will not accept any person against a poor man, but will hear the prayer of the oppressed. *Ecclus.* xxxv. 13.

How long will ye judge unjustly; and accept the persons of the wicked? Defend the poor and fatherless: do justice to the afflicted and needy. Deliver the poor and needy, &c. *Psal.* lxxxii. 2, 3, 4.

Judges and Officers shalt thou make thee in all thy gates which the Lord thy God giveth thee throughout thy tribes: and they shall judge the people with just judgment. Thou shalt not wrest judgment, thou shalt not respect persons, neither take a gift, for a gift doth blind the eyes of the wise, and pervert the words of the righteous. That which is altogether just shalt thou follow. *Deut.* xvi. 18, 19, 20.

Although these texts relate to the duty of Judges, yet they may be applied here, seeing the persons who are named Arbitrators do exercise the Functions of Judges. It is necessary to distinguish among the considerations that an Arbitrator may have for one of the Parties more than for the other, those which relate to the person barely on account of the favour and affection which the Arbitrator may have for him, whether it be because of the confidence which the Party seems to repose in him by taking him for his Arbitrator, or because he is his friend, and others of the like nature, from those which regard in the persons the quality of their Rights; the matter in dispute being, for example, about a large Sum of Money claimed by one that is rich, from one that is poor, and that by a disputed Title, the considerations of the first sort are a respect of persons that is never allowed; for it is never lawful to prefer in Judgment the interest of one person before that of another, because one loves him, esteems him, or has some obligation to him, and such a view as this in Judgment is always unjust; but it is not to be esteemed a respecting of persons in an Arbitration upon a doubtful Right, if for the sake of peace an Arbitrator is obliged to have recourse to some expedient for accommodating the matter in dispute, and if he inclines to abridge the pretensions of one of the Parties rather than those of the other, because of the difference that is between them, and which does not proceed from the affection which the Arbitrator has for either of them, but from the quality of their pretensions, and the circumstances either of their Persons or their Rights.

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III.

3. The liberty which Arbitrators have of not rendring Justice according to the rigour, ought not to be abused by committing injustices under the pretext of accommodation.

The liberty which Arbitrators may have not to render Justice according to the rigour thereof, and to make use of some healing expedients for the sake of peace between the Parties, hath its bounds and extent according to Equity, and ought not to be extended so far as to be a handle to the Arbitrators to commit injustices under pretext of accommodating matters: thus it is the duty of Arbitrators to apply the temperaments of Equity with discretion; to chuse them, in the cases where Equity may require, such as may not destroy that very Equity by some excess, and not to use any in the cases where Justice is due in its full extent to demands that are so just and so clear, that they do not admit of any abatement, or of any difficulty [c].

[c] Take heed what ye do: for ye judge not for man, but for the Lord, who is with you in the judgment. 2 *Chron.* xix. 6.

Ye shall do no unrighteousness in judgment, in mete-yard, in weight, or in measure. *Levit.* xix. 35.

IV.

4. Arbitrators ought to abstain from judging of matters which cannot be referred to Arbitration.

Seeing there are matters which cannot be referred to Arbitration, as has been said in the sixth Article of the foregoing Section; if there should be any Compromise contrary to this Rule, it would be the duty of those who are named Arbitrators to abstain from judging of such matters.

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THE PUBLICK LAW: BEING A SUPPLEMENT TO THE CIVIL LAW IN ITS NATURAL ORDER.

BOOK III.

Of CRIMES and OFFENCES.

WE have not in our Language any common word which comprehends in general and precisely every thing that is understood by these two Words, *Crimes* and *Offences*. For the word *Misdeeds*, which might signify both the one and the other, is not so common in use. But we not only have not any proper word, whereof the meaning takes in all Crimes and Offences; but we have not even any Rule or Usage which distinguishes precisely the meaning of the word Offences from that of Crimes. And altho' we commonly understand by the word Crimes a Robbery, a Murder, Forgery, and other wicked deeds, which deserve the punishment of Death, the Gallies, Banishment, and other great punishments; and that the bare word of Offences is usually understood of actions that are less wicked, and liable to a lesser degree of punishment, but which may nevertheless deserve some punishment, such as Injuries, a wound or hurt in a Scuffle, yet sometimes the word Offences is made use of to express the greatest Crimes. Thus it is said, that an Offender has made some disposition of his Goods after the Offence is committed; that a Thief, a Robber, a Murderer has been taken in the very act, but we never apply the word Crime to Injuries, or to wounds in a Scuffle; and to them we give the name only of bare Offences. Thus the word Offence is understood sometimes of Crimes, but the word Crime is never used to express a slight Offence.

It is in consideration of the want in our language of a common term which may agree to all Crimes and to all Offences, that we have entitled this Book of Crimes and Offences: and seeing these two words have different significations, but which are not clearly enough distinguished; in order to give

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a just and precise Idea of them, it was necessary before we should begin to speak of Crimes and Offences to make this first reflexion on the use of these two words; to which we must likewise add, that in the *Roman* Law, from whence the said words have been taken, they have not even there a meaning that is peculiar to each of them, and such as may not agree to the other, but they are often there confounded together; neither is there in the *Roman* Law any true and proper word that signifies exactly and precisely every thing that is contained under these two words of Crimes and Offences, on which it would be superfluous to enlarge any further here; but it is necessary to take notice here of a difference that was made in the *Roman* Law of two sorts of Crimes or Offences which comprehended them all, and divided them into two kinds, which it is necessary to understand because of the relation which they have to our Usage.

The first of these two kinds of Crimes or Offences, was of those which were called publick; and the second of those that were called private. The publick Crimes were those which the Law allowed all manner of persons to prosecute in Judgment, altho' they had no particular interest therein; and the private Offences were those of which the prosecution was not allowed to any but the persons who had an interest therein. Thus the Crimes of Treason, Imbezzlement of the Publick Money, Forgery, Adultery, and many others were publick Crimes. Thus, the Emperors *Arcadius*, *Honorius*, and *Theodosius* ranked in the number of publick Crimes the Heresy of the *Manicheans*[a]. Thus on the contrary Injuries, defamatory Libels, Theft, Stellionate, or all kind of Cozenage in bargaining, and some others were private Offences.

[a] Huic itaque hominum generi nihil ex moribus, nihil ex legibus, commune sit cum cæteris. Ac primùm quidem volumus esse publicum crimen. *l.* 4. *C. de hæret.*

We shall shew hereafter how far this distinction between publick Crimes and private Offences agrees with our Usage; but it is necessary to observe in the first place, that altho' in the *Roman* Law they used the word Offences commonly for private Offences, and the word Crimes for publick Crimes; yet sometimes they gave the name of Crimes to private Offences[b], and the name of Offences to all sorts of Crimes without distinction[c].

[b] *Stellionate, or Cozenage in bargaining, was a private Offence, and it is placed in that rank in the twentieth Title of the forty seventh Book of the* Digests; *and in the thirty fourth Title of the ninth Book of the* Code, *it is called a Crime, altho' it is said in the third Law of the same Title that it is not a publick Crime.*

[c] *Altho' in some places Offences are distinguished from Crimes, as in the eighteenth Section of the seventeenth Law.* ff. de Ædil. edict. *where Offences are opposed to Publick Crimes,* quæcunque committuntur ex delictis, non publicis criminibus; *Yet we see in other places that the word Offence signifies all manner of Crimes. Thus in the second Law,* ff. de re militari, *all the Crimes of Soldiers are called Offences. Thus in the* 131st *Law,* §. 1. ff. de verb. signif. *the word Punishment is defined as a general word, which signifies the chastisement of all sorts of Offences; which comprehends very clearly all manner of Crimes, and all manner of Offences, seeing they have all of them their proper Punishments,* cum pœna generale sit nomen, omnium delictorum coercitio. *d. l.*

This distinction of the *Roman* Law between publick Crimes and private Offences, altho' it is not received with us in the same manner as in the *Roman* Law, yet it has been the occasion of our retaining these expressions of publick Crimes and private Offences in another sense and meaning; as to which it is necessary to observe wherein it is distinguished from that of the *Roman* Law.

In the *Roman* Law there were no publick Crimes but those which were declared to be such by some Law or other: and they were called publick Crimes, because the punishment of them was of importance to the Publick, and because for that reason whoever was willing to prosecute an Offender for a Crime of this nature, was allowed to do it, as has been just now observed: and altho' the person, if there was any who was injured by the Crime, did not complain of it, the Prosecutor might go on to make proof of the Accusation, in order to have the Offender brought to punishment. And in private Offences, it was only the parties who were injured that could complain thereof, and sue for the punishment of the Offenders, as has been likewise remarked, because the punishment of these Crimes was not thought to be of the same importance to the Publick. And they placed in this Rank Theft, Defamatory Libels, the driving away of Cattle, the Crime of those who cut down Trees privately, Stellionate, and some others.

By our Usage no body has a right to carry on a Criminal Prosecution, and to sue for the punishment of a Crime, except the party who is injured, and the publick Officer to whom this charge is committed. And it is for this end that in all Courts of Justice which have a Jurisdiction

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Jurisdiction in Criminal matters there are Officers appointed, one of whose most important Functions is to be careful and diligent in bringing Offenders to Justice, as has been taken notice of in another place. These are the Officers who are called the King's Council, who are the Advocates and Procurators General in the Supreme Courts; the King's Advocates and Procurators in the Districts of Bailiffs, Seneschals, and other Jurisdictions; and the Proctors, who are called Fiscals, or Promoters of the Office, in the Jurisdictions of Lords of Mannors, as has been already observed in the same place: So that those Officers being obliged by the duty of their Offices to sue for the punishment of all Crimes, which the Publick is concerned to have punished, it is not allowed for any particular person to become an Accuser of an Offender, and to carry on the Criminal Prosecution in his own Name; but because it may happen that some persons who have a particular knowledge of the proof of a Crime, and who may be induced by some motive or other to interest themselves in getting the same to be punished, they are allowed to become Informers, that is, to acquaint the King's Procurator, that such a one has committed such a Crime, and to inform him of the circumstances which may serve to prove the fact. This Information, which is taken down in writing in the Registry of the King's Procurator, and signed by the Informer, is kept secret, so that the King's Procurator does not carry on any Prosecution in the name of the Informer, nor is there any mention made of him in any one of the Acts; but if by the event of the Prosecution the accused Party is acquitted, the King's Procurator is obliged in that case to give him the name of his Accuser, that he may sue him for having falsly accused him. And as for the Accusers, who are otherwise called Plaintiffs, and are the Parties interested, they are particularly named in the several Acts of the Proceeding, which is carried on in the name, and at the request of the King's Procurator, and upon the complaint, and at the instance of the Plaintiff, who is called the Civil Party, because he sues only for his Civil Interest. For there is this difference between the interest of the Party, and that of the King's Procurator, that all the steps made by the Civil Party tend only, with regard to him, to obtain a Sentence of Condemnation for Damages, or a Civil Reparation of the Loss which the Crime may have occasioned to him; but he cannot demand that the party who is accused should be condemned to undergo the punishment which the Crime may deserve with regard to the Publick: for it is properly the business of the King's Procurator to demand that the said Punishment be inflicted, whether it be that of Death, the Gallies, or other Punishment. And this Policy is conformable to the Spirit of the Christian Religion, which puts into the hands of the Prince and of his Officers, the Right of avenging and punishing Crimes[d]; and which forbids private persons to take vengeance[e]. Thus our Usage is in that respect different from the *Roman* Law, seeing it does not give liberty to any private person to sue for the punishment of a Crime. Our Usage likewise differs from the *Roman* Law in another respect; for whereas by the *Roman* Law many Crimes which deserved a publick punishment were not for all that accounted publick Crimes; we place in the rank of publick Crimes, which may be prosecuted by the King's Procurators, Crimes which were not publick in the *Roman* Law; such as Theft, the receiving of stollen Goods, Robbery, the cutting down of Trees by stealth, the assembling together in a riotous manner to do some act of violence, or to carry away any thing by force, the driving away of Cattle, and the breaking of Prison[f]. For there is not any one of these several sorts of Crimes, which having been brought before a Court of Justice, the King's Procurator may not prosecute, in order to have the same punished. For there is none of these several Crimes, which may not be prosecuted at the instance of the King, when his Officers have knowledge of them, altho' the party who first brought the complaint should desist from it, or agree the matter with the party accused.

[d] To me belongeth vengeance. *Deut.* xxxii. 35.
If thou do that which is evil, be afraid; for he beareth not the sword in vain: for he is the minister of God, a revenger to execute wrath upon him that doth evil. *Rom.* xiii. 14.

[e] Recompence to no man evil for evil. Provide things honest in the sight of all men. If it be possible, as much as lieth in you, live peaceably with all men. Dearly beloved, avenge not your selves, but rather give place unto wrath: for it is written, Vengeance is mine, I will repay it, saith the Lord. *Rom.* xii. 17, 18, 19. *Mat.* v. 39.
He that revengeth shall find vengeance from the Lord, and he will surely keep his sins in remembrance. Forgive thy neighbour the hurt that he hath done unto thee, so shall thy sins also be forgiven when thou prayest. One man beareth hatred against

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against another, and doth he seek pardon from the Lord? *Ecclus.* xxviii. 1, 2, 3.

[f] *All these several Crimes are ranked in the number of private Offences in the forty seventh Book of the Digests.*

It was necessary to make these Remarks on the differences between our Usage and the *Roman* Law as to the manner in which we consider Crimes and Offences in whatever sense we take the one and the other of these two words; and the Reader may be able to judge by what has been said, that it is of no great importance, and that it would be no easy matter to give a just and precise Idea of the distinction between Crimes and Offences; and that it is sufficient to know that in our Usage we consider as Crimes, and as publick Crimes, all Crimes and all Offences whatsoever, in which the Publick is concerned, that they should not be let go unpunished, to the end that they may not multiply thro' impunity, and that the punishments may restrain at least some of those who would not be withheld by other motives. For altho' it be true that the greatest Punishments do not totally prevent any Crime, yet they diminish the frequency thereof, and if they were let go unpunished, it would occasion an infinite multitude of all sorts of Crimes; and it is for this reason, that when some Crimes become more frequent than they were, the punishment of them is made the more severe, in order to restrain the growing multitude of Offenders.

It is to this Punishment of Crimes and Offences that all the Rules concerning this matter have a relation, and all that shall be said thereof in this third Book hath its use only with respect to this Punishment, without which the matter of Crimes would not be a subject of Human Laws, and would have for its Rules only the Divine Law; as to which it is necessary to remark the different ways in which the Spirit of the Divine Law, and that of Human Laws consider Crimes. For in this difference consists the distinction between the Conduct which the Pastors of the Church and the Ministers of the Spiritual Power ought to hold with respect to Crimes; and that which the Ministers of Justice and of the Temporal Power ought to observe therein.

The Spirit of the Law of God, who prepares for Crimes which he shall not have forgiven in this world other punishments than death, and which are more terrible than the severest punishments that can be inflicted in this life, aims at the amendment of the greatest Offenders, and at reclaiming them to their duties, by working in them such a change as may transform them from being the most profligate Wretches into the greatest Saints; and we see sometimes Offenders, whom God suffers to escape the punishments inflicted by the Temporal Laws, that he may work this change in them, or whose hearts he touches even in the midst of their Punishments, as it happened to that Robber, who at the last moment of his life made his punishment serve as a passage for him into Heaven. But the Policy of Human Laws, which tends to regulate the Society of Mankind, and to restrain all attempts that may disturb the Order thereof, hath established Punishments proportionable to the different Crimes, and even that of Death it self, against some which could not be prevented by lesser Punishments; accompanying it sometimes with torments which strike a greater terror than simple Death: and as this use of Punishments has always been necessary in the multitude of Crimes which have always abounded, we have seen that in the days wherein God himself was pleased to govern in a visible manner the People whom he had made choice of, and to mix together the Spiritual and the Temporal Government by his Divine Law which he gave to *Moses*, he there establishes the Punishment of Death against several Crimes [g]. But when he sent his Son into the World to plant the Gospel in the room of the ancient Law, he separated from the Spiritual Ministry of Religion, the use of the Punishment of Death, and of other Corporal Punishments, and left it solely to the Temporal Powers, that they might thereby maintain, as much as is possible, the Order of Society.

[g] And the *Israelitish* woman's son blasphemed the name of the Lord, and cursed: and they brought him unto *Moses*, (and his mother's name was *Shelomith*, the daughter of *Dibri*, of the tribe of *Dan*.) And they put him in ward, that the mind of the Lord might be shewed them. And the Lord spake unto *Moses*, saying, Bring forth him that hath cursed, without the camp, and let all that heard him, lay their hands upon his head, and let all the congregation stone him. And thou shalt speak unto the children of *Israel*, saying, Whosoever curseth his God, shall bear his sin. And he that blasphemeth the name of the Lord, he shall surely be put to death, and all the congregation shall certainly stone him; as well the stranger, as he that is born in the land, when he blasphemeth the name of the Lord, shall be put to death. And he that killeth any man, shall surely be put to death. *Levit.* xxiv. 11, &c. See *Exod.* xxi. 23, 24. *Deut.* xix.

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We ſhall not enlarge any further on this diſtinction between the Spirit of Religion, and that of the Temporal Policy; the Reader may ſee what has been ſaid of it in the 10th Chapter of the Treatiſe of Laws, and in the 19th Title of the firſt Book of the Publick Law. It ſufficeth that we remark here the Cauſes of the neceſſity of puniſhing Crimes; as to which it is neceſſary in the firſt place to diſtinguiſh two ſorts of Crimes.

The firſt is of thoſe which without doing any wrong to any particular Perſon, deſtroy the publick Order, and diſturb Society, ſuch as Impiety, Hereſy, Blaſphemy, the deſpair of thoſe who lay violent hands on themſelves, and other Crimes, ſome of which ought not ſo much as to be named. The ſecond is of thoſe which beſides the diſturbance of the publick Order of the Society, do prejudice to ſome Perſons in particular, ſuch as Theft, Robbery, Imbezlement of the Publick Money, the counterfeiting of the King's Coin, Murder, and others. The Crimes of the firſt of theſe two ſorts, deſerve only a ſimple Puniſhment, ſuch as may revenge the Publick of the Crime, and chaſtiſe the Offender; and thoſe of the ſecond ſort deſerve, beſides this Vengeance and this Chaſtiſement, to be puniſhed with a Reparation of the Damage that is done by the Crime, ſuch as the Reſtitution of the thing ſtolen, the indemnifying a Widow whoſe Husband has been killed, and the other Civil Intereſts of the like nature, to the Perſons to whom they are due. So that there are two ſorts of Puniſhments for this ſecond kind of Crimes: that of the Crime it ſelf, without regard to the Damage, by the bare View of the Chaſtiſement which it may deſerve; and that of making good the Loſs occaſioned by the Crime.

Beſides this firſt diſtinction of theſe two ſorts of Puniſhments, which is neceſſary for underſtanding aright the uſe of Puniſhments according to the Spirit of the Laws, we muſt take notice of a ſecond diſtinction of four ſeveral Kinds of the firſt ſort of Puniſhments which have been juſt now mentioned. The firſt, to begin with the leaſt, is that of the Puniſhments which are called pecuniary, which are limited to a Condemnation in a certain Sum of Money without inflicting any mark of Infamy; and we muſt place in the ſame Rank of the firſt ſort of leſſer Puniſhments, the Admonitions and Reproofs which are given in open Court, and which likewiſe do not brand with Infamy. The ſecond Kind is that of the Puniſhments which affect the Honour, and carry with them a mark of Infamy; ſuch as a Condemnation in a Fine to the King, and that ſort of Correction, which is called a Judicial Reprimand. The third, is of the Puniſhments which are inflicted on the Perſon, and on the Body of the Party accuſed, ſuch as Whipping, Marking, the making a publick Confeſſion of the Crime in that ignominious manner which is called in *France*, *Amande Honorable* *, Baniſhment, and other Corporal Puniſhments, all which are attended with Infamy. And the fourth is of the ſeveral ſorts of Puniſhment by Death; ſuch as Hanging, Burning, Breaking on the Wheel, and others.

It is eaſy to judge by theſe ſeveral ſorts of Puniſhments, of the divers Views of the Laws which have enjoined them. The firſt of thoſe Views, which is common to all the four ſorts of Puniſhments, is to puniſh and avenge the Crime by the publick Satisfaction which the Offender is obliged to make *h*. The ſecond, which is common alſo to all Puniſhments, is to reſtrain by the Example of the Puniſhments, thoſe who cannot be influenced by better Motives to abſtain from the Commiſſion of Crimes *i*. The third, which agrees only to the three firſt ſorts of Puniſhments, is that of the Correction or Amendment of the Offenders: For altho ſome of theſe Puniſhments have in them a ſeverity which exceeds the bounds of Correction, yet they all of them imply the effect of Correction and Amendment, by putting the Offenders in mind that greater Puniſhments are reſerved for them, in caſe they fall into new Crimes; and there are ſome of theſe Puniſhments which are Corrections from the Mouth of the Judges, when they give Admonitions to ſome Offenders; for the end of theſe ſorts of Admonitions is not only

[* 'This Puniſhment which is ſtiled in *France* '*Amande Honorable*, is when the Criminal is con'demned to make a publick Confeſſion and Ac'knowledgment of his Crime, being ſtript naked 'to his Shirt, bare headed, and bare footed, ha'ving a Torch in his Hand, and in this Poſture to 'ask Pardon of God, of the King, of Juſtice, and 'of the Party whom he has injured. *Imbert Pra*'*tique Civile & Criminelle liv.* 3. *chap.* 21.]

h For the Puniſhment of Evil doers. 1 Pet. 2. 14.

i And thoſe which remain ſhall hear, and fear, and ſhall henceforth commit no more any ſuch Evil among you. Deut. 19. 20.

only to punish the Offenders by the shame of being reprimanded in open Court, but also to amend them, and to exhort them to change their Course of Life *l*: And we may add for a fourth View of the Laws in enacting Punishments, that of putting profligate Wretches and those who are guilty of great Crimes out of a condition of committing new ones; which properly agrees only to the Punishment of Death, altho there be others which may have this Effect.

Altho it be certain that the severity of the Punishments diminishes in a great measure the number of the Crimes in a State, and that in proportion as the Laws use more precaution, and the Officers are more diligent and careful in finding out and punishing Offenders, there are fewer Crimes committed; yet still it must be owned that notwithstanding these Remedies Crimes are very frequent; for they cannot cure the Causes of the Disease, which are the different Passions of Men, so strong in a great many and having so great a mastery over them, that even the sight of the Punishment does not deter them from committing the very Crimes which they see actually punished in others. Thus those whom Avarice has engaged in a habit of Theft, make no scruple to pick Pockets in a Crowd of Spectators that are looking on at the Execution of a Thief; and the acquired habits of other Crimes, and the transports of Revenge, and other Passions, kindle such a Fire as nothing is able to extinguish, and which takes away all manner of thought of the Consequences of the Crimes, or makes them run the hazard of all Events let them prove what they will.

It is from this Fountain that we see daily flow those several Crimes which are so frequent, especially in great Towns, where the occasions of committing them are more common, and where it is easier to conceal the Crimes, and to skreen the Offenders from the hands of Justice.

This frequency of Crimes, is it then become an Evil without any Remedy, which may at least diminish it? And is there no possibility to render those Crimes less frequent which are most common, such as Thefts, Robberies, Murders? Might not we hope from the great and singular Example of the disuse of Duels, which has been effected in *France*, to be able to procure a diminution of those other Crimes, not by the same ways which have been taken to prevent duelling, which would not be applicable to this design, but by other ways proportioned to the Causes of the Evil? The Causes of the frequency of Thefts, of Robberies, and of Murders which are the Consequences thereof, are Poverty joined with a bad Education, Idleness, vicious Habits, Debauchery, and the disorderly Life which Persons under those Circumstances commonly fall into, and from which they are gradually drawn into the Commission of the greatest Crimes. Many are poor from their Birth, a bad Education trains them up in Idleness, and the habit of doing nothing leads them to the doing of Mischief, which cannot afterwards be stopped but by the Force of Justice; which comes too late, and serves only as a Fence against a Torrent, which overflows its Banks.

It would seem therefore to be of great advantage to a State, to establish therein such a Policy, as might diminish in it as much as is possible these bad Effects, by removing their Causes; which are Idleness, Poverty, a bad Education, which occasion so many Thefts, Robberies, and Murders which usually attend Robberies; for these are the sorts of Crimes that are the most frequent, and they are so frequent only because they spring from those three Causes which are common every where: So that there is this difference between these sorts of Crimes and all others; that altho there be many other Kinds of Crimes, such as Treason both against God and Man, Impiety, Blasphemy, Sorcery, Sedition, Rebellion against the Orders of a Court of Justice, counterfeiting the King's Coin, Murders, and Assassinations on account of Quarrels and out of Revenge, Poisoning, Forgery, Extortions, Adulteries, and others; yet we see as many or more Crimes of that one kind of Thefts, Robberies, and of Murders committed by Robbers, as of all the other kinds of Crimes put together. And there is likewise this other difference between these Crimes and all the others; that altho there be no other Remedy, to prevent the multitude of the several Crimes besides

l Interlocutio præsidis, quæ indicta est, infamem eum de quo quæris fecisse non videtur: cum non specialiter ob injuriam vel admissam vim condemnatus sit, sed ita præsidis verbis gravatus & admonitus, ut ad melioris vitæ frugem se reformet. *l*. 19. *C. ex quib. caus. inf. irr.*

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besides the Example of Punishments, and that it is not possible to cure in every one Ambition, Avarice, Debauchery, Libertinism, Impiety, Envy, Hatred, and the other Passions and disorderly Affections, which lead to the Commission of those different sorts of Crimes, even those Persons who are rich enough, and some who have had the Advantage of a good Education; yet it does not appear to be impossible for a State to provide Subsistence for all the Families in it, either by their own Labour, if that be sufficient, or by giving them such Assistance as cannot be refused without Injustice; by punishing those who having nothing of their own to subsist on, and being able to work and gain their Livelihood, do nevertheless spend their time in Idleness; by making a diligent Enquiry after poor Families, in order to find out and punish those who do not work; by visiting carefully all the Houses suspected to harbour idle Persons, and to receive stolen Goods; by making all Persons whose Condition is not known, give an account of the Place of their Abode, of their Family, of their Imployment; and in fine by using all possible and just Precautions for lessening the number of idle Persons and Vagabonds, which would of consequence diminish likewise the Crimes which proceed from Idleness. Such an Inquiry as this would moreover produce this good Effect in the State, that it would multiply in it Manufactures and Trade, and would add to the publick Tranquillity one of the best Ways for maintaining it. And altho this Policy does imply a necessity of having Officers to put the same in execution, and of erecting publick Work-Houses for employing the Poor; and tho it should consequently put the Publick to great Charges, yet that would be no inconvenience, for there would be no proportion between the Expence and the Advantages that such a Regulation as this, if well concerted, and well executed, would produce in many respects, and even by the bare Effect of diminishing considerably Idleness, and the Vices which are the Consequences of it.

As for the other sorts of Crimes, it is to no purpose to hope for a total Cessation of them, no more than that of the Vices and Passions of Men; and we must on the contrary own that it is only by a singular Effect of the Divine Providence, that the number of all sorts of Crimes is not much greater, as it certainly would be, if God should abandon every one to his Passions; but his Providence over the Society of Mankind moderates in a great many their Inclination to Vices and Passions by the bare Effect of Reason, and of a less corrupted natural Constitution; so that the greater part of Mankind is free from the Vices and Habits which lead to the Commission of Crimes, and chuse to contain themselves within the external Order of the Temporal Policy. And this Order is moreover greatly preserved by the Union of Religion and the Civil Policy together, and by the good Use which ought to be made of the one and of the other, both by Persons in a private Capacity, that they may keep within the bounds of their respective Duties; and also by those who have a share in the Government, and in the Administration of Justice, that they may punish those who disturb the said Order.

It is by the means of this Providence of God over Mankind, and of the joint Concurrence of Religion and Policy together, that altho the Crimes which disturb the Order of Society are very frequent with respect to the great Evils which they cause, yet it may be said in another sense that considering the universal Bent which Men have to Evil, the Crimes which are so exorbitant as to deserve some temporal Punishment are too frequent in proportion to the other Evils, which do not amount to that Excess: for we must distinguish in the Society of Mankind two sorts of Evils, which are caused by the Passions and wicked Inclinations of the greatest part of those who are Members thereof. The one, of that infinite number of Infidelities, Injustices, Cheats, vexatious Law-Suits, Quarrels, Enmities, Divisions, and other Evils which over-run the Society, and which being the Works of Covetousness, Ambition, Hatred, Anger, Envy, and of all sorts of unlawful Desires, Vices and Passions, are before God, and in the Language of the Scriptures, so many several Crimes worthy of the Punishments which the Divine Justice prepares for those who transgress his Law, altho they do not amount to that Excess as to be placed in the Rank of Crimes in the sense which is given to this Word in the Style of Human Laws. And the other of these

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these two sorts of Injustices is that which consists of those to which the human Laws give the Name of Crimes, and which they punish with several Punishments; and it is necessary likewise to distinguish, among all those Injustices of Men, which do not come under the Rank of Crimes, in the sense which human Laws give to this Word, altho they may be Crimes in the sight of God, between those which create no disturbance in the Society, and which do hurt to none but those who commit them; and those which besides that they do hurt to other Persons than the Authors of them, do also disturb the Order of the Society. The first sort of Injustices which create no disturbance in the Society that deserves to be revenged by human Laws, and which do hurt to no Person, are properly speaking a Matter belonging to the Rules of the Church, which prescribe Remedies against them, and direct her Ministers in the Method of correcting and reclaiming those who are guilty of them, by Ways proportioned to the Spirit of Religion, which requires Justice in the inward Parts of Man; and the temporal Policy does not meddle therewith. But as for the Injustices which disturb the Order of the Society, and which go to that Excess as to be ranked among Crimes and Offences, they are not only a Matter which belongs to the Rules and Canons of the Church which forbids them; but they are moreover a Matter cognizable by the temporal Policy, and subject to the Administration of Justice, which ought to suppress all Attempts against one another's Right, and maintain every one in their Property, which is the Duty of those who are intrusted with the Care of the Government, and the Administration of Justice. Thus the temporal Policy, whose business it is to regulate the external Order of human Society, exerts it self in two different manners, with respect to all the kinds of Injustices that disturb the said Order.

The first which respects in general all sorts of Disturbances, Attempts and Injustices, which are not of the number of Crimes and Offences, and which do not deserve any Punishment; and the second, which relates to the Punishment of Crimes and Offences that may deserve Punishments or other Correction. And this is what distinguishes the Subject of this third Book from all the other Matters of the Laws, whether they be of the Publick or Private Law.

We thought it necessary to make all these general Reflections on this Matter of Crimes and Offences, in order to give an Idea of the Rank which it holds in the Publick Law, and of the Use of the Laws which regulate it; it remains now that we should explain what it is wherein the Detail of this Matter consists, and the Views which we propose by digesting it in order.

The Matter of Crimes and Offences consists of two Parts; every one of which hath its Rules of a different nature, which it is necessary to distinguish, and which ought to have their separate Rank. The first of these two Parts comprehends every thing which relates to the Distinctions of the several kinds of Crimes and Offences, and their Punishments; the Rules of the Proportion of the Punishments to the Crimes and Offences, in consideration of their Enormity, their Quality, their Consequence, the Necessity of making an Example, or upon other Considerations which may plead for a Mitigation of the Punishments; the Rules of the Regard which ought to be had to the different Circumstances of the Quality of the Persons, of their Age, the Time, the Place, of the Dispositions of the Offenders, which distinguish those who offended with Design, out of Rashness, by some Effect of an Accident, and the other Circumstances of the like nature; the Distinction which ought to be made between the principal Offenders, and their Accomplices and others who may have had some hand in the Crimes and Offences; what the Proofs of Crimes ought to be, and in what manner they are gather'd, not only from the Depositions of the Witnesses, and from Writings, if there be any, but also from the Mouth of the Offenders themselves; whether it be by their Confession, or by Consequences drawn from their Answers, as if they deny known Truths, or if they assert Facts that are notoriously false, or if they vary in their Answers to Interrogatories, and make other Discoveries by which they may be convicted; what are the Cases wherein it may be lawful to proceed to Torture, which is called the Question; what are the Rules of the Abolition, Remission, or Pardon of Crimes by Letters Patent of the Prince.

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The second part of the Matters of Crimes and Offences contains that which relates to the Proceedings in criminal Causes, the manner of forming Complaints, Accusations, Denunciations, the taking of Informations and the other Proofs, Decrees for apprehending the Persons who are charged with any Crime, or for obliging those to appear in Judgment who cannot be imprisoned, their Examinations, the repeating and confronting of Witnesses when it is necessary to have recourse thereto, and every other thing relating to the Proceedings that are necessary for the Instruction of Criminal Causes.

It is easy to judge, that these two sorts of Matters being different, they ought to be treated separately, and that those of the second part belong to the Order of Judicial Proceedings, and ought to be explained in the fourth Book, where we shall explain every thing that relates to Judicial Proceedings, as well in civil as in criminal Causes; and the Matters touching Proceedings in criminal Causes shall be the second Part of the said fourth Book: So that there remain for the Subject of this Book the Rules which concern the Detail of this first part of Crimes and Offences which we have been just now explaining, and of which it is necessary to draw the Plan.

According to the natural Order of these Matters, the first Rank ought to be given to that which relates to the Distinctions of the different kinds of Crimes and Offences: for before we explain the Detail of a Subject, it is necessary in the first place to know its Nature; and it is from the Nature of things that we discover the Grounds and Principles of the essential Truths which relate to them; and when the Business is to lay down Rules which are the Truths of the Science of Laws, it is from the Nature of that which is their Object that we must gather them.

The Distinctions of the different kinds of Crimes and Offences may be made differently by divers Views, as by the Difference between publick Crimes and private Offences, taking this Distinction in the sense in which it is applicable to our Usage, as the same is explained in the beginning of this Preamble: or by the different Degrees of the Malice and Heinousness of the Crimes, distinguishing the greater from the lesser; thus Murders are more heinous Crimes than Thefts, and Seditions greater than Calumnies and defamatory Libels: Or by the Consequence of the publick Interest, which is greater in some Crimes than in others; thus Rebellion and Disobedience to the Orders and Decrees of Courts of Justice give greater Disturbance to the publick Tranquillity than Thefts; and the counterfeiting the Coin more than Forgery: Or by the Difference of the Objects which the Crimes may have relation to; thus Blasphemy, Impiety, Atheism, and the other Crimes of Treason against the Divine Majesty relate to God himself; thus all Attempts against the Prince and against the State, which come under the Denomination of High Treason, respect the Sovereign and the Order of the Government; thus Robberies, Murders, Adultery, defamatory Libels, and other Crimes, affect particular Persons, either in their Estates, Honour, or Persons: Or by the Difference of the Punishments that the different Crimes may deserve; for some Crimes against the Divine Majesty are more mildly punished than others against private Persons; thus Blasphemy is not punished with Death, as Murder is. We might likewise under another view distinguish between the Crimes which are cognizable by the Judges of the Courts of Lords of Mannors, as well as by the King's Judges, and those which are called Royal Cases, or Pleas of the Crown, which are cognizable only by the King's Judges, such as the counterfeiting of the King's Coin, Sedition, and many other Crimes.

We might likewise distinguish by other Views the several kinds of Crimes, and place them in different Orders; but it would seem that the most simple and most natural way of distinguishing the several sorts of Crimes and Offences, is to consider in the first place what is the Character that is common to them all, which places them in the number of Crimes and Offences, and to remark in every one of them what it has peculiar and singular in its Nature, which makes it to partake of this Character. This Idea, which may appear to some to be somewhat obscure, will be easily made clear by a bare Explanation of this Character, and by two Examples of some Crimes wherein the said Character is consider'd.

The common Character which makes all

all Crimes and all Offences, is that they disturb the Order of the Society of Mankind in such a manner as to prejudice the Publick, and so for that reason deserve some Punishment; and this Character is so essential to the Nature of Crimes and Offences, that as it is in all of them, so likewise there are no Actions which have this Character but what are either a Crime or an Offence. Thus Sedition is a Crime, because it disturbs the Order of the Society of Mankind, and is an Offence against the Publick, and also against the Prince, and therefore deserves some Punishment. And Sedition is an Offence against the Publick, because it disturbs the publick Tranquillity by an Attempt which puts those who ought to obey in the place of those who have the Command, and which makes mutinous and seditious Persons become Dispensers of Authority: and by that means it is an Offence likewise against the Prince. Thus the counterfeiting of the King's Coin is a Crime, because it disturbs the Order of the Society of Mankind, and is an Offence against the Publick, and also against the Prince; and for that reason is worthy of some Punishment. And the counterfeiting of the Coin is an Offence against the Publick, because it occasions an infinite number of Losses to all sorts of particular Persons, disturbs Trade and Commerce, and does Injury to the Prince, who alone has the Right of giving Currency to the Money he orders to be stamped, or of which he is willing to allow the Use.

We see in these two Examples, that each of these two Crimes has the character of disturbing the Order of the Society, and of offending the Publick; and we see in every one of them what it has peculiar and singular in its Nature that makes it to partake of this character: Sedition, by disturbing the publick Tranquillity, and encroaching on the Government and Authority of the Sovereign; and counterfeiting the Coin, by causing Disorders in Trade, and Losses to particular Persons. And it is necessary likewise to discern in each Crime and in each Offence, this Character which is common to them, and to distinguish also in the Nature of every one of them that which it has peculiar in it that disturbs the Order of Society, and which offends the Publick in such a manner as to deserve Punishment; and in order to form this Judgment, and to make this Distinction, it is necessary first of all to consider what there is in the Order of the Society of Mankind, which makes this publick Good, that is injured by Crimes and Offences; and we shall easily perceive in every one of them, wherein it is that its Nature hath this Character.

We take for granted here what has been already explained in the Treatise of Laws, touching the Foundations on which God hath established the Society of Mankind; and as to what concerns the Distinctions of the several sorts of Crimes and Offences, it sufficeth to consider in general the Plan of this Society, according to the Description that has been given thereof in the said Treatise of Laws; and to distinguish in that Plan the divine Order which hath established Society, and made it to subsist by his Providence, by the Ministry of Religion in the Places where it is known, by the Temporal Government, and by the Ties and Engagements which unite Men to one another, in order to their forming their Society: for it is by the Distinctions of those Foundations of the Order of Society, and of those Ties and Engagements which make it as it were different Parts of the Order which God has established in it, that we may be able to judge in each Crime and in each Offence, in what manner it violates the said Order.

According to this view, we may distinguish in the Order of the Society of Mankind, as it were six different Parts which are the Foundations of it, and which compose the said Order; and according as the Crimes and Offences offend differently any one of the said Parts, they may be divided into six kinds.

The first of these parts of the Order of Society, consists in the Dependance on the said Order of God who has formed it, and who preserves it by his Providence, by his Divine Laws, by the Rules of the Law of Nature, and by Religion in the Places where it is known.

The second is the Authority which God has given to the temporal Powers for the Government of the Society.

The third is the general Policy of each State.

The fourth takes in the two sorts of natural Ties which God has made use of for forming the first kind of Engagements

ments which unite Men together: Those two Ties are Marriage, which unites the two Sexes, and Birth, which unites Parents to their Children, and composes the Families, which being assembled together, form the Society.

The fifth contains all the other kinds of Engagements, which link Men together for all their Wants, which God has established in order to render them necessary to one another, and that they may exercise towards one another the second Law, as has been explained in the fourth Chapter of the same Treatise of Laws.

The sixth and last of these Parts, which ought to form the Order of Society, relates to every individual Person, considering him as a Member of this Body, and with respect to what he owes in his Person to the Society of which he is a Member; which distinguishes this sixth Part from that immediately preceding, which relates to the Engagements of every one towards others in particular, whereas this last Part concerns only the Engagements of every individual Person to the Publick. Thus, for example, every particular Person is obliged both with regard to himself, and also to the Publick, to make a right Use of his Person; which makes some Actions liable to Punishment, altho they appear to be confined to the Persons of those who commit them, and they are, as will appear immediately, a last kind of Crimes and Offences.

Among all the different Manners in which the different kinds of Crimes might have been distinguished, as has been already observed, we have thought fit to make choice of that of dividing them, according as they offend any one of these six Parts of the Order of Society, seeing it is certain that the Character which is common to Crimes consists in this, that they disturb that Order; and therefore it is natural to distinguish them by the Relation which they have to some one of these six Parts, which makes six different kinds of Crimes and Offences, which comprehends them all.

The first kind is of those Crimes which offend against the first part of the Order of Society; the Character of which is to attempt something directly or indirectly against the Divine Majesty; such as Blasphemies, Impieties, Heresies, Sacrilege, Sorcery and others.

The second, of those which violate the second part of the Order of Society, and which trespass against the Prince and the State; such are the Crimes of High Treason in the first degree, which is against the Person of the Prince; and in the second, which is against the State, and the other Crimes which partake of this nature.

The third, of the Crimes which transgress against the general Policy and publick Order of the State, and which on one part do not especially affect the Interest of any one Person in particular, and on the other, are not properly Crimes of High Treason, altho they encroach upon the Authority of the Prince; such as are the Crimes of unlawful Assemblies, of Monopolies, of counterfeiting the Coin, and other sorts.

The fourth, of the Crimes which violate the natural Ties of Marriage, and of Birth, in such a manner as to disturb the publick Order of the Society, and of which the Consequence demands a publick Punishment; such as are Adultery, the having of two Wives or Husbands, which is called Bigamy, a Rape, the imposing of supposititious Children, Incest, Parricide, Attempts against the Persons of Parents, the exposing of Children, the Crimes of Mothers who suffocate their Children at their Birth, and the other Crimes and Offences which violate these sorts of Ties.

The fifth, of the Crimes and Offences which violate the different Engagements between particular Persons; and this takes in all the Crimes and Offences which injure any one, either in his Person, or his Honour, or in his Estate, to such an Excess as may deserve to have some kind of Punishment inflicted for it by a Court of Justice; such as Manslaughter, Murder, Robbery, Theft, Forgery, Injuries, defamatory Libels, and others.

The sixth, of Crimes and Offences, which without prejudicing the Interests of any particular Person, disturb the publick Order of the Society by the bad use which some make of their Persons; such as those who spend their time in Idleness, Prodigals, those who run into Despair, leud Women, and Persons who fall into those monstrous Crimes which are not proper to be named.

It is easy to perceive by this Distinction

tion of these six kinds of Crimes and Offences, that they comprehend them all, and that there is not any one of them of which we may not at first sight judge under which of the kinds it ought to be ranked: and it is only necessary to observe that there may be some Crimes and Offences of a complex nature, which consist of both Characters, and have relation to more than one kind, but even those have their most natural Situation in one of the two, which it is very easy to discern. Thus, for example, a Robbery of Church-Plate is a Sacrilege, and by reason of this Character it belongs to the first kind of Crimes; but because this Crime does hurt to those to whom the said Plate did appertain, it does by this second view belong to the fifth kind: but since the Character of Sacrilege distinguishes it from other Robberies, it is more naturally qualified by the Name of Sacrilege, and therefore is ranked in the first kind.

It is according to this Method and Order that we shall explain in this third Book all the different kinds of Crimes and Offences, not by reducing them all to six Titles, according to these six general Kinds, but by ranking them under their proper Titles, and placing the Titles in the Order of these six Kinds, as they are in the Table, where those of the first Kind are the first in Order, and the others follow, each in the Order of its Kind.

The Matter of Crimes and Offences takes in two sorts of Rules: The first is of those which are peculiar to each Crime and to each Offence; such as are the Rules which relate to their Nature, their Characters, the Consequence of making enquiry after those who are guilty of them, and of bringing them to Justice, the Punishments proportioned to the Quality of the Crime or Offence, and others of the like nature. The second, of some Rules which are common, either to all sorts of Crimes and Offences in general, or only to some in particular. Thus the Rules concerning the Regard which ought to be had to the Intention of the Party that is accused, and to the Circumstances, are common to all Crimes and Offences; and those relating to the Effect which the Intention and Circumstances ought to have, in order to obtain the Pardon of a capital Crime, are proper only to some Crimes, and do not agree to all: Thus the Rules which relate in general to the Proofs of Crimes agree to all Crimes and Offences; and those concerning the Proof which is drawn from the Torture of the Persons who are accused, are peculiar to capital Crimes.

In order to distinguish these two sorts of Rules, and to rank them each in its proper place, we shall explain those of the first sort in the Titles proper to each Crime, and to each Offence, according to their different Natures which diversify the said Rules; and as for the Rules of the second sort, we shall reduce them under six Titles, which shall be the last of this Book. The first, where we shall explain the Causes of Crimes, in the Disposition and Intention of the Criminals and their Accomplices. The second, of the different Circumstances of Crimes, and the Regard which ought to be had to them. The third, of Accusations, and the Engagements of the Accusers. The fourth, of the several sorts of Proofs of Crimes and Offences. The Fifth, of the Punishments of Crimes and Offences. The sixth and last, of the Ways by which the Persons accused are either cleared or acquitted from the Punishments due to the Crimes.

TIT. I.

Of Crimes and Offences.

WE have run through in general all the different Natures of the several Affairs and Intercourses which pass between Men, the Manners by which they communicate to each other the Property and Use of one anothers Goods and Labours, and the Ways by which the Goods pass from one Generation to another. We have likewise seen that Providence hath thus multiplied the said Communications and Intercourses, in order to keep Men in the Exercise of the Law of Love. And seeing all these Matters have a relation to this Fundamental Law, all the particular Laws which are the Rules of these Matters, are only Consequences of that primary Law, which is the Foundation and Principle of all the others; and that they all tend to unite Men

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Men together, and to keep them in Peace one with another, without which they cannot obſerve the Law which commands them to love one another.

It is this Peace which is the natural Work of Juſtice, and the End of all Laws; but becauſe the greater part of Mankind neither know, nor ſeek after, nor love any other Peace beſides the quiet Uſe of all the Objects of their Self-Love, and that the Deſire of this falſe Peace engages often many Perſons in the purſuit of the ſame Objects, they are ſo far from being united, that they fall out with one another, and come not only to Conteſts and Diſputes, which oblige them to have them regulated by the Ways of Juſtice; but they proceed to Acts of Violence in order to make themſelves Maſters of what their Intereſts and Paſſions deſire. And it likewiſe often happens that without Diviſion, and without Diſputes, the Paſſions of People carry them to Exceſſes of another nature, the Conſequences of which, or the bare ſight of them, gives diſturbance to the Publick. Thus Men are carried differently to the Commiſſion of all the ſeveral kinds of Enterprizes, Violences, and other Exceſſes, which are called Crimes or Offences.

Theſe are the Crimes and Offences that trouble the Peace and Quiet of Societies in ſo many different manners, which ſhall be the Subject of this third Book, and which we are now to conſider, that we may digeſt them into their proper Order.

By a Crime or Offence is meant an Injuſtice which deſerves Puniſhment; not that there is any Injuſtice that does not deſerve a Puniſhment proportionable to the Diſobedience to the Law which it tranſgreſſes, ſince every Act of Injuſtice implies the Violation of ſome Law, and that the Effect of the Law is not only to command and to prohibit, but likewiſe to puniſh thoſe who do not what the Law commands, or thoſe who do that which it forbids: but ſeeing there are two ſorts of Laws, thoſe of Religion, and thoſe of Policy, the Characters and Differences of which ſhall be hereafter explained, Injuſtices are differently conſider'd and puniſhed by theſe two kinds of Laws; and it often happens that Injuſtices, which in Religion are great Crimes, ſuch as Avarice, Hatred, Envy, and others of the like nature, which tranſgreſs the Law of Love in a higher degree, are conſider'd in the Order of the Civil Policy only as Injuſtices of a kind which it takes no manner of notice of, in caſe the Crimes of that nature do not in outward Acts proceed to ſuch an Exceſs as to diſturb the Order of the Society: So that many Injuſtices, which are great Crimes in Religion, go unpuniſhed by the Civil Government; which gives the Name of Crime only to ſuch Injuſtices as deſerve a Puniſhment according to the Preſcription and Rules of the Civil Policy. We ſhall explain in its proper place the Cauſes of this Difference between the Conduct of Religion and that of the Civil Policy: but it ſufficeth here to take notice of one of the Foundations of this Difference, which conſiſts in this, that Religion does not content itſelf with the falſe outward Peace which is maintain'd by Self-Love, but it aims at the eſtabliſhing a true and ſolid Peace, which is the Fruit of an univerſal Juſtice, and an Obſervance of the whole Law; and that Religion likewiſe produces in thoſe who love and obſerve this Juſtice, this two-fold Effect, of forming in the inward part of the Mind and Heart a ſincere Peace, and of keeping them in an outward Peace with all others, and even with thoſe who love not Peace, or who are Haters of it. And thus Religion condemns and puniſhes differently, and by Puniſhments ſuited to its own Spirit and Conduct, all the Injuſtices which violate this double Peace. But ſeeing the Spirit of the Divine Law and of Religion tends principally to reclaim thoſe whom it puniſhes, and to bring them back to the Peace which it recommends to them; this Law of Peace makes uſe only of ſuch Puniſhments in this Life, as ſerve to reclaim thoſe whom it puniſhes, and abſtains from all thoſe Puniſhments which are not proper for ſuch a purpoſe. But becauſe this Spirit of Religion doth not reign in the Multitude, and doth not produce in all Perſons the inward Peace, God has provided by another Method of his Providence, that the Civil Policy ſhould correct or reſtrain thoſe whom the Spirit of Religion doth not mend, and who proceed to that Extravagance as to commit Violences and other Exceſſes, which diſturb the external Order of the Society: and it is for this reaſon that the Civil Policy retaining the univerſal Spirit of the Divine Law for the common Good of the Society, and in order

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order to contain Men at least in outward Peace as much as is possible, makes three different Uses, according to the Spirit of the Divine Law, of the Penalties and Punishments which it establishes against all Crimes.

The first, which is proper to all the Punishments, excepting that of Death, is to reform those who are punished.

The second, which is peculiar to Capital Punishments, is to put the Criminals out of a condition of causing new Troubles in the Society.

The third, which is common to all sorts of Punishments, is the Use of Example, for restraining by the Sight and Fear of Punishments those who abstain from Crimes only out of fear; and it is this Example that diminishes the number of Crimes, which we should see multiply to a strange degree if they were let go unpunished.

These are the Violences, the Attempts, and other Excesses, that trouble the outward Peace and Order of the Society, which the Civil Policy restrains by Punishments and other Penalties.

We may consider in the external Order of the Society three sorts of Goods, the Use whereof is necessary in it, and upon which no Man can make any Attempt without being guilty of some Crime, or Offence. The first sort, is Life, and the Liberty of one's Person. The second, is the free Use of the Temporal Goods, which God gives unto Men, whereby they may be enabled to subsist in the free Use of their Lives and Persons. And the third, is that Good which is called Honour, and which Men value above all other Goods.

There is no body but what comprehends sufficiently what the Nature of the two first kinds of Goods is, and every one hath the same Idea of them; but as for Honour, it is such a Good, that altho it be a real one, yet it is not of such a nature, as that it is very easy to conceive a just Idea thereof: and seeing the necessity of understanding aright what are the Crimes which offend against Honour, makes it likewise necessary to know what this Honour is which the said Crimes may offend; we cannot forbear enquiring in what manner this Honour, which makes this third kind of Goods, is considered in the Order of the Laws, which take it so far under their protection, as to inflict Punishments, and sometimes Death it self, for the Chastisement of those who have either ravished, or attempted to ravish it.

This word Honour in our Language hath divers significations; for it signifies the Respect or Consideration which one has for Virtue, for Merit, for Dignity: and it is in this sense that we are said to honour one.

It signifies likewise Virtue it self, the Merit, and the Dignity which procure this external Honour; and it is in this sense that we say, that those Qualities do honour to a Man.

It signifies also in a more extensive and more common Sense, that advantage which those who live in such a manner, even those of the meanest Condition, as not to draw upon themselves any Censure or Imputation from the Publick, have over those Persons whose Life is subject to some Reproach, which discredits them in the eye of the World; and it is said of those Persons who are of an unblemished Character, that they live like Men of Honour.

It signifies that honourable State, in which young Women are who have preserved their Integrity, and Wives who have not violated their Marriage Vows, and Widows who live chaste. And lastly it signifies Reputation, that is, the Esteem which all these different kinds of Honour procure to Persons in publick; and it is in this sense that we say of those who injure any one's Reputation, that they take away their Honour.

We may perceive by all these different significations of the word Honour, that there is in every one of them that Character which is proper to express the manner in which the Publick considers the Condition in which every Man is by his Virtue, by his Merit, by his Dignity, and by his other qualities, according as the said condition and the said qualities procure him Respect, or exempt him from just Reproach: so that Honour, according to all the different significations that have been just now taken notice of, is a real Good which consists chiefly in those Qualities, which procure Esteem, or which exempt from Reproach; and that Esteem also, in which Reputation consists, is a real Good: for altho it is not right to covet and desire that Esteem, yet it is a good thing to deserve it, not only because it is a natural Consequence of Merit and Virtue, and of other

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other good Qualities, but likewise because it is of importance in a Society that each Member thereof be considered in it according as he is useful or hurtful, valuable or despicable by his Qualities. And it is not only of importance to the Society, that the Persons who compose it should have the Qualities which may render them useful, and may procure them an Honour proportionable to the usefulness and advantages of their Qualities; but it is also of very great importance, that the Publick should acknowledge and consider those Qualities in the Persons who have them, and should take care that the Disgrace and Contempt that People fall into by Slander and Defamation, do not render those Persons either useless or contemptible, whose known qualities may be of service to the Publick. And in fine, it is a natural use of Honour in the Order of Society, that it supports mutual Love, which nothing begets so much as Esteem: for altho we ought to love those in whom we esteem nothing but their Human Nature, and the hopes of making them good, yet the Love which is reduced to such Motives, is but of little use in the external Order of Society; and that Love which is maintained by the Ties of Honour and Esteem, is of a more universal Use, both in Religion, and in the Civil Government.

It is for these very essential Reasons, that Honour is a real and a very great Good, both for those who have it, and for the Publick, both in Religion and in the State: And this Good both in the one and the other is of so great a Value, that in Religion the wisest and the most humble are obliged to prefer Honour to all other Temporal Goods, and to defend themselves against the Calumnies which cast a slur upon it; and in the Civil Policy the Laws consider Honour in such a manner, that they do not suffer Persons in any Case either to wound the Honour of those who have the advantage of it, or to reproach the want of it in those who have it not; and no body can with impunity dishonour any Person whatsoever, whether it be by Calumny, or by reproaching one with a defect which he really has; and it is lawful for none to take away any Person's Honour, except the Magistrate alone, who may disgrace or dishonour in a Judicial way of proceeding those who deserve such a Punishment.

It is therefore in this Point that the Importance and Consequence of Honour do consist, that seeing all Men are obliged to make themselves useful one to another, and to render themselves amiable by the good Qualities which make them both useful and amiable, one ought to prefer to all other Good whatsoever that state of Honour, in which one has the Qualities which render Persons useful and amiable, and the Reputation which puts the said Qualities in use: which shews that solid Honour ought not to be understood, to consist, either in vain Qualities, which without Virtue and without Use make but an empty Merit, or in the vain Reputation which all those vain Qualities may procure.

It was necessary to make here all these Remarks, that the Reader may be the better able to discern in the sequel of this Book the different Characters of the Crimes, which offend against the different Kinds of Honour; and we may now proceed to consider the several Crimes which encroach upon these three several Kinds of Goods, Life, Honour, and Estate.

The Crimes and Offences, which attack the Life and Person of Man, are Assassinations, Duelling, Homicide, Poisoning, Acts of Violence committed upon the Person, Blows, and all Excesses which wound, disfigure, lame, or hinder otherwise the use of the Members, or which prejudice the Health *b*.

The Crimes and Offences which affect Peoples Estates, are the several Enterprizes, Acts of Force and Violence, Frauds, and other ways, by which one encroaches upon the Goods of another, either by Force, or otherwise, or by other ways; such as Robbery, Theft, the receiving of stolen Goods, Usury, Forgery, Stellionate or Cozenage in bargaining, fraudulent Bankrupcies, the driving away of Cattle, the cutting down of Timber, setting Houses on fire, removing of Land-marks, and all the Crimes and Offences which occasion any Loss or Damage.

The Crimes and Offences which relate to Honour, are all the attempts to blemish or wound the Honour of any Person; which happens two ways, either by an injurious treatment of the Person, or by assaulting the Reputation: for one may abuse another and offend him

b *A good Name is rather to be chosen than great Riches.* Prov. 22. 1.

him in his Honour by Actions, or by opprobrious and injurious Language, without lessening his Reputation; and one may cast a blemish on another's Honour by words, by writing, and by other attempts against his Reputation; or one may attack by one and the same way, both the Reputation and Person of another, either by an Action, or by an Injury, which may have the double Character of offending and discrediting.

Besides these three sorts of Crimes against these three Kinds of Goods, there are some which affect differently, either one or two of the three Kinds of Goods, or all the three together, and which are so much the more grievous, altho they often go the rather unpunished, because they arise from the Administration of Justice, and because they are peculiar to the three sorts of Persons who exercise the said Ministry. Those three sorts of Persons are, the Judges, the Parties, and those who defend in Judgment the Interests of the Parties.

The Crimes peculiar to Judges, are Extortion, the taking of Bribes, and other Misdemeanours.

The Crimes peculiar to the Parties, are Calumny, and all unfair Practices to make out a Right; such as Forgery, and others of the like nature. And the Crimes peculiar to those who defend the Parties in Judgment, are Prevarication, and advancing for Truths what they know to be false. And all these Crimes attack indifferently, either the Life, or the Person, or the Honour, or the Estate, or two of them, or all three together; as if the Calumny of the Party, or the Prevarication of the Advocate, or the Corruption of the Judge relate to an Accusation of a Crime, which endangers the Person, the Honour, and the Estate.

All these different Kinds of Crimes comprehend under them all Crimes of what nature soever they may be; and there is not any one which may not be reduced to some one or other of these six Kinds, altho there be some Crimes which belong to several of the Kinds together; as for example, the Theft of a thing dedicated to a sacred Use, which is a Crime composed of the double Character of the first and sixth Kind; the counterfeiting of the Publick Coin, which has the double Character of the second and sixth Kind, and others of the like nature. And altho there be some Crimes which seem not to come under any one of these Kinds, as for example, the change of Name; it is nevertheless true that this Crime is never committed by any private Person, but out of some View which gives it the Character of one of these six Kinds. Thus when he who changes his Name disguises himself with a design to corrupt the Wife of one who is absent, and to give himself out for the Husband; the Crime of changing the Name takes the Character of the Crime of Adultery; and if this Change is made with an intention to steal, to kill, or to commit other Crimes, it takes its Character from the Crime with which it is connected as a Circumstance; and the changing of one's Name has always in general the Character of deceiving some body, if it is not done with the Circumstances which may render it lawful *c*.

Seeing there is not any one of all these Crimes and Offences of all the several Kinds, but what deserves some Punishment in the Order of the Civil Policy, and that all Crimes are not equal, as the Stoicks falsly imagined, not even the Crimes of the same Kind; it is of moment to enquire a little what it is that makes this difference, and renders Crimes more or less heinous, and more or less punishable in the Civil Policy.

There are three Causes of the differences between Crimes, or Offences: The Character of each Crime, and of each Offence; the Motive which induced the Person to commit it; and the condition of the things which accompany the Crime or Offence, which is called the Circumstances.

The Character of each Crime, is what is called the quality of the Crime; and it is first of all by the quality of the Crime, that we distinguish between the enormity and heinousness of a Murder, and the smallness in comparison of a blow with the hand in a scuffle. Thus in the other Crimes and Offences, the motive of the Person who commits the Crime, is the Principle which moved him to do it, and made him act. And there are three ways in which one is moved, or engaged to commit a Crime, or an Offence, either out of a preme-

c l. 13. ff. de fal. Paulus 5. Sentent. 25. 20. Cod. de mutat. nom.

premeditated design, in the heat of Passion, or thro Imprudence. And it is easy to imagine that in the same Kind of Crime, a transport of Passion is much more grievous than Imprudence, and a premeditated Design much more heinous than a transport of Passion.

There are some Crimes which cannot be committed but out of a premeditated Design, such as Assassinations, Duelling, Poisoning, a Rape, Robbery, Theft, and many others; and there are some which may be committed, either out of a premeditated Design, or in the heat of Passion, or through Imprudence, such as Homicide; for one may kill another with a premeditated Design to kill; one may kill in the heat of Passion, or through Imprudence, without any premeditated Design, and only out of a Design arising in the height of ones Passion; and one may kill through Imprudence, as for example, if one should kill his Friend thinking to kill a Beast behind a Bush. And it is this difference of the Principles and Motives which engage Persons in the commission of a Crime, or an Offence, which is the second Cause that distinguishes between Crimes and Offences, and which renders them more or less heinous, according to what passes in the Mind and in the Heart of the Person who commits the Crime.

The Circumstances, which are the disposition and condition of the things which attend the Action, and which may have any relation to it, make a third Cause of the distinction of Crimes or Offences, and produce these two Effects; one, to make some Actions either criminal or innocent by the bare difference of the Circumstances; and the other, to make those which are in reality Crimes, more or less heinous and punishable. Thus for example, Homicide is an Action which under the Circumstances of a lawful War is innocent, and which is a Crime in the case of a Riot or Sedition. Thus it is a smaller Crime to steal a common thing out of the House of a private Person, than to steal a thing dedicated to a sacred Use out of the Church.

We do not enlarge here on the several Kinds of Circumstances, which are to be considered in judging of Crimes, such as those relating to the Persons, the Place, the Time, and others; reserving this matter to be treated of when we come to the detail thereof: but it was necessary to make these general Remarks, in order to give the first Ideas of this matter, and to settle its Order; and we shall only add two Reflections in relation to the Circumstances. The first, that according to the common acceptation of this Word, there are two sorts of Circumstances; those which happen in the Person who does the Action, of which it is necessary to judge, in order to know whether it be criminal or not, or if it be more or less heinous; and those Circumstances which occur outwardly. Thus we consider in the Person his Quality with respect to his Actions; and if it is, for example, a Person who has been already reprimanded for the same Crime, that Circumstance renders the second Crime more heinous and more worthy of Punishment than the first. Thus we consider independently of the Person, the Time, the Place, and the other outward Circumstances, where the Crime has been committed; and these two sorts of Circumstances, either in the Person, or without the Person, have this in common, that they discover the disposition in which the Criminal was, by the Views and Designs which he may have had, and the Circumstances in which he was.

The second Reflection, is that among the divers Views which we ought to have in the matter of Crimes, one of the chief is that of the Events, which the Laws place in the number of the Circumstances *d* which aggravate or lessen the Crime and the Punishment: for it is of importance to observe, as the foundation of some Principles, that altho the Event of an Action be a Circumstance before God who judges the Heart, and that his Justice considers only the Views of the Motives, which are the Principles of our Actions, and which give them the Character on which God judges them without mixing in his Judgments the Views of the Events, which he orders and directs without any regard to our Views and to our Designs; yet it is nevertheless true that in the Civil Policy the Events are considered; and it is likewise just that they should be considered, and that of two Actions which are of the same Character, both by the quality of the Action, and by the motives of the Criminal, that which is followed by an Event which gives greater disturbance

d V. l. 16. ff. de pœnis.

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to the external Order of the Society, ought to be otherwise considered by the Civil Policy than that which gives a less disturbance. Thus for example, if we compare in two Quarrels two passionate Men who intend to kill, and make a Pass at their Adversary with that intent; and if we suppose that one wounds only, and that the other kills, the Event of Homicide in one of these two Quarrels, and the Event of a bare Wound in the other, make in the Civil Policy such a difference between these two Crimes, that he who has only wounded will be but slightly punished, and he who has killed will be prosecuted for Murder, and cannot escape the Punishment of Death, unless the Circumstances of the Action may intitle him to the Prince's Mercy. And there is no reason to think that there is any thing unjust in this Conduct, which treats in so different a manner these two Criminals, whom nothing distinguishes but the Event; for altho in the Heart and before God these two Actions are equal, yet there are two essential Reasons in the external Order of the Civil Policy for making a difference between them.

The first is, that as the Spirit of the Civil Policy tends to regulate the external Order of the Society, so it applies it self to the finding out and punishing of Crimes, in proportion to the disturbance which they give to the said Order: and therefore it is but reasonable that it should consider in another manner, and punish more severely the Actions which produce a much greater disturbance in the Society than those which are attended with lesser Consequences; leaving it to the rigour of the Divine Justice to discern, and to punish more severely the Actions which occasion the least disorder in the Society, altho they be as much or more criminal in the Heart as the others.

The other Reason is, that it is sometimes difficult, and even impossible to discern what has been the Motive and the Principle, which has induced him to act who is fallen into some Crime, or some Offence; and if there is either mere Imprudence, or Passion, or a real and true Design, when the Action and the Event, and the other Circumstances leave room to doubt of the disposition and intention of the Person who has offended, it would be unjust to suppose that his design was more criminal than it appears to have been by the Event and by the Circumstances; and according as there is room for doubting, it is presumed, if possible, that he has offended out of Imprudence rather than out of Passion, and rather out of Passion than out of a premeditated Design.

But when the Crime is such that it cannot be committed either out of the heat of Passion, or through Imprudence, and when it is the effect of a premeditated Design, such as Robbery, Theft, Assassination, and other the like Crimes; if the design which is conceived in the Mind, and formed in the Heart, hath produced some Motion that hath appeared outwardly, this Motion is considered in the Civil Policy as a Trouble which disturbs the Order of the Society; and although the Event has not ensued according to the Intention, that the Murderer has not killed, that the Robber has not carried any thing away, yet the Law takes for the Event the bare attempts of Crimes of this nature, because those Attempts trouble the external Order of the Society, and shew that the Persons who made them, are of such a Character as to endanger the Life and Estate of all Men; and the said Attempts are punished in proportion to their Malignity, and their Consequences.

By this time the Reader may perceive that all these matters of which we have just now spoken, ought to enter into this Treatise of Crimes and Offences, and that it ought to contain the several Kinds of Crimes and Offences, the three different manners in which they are committed, and the Circumstances; and it remains that we should consider in general the other matters which this third Book ought likewise to contain.

After this first View of the Causes and Circumstances of Crimes and Offences, we must in the next place proceed to the matters which are the Consequences thereof, which are all those which relate to the Punishment of Crimes; the Accusation, the Arrest, the Custody of the Persons who are accused, the Proofs, the Torture, the Sentence of Condemnation, the Writings exhibited, the Defence and Acquittal of Persons accused, Pardons and Abolitions, or Acts of Indemnity. And it is first of all necessary to give the general Ideas of all these matters, in order to explain them in such a manner as that

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that they may be underſtood, both according to our Uſage, and according to the Uſage of the Roman Law, and that they may ſerve as a Foundation to the Principles which are peculiar to them, and alſo in order to ſettle the Rank of every one of them in this Treatiſe.

Seeing Crimes and Offences ought to be puniſhed, it is neceſſary that there ſhould be not only Judges to decree the Puniſhment of them, but alſo Perſons to carry on the Proſecutions againſt the Criminals; becauſe thoſe who are to judge, cannot exerciſe the double Function of Judges and Parties, no more than they can be Judges in their own Cauſes; and let them be Perſons of ever ſo great Integrity, yet they cannot be both Proſecutors and Judges, according to the Rules and Reaſons, which ſhall be ſet down in the matter of Accuſers.

This Proſecution of Crimes may have two Views, one for the Puniſhment of the Crime, and for the publick Example, and the other for the Reparation of the Damage which the particular Perſon who has been injured has ſuſtained: and as we have already obſerved that according to the Conſtitution of our Government, the particular Perſons who have been injured can demand only the Reparation of their Damage, and that Vengeance and the publick Example are the Care of the Publick Officer; we have therefore, according to our Uſage, two ſorts of Perſons who concur with theſe two Views in the Proſecution of Criminals; the Party intereſted who complains, and demands Reparation of his Damage, and the Officer who for the good of the Publick ſues for the Puniſhment of the Criminal: and they concur differently in this Proſecution.

The particular Perſons who are intereſted in the Crimes or Offences may proſecute, or not proſecute, as they pleaſe; but when they proſecute, the Publick Officer ought to be joined with them in the Proſecution, and he cannot refuſe to exerciſe his Miniſtry in conjunction with the injured Party who complains, becauſe every Crime and every Offence deſerves a Puniſhment: and ſince the injured Party cannot demand a publick Puniſhment of the Crime, it is neceſſary that the publick Officer ſhould on his part proſecute the Criminal in order to Puniſhment, while the injured Party ſues for Reparation of his Damage; and it is for this Reaſon that he is called the Civil Party, becauſe altho he proſecutes a Criminal, yet he ſues only for Satisfaction to be made to him of the Damage he has ſuſtained, or the Reparation of his Loſs, which is called Civil Intereſt, and he can never demand the Puniſhment of the Criminal. If the injured Party declines to make his Complaint, the publick Officer is obliged, or not obliged, to proſecute on his part according to the quality of the Crime; for if it is heinous, and deſerves that the Criminal ſhould be made an Example of, the publick Officer ought to carry on the Proſecution, altho the injured Party makes no Complaint; and there are Rules by which he may be able to diſtinguiſh between the Caſes where he may be ſilent, and thoſe where his Duty obliges him to proſecute, altho the injured Party makes no Complaint.

There are therefore in *France* two ways, by which the publick Officer ought to proſecute the Puniſhment of a Criminal; one, when he is joined with the Perſon who has been injured, and the other, when he ſues alone, and without the Concurrence of the injured Party: and there are alſo two ways by which private Perſons may accuſe a Criminal; one, when they accuſe publickly, making themſelves Parties, and proſecuting the Criminal; and the other, when they are only Informers without making themſelves Parties. And this Information may be given by two ſorts of Perſons; for it may be given by the Party intereſted, when he either cannot or will not carry on the Proſecution, and only gives in a bare Information: and this is received alſo in great Crimes from thoſe who without any perſonal Intereſt accuſe Criminals, and by this Accuſation they engage themſelves to furniſh the Proofs of the Crime: and altho many Informers are excited more by Paſſion than a Zeal for Juſtice and the Publick Good, and that a Court of Juſtice ought not to give ear to thoſe who are acted only by Paſſion; yet two Conſiderations of importance oblige Magiſtrates to liſten to Informers; one, becauſe there may be ſome Informers who act out of a juſt and lawful Motive, and the other, becauſe the Order of the Government requires for the publick Good that Governours ſhould imitate the Divine Providence which knows

knows how to draw Good out of Evil, and that they ſhould make uſe for the Conviction and Puniſhment of Criminals, of the Lights and Diſcoveries that are to be had from thoſe Perſons who contribute towards it only out of a bad Intention.

The Accuſation being formed, the next ſtep to be taken is to find out the Proofs of the Crime; and when there appears to be Proof enough for bringing the Criminal to his Trial, that he may either clear himſelf or undergo the Puniſhment of the Crime, he is required to give an appearance; and if the Crime be ſuch as that it may be prudent to arreſt his Perſon, at the time that an Order iſſues for his Appearance, he is immediately ordered to be taken into Cuſtody and impriſoned: and in both theſe Caſes, either of Impriſonment, or of his giving an Appearance without any Confinement of his Perſon, he is examined touching the Accuſation that is brought againſt him, with a View to diſcover and find out the Truth, that he may be either acquitted, or convicted.

If the Criminal confeſſes the Crime, and the Crime be capital, yet nevertheleſs the Court proceeds to hear the Proofs; for it would not be juſt to condemn an innocent Perſon on a falſe Confeſſion: If the Party accuſed denies the Crime, they go on with the Proof of it; and in order to finiſh the Proofs, the Witneſſes are again called, and they ſhew them what they have already declared touching the Fact, to give them an opportunity either to perſiſt in the Truth, if they have told the whole Truth, without making any alteration, or to explain and amend ſuch part of their Depoſitions as they may think neceſſary to be altered: after which the Criminal and the Witneſs are brought face to face, and the Criminal is made acquainted with what the Witneſs has declared, and with the other Proofs; and when the Proofs are ſuch as to make it neceſſary to uſe the Torture, according to the Rules which ſhall be explained in their proper Place, the Criminal is put to the Torture; and afterwards they proceed to give Judgment, and to condemn him to the Puniſhment which his Crime may deſerve.

Puniſhments are the ſeveral Evils which Criminals are made to ſuffer, and which Juſtice uſes, according to the three Views, which we have already taken notice of, either to amend the Offender, or to prevent his falling into the ſame Crime again, and always to make an Example; for Puniſhments are the only means whereby it is poſſible to reſtrain the Licentiouſneſs of Malefactors. And altho this Remedy is imperfect, and that the force of Paſſion ſurmounts in many the fear of Puniſhment, yet it is the only way that can be practiſed, for reſtraining the greateſt part of Mankind: for ſince no one is moved to the commiſſion of a Crime except it be by ſome unlawful deſire of an Object which excites his Paſſion, there is no ſtopping the Violence of the Paſſion but by ſubſtituting in the place of the Object which the Perſon ſets his Heart upon, a contrary Event, which may be ſo diſagreeable as to allay the vehemence of the Paſſion: and it is in order to give to Malefactors a View of this Event, that exemplary Puniſhments are made, by which ſuch a Change is wrought in thoſe who take warning from the Example, that the Motion of Self-Love and of the Paſſion which ſtirs them up to the commiſſion of the Crime, is changed into a contrary Motion of the ſame Self-Love, which without extinguiſhing the Paſſion, avoids either the Crime, or at leaſt the Puniſhment. And it may likewiſe happen that the uſe of Examples may contribute to keep ſome Perſons within the bounds of a true Moderation, and work in them a ſincere Averſion, as well to the Crime it ſelf as to the Puniſhment.

It is for this uſe of Puniſhments, according to theſe three Views, of amending the Criminals, or of putting them out of a condition of committing new Crimes, and of making an Example, that the Laws have eſtabliſhed that great multitude of ſeveral different Puniſhments, not only according to the different Crimes, but differently eſtabliſhed in divers Places and at divers Times for the ſame Crimes.

Seeing all theſe different Puniſhments ought to have this Character, of making thoſe who are puniſhed to feel an Evil which the Crime draws upon them, and of ſtriking a Terrour into others, all Puniſhments may be reduced to the three Kinds of Evils already remarked, which Men may be made to ſuffer: and according to this View the firſt Kind of Puniſhments conſiſts of thoſe which are inflicted on the Perſon, as Condemnation to Death, to the Galleys, Whipping,

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ping, Banishment, the cutting off a Member, and others of the like nature: the second Kind, is that of the Punishments which particularly affect the Honour; for altho every Punishment destroys or diminishes the Honour of the Person who is condemned, yet there are some Punishments which affect particularly the Honour, such as that ignominious publick Confession of the Crime which in *France* is called *Amande Honorable*, and a publick Reprimand given by the Judge to the Criminal in open Court; both which Punishments brand the Criminal with Infamy, altho they do not touch either his Person, or his Estate, as in the case of a Judicial Reprimand: and the third Kind of Punishments consists of those which take away the Goods of the Criminal, or a part of them; as when he is condemned to make restitution, to repair the Damage he has done, to pay a Fine, or when all his Estate is declared to be forfeited.

All these Punishments have this in common, that altho they do not all of them directly affect the Honour of the Person that is condemned, yet there is not any one of them but what carries Dishonour along with it; and even those Punishments which are the slightest, such as the being condemned to give some Alms to the Poor, the receiving an Admonition, and which do not inflict that Infamy which is called Legal Infamy, and which renders the Persons who are noted therewith, incapable of certain Functions, do nevertheless stain, or blemish the Honour in the general Esteem of Men: And sometimes the three Kinds of Punishments are all accumulated together, as in the case of those who are condemned first to make a publick Confession of their Crime in an ignominious manner, and afterwards suffer Death, and their Estates confiscated, which always attends the Punishment of Death.

The Persons who are accused may avoid the Punishments three ways, by justifying their Innocence, by a particular Pardon from the Prince, and by an Abolition or general Act of Indemnity.

When the Person who is accused justifies his Innocence, he is not only freed from the Punishment, but acquitted of the Crime; and there needs no Pardon from the Prince, nor Indulgence from the Judge, to him against whom no Crime is proved, or who clears himself against the Proofs which have been offered against him; and he is acquitted either for the want of Proof to convict him, or by the effect of the Proofs which he alledges for his Innocence, and which he confirms.

The Pardon of the Prince, which would be superfluous to such as are wrongfully accused of a Crime which they have not committed, is necessary to those who have committed a Crime, which in its nature may deserve Death, or who have been Accomplices in the Commission of such Crime, but who are under Circumstances which may intitle them to the Prince's Pardon, and to have the Punishment remitted. Thus for example, if he who has killed a Man, which is a Crime that deserves Death, has killed without any fore-thought Malice, by a mere Accident; or if he has killed him to save his own Life, defending himself in that manner which in the Civil Policy is called a lawful Defence, because in the external Order of the Civil Policy the same is excused, or forgiven; or if he was privy to the design of the Person who killed one in his Company; It is necessary in these Cases that the Criminal should have recourse to the Prince, to obtain from him a Pardon of the Crime, and a Remission of the Punishment: Which shews plainly the difference between the innocent Person who has not killed, and him who has killed, or has contributed to the killing of another, with whatever Circumstances the Homicide may be attended; because the one is absolutely free from all manner of Crime and from all manner of Fault, and the other is so far involved in the Crime, or in the Fault, that he stands in need of a Pardon.

An Abolition, or Act of Indemnity, is necessary for those who are convicted, and who cannot plead an excuse from any of the Circumstances; for in that case if the Prince is disposed to Pardon, he must do it by another way than that of a special Pardon and Remission, which are founded upon Circumstances, and he must of his own free Will and Pleasure, and by virtue of his absolute Authority, abolish the Crime, and the Punishment, out of Motives which induce him to prefer Impunity to Punishment; such as the Consideration of the personal Merit of the Criminal, or the Regard which the Prince has for his Family,

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Family, or upon other Views, of which he is to render an account to God alone.

Seeing Pardons, Remissions, and Abolitions are in use only for Crimes which of their own nature deserve to be punished with Death, we have not set down among the ways by which Persons who are accused avoid the Punishments, that of Death, and Flight; for there are some Crimes which Death it self does not prevent an Enquiry to be made into them, and Punishments to be inflicted for them; and Flight is it self a Punishment, and does not free one from all the other Punishments.

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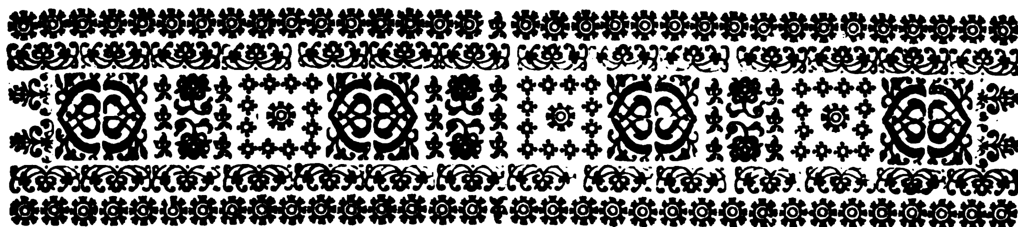

THE PUBLICK LAW; BEING A SUPPLEMENT TO THE CIVIL LAW IN ITS NATURAL ORDER.

BOOK IV.

Of the Ways of terminating Law-Suits, and Differences, and of the Order of Judicial Proceedings.

IT is not enough for the Knowledge and Exercise of the Science of Law, to know throughly the Nature, the Principles, and the Detail of all the several Matters which are the Subject of Contests, of Differences, of Crimes and Offences, and all the Divisions which trouble and molest the Peace and Union that ought to link the Members of a Society together; but it is likewise necessary to know the Ways that are made use of for judging and deciding these Differences, these Divisions, and Affairs of all kinds.

There are three different ways by which an end may be put to all sorts of Affairs and Disputes between particular Persons, comprehending under these Words of particular Persons, all sort of Persons whatsoever, without excepting even Communities.

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The first is the voluntary Agreement which the Parties make among themselves, either wholly by themselves, or by the Mediation of their Friends, by their Counsel, or by the Advice of some third Person, without waiting for any formal Judgment or Award.

The second is the choice of some Persons to whom they give power to regulate and to adjust their Differences.

The third, which becomes necessary when those who have any Dispute together, where one of them will not hearken to any of the two first Ways, is to go before the Judges, whether it be that one Party is drawn thither, or that he inclines to draw his Adversary into Judgment.

We do not place in this Rank of the Ways of terminating Differences, two other Ways, which seem to produce the same Effect. One is Tyrannical, when one of the Parties imposes Silence on the other by his Violence; and the other full of good Nature, and of Christian Patience, when one of the Parties being desirous of Peace, and despising that which is the Ground of the Difference, abandons, not out of Negligence, but out of Prudence and a Principle of Virtue, either that which he has a right to demand, or that which is unjustly ravished from him. These two Expedients cannot be reckoned among the Ways of ending Differences; for one of them is a Crime liable to Punishment, altho it be very frequent, and yet seldom punished; and the other is a Virtue so little known, that many give it another Name; and few of those who know it are willing to practise it: And besides, the Violence of some, and the Patience of others, not rendring to every one what belongs to him, are not Ways of terminating Differences, no more than an Inability to go to Law, and the other Ways by which People may abandon their Right.

We have restrained these three Ways of terminating Differences to such as are between particular Persons, of what Nature soever they may be; for in Crimes where the publick Concern for Punishment is mixed with the private Interest of particular Persons, altho the particular Persons may, as to what concerns their private Interests, make an end thereof by any of these three Ways which they please to make choice of, yet they cannot meddle with any thing that relates to the publick Interest; for the Officer who is charged with the care of it can use only the Way of a Judicial Prosecution, because he is not Master of the publick Interest, so as to dispose of it, as private Persons are at liberty to do with their Interests what they please; for this Officer being obliged by the Duty of his Office, to sue for the Punishment of the Crime, he cannot faithfully discharge this Duty, but by prosecuting the Criminal without any Terms of Accommodation, and before the Judge, who is the only Person to whom the publick Interest has been intrusted.

These three Ways of putting an end to the Differences between particular Persons, have their Names, their Natures, and their Principles wholly different.

The first, which is the voluntary Accommodation to which the Parties agree, is called a Transaction, that is to say, a Treaty concerning a Difference that is either begun, or ready to begin, and which puts an end to it.

The second, which is the Choice of one or more Persons who are taken for Judges, is called Arbitration, because they give the Name of Arbitrators to the Persons who are taken for Judges, and to whom they give power to terminate the Difference by a Sentence, which is called for that reason an Award or Arbitrament, and the Treaty by which they give them this Power is called a Compromise, because the Parties promise mutually to execute whatever the Arbitrators shall decree. And because the Arbitrators being chosen only by Persons in a private Capacity, have not the Authority of real Judges, who exercise the publick Function of judging, it was necessary to give unto their Sentences another Force than that of the publick Authority, and such as might be proportionable to the Power which the Arbitrators derive only from the Parties who have named them. And it is for this reason that whereas the Sentences of Judges are executed by the natural force which they have from Authority, the Want of Authority which private Persons cannot give to those whom they chuse for their Arbitrators, is supplied by another Way which is in the power of the private Persons themselves, and that is, the agreeing to a Penalty to which they bind and engage themselves by the Com-

Compromise, promising thereby that he who shall refuse to execute the Award, shall be bound to pay the Penalty to the other; so that the whole Effect of Compromises is reduced to the Payment of this Penalty *a*, which is called the Penalty of the Bond; and he who is not satisfy'd with the Award, may chuse either to pay the Penalty, or to perform the Award.

The third Way of terminating Differences and Law-Suits, and which is much more frequent than the two others, is the Recourse which is had to the Judges, which is called the Way of Justice; not that it is more just to have recourse to this Method, than to make an end by an Arbitration, or by a Transaction: for on the contrary, it is infinitely more conformable to the Divine Law, and consequently more just, and likewise more profitable, to shun this Way, and to seek for Peace, even with the Hazard of some Loss, rather than to go to Law, and expose ones self to the Consequences which all Law-Suits are attended with, and which are equally contrary to Charity and to Self-Love. But this third Way of ending Law-Suits and Differences is called the Way of Justice, because it is just that the lawful Authority should judge and determine the Law-Suits and Differences which the Parties themselves would not make an end of another Way, and that it ought to be Justice which accompanies that Authority, and also because it is Justice which the Parties ought to expect by this Way: And lastly, altho it should happen that the Judges who judge in the last Resort, and who have the Authority of putting the last end to all Law-Suits, should render a Judgment that were not just, yet it is just to abide by it; and there would be no likelier Way of introducing Rebellions and Seditions, and consequently nothing more unjust, than to leave particular Persons at liberty to resist Authority, and to render to themselves the Justice which they had not been able to find in the Place where they ought to have had it. And it is only Sovereign Princes, who owning no common Superior from whom they may demand Justice, when they cannot agree among themselves, are naturally engaged in the way of War, which is a kind of Recourse to the Judgment which God, who alone is their common Master, shall think fit to pronounce between them, by the Success which he shall give to the Arms of the contending Parties.

These are therefore the three Ways of terminating Law-Suits and Differences, by Transaction, by Arbitration, and by the Way of Justice, which shall be the Subject of this last Treatise; and because the particular Matters of Transactions and Arbitrations are of no large Extent, and that it is natural to come to the Way of Justice, when none of the other two Ways succeed, this general Treatise of the Ways of terminating Law-Suits and Differences, and of the Order of Judicial Proceedings, shall be preceded by two particular Treatises, one of Transactions, and the other of Compromises and Arbitrations, and that of the Order of Judicial Proceedings shall follow afterwards.

We shall not point out here the particular Matters which ought to come into the Treatise of Transactions and Arbitrations; for besides that they are of no great Extent, it sufficeth to give here these general Ideas, to shew the Nature and Order of the said Matters; but as to what concerns the Order of Judicial Proceedings, the multitude and variety of the Matters which it contains, have obliged us to set down here the Ideas that are necessary, for conceiving aright the Nature thereof, and digesting them in their proper Order.

As we have seen at the beginning of the general Division of all the Matters of the Law, that it is necessary to consider Persons, Things, and the Ways by which Persons make use of the Things; so likewise it is necessary to consider in the Matter of the Order of Judicial Proceedings, the Persons who are concerned therein, the Things that are there transacted, and the Ways in which they are transacted.

The Persons who are to be consider'd in the Order of Judicial Proceedings, are the Parties who are at variance with one another, the Judges who are to render them Justice, and all those whose Ministry is necessary, either to act for the Parties, and to defend their Rights, or to demand that Justice may be done them.

The Parties come into Judgment four Ways, which give so many different Names to those who are at Law. He who

a Ex compromisso placet exceptionem non nasci, sed pœnæ petitionem. *l.* 2. *ff. de recept.*

who comes to demand Justice, and who calls another into Judgment, against whom he demands Justice, is named the Plaintiff or Demandant; he against whom Justice is demanded is called the Defendant; and when it happens that a third Person pretends some Right in a thing that is contested between the Plaintiff and Defendant, and that without citing any one, or being cited himself, he comes in for his Interest, he is called the Party intervening; and when he from whom any thing is demanded, pretends that another is bound for him, and causes him to be summoned, that he may put him in his Place, in order to warrant him in his Title and Possession, or that the said Person offers himself without being summoned, and becomes a Party, and he is called the Guarantee or Vouchee, he being called or vouched to Warranty. Thus to shew in one Example these four Parts, Plaintiff, Defendant, the Party intervening, and the Guarantee: If *John* has sold to *Peter* an Estate which belongs to *James*, and *Peter* being in possession, *James* summons *Peter* to give him back his Estate, and *Peter* summons *John* of whom he bought it, to warrant and defend him in his Possession; *James* will be the Plaintiff or Demandant, *Peter* the Defendant, and *John* the Guarantee; and if *Andrew* being a Creditor to *James*, and having a Mortgage on the said Estate, opposes *James* his being put into possession, and demands of him that he be allowed to enjoy the Fruits of the Estate for the Debt that is due to him, he will be the Party intervening.

These four Ways of going to Law, either as Plaintiff, as Defendant, as Guarantee, and as a Party intervening, are the Ways by which Law-Suits are begun before the Judges in the first Instance, to whom the Parties ought first to address themselves; but the Law-Suit being decided by the Sentence of the first Judges, if one of the Parties is not willing to abide by it, he ought to have recourse to the superior Judges, and the Way of coming to the superior Judge for obtaining a Reformation of the Sentence, is called Appeal; and the Party who uses this Way is called the Appellant, whether he was Plaintiff or Defendant, Guarantee or a Party intervening in the first Instance, and he who defends the Sentence is called the Party Appellate or Respondent.

The Judges are of several sorts, and differently distinguished; either by the Difference of Authority in the same kind of Jurisdiction between the inferior Judges from whom the Cause is appealed, and the superior Judges before whom the Appeal is brought: And there are many other Differences between the Judges. But as to what relates to the Order in Judicial Proceedings, it sufficeth to consider in the Person of every Judge his Function to administer Justice to the Parties in the full extent of his Ministry, which comprehends every thing that he ought to regulate, both during the Instruction of the Cause, and at putting an end to it by a final Sentence, as also that which concerns the Execution of his Judgment.

Besides the Ministry of the Judges, we are to consider in the Order of Judicial Proceedings that of another kind of Officers, which is of singular importance and necessity in all the Affairs where the Publick is any way concerned, whether they be Civil or Criminal, and who in these kinds of Affairs, and in all those which are committed to their Charge, are in the place of Parties.

Next to these first Officers whose Functions are accompanied with Authority and Dignity, we consider in the Order of Judicial Proceedings the other Officers whose Ministry is necessary either to the Judges or to the Parties. Thus Registers are necessary both to the Judges and to the Parties, to write down every thing that the Judge orders and decrees; and Apparitors and Bailiffs are necessary for executing it, and for making Intimations to the Parties.

Besides the Persons already mentioned who are necessarily to be consider'd in the Order of Judicial Proceedings, there are likewise two other sorts of Persons necessary for the Parties; for the greatest part of Mankind being either unfit or unwilling to appear in Judgment, or occasioning a great many Inconveniences when they do appear in Person before the Judges, by the Transport of their Passions, their Eagerness in defending their Interests, and being also for the most part ignorant of their Rights, and of the proper Arguments to support them, all these Considerations of the Interest of the Parties, and of the Decorum which ought to be observed in the Distribution of

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of Justice, have made it necessary to employ in most Tribunals Persons who may give constant Attendance, and who are throughly versed in the several Steps that are to be taken, in order to have a final Decision of Differences and Law-Suits: for which reason Proctors have been established to represent the Parties; and out of the number of those who exercise this Ministry, each Party may and ought to chuse one who may perform for him all the Functions for which they are established, unless it be in such Tribunals, where the Parties are allowed to instruct and plead their own Cause, without the Assistance of Proctors.

And because there are many Differences and many Law-Suits relating to Matters, which require the Knowledge of the Principles of Law, which cannot be had without much Study and Experience, and which neither the Parties themselves, nor their Proctors, have had an opportunity of acquiring; it was necessary that there should be Persons who had a thorough Knowledge of all these Matters and Principles, and who might be able to explain and defend the Right of the Parties, either by word of mouth, or by writing, according as there is occasion to instruct the Causes in one or other of these two Ways; and these are the Persons who are called Advocates, who exercise, or may exercise, these three Functions, of giving Counsel and Advice to the Parties, of writing in defence of their Rights, and of pleading their Causes for them.

Having taken this general view of the Persons who are concerned in the Order of Judicial Proceedings, it is proper in the next place to consider the things which are there transacted.

It is usual to give the general Names of Acts and Proceedings to every thing that passes in the Order of Judicial Proceedings; and because the said Acts and Proceedings are sped by certain Forms regulated by Usage, or prescribed by the Ordinances, we call the manner of speeding the said Acts, Forms, and we give also the same Name to the Acts themselves. Thus, for example, we say that a Proceeding is according to form, or that all the Forms and Formalities have been observed therein, when it has all the Acts that are necessary for making it regular: And it is in this sense that we say that the Libels, the Answers, and the other Acts, are the Formalities necessary to be observed. And we say in another sense, that an Act is according to Form, when it is done after the manner that the Laws prescribe, and the Forms or Formalities signify in this sense the right Ways of speeding the Acts.

It is not only to explain the Meaning of these Words of Forms and Formalities that we make here this Remark; it is necessary upon another account, which is of much greater Importance, and that is, for discovering an Abuse that is very common, which is occasioned by these two Words, and for showing the right use that ought to be made of them.

Seeing these Words of Forms and Formalities signify indifferently both the Acts or Proceedings themselves, and the Ways of speeding the said Acts and Proceedings, and that often the said Ways are indifferent, altho the Acts themselves be most necessary; it is dangerous to confound the Meaning of these Words, and to imagine that because the Ways of speeding some Acts are indifferent, we may say the Forms are also indifferent, because there are Forms which are very essential, whether we understand by this Word the Acts themselves, or the Ways of speeding them.

In order therefore to conceive the right Idea which we ought to have of these two Words, Forms and Formalities, it is necessary to distinguish and to consider in each Act that which is natural and essential in it, and which makes it necessary in the Proceeding, and that which is essential or indifferent in the way or manner of doing it. One single Example will be sufficient to illustrate all that has been said of Acts, and of the Ways of speeding them.

Every body knows that in order to decide a Difference between two Parties, it is necessary to know the Truth of the Facts which are essential to the Difference; and that in order to know the said Truth, it is necessary to hear both Parties, that each of them may be able to shew what the other has falsly advanced or concealed. It follows from these Principles, that he who intends to make any Demand before a Judge, ought to bring his Adversary before him, and that it is necessary to have some Way of obliging him to come before the Judge, either to deny or to confess the Truth, and to own the Justice

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Justice of the Demand brought against him, or to defend himself against it. And this Way that is necessary for obliging the Party to appear before the Judge, is the first Act that begins all the Law-Suits, and which is so natural and so necessary, for the important Reasons which we have just now taken notice of, that there is no Government whatsoever where the Party who pretends to make any Demand is not obliged to give notice, or cause notice to be given to his Adversary to appear before the Judge; but the Ways of giving notice may be different, and are so in effect. Thus in former times at *Rome* the Plaintiff himself conducted the Defendant before the Judge; and now it is a publick Officer who cites the Party to appear before the Judge, and makes an Act which is called a Certificate of the Service of the Process, and which contains a recital of the Time and Place where the Process was served; and this Certificate may be made several Ways, which have been varied with us according to the Inconveniences which have made the said Variation necessary.

We see by this Example that the Certificate of the Service of a Process, is an Act so natural and so essential, that we cannot have Justice on a Demand unless it be made after this manner; and we likewise see that the Ways of citing the adverse Party are indifferent, but become necessary according as they are established by Law and by Usage: from whence it follows that it would be false and very unjust to imagine that Forms have nothing essential in them, taking this Word in the common ordinary Acceptation thereof, according to which it signifies both the Acts themselves, and the Ways of speeding them; and the only true Meaning of this Expression which is so common, that we ought not to adhere too nicely to Forms, ought to be restrained to the Ways and Manners which are indifferent, and which are not essential to the Acts. Thus, for example, in the Service of a Process, it is necessary that it be done by a publick Officer, that it should have a Date, that it should explain the Demand, that it should be served on the Person himself who is cited, or that a Copy thereof be left at the Place of his Abode; and so for the rest. But it is indifferent, whether it be conceived in certain Terms, and according to a certain Style; and one may vary, without causing a Nullity, the Order and the Terms thereof as one pleases. And it is the same thing with respect to all other Judicial Acts; for in every one of them it is necessary to consider what it has that is natural and essential to it, and what belongs only to the Way and Manner in which it ought to be sped; as to which it remains only that we observe concerning this external Form of Acts, that there is in every Place a certain Style, and stated and uniform Ways for every kind of Acts, and that the said Stiles and Ways have nothing in them that is of absolute necessity, except what serves to express that which is natural and essential in the Act; and it ought to subsist, provided it be done in this manner, altho the Form thereof in other respects be different from that of the Style.

What is said here is not to be understood of certain Acts, in which some Customs have prescribed certain Terms to be used, and which cannot be alter'd without making the Act null and void, not even altho other Terms of the same Signification be substituted in their room, which the said Customs observe in certain Matters; as in the Custom of *Paris*, with respect to the Form of Testaments, in the same manner as formerly at *Rome*, every Demand was to be made in certain solemn Terms, which were so necessary, that he who erred in one Syllable, lost his Demand; which scrupulous and odious Formalities were first abolished by the Emperor *Constantine*. But excepting these particular Cases, People are at liberty to make use of what Expressions they please, provided they contain what is natural and essential in the Acts.

It remains that we should make one Remark more in relation to what is transacted in the Order of Judicial Proceedings; that all the Acts ought to be set down in Writing, to the end there may remain a Proof of what has been well or ill done, and that nothing be altered to the prejudice of Truth.

It was necessary to distinguish these several Ideas of Acts, of Forms and Formalities, because the said Acts and Forms make up the whole matter of the Order of Judicial Proceedings, and because it is of importance to know how to discern aright what is natural, essential and necessary in every Act, and what part of the Way and Manner thereof

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thereof it is which ought to answer the Nature of the Act, and the Use for which it was intended; and it is for that reason that we have thought it proper to make here all these general Remarks on this Subject, in order to give an Idea of the Nature and Foundations of this Matter; and we shall go through in the same manner, and in general the Nature and the essential Parts of the several sorts of Acts which compose the Order of Judicial Proceedings, and which are necessary in all Courts of Judicature: But as to what relates to the Way and Manner of speeding the said Acts, we confine our selves to what has been said thereof here in general; for it is not the design of this Book to lay down a Style of Judicial Proceedings. And since our Style and Method in Judicial Proceedings is different from that which was observed in the *Roman* Law; and seeing we have confined our selves to what is common to the *Roman* Law and to our Usage, it will be sufficient if we consider what is essential in the Order of Judicial Proceedings.

5 Seeing the Order of Judicial Proceedings ought to tend only to the Discovery of the Truth, and to give an opportunity to the Parties to make it known, and to establish their Rights, the most simple and most natural Manner whereof this Order ought to consist, would be for the Parties themselves to come before the Judge, and to explain their several Pretensions; and for the Judge after having heard them to administer to them on the spot the Justice that should be due to them. But this Way is not in use with us, except for some slight Differences between poor People, where the Matter in debate is very trivial, and which the Parties themselves are able to state sufficiently to the Judge; but all the other Affairs of what nature soever they may be, are not terminated in so short a time, nor so easily, but they are usually protracted and embarass'd by all the Difficulties which we see multiplied in so many different manners. And it is not strange that God has scatter'd these Thorns in a Way wherein the greatest part of Mankind are led wholly by the Impulse of Avarice, Ambition, Hatred, Revenge, and of other Passions, and in which they walk in a manner suitable to the Impulse that first moved them, and which engages them in Lying, in Calumny, in Cavilling and Tricking, and in all the kinds of Injustices which we see multiplied in all Law-Suits.

The Passions of the Parties are not the only cause of so great, and so extensive an Evil; for if they are the first Cause that draws down all these Evils, as so many Punishments which God inflicts on them, yet there are other Causes mixed with them, which are as it were the Hands which scatter among those who go to Law all these several Evils, for the Punishment of such as deserve them, and for exercising the Patience of those who make a good use of them.

It is easy to judge that these other Causes of the multitude of Querks and Cavils that are so frequent in Law-Suits, arising from something else than the Parties, can proceed only from the other Persons, who have a share in the Administration of Justice; and that if those who have this Honour, whatever Place they may occupy therein, have not in their Hearts a steddy and sincere Love of Justice and Truth, and if they consider their Ministry with any other Views, they will be so far from dissuading the Parties from making use of unfair Practices, that they will be ready to suggest and to countenance them according to the Quality of their Ministry, they finding their account in multiplying unfair Practices, and in prolonging the Steps that are necessary to be taken. It is not strange therefore that such a Concurrence of Passion in the Parties, and of Interest in the Persons who exercise the Functions of Justice, and the Easiness of the Opportunity, should produce all these horrible Consequences, which the best concerted Laws in the World are not able to put a stop to, and which on the contrary make the Laws an occasion of new Inventions, for multiplying Law-Suits and the Proceedings therein.

We could not forbear making this Reflection, and it ought not to be looked upon as a Digression, either useless or superfluous; for it is essential to the Design which we have laid down of considering the Nature of each Matter.

Thus we have been obliged to make this general Remark, which is absolutely necessary for distinguishing the Proceedings which are natural and ne-

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cessary from those which are the effect, either of the Passion of the Parties, or of the Misdemeanour of those who are concerned in the Administration of Justice; and for shewing the Difference between those who exercise their Ministry according to the Spirit of the Laws, which is the Spirit of Truth and of Justice, and who bound their Interests by the just Rules of their Ministry, and those who abuse their Ministry to advance their Interest.

That we may be able therefore to judge of what is natural and essential in the Order of Judicial Proceedings, and by the knowledge of that to discern what is mixed therewith that is vicious or superfluous, it is necessary to run over the natural Order which ought to be observed in informing the Judges of Justice and of Truth.

We have seen that the first Step by which all Law-Suits are begun, is that of the Summons, or Citation, which he who commences the Suit procures to be served on the Party against whom he has some Pretension; and the said Step is followed, either by the Silence of him who is summoned, or by his Appearance; if he continues in Silence till the delay which the Law allows him is expired, it is but just that he who caused him to be cited should have justice done him without hearing his Adversary, seeing he has neglected to make use of that Right: and in this case, if the Demand be sufficiently established by what appears, the Judge may condemn him whose Silence is a Presumption that he has no defence to make.

But when he who is cited, and who is called the Defendant, appears to defend himself, that is to say, according to our Usage, constitutes a Proctor; the first Step on his part, which is the second in the Order of Judicial Proceedings, is that he defend himself, or if he has any thing to demand that may be necessary for his Defence, that he explain it, and so proceed to his Defence, and that his Defence be made known to his Adversary, to the end he may either contest it, or confess it; and if by the Demand, and the Defences that are made to it, the Fact and the Pretensions on both sides are fully stated and understood, the Judge may then proceed to give his Sentence.

But if the Defence made by the Defendant obliges the Plaintiff to answer it on his part, this Answer is called a Reply; and thus the Parties establish on both sides each of them his Right by Writings.

All the Contests of the Parties are of two sorts; for they can contest but one of two things, either the Truth of the Fact, or the Consequences which are drawn from it. We call those Questions of Fact where the Business is to know the Truth of Facts; and we call those Questions of Law, where the Matter is about reasoning on Facts that are agreed on, in order to draw from them the Consequences which may serve to establish the Right of the Parties.

The Questions of Facts are resolved and decided by the Proofs which discover the Truth of the Facts in dispute.

The Proofs of Facts are of several sorts; for as we give the Name of Proof to every thing that makes a Truth known, and as there are several Ways of making known the Truth of Facts, so there are also several kinds of Proofs.

All the Ways of proving Facts in a Court of Justice are of four sorts; the Confession of the Party, the Testimony of Persons who know the Fact, the Evidence which arises from Deeds and Writings, and the Knowledge of certain Facts, which are linked in such a manner with that whereof we search the Truth, that one may gather the said Truth from the Connection there is between the Fact in question and those of which the Truth is proved. These four kinds of Proofs are common to Matters both Civil and Criminal.

The Confession of the Party against himself is always a certain Proof of the Fact which he owns, unless the contrary Truth were established in such a manner as that there might be reason to think that the Confession is an Effect of Folly or Stupidity in the Person who should confess against himself that which is false: And this Rule has only one Exception in Accusations of Capital Crimes, where it is not enough that the Party who is accused confesses a Crime which is not proved; but other Proofs are necessary for putting him to Death besides his own Confession, which might be an Effect of Melancholy or Despair, or proceed from some other Cause than the Force of Truth.

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In order to come at this Proof, which is drawn from the Confession of the Party, leave is given to those who are desirous to proceed this way, to propose the Facts; wherein it is of importance to them to have either the Confession of the Party, or Answers, which may discover his Insincerity, when they shall oppose to his Answers the Proofs of the Facts which he shall have denied, or that they shall draw from his Prevarications, and the other Defects or Circumstances of his Answers, the Consequences that discover the Truth. And according to the Usage established in *France* by the Ordinances, each Party is at liberty to propose Facts, and to demand that the adverse Party be obliged to answer them upon Oath, and to declare what he knows concerning each Fact; and they draw afterwards from the Interrogatories and Confessions, the Denials, and the other Circumstances, the Consequences which may serve to prove the Facts, the Truth of which they intend to make appear.

The Proof by Witnesses is that which results from the Declaration of two, three, or more Persons, who have Knowledge either of the Facts in question, or of others which may serve towards the Proof of the said principal Facts; and this Proof hath its full Force when the Credit of the Witnesses is not destroyed by any Blemish or Imputation, which may render their Testimony null or suspicious: for altho it may happen that Witnesses may give a false Testimony, and that nothing can be objected against them, yet it is of absolute necessity in the Order of the Society of Mankind, that in the infinite multitude of Facts, of which the Proofs are necessary, and which depend on the relation made by Persons who are Witnesses thereof, to suppose that those who relate the Facts declare the Truth, when nothing obliges them to make a declaration contrary to it. And this Method of Proof is not only grounded upon this Necessity, and upon the natural Order of Things, but it is also established by the Divine Law, which hath made it a Rule.

Written Evidences are of several sorts, according to the several kinds of Acts which People are desirous to preserve the Memory of after this manner, in order to make proof of the Truth of them; and also according to the several Ways of preserving the Acts, and of proving them by the means of Writing.

If the Acts whereof the Memory is to be preserved, pass in a Court of Justice, the only way of proving the Truth of them is to have them taken down in Writing, and to have the Writing signed by a publick Officer, who may by his Signature bear testimony of the Truth of the Act which he signs. Thus in *France*, Apparitors and Bailiffs sign the Certificates and Returns which they make of the Processes that they have served. Thus the Judges sign their Sentences. Thus the Registers, who are the Depositaries of the Sentences, and who ought to give Exemplifications of them to the Parties, sign the said Exemplifications; and every Officer signs the Acts which are to receive their Form and their Proof from his Ministry, according to the Rules which the Ordinances and Usages of Places have established, both for the Quality of the Acts, and for the Functions of each Officer. If the Acts are not sped in a Court of Justice, but are such as that it is easy to foresee that they may be necessary, either for proving the Truth when it shall be required, or that there be other Causes which make it necessary to have a written Proof, as will appear by the Examples; there are two Ways of writing the said Acts according to two kinds thereof which may be made; for there are some Acts which in their Nature relate only to particular Persons who have Business together, or to their Heirs: as if one borrows of another that which he owes him; if they have any Account to adjust between them, if they sell, exchange, transact, and treat together in any other manner: and there are some Acts which in their Nature regard other Persons besides those who make them, such as Testaments, Codicils, Publick Registers, in which ought to be recorded the Proof of the Birth of Persons, of their Marriage, of their Promotion to Holy Orders, of their Death, the Deliberations of Communities, the Collations of Offices, of Benefices, and in general all the Acts whereof

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whereof the truth ought to be made manifest by an Authentick Proof, and to which People may have recourse on all occasions, wherein this Proof becomes necessary, whether it be in Judicial Proceedings or on other occasions: and all the Acts of these two Kinds have their particular manners in which they are written.

The Acts which in their Nature relate only to particular Persons, who treat together, or to their Heirs, such as a Loan, a Sale, an Account, an Acquittance, and others of the like Nature, for proving of Covenants, and other Affairs, may be written in two manners, either by the Parties themselves, if they can write their Names, or by a Publick Officer, who is the Notary, for Persons who cannot write. And it is free likewise, and often convenient, and even necessary for Persons who can write, to have the Acts sped in the presence of a Notary, whose Ministry hath in *France*, among other Effects, this principal one; that the Acts sped by a Notary, carry their Proof along with them by the publick Authority which the Character of the Officer gives them, whereas private Writings may be denied, and oblige those who make use of them to prove them; and the other, that the Acts sped by Publick Notaries give a Right of Mortgage on the Estate of the Person who obliges himself, and which a private Writing does not give; because if any private Deed or Writing should be allowed to convey such a Right, it would be an easy matter for private Persons to defeat prior Mortgages, by antedating posterior Mortgages for Debts contracted after the Settlement of the first Mortgage.

All the other Acts which regard other Persons besides those who are Parties to them, such as the Acts which have been just now taken notice of, as Testaments, publick Registers, Collations of Benefices, Patents or Commissions, and others of the like Nature, ought to be written by Persons who are vested with the publick Character and Ministry, which impowers them to draw or speed all these different Kinds of Acts. Thus, in *France*, Notaries Publick and the Curates of the Parish draw up last Wills and Testaments, and Codicils; the Curates keep the Registers of Christenings, Marriages, and Burials: thus Patrons of Benefices give the Presentations; and all the other different Acts ought to be sped by the proper Officer who has the Charge thereof, and Notaries Publick speed all Contracts and other Acts between private Persons.

All these several Acts, of what Nature soever they be, have this in common, that they are written Proofs, and that the Truth of the Acts being proved by the Character which either the publick Form and the Signature of the proper Officer, or the Signature of the private Persons who are Parties to them gives them, they serve as a Proof of the Truth of the Fact which they declare and set forth.

There is likewise a fourth Kind of Proofs, which are called Presumptions, that is to say, Consequences which are drawn from certain Facts that are known and proved, whereby to guess at or infer the certainty of the Fact in dispute, and of which the said known Facts are Marks and Signs; and these sorts of Proofs are called Presumptions, because they do not demonstrate the Fact it self which is to be proved, but prove the Truth of other Facts, the Knowledge whereof discovers, points out, and gives room to conjecture and presume the Fact in question, because of the natural and necessary Connection between the Facts that are known and those which we want to know the Truth of. Presumptions being Consequences that are drawn from known Facts to the Fact which is to be proved, they are certain or doubtful according as the Connection between the known Facts and the unknown Fact is certain or doubtful: and as there are some Facts whereof the Connection with others is indubitable, so there are likewise Presumptions which make certain and undoubted Proofs; but those which are founded only upon Facts whereof the Connection with others is uncertain, are not Proofs. Thus for a first Example of a certain Presumption, if it is in proof that two Men having quarrelled, the one followed the other who fled, and that he who fled having taken shelter in a House, the other went into it, and came out with his Sword bloody, the Man who was pursued in this manner, being found wounded with a Sword in that House wherein there was no other Person; all these Facts put

put together carry with them a Proof, that it was this Aggressor who killed the said Man; and altho no body saw him kill him, yet it is enough that People saw the Aggressor pursuing the deceased with his naked Sword, follow him into the House, and come out again with his Sword all bloody, that they saw that the Person was dead of his Wounds, and that no body else was in the House; for these Facts which are proved have a natural and necessary Connection with the only Fact which remains to be proved, that it was that Person who gave the thrust which no body saw given: this Connection between the said Fact and the others, makes a very sufficient Proof, from which we may certainly conclude that it was this Aggressor who gave the Wound of which the Party died: and this Proof of a Fact which is not known, either by Confession, if the Aggressor denies it, or by Witnesses who saw the wound given, or by other ways, is reduced to Conjecture, and Presumption, that is to say, to the natural Consequence by which we gather from these Signs and Tokens, that it being impossible on one part, that it should be any other Person who gave the Wound, and natural on the other part that it might be given by him who followed in this manner, it is necessary to conclude, and impossible not to judge him to have been the Author of the Murder.

But for a second Example of a Presumption that is uncertain, if it is proved that a Man was found all alone near to the dead Body of one who was killed on the High-way, the Consequence is not certain that he is the Person who killed him; for he may perhaps have come there after the Murder was committed, and his Presence not having a necessary Connection with the Murder, the Presumption remains uncertain, and does not make an undeniable Proof. It appears by these two Examples, that Presumptions may be either certain and unquestionable, or doubtful and uncertain; they are certain when they are such, that they make a full and perfect Proof, and that altho no Person did see the Fact in question, yet one may certainly conclude that it has happened, when they see its Causes, its Signs, its Effects, its Consequences, and the other Facts which are inseparable from it, and so connected with it, that it is not to be imagined that the Fact in Controversy has not happened when we see the others, as in the first Example: and on the contrary the Presumptions are doubtful, when they are grounded upon uncertain or false Signs, and from which no certain Consequence can be gathered. So that the whole Force of this kind of Proof by Presumptions, consists in the necessity of the Connection between the known Facts and the Fact that is not known; and the Proofs of this nature are strong or weak, certain or uncertain, in proportion as this Connection is natural and necessary, sure and certain, or as it is doubtful.

It follows from these Remarks on this last Kind of Proofs by Presumptions, that seeing they depend on the Judgment that is to be made of the necessity of the Connexion between the known Facts and the unknown Facts, the Truth of which we want to know, or of the uncertainty of the said Connection, they depend consequently on making a right judgment of the Causes from which the said Connection may be gathered, or not gathered. And whereas there is no great clearness of Understanding required for discovering the Truth of a Fact when it is proved, either by those who saw it, or by some Writing, a great deal of Understanding and Prudence is necessary, and also Experience; in the Cases where it is necessary to judge by Presumption, in order to discern among the Signs and Tokens which appear, those which are doubtful, from those which are certain; and there is still a greater degree of Understanding and Prudence required, when the Signs and Tokens do not appear, in order to find them out and discover them.

It is because of this difficulty that the World has justly admired the Knowledge and Wisdom of *Solomon* in that renowned Judgment which he pronounced between the Mother of the Child which was alive, and her who had strangled her own Child; for the matter was to discover the truth of a hidden Fact, and of which not the least Circumstance was known; so that no Sign or Token did appear, from which Presumptions might be formed; and the Wisdom of this Judgment consisted in finding out a Fact which might be known, and which might discover who was the Mother: and it was with this View that *Solomon* exposed

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exposed the two Women to the danger of seeing the Child, which they both pretended to be the Mother of, put to Death, being persuaded that this danger would surprize and trouble the Mother, and that the other could not feel the like Impression, nor shew the like Marks; it was the surprize and concern which appeared in the Mother, which discovered the love and tenderness which Nature had given her for her Child, and which made *Solomon* to judge upon a sure foundation that she was the Mother, because there was a natural and necessary Connection between the quality of a Mother and that tenderness, and between the said tenderness and the trouble at the sight of such a Danger: and it was this Connection between these necessary Effects and their natural Causes, which discovered the Mother with greater certainty than could have been had from the Testimony of many Witnesses: for whereas Witnesses may deceive, or be deceived, and that the whole force of the Proof by Witnesses consists in the Presumption of their having sufficient Understanding and Capacity to know the Facts to which they bear Testimony, and of their Fidelity in relating them, and that this Presumption may be ill grounded, as was that of the Testimony of the two Elders against *Susanna*; the Proofs which are drawn from the necessary Consequences of natural Effects to their Causes, and of Causes to their Effects, are much more certain and more infallible. Thus, for example, the sudden motion of a Passion in him who had forgot his design to dissemble, is a most certain proof of the Passion which produced that Motion; and the other Effects point out their Causes; and the only business is to know how to discern the necessity of the Connection between the Effects and their Causes, and the necessity of the Consequence between the Facts which do appear, and that which we endeavour to come at the knowledge of: so that the common saying, that we ought not to judge on Presumptions, is both false and true, according to the two ways of presuming which we have just now taken notice of; for we conclude most certainly the truth of the Cause from the truth of the Effect, or the truth of the Effect from the truth of the Cause, when the Connection is infallible between the one and the other: but we make a false Conclusion, when we attribute to one Cause the Effect of another, or we conclude without certainty under pretext of an apparent Connection between that Cause and the Effect of the other, when we attribute the Effect to its Cause, but in a slight manner, if the Signs or Tokens thereof are uncertain; or if in the case of a Man being killed on the High-way, where one single Person is found near to the dead body, if we judge that the said Person killed him, we shall be in danger, either of judging falsly, because it may be that the said Person came there after the flight of the Murderer; or of judging without certainty, and condemning him wrongfully, if there be no other Tokens or Signs which may certainly determine us to judge that the said Person is guilty of the Murder; because the case being doubtful, it would be unjust to condemn him; and it is better to leave to the Judgment of God the Person who is truly guilty, when his Crime is not sufficiently proved, than to run the hazard of condemning unjustly one who perhaps may be innocent.

Presumptions are therefore only certain and concluding, when the Connection between the known Fact and the unknown Fact is so necessary, that it makes us judge with certainty of the truth of the unknown Fact by the knowledge of the other; and this kind of Proof is so natural and concluding, that the Laws have established certain Presumptions for Truth. Thus, for example, in the Roman Law *b*, if a Man and a Woman being accused of Adultery, had defended themselves against the Accusation on the head of their being too nearly related, and having been for that reason acquitted, had afterwards intermarried with one another, they were punished for Adultery upon the bare Presumption that their Marriage was only an effect of the same Passion which had brought them under the suspicion of Adultery. Thus in *France*, a Woman who conceals her big Belly and her being brought to Bed, is presumed to have murdered her Child,

b *l.* 34. *C. de adult.*

if

if it does not appear that it was buried or christened publickly; upon this Presumption, that she who was unwilling to be known to be a Mother, has made away with the Child, whose Birth brought a Dishonour upon her.

These are the sorts of Presumptions which are called violent, according to the Expression of Pope *Alexander* the Third c in another Example, upon which may be grounded a sure and certain Judgment.

c Alexand. 3. C. 12. *de præs.*

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An ALPHABETICAL TABLE OF THE Principal Matters CONTAINED IN The TWO VOLUMES of *The CIVIL LAW in its Natural Order.*

A.

ABOLITION of a Crime, how the same differs from a Pardon, and when necessary. Vol. II. Page 649

Accretion, how the Right thereof takes place in the Succession of Intestates, and how in Testamentary Successions. II. 85. 86

The Right of Accretion in the Civil Law, is the same as that of Survivorship in the Common-Law of *England*. ibid. 92

The Right of Accretion in the Civil Law takes place only in Successions, and not in Deeds or Grants. But that of Survivorship in *England* takes place both in the one and the other. ibid. 92

Among Co-heirs, or Co-executors, there is always a Right of Accretion. ibid. 93

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FINIS.

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A SUPPLEMENT TO THE CIVIL LAW IN ITS NATURAL ORDER.

BOOK III.

Of the PUBLICK LAW.

TITLE I.

Of Heresies, Blasphemy, Sacriledge, and other Impieties.

The CONTENTS.

1. *What is Heresy.*
2. *Canonical Punishments inflicted on Hereticks.*
3. *How far Hereticks may be restrained by the Civil Power.*
4. *They may take their Churches from them, and probibit their Assemblies.*
5. *They may send their Ministers into remote Parts, and forbid the reading of their Books.*
6. *They may exclude them from all publick Offices, and from exercising certain Professions.*
7. *If the* Jews *may hold Assemblies.*
8. *What conduct they ought to observe, when they are tolerated.*
9. *What is Blasphemy, and its different kinds.*
10. *The Punishments to which Blasphemers are liable.*
11. *Of Sacriledge, and the Punishments of those who are guilty of it.*
12. *Of those who violate the Sepulchres of the Dead.*

I.

HERESY is a Crime of High Treason against the Divine Majesty, whereof one is guilty, when he abandons the true Catholick Faith, and obstinately maintains an Error which the universal Church hath condemned [a].

1. What is Heresy.

[a] Hæreticorum autem vocabulo continentur, & latis adversus eos sanctionibus succumbere debent, qui vel levi argumento a judicio Catholicæ Religionis, & tramite detecti fuerint deviare. *l.* 2. *Cod. de Hæreticis & Manichæis, & Samaritis.*

Manifestum facimus vestræ sanctitati, quod pauci quidam infideles, & alieni sanctæ Dei Catholicæ atque Apostolicæ Ecclesiæ, contradicere Judaicè atque Apostaticè ausi sunt adversus ea, quæ ab omnibus sacerdotibus secundùm vestram doctrinam (Joannis Papæ) rectè tenentur, & glorificantur, atque prædicantur. *l.* 8. § 1. *Cod. de summa Trinitate.*

In England, *before the Reformation from Popery, many Opinions having been unjustly extended by the Romish Clergy to be Heresy, which really were not, an Act of*

Parliament was made in the first Year of the Reign of Queen Elizabeth, *declaring that from thence forward no Matter or Doctrine should be adjudged to be Heresy, but only such as before that Time had been determined, ordered or adjudged to be Heresy, by the Authority of the Canonical Scriptures, or by the first four general Councils, or any of them, or by any other general Council wherein the same was declared Heresy, by the express and plain Words of the said Canonical Scriptures, or such as should thereafter be ordered, judged or determined to be Heresy, by the High Court of Parliament, with the Assent of the Clergy in their Convocation.* Stat. 1. Eliz. chap. 1. §. 36.

II.

2. Canonical Punishments inflicted on Hereticks.

They who will not hearken to the Church, which is the pillar of Truth, and against which the Gates of Hell shall never prevail, ought to be treated as Heathens and Publicans. For which Reason it is, that the Church cuts them off from its Communion, in excluding them from the Participation of the Sacraments, from joining in the publick Prayers, and from Christian Burial. But the Church, like a tender Mother, is always ready to receive them again into her Arms, when they retract their erroneous Tenets, and submit to the Decisions of the Church[b].

[b] Hæc est igitur vera vestra fides: hæc certa religio: hoc beatæ recordationis, ut diximus, patres omnes, præsulesque Romanæ Ecclesiæ, quos in omnibus sequimur, hoc sedes Apostolica prædicavit hactenus, & inconcussè custodivit; huic confessioni, huic fidei quisquis contradictor extiterit, alienum se ipse a sanctâ Communione, alienum ab Ecclesia judicabit esse Catholica. — Sed obduratum est cor eorum, ut scriptum est, ut non intelligerent; & pastoris vocem oves, quæ meæ non erant, audire minimè voluerunt, in quibus observantes ea, quæ ab ipsorum sunt statuta pontifice, eos minime in nostrâ communione recipimus, & ab omni Ecclesia Catholica esse jussimus alienos: nisi errore damnato, nostram doctrinam quantocius sequi, habitâ regulari professione signaverint. Æquum quippe est, ut qui nostris minime obedientiam accommodant statutis, ab Ecclesiis habeantur extorres. Sed quia gremium nunquam redeuntibus claudit Ecclesia; obsecro Clementiam vestram, ut si proprio deposito errore, & pravâ intentione depulsâ ad unitatem Ecclesiæ reverti voluerint, in vestram communionem receptis, indignationis vestræ removeatis aculeos. *l.* 8. *inter.* §. 6. *Liquet. Cod. de summa Trinitate.*

III.

3. How far Hereticks may be restrained by the Civil Power.

The Power which Jesus Christ hath committed to his Church being altogether Spiritual, she can inflict upon Hereticks none other but Spiritual Punishments, the greatest whereof is that of Excommunication. But Sovereign Princes may employ the temporal Authority for the Suppression of Heresies, to prevent their spreading or being propagated in their Dominions. And this they are bound to do, not only in maintenance of the Decision of the Catholick Church, of which they are the Protectors and Defenders, but also that they may preserve Unity among their Subjects, which is often disturbed by the diversity of Opinions in Matters of Religion[c].

[c] Cunctos populos, quos Clementiæ nostræ regit imperium, in tali volumus religione versari, quam divum Petrum Apostolum tradidisse Romanis, religio usque adhuc ab ipso insinuata declarat, quamque Pontificem Damasum sequi claret, & Petrum Alexandriæ Episcopum, virum Apostolicæ Sanctitatis: hoc est, ut secundùm Apostolicam disciplinam, Evangelicamque doctrinam, Patris & Filii & Spiritus sancti unam Deitatem, sub pari Majestate, & sub pia Trinitate credamus. Hanc legem sequentes Christianorum Catholicorum nomen jubemus amplecti; reliquos vero dementes, vesanosque judicantes, hæretici dogmatis infamiam sustinere, divinâ primùm vindictâ, post etiam motus animi vestri, quem ex cælesti arbitrio sumserimus ultione plectendos. *l.* 1. *Cod. de summa Trinitate.*

Decere arbitramur nostrum imperium, subditos nostros de religione commonefacere: Ita enim & pleniorem acquiri Dei ac Salvatoris nostri Jesu Christi benignitatem possibile esse existimamus, si quando & nos pro viribus ipsi placere studuerimus, & nostros subditos ad eam rem instituerimus. *l.* 3. *Cod. de summa Trinitate.*

IV.

4. They may take their Churches from them, and prohibit their Assemblies.

One of the most effectual Ways which Sovereign Princes can take to hinder the Progress of Heresy, is to take from the Hereticks the Places where they assemble for the Exercise of their pretended Religion, whether it be Churches that they have taken from the Orthodox Christians, or Temples which they themselves have built, and to forbid their assembling together in private Houses. If they transgress these Laws, the Magistrates ought to punish them the more severely, in that the Civil Policy condemns all Assemblies which are not authorized by the Sovereign[d].

[d] Nullus hæreticis ministeriorum locus, nulla ad exercendam animi obstinacioris dementiam pateat occasio. Sciant omnes, etiam si quid speciali quolibet rescripto per fraudem elicito ab hujusmodi hominum genere impetratum sit, non valere. Arceantur cunctorum hæreticorum ab illicitis congregationibus turbæ: *l.* 2. *Cod. de summa Trinitate.*

Cuncti hæretici procul dubio noverint omnia sibi loca adimenda esse, sive sub Ecclesiarum nomine teneantur, sive diaconica appellentur, vel etiam decanica. Sive in privatis ædibus vel locis, hujusmodi cœtibus copiam præbere videantur: His ædibus vel locis privatis Ecclesiæ Catholicæ vindicandis. Ad hoc interdicantur his omnibus, ad litanias nocte vel die profanis coire conventibus, statutâ videlicet condemnatione —— si quid hujusmodi fieri vel in publico, vel in privatis ædibus concedatur. *l.* 3. *Cod. de Hæreticis & Manichæis.*

V.

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V.

5. They may send their Ministers into remote Parts, and forbid the reading of their Books.

Another Means, which is not less effectual than the former, is to remove into distant Parts the Ministers who propagate the Error, and who seduce the Weak and Simple by their false Learning, or who encourage in their erroneous Opinions those who have embraced them; to prevent the Books of Hereticks from falling into the Hands of weak People who may be easily led astray by their subtil Notions; and to take care that the Children of Hereticks be educated in the Schools of the Orthodox [e].

[e] Sancimus ut qui affectant impiam Nestorii opinionem, vel nefariam ejus doctrinam sectantur; si Episcopi aut Clerici sint, ab Ecclesiis ejiciantur: si laici, anathematizentur, —— licentiam habituris Orthodoxis, quicunque voluerint, secundum nostram legislationem, absque metu, & damno ipsos propalare & accusare. *l.* 3. §. 2. *Cod. de summa Trinitate.*

Ut autem omnes re ipsâ discant, quantum nostra divinitas aversetur eos, qui impiam Nestorii fidem adfectant: Præcipimus Irenæum dudum ob hancce causam nostræ indignationi suppositum, & postea —— Tyriorum Civitatis Episcopum factum, ex Tyriorum quidem Ecclesiâ dejici, in suâ autem duntaxat patriâ degere quiescentem omnimodo, & schemate atque nomine sacerdotis exutum. *Ibid.* § 4.

Quoniam vero pervenit ad pias nostras aures, quod quidam doctrinas quasdam conscripserunt, ediderunt ambiguas, & non per omnia ac præcise congruentes expositæ orthodoxæ fidei à sanctâ Synodo eorum sanctorum Patrum, qui Nicææ & Ephesi convenerunt,—jubemus, facta hujusmodi scripta, sive antea, sive nunc, (potissimum autem ea quæ Nestorii sunt) comburi, & perfectissimo interitui mancipari; ita ut in nullius cognitionem venire possint. *Ibid.* § 3.

Qui dicuntur ex ipsis Montanistis, Episcopi, aut Clerici, expelluntur urbe Constantinopolitanâ. *l.* 20. §. 2. *de Hæreticis & Manichæis.*

VI.

6. They may exclude them from all publick Offices, and from exercising certain Professions.

It is also very natural that a Catholick Prince should not suffer Hereticks who are in his Territories to bear there any publick Offices, any honourable Employments, or to exercise some Professions which are the most in Repute, such as these of Advocates, Physicians, Professors in the Universities and Colleges [f].

[f] Qui tribuit eis (Montanistis) irrationabilem præfecturam, decem libris mulctatur, & decem quoque libris Præsides ex negligentiâ, & Comes privatorum, & officium eorum. *l.* 20. §. 3. *Cod. de Hæreticis & Manichæis.*

There are many Laws in the Code, in the Title de summa Trinitate, *and the Title* de Hæreticis & Manichæis, *by which the Emperors condemn Hereticks to corporal Punishments, and even to Death. The Ordinances of* Francis *the 1st, and of* Henry *the 2d, direct likewise Corporal Punishments to be inflicted on Hereticks. To these severe Edicts succeeded the Edicts of Pacification, to which the great Numbers of those professing the Reformed Religion in* France *gave Rise.* Lewis *the* XIVth *took a middle Way between those two Extremes. He took from the Reformed every Thing that might contribute to encourage them to go on in their own Opinions, he deprived them of all Honours, thinking to engage them by that Means to reflect on their State and Condition, and to forsake the Doctrines of the Reformed Church, and to become Members of the Church of* Rome. *This Method was said not to be a Command to them to embrace the* Romish *Religion, but the Adding to the Instructions and Exhortations of the Ministers of the Church of* Rome, *temporal Means which they pretended could not be look'd upon as Acts of Violence. It is certain however that they treated with greater severity, those among the Reformed who any way trangressed against the Rules which the* French *King had prescribed, for preventing the Growth of the Reformed Religion, and also such of the Reformed as held Assemblies contrary to the Laws in being. And it was pretended, that those punishments were not inflicted on them because of their Opinions in Matters of Religion, but because they had transgressed the Laws of the Civil Policy of the Kingdom.*

VII.

7. If the Jews may hold Assemblies.

The *Jews* cannot hold Assemblies, nor have the Exercise of their Religion, except in the Towns where the Sovereign Princes have expresly given them leave to do it. And they ought not to build any new Synagogues in those Towns, without leave from the Prince. They are excluded from all Dignites, and honourable Employments [g].

[g] Hac valiturâ in omne ævum lege sancimus, neminem Judæorum, quibus omnes administrationes & dignitates interdictæ sunt, nec defensoris civitatis fungi saltem officio, nec patriæ honorem arripere concedimus; ne adquisiti sibi officii autoritate muniti, adversus Christianos, & ipsos plerumque sacræ Religionis antistites, veluti insultantes fidei nostræ, judicandi, vel pronunciandi quamlibet habeant potestatem. §. 1. Illud etiam pari consideratione rationis arguentes, præcipimus, ne qua Judaica Synagoga in novam fabricam surgat: Fulciendi veteres permissa licentia, quæ ruinam minantur. §. 2. Quisquis igitur, vel infulas accepit, quæsitis dignitatibus non potiatur: vel si ad officia vetita irrepserit, ab his penitus repellatur: vel si Synagogam extruxerit, compendio Catholicæ Ecclesiæ noverit se laborasse. Et qui ad honores & dignitates irrepserit, habeatur, ut antea conditionis extremæ, etsi honorariam illicite promeruerit dignitatem. Et qui Synagogæ fabricam cœperit, non studio reparandi, cum damno quinquaginta librarum auri, fraudetur ausibus suis. *l.* 19. *Cod. de Judæis.*

VIII.

8. What Conduct they ought to observe,

When the *Jews* are permitted to have the free Exercise of their Religion in any Town,

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when they are tolerated. Town, it is always upon condition, that they shall do nothing in Contempt of the Holy Mysteries of the Christian Religion, and that they shall not any Way insult the Christians. On the other hand the Christians are not to insult the *Jews* when they assemble in their Synagogues, in case their Assemblies are tolerated by the Prince. The *Jews* are severely punished when they engage Christians to be circumcised, or when they insult those among them who have abandoned Judaism, in order to imbrace the Christian Religion [h].

[h] Judæos quosdam festivitatis suæ solemnia ad pœnæ quondam recordationem incendere, & sanctæ crucis adsimulatam speciem in contemptum Christianæ fidei sacrilega mente exurere, provinciarum Rectores prohibeant: neve locis suis fidei nostræ signum immisceant, sed ritus suos citra contemptum Christianæ legis retineant: amissuri sine dubio permissa hactenus, nisi ab illicitis temperaverint. *l.* 11. *Cod. de Judæis.*

Nullus tanquam Judæus, cum sit innocens, obteratur, nec expositam eum ad contumeliam religio qualiscunque perficiat: non passim eorum Synagogæ, vel habitacula concrementur, vel perperam sine ulla ratione cædantur. Cum alioquin, etiam si sit aliquis sceleribus implicitus, idcirco tamen judiciorum rigor, jurisque publici tutela videtur in medio constituta, ne quisquam sibi ipsi permittere valeat ultionem. Sed ut in hoc personis Judæorum volumus esse provisum: ita id quoque monendum esse censemus, ne Judæi forsitan insolescant, elatique sui securitate, quicquam præcipites in Christianam reverentiam ultionis admittant. *l.* 14. *Cod. de Judæis.*

Judæi & bonorum proscriptione, & perpetuo exilio damnabuntur, si nostræ fidei hominem circumcidisse eos, vel circumcidendum mandasse constiterit. *l.* 16. *Cod. de Judæis.*

Judæus, qui eum qui Judaicæ Religionis non esset, contrariâ doctrinâ ad suam Religionem traducere præsumpserit, bonorum proscriptione damnetur, miserumque in modum puniatur. *l.* 18. *Cod. de Judæis.*

In England, *it is provided by an Act of Parliament,* 1. Annæ, Cap. 30. *that if any* Jewish *Parent, in order to the Compelling their Protestant Children to change their Religion, shall refuse to allow such Child a fitting Maintenance, suitable to the Degree and Ability of such Parent, and to the Age and Education of such Child, upon complaint thereof to the Lord High Chancellor, he may make such order therein, for the Maintenance of such Protestant Child, as he shall think fit.*

IX.

9. What is Blasphemy, and its different kinds. Blasphemy is, when any Reproaches, Injuries and Execrations are uttered against God, and the Persons of the Holy Trinity; whether it be that they deny the Almighty Power of God, or that they attribute to him some Failings and Imperfections, or that they say that he has not some of the Perfections which are essentially united to the Divine Nature, or whether it be that they attack the principal Mysteries of Religion. There are two ways of committing this horrible Crime, one by Words, and the other by Writing. Blasphemy is commonly attended with execrable Oaths. It is prohibited both by the Law of God, and also by the Laws of Man [i].

[i] Quoniam quidem ad hæc quæ diximus, & blasphema verba, & sacramenta de Deo jurant, Deum ad iracundiam provocantes: istis injungimus abstinere ab hujusmodi, & aliis blasphemis verbis, & non jurare *per capillos, & caput, & his proxima verba.* Si enim contra homines factæ blasphemiæ impunitæ non relinquuntur; multo magis qui ipsum Deum blasphemant digni sunt supplicia sustinere. Propterea igitur omnibus hominibus hujusmodi præcipimus à prædictis delictis abstinere, & Dei timorem in corde accipere, & sequi eos qui bene vivunt. Propter talia enim delicta, & fames, & terræ motus, & pestilentiæ fiunt: Et propterea admonemus abstinere ab hujusmodi prædictis illicitis, ut non suas perdant animas. Sin autem & post hujusmodi nostram admonitionem inveniantur aliqui in talibus permanentes delictis: Primùm quidem indignos semet ipsos faciunt Dei misericordia: Post hæc autem & legibus constitutis subjiciuntur tormentis. *Nov.* 77. *cap.* 1. §. 1.

X.

10. The Punishments to which Blasphemers are liable. Blasphemers are punished the first Time by Fine, or publick Penance, and in Case of frequent Relapses their Lips are peirced with a hot Iron, their Tongue is cut out, and they are condemned to the Pillory, to Banishment or to the Gallies. Sometimes the Blasphemies are so enormous, or have been uttered with some Circumstances which do so greatly aggravate the Heinousness of the Crime, that he who has been guilty thereof may be Condemned for the first Time to some Corporal Punishment, and even to Death it self. The Writings which contain Blasphemies, are ordered to be burnt by the Hands of the common Hangman [k].

[k] Judices prohibeant, ut à blasphemiis, & perjuriis, quæ ipsorum inhibitionibus debent comprimi, omnes homines penitus conquiescant. *l.* 3. *in fine Cod. de aleatoribus.*

Præcipimus enim gloriosissimo Præfecto regiæ Civitatis, permanentes in prædictis illicitis & impiis actibus post hanc admonitionem nostram comprehendere, & ultimis subdere suppliciis, ut non ex contemptu talium inveniatur & Civitas & Respublica per hos impios actus lædi. Si enim & post hanc nostram suasionem quidam tales invenientes, hoc subtercelaverint; similiter à Domino Deo condemnabuntur. Ipse etenim gloriosissimus præfectus si invenerit quosdam tale aliquid delinquentes, & vindictam in eos non intulerit secundum nostras leges: Primùm quidem obligatus erit Dei judicio, post hæc autem & nostram indignationem sustinebit. *Nov.* 77. *cap.* 1. §. 2.

See the Ordinances of the Kings of France, *St.* Lewis, Philip VI. Charles VII. Lewis XII. Francis I. Henry II. Charles IX. Henry III. *against Blasphemers, collected in the ninth Book of the Comparison of the Ordinances of* Guenois, *and the Declaration of* Lewis XIV. *of the* 30th *of* July 1666, *against those who imprecate and blaspheme the holy Name of God.*

[By an Act of Parliament in *England*, 9 & 10 *W.* 3. *cap.* 32. for suppressing Blasphemy and Prophaneness, it is enacted, That such Persons as having been educated in, or having made Profession of the

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the Christian Religion within the said Realm, and shall by writing, printing, teaching, or advised speaking, deny any one of the Persons in the Holy Trinity to be God, or shall assert or maintain there are more Gods than one, or shall deny the Christian Religion to be true, or the Holy Scriptures of the Old and New Testament to be of Divine Authority, and be thereof lawfully convicted, shall for the first Offence be incapable to have and enjoy any Offices or Employments Ecclesiastical, Civil or Military. And being a second Time convicted of any of the aforesaid Crimes, shall be disabled to sue, prosecute, plead or use any Action or Information in Law or Equity, or be Guardian of any Child, or Executor or Administrator of any Person, or capable of any Legacy or Deed of Gift, or to bear any Office, Civil or Military, or Benefice Ecclesiastical, for ever, within the said Realm; and shall suffer three Years Imprisonment, from the Time of such Conviction, without Bail or Mainprize.

XI.

11. Of Sacriledge, and the Punishments of those who are guilty of it.

Sacriledge is an Abuse and Prophanation of Things that are holy, or a Crime committed against the Persons and Things which are consecrated and set apart for the Worship of God. Those Persons are punished as guilty of Sacriledge, who steal the Communion Plate, and the Ornaments set apart for the Service of the Altar, those who steal common Moveables out of a Place that is holy, those who are so wicked as to prophane the consecrated Elements, those who take upon them to administer the Sacrament without having received the Order of Priesthood; those who strike, maim, or kill any one in Holy Orders. Those who are guilty of Sacriledge, are condemned to Death, unless there be some particular circumstances in their case which may engage the Judges to mitigate the Punishment [l].

[l] Mandatis autem cavetur de sacrilegis, ut Præsides sacrilegos, latrones, plagiarios, conquirant, & ut prout quisque deliquerit, in eum animadvertant. Et sic Constitutionibus cavetur, ut sacrilegi extra ordinem dignâ pœnâ puniantur. *l.* 4. §. 2. *ff. ad Legem Juliam peculatus, & de sacrilegis.*

Sacrilegi capite puniuntur. Sunt autem sacrilegi, qui publica sacra compilaverunt. *l.* 9. *princ. ff. ibid.*

XII.

12. Of those who violate the Sepulchres of the Dead.

It is a kind of Sacriledge to violate the Sepulchres of dead Persons, whether it be that the Bodies of the Dead are dug up by way of Insult, or to put them to some unlawful uses; or whether it be that the Bodies are only dug up, or that they carry away the Ornaments of the Tombs. The Law declares those who are guilty of this Crime to be infamous Persons, and the Judges condemn them to Corporal Punishments, which are different according as the Circumstances of the Case are different [m]. It ought not to be suffered that a Creditor shall hinder the Interment of the Corps of his Debtor; and if any one should be so rash as to stop the burying of a Person deceased under this pretext, he would be fined very severely. And if he had taken notes from the presumptive Heirs of the Deceased in their own Names, or had taken pledges before he would consent that the Corps of the Deceased should be carried away, all the precautions taken by him would be null and void, and the Presumptive Heirs would be relieved against an Obligation so contrary to good Manners [n].

[m] Pergit audacia ad busta defunctorum, & aggeres consecratos: Cum & lapidem hinc movere, & terram evertere, & cespitem evellere, proximum sacrilegio majores nostri semper habuerint: Sed & ornamenta quædam tricliniis, aut porticibus auferre de sepulchris. Quibus primo consulentes, ne in piaculum incidat contaminata religio defunctorum, hoc fieri prohibemus, pœna sacrilegii cohibentes. *l.* 6. *Cod. de sepulchro violato.*

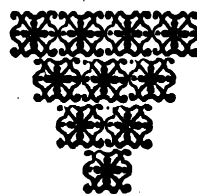
Huic autem pœnæ subjacebunt, & qui corpora sepulta, aut reliquias contrectaverint. *l.* 4. *in fine Cod. ibid.*

Adversus eos qui cadavera spoliant, Præsides severius intervenire solent; maxime si manu armata adgrediantur: Ut si armati more latronum id egerint, etiam capite plectantur, ut divus Severus rescripsit; si sine armis, usque ad pœnam metalli procedunt. Qui de sepulchri violati actione judicant, æstimabunt, quatenus intersit: Scilicet ex injuria quæ facta est, item ex lucro ejus qui violavit, vel ex damno quod contigit, vel ex temeritate ejus qui fecit. *l.* 3. §. 7. 8. *ff. de sepulchro violato.*

Rei sepulchrorum violatorum, si corpora ipsa extraxerint, vel ossa eruerint, humiliores quidem fortunæ summo supplicio afficiuntur, honestiores in insulam deportantur; alias autem relegantur, aut in metallum damnantur. *l.* 11. *ff. de sepulchro violato.*

Sepulchri violati actio infamiam irrogat. *l.* 1. *ff. de sepulchro violato.*

[n] Cum sit injustum, & nostris alienum temporibus, injuriam fieri reliquiis defunctorum, ab his qui debitorem sibi esse mortuum dicendo, debitumque exigendo, sepulturam ejus impediunt: Ne in posterum eadem injuria procederet, cogendis his, ad quos funus mortui pertinent, sua jura perdere: Ea quidem, quæ mortuo posito ante sepulturam ejus facta fuerint, vel exigendo quod debitum esse dicitur, vel confessiones aliquas, aut fidejussorem, aut pignora capiendo, penitus amputari præcipimus. Redditis vero pignoribus, vel pecuniis, quæ solutæ sunt, vel absolutis fidejussoribus, & generaliter omnibus sine ulla innovatione in pristinum statum reducendis, principale negotium ex integro disceptari. Eum vero, qui in hujusmodi fuerit deprehensus flagitio, quinquaginta libras auri dependere, vel si minus idoneus ad eas persolvendas sit, suo corpore sub competenti judice pœnas luere. *l.* 6. *Cod. de sepulchro violato.*



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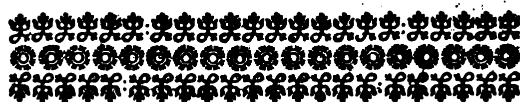

TITLE II.

Of the Crime of High Treason.

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1. *What is High Treason.*
2. *Attempts against the Queens, and against the Princes of the Royal Family.*
3. *Different ways of falling under the Crime of High Treason.*
4. *The same.*
5. *Of the Accomplices in this Crime, and of those who being privy to the Design of the Criminal, have not revealed it.*
6. *The Punishments of those who have attempted to take away the Life of the Sovereign.*
7. *Other Punishments inflicted on those who are guilty of High Treason.*
8. *This Crime is not extinguished by the Death of the Criminal.*

I.

1. What is High Treason.

HIGH Treason is, when any Attempt is made against the sacred Person of the King, and against the State. This Crime is the most heinous of all those that can be committed against the Order of Civil Society. It is a kind of Sacrilege, because Sovereign Princes are upon the Earth the Images of God himself [a].

[a] Proximum sacrilegio est, quod Majestatis dicitur. Majestatis autem crimen est, quod adversus populum Romanum, vel adversus securitatem ejus committitur. *l. 1. ff. ad Legem Juliam Majestatis.*

Publica autem Judicia hæc sunt: Lex Julia Majestatis, quæ in eos qui contra Imperatorem vel Rempublicam aliquid moliti sunt suum vigorem extendit. Cujus pœna animæ amissionem sustinet, & memoria rei etiam post mortem damnatur. *Instit. de publ. judiciis. §. publica.*

II.

2. Attempts against the Queens, and against the Princes of the Royal Family.

We ought to place among the Number of Crimes of High Treason, Attempts against the Queens, against the King's Children, and against the Princes of the Royal Family. Attempts may be made against them as well as against the Kings two different manner of Ways, by Actions, or by Writings, and even by Designs formed against their Life [b].

[b] De nece etiam virorum illustrium qui conciliis & consistorio nostro intersunt, Senatorum etiam (nam & ipsi pars corporis nostri sunt) vel cujuslibet postremo qui nobis militat cogitaverit, (eâdem enim severitate voluntatem sceleris quâ effectum, puniri jura voluerunt) ipse quidem utpote majestatis reus, gladio feriatur, bonis ejus omnibus fisco nostro addictis. *l. 5. Cod. ad L. Juliam Majestatis.*

We may apply to the Princes of the Blood Royal, more properly than to Senators, these Words of the Emperors Arcadius *and* Honorius, Nam & ipsi pars corporis nostri sunt. *Those who make any Attempt against Magistrates are punished more severely, than if they had attacked private Persons; and the Punishment inflicted on them is more or less severe, according to the quality of the Magistrates who have been offended. But the said Offenders are not treated as if they were guilty of High Treason.*

III.

3. Different ways of falling under the Crime of High Treason.

All Persons, of whatsoever State and Condition they be, may render themselves guilty of the Crime of High Treason; and they are prohibited to hold Correspondence, and to enter into Leagues and Confederacies directly or indirectly, by Word of Mouth or by Writing, within or without the Kingdom, with Foreign Princes, to levy Troops without the King's express Leave, to excite the Subjects to take up Arms against their Sovereign, to hinder the Execution of his Orders, to assume to themselves a Sovereign Authority in any Province [c].

[c] Quo tenetur (crimine Majestatis) is cujus operâ dolo malo concilium initum erit, quo obsides injussu principis interciderent, quo armati homines cum telis, lapidibusve in urbe sint, conveniant adversus rempublicam, locave occupentur vel templa. Quove cœtus, conventusve fiat, hominesque ad seditionem convocentur ——— quove quis contra rempublicam arma ferat. Quive hostibus populi Romani nuntium, literasve miserit, signumve dederit, feceritve dolo malo, quo hostes populi Romani consilio juventur adversus rempublicam. Quive milites sollicitaverit, concitaveritve: quo seditio, tumultusve adversus rempublicam fiat. *l. 1. ff. ad legem Juliam Majestatis.*

Eâdem lege tenetur, & qui injussu principis bellum gesserit, delectumve habuerit, exercitum comparaverit, quive cum ei in provincia successum esset, exercitum successori non tradidit. *l. 3. ff. ad L. Juliam Majestatis.*

IV.

4. The same.

It is High Treason to desert from the Army to the Enemies of the State, to deliver up to them by treachery Places or Posts which might be defended, to give them admission into the Towns of the Kingdom, or within the Camp [d].

[d] (Majestatis crimine tenetur) qui exercitum deseruit, vel privatus ad hostes perfugit. *l. 2. ff. ad L. Juliam Majestatis.*

Lex autem Julia Majestatis præcipit, eum qui Majestatem publicam læserit, teneri: qualis est ille qui in bellis cesserit, hostemve arcere renuerit, aut arcem non tenuerit, aut castra concesserit. *l. 3. ff. ad L. Juliam Majestatis.*

Majestatis crimine accusari potest, cujus ope, consilio, dolo malo provincia vel civitas hostibus prodita est. *l. 10. ff. ad L. Juliam Majestatis.*

V.

5. Of the Accomplices in this Crime, and of those

In Crimes of High Treason, they punish not only the Persons who have committed the Fact, but likewise those who have

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who being privy to the Design of the Criminal, have not revealed it. have formed the Design of committing it, when there are sufficient Proofs against them. They likewise condemn as guilty of High Treason, those who having had some Knowledge of the wicked Designs formed against the King, and the State, did not reveal them, although they had no hand in the said criminal Associations. One becomes an Accomplice of the Crime, by not taking all the necessary Measures to prevent it. One ought not to give the least Ground for any Suspicion against him, in a Matter of so great Importance. It is for this Reason that Officers who receive Messages, or Letters from the Enemies of the State, are obliged to acquaint their Superiors therewith, upon pain of being treated as Traitors [e].

[e] Majestatis rei etiam post mortem tenentur, & confiscatur eorum substantia: & post mortem hoc crimen moveri incipit, & memoria defuncti damnatur: & res ejus hæredibus auferuntur. Nam ex eo tempore, quo hanc cogitationem subiit, propter cogitationem dignus est pœna. *l.* 6. *Cod. ad L. Juliam Majestatis.*

Id quod de prædictis (reis Majestatis) etiam de *satellitibus*, conscii, ac ministris eorum simili severitate censemus. Sanè si quis ex his in exordio initæ factionis, studio verò laudis accensus, initam prodiderit factionem, & præmio & honore a nobis donabitur. Is verò qui usus fuerit factione, si vel serò (incognita tamen adhuc) consiliorum arcana patefecerit: absolutione tantum, ac veniâ dignus habebitur. *l.* 5. §. 6. 7. *Cod. ad L. Juliam Majestatis.*

VI.

6. The Punishments of those who have attempted to take away the Life of the Sovereign.

Those who have attempted to take away the Life of the King are condemned to the severest Punishments. And in *France* the Punishment is after this Manner. The Criminals having first made a publick Acknowledgment of this Offence at the Church Door, being bareheaded, in a white Sheet, and having a lighted Torch in their Hands, their Hands are cut off, they then tear off with red-hot Pincers the Flesh on their Breasts, on their Arms, and on their Thighs, and they afterwards throw hot burning Lead, Oyl, Rosin, Wax and Brimstone, all melted together, upon the Places where the Flesh has been tore off with Pincers. Afterwards their Bodies are drawn and dismembred by four Horses; their Members are burnt to Ashes, and thrown into the Air. All their Goods are confiscated; even those which are situated in the Provinces where Confiscation does not take Place. The Houses in which they were born are demolished, and it is not so much as lawful to erect any new Edifice on the same Spot of Ground for the future. Their Father, and Mother and Children are banished out of the Kingdom for ever. Those who bear the same Name are obliged to quit it. It is impossible to join too great a Number of different Punishments for punishing a Crime that comprehends a great Number of other Crimes, and that is attended with so fatal Consequences. One cannot without horror think of the Crime, or its Punishment [f].

[f] Filii verò ejus (rei Majestatis) quibus vitam Imperatoriâ specialiter lenitate concedimus, (paterno enim deberent perire supplicio, in quibus paterni, hoc est, hereditarii criminis exempla metuuntur) à paternâ vel avitâ omnium etiam proximorum hæreditate ac successione habeantur alieni, testamentis extraneorum nihil capiant, sint perpetuò egentes & pauperes, infamia eos paterna semper comitetur, ad nullos prorsus honores, ad nulla sacramenta perveniant: sint postremò tales, ut iis perpetuâ egestate sordentibus, sit & mors solatium, & vita supplicium. *l.* 5. *Cod. ad legem Juliam Majestatis.*

[*In* England *the stated Judgment for High Treason, in all cases except counterfeiting the Coin, is for the Offender to be drawn to the Place of Execution, to be there hanged by the Neck, to be cut down alive, his Entrails to be taken out and burnt, his Head cut off, his Body quartered, his Head and Quarters to be put up where the King shall direct. The Judgment of a Woman in those cases, is to be drawn and burnt.*

In this Judgment is implied the Forfeiture of all the Offender's Manors, Lands, Tenements, and Hereditaments. His Wife loses her Dower. His Children become base and ignoble. He loses his Posterity; for his Blood is stained and corrupted, and they cannot inherit to him, or any other Ancestor. All his Goods and Chattels are likewise forfeited. And the Reason why all these several Punishments are inflicted for this Crime of High Treason is, that his Body, Lands, Goods, Posterity, &c. *should be torn, pulled asunder, and destroyed, that intended to tear and destroy the Majesty of Government.* Coke 3d. Inst. Pag. 210. 211. *Hale's* Pleas of the Crown Pag. 268.]

VII.

7. Other Punishments inflicted on those who are guilty of High Treason.

As to the other kinds of High Treason, the Punishment is always Forfeiture of Goods, and Death; but the kind of Punishment is different according to the nature of the Crime. That which is most common is to quarter the Bodies of the Criminals, and to set up their Members in some Place where they may be exposed to publick View. Sometimes they are only beheaded, if they are Persons who are distinguished by their Quality, or by their Implyments. When their Children are not banished out of the Kingdom, they and their Posterity

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are degraded from their Nobility, and they are declared incapable of enjoying any dignity, and of having any honourable Employment within the Kingdom.

VIII.

8. This Crime is not extinguished by the Death of the Criminal.

The Crime of High Treason is not extinguished by the Death of the Criminal; a Prosecution is carried on against his Corpse, or against his Memory; his Goods are confiscated for the King's use; and his Descendants are condemned to the same Penalties, as if he had been convicted in his own lifetime of the Crime of High Treason [z].

[z] Post divi Marci constitutionem hoc jure uti cœpimus, ut etiam post mortem nocentium hoc crimen inchoari possit: ut convicto mortuo, memoria ejus damnetur, & ejus bona successori ejus eripiantur. *l.* 8. *Cod. ad Legem Juliam Majestatis.*

Is qui in reatu decedit, integri statûs decedit; extinguitur enim crimen mortalitate. Nisi forte quis majestatis reus fuit. Nam hoc crimine, nisi a successoribus purgetur, hæreditas fisco vindicatur. *l.* 11. *ff. ad Legem Juliam Majestatis.*

[*The Law of* England *does not extend the Punishment of High Treason after the Death of the Offender unless he has been lawfully attaint thereof in his lifetime. And therefore if a Person be slain in open Rebellion, he forfeits nothing, neither can he be attaint in such case, but by Parliament.* Hales's Pleas of the Crown. Pag. 17. Coke 3. Inst. Pag. 12.]

TITLE III.

Of Rebellions against Courts of Justice.

The CONTENTS.

1. *Of those who insult Judges in the discharge of the Functions of their Office.*
2. *Of those who commit any violence against Judges.*
3. *Of breach of Prison.*
4. *Of those who are aiding and assisting in breaking the Prison.*
5. *Of Jaylers, who let their Prisoners escape.*

I.

1. Of those who insult Judges in the discharge of the Functions of their Office.

THOSE who insult Judges in the discharge of the Functions of their Office are to be punished very severely. Their punishment ought to be either Pecuniary or Corporal, according to the Nature of the Insult, the quality of the Judge that is insulted, or of the Person who has committed the Crime. The Judge himself who is insulted in the Seat of Justice ought to take the Matter into his own Cognizance, and to pronounce Sentence against the Offender [a].

[a] Omnibus Magistratibus —— secundum jus potestatis suæ concessum est jurisdictionem suam defendere pænali judicio. *l. un. ff. si quis jus dicenti non obtemperaverit.*

II.

2. Of those who commit any violence against Judges.

All Persons are forbid upon pain of Death to use any Violence against Magistrates, and against the Officers of Justice, Serjeants, Bailiffs, and others who execute the Decrees of Courts of Justice.

See in the 9th Book of the Collection of the Ordinances of France, *those of* Charles IX. *and* Henry III. *relating to this Matter.*

III.

3. Of breach of Prison.

If one that is accused of a Crime makes his escape out of Prison, he may be proceeded against as contumacious, not only for the Crime laid to his charge, but also for the Breach of Prison. In case the Proof be clear of the Crime for which he was committed, they inflict the severer Punishment upon him because of his breaking the Prison, which implies a very strong presumption of his guilt. In case the Prisoner that has made his escape be not found guilty of the Crime, then they only inflict upon him the Punishment that is due for the Breach of Prison. This Punishment depends on the different Circumstances of the Offence, by which the Judge is to govern himself. A Prosecution is likewise instituted against Prisoners who have attempted by Force to make their escape out of Prison, although their Attempt was unsuccessful [b].

[b] In eos qui cum recepti essent in carcerem, conspiraverint, ut ruptis vinculis & effracto carcere evadant, amplius quam causa ex qua recepti sunt reposcit, constituendum est: quamvis innocentes inveniantur ex eo crimine propter quod impacti sunt in carcere, tamen puniendi sunt. *l.* 13. *ff. de custod. & exhibit. reorum.*

See the Ordinance of 1670. *Tit.* 17. *Art.* 24, 25.

[It appears by the ancient Authors of the Common Law of *England*, that if a Prisoner, whatsoever the Cause was for which he was committed, had broken the King's Prison, and made his escape out of it, it was Felony. But by the Statute *de frangentibus Prisonam*, made the first Year of *Ed.* 2. it is enacted, that none that breaketh Prison shall have judgment of Life and Member for breaking of Prison, except the Causes, for which he was taken and imprisoned, did require such Judgment, if he had been convicted. *Bracton*, *lib.*

lib. 3. *Fol.* 124. *a.* Stamford's *Pleas of the Crown, Fol.* 30. Coke 2. Instit. *Pag.* 589.]

IV.

4. Of those who were aiding and assisting in breaking the Prison.

The Persons who furnish the Prisoners with iron Tools, or other Instruments, by the help of which they make any Breach in Order to their escape, are to be punished in the same Manner as if they themselves had broken the Prison, or rescued the Criminals out of the Hands of the Officers of Justice.

See the Ordinance of Francis I. *at* Ys *upon* Thille *in* 1525.

V.

5. Of Jaylers, who let their Prisoners escape.

When the Jayler is in confederacy with the Prisoners to help them to make their escape out of the Prison, or when the Jayler contributes to their Escape, by neglecting to use the necessary Means to watch them, he ought to be condemned to suffer the same Punishment, which the Criminals who have made their escape would have been liable to, if they had been convicted of the Crimes for which they were imprison'd. [c] But if the Prisoner makes his escape without any connivance or negligence on the part of the Jayler, they cannot trouble him on account of the Escape of the Criminals. It is the same Thing with respect to the Sheriff's Officers who conduct to the Gallies the Criminals who were condemned to undergo that Punishment. But those who by force of Arms attack the Guards on the Highway, in order to set the Galley Slaves at Liberty, are punished with Death [d].

[c] Carceri præpositus si pretio corruptus, sine vinculis agere custodiam, vel ferrum, venenumque in carcerem inferri passus est, officio Judicis puniendus est: si nescit, ob negligentiam removendus est ab officio. *l.* 8. *ff. de custod. & exhibitione reorum.*

[d] Milites si amiserint custodias, ipsi in periculum deducuntur: nam divus Hadrianus Statilio secundo legato rescripsit, quoties custodia militibus evaserit, exquiri oportere utrum nimiâ negligentiâ militum evaserit, an casu: & utrum unus ex pluribus, an unâ plures. Et ita demum adficiendos supplicio milites, quibus custodiæ evaserint, si culpa eorum nimia deprehendatur, alioquin pro modo culpæ in eos statuendum. *l.* 12. *ff. de custod. & exhibit. reorum.*

[*In* England, *the Punishment of the Jayler for a negligent Escape of his Prisoner, is a Fine: But for a voluntary Escape; the Jayler is esteemed to be guilty of the same Crime that the Person permitted to escape stood committed for, whether for Treason, or Felony.* Hales's Pleas of the Crown, *pag.* 113. 114.]

TITLE IV.

Of unlawful Assemblies, taking up of Arms, and of Force.

The CONTENTS.

1. *Of unlawful Assemblies.*
2. *Of such Assemblies, when they are attended with Acts of Violence.*
3. *All Acts of Violence prohibited.*
4. *Private Prisons forbidden.*

I.

1 Of unlawful Assemblies.

ALL those Assemblies are called unlawful, which are held contrary to the Regulations of the Civil Government, or with a formed Design to insult and affront others. Those who join in such Assemblies are punished, as disturbers of the publick Peace [a]. The Crime is the more heinous, when those who are assembled with an evil Design, are armed, or when they intend to raise some popular Commotion [b].

[a] In eadem causa sunt, (Legis Juliæ de vi) qui turbæ seditionisve faciendæ consilium inierint, servosve aut Liberos homines in armis habuerint. —— In eadem causa sunt, qui pessimo exemplo, convocatâ seditione villas expugnaverint, & cum telis & armis bona rapuerint. —— Eâdem Lege tenentur, qui hominibus armatis, possessionem domo, agrove suo, aut navi suâ dejecerit, expugnaverit concursu. *l.* 3. *ff. ad Legem Juliam de vi publica.*

[b] Qui cœtu, concursu, turbâ, seditione, incendium fecerit: quique hominem dolo malo incluserit, obsederit: quive fecerit, quo minus sepeliatur, quo magis funus diripiatur, distrahatur: quive per vim sibi aliquem obligaverit: nam eam obligationem Lex rescindit. *l.* 5. *ff. ad Legem Juliam de vi publica.*

Hac Lege tenetur, & qui convocatis hominibus vim fecerit, quo quis verberetur & pulsetur, neque homo occisus sit. *l.* 10. § 1. *ibid.*

Armatos non utique eos intelligere debemus, qui tela habuerint: sed etiam quid aliud, quod nocere potest. *l.* 9. *ibid.*

[*The Distinction which the Law of* England *makes between a* Riot, *and an* unlawful Assembly, *is this. A* Riot *is, when three or more meet to do some unlawful Act, and do act it; as to beat any Man, or to hunt in his Park, Chase, or Warren, or to enter or take Possession of another Man's Land, or to cut or destroy his Corn, Grass, or other thing belonging to him. An* unlawful Assembly *is, when three or more assemble themselves together to do some unlawful Act, and do it not. And the Justices are to take care to suppress them, to prevent the Mischief which they intended.*

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Coke's 3d. Inst. chap. 79. Hales's Pleas of the Crown, *pag*. 137.]

II.

2. Of such Assemblies when they are attended with Acts of Violence.

When the unlawful Assemblies are attended with popular Commotions, or with Acts of Violence, as if any Persons have been wounded, Houses pillaged, the Criminals are condemned to Death [c]. In all other Cases, those who have assembled themselves together in an unlawful Manner, even although they be armed, are condemned to milder Punishments, such as the Gallies, or perpetual Banishment [d].

[c] Hi qui ædes alienas aut villas expilaverint, effregerint, expugnaverint: si quidem in turbâ cum telo fecerint, capite puniuntur. *l.* 10. *ff. ad Legem Juliam de vi publica.*

[d] Damnato de vi publicâ, aquâ & igni interdicitur. *l.* 10. § 2. *ibid.*

[*Offences of this Nature are punishable by the Common Law of* England, *as Trespasses, by Fine and Imprisonment only*; *yet sometimes, where they have been very enormous, they have been punished with Pillory.* Hawkins's Pleas of the Crown, *Book* 1. *Chap.* 65. *Pag.* 159.

But the Punishment of such Offences is now made Capital in some Cases, by an Act of Parliament 1º Geo. Cap. 5. *intituled,* An Act for preventing Tumults and riotous Assemblies, and for the more speedy and effectual punishing the Rioters. *By which Act it is Felony without benefit of Clergy, if any Persons, to the Number of twelve or more, being unlawfully, riotously and tumultuously assembled together, to the Disturbance of the publick Peace, and do not disperse themselves after Proclamation made in the King's Name, by a proper Officer of the Peace. And it is farther enacted by the said Act, that if any Persons assembled together in this riotous and tumultuous Manner, shall with Force demolish or pull down, or begin to demolish or pull down any Church or Chapel, or any Building for religious Worship allowed by Law, or any Dwelling House, Barn, Stable, or other Out-house, the Offenders therein shall be adjudged Felons, and shall suffer Death as in Case of Felony, without benefit of Clergy.*]

III.

3. All Acts of Violence prohibited.

All Acts of Violence are prohibited; it is not allowed that any one should make use of them to do himself justice [e]. And therefore if any one who pretends Right to a Piece of Ground, or to a House, has taken possession of it by Force he is punished in the first Place with a Punishment suitable to the Nature of the Violence which he has used. After which a proper Enquiry is made, to see whether the Ground or House belongs to him.

[e] Si de vi, & possessione, vel dominio quæratur: ante cognoscendum de vi, quàm de proprietate rei, Divus Pius τῳ κοινῳ των Θεσσαλων, id est, *Universitati Thessalorum*, Græce rescripsit. Sed & decrevit ut de vi prius quæratur, quàm de jure dominii sive possessionis. *l.* 5. *ff. ad Legem Juliam de vi publica.*

Si quis aliquem dejecit ex agro suo hominibus congregatis sine armis, vis privatæ postulari possit. *l.* 5. *ff. ad Legem Juliam de vi privata.*

Sed etsi nulli convocati, nullique pulsati sint; per injuriam tamen ex bonis alienis quid ablatum sit: hac Lege teneri eum, qui id fecerit. *l.* 3. § 2. *ff. ad Legem Juliam de vi privata.*

Si creditor sine auctoritate Judicis res debitoris occupet, hac lege tenetur, & tertiâ parte bonorum mulctatur, & infamis fit. *l. ult. ff. ibid.*

At present this Law would not take place in its full rigour, unless the Force was accompanied with Circumstances which aggravated the Offence.

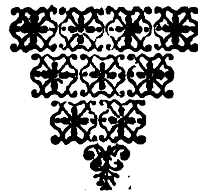
IV.

4. Private Prisons forbidden.

No Person of what Quality soever he be, may by his own proper Authority Arrest his Debtor, or him by whom he pretends to have been insulted; and much less may he confine him in a private House as in a Prison [f]. Those who are so audacious as to transgress this Law ought to be punished with the utmost severity, for it is to usurp a Branch of the Sovereign Authority, to attempt to do justice to one's self, and to pretend to a Right of having a Prison.

[f] Jubemus, nemini penitus licere, —— in quibuslibet imperii nostri provinciis, vel in agris suis, aut ubicunque domi, privati carceris exercere custodiam, —— viris clarissimis omnium provinciarum rectoribus daturis operam ——ut sæpedicta nefandissimorum hominum arrogantia modis omnibus opprimatur. Nam post hanc saluberrimam constitutionem, & vir spectabilis pro tempore Præfectus Augustalis, & quicunque Provinciæ Moderator, Majestatis crimen proculdubio incursurus est, qui cognito hujusmodi scelere, læsam non vindicaverit Majestatem. *l.* 1. *Cod. de privatis carceribus cohibendis.*

[*In* England, *no Subject can have a Prison of their own*; *for all Prisons or Jails are the King's Prisons or Jails, but a Subject may have the custody or keeping of them.* Coke 2. Inst. pag. 100. 589.]



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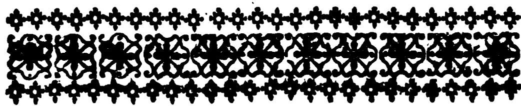

TITLE V.

Of the Imbezlement of the Publick Money.

The CONTENTS.

1. *What comes under the Notion of this sort of Imbezlement.*
2. *Of the Officers of the Mint, who alter the Standard of the Coin.*
3. *Of the Officers of the Revenue, who waste or detain in their Hands the Publick Monies.*
4. *The Punishments inflicted on those who are guilty of this Crime, and their Accomplices.*
5. *If this Punishment is extinct by the Death of the Offender.*
6. *A Particular kind of this sort of Imbezlement.*

I.

1. What comes under the Notion of this Sort of Imbezlement.

THE Imbezlement of the Publick Money, which the *Romans* called *Peculatus*, is when the Persons who have the Direction thereof, or the Custody of it, do either convert any Part of the said Money to their own private Uses [a], or apply it to other Purposes than those for which the Sovereign intended it [b].

[a] Lege Juliâ peculatus cavetur, ne quis ex pecunia sacra, religiosa, publicave auferat, neve intercipiat, neve in rem suam vertat, neve faciat, quo quis auferat, intercipiat, vel in rem suam vertat; nisi cui utique Lege licebit. *l. 1. ff. ad Legem Juliam peculatus.*

[b] Qui publicam pecuniam in usus aliquos acceptam retinuerit, nec erogaverit, hac Lege tenetur. *l. 4. § 4. ff. ad L. Juliam peculatus.*

Is, qui prædam ab hostibus captam subripuit, Lege peculatus tenetur, & in quadruplum damnatur. *l. 13. ff. ibid.*

II.

2. Of the Officers of the Mint who alter the Standard of the Coin.

Those Persons fall likewise under the Guilt of this Crime, who having the direction of the Mint do alter the Standard of the Coin, or cause it to be alter'd by the Workmen who are imploy'd under them [c].

[c] Lege Juliâ peculatus cavetur, ——— nequis in aurum, argentum, æs publicum quid indet, neve immisceat: neve quod quid indatur, immisceatur, faciat sciens dolò malo, quò id pejus fiat. *l. 1. ff. ad Legem Juliam peculatus.*

III.

3. Of the Officers of the Revenue who waste, or detain in their Hands, the publick Monies.

The Officers of the Revenue who lose the King's Money at Play, or who retire into Foreign Countries, not having made up their Accounts; are prosecuted as being guilty of imbezling the Publick Money, in case they be in arrear either to the King, or to the Publick.

See the Collation of the Ordinances relating to Imbezlements of the publick Money, and the Declarations of 1690, 1699, and 1701, against those who run away with the King's Money.

IV.

4. The Punishments inflicted on those who are guilty of this Crime, and their Accomplices.

As there are different Ways of committing this Crime of Imbezlement of the Publick Money, some of which are more heinous than others, those who are guilty thereof are condemned to different Punishments according to the different Circumstances of their Crimes [d]. In some Cases the Offenders are condemned to Death, in others to the Gallies and to perpetual Banishment, with Confiscation of their Goods; and in other Cases to Punishments less severe, such as making considerable Restitutions in Money, and Fines to the King, and to the Publick. The Accomplices in this Crime are to be punished, as well as those who are the principal Actors in it.

[d] Judices qui tempore administrationis publicas pecunias subtraxerunt, lege Julia peculatus obnoxii sunt, & capitali animadversioni eos subdi jubemus. His quoque nihilominus, qui ministerium eis ad hoc adhibuerunt, vel qui subtractas ab his scienter susceperunt, eadem pœnâ percellendis. *l. 1. Cod. de crimine peculatus.*

Peculatus pœna aquæ & ignis interdictionem, in quam hodie successit deportatio, continet. Porrò qui in eum statum deducitur, sicut omnia pristina jura, ita & bona amittit. *l. 3. ff. ad Legem Juliam peculatus.*

The Law Peculatus 7. ff. ad Legem Juliam peculatus, *forbad Prosecutions against those who were guilty of imbezling the Publick Money, unless they were commenced within five Years after the Commission of the Crime. But there is no reason why one should prescribe against the Punishment of this Crime, in less Time than in other Crimes of less importance. Hence it is that at present the Prescription against the Punishment of this Crime does not take place till after the Expiration of twenty Years. As to the Restitution due to the King, or to the Publick, from him who is guilty of this sort of Imbezlement; the same may be recovered by a personal Action, which lasts thirty Years, and even forty Years, when the personal Action is joined with the Action Hypothecary.*

V.

5. If this Punishment is extinct by the Death of the Offender.

The Crime of Imbezlement of the publick Money is extinguished by the Death of the Offender, with regard to the Corporal Punishments, and to Fines. But there lies a Civil Action against his Heirs, Executors or Administrators, for obtaining Restitution of the Monies which have been

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been secreted, dissipated, or applied contrary to the Intention of the King [f]. And this Action lies even against the Children of Farmers of the Revenue whom their Fathers who have been guilty of this Imbezlement have advanced either by Offices or Portions, although they be not their Heirs. They are obliged to make Restitution to the Value of the Offices, or of the Portion which they have received from their Father, since the Time that they have been intrusted with the Direction of the Publick Money.

[f] Publica judicia peculatus, & de residuis, & repetundarum, similiter adversus hæredem exercentur, nec immerito: cum in his quæstio principalis ablatæ pecuniæ moveatur. *l. ult. ff. ad Legem Julian peculatus.*

VI.

6. A particular Kind of this Sort of Imbezlement.

The Persons who are charged with collecting and receiving the Publick Money, and who set down in their Books less than they have received, are guilty of this Crime of Imbezlement [g]. It is the same Thing with respect to those who being intrusted with the Care of letting out the Demesne Lands of the Crown, or of a Community, make private Bargains with the Lessees, whereby they secure to themselves some particular Profits and Advantages.

[g] Hac lege tenetur, qui in tabulis publicis minorem pecuniam, quam quid venierit, aut locaverit, scripserit. Aliudve quid simile commiserit. *l. 10. ff. ad Legem Julian peculatus.*

TITLE VI.

Of EXTORTION, and other Misdemeanors of Officers.

The CONTENTS.

1. *What is meant by Extortion.*
2. *Different Kinds of Extortion.*
3. *The same.*
4. *The Punishments of Extortion.*
5. *Nullity of that which is done by Extortion.*
6. *For what Extortions the Judge is answerable.*
7. *Of him that is the Occasion of the Extortion.*
8. *The Executors or Administrators of the Person that is guilty of Extortion, may be sued in a Civil Action.*

I.

1. What is meant by Extortion.

EXTORTION is a Crime committed by the Officers of Justice, of the Revenue, or of War, when they exact more than is due to them, or when they take greater Fees than what belong to them according to Law and Usage [a].

[a] Lex Julia repetundarum pertinet ad eas pecunias, quas quis in Magistratu, Potestate, Curatione, Legatione, vel quo alio Officio, munere, ministeriove publico cepit, vel cum ex cohorte cujus eorum est. Excipit Lex, a quibus licet accipere, a *sobrinis, propiorеve gradu cognatis suis*, uxore. *l. 1. ff. de Lege Julia repetundarum.*

II.

2. Different Kinds of Extortion.

Judges are guilty of Extortion, or Bribery, when they suffer themselves to be corrupted by Money, or Presents, to condemn or acquit contrary to the Rules of Justice, whether it be in Civil or Criminal Actions [b]; to exempt from Publick Offices those who are bound to serve them, or to compel those to serve who are exempted from them [c]; to defer the rendring of Justice to those to whom the same is due; or when they concert Measures so as that the Sales, Leases and other Acts which pass under their Authority turn to their own private Advantage, or that of their near Relations.

[b] Lege Julia repetundarum tenentur, qui cum aliquam potestatem haberet, pecuniam ob judicandum, decernendumve acceperit. *l. 3. ff. de Lege Julia repetundarum.*

Lege Julia repetundarum cavetur, ne quis ob militem legendum mittendumve æs accipiat: neve quis ob sententiam in senatu consiliove publico dicendam, pecuniam accipiat: vel ob accusandum, vel non accusandum utque Urbani Magistratus ab omni sorde se abstineant. *l. 6. § 2. ff. ibid.*

[c] Lex Julia de repetundis præcipit, ne quis ob judicem, arbitrumve dandum, mutandum, jubendumve, ut judicet; neve ob non dandum, non mutandum, non jubendum, ut judicet neve ob hominem in vincula publica conjiciendum, vinciendum, vincirive jubendum, exve vinculis dimittendum: neve quis ob hominem condemnandum, absolvendumve; neve ob litem æstimandam, judiciumve capitis, pecuniave faciendum vel non faciendum, aliquid acceperit. *l. 7. ff. de Lege Julia repetundarum.*

III.

3. The same.

Officers of the Army who take Money for discharging Soldiers from the Service, are to be punished as guilty of Extortion, whether the Soldiers be capable, or incapable of serving any longer [d].

[d] Lege Julia cavetur, ne quis ob militem legendum, mittendumve, æs accipiat. *l. 6. § 2. de Lege Julia repetundarum.*

IV.

4. The Punishment of the Extortion.

The Punishment of Extortion is different according to the Circumstances and the

the Enormity of the Offence [e]. The smallest Punishment to which Persons, who are guilty of this Crime, can be condemned, is to make Restitution of what they have unjustly received, to pay the Damages of the Person who has suffer'd by their Means, and a Fine to the King, to be deprived of the Office in which they have acted contrary to their Duty, and to be declared incapable of serving in any other Office. To these Punishments may be added, according to the Circumstances of the Case; a publick Acknowledgment of his Offence in the most ignominious Manner, Banishment, the Gallies. There are some Cases where the Punishment of Extortion, or Bribery, would extend even to Death. Such would be, for Instance, the Case of a Judge who should take Money to condemn an innocent Person to some corporal Punishment.

[e] Hodie ex Lege repetundarum extra ordinem puniuntur, & plerumque vel exilio puniuntur, vel etiam durius, prout admiserint. Quid enim si ad hominem necandum pecuniam acceperint: vel licet non acceperint, calore tamen inducti interfecerint vel innocentem, vel quem punire non deberent, capite plecti debent, vel certe in insulam deportari, ut plerique puniti sunt. *l. 7. § 3. de lege Julia repetundarum.*

V.

5. Nullity of that which is done by Extortion.

Prescription cannot give a legal Title to the Possession of any thing which a Judge has acquired by Extortion [f]. And all the Acts of Justice which have been done in Consequence of this Crime are absolutely null. Thus the Party whose Goods have been sold at a publick Sale by Order of Court, or his Creditors, may procure the said Sale to be declared null, upon their making Proof that the Judge was bribed to procure the Goods to be sold at a low Price, either by discouraging Bidders, or by some other Means.

[f] Quod contra legem repetundarum, Proconsuli, vel Consuli donatum est; non poterit usucapi. Eadem Lex venditiones, locationes ejus rei causâ, pluris minorisve factas, irritas facit: impeditque usucapionem, priusquam in potestatem ejus, a quo profecta res sit, hæredisve ejus veniat. *l. 8. ff. de Lege Julia repetundarum.*

VI.

6. For what Extortions the Judge is answerable.

A Judge is answerable not only for the Extortion which he himself is guilty of, but also for those which he procures to be done by Persons under his Authority [g], and of those which they do without his Order, when he having had notice of the Crime, has not taken the necessary Measures to prevent it. If the Judge himself knew nothing of the Extortion, in that Case they punish only the Officers who have committed the Crime.

[g] Ut unius pœna, metus possit esse multorum, Ducem qui male egit ad provinciam, quam nudaverit, cum custodiâ competenti ire præcipimus: ut non solum, quod ejus non dicam domesticus, sed manipularius & minister acceperit: verum etiam quod ipse a provincialibus nostris rapuerit, aut sustulerit, in quadruplum exolvat invitus. *l. 1. Cod. ad Legem Juliam repetundarum.*

VII.

7. Of him that is the Occasion of the Extortion.

He who gives Money, or who makes other Presents to a Judge, in order to engage him to prevaricate in the Functions of his Office, is guilty of the Crime of Extortion, or Bribery, as well as the Judge who receives the Presents [h]. Both the one and the other ought to be punished very severely, as well as all those who are Accomplices in the Crime [i].

[h] Omnes Cognitores, & Judices a pecuniis, atque patrimoniis manus abstineant, neque alienum jurgium putent suam prædam. Etenim privatarum quoque litium cognitor, idemque mercator statutam legibus cogetur subire jacturam. *l. 3. Cod. ad Legem Juliam repetundarum.*

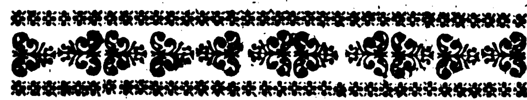
[i] Non modo adversus accipientem, sed etiam adversus dantem, accusandi cunctis tanquam crimen publicum concedimus facultatem: quadrupli pœnâ eo qui convictus fuerit, modis omnibus feriendo. *l. ult. ibid.*

VIII.

8. The Executors or Administrators of the Person that is guilty of Extortion, may be sued in a Civil Action.

A Criminal Prosecution is not carried on for the Crime of Extortion after the Death of the Offender; but a Civil Action lies against his Executors or Administrators, who are condemned to make restitution of the Sums which the Extortioners had received contrary to Law, and to indemnify the Parties for the Damages they have sustained [k].

[k] Sciant judices super amissis propriis, aut a se, aut ab hæredibus suis pœnam esse repetendam. *l. 2. Cod. ad Legem Juliam repetundarum.*



TITLE VII.

Of Assassinations, Homicides, Poisoning, and other Attempts against the Life of other Persons, or one's own Life; of dropping Children in the Streets; of Duels.

The CONTENTS.

1. *Different Kinds of Homicide.*
2. *Casual Homicide.*
3. *Other Kinds of casual Homicide.*

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4. *Homicide which happens through negligence.*
5. *Voluntary Homicide without any premeditated Design.*
6. *The Case of lawful Self-defence.*
7. *Homicide of a Wife taken in Adultery.*
8. *Homicide in a Fray.*
9. *Homicide committed with premeditated Design.*
10. *Of lying in wait with Design to kill.*
11. *Of Assassination.*
12. *Of Poisoning.*
13. *Of Medicines which destroy Children in the Mother's Womb.*
14. *Of Parricide.*
15. *Of Women who conceal their being with Child.*
16. *Of those who drop their Children in the Streets.*
17. *Of Accomplices in the Crime of Parricide.*
18. *Whether one guilty of Parricide is prosecuted after his Death.*
19. *As they are who kill themselves.*
20. *The Punishments inflicted on those who fight Duels.*
21. *The same.*

I.

1. Different kinds of Homicide.

HOMICIDE is so different according to the Circumstances of Time, Place, and Persons, that it comprehends several kinds of Crimes and Offences.

II.

2. Casual Homicide.

Casual Homicide is that which happens without any Intention to kill, without any fault, or negligence on the Part of him who has been the Occasion of the Death of another. [a] As in this Case there is neither Crime nor Offence, one cannot inflict any Punishment on the Person who is accused of this sort of Homicide. If it happens, for Instance, that one is cutting down the Branches of a Tree growing on the High-way, and that one of the Branches falls upon a Man that is passing by, and kills him, he who was cutting down the Branches is not guilty, provided he gave warning to the Person that was passing by. [b] If the Tree was not on the High-way, the Homicide would still be looked upon as casual, even although he who was lopping the Boughs did not give warning, because he could not foresee that any Person would leave the High-road, to cross through the midst of a Field. He would not be thought guilty of any crime, unless he threw down the Bough on set purpose on the Person that was passing by.

[a] Frater vester rectius fecerit, si se præsidi provinciæ obtulerit. Qui si probaverit non occidendi animo hominem à se percussum esse, remissâ homicidii pœnâ, secundum disciplinam militarem sententiam proferet: crimen enim contrahitur, si & voluntas nocendi intercedat. Cæterùm ea quæ ex improviso casu, potius quam fraude accidunt, fato plerumque, non noxæ imputantur. *l.* 1. *Cod. ad Legem Corneliam de sicariis.*

[b] Si putator, ex arbore ramum cum dejiceret, vel machinarius hominem prætereuntem occidit: ita tenetur, si is in publicum decidat; nec ille proclamavit, ut casus evitari possit. Sed Mutius etiam dixit, si in privato idem accidisset, posse de culpâ agi: Culpam autem esse. quod cum a diligente provideri poterit, non esse, provisum; aut tum denunciatum esset, cum periculum evitari non possit. Secundum quam rationem non multum refert, per publicum, an per privatum iter fieret: Cum plerumque per privata loca vulgo iter fiat: Quod si nullum iter erit; dolum duntaxat præstare debet, ne immittat in eum, quem viderit transeuntem. Nam culpa ab eo exigenda non est: cum divinare non potuerit, an per eum locum aliquis transiturus sit. *l.* 31. *ff. ad Legem Aquiliam.*

III.

3. Other kinds of casual Homicide.

We place among the Number of casual Homicides, those which are committed by Mad-men and Fools, when there are undoubted Proofs that the Madness or Folly preceded the Action, and that the said Infirmities deprived those who were attacked with them of their freedom in acting. [c] It is the same Thing with respect to Homicide committed by Children, when it appears by the Circumstances that they could not have formed the Design of killing; but if it appears from the Proofs that the Child was sensible of the Heinousness of his Action, that he acted with premeditated Design, he may be punished corporally, even although he had not attain'd the Age of Puberty. [d] The Punishment nevertheless is mitigated by reason of the Tenderness of the Age of the Offender.

[c] Infans vel furiosus, si hominem occiderint, Lege Corneliâ non tenentur: Cum alterum innocentia consilii tuetur, alterum fati infelicitas excusat. *l.* 12. *ff. ad Legem Cornelium de sicariis.*

[d] Quærimus, si furiosus damnum dederit, an Legis Aquiliæ actio sit? Et Pegasus negavit. Quæ enim in eo culpa sit, cum suæ mentis non sit? Et hoc est verissimum.—— Sed & si infans damnum dederit, idem erit dicendum. Quod si impubes id fecerit, Labeo ait, quia furti tenetur, teneri & Aquiliâ eum: & hoc puto verum, si sit jam injuriæ capax. *l.* 5. §. 2. *ff. ad Legem Aquiliam.*

IV.

4. Homicide which happens through negligence.

If there is any Negligence and Fault on the Part of him who has given Occasion to the Homicide, that is, if he has not taken all the Measures which a prudent Person ought to have taken to prevent the Accidents, he ought to be condemned to make good the Damages, to the Heirs of the Deceased, and even to suffer bodily Punishment, unless he does get a Pardon from the Sovereign. It is upon the Foundation of this Principle, that Nurses are corporally punished, when Children

are

are found overlaid that lay in the Bed with them [e].

[e] Mulionem quoque, si per imperitiam impetum mularum retinere non potuerit, si eæ alienum hominem obtriverint, vulgo dicitur culpæ nomine teneri. Idem dicitur & si propter infirmitatem sustinere mularum impetum non potuerit. Nec videtur iniquum si infirmitas culpæ adnumeretur: cum affectari quisque non debeat, in quo vel intelligit, vel intelligere debet, infirmitatem suam alii periculosam futuram. Idem juris est in persona ejus, qui impetum equi, quo vehebatur, propter imperitiam, vel infirmitatem retinere non poterit. *l.* 8. § 1. *ff. ad Legem Aquiliam.*

V.

5 Voluntary Homicide without any premeditated design.

Voluntary Homicide, but which is not out of premeditated Design, may be committed different ways, which it is necessary to examine carefully, because the Circumstances of the Fact either heighten or lessen the Offence.

VI.

6. The Case of lawful self-defence.

He who is attacked by Robbers, or by other Persons that are armed in such a Manner as to put him in danger of his Life, in case he does not defend himself, may kill the Robber, or the Aggressor [f], without any fear of being punished as a Murderer [g].

[f] Furem nocturnum si quis occiderit, ita demum impune feret, si parcere ei sine periculo suo non potuit. *l.* 9. *ff. ad Legem Corneliam de sicariis.*

Is qui aggressorem vel quemcunque alium in dubio vitæ discrimine constitutus occiderit, nullum ob id factum calumniam metuere debet. *l.* 2. *Cod. ad Legem Corneliam de sicariis.*

Si quis percussorem ad se venientem gladio repulerit, non ut homicida tenetur: quia defensor propriæ salutis in nullo peccasse videtur. *l.* 3. *Cod. ibid.*

Si (ut allegas) latrocinantem peremisti dubium non est, eum qui inferendæ cædis voluntate præcesserat, jure cæsum videri. *l.* 4. *Cod. ibid.*

[g] Liceat cuilibet aggressorem nocturnum in agris, vel obsidentem vias, atque insidiantem prætereuntibus, impune occidere, etiam si miles sit: Melius namque est his occurrere, & mederi, quam injuriâ acceptâ vindictam perquirere. *l.* 5. *Cod. ibid.*

VII.

7. Homicide of a Wife taken in Adultery.

A Husband who kills upon the Spot his Wife whom he surprizes in Adultery, and her Accomplice, does but follow the Motions of a justifiable Grief; for which reason he easily obtains his Pardon [h]. Nevertheless he cannot reap the Benefit of the Advantages which the Wife has granted him by her Marriage Contract.

[h] Si tamen maritus in adulterio deprehensam (uxorem) occidat: Quia ignoscitur ei, dicendum est, non tantum mariti sed etiam uxoris servos liberandos, si justum dolorem exequenti domino non restiterunt. *l.* 3. § 3. *ff. de Senatus consulto Silaniano.*

VIII.

8. Homicide in a Fray.

If it happens that in a Fray one Man kills another, the Punishment is mitigated, if he who has killed the other was assaulted by him, if he did not make use of offensive Weapons, if he did not strike, or had no Intention to strike in any Part of the Body where the Strokes are mortal; because the Homicide attended with these Circumstances is much the same as casual Homicide [i]. When the Circumstances of the Fact are otherwise, the Offender ought to be punished more severely.

[i] Eum, qui adseverat homicidium se non voluntate, sed casu fortuito fecisse, cum calcis ictu mortis occasio præbita videatur: si hoc ita est, neque super hoc ambigi poterit, omni metu, ac suspicione; quam ex admissæ rei discrimine sustinet, secundum id, quod adnotatione nostrâ comprehensum est, volumus liberari. *l.* 5. *Cod. ad Legem Corneliam de sicariis.*

According to the Law in France, *the Person who is guilty of Homicide, even when it is attended with the Circumstances that have been observed in this Article, is condemned to death, unless he procures his Pardon, which is easily obtained under these Circumstances. And if the Criminal himself had not asked for a Pardon, the Judges who judge of these Crimes in the last resort, would rather take the trouble upon themselves to sollicit for a Pardon to the Criminal than condemn him to death, when the Homicide is casual, or that it has been committed in the Case of a lawful Self-defence.*

IX.

9. Homicide committed with premeditated design.

When Homicide is committed with premeditated Design, it is always punished with Death, although there has been no lying in wait, nor Assassination, nor Poisoning [l]. Thus a Man who having had a Dispute with another, meets him sometime afterwards, assaults and kills him, ought to be condemned to Death [m]. Not only is the Person who actually kills punished in this Case, but even he who has formed a Design to kill, if he has begun to execute it, either by firing a Gun, or by wounding with a Sword the Person whom he had resolved to kill.

[l] Is, qui cum telo ambulaverit hominis necandi causa, sicut is, qui hominem occiderit, vel cujus dolo malo factum erit commissum, Legis Corneliæ de sicariis pœnâ coercetur. *l.* 7. *Cod. ad Legem Corneliam de sicariis.*

[m] Divus Hadrianus in hæc verba rescripsit: In maleficiis voluntas spectatur, non exitus. *l.* 14. *ff. ad Legem Corneliam de sicariis.*

Si quis necandi infantis piaculum aggressus, aggressave sit, sciat se capitali supplicio esse puniendum. *l.* 8. *Cod. ad Legem Corneliam de sicariis.*

X.

10. Of lying in wait with design to kill.

The Law punishes still more severely the lying in wait with Design to kill; which is when a Man's Life is taken away with Malice forethought, by a Person who has formed a Design to kill another,

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ther, and has concerted Measures for executing his Design, either by lying in wait for him in some Highway, or watching about his House in order to find a proper Opportunity to kill him when he should go abroad. In this Crime the bare Intention of committing it is punished, when there are external Proofs of it, from the Actions of the Criminal.

See the first Article of the 29th Chapter of the Custom of Auvergne.

By the Ordinances of France, *those who kill a Man with premeditated Design are to be broke upon the Wheel.*

[In *England*, all Homicides are divided into *Voluntary* and *Involuntary*. Involuntary Homicide is either by Misadventure, where a Man is doing a lawful Act without Intent of Hurt to another, and the Death of some Person doth by chance ensue. Or it is done out of *Necessity*, as where it is in the necessary Defence of one's Person, House or Goods; in which case the Homicide is *excusable*; or where it is occasioned by the due Execution of Publick Justice, in which Case it is *justifiable*.

Voluntary Homicide is either with Malice, or without Malice. If it is attended with Malice, it is called *Murder*, and the Punishment of it is Death. And the Malice may be either implied or expressed. Homicide without Malice, is where one kills another upon a sudden falling out, or Provocation, or in doing an unlawful Act. And this is called *Manslaughter*, the Punishment whereof is Burning in the Hand, and Forfeiture of Goods and Chattels. *Coke* 3. *Inst. pag.* 55. 56. 57. 220. *Hales's Pleas of the Crown*, *pag.* 43. 56. 269.]

XI.

11. Of Assassination.

Assassins are those who hire themselves for Money, or other Reward, to beat, abuse, or kill some Person. Assassins are punished with Death for the bare Attempt, altho' the Crime was not consummated [n]. Those who gave Money to the Assassins to kill, are punished in the same Manner as if they themselves had killed.

[n] Nihil interest, occidat quis, an causam mortis præbeat. Ὁ ἐντειλάμενός τινι φονεῦσαι, ὡς φονεὺς κεῖται. Mandator cædis pro homicida habetur. *l.* 15. *ff. ad Legem Corneliam de sicariis.*

The Word Assassination is sometimes taken in a larger Signification for all Homicides done with premeditated Design; but we thought proper to confine our selves here to the peculiar Meaning of the Word. It comes from certain Mahometans, *Subjects of* Vieil de la Montagne, *who went, by Order of their King, into Foreign Courts, there to kill General Officers, and even the Sovereign Princes.*

XII.

12. Of Poison.

There is no sort of Homicide of a blacker Die, and more odious, than that which is done by Poison [o]. Those who are guilty of this Crime are condemned to Death, and their Bodies are burnt after their Death, although the Poison had not worked its Effect, by reason the same had been prevented by taking Counter-Poison. They who sold the Poison, knowing what use was to be made of it, those who made the Person take it, knowing the Design, and those who ordered it to be given, are all of them punished as Poisoners.

[o] Plus est hominem extinguere veneno, quàm occidere gladio. *l.* 1. *Cod. de Maleficis & Mathematicis.*

There are some Drugs which may serve to poison Men, and which may likewise be imployed to other Uses that are lawful. Apothecaries ought not to sell these sorts of Drugs but to Persons that are known, and they ought to set down in their Books the Names of the Persons to whom they sell them, and make them sign the said Article. As to such Drugs as can serve to no other Use but to poison Men, an Apothecary who had deliver'd them, would be punished as an Accomplice of the Poisoner.

XIII.

13. Of Medicines which destroy Children in the Mother's Womb.

Those Persons are punished as Poisoners who give Medicines to Women with Child to make them miscarry, or to make them come before their Time, so as that the Child may perish in the Birth [p]. The Punishment of Death is also inflicted on married Women, or unmarried Women, who being with Child take these sorts of Drugs.

[p] Cicero in Oratione pro Cluentio Avito scripsit, Milesiam quandam mulierem, cùm esset in Asiâ quod ab hæredibus secundis acceptâ pecuniâ, partum sibi medicamentis ipsa abegisset, rei capitalis esse damnatam. *l.* 39 *ff. de pœnis.*

XIV.

14. Of Parricide.

The Tie of Blood between the Murderer and the Person whom he has killed, renders the Crime much more heinous, than if it had been committed upon a Stranger [q]. It is likewise certain that this heinousness augments or diminishes in proportion to the Degree of Kindred or Affinity. Thus he who kills his Father, his Mother, or his Grand-father, is condemned to a much more hideous Punishment than he who has killed his Brother, or some other more distant Relation [r]. However, under the general Name of Parricide are comprehended all those who kill their Relations even to the Degree of Cousin German, or

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or their Children. As also Husbands who kill their Wives, and Wives who kill their Husbands.

q Lege Pompeia de parricidiis cavetur, ut si quis patrem, matrem, avum, aviam, fratrem, sororem, patruelem, patruum, avunculum, amitam, consobrinam, uxorem, virum, generum, socrum, vitricum, privignum, privignam,——occiderit; cujusve dolo malo id factum erit: Ut pœnâ eâ teneatur, quæ est Legis Corneliæ de sicariis. Sed & mater quæ filium filiamve occiderit, ejus Legis pœnâ afficitur: & avus qui nepotem occiderit. Et præterea qui emit venenum, ut patri daret, quamvis non potuerit dare. *l.* 1. *ff. de Lege Pompeia de parricidiis.*

r Novercæ & sponsæ personæ omissæ sunt; sententiæ tamen legis continentur. *l.* 3. *ibid.*

Cum pater & mater sponsi, sponsæ, socerorum, ut liberorum sponsi, generorum appellatione continentur. *l.* 4. *ibid.*

The Punishment to which those are condemned in France *who kill their Father or their Mother, is that of being broke on the Wheel. Before they are laid upon the Wheel they are obliged to make a publick Acknowledgment of their Offence in an ignominious Manner. Among the* Romans, *pursuant to the single Law of the Code* de his qui parentes vel liberos occiderunt, *all Parricides, that is to say, all those who had killed any one of their Ascendants, Descendants, or nearest Collateral Relations, were to be sowed up in a Leathern Bag, together with a Dog, a Cock, a Viper, an Ape, and several Serpents, and thrown into the Sea, or into the River next adjoining to the Place where the Crime was committed.*

XV.

15. Women who conceal their being with Child.

Women who have concealed their being with Child, and whose Children are dead without receiving Baptism, are reputed to have murdered their Children, and are condemned to suffer death.

See the Edict of King Henry II. *of the Year* 1556, *and the Declaration of* Lewis XIV. *which revives the said Edict.*

XVI.

16. Of those who drop their Children in the Streets.

According to the Rigour of the Law, those Persons ought to be punished as Parricides who drop their Children in the Streets, whether the said Children be Bastards, or lawfully begotten, as also the Accomplices in the said Crime s. But the Punishment is mitigated when the Child has been found alive, lest a more rigorous Punishment should occasion worse Accidents.

s Crimen à sensu humano alienum, & quod nec ab ullis quidem barbaris admitti credibile est, Dei amantissimus Thessalonicensis Ecclesiæ Apocrisiarius Andreas ad nos retulit, quod quidam vix ex utero progressos infantes abjiciant, —— æquum sanè erat, ut qui talia perpetrarent, vindictam quæ proficiscitur ex legibus non effugerent, sed quo magis alii exemplo horum temperatiores fierent, extremis pœnis subjicerentur; ut qui per actionis impudentiam sua detulerint flagitia. Id quod in posterum custodiri jubemus. *Nov.* 153.

XVII.

17. Of the Accomplices in the Crime of Parricide.

The Accomplices in the Crime of Parricide are to be punished as Parricides, although they be no ways related to the Persons, whose Death they have been accessory to t. It is the same Thing with respect to him who has received Money from one, to assassinate his Father, Mother, or Child u. Both the Assassin and he who has given him the Money are punished as Parricides.

t Utrum qui occiderunt parentes, an etiam conscii, pœnâ parricidii adficiantur, quæri potest? Et ait Mæcianus, etiam conscios eâdem pœnâ adficiendos, non solum parricidas. Proinde conscii etiam extranei eâdem pœnâ adficiendi sunt. *l.* 6. *ff. de Lege Pomponia de parricidiis.*

u Si sciente creditore, ad scelus committendum pecunia sit subministrata, (utputa si ad veneni mali comparationem, vel etiam ut latronibus agressoribusque daretur, qui patrem interficerent) parricidii pœnâ tenebitur, qui quæsierit pecuniam, quique eorum ita crediderint, aut à quo ita caverunt. *l.* 7. *ibid.*

XVIII.

18. Whether one guilty of Parricide is prosecuted after his death.

Parricide is a Crime of so heinous a Nature, that the Punishment of Death is inflicted on those who have formed a Design to commit it, and who have taken any step towards the Commission of it, although they had not accomplished the Design x. However, there are no Proceedings had against the Memory or Ashes of those who die after they have been judicially accused of this Crime, or even after they have been condemned as Parricides, by a former Judgment from which they had appealed.

x Parricidii postulatus si interim decesserit, siquidem sibi mortem conscivit, successorem Fiscum habere debebit. Si minus, eum quem voluit, si modo testamentum fecit. Si intestatus decessit eos hæredes habebit qui lege vocantur. *l.* 8. *ff. de Lege Pompeia de parricidiis.*

Prescription takes place in the Crime of Parricide, as well as in other Crimes, with respect to the Criminal Prosecution. But the Offender who has acquired this Prescription cannot inherit, nor even his Children, to the Person whom he has killed.

XIX.

19. As they are who kill themselves.

A Prosecution is carried on against the dead Corpse of those who have laid violent Hands on themselves. The Corpse is drawn on a Hurdle, and afterwards hanged, and the Goods of him who has committed this Violence on himself are confiscated. There is nothing but Folly or Madness that can be pleaded in excuse for so barbarous an Act.

There is a Title in the Digests, and another in the Code in relation to the Goods of those who have made away with themselves. All the Laws which are collected under these two Titles distinguish between Persons who have laid violent Hands on them-

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themselves, whilst they are under an Accusation of a Capital Crime, or having been taken in the Fact, and those who have made away with themselves, being weary of Life or for some other Reason. In the first Case the Goods of the Criminal were confiscated, because he was supposed by that Action to have acknowledged himself guilty of the Crime with which he was charged. In the second Case the Criminal was not punished, because that Action was authorized among the Romans *by the example of illustrious Persons, and by the Philosophers. But both Reason and Religion having taught us that our Life is not our own, but belongs to God who gave it us, and to the State, it has been judged reasonable to inflict a Punishment on those who lay violent Hands on themselves. It is not less barbarous to kill one's self, than to kill another Person. That which the* Romans *looked upon as a Greatness of Soul, is one of the meanest Weaknesses that a Man of Courage can be guilty of.*

XX.

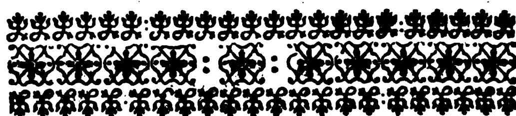
20. The Punishments inflicted on those who fight Duels.

Duelling is one of the Crimes that are most fatal to Society and to the State, for which the Law condemns to Death those who fight Duels, either as Principals or Seconds, not only when they have killed or wounded their Adversaries, but even when the Parties have retired from the fight, without any Blood shed. He who challenges another to fight a Duel, is to be imprisoned for the space of two Years, to pay a Fine to the Hospital, to be suspended from the Exercise of his Offices, and to be deprived of the Emoluments thereof for three Years, although the Challenge has not been accepted, and the Parties did not fight. Corporal Punishments are likewise inflicted on those who carry Challenges, or who accompany the Parties to the Place of Combat.

XXI.

21. The same.

A Criminal Prosecution is carried on against the Memory of those who have been killed in a Duel, or who have died since the Commission of that Crime; and in case they do survive they cannot prescribe against the Punishment due for that Crime, by any lapse of time whatsoever, after that the Prosecution has been once commenced against them as Duellists; and they can have no hopes of obtaining a Remission, Pardon, or Abolition of that Crime.



TITLE VIII.

Of Robbery; Theft and fraudulent Bankruptcies.

The CONTENTS.

1. *Definition of Theft.*
2. *The Punishment depends on the Circumstances of the Crime.*
3. *What are the Circumstances.*
4. *The same.*
5. *Theft committed by an Infant.*
6. *Punishment of Theft although Restitution be made.*
7. *The Heirs or Executors of the Thief prosecuted in a Civil Action.*
8. *Punishments of those who are Accomplices in a Theft.*
9. *Against those who conceal the Effects stolen, and the Thieves.*
10. *The Thing stolen challenged in the Hands of a Purchaser.*
11. *Of concealing and secreting Effects which do not belong to them, and of Accomplices in that Crime.*
12. *Of those who take away Children.*
13. *Of fraudulent Bankrupts, and their Accomplices.*

I.

1. Definition of Theft.

THEFT is a fraudulent Subtraction of a Thing from the Person to whom it doth belong, in order to appropriate it to one's self, or to make use of it against the Will of the Owner [a].

[a] Furtum est contrectatio rei fraudulosa lucri faciendi gratiâ, vel ipsius rei, vel etiam usus ejus, possessionisve: quod lege naturali prohibitum est admittere. *l. 1. ff. de furtis.*

Furtum autem fit non solum cum quis intercipiendi causâ rem alienam amovet, sed generaliter cum quis alienam rem invito domino contrectat. Itaque sive creditor pignore, sive is apud quem res deposita est, eâ re utatur; sive is qui rem utendam accepit, in alium usum eam transferat, quam cujus gratiâ ei data est, furtum committit, veluti si quis argentum utendum acceperit, quasi amicos ad cœnam invitaturus, & id peregrè secum tulerit: Aut si quis equum gestandi causâ commodatum sibi, longius aliquo duxerit. Quod veteres scripserunt de eo, qui in aciem equum perduxisset. *Instit. lib. 4. tit. 1. § 6.*

II.

2. The Punishment depends on the Circumstances of the Crime.

The Circumstances of the Time and Place where the Theft was committed, of the Things which have been stolen, the Quality of the Persons from whom one

one has fraudulently taken away any Thing, and that of the Thieves, increase or diminish the Punishment of this Crime.

III.

3. What are the Circumstances.

Those who wait for Passengers in the Highways to rob them, are condemned to be broke on the Wheel. Those who commit theft in the Royal Palaces are likewise punished with Death, as also Servants who rob their Masters. It is a greater Crime to steal that which is in some Manner under the Publick Guard, and under the Protection of Justice, such as the Instruments of Agriculture which are left in the open Fields, than to steal Effects that are usually locked up in Houses. The Theft of any Thing that is consecrated to the Worship of God is Sacrilege. The Quality of the Thing stolen is also to be reckoned among the Circumstances which the Judge ought to examine, before he gives his Judgment.

IV.

4. The same.

When the Theft has been committed without breaking any thing open, and without other aggravating Circumstances, the Thief is sentenced to be whipt, and to be marked with a Flower de Luce, to Banishment and to the Gallies for a certain Time; but if he is again guilty of the same Crime after his first Sentence, the Punishment is increased, which for the third Offence cannot be less than Death.

V.

5. Theft committed by an Infant.

An Infant which is near to the Age of Puberty may be punished with Corporal Punishment, if he is found guilty of Theft, when he knows that he has committed a Crime in stealing [b]. For it is no Theft, if there is not a Design to do wrong to him from whom he takes any thing away.

[b] In summa sciendum est, quæsitum esse, an impubes rem alienam amovendo, furtum faciat? Et placuit, quia furtum ex affectu furandi consistit, ita demum obligari eo crimine impuberem, si proximus pubertati sit, & ob id intelligat se delinquere. *Instit. lib.* 4. *tit.* 1. §. 18.

VI.

6. Punishment of Theft although Restitution be made.

Although the Thief have restored the Thing which he had fraudulently taken away, he may nevertheless be prosecuted and punished extraordinarily, that he may make Reparation for the Crime he has committed [c].

[c] Qui eâ mente alienum quid contrectavit, ut lucri faceret; tametsi mutato consilio, id postea domino reddidit, fur est: nemo enim tali peccato pœnitentiâ suâ nocens esse desiit. *l.* 65. *ff. de furtis.*

VII.

7. The Heirs or Executors of the Thief prosecuted in a Civil Action.

The Heirs or Executors of the Thief cannot be prosecuted criminally on account of the Theft committed by the Person to whom they succeed; but they are condemned to make Restitution of the Thing stolen, or of the Value of it; and to make good all Damages [d].

[d] Furti actione minimè teneri successores, ignorare non debueras; de instrumentis autem ablatis in rem actione tenentes convenire potes. *l.* 15. *Cod. de furtis.*

VIII.

8. Punishments of those who are Accomplices in a Theft.

The Accomplices in a Theft, are punished in the same Manner as the Thieves themselves [e]. We are to look upon all those to be Accomplices who have been aiding and assisting to the Thief, and who have with a premeditated Design favoured him in the Execution of his Crime [f]; whether it be that they broke the Windows, by which the Thief entred the House, or that they held the Ladder by which he mounted, or that knowing of the Crime which he intended to commit, they furnished him with false Keys, or other Instruments which he made use of to open Doors and Trunks, or whether it be that he let out the Beasts out of the Stable or Park, to give the Thief an Opportunity of carrying them off. The Accomplice of the Thief is punished corporally, although he received no Share of the Thing stolen; and he is condemned with the Thief, to make full Restitution of the Thing stolen.

[e] Interdum quoque furti tenetur, qui ipse furtum non fecit: qualis est is cujus ope & consilio furtum factum est. In quo numero est qui tibi nummos excussit, ut alius eos raperet; aut tibi obstiterit, ut alius rem tuam exciperet. Et hoc veteres scripserunt de eo, qui panno rubro fugavit armentum. Sed si quid eorum per lasciviam, & non datâ operâ, ut furtum admitteretur, factum est: in factum actio dari debet. At ubi ope Mævii Titius furtum fecerit: ambo furti tenentur. Ope & consilio ejus quoque furtum admitti videtur, qui scalas forte fenestris supponit, aut ipsas fenestras vel ostium effringit ut alius furtum facerit; quive ferramenta ad effringendum, aut scalas, ut fenestris supponerentur commodaverit, sciens cujus rei gratiâ commodaverit. *Instit. lib.* 4. *tit.* 1. §. 11.

[f] Qui ferramenta sciens commodaverit ad effringendum ostium vel armarium, vel scalam sciens commodaverit ad ascendendum, licet nullum ejus consilium principaliter ad furtum faciendum intervenerit: tamen furti actione tenetur. *l.* 55. §. 4. *ff. de furtis.*

IX.

9. Against those who conceal the Effects stolen, and the Thieves.

The Persons who shelter Thieves in their Houses, who conceal the Effects which have been stolen, or who buy them knowing them to be stolen [g], are punished corporally, according to the Heinousness of the Crimes which they have countenanced [h].

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[g] Pessimum genus est receptorum, sine quibus nemo latere diu potest. Et præcipitur ut perinde puniantur, atque latrones. In pari causâ habendi sunt, qui cum apprehendere latrones possent, pecuniâ acceptâ, vel subreptorum parte, demiserunt. *l.* 1. *ff. de receptatoribus.*

[h] Eos qui a servo furtim ablata scientes susceperint, non tantum de susceptis convenire, sed etiam pænali furti actione potes. *l.* 14 *Cod. de furtis.*

X.

10. The Thing stolen challenged in the Hands of a Purchaser.

The Owner of the Thing that has been stolen, may challenge it wherever he finds it, even in the Hands of one who has purchased it fairly and honestly [i]. But when the Question is, whether the Owner who claims the Thing that has been stolen from him, is obliged to make Restitution to the Purchaser of what he paid for it, it is necessary to distinguish two Cases; the first is of him who has bought it of an unknown Person, who brought the Thing into his House, of one of a suspicious Character, of a poor Man who has sold a good deal of silver Plate; the Second is of him who has bought it of a Person that is known, and who could not be readily suspected to have stole it, or who bought the Thing that is challenged in a Market, and in a Shop, where they do not examine into the Quality of the Buyer [k]. In the first Case the Purchaser ought to restore the Thing that is claimed without making any Restitution of the Price, because the Purchaser is guilty of a Neglect which favours very much of Deceit. But in the second Case, where no Blame can be imputed to the Purchaser, it is not reasonable that he should be at the same Time stripped both of the Thing which he has purchased, and also of the Price which he has paid for it.

[i] Incivilem rem desideratis, ut agnitas res furtivas non prius reddatis, quam pretium fuerit solutum a dominis. Curate igitur cautiùs negotiari, ne non tantum in damna hujusmodi, sed etiam in criminis suspicionem incidatis. *l.* 2. *Cod. de furtis.*

[k] Civile est quod à te adversarius tuus exigit, ut rei quam apud te fuisse fateris, exhibeas venditorem: nam à transeunte & ignoto te emisse, dicere non convenit, volenti evitare alienam bono viro suspicionem. *l.* 5. *ibid.*

XI.

11. Of concealing and secreting Effects which do not belong to them, and of Accomplices in that Crime.

A Wife who carries away out of the House of her Husband Effects belonging to him, cannot be prosecuted as being guilty of Theft, but the said Action is called a Secreting and Misimploying her Husband's Effects [l]. It is the same Thing when a Widow conceals and detains any Effects belonging to the Estate of her Husband, or to the Community between them, and this is because of the Respect that is due to the Marriage which is newly dissolved. The Punishment which is inflicted on the Widow who is convicted of such Concealment, is that she is deprived of the Share which she might claim in the Thing which she has concealed, whether it be that she is intitled to it by virtue of any Grant, or as being Part of the Goods of the Community. The Accomplices in such Concealments and Misapplications committed by a married Woman, or a Widow, may be prosecuted and punished as Thieves [m].

[l] Divortii causâ rebus uxoris à marito amotis, vel ab uxore mariti; rerum amotarum Edicto perpetuo permittur actio. Constante etenim matrimonio, neutri eorum neque pœnalis, neque famosa actio competit, sed de damno in factum datur actio. *l.* 2. *Cod. rerum amotarum.*

Uxor expilatæ hereditatis crimine idcirco non accusatur, quia nec furti cum eâ agitur. *l.* 5. *ff. expilatæ hæreditatis.*

[m] Si quis uxori res mariti subtrahenti opem, consiliumve accommodaverit furti tenebitur. Sed & si furtum cum eâ fecit, tenebitur furti, cum ipsa non teneatur. Ipsa quoque si opem furi tulit, furti non tenebitur, sed rerum amotarum. *l.* 52. *ff. de furtis.*

The Roman *Law made a particular kind of Crime of the pillaging an Inheritance, which name it gave to the Action that was commenced against those who had taken away the Effects belonging to the Inheritance, before the presumptive Heir or Executor had taken that Quality upon him, or that he had taken Possession of the Effects belonging to the Inheritance. Till then, it was said, there was no Owner of the Effects which were the Deceased's, and consequently no Action of Theft could be brought against him who had taken them away. But in* France *that Distinction ought not to take place, because the dead Person gives Seisin to the Living, both in the Provinces which are governed by their own Customs, and in those which are governed by the Civil Law. Besides, that was only a bare Formality, which had no great influence on the Matter it self, because he who had pillaged the Goods of a Succession, was prosecuted and punished in the same manner as Thieves.*

XII.

12. Of those who take away Children.

The vagrant Beggars who carry away Children, and who maim them in order to make them Objects of Compassion, are to be punished with Death [n]. It would be the same Thing, if there were any Person so barbarous, as to take away Children and sell them to Infidels, who would make Slaves of them.

[n] Plagiarii qui viventium filiorum miserandas infligunt parentibus orbitates, metalli pœnâ, cum cognitis ante suppliciis, teneantur. Si quis tamen hujusmodi reus fuerit oblatus, posteaquam super crimine claruerit, servus quidem vel libertate donatus bestiis subjiciatur, ingenuus autem gladio consumatur. *l.* 16. *ad Legem Falcidiam de plagiariis.*

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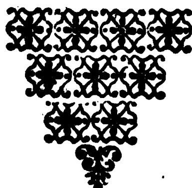
XIII.

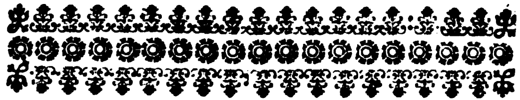
13. Of fraudulent Bankrupts and their Accomplices.

A fraudulent Bankruptcy is a kind of Theft, whether it be that the Bankrupt hath carried off his Effects, or that he has set up pretended Creditors, or that he has declared himself to be indebted more than really he was to true Creditors. Fraudulent Bankrupts are to be prosecuted and punished in an extraordinary Manner; and it is the same Thing with regard to those who have concealed the Effects belonging to Bankrupts. Those who have countenanced the Bankruptcy, by accepting feigned Sales and Assignments, or by declaring themselves to be Creditors, when really and truly they were not, are condemned to pay Fines, and to pay the double of what they demanded which was not due to them.

See the Ordinance relating to Commerce, Tit. 11.

[*In* England, *the Legislature has taken particular care to prevent the mischiefs that happen to Trade and Credit by fraudulent Bankruptcies, and for that End several Acts of Parliament have been made to punish and restrain them. The Statue of the* 4th and 5th of Queen Anne, Chap. 17. *directs, That all Bankrupts shall make a true Discovery of all their Goods or Estate to Commissioners appointed to examine them, and deliver up to the said Commissioners all their Estates and all Books, Papers and Writing relating thereunto, and in Case of any wilful Omission, being thereof convicted by Indictment or Information, they are to suffer as Felons, without Benefit of Clergy. And by the Statute,* 5th of Queen Anne, Chap. 22. *it is provided, That if any Person who shall become Bankrupt, or any others, with their consent or privity, shall remove, conceal or imbezil any Monies or Effects, whereof they, or any Persons in trust for them, are possessed of, or entitled to, to the Value of twenty Pounds, or any Books of Accounts, Bonds, Bills or any Writings relating thereunto, with intent to defraud their Creditors, every such Person so becoming Bankrupt shall suffer as a Felon, without Benefit of Clergy, and his Estate shall be divided amongst his Creditors.*]





TITLE IX.

Of Forgery, and of Counterfeiting the King's Coin.

The CONTENTS.

1. *Different Kinds of Forgery.*
2. *Whence are drawn the Proofs of the Forgery of an Act.*
3. *Of verifying a Writing by Comparison of Hands.*
4. *A forged Deed produced by one who did not commit the Forgery.*
5. *Punishments inflicted on publick Officers who are convicted of this Crime.*
6. *Punishments of those who are Accomplices in this Crime.*
7. *Punishment of the Heir, or Executor, of the Forger.*
8. *Prescription against the Punishment due for the Crime of Forgery.*
9. *A Transaction grounded on forged Deeds.*
10. *The assuming a false Name, or Person.*
11. *The suborning of a Child.*
12. *The Counterfeiting of the King's Coin.*
13. *Of the Officers of the Mint, who alter the Standard of the Coin.*
14. *False Weights, false Measures.*
15. *Of the Crime of Stellionate.*
16. *Of false Witnesses.*
17. *Forgery, in suppressing the Truth.*

I.

1 Different kinds of Forgery.

THE Crime of Forgery may be committed in Acts or Deeds, by putting to them a false Subscription, or by altering a Deed that has been signed by the Parties, whether it be by erasing some Lines or some Words, nay even some Letters, to substitute others in their Place, or whether it be by altering the Date, or adding something to what was written when the Parties signed it[a].

[a] Lex Cornelia de falsis, quæ etiam testamentaria vocatur, pœnam irrogat ei, qui testamentum, vel aliud instrumentum falsum scripserit, signaverit, recitaverit, subjecerit, vel signum adulterinum fecerit, sculpserit, expresserit sciens dolo malo. *Instit. lib.* 4. *tit.* 18. §. 7.

Qui testamentum amoverit, celaverit, eripuerit, deleverit, interleverit, subjecerit, resignaverit, quive testamentum falsum scripserit, signaverit, recitaverit dolo malo; cujusve dolo malo id factum erit: Legis Corneliæ pœnâ damnatur. *l. 2. ff. ad Legem Corneliam de falsis.*

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II.

2. Whence are drawn the proofs of the forgery of an Act.

The Proofs of the Forgery are drawn from the Instrument it self, if it is supposed, for Example, to have been signed by a Person who was dead before the Date which the forged Instrument bears, from Depositions of Witnesses who were privy to the Forgery, from the Report made by Persons who are skilled in the Comparison of Hands [b]. Sometimes the bare View of the forged Writing is sufficient to discover the Forgery.

[b] Ubi falsi examen inciderit, tunc acerrima fiat indago argumentis, testibus, scripturarum collatione, aliisque vestigiis veritatis: Nec accusatori tantum quæstio incumbat, nec probationis ei tota necessitas indicatur. Sed inter utramque personam sit Judex medius: nec ullâ interlocutione divulget quæ sentiat: sed tanquam ad imitationem relationis, quæ solum audiendi mandat officium, præbeat notionem: postremâ sententiâ, quid sibi liqueat, proditurus. *l. 22. Cod. ad Legem Corneliam de falsis.*

III.

3. Of verifying a Writing by comparison of hands.

If the Judge orders that the Writing which is said to be forged shall be verified by comparing it with other Writings; the Writings which are to found the Comparison ought to be confessed by the Party that is charged with the Forgery, or Authentick, that is to say, attested by a publick Seal, or taken out of the publick Archives of a Court of Justice [c]. The Persons who are to make the Comparison, after they have been sworn, are to compare at their leisure the Writings upon which the Comparison is founded with those which are to be verified. They are afterwards to give in their Report, and to acknowledge it as such before the Judge. Great Precautions are to be taken before the Judge gives sentence upon their Report; for what they say concerning the Similitude or Dissimilitude of the Hand-writing is commonly founded only upon Conjectures, or upon Presumptions, the Force of which the Judge is to examine [d]. The diversity of Ink and Pens, and the different Situation one's body is in when he is writing changes and alters the Character of the Hand-writing. A Man in Years, a sick Man, does not write in the same Manner in which he wrote when he was Young, and whilst he was in full Vigour of Health. There needs only a violent Exercise of the Hand, to make some alteration in the Hand-writing. In fine, there are Cheats so expert in counterfeiting of Hands, that it is almost impossible to convict them of Forgery by the Reasonings of Men that are well versed in the Comparison of Hands.

[c] Comparationem litterarum ex chirographis fieri, & aliis instrumentis quæ non sunt publicè confecta, satis abundèque occasionem criminis falsitatis dare, & in judiciis & in contractibus manifestum est. Ideoque sancimus non licere comparationes literarum ex chirographis fieri, nisi trium testium habuerint subscriptiones, ut prius literis eorum fides imponatur, —— & tunc ex hujusmodi cartulâ jam probatâ comparatio fiat, aliter etenim fieri comparationem nullo concedimus modo —— sed tantum modo ex forensibus vel publicis instrumentis, vel hujusmodi chirographis quæ enumeravimus comparationem triturandum. Omnes autem comparationes non aliter fieri concedimus, nisi juramento antea præstito ab iis qui comparationem faciunt, fuerit affirmatum, quod neque lucri causâ, neque inimicitiis, neque gratiâ tenti, hujusmodi faciunt comparationem. *l. 20. Cod. de fide instrumentorum.*

Ad hæc ex literis quibus, adversarius tuus utitur, & profert, rectè petis examinationem fieri. Item & charta quæ profertur ex archivo publico, testimonium publicum habet. *Authent. ad hæc ibid.*

[d] Novimus nostras leges quæ volunt ex collatione literarum fidem dari documentis, & quia quidam Imperatorum super excrescente jam malitiâ eorum qui adulterantur documenta, hæc talia prohibuerunt, illud studium falsatoribus esse credentes, ut ad imitationem literarum semetipsos maxime exerceant, eo quod nihil est aliud falsitas, nisi veritatis imitatio, — videmus tamen naturam ejus crebro egentem rei examinatione, quando literarum dissimilitudinem sæpè quidem tempus facit. Non enim ita quis scribit juvenis & robustus, ac senex & fortè tremens, sæpe autem & langor hoc facit. Et quidem hoc dicimus, quando calami & atramenti immutatio, similitudinis per omnia aufert puritatem. *Novel. 73. in præfat.*

IV.

4. A forged Deed produced by one who did not commit the Forgery.

When a Party has produced in Court a forged Deed, in the Forgery whereof he had no Hand, he cannot be punished for a Crime which he did not commit, but he is condemned to pay the Charges of proving the Forgery; and the Author of the Forgery may be prosecuted at the Instance of the Publick [e]. The King's Attornies General in his several Courts, and those of Lords of Manors, may likewise prosecute out of the ordinary Course those who are accused of having forged a counterfeit Deed, although he who produced it had declared that he would not make use of it, and that the said Deed had been thrown out of the Proceedings in the Cause [f]. And this more especially takes place when he who has produced the forged Writing is charged with being the Author of the Forgery.

[e] Divus Pius Claudio rescripsit, pro mensura cujusque delicti constituendum in eos, qui apud Judices instrumenta protulerunt, quæ probari non possint —— sed Divus Marcus cum fratre suo pro humanitate hanc rem temperavit, ut si (quod plerumque evenit) per errorem hujusmodi instrumenta proferantur, ignoscatur eis qui tale quicquam protulerint. *l. 31. ff. ad Legem Corneliam de falsis.*

[f] Majorem severitatem exigit, ut merita eorum, qui falsis rescriptionibus utuntur, dignâ coerceantur pœnâ: sed qui deceptus est per alium, si suam innocentiam probat, & eum à quo accepit, exhibet, se liberat. *l. 4. Cod. ad Legem Corneliam de falsis.*

Si falsos codicillos ab iis contra quos supplicas, factos esse contendis: non ideo accusationem evadere possunt, quod se illis negent uti: nam illis prodest instrumenti usu abstinere, qui non ipsi falsi machinatores

tores

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tores esse dicuntur, & quos periculo solus usus adstrinxerit. Qui autem compositis per scelus codicillis, in severitatem legis Corneliæ inciderunt, non possunt defensiones ejus recusando, crimen evitare. *l.* 8. *Cod. ad Legem Corneliam de falsis.*

V.

5. Punishments inflicted on publick Officers who are convicted of this Crime.

Publick Officers, and their Clerks, who are guilty of Forgery in the Discharge of the Functions of their Office, or Commission, and those who counterfeit the King's Sign Manual, or Seals, are to be punished with Death, even although they are not Officers of the Chancery [g]. With respect to the Authors of other Forgeries, the Judges ought to proportion the Punishments to the Enormity of the Crimes, and even condemn the Guilty to suffer Death, according to the different Circumstances.

[g] Ejusque legis (Corneliæ de falsis) pœna in servos, ultimum supplicium est; (quod etiam in lege de sicariis & veneficiis servatur) in liberos vero deportatio. *Instit. lib.* 4. *tit.* 18. §. 7.

See the Edict of Francis I. *of* 1531, *and the Edict of the Month of* March, 1680.

See under the 4th Article the Law majorum *there quoted.*

[*In* England, *it is High Treason to counterfeit the King's Great or Privy Seal.* Stat. 25. Ed. 3. Cap. 2. *And by* Stat. 1. Mar. Cap. 6. *the foregoing and counterfeiting the King's Privy Signet, or the Sign Manual, is made High Treason also.*]

VI.

6. Punishments of those who are Accomplices in this Crime.

The Punishment of Forgery extends not only to those who have forged the counterfeit Deed or Writing, but likewise to their Accomplices, whether it be that they were aiding or assisting in forging the Writing, or that they ordered it to be done, or that they gave Money for the doing of it [h].

[h] Pœna Legis Corneliæ irrogatur ei, qui quid aliud, quam in testamento, sciens dolo malo falsum signaverit, signarive curaverit. *l.* 9. *ff. ad Legem Corneliam de falsis.*

VII.

7. Punishment of the Heir, or Executor, of the Forger.

The Heir or Executor cannot be prosecuted criminally for the Crime of Forgery committed by the Person to whom he succeeds: But he cannot reap any benefit from the Forgery committed by the Person to whose Rights he succeeds [i]. Thus when any one has forged a Testament in their own Favour, the Legacy which he has given to himself in it ought not to be paid to his Executors, and they ought to restore it, if their Author had received it. They are likewise condemned in Costs, if they defend the Validity of the Testament, which is afterwards proved to be forged.

[i] Si quis, cum falsò sibi legatum adscribi curasset, decesserit, id hæredi quoque extorquendum est. *l.* 4. *ff. ad Legem Corneliam de falsis.*

Cum falsi reus ante crimen illatum, aut sententiam dictam, vitâ decedit, cessante Corneliâ, quod scelere quæsitum est hæredi non relinquitur. *l.* 12. *ibid.*

VIII.

8. Prescription against the Punishment due for the Crime of Forgery.

The Criminal acquires an Exemption from the Punishment due for Forgery, by the lapse of twenty Years from the time of the Commission of the Crime, if no Proceedings have been had against him for the same within that time [k]. But the Prescription does not commence to run, with respect to the Civil Effects of it, but from the Day that the Forgery has been discovered. And this takes Place likewise in regard to Petitions for reversing Decrees that have been pronounced on the Authority of forged Writings.

[k] Querela falsi temporalibus præscriptionibus non excluditur, nisi viginti annorum exceptione. Sicut cætera fere crimina. *l.* 12. *Cod. ad Legem Corneliam de falsis.*

IX.

9. A Transaction grounded on forged Deeds.

If one has concluded an Agreement on a Writing which he himself had objected against as being forged, he will not be allowed afterwards to call the said Agreement into question, and to prove the Forgery of the Writing [l]. But if on the contrary he had made an Agreement on forged Deeds, which he did not then know to be counterfeit, he might procure himself to be relieved against the said Agreement within ten Years after the Forgery had been discovered.

[l] Ipse significas, cum primum adversarii instrumenta protulerunt, fidem eorum te habuisse suspectam. Factâ igitur transactione, difficile est ut is qui provinciam regit, velut falsum cui semel acquievisti, tibi accusare permittat. *l.* 7. *Cod. ad Legem Corneliam de falsis.*

X.

10. The assuming a false Name, or Person.

The assuming a false Name and Person is a Forgery [m]. If it happens, for Instance, that *James* having been killed in a Fight, or having been absent for a long Time in a very remote Country, *Peter* takes the Name of *James*, and endeavours to get himself owned as such in the Family, he is to be punished with Death. It is the same Thing if one personating another signs a Promissary Note, or an Acquittance, under that borrowed Name. But he who changes his Name without any bad Design is not prosecuted as being guilty of Forgery [n].

[m] Falsi nominis vel cognominis adseveratio pœnâ falsi coercetur. *l.* 13. *ff. ad Legem Corneliam de falsis.*

[n] Sicut in initio nominis, cognominis, prænominis recognoscendi singulos impositio libera est privatis:

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tis: ita eorum mutatio innocentibus periculosa non est. Mutare itaque nomen vel prænomen sine aliqua fraude licito jure, si liber es, secundum ea quæ sæpè statuta sunt, minimè prohiberis: nullo ex hoc præjudicio futuro. *l. unicâ Cod. de mutatione nominis.*

XI.

11. The Suborning of a Child.

The suborning a Child, is a Forgery committed by a Woman who takes the Child of a Stranger and will have it to pass for her own [o]. The Women who are convicted of this Crime deserve to be severely punished, because they confound the Order of Families. One is admitted to prove the Subornation of the Child, and to deprive the supposititious Child both of the Father's and Mother's Inheritance, although the Person who has committed the Crime be dead [p]. And this takes place even in the Case where the Husband and Wife have agreed together in the Subornation of a Child which was none of theirs. A Nurse would be condemned to Death, if after the Death of the Child which had been committed to her Care, she had suborned another in its room, or if she had given back her own Child instead of that which she had been intrusted with.

[o] Publicè interest partus non subjici, ut ordinum dignitas, familiarumque salva sit. *l. 1. ff. de inspiciendo ventre.*

Cum suppositi partus crimen patris tui uxori moveas, apud rectorem Provinciæ institutâ accusatione id proba. *l. 10. Cod. ad Legem Corneliam de falsis.*

[p] Accusatio suppositi partus nullâ temporis præscriptione depellitur, nec interest, decesserit necne ea quæ partum subdidisse contenditur. *l. 19. ff. ad Legem Corneliam de falsis.*

XII.

12. The Counterfeiting of the King's Coin.

The Counterfeiting the King's Coin is one of the kinds of High Treason, and is punished with Death [q]. The Law condemns as Counterfeiters of the Coin, not only those who put off counterfeit Silver or Gold marked with the King's Stamp for true, or Pieces of Money that are altered, whether it be with respect to the Weight, or with respect to the Allay [r]; but also those who have by their own private Authority marked with the King's Stamp, Pieces of Gold and Silver of the same Fineness and Weight as is observed in the publick Coin, because the Power of coining Money is a Right reserved to the Sovereign. The Accomplices in this Crime, and even those who utter and put off this counterfeited Coin, in concert with the Persons principally concerned in the coining, are also punished with Death.

[q] Quicunque nummos aureos partim raserit, partim tinxerit, vel finxerit: si quidem liberi sunt, ad bestias dari: si servi, summo supplicio adfici debent. *l. 8. Cod. ad Legem Corneliam de falsis.*

Lege Corneliâ cavetur, ut qui in aurum vitii quid addiderit, qui argenteos nummos adulterinos flaverit, falsi crimine teneri. Eâdem pœnâ adficitur etiam is qui, cum prohibere tale quid posset, non prohibuit. Eâdem lege exprimitur, ne quis nummos stagneos, plumbeos, emere, vendere dolo malo vellet. *l. 9. ff. ad Legem Corneliam de falsis.*

[r] Si quis nummos falsâ fusione formaverit, universas ejus facultates fisco nostro præcipimus addici. In monetis etenim tantum modo nostris cudendæ pecuniæ studium frequentari volumus: cujus obnoxii, majestatis crimen committunt. Quicunque solidorum adulter poterit reperiri, vel à quocunque fuerit publicatus, illicò omni dilatione summotâ flammarum exustionibus mancipetur. *l. 2. Cod. de falsâ monetâ.*

XIII.

13. Of the Officers of the Mint who alter the Standard of the Coin.

If it should happen that those who are imployed in the Mint by the King's Orders, should alter the Coin, whether it be with regard to the Weights, or with regard to the Allay, they would be punished as Counterfeiters of the Coin [s].

[s] Quoniam nonnulli monetarii adulterinam monetam clandestinis sceleribus exercent, cuncti cognoscent necessitatem sibi incumbere hujusmodi homines inquirendi: ut investigati tradantur judici, facti conscios per tormenta illicò prodituri, ac sic dignis suppliciis addicendi. *l. 1. Cod. de falsâ monetâ.*

XIV.

14. False Weights, false Measures.

Nothing is more necessary in Trade than justness in Measures and Weights; for which reason those who wittingly and willingly sell with false Weights and false Measures ought to be punished corporally, or at least banished [t]. The Punishment would still be more severe, if any one should have the boldness to falsify the publick Weights and Measures.

[t] Si venditor mensuras publicè probatas, vini, frumenti, vel cujuslibet rei, aut emptor corruperit, dolove malo fraudem fecerit: quanti ea res est, ejus dupli condemnatur. Decretoque divi Hadriani præceptum est, in insulam eos relegari, qui pondera aut mensuras falsassent. *l. 32. ff. ad Legem Corneliam de falsis.*

XV.

15. Of the Crime of Stellionate.

Stellionate is a general Name that is given to all manner of Cheating and Deceit, and which is particularly applied to the Crimes of those who having mortgaged a Thing to one Person sell it to another, and fraudulently conceal from him the Mortgage to which it is subject [u]. or who grant an Annuity, and charge an Estate with it as being free from all manner of Debt or Incumbrance, although it be already mortgaged [x]; or who sell a Thing which does not belong to them. The ordinary Punishment of Stellionate is, that he who is found guilty of it shall remain in Prison, until he has repaired the Wrong he has done, and paid the Damages. Sometimes this Crime is attended with such aggravating Circumstances, that the Judge condemns the Person that is guilty

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ty to severer Punishments, such as those of making a publick Acknowledgment of his Offence in an ignominus manner, and of Banishment.

[u] Stellionatus accusatio ad Præsidis cognitionem spectat. Stellionatum autem objici posse his, qui dolo quid fecerunt sciendum est —— maximè autem in his locum habet: si quis fortè rem alii obligatam, dissimulatâ obligatione, per calliditatem alii distraxerit, vel permutaverit, vel in solutum dederit,—— pœna autem stellionatus nulla legitima est, cum nec legitimum crimen sit; solent autem ex hoc extra ordinem plecti, dummodo non debeat opus metalli hæc pœna in plebeis egredi, in his autem qui sunt in aliquo honore positi, ad tempus relegatio, vel ab ordine motio remittenda est. *l.* 3. *ff. stellionatus.*

[x] Qui duobus in solidum eandem rem diversis contractibus vendidit, pœnâ falsi coercetur, & hoc divus Hadrianus constituit. His adjungitur & is qui judicem corrumpit, sed remissius puniri solent ut ad tempus relegentur, nec bona illis auferantur. *l.* 21. *ff. ad Legem Corneliam de falsis.*

Improbum quidem & criminosum fateris, easdem res pluribus pignorasse, dissimulando in posteriore obligatione, quod eædem aliis pignori tenerentur. Verùm securitati tuæ consules, si ablato omnibus debito, criminis instituendi causam peremeris. *l.* 1. *Cod. de crimine stellionatus.*

XVI.

16. Of false Witnesses.

Witnesses who are convicted of having taken a false Oath in a Court of Justice are punished with Death [y]. Those Persons are prosecuted and punished as false Witnesses, who either retract their Depositions, or who change them in any material Circumstances, after they have been repeated upon their Examination and acknowledged their Deposition before the Judge. The Witness who has been suborned by the Party in a civil Cause, is also condemned for suffering himself to be suborned, and likewise the Party for suborning him. It is the same Thing if a Judge has suffered himself to be corrupted.

[y] Pœna legis Corneliæ irrogatur ei qui falsas testationes faciendas, testimoniave falsa dicenda dolo malo coierit. —— Sed & si quis ad renuntiandum, remittendumve testimonium, dicendum vel non dicendum, pecuniam acceperit: pœnâ legis Corneliæ afficitur, & qui judicem corruperit, corrumpendumve curaverit. *l.* 1. §. 1. 2. *ff. ad Legem Corneliam de falsis.*

XVII.

17. Forgery, in suppressing the Truth.

One is guilty of the Crime of Forgery not only by saying or doing something against Truth, but likewise by doing something to hinder the Truth from being known [z]. Thus he who bribes a Witness, that he may not give Testimony to the Truth in a Court of Justice, ought to be punished as one guilty of Forgery [a]. It is the same Thing with respect to the Heir who suppresses the Testament of him to whom he has a right to succeed in right of Blood.

[z] Paulus respondit, Legis Corneliæ pœnâ omnes teneri, qui etiam extra testamenta, cætera falsa signassent. Sed & cæteros qui in rationibus, tabulis, literis publicis, aliave qua re sine consignatione falsum fecerunt; vel, ut verum non appareat, quid celaverunt, subripuerunt, subjecerunt, resignaverunt, eâdem pœnâ adfici solere dubium non est. *l.* 16. §. 1. 2. *ff. ad Legem Corneliam de falsis.*

[a] Eum qui celavit vel amovit, testamentum, committere crimen falsi publicè notum est. *l.* 14. *Cod. ad Legem Corneliam de falsis.*

TITLE X.

Of Offences against Chastity, and of Adultery.

The CONTENTS.

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2. *Of Fornication.*
3. *Circumstances which aggravate the Fornication.*
4. *Of common Whores, and of those who make a Trade of procuring them.*
5. *Punishment of an adulterous Woman.*
6. *Punishment of the Man, who commits the Adultery.*
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9. *If the Heirs of the Husband may prosecute the Wife for the Crime of Adultery.*
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11. *Reconciliation of the Husband with his adulterous Wife.*
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13. *Of a Woman that has been ravished.*
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15. *Of the Rape of a Nun.*
16. *Of Violence offered to a Woman.*
17. *Of Incest.*
18. *Of Crimes against Nature.*
19. *Of Polygamy.*

I.

1. Of the Crime of Luxury.

WE comprehend under the general Name of Luxury, or Offences against Chastity, simple Fornication, Adultery, Rape, Violence, Incest, Crimes against Nature, and Polygamy.

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II.

2. Of Fornication.

Fornication is a criminal Converſation which two ſingle Perſons, who are free from all Engagements, have with one another; that is to ſay, Perſons who are not engaged, either by the Ties of Marriage, or by a ſolemn Vow of Religion. If a Child is born of this unlawful Commerce, and the Woman is not a common Proſtitute, the Father of the Child is condemned to maintain it, and to pay to the Mother moderate Damages, according to the Condition of the Parties, and the Circumſtances of the Offence. Both Parties are likewiſe condemned to pay a Fine, or to give ſomething to the Poor.

The Emperor Juſtinian *thought it proper to inflict a ſeverer Puniſhment on thoſe who committed ſimple Fornication with a Maiden, or a Widow, who was not a common Proſtitute. For he ordains in the Title of the Inſtitutes* de publicis judiciis, *that thoſe who are found guilty of this Crime ſhall forfeit the half of their Goods, if they are Perſons of an illuſtrious Rank, and that they ſhall be puniſhed with corporal Puniſhment, and Baniſhment, if they are Perſons of a low Condition.*

[As to the Maintenance of Baſtard Children, in *England* the reputed Father, if he is of ability, is obliged to maintain them, whether the Mother be a common Proſtitute, or a Perſon of leſs abandoned Character. And ſeveral Acts of Parliament have been made to prevent Baſtard Children being left as a Burden on the Pariſh where they happen to be born. By the Stat. 13. and 14. *Car.* 2. Chap. 12. Church-Wardens and Overſeers of the Poor, where any Baſtards are born, may ſeize ſo much of the Goods, and Profits of the Lands, of the putative Father and lewd Mother, as two Juſtices of the Peace ſhall order towards the Diſcharge of the Pariſh.]

III.

3. Circumſtances which aggravate Fornication.

Sometimes the Circumſtances of ſimple Fornication may ſo heighten the Enormity of the Crime, as that one of the Parties may be condemned to corporal Puniſhment, even to that of Death [a]. Thus a Guardian who debauches his Ward may be puniſhed with Death. It is the ſame Thing in the Caſe of a Servant who has an unlawful Commerce with his Maſter's Daughter, or a Jayler who debauches an honeſt Woman who is confined in the Priſon of which he is the Keeper.

[a] Si tutor pupillam quondam ſuam violatâ caſtitate ſtupraverit, deportationi ſubjugetur, atque univerſæ ejus facultates fiſci juribus vindicentur, quamvis eam pœnam debuerit ſuſtinere; quam raptori leges imponunt. *l. unicâ. Cod. ſi quis eam cujus tutor fuerit corruperit.*

IV.

4. Of common Whores, and of thoſe who make a Trade of procuring them.

When common Whores are informed againſt before the Civil Magiſtrate by the Neighbours, or by the Officers who are appointed to take care of the Civil Policy, they are ſhut up for a certain Time in a Houſe of Correction, or they are ſent into Colonies [b]. As to Perſons of both Sexes, who drive a ſcandalous Trade in proſtituting young Women, they are declared to be infamous, and they are condemned to be whipt and baniſhed. If thoſe who are guilty of this infamous Commerce are convicted of having ſeduced young Women of good Families, and of having drawn them away by Artifice from their Parents, they would be puniſhed with Death. It is even unlawful for any Perſons to let their Houſes to Women of a ſcandalous Life, and much more to thoſe who harbour them in their Houſes, in order to proſtitute them.

[b] Lenones jubemus extra hanc fieri feliciſſimam civitatem, (ſcilicet Conſtantinopolim) tanquam peſtiferas, & communes caſtitatis vaſtatores factos, & liberas ancillaſque requirentes & deducentes ad hujuſmodi neceſſitatem, & decipientes, & habentes educatas ad univerſam confuſionem. Præconizamus itaque quia ſi quis de cætero præſumpſerit invitam puellam aſſumere, & habere ad neceſſitatem nutritam, & fornicationis ſibi deferentem quæſtum: hunc neceſſe eſt à ſpectabilibus prætoribus populi hujus feliciſſimæ civitatis comprehenſum omnia noviſſima ſuſtinere ſupplicia. Si enim pecuniarum eos furtorum & latrociniorum emendatores elegimus; quomodo non multo magis caſtitatis furtum & latrocinium eos coercere permittimus? Si quis autem patiatur in ſua domo quemquam lenonem & hujuſmodi præpoſitum operationis habere, & hæc denuntiata cognoſcens, non etiam domo ſuâ expulerit: ſciat ſe & decem librarum auri ſuſtinere pœnam, & circa ipſam periclitaturum habitationem. *Nov.* 14. *cap. unico.*

V.

5. Puniſhment of an adulterous Woman.

When a married Woman is convicted of Adultery, ſhe is condemned to be ſhut up in a Nunnery, where ſhe continues for two Years in a Lay-habit [c]. If the Huſband does not take her out of the Nunnery in the Space of two Years, or if he happens to die, ſhe is ſhaved, and puts on the Habit of a Nun, in order to paſs the Remainder of her Days in that State. She is deprived of all the Advantages ſhe was intitled to under her Marriage Settlement, and her Marriage Portion falls to her Huſband in caſe ſhe has no Children; and if ſhe has Children the Mother's

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ther's Portion is decreed to them. There is to be taken out of the said Portion, whether it be decreed to the Husband, or to the Children, so much as will pay the Pension of the Adulteress in the Nunnery.

[c] Adultera —— in monasterium mittatur: quam intra biennium viro recipere licet. Biennio transacto, vel viro priusquam reduceret ream mortuo: adultera tonsa monastico habitu suscepto, ibi dum vivit, permaneat. —— pactis dotalibus instrumentorum in omni casu viro servandis. *Authent. sed hodie. Cod. ad Legem Juliam de adulteriis.*

What is said in the Authentick sed hodie, *that after two Years the Adulteress shall be shaved, in order to spend the Remainder of her Days in a Monastery, is to be understood in Case the Husband does not take her out from thence even after two Years. For a Husband is always at liberty to be reconciled to his Wife. And even Adulteresses have been sometimes permitted to quit their Retreat in order to be married again, after the Death of the Husband to whom they have been unfaithful. In this case it is necessary that the Widow who has been thus shut up in a Cloyster, be demanded in marriage of the supreme Court of Judicature by the Person who designs to marry her.*

VI.

6. Punishment of the Man who commits the Adultery.

The Man who has committed Adultery with another Man's Wife may be prosecuted out of the ordinary Course by the Husband of the Woman with whom he has had an unlawful Commerce; but the Punishment of this Crime commonly ends in some Alms to the Poor, and Damages to the Husband that has been injured. Sometimes the Adultery is attended with aggravating Circumstances which oblige the Judges to heighten the Punishment. Thus a Vassal that should lie with the Wife of his Lord, would forfeit his Fee. A Servant who should have a criminal Conversation with his Master's Wife, would be punished with Death.

By the Roman *Law every Adulterer was punished with corporal Punishments.*

VII.

7. Adultery with a common Whore.

If the Woman with whom the Adultery was committed, was a common Prostitute, the Husband could not have this Action against the Man who had committed this Crime with her, nor have condemned to pay any Damages [d].

[d] Si ea, quæ stupro tibi cognita est passim venalem formam exhibuit, ac prostitutam meretricio more vulgo se præbuit: adulterii crimen in ea cessat. *l. 22. Cod. ad Legem Juliam de adulteriis.*

VIII.

8. Who has the right to prosecute one for the Crime of Adultery.

It is only the Husband that can accuse his Wife of Adultery; for it is not reasonable that others should be permitted to raise discord and division between Husband and Wife who appear to be very well satisfied with each other's conduct [e]. We must except from this Rule the case of a Husband who encourages the disorderly Life of his Wife, and who prostitutes her himself, or who suffers her to live as a publick Whore [f]. For in that Case the Officers who are charged with the Care of the Civil Policy, ought to prosecute both the Husband and the Wife with the utmost Rigour; in order to bring them to condign Punishment.

[e] Constante matrimonio, ab eo qui extra maritum ad accusationem admittitur, accusari mulier adulterii non potest. Probatam enim marito uxorem, & quiescens matrimonium non debet alius turbare, atque inquietare, nisi prius lenocinii maritum accusaverit. *l. 26. ff. ad Legem Juliam de adulteriis.*

[f] Qui quæstum ex adulterio uxoris suæ fecerit plectitur, nec enim mediocriter delinquit, qui lenocinium in uxore exercuit. Quæstum autem ex adulterio uxoris facere videtur, qui quid accepit: ut adulteretur uxor. Sive eniam sæpius, sive semel, accepit: non est eximendus. Quæstum, enim de dulterio uxoris facere propriè ille existimandus est, qui aliquid accepit, ut uxorem pateretur adulterari meretricio quodam genere. Quod si patiatur uxorem delinquere non ob quæstum, sed negligentiam vel culpam, vel quandam patientiam, vel nimiam credulitatem: extra legam positus videtur.

IX.

9. If the Heirs of the Husband may prosecute the Wife for the Crime of Adultery.

The Heirs of the Husband cannot bring an Accusation against the Widow for the Crime of Adultery which she had committed during the Marriage; because the Husband is presumed in his own lifetime to have forgiven the Widow for the said Crime [g]. But if he dies in the time whilst he is preparing an Accusation against his Wife, his Heirs may go on in the Prosecution of that Accusation, in order to have her condemned to the Punishment that the Law inflicts for Adultery, and to have her Marriage Portion declared to be forfeited for their Advantage. It is likewise permitted to the Heirs to object to the Widow her immodest Life and Conversation, when she has lived a disorderly Life in the Year of her Widow-hood, in order to strip her of all the Advantages which she could hope for from her first Marriage, whether it be in respect to her Dower, or the Addition to her Marriage Portion, or in respect to any Gifts made to her by her Husband.

2 g Hære-

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g Hæredi mariti licet in solidum condemnetur, compensationis tamen, quæ ad pecuniariam causam respiciunt, proderunt ut minus sit obligatus: veluti ob res donatas, & amotas & impensas, morum vero coercitionem non habet. *l.* 15. *ff. soluto matrimonio.*

X.

10. If there is a compensation of the Adultery on the Part of the Husband, with that committed by the Wife.

If a Husband who sues his Wife in a Court of Justice on the Head of Adultery, is himself guilty of that Crime, the Court ought not to decree to him his Wife's Marriage Portion, because it would be unjust that he should reap the Advantage of Punishment of a Fault, of which he himself is guilty [h]. But there is no Compensation of the Crime. So that the Judges may punish both the Husband and the Wife that are guilty of Adultery.

h Judex adulterii ante oculos habere debet & inquirere maritus pudicè vivens, mulieri quoque bonos mores colendi autor fuerit. Periniquum enim videtur esse, ut pudicitiam vir ab uxore exigat, quam ipse non exhibeat. Quæ res potest & virum damnare, non rem ob compensationem mutui criminis inter utrosque communicare. *l.* 13. *ff. ad Legem Juliam de adulteriis.*

XI.

11. Reconciliation of the Husband with his adulterous Wife.

When the Husband is reconciled to his Wife, after he had knowledge of the Adultery she had committed, he is not allowed afterwards to accuse her [i]; whether it be that the Action was not commenced, or that the Proceedings which had been begun were suspended by the Reconciliation of the Parties [k]. Because the Husband is presumed in this Case to have looked upon his Wife to be innocent, or to have forgiven her the Fault which she had committed.

i Si qua repudiata, mox reducta sit, non quasi eodem matrimonio durante, sed quasi alio interposito: videndum est an ex delicto, quod in priore matrimonio admisit, accusari possit? & puto, non posse abolevit enim prioris matrimonii delicta, reducendo eam. *l.* 13. § 9. *ff. ad Legem Juliam de adulteriis.*

Item quæritur, an idem maritus destitisse videatur, vel lenocinium commisisse, qui eandem reduxit uxorem? Paulus respondit, eum, qui post crimen adulterii intentatum eandem uxorem reduxit, destitisse videri: & ideo ex eâdem Lege postea accusandi ei jus non superesse. *l.* 40. § 1. *ad Legem Juliam de adulteriis.*

k Abolitionem adulterii criminis postulans; Præsidem in cujus officio accusatio fuerit instituta, adire debes. ——— Quin hoc amplius scias, nullam fuisse tibi amplius potestatem instituendi hujusmodi accusationes: quia & decreto Patrum & Lege Patroniâ, ei qui jure viri delatum adulterium non peregit, nunquam posteà hoc crimen deferre permittitur. *l.* 16. *Cod. ad Legem Juliam de adulteriis.*

It is to be observed with respect to the two last Proofs of this Article, that such a Divorce as totally dissolves the Marriage not being allowed in Popish Countries, not even for the Crime of Adultery; in such Countries they are to apply to a Reconciliation, that is proved by the Parties cohabiting together again as Man and Wife, or by some other Means, that which is said of a second Marriage in the 9th §. *of the* 13th *Law quoted, as also in the* 40th *Law. As to the Law* Abolitionem, *it is to be observed, that by the* Roman *Law a Husband was not allowed to live with his Wife whom he knew to be an Adulteress, and he could not desist from carrying on the Prosecution against her for the Crime of Adultery which he had commenced, without declaring to the Judge, that his Prosecution against her was begun upon frivolous suggestions. The Judgment which was given upon the said Declaration made by the Husband, was called* Abolition.

XII.

12. Adultery committed during the first Marriage.

The Husband of a Widow who had committed Adultery during the Time of her first Marriage, cannot prosecute her as an Adulteress, because he has no controul over his Wife's Conduct, but from the Day when he married her [l].

l Si quis uxorem suam velit accusare, dictaque eam adulterium commisisse, antequam sibi nuberet: jure viri accusationem instituere non poterit: quia non, cum ei nupta est, adulterium commisit. *l.* 13. §. *ad Legem Juliam de adulteriis.*

XIII.

13. Of a Woman that has been ravished.

If the Wife has been ravished, her Husband cannot prosecute her as an Adulteress, because Chastity is a Virtue of the Mind which cannot be sullied by any external Force [m].

m Si quis planè uxorem suam, cum apud hostes esset, adulterium commisisse arguat. benignius dicetur, posse eum accusare jure viri. Sed ita demum adulterium maritus vindicabit, si vim hostium passa non esset. Cæterùm quæ vim patitur non est in eâ causâ, ut adulterii vel stupri damnetur. *l.* 13. §. 7. *ad Legem Juliam de adulteriis.*

XIV.

14. Different kinds of Rapes; the Punishments inflicted on the Ravishers.

There are two Kinds of Rape, the one by Force, when one carries off single Women or married Women against their Will from their own Houses, in order to debauch them; the other is by Way of Seduction, when one intices a married Woman to leave the House of her Husband, in order to lead a disorderly Life, or a young Woman to quit the House of her Father, or of her Guardian, whether it be with a View to gratify an unruly Passion, or to marry against the Will of those to whose care she is committed. We ought likewise to look upon it as a Rape by

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by Seduction, when an Infant of a good Family is drawn away to marry against the Will of the nearest Relations. The Ravishers and their Accomplices ought always to be punished with Death, when the Rape is by Force, even although the Person ravished should consent to marry the Ravisher[n]. According to the Rigour of the Law it ought to be the same Thing with respect to a Rape by Seduction; but the Punishment is often mitigated according to the Circumstances, which are more particularly gathered from the Age and Quality of the Parties.

[n] Raptores virginum honestarum vel ingenuarum, sive jam desponsatæ fuerint, sive non, vel quarum libet viduarum fœminarum, licet libertinæ, vel servæ alienæ sint, pessima criminum peccantes, capitis supplicio plectendos decernimus —— Pœnas autem, quas prædiximus, id est, mortis, & bonorum amissionis, non tantum adversus raptores, sed etiam contra eos, qui hos comitati in ipsâ invasione, & rapina fuerint, constituimus. Cæteros autem omnes, qui conscii, & ministri hujusmodi criminis reperti, & convicti fuerint, vel qui eos susceperint, vel quicunque opem eis tulerint, sive masculi, sive fæmine sint cujuscunque conditionis, vel gradus, vel dignitatis, pœnæ tantummodo capitali subjicimus, ut huic pœnæ omnes subjaceant, sive volentibus, sive nolentibus virginibus, sive aliis mulieribus, tale facinus fuerit perpetratum. Si enim ipsi raptores metu, vel atrocitate pœnæ ab hujusmodi facinore se temperaverint, nulli mulieri sive volenti, sive nolenti peccandi locus relinquetur: quia hoc ipsum velle mulierum ab insidiis nequissimi hominis, qui meditatur rapinam, inducitur. Nisi etenim eam sollicitaverit, nisi odiosis artibus circumvenerit, non faciet eam velle in tantum dedecus sese prodere. *l. un. Cod. de raptu virginum.*

See the Ordinance of Blois, *and that of* 1639.

[Rape is described in the Laws of *England* to be when a Man hath carnal Knowledge of a Woman by Force, and against her Will. The Punishment of it is Death. Although there be *emissio seminis*, yet if there be no penetration, that is *res in re*, it is no Rape. Before the Time of King *Edw.* I. the Punishment of this Crime was by Castration and putting out of the Eyes of the Offender; but of the ancient Time at the Common Law it was Death at the Election of the single Woman ravished. *Coke* 3. *Inst. pag.* 60. *and* 2. *Inst. pag.* 181.

It having been made a Doubt in the Time of Queen *Elizabeth*, at what Age a Woman-child might be ravished, this gave occasion to the making of the Act of Parliament of 18 *Eliz. cap.* 6. for the plain Declaration of the Law in this Point. And it is therein declared, that if any Person should unlawfully know and abuse any Woman-child under the Age of *ten years*, every such unlawful and carnal knowledge should be Felony, and that the Offender therein being duly convicted, should suffer as a Felon, without Benefit of Clergy.

The Parliament of *England* has been very careful in making Provision against this Offence of carrying away Women against their Will, either to marry, or to defile them. For by the Act of 3 *H.* VII. *cap.* 2. it is enacted, that if any Person takes any Woman against her Will unlawfully, she having Substance in Lands or Tenements, or moveable Goods or being Heir apparent to her Ancestors, and she be married either to the Misdoer himself, or to some other by his consent or be defiled, such taking shall be Felony. And by this Act, not only the Takers but the Procurers, Abetters, and Receivers of the said Women wittingly, knowing the same, are all adjudged as principal Felons.

There is likewise a very good Act made in the 4*th and* 5*th Philip and Mary*, *cap.* 8. for the Punishment of such as shall take away young Women, under the Age of sixteen Years, altho' it be not against their Will, and shall marry them without consent of their Parents or Guardians. The Punishment of the said Offence is Fine or Imprisonment.]

XV.

15. Of the Rape of a Nun.

Those who carry away a Nun out of her Monastery, are to be punished with Death together with their Accomplices, whether it be that the Rape has been committed by force, or that the *Nun* did consent to it[o]. As to the Nun herself, she is shut up again in her Convent, where she is severely chastised, if it was with her own Consent that she was carried off.

[o] Si quis rapuerit, aut sollicitaverit, aut corruperit ascetriam, aut diaconissam, aut monastriam, aut quamlibet aliam fæminam venerabilem habitum habentem, —— jubemus —— eos qui talia deliquerint, & participes eorum sceleris fuerint, capitale periculum sustinere. Talem verò mulierem ubicunque est —— in monasterio recondi, in quo cautiùs custodiri possit, ut non rursus in eodem crimine reperiatur. *Nov.* 123. *cap.* 43.

XVI.

16. Of Violence offered to a Woman.

All sorts of Violence used against a single or married Woman, in order to have the carnal Knowledge of her against her Will, ought to be punished with Death, whether it be that the Crime has been consummated, or that there were only Endeavours used to consummate the Crime.

XVII.

17. Of Incest.

Incest is punished according to the Degree of Kindred or Affinity of the Parties who have this incestuous Commerce with one another. If those who are guilty of this Crime, were related together in the direct Line, such as the Mother and Grandmo-

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ther and the Grandson, they would be burnt. If they were related in the first Degree of the Collateral Line, the Manner of the Punishment might be mitigated, but it could not be less than Death, and the Body to be burnt. The Spiritual Incest which a Confessor commits with the Penitent who makes her Confession to him, is also punished with Death.

XVIII.

18. Of Crimes against Nature.

The Crimes against Nature which cannot be so much as named without horrour, such as Sodomy and Buggery, are to be punished with Death [p].

[p] Cum vir nubit, in fæminam viris porrecturam, quid cupiatur, ubi sexus perdidit locum, ubi scelus est quod non proficit scire: ubi Venus mutatur in alteram formam; ubi amor quæritur, nec videtur, jubemus insurgere leges, armari jura gladio ultore, ut exquisitis pœnis subdantur infames qui sunt vel qui futuri sunt rei. *l. 32. Cod. ad Legem Juliam de adulteriis.*

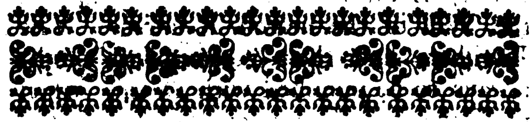
XIX.

19. Of Polygamy.

He is called a Polygamist who having a lawful Wife living marries another [q]. Although the second Marriage be null and void, yet he who is convicted of this Crime is condemned to stand in the Pillory with as many Distaffs as he has had Wives at the same Time, and is either sent to the Gallies, or banished. If it is a Woman that is guilty of Polygamy, besides the Punishment of Adultery to which she is condemned, she is set in the Pillory, that she may suffer the Infamy which she has deserved by her marrying a second Husband whilst the first was living.

[q] Neminem qui sub ditione sit Romani nominis, binas uxores habere posse, vulgò patet: cum etiam in Edicto Prætoris hujusmodi viri infamiâ notati sint. Quam rem competens Judex inultam esse non patietur. *l. 2. de incestis & inutilibus nuptiis.*

[*In* England, *it is Felony to marry a second Husband or Wife, the former Husband or Wife living. See the Statute of* 1 Ja. 1. cap. 11. *But the Offender against this Statute may have the Benefit of Clergy.* Coke. 3. Instit. cap. 27.]



TITLE XI.

Of Injuries, and Defamatory Libels.

The CONTENTS.

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I.

1. Different kinds of Injuries.

WE give the Name of Injury to every Thing that is said, written, or done designedly with a View to offend and affront any one [a]. Thus there are verbal Injuries which are done by Words, or by Songs, Injuries by Writing, and others which are real Injuries, when they strike any one, or do any Thing to insult him [b].

[a] Ait Prætor, ne quid infamandi causâ fiat. Si quis adversus ea fecerit, prout quæque res erit animadvertam ——— Generaliter vetuit Prætor quid ad infamiam alicujus fieri. Proinde quodcunque quis fecerit vel dixerit, ut alium infamet, erit actio injuriarum. Hæc autem fere sunt quæ ad infamiam alicujus fiunt: utputa ad invidiam alicujus veste lugubri utitur, aut squalida: aut si barbam demittat, vel capillos submittat; aut si carmen conscribat, vel proponat, vel cantet aliquod, quod pudorem alicujus lædat. *l. 15. §. 25. 27. ff. de injuriis.*

Adversus eos qui minuendæ opinionis tuæ causa aliquid confecisse comperientur, more solito injuriam judicio experiri potes. *l. 3. Cod. de injuriis.*

[b] Injuriam autem fieri Labeo ait aut re aut verbis; *re*, quoties manus inferuntur, *verbis* autem, quoties non manus inferuntur, sed convicium fit. Omnemque injuriam aut in corpus inferri, aut ad dignitatem,

aut

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aut ad infamiam pertinere. *In corpus* fit, cum quis pulsatur. *Ad dignitatem*, cum comes matronæ abducitur. *Ad infamiam*, cum pudicitia adtemptatur. *l.* 1. §. 1. 2. *ff. de injuriis.*

Injuria autem committitur, non solum cum quis pugno pulsatus, aut fustibus cæsus, vel etiam verberatus erit: sed & si cui convicium factum fuerit; sive cujus bona quasi debitoris, qui nihil deberet, possessa fuerint ab eo, qui intelligebat nihil eum sibi debere; vel si quis ad infamiam alicujus libellum aut carmen, aut historiam, scripserit, composuerit, ediderit, dolove malo fecerit, quo quid eorum fieret: sive quis matrem familias, aut prætextatum, prætextatamve adfectatus fuerit; sive cujus pudicitia attentata esse dicetur. Et denique aliis plurimis modis admitti injuriam, manifestum est. *Instit. lib.* 4. *tit.* 4. §. 1.

II.

2. Of Defamatory Libels.

One may sue in an Action of Injury not only those who have composed Defamatory Libels, and who have printed them [c], but likewise those who have published and dispersed them [d]. It is the same Thing with respect to Pictures and Prints, which have been drawn or engraven to reflect on the Honour of any one.

[c] Si quis librum ad infamiam alicujus pertinentem scripserit, composuerit, ediderit, dolove malo fecerit, quo quid eorum fieret, etiam si alterius nomine ediderit, vel sine nomine, uti de ea re agere liceret. —— Eâdem pœnâ ex Senatus consulto tenetur etiam is qui ἐπιγράμματα, id est, *inscriptiones*, aliudve quid sine scriptura in notam aliquorum produxerit: item qui emendum vendendumve curaverit. *l.* 5. § 9. 10. *ff. de injuriis.*

[d] Si quis famosum libellum sive domi, sive in publico, vel quocunque loco ignarus reperit: aut corrumpat priusquam alter inveniat, aut nulli confiteatur inventum. Si verò non statim easdem chartulas vel corruperit, vel igni consumpserit, sed vim earum manifestaverit, sciat se quasi autorem hujusmodi delicti capitali sententiæ subjugandum. *l. un. Cod. de famosis libellis.*

III.

3. Of injurious Writings exhibited in the Proceedings of a Cause

The Libels and other Writings which are exhibited in the Proceedings of a Cause are to be reckoned in the Number of Defamatory Libels, when they contain injurious Words or Facts which reflect on the Reputation of the Parties; and we are to except only the Facts which are true, and which it is necessary to lay open in order to the Decision of the Cause [e].

[e] Si quis libello dato vel Principi vel alicui famam alienam insectatus fuerit: injuriarum erit agendum, Papinianus ait. *l.* 15. §. 29. *ff. de injuriis.*

IV.

4. Of Injuries by deed.

It is a real Injury, to strike any one, to enter one's House by force [f], to turn one out of his own House, to cause the Effects of a Merchant to be sealed up as if he were become a Bankrupt, although he was absent upon his lawful Occasions, to make a Tumult or Disorder before the Door of a Widow upon her marrying another Husband, to place at the Door of a Man some Sign whereby they would insinuate that his Wife had not been faithful to him, to attempt the taking of indecent Freedoms with a virtuous Woman, to throw any Filth or Nastiness into the Precincts of their Neighbours, with Design to affront them [g]. There are many other kinds of real Injuries, which are easily distinguished, when we once know what a real Injury is.

[f] Lex Cornelia de injuriis competit ei qui injuriarum agere volet ob eam rem, quod se pulsatum, verberatumve, domumve suam introitam esse dicat. —— Domum accipere debemus, non proprietatem domus, sed domicilium. Quare sive in propriâ domu quis habitaverit, sive in conducto, vel gratis, sive hospitio receptus, hæc lex locum habebit. *l.* 5. *ff. de injuriis.*

Si creditor meus, cui paratus sum solvere, in injuriam meam fidejussores meos interpellaverit, injuriarum tenetur. *l.* 19. *ff. de injuriis.*

See under the first Article, the 1*st* §. *of the* 4*th tit. of the* 4*th Book of the Institutes.*

[g] Si inferiorum dominus ædium, superioris vicini fumigandi causâ fumum faceret, aut si superior vicinus in inferiores ædes quid aut projecerit, aut infuderit: negat Labeo injuriarum agi posse; quod falsum puto, si tamen injuriæ faciendæ causâ immittitur.

V.

5. Of Injuries which one procures to be done by the Means of another Person.

One may be sued in an Action of Injury, not only when one does the Injury himself, but likewise when he procures it to be done [h]. For Instance, when one commands a Person to beat another, to publish a defamatory Libel against him, or to do him some other Injury.

[h] Non solum is injuriarum tenetur, qui fecit injuriam, hoc est, qui percussit: verùm ille quoque continetur, qui dolo fecit, vel qui curavit, ut cui mala pugno percuteretur: —— Si mandatu meo facta sit alicui injuria, plerique aiunt, tam me qui mandavi, quàm eum qui suscepit injuriarum teneri. Proculus rectè ait, si in hoc te conduxerim, ut injuriam facias, cum utroque nostrum injuriarum agi posse; quia meâ operâ facta sit injuria. *l.* 11. *ff. de injuriis.*

VI.

6. Injuries done to those who belong to us.

A Man may bring an Action of Injury against those who have insulted his Wife, or his Children who are subject to his Authority [i]; and even against those who have insulted his Servants, if the Injury has been done to the Servants on account of the Master [k]. But the Wife cannot sue in a Court of Justice for Reparation of an Injury done to her Husband, because he is the Head of the Family, and it ought to be left to his Discretion either to sue for Reparation of the Injury, or to forgive it [l].

[i] Per ipsum alicui fit injuria, aut per alias personas. Per ipsum, cum directo ipsi cui patrifamilias, vel matrifamilias fit injuria. Per alias, cum per consequentias fit, ut cum fit liberis meis, vel servis meis, vel uxori, nuruive. *l.* 1. §. 3. *ff. de injuriis.*

[k] Si libero homini, qui tibi bonâ fide servit, injuria facta sit, nulla tibi actio dabitur, sed suo nomine is

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is experiri poterit: nisi in contumeliam tuam pulsatus sit: tunc enim competit & tibi injuriarum actio. *Instit. lib.* 4. *tit.* 4. §. 6.

[l] Quod si viro injuria facta sit, uxor non agit: quia defendi uxores a viris, non viros ab uxoribus æquum est. *l.* 2. *ff. de injuriis.*

VII.

7. If the Heir may have an Action for the Injury done to the Person to whom he succeeds.

The Right of prosecuting one for an Injury done does not go to the Heirs of the Party injured, unless he who has received the Injury had began his Action in his Lifetime, because he is presumed by his silence to have forgiven the Injury [m]. But if the Insult has been offered to the Corpse, to the Memory, or to the Grave of the Deceased, the Heir has a Right to demand Satisfaction for it [n]; because it is in some respect to attack himself, when an Insult is offered to the Memory of him to whom he succeeds, and whom he represents.

[m] Injuriarum actio neque hæredi, neque in hæredem datur. *l.* 13. *ff. de injuriis.*

[n] Si fortè cadaveri defuncti fit injuria, cui hæredes, bonorumve possessores extitimus: injuriarum nostro nomine habemus actionem, spectat enim ad existimationem nostram si qua ei fiat injuria. Idemque & si fama ejus cui hæredes extitimus laceratur. *l.* 1. §. 4. *ff. de injuriis.*

Si statua patris tui in monumento posita, saxis cæsa est: sepulchri violati agi non posse, injuriarum posse, Labeo scribit, *l.* 27. *ff. de injuriis.*

VIII.

8. Injury done without a design to affront the Person injured.

There is no Injury done, when there is no Design to affront [o]. Thus one cannot prosecute a Mad-man, or an Infant that is not yet capable of Malice, if he wounds or insults any one. One cannot for the same Reason sue in an Action for Reparation of an Injury, him who has wounded one in Play.

[o] Sunt quidam qui facere (injuriam) non possunt; utputa furiosus & impubes, qui doli capax non est. Namque hi pati injuriam solent, non facere. Cum enim injuria ex affectu facientis consistat, consequens erit dicere hos, sive pulsent, sive convicium dicent, injuriam fecisse non videri. Itaque pati quis injuriam etiamsi non sentiat; potest facere nemo, nisi qui scit se injuriam facere, etiamsi nesciat quid faciat. Quare si quis per jocum percutiat, aut dum certat, injuriarum non tenetur. *l.* 3. §. 1. 2. 3. *ff. de injuriis.*

IX.

9. Injuries done in pursuance of Orders of Courts of Justice.

One cannot sue in an Action of Injury, those who execute only the Orders of Judges [p]. But the Party who has obtained the Decree of the Judge, by which an Injury is done to a Person without cause ought to repair the Injury. The Judge himself might be made a Party, if he had made without good Ground, a Decree against a Person that was injurious to him.

[p] Is qui jure publico utitur, non videtur injuriæ faciendæ causâ hoc facere: juris enim executio non habet injuriam. —— Quæ jure potestatis a magistratu fiunt, ad injuriarum actionem non pertinent. *l.* 13. §. 1. 6. *ff. de injuriis.*

X.

10. The enormity of the Injury depends on the Circumstances.

The Injury is more or less heinous, according to the Circumstances of the Time and Place, the Quality of the Person that is insulted, the Condition of him who has done the Injury, and the Nature of the Injury that is done [q]. Thus he who affronts a Magistrate, or a Priest in Holy Orders, deserves to be punished more severely, than he who affronts any private Man. The Injury is still more heinous, if it is done to a Magistrate whilst he is sitting on the Bench, and administring Justice, or to a Priest when he is at the Altar celebrating the holy Mysteries of our Religion [r]. A private Person that is injured in a publick Assembly, ought to have a more publick Satisfaction made him, than if the Injury had been done only in the Presence of two or three Witnesses [s]. A Box on the Ear, or Blows with a Cane, do more sensibly affect a Man of courage than other Acts of Violence. A Man of low estate who affronts a Person of Quality is guilty of a more heinous Offence, than if he had affronted a private Person of equal Condition with himself. It is a greater Crime to maim one, than to make any contusion. Injurious Words are punished with less severity when they are uttered inadvertently in the heat of a Dispute, than when they are spoke with premeditated design.

[q] Atrocem autem injuriam, aut persona, aut tempore, aut re ipsa fieri, Labeo ait. *Personâ* atrocior, injuria fit, ut cum Magistratui, cum parenti, patrono fiat. *Tempore*, si ludis, & in conspectu. Nam Prætoris in conspectu, an in solitudine injuria facta sit, multum interesse ait: quia atrocior est, cum in conspectu fiat. *Re* atrocem injuriam haberi, Labeo ait, utputa, si vulnus illatum, vel os alicui percussum. *l.* 7. §. 8. *ff. de injuriis.*

Sed est quæstionis, quod dicimus re injuriam atrocem fieri, utrum si corpori inferatur, atrox sit? an & si non corpori, utputa vestimentis scissis, comite abducto, vel convicio dicto. Et ait Pomponius, etiam sine pulsatione atrocem dici injuriam, personâ atrocitatem faciente. Sed & sit in theatro, vel in foro cædit & vulnerat, quanquam non atrociter, atrocem injuriam facit. *l.* 9 *ff. de injuriis.*

[r] Atrocem sine dubio injuriam esse factam manifestum, si tibi illata est cum esses in sacerdotio, & dignitatis habitum & ornamenta præferres, & ideò vindictam potes eo nomine persequi. *l.* 4. *Cod. de injuriis.*

Vulneris magnitudo atrocitatem facit, & nonnunquam locus vulneris, veluti oculo percusso. *l.* 8. *ff. de injuriis.*

[s] Quædam injuriæ à Liberis hominibus factæ, levis nonnullius momenti videntur: enimvero à servis, graves sunt: crescit enim contumelia ex persona ejus, qui contumeliam fecit. *l.* 17. § 3 *ff. de injuriis.*

XI.

11. It is the same Thing with respect to the Reparation of the Injury.

The Punishment of the Injury depends, as well as the Enormity thereof, on the different Circumstances; a Child who is so unnatural as to lift up its Hand against its Father or Mother, is condemned

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condemned to Death, although he has not wounded them; if he insults them with Words, he is sentenced to the Gallies, or to perpetual Banishment. The Gallies, or perpetual Banishment, or a publick ignominious Acknowledgment of the Offence, are the Punishments of those who compose, who print, or who disperse defamatory Libels. Slight Injuries are punished by obliging the offending Party to ask Forgiveness of the Party injured in the Presence of a certain Number of Persons, and to make Reparation of the Damages according to the Quality of the Offence. If the Injuries have been inserted in Libels, and in other Writings in the Proceedings of a Cause, they are to be struck out.

[t] Si quis injuriam atrocem fecerit, qui contemnere judicium possit ob infamiam suam aut egestatem, Prætor acriter exequi hanc rem debet, & eos qui injuriam fecerunt coercere. *l.* 35. *ff. de injuriis.*

De injuriâ nunc extra ordinem ex causâ & personâ statui solet. Et servi quidem flagellis cæsi dominis restituuntur. Liberi verò humilioris quidem loci, fustibus subjiciuntur. Cæteri autem vel exilio temporali, vel interdictione certæ rei coercentur. *l. ult. ff. de injuriis.*

XII.

12. Two ways of suing for reparation of the Injury.

One may sue for Reparation of an Injury either in a Civil Action, or by a Criminal Prosecution [u]. But when the Judge perceives by the Charge and the Informations, that the Injury is but slight, and that the whole must terminate in a Declaration of Damages, he ought not to suffer the Criminal Prosecution to go on. The Informations are then converted into Articles of a Libel in order to Proof, and Sentence is given according to what comes out in the Proof that is made, either by the Depositions of Witnesses, or by the Confession of the Parties.

[u] Sciendum est, de omni injuriâ eum, qui passus est, posse vel criminaliter agere, vel civiliter. *Instit. lib.* 4. *tit.* 4. §. 10.

XIII.

13. Injurious words which are true in fact.

Although the approbrious Words contain nothing but what is true in Fact, and what is publickly known, yet the Person who utters them is not exempt from the Punishment due for the Injury. It is not allowed, for Example to upbraid a Person, because one of his Family has been condemned to an ignominious Punishment. It is not permitted to make proof of Facts which are secret, and which have been the Foundation of reproachful Words.

XIV.

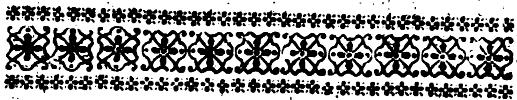
14. Within what time one may demand Reparation of an Injury.

If he who has received an Injury has forgiven him that did it, whether it be upon his receiving a Reparation which the Parties themselves agreed on, or whether it be by a Reconciliation with the Person who has offended him, he cannot afterwards sue in a Court of Justice for a Reparation of the Injury [x]. It is the same Thing if he suffers one Year to pass without bringing his Action against the Person who has insulted him; because that Action lasts only for a Year [y], and becomes extinct by the Silence of the injured Party for the Space of a Year, to be computed from the Day that the Injury was done.

[x] Injuriarum actio ex æquo & bono est, & dissimulatione aboletur. Si quis enim injuriam dereliquerit, hoc est, statim passus ad animum suum non revocaverit: postea ex pœnitentiâ remissam injuriam non poterit recolere. Secundum hæc ergò æquitas actionis omnem metum ejus abolere videtur, ubicunque contra æquum quis venit. Proinde & si pactum de injuria intercessit, & si transactum, & si jusjurandum exactum erit: actio injuriarum non tenebit. *l.* 11. §. 1. *ff. de injuriis.*

Si autem in rixam inconsulto calore prolapsus, homicidii convicium objecisti, & ex eo die annus excessit: cum injuriarum actio ex eo tempore præscripta sit, ob injuriæ admissum conveniri non potes. *l.* 5. *Cod. de injuriis.*

There are some heinous Injuries which may be prosecuted by the Publick, in order to bring the Offenders to condign Punishment; although the Party that is injured keeps silence, or perhaps has forgiven the Offence.



TITLE XII.

Of the several Infractions of the Orders established for the Civil Policy.

The CONTENTS.

1. *Of Monopolies.*
2. *Of Gaming.*
3. *Of Vagabonds.*

I.

1. Of Monopolies.

IT is not lawful for private Persons, or Merchants to lay up great Stores of Corn, or other Merchandize, with a View to make themselves Masters of that Trade, and to sell the said Merchandizes

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afterwards at what Price soever they shall think proper to fix [a]. It is likewise unlawful for Merchants to have any private Understanding with one another to the Prejudice of the publick Interest, and to agree among themselves not to sell Merchandizes but at a certain Price. Those who act contrary to these Prohibitions ought to be severely punished, and more especially in Times of Dearth, when Monopolies do often more hurt than the Famine it self.

[a] Jubemus, nequis cujuscunque, vestis vel piscis, vel pectinum forte, aut echini, vel cujuslibet alterius ad victum, vel ad quemcunque usum pertinentes speciei, vel cujuslibet materiæ, pro sua autoritate, ——— monopolium audeat exercere: neve quis illicitis habitis conventionibus conjuret, aut paciscatur, ut species diversorum corporum negotiationis, non minoris quam inter se statuerint venundentur. Si quis autem monopolium ausus fuerit exercere, bonis propriis expoliatus, perpetuitate damnetur exilii. *l. un. Cod. de monopoliis.*

Lege Juliâ de annonâ pœna statuitur adversus eum, qui contra annonam fecerit, societatemve coierit, quo annona carior fiat. *l. 2. ff. de Lege Julia de annona.*

[*In* England, *all Grants of Monopolies have been declared by Parliament to be against the Ancient and Fundamental Laws of the Kingdom.* Stat. 21 Ja. 1. Cap. 3. Coke 3. Instit. chap. 85.]

II.

2. *Of Gaming.*

Games of meer Hazard, which may cause in a short Time the Ruin of Families, are absolutely prohibited by the Regulations of the Civil Policy [b]; and those Persons are severely fined who are convicted of having played at such Games, and of having kept Assemblies in their Houses for such sort of Games. Bonds and Obligations contracted on account of Play are absolutely Null and Void, whether the Motive of the Obligation be mentioned in the Bond, or whether the Bond be altogether silent as to the true Cause of the Obligation, or that it mentions another Cause instead of the true one. We must except from this Rule small Debts contracted by one of full Age, at Games which are an Exercise of the Body, and which tend to render those who play at them more nimble and dexterous.

[b] Senatus consultum vetuit in pecuniam ludere: præterquam si quis certet hastâ, vel pilo jaciendo, vel currendo, saliendo, luctando, pugnando; quod virtutis causâ fit. *l. 2. ff. de aleatoribus.*

Victum in aleæ lusu, non posse conveniri, ——— Data autem super aleæ lusu cautio sit irrita, & condici possit. Sed & si quis sub specie alearum victus sit lupinis, vel aliâ quâvis materiâ, cesset etiam adversus eum omnis exactio. ——— Duntaxat autem ludere liceat μονόβολον, liceat item ludere κοντομονόβολον κυνταιὸν κόνταχα, & item liceat ludere χωρὶς τῆς πόρπης, id est, ludere vibratione. Quintiana, absque spiculo, sive aculeo, aut ferro, à quodam Quinto ita nominatâ hâc lusus specie. Liceat item, ludere [illegible], id est, exerceri lucta: Liceat verò etiam exerceri hippice, id est, equorum cursu, seu hippodromo, absque dolo, & circumventione. Et liceat quidem ditioribus ad singulas commissiones, seu ad singulos congressus, aut vices, unum assem, seu numisma, seu solidum deponere & ludere, cæteris autem longè minori pecunia. *l. 1. Cod. de aleatoribus.*

[*The Parliament of* England *being sensible of the great Mischiefs which daily happen to Persons of Noble Families, and great Estates by excessive and deceitful Gaming, made a prudent and laudable Act for preventing the same, in the 9th Year of Queen* Anne, Chap. 14. *By which it is enacted, That all Securities, where the Whole, or any Part of the Consideration shall be for Money, or other valuable Thing, won at Play, or by Betting, or for repaying any Money knowingly lent for such Gaming or Betting, or lent at the Time and Place of Gaming or Betting, shall be void. It is farther provided by the said Act, that if any Person shall lose at one Time the Sum or Value of ten Pounds, and shall pay it to the Winner, in such Case the Loser may, within three Months after, sue the Winner for the same, which he shall recover, with Costs. And for the more effectual Discouragement of all such Persons as make a Profession of Gaming, it is provided by the said Act, that two Justices of Peace may cause any Person suspected by them to have no visible Estate, Profession or Calling to support himself, to be brought before them; and if such Person shall not make it appear, that the principal Part of his Maintenance is not by Gaming, then they may bind him to his good Behaviour with Sureties for a Year, and if he cannot find Sureties, they may commit him to Prison till he can.*]

III.

3. *Of Vagabonds.*

It is the Interest of the Publick to take care that there be not in a Kingdom common Vagrants or Vagabonds, Persons who have no fixed abode, and who, by Want, and the licentious Life which they lead, are often tempted to commit great Crimes. In order to prevent such Mischiefs, it is usual to take up common Vagrants, and to oblige them to go to the Place of their Birth, and there to employ themselves at Work; or they are shut up in Hospitals; or they are sent abroad into the Colonies or Plantations.

There are other Offences against the Civil Policy, into the Detail of which it is not necessary to enter at present. Such are Trespasses with respect to Woods and Forrests,

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rests, to the Fishery, whether it be in the Rivers, or in the Sea; the Particulars of which may be seen in the Ordinances which relate to the Rivers and Forrests, and to the Marine Affairs. Such is Usury, which has been treated of in the 6th Title of the 1st Book of the Civil Law in its Natural Order. Such is Luxury, against which many sumptuary Laws have been made; which the Pride and Vanity of Mankind have hindred from being put in Execution.

As to common Vagrants and Vagabonds, there are many Acts of Parliament in *England* to punish and restrain the Number of those idle wandering Persons. The Act of the 12th of Queen *Anne*, *Sess.* 2d. *Chap.* 23. is the fullest in the Directions given, and the Provisions made for the Punishing all such idle Persons as shall be deemed Rogues and Vagabonds. For the Particulars whereof I must refer the Reader to the Act itself.

TITLE XIII.

Of the Crimes of Communities, or Corporations.

The CONTENTS.

1. *When a Crime is deemed to be committed by a Community.*
2. *Of the Punishments which are in this Case inflicted on the Community.*

I.

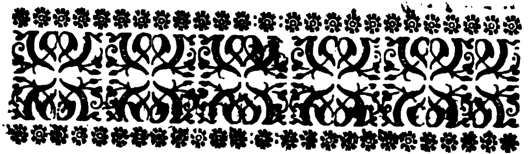
1. When a Crime is deemed to be committed by a Community.

A Crime is taken to be the Act of the Community, when it has been committed by the Inhabitants of Towns, of Villages, and by the Members of a Company, pursuant to a deliberate Resolution of the Community, or in Consequence of a tumultuary Resolution, and popular Commotion; such as sounding an Alarm-bell, or the like.

II.

2. Of the Punishments which are in this Case inflicted on the Community.

Communities who have been guilty of Rebellion, or done some Act of Violence, or some other Crime, ought to be condemned only to make Reparation of Damages to the Party injured, to pay a Fine, to forfeit their Privileges, or to undergo some other Punishment which may sufficiently denote the Chastisement which they have deserved by reason of their Crime. But those who have been chiefly concerned in raising the Rebellion, the principal Actors in the Commission of Crimes, and their Accomplices, may be punished separately from the Corporate Body itself, and that even with Death itself, when the Heinousness of the Crime requires it.



TITLE XIV.

Of Punishments.

The CONTENTS.

1. *In what manner the Judge is to demean himself in inflicting Punishments.*
2. *Of the different Kinds of Punishments.*
3. *Of Punishments which are attended with Infamy.*
4. *Of Punishments which imply Civil Death.*
5. *Of Condemnations to Death.*
6. *Of Confiscation.*

I.

1. In what manner the Judge is to demean himself in inflicting Punishments.

WHEN a Judge condemns a Criminal, he ought carefully to examine the Nature of the Crime and its Circumstances, that he may the better proportion the Punishment to the Crime, without affecting too great Severity, or a Lenity which may be attended with dangerous Consequences [a].

[a] Perspiciendum est judicanti, ne quid aut durius aut remissius constituatur, quàm causa deposcit: nec enim aut severitatis aut clementiæ gloria affectanda est: sed perpenso judicio, prout quæque res expostulat, statuendum est. Plane in levioribus causis proniores ad lenitatem judices esse debent: in gravioribus pœnis severitatem legum cum aliquo temperamento benignitatis subsequi. *l.* 11. *ff. de pœnis.*

II.

2. Of the different Kinds of Punishments.

The mildest Punishments are those which are not attended with any bodily Correction, nor with Civil Death, nor with a Mark of Infamy. Such is a Fine or Pecuniary Mulct, when the Offender is not condemned to it for a Crime which in its own Nature renders those Persons infamous who are found guilty of it.

III.

3. Of Punishments which are attended

The Condemnation to Banishment and to the Gallies for a certain Time, as also the

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with Infamy. the making a publick Acknowledgment of the Offence, the Criminal being naked to his Shirt, and having a Torch in his Hand, Whipping, and other Punishments of the like Nature, render those Persons who are condemned to them infamous; but they do not however imply Civil Death [b].

[b] Cæteræ pœnæ ad existimationem, non ad capitis periculum pertinent, veluti relegatio ad tempus vel in perpetuum, vel in insulam: vel cum in opus quis publicum datur, vel cum fustium ictu subjicitur. *l.* 28. § 1. *ff. de pœnis.*

IV.

4. Of Punishments which imply Civil Death. There are some Punishments which without taking away the Natural Life of the Criminal, deprive them of the Effects of the Civil Life, that is to say, of the Rights which belong to the Inhabitants of the Kingdom, to possess Goods within the Territories of the State, to make a Testament, and to inherit [c]. We ought to reckon in the Number of these Punishments, perpetual Banishment out of the Kingdom, and a Condemnation to the Gallies for ever.

[c] Quidam ἀπόλιδες sunt, hoc est, sine civitate ut sunt in opus publicum perpetuò dati, & in insulam deportati: ut ea quidem quæ juris civilis sunt non habeant, quæ verò juris gentium habeant. *l.* 17. § 1. *ff. de pœnis.*

V.

5. Of Condemnation to Death. The highest Punishment is that of Natural Death [d]. But the Kind of this Punishment is different, with respect to the Torments which the Criminals are made to suffer, according to the Nature and Circumstances of the Crime [e].

[d] Ultimum supplicium esse mortem solam interpretamur. *l.* 21. *ff. de pœnis.*

[e] Summum supplicium esse videtur ad furcam damnatio, item vivi crematio. *l.* 28. *ff. de pœnis*

VI.

6. Of Confiscation. In all the Provinces of *France* where Confiscation takes Place, Condemnation to a Natural Death, or to a Civil Death, implies a Confiscation of the Goods of the condemned Person either to the Behoof of the King, or to the Lord of the Mannor. In the Provinces where Confiscation has not place the Criminal is condemned to pay a Fine to the King, besides the Charges of the Prosecution which are taken out of his Estate; and the Remainder goes to his presumptive Heirs.

Here endeth the Supplement *to the Third* Book *of the* Publick Law.

THE

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A

SUPPLEMENT

TO THE

CIVIL LAW

IN ITS

NATURAL ORDER.

BOOK IV.

Of the PUBLICK LAW.

TITLE I.

Of the several Sorts of Judicial Demands and Actions.

The CONTENTS.

1. *What an Action is.*
2. *Three principal kinds of Actions.*
3. *Personal Actions whence they arise.*
4. *Two kinds of Personal Actions.*
5. *Of Real Actions.*
6. *Actions Confessory, or Negatory.*
7. *Hypothecary Action.*
8. *Possessory Action.*
9. *How the Hypothecary Action becomes a mixt Action.*
10. *Of other mixt Actions.*

I.

AN Action is the Right which we have to demand in a Court of Justice, that which is due to us, and a Reparation of the Injury that is done to us, whether it be by Deed, or by Words [a].

1. What an Action is.

[a] Actio autem nihil aliud est, quàm jus persequendi in judicio, quod sibi debetur. *Instit. lib. 4. tit. 6. in princ.*

Lex itaque Cornelia ex tribus causis dedit actionem quod quis pulsatus, verberatusve, domusve ejus vi introita sit. *l. 5. ff. de injuriis.*

II.

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II.

2 Three principal kinds of Actions.

There are two principal kinds of Actions, Personal and Real [b]. Mixt Actions are those which partake of the nature of both Personal and Real.

[b] Omnium autem actionum quibus inter aliquos apud judices arbitrosve de quacunque re quaeritur, summa divisio in duo genera deducitur; aut enim in rem sunt aut in personam. *Instit. l.* 4. *tit.* 6. §. 1.

Quaedam actiones mixtam causam obtinere videntur, tam in rem quam in personam: qualis est familiae erciscundae actio, quae competit cohaeredibus de dividenda haereditate. Item communi dividundo, quae inter eos redditur, inter quos aliquid commune est, ut id dividatur: item finium regundorum actio, quâ inter eos agitur, qui confines agros habent. Ibid. §. 20.

III.

3. Personal Actions, whence they arise.

Personal Actions are those by which we sue those Persons who are under some obligation to us, or who have done us some wrong, in order to compel them to pay what they owe us, or to do the things which they have bound themselves to us to do [c]. These Actions are annexed to the Person that is bound, they follow him throughout, and they can be brought only against him, or against those who represent him. They arise commonly from an Obligation, or a Contract, which serve as a Foundation to those who bring them, or from a Trespass.

[c] Agit unusquisque, aut cum eo, qui ei obligatus est, vel ex contractu, vel ex maleficio: quo casu proditae sunt actiones in personas, per quas intendit adversarium ei dare aut facere oportere, aut aliis quibusdam modis. *Instit. lib.* 4. *tit.* 6. §. 1.

IV.

4. Two kinds of Personal Actions.

Personal Actions are divided into Civil Actions and Criminal Actions. The first sort are those which are brought for the Payment of a Debt, or for other Causes purely civil. The Second are those by which we demand Satisfaction for a Wrong or an Injury, that has been done us, or to those who belong to us. Sometimes these two personal Actions are reunited into one, and then we call them mixt personal Actions [d].

[d] Ex maleficiis verò proditae actiones, aliae tantum poenae persequendae causâ comparatae sunt: aliae tam poenae, quam rei persequendae & ob id mixtae sunt. *Instit. lib.* 4. *tit.* 6. §. 18.

In France, the Parties who have been injured, or who have suffered any Wrong, by a Crime, sue in their own Names only for a Civil Reparation, and for Damages: So that Criminal Actions are prosecuted by the Officers of the Publick.

V.

5. Of Real Actions.

As Personal Actions are annexed to the Person, so Real Actions follow the Thing into whose Hands soever it passes [e]. Under this Word *Thing* we comprehend not only Lands and Inheritances, but likewise all the real Rights with which Lands may be charged, such as Services, Mortgages, and Ground Rents. This Action is not always founded on a Contract, or a prior Obligation, but on the Property of the Ground, or of the Right which belongs to the Demandant, who is in a Condition to claim what belongs to him.

[e] Aut cum eo agit, qui nullo jure ei obligatus est movet tamen alicui de aliqua re controversiam. Quo casu proditae actiones in rem sunt. Veluti si rem corporalem possideat quis, quam Titius suam esse affirmet, possessor autem dominum ejus se esse dicat. Nam si Titius suam esse intendat, in rem actio est aeque si agat quis, jus sibi esse fundo fortè vel aedibus utendi, fruendi, vel per fundum vicini eundi, agendi, vel ex fundo vicini aquam ducendi: in rem actio est. Ejudem generis est actio de jure praediorum urbanorum: veluti si quis agat, jus sibi esse altius aedes suas tollendi, prospiciendive, vel prospiciendi aliquid, vel immitendi tignum in vicini aedes. *Instit. lib.* 4. *tit.* 6. §. 1, 2.

VI.

6. Actions Confessory, or Negatory.

When a Real Action is commenced by the Owner of a House or Lands, claiming a Service due from the House or Lands of another Person, that Action is called a *Confessory* Action. And the Name of *Negatory* Action is given to that which is brought by a Person, who insists that his House or Lands are not charged with the Service which is claimed to be due from them [f].

[f] In confessoria actione, quae de servitutibus movetur, fructus etiam veniunt.—— Sed & in negatoria actione (ut Labeo ait) fructus computantur, quanti interest petitoris, non uti fundi sui itinere adversarium. *l.* 4. *ff. si servitus vindicetur.*

VII.

7. Hypothecary Action.

The Hypothecary Action is that which the Creditor brings against the Immoveables which are mortgaged to him by his Debtor, although the Creditor had not been put into possession of them [g]. This Action takes Place, whether the Immoveable Thing be in the Hands of the Debtor, or have passed into the Hands of a new Purchaser.

[g] Serviana (actio) & quasi Serviana (quae etiam hypothecaria vocatur) ex ipsius Praetoris jurisdictione substantiam capiunt. Serviana autem experitur quis de rebus coloni, quae pignoris jure pro mercedibus fundi ei tenentur. Quasi Serviana autem est, quâ creditores pignora, hypothecasve persequuntur. —— At eam, (rem) quae sine traditione; nudâ conventione tenetur, propriè hypothecae appellatione contineri dicimus. *Instit. lib.* 4. *tit.* 6. §. 7.

VIII.

8. Possessory Action.

He who was in possession of a House or Lands or of some Right, and is molested therein, or turned out of his Possession, may commence a Possessory Action in order to be quieted in his Possession, if he

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he is molested, or to regain it, if he has lost it [b].

[b] Sequitur, ut dispiciamus de interdictis, seu actionibus quæ pro iis exercentur. Erant autem interdicta formæ atque conceptiones verborum, quibus Prætor aut jubebat aliquid fieri, aut fieri prohibebat Quod tunc maximè fiebat, cùm de possessione aut quasi possessione inter aliquos contendebatur. *Instit. lib.* 4. *tit.* 15. *in princ.*

IX.

9. How the Hypothecary Action becomes a mixt Action.

The Prayer in a Hypothecary Action is, that an Estate may be declared to be charged and mortgaged for the Payment of a Debt, or a Rent, that is due to us [i]. This Action is a Real Action in its own Nature, but it is often rendred a mixt Action, by concluding that the Possessor of the Estate may be compelled to pay a certain Sum of Money, or a Rent, or otherwise to relinquish the Estate. It is always a mixt Action, when the Debtor, or his Representative, is in Possession of the Estate.

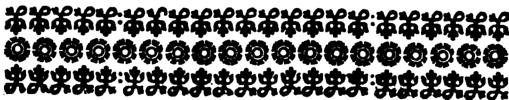
[i] Serviana (actio) & quasi Servians (quæ etiam hypothecaria vocatur) ——— Quasi Serviana autem est, quâ creditores pignora hypothecasve persequuntur. *Instit. lib.*4. *tit.* 6. §. 7.

X.

10. Of other mixt Actions.

Mixt Actions partake of the Nature of Personal and Real Actions [k]. Such are all demands for Partition of an Estate among Coheirs, for dividing what belongs to severals in Partnership, or as joint Proprietors. For the Division of the Estate is Real; but the Restitution of the Fruits and Revenues, the Reimburstment of the Charges, and the Contributions that are to be made by the respective Parties, are Personal.

[k] Quædam actiones mixtam causam obtinere videntur, tam in rem quam in personam: qualis est familiæ ercifcundæ actio, quæ competit cohæredibus de dividenda hæreditate. Item communi dividundo, quæ inter eos redditur, inter quos aliquid commune est, ut id dividatur. Item finium regundorum actio, quâ inter eos agitur, qui confines agros habent. *Instit. lib.* 4. *tit.* 6. §. 20.



TITLE II.

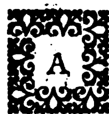
Of Proceedings in Causes in general, either upon an Appearance of Parties, or by Default, and of Delays

The CONTENTS.

1. *What a Citation is.*
2. *The Formalities required in Citations.*
3. *Where Persons out of the Kingdom, and those who have no fixed Abode, are to be cited.*
4. *Delays which are granted to the Parties cited, for their appearance.*
5. *Days which are or are not, included in the Delays.*
6. *A Default taken against the Defendant who does not appear.*
7. *Opposition to the Default taken.*
8. *If in Proceedings by Default, they always give Judgment according to the Prayer of the Plaintiff.*
9. *Of Defences made against the Demand.*
10. *Reasons for which the Defendant declines the Jurisdiction.*
11. *When declinatory Exceptions ought to be made.*
12. *In what manner the Judge is to decide the Exceptions taken to his Jurisdiction.*
13. *Of dilatory Exceptions.*
14. *All the dilatory Exceptions ought to be made at once.*
15. *Of peremptory Exceptions.*
16. *Of a Tender made, when the Defendant has no Exceptions to offer.*
17. *Default at the Hearing of the Cause. Opposition against that Default.*
18. *Two ways of giving Judgment, either upon a summary Hearing, or after Pleadings in Writing.*
19. *Judgment in summary Causes.*
20. *What is done in case of the Death of the Party, or of his Proctor.*

I.

1. What a Citation is.



A Citation, which we are to look upon as the Foundation of all Judicial Proceeding, is a Process, or Warrant, by virtue of which an Officer summons one or more Persons to appear before a certain Judge, and on a certain Day, to see himself or themselves condemned to perform what is demanded by the Plaintiff [a].

[a] In jus vocare, est juris experiundi causâ vocare. *l.* 1. *ff. de in jus vocando.*
Omnium autem actionum instituendarum principium, ab ea parte Edicti proficiscitur, quâ prætor edicit de in jus vocando. Utique enim imprimis adversarius in jus vocandus est: id est, ad eum vocandus qui jus dicturus sit. *Instit. lib.* 4. *tit.* 16. §. *ult.*

II.

2. The formalities required in Citations.

The Citation ought to be by way of Libel, that is, it ought to contain summarily the Demand of the Plaintiff, and the Title upon which it is founded [b]. The Officer ought to declare to what Court he belongs, the Place of his own Abode, and also that of the Party at whose instance he serves the Citations, the Name of the Plaintiff's Proctor, when it is necessary to imploy a Proctor in the Cause. The Citation

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tation must be served upon the Defendant personally at his Dwelling-house. And the Names of the Persons with whom the Summons was left ought to be set down both in the Orignal Process, and in the Copy. The Process ought to have a Date, and to be registred.

[b] Quâ quisque actione agere volet, eam edere debet, nam æquissimum videtur, eum, qui acturus est, edere actionem, ut proinde sciat reus, utrum cedere an contendere ultra debeat. Et si contendendum putat, veniat instructus ad agendum, cognitâ actione, quâ conveniatur. *l. 1. ff. de edendo.*

III.

3. Where Persons out of the Kingdom, and those who have no fixed Abode, are to be cited

Those who have no known Domicil are cited by one single Publick Outcry, in the chief Market-place of the Town, where the Court is held which issues the Process. Strangers who are out of the Kingdom are cited at the House of the Procurators General of the Parliaments in *France*, to which there lies an Appeal from the Judges, who are to take cognizance of the Matter in dispute in the first Instance. And Subjects that are out of the Kingdom, or those who are condemned to Banishment and the Gallies for a certain Time, are cited at the Place of their last abode.

See in relation to Citations, the 2d. Title of the Ordinance of 1667, and the Edicts and Declarations of the French King touching the registring of Processes.

IV.

4. Delays which are granted to the Parties cited, for their appearance.

In summoning a Party, it is necessary to grant him a Delay, not only that he may prepare himself for making his Appearance before the Judge; but likewise that he may consider, whether he should acquiesce to the Plaintiff's Demand, or that he may look out the Deeds and Writings that are necessary for the Defence of his Cause. This Delay is different according to the Distance of the Defendant's Domicil, from the Place where the Court is held, where the Affair is to be decided, and according to the Quality of the Court. The Judge shortens the Delays, when he sees that the Affair requires Dispatch, and that there would be Danger in adhering to the usual Terms of Delay.

See the third Title of Delays in appearing to Citations, in the Ordinance of 1667.

V.

5. Days which are, or are not, included in the Delays.

The Day on which the Citation is served, and that on which it is returnable, are not included in the Delays; but all the intermediate Days are to be reckoned, even Sundays and Holidays.

VI.

6. A Default taken against the Defendant who does not appear.

If the Defendant does not constitute a Proctor, and does not make any Defence, within eight Days after the Return of the Process, the Plaintiff may take a Default in the Registry; but he cannot have Judgment upon it till after another Delay of a Week or a Fortnight, if it is assigned for one of those Terms, or for half the Time allowed for appearing to the Process, in case he passes the Week, or the Fortnight.

VII.

7. Opposition to the Default taken.

The Defendant takes his Exceptions to the Judgments that have been given in default of his appearing, or making his Defence, within a Week from the Day that intimation has been given him of the said Judgments, either personally, or by notice left at his House, when he has not appointed a Proctor in Court; and within eight Days after Notice given to his Proctor, when he has a Proctor in Court.

VIII.

8. If in Proceedings by Default, they always give Judgment according to the Prayer of the Plaintiff.

In Judgments given by Default, the Judge ought not to decree according to the Prayer of the Plaintiff, unless it appears to be just and well founded. Thus it may so fall out, that the Plaintiff may lose his Cause, even when there is no Body to oppose him.

[c] Post Edictum peremptorium impetratum, cum dies ejus supervenerit, tunc absens citari debet: &, sive responderit, sive non responderit, agetur causa, & pronunciabitur: non utique secundum præsentem, sed, interdum vel absens, si bonam causam habuit, vincet. *l. 73. ff. de judiciis.*

Cum autem eremodicium ventilatur, sive pro actore, sive pro reo; examinatio causæ sine ullo obstaculo celebretur. Cum enim terribiles in medio proponuntur scripturæ, litigatoris absentia Dei præsentiâ repleatur. *l. 13. §. 4. Cod. de judiciis.*

IX.

9. Of Defences made against the Demand.

The first Thing which the Defendant ought to do after his Appearance, is to propose the Defences which he has to make against the Plaintiff's Demand, and to give Copies of the Deeds, or Writings, which he intends to make use of, in order to hinder the Plaintiff from obtaining his Demand [d]. The Defences which he makes, contain Exceptions, which are either declinatory, dilatory, or peremptory [e].

[d] Sequitur, ut de exceptionibus dispiciamus. Comparatæ autem sunt exceptiones defendendorum eorum gratiâ, cum quibus agitur. *Instit. lib. 4. tit. 13. de exceptionibus in princ.*

e Ap-

[e] Appellantur autem exceptiones aliæ perpetuæ & peremptoriæ, aliæ temporales & dilatoriæ. Perpetuæ & peremptoriæ sunt, quæ semper agentibus obstant, & semper rem de quâ agitur, perimunt: qualis est exceptio doli mali, & quod metus causa factum est, & pacti conventi, cum ita convenerit, ne omnino pecunia peteretur. Temporales atque dilatoriæ sunt, quæ ad tempus nocent, & temporis dilationem tribuunt: qualis est pacti conventi: cum ita convenerit, ne intra certum tempus ageretur, veluti intra quinquennium: nam finito eo tempore non impeditur actor rem exequi. *Instit. lib.* 4. *tit.* 13. §. 8, 9, 10.

X.

10. Reasons for which the Defendant declines the Jurisdiction.

The Defendant declines the Jurisdiction, and demands that he may be sent to another Court, when the Matter in dispute does not belong to the Cognizance of the Judge before whom he is cited, when the said Judge has not a Jurisdiction in the Place where the Defendant lives, in the Case of personal Actions, or in the Place where the Thing is situated, in the Case of real Actions; when the same Matter is contested in another Court; or when the Defendant has the Privilege of having the Causes he is concerned in, tried before another Judge, than that of his Domicil. One demands likewise to have the Cause tried before another Court, when either of the Parties is an Officer of the Court where it is begun, or when many of their Kindred or Allies are Officers in it. And this in the Terms of the *French* Law, is called *Evocation* of a Cause, from the *Latin* Word *evocare.*

See touching Evocations of Causes, the Ordinance of the Month of August, 1669.

XI.

11. When declinatory Exceptions ought to be made

The declinatory Exceptions must be offered before all others, because one is not suffered to decline the Jurisdiction of the Court, after they have owned the Authority of the Judge, by a voluntary Proceeding in the Cause before him [f].

[f] Præscriptiones fori in principio litis, à litigatoribus opponendas esse, legum decrevit autoritas. *l. ult. Cod. de exceptionibus.*

XII.

12. In what manner the Judge is to decide the Exceptions taken to his Jurisdiction.

The Judge ought to decide summarily at a Hearing the Exceptions taken against the Jurisdiction of the Court; and if he finds that the Cognizance of the Matter does not belong to him, he ought to send the Parties before the proper Judge, or he ought to direct them to apply to the proper Judge; on pain of his Decree being Null and Void, and himself being made a Party [g].

[g] Si militaris judex super ea causa, de quâ civilibus actionibus disceptandum fuit, non datus à quo dari poterat, cognovit, etiam remotâ appellatione, id quod ab eo statutum est, firmitatem judicati non habet. *l.* 2. *Cod. si a non competente judice judicatum esse dicatur.*

Et in privatorum causis hujusmodi forma servetur, ne quenquam litigatorum sententia non à suo Judice dicta constringat. *l.* 4. *Cod. ibid.*

[*What is said in this Article of the Judge's being obliged, in case he finds the Matter in dispute not to belong to his Jurisdiction, to send the Parties before the proper Judge, on pain of his Decree being null, and himself being made a Party, is no where directed by the* Roman *Law, neither does it obtain in practice with us in* England. *For all that the Judge is obliged to do in that Case, when the Matter does appear not to belong to his Cognizance, is to dismiss the Defendant with Costs, and leave it to the Plaintiff to bring his Action before the proper Court.*]

XIII.

13. Of dilatory Exceptions.

Dilatory Exceptions are those which tend to delay the giving Judgment on the Merits of the Cause, and to hinder the Judge from proceeding, until he has determined the Matter of the said Exceptions. They arise, either from the Nature of the Action that is commenced, as if a Creditor who has allowed his Debtor a Time for Payment, sues him before the Time is expired, or from the Quality of the Plaintiff, as in the Case of a Minor, who commences an Action, without the Assistance of a Guardian.

See the Proof of the 9th Article.

XIV.

14. All the dilatory Exceptions ought to be made at once.

In order to hinder the Parties from protracting the Cause, it is required that those who have many dilatory Exceptions to offer, shall propound them all in one single Act. Here we must except Widows and Heirs, who are not obliged to propound their other dilatory Exceptions, till the Time which is allowed them for deliberating is expired.

XV.

15. Of peremptory Exceptions.

The Defences, or peremptory Exceptions, tend to destroy or extinguish the Action brought by the Plaintiff, and to have the Defendant dismissed and acquitted from the Plaintiff's Demand. Of this Kind are Prescription, Compensation and Payment.

See the Proof of the 9th Article.

XVI.

16. Of a Tender made, when the

In case the Defendant have no Exceptions to offer that may hinder the Plaintiff

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Defendant has no Exceptions to offer. Plaintiff from obtaining a Decree for what he demands, he ought to make a Tender, in order to stop any further Proceedings. If the Tender is judged to be sufficient, and the Plaintiff refuses it without just cause, he ought to be condemned in the Expences incurred after the Time of making the Tender.

XVII.

17. Default at the Hearing of the Cause. Opposition against that Default. Three Days after the Defendant has given in his Defences, the Cause is appointed for Hearing upon a bare Act signed by the Proctor. If one of the Parties, or rather he who is the Defendant, his Advocate or Proctor, does not appear, a Default is taken against him, and a diffinitive Sentence given in the Cause, to which Opposition may be made within a Week after Notice of the Sentence, unless the Cause has been called in the ordinary Course, as it stood in the Paper of Causes; for in that Case the Party is not admitted to make any Opposition against the Sentence.

XVIII.

18. Two ways of giving Judgment either upon a summary Hearing, or after Pleadings in writing. If the Cause having been argued on both Sides, it appears to be sufficiently cleared up, Judgment is given at the said Hearing. But if in the Argument there arise Points of great moment and difficulty, Facts that are obscure, and there be many Writings to be examined into, the Parties are directed to clear up the said Difficulties in Writing, and a diffinitive Sentence is given upon the Writings exhibited by the Parties. And the Party who refuses to produce his Writings after the usual Delays is forejudged.

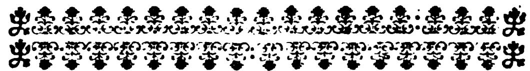
XIX.

19 Judgment in summary Causes. Matters of a summary Nature, such as in the inferior Courts Causes meerly Personal, where the Matter in dispute does not exceed the Value of two hundred Livres, the Affairs which relate to the Civil Policy, and others of the like Nature, ought always to be judged at the first Hearing, without any further appointment by the Judges for a fuller Discussion of the Cause in Writing [h].

[h] Sit tibi quoque tertium studium, lites cum omni æquitate audire, & omnes quidem breviores, & quæcunque maximè vilium sunt, ex non scripto decidere, & judicare, & liberare omnes alternâ contentione. *Nov. 73. cap. 3.*

XX.

20. What is done in case of the Death of the Party, or of his Proctor. When one of the Parties dies, while the Cause is depending, it is necessary that the other Party cause the Executor or Administrator of the Deceased to be cited, in order to carry on the Cause, if he has not already undertaken it of his own accord. It is the Method likewise when the Proctor of a Party dies, to cause him to be cited in order to constitute a new Proctor; and after that is done, the Proceedings in the Cause are carried on in the same State they were in at the Time of the Death of the Proctor, or of the Party.



TITLE III.

Of Interventions.

The CONTENTS.

1. *Of Petitions of Intervention.*
2. *Proceedings upon the Petition of Intervention.*
3. *In what Court the Party intervening is to proceed.*

I.

1. Of Petitions of Intervention. WHEN a Person has Interest in a Cause that is depending before a Court, whether it be in the first Instance, or upon an Appeal, the said Person may present a Petition at any Time whilst the Cause is depending, praying to be admitted to intervene, in order to take care of his Right [a].

[a] Principaliter causam ejus de quo supplicas, esse, quam tuam perspicimus: nam cum te eum ad libertatem perduxisse profitearis, illius interest magis solemniter suum tueri statum, & consequenter tua etiam agetur causa. Nam si ab eo contra quem fundis preces, servus dicatur, eique libertas ex manumissione tuâ vindicetur: probatio servitutis originis, & beneficium manumissionis libertatem illi assignans, tuum etiam jus patronatus tuetur. Si vero consentiat servituti; tunc jure concesso, adito Præside Provinciæ, eum invitum defendere poteris. *l. 19. Cod. de liberali causa.*

II.

2. Proceedings upon the Petition of Intervention. The Petition of Intervention ought to set forth the particular interest of the Party who prays to be admitted to intervene, to which ought to be annexed the Vouchers to prove the said Interest, a Copy of which ought to be communicated to the other Parties, that they may see whether the Person who prays to intervene, has a real Interest in the Cause, or whether he pretends only an Interest to intervene, that he may protract the Cause. Upon the presenting of this Petition, the Parties are called to declare what they have to say against it, and if the Interest of the Party inter-

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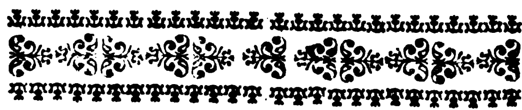
intervening is either confest, or sufficiently proved, he is admitted to intervene, and the Cause of Intervention goes on in the same steps with the principal Cause, if that is appointed to be heard in a full Court, saving always a Liberty to sever them if it shall be found necessary so to do. But if the principal Cause is of such a Nature as to be decided on a Summary Hearing, the principal Cause, and the Cause of Intervention, are both of them decided at one and the same Time.

III.

3. In what Court the Party intervening is to proceed.

The Plaintiff, in the Cause of Intervention, ought to proceed in the same Court where the principal Cause was begun; because the Party intervening being considered as Plaintiff, ought to follow the Jurisdiction of the Defendants. He may nevertheless offer reasons of Recusation against the Judges, if he has any that are lawful [b].

[b] Actor rei forum, sive in rem, sive in personam sit actio, sequitur. *l.* 3. *Cod. ubi in rem actio exerceri debeat.*



TITLE IV.

Of the Recusation of Judges.

The CONTENTS.

1. *When a Party may recuse a Judge.*
2. *Kindred, a Cause of Recusation.*
3. *Affinity by the Wives of Judges.*
4. *Other grounds of Recusation.*
5. *The same.*
6. *The same.*
7. *When the Recusation ought to be offered.*
8. *Proceedings in Order to come at the Recusation.*
9. *Judgment on the Matter of Recusation.*
10. *Declaration of the Judge against whom there are grounds of Recusation.*

I.

1. When a Party may recuse a Judge.

THE Party who suspects a Judge upon good Grounds, which are well proved may recuse or challenge him; that is, may hinder him from taking cognizance of the Matter in dispute.

II.

2. Kindred, a cause of Recusation.

The Judge may be challenged in a Civil Cause, if he is related by Kindred or Affinity to the Parties, even to the fourth Degree inclusive, according to the Manner of computing Degrees by the Canon Law [a]. In a Criminal Cause, the Judge may be challenged even to the fifth Degree of Kindred or Affinity inclusive; and even in the remotest Degree, when the Judge bears the Name and Arms of the Criminal, or of the Prosecutor. Which is to take place, even when the Judge is related or allied to both the Parties. However, the Judge who is related or allied to one or both the Parties, may hear and determine a Civil Cause, if all the Parties give their consent in writing. But it is not the same Thing in a Criminal Cause, in which Relations cannot be Judges, altho' the Parties, and likewise the King's Counsel, should agree to it.

[a] Qua Lege (Corneliâ) cavetur, ut non judicet qui ei qui agit, gener, socer, vitricus, privignus, sobrinusve est, propiusve eorum quemquam eâ cognatione, affinitateve attinget. *l.* 5. *ff. de injuriis.*

[*By the Common Law of* England, *the Judges, or Justices, cannot be challenged.* Coke 1. Inst. fol. 294. [a] *But in the Courts of* England, *where the Proceedings are according to the Civil and Canon Law, the Judges may be challenged. And they commonly of their own accord decline sitting as Judges in a Cause, where they may be supposed to be under any the least sort of Bias of Partiality to the one side or the other.*]

III.

3. Affinity by the Wives of Judges.

This Ground of Recusation which proceeds from the Kindred and Affinity of the Judge, takes place likewise in the Case of the Kindred and Affinity of the Wife of the Judge, she being still living, or, in case of her decease, if she has left behind her Children who are still alive. It is the same Thing when the Wife of one of the Parties is related or allied to the Judge. But the Father-in-Law, the Son-in-Law, and the Brothers-in-Law, are not to be Judges, although the Wife be deceased, and has left no Children.

IV.

4. Other grounds of Recusation.

One may challenge a Judge who is a capital Enemy to the Party, who has threatned him either by Word of Mouth, or in Writing, since the Commencement of the Cause, or within six Months before; who has a Law-Suit against the Judge, provided the said Suit be not in relation to any Title or Right which the Party has acquired by Assignment, since the beginning of the Cause, and with a View to challenge a Judge, who himself is Party in a Suit of the like Nature with that on which

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which he is to give Judgment, or who has a Suit depending before a Court of which one of the Parties is a Judge.

V.

5. The same.

A Judge may be challenged, if he lives too familiarly with one of the Parties, as if he eats frequently with him, if he has been his Advocate in the same Cause [b], if he has sollicited for him, if he has told him his Opinion of the Cause before Judgment given, if he has given him some Advice in relation to the same Affair, if the Cause has already been before him as Judge in another Court, or as Arbitrator.

[b] Quisquis vult esse causidicus, non idem in eodem negotio sit advocatus & judex: quoniam aliquem inter arbitros & patronos oportet esse delectum. *l. 6. Cod. de postulando.*

VI.

6. The same.

One cannot be Judge in an Affair wherein an Ecclesiastical Community is concerned, of which he himself is a Syndick, nor one who is Tutor, whether it be honourary or acting Tutor, substituted Tutor or Curator, presumptive Heir, Master or Servant, to one of the Parties. Neither ought one to sit as Judge in the Cause of a Patron of Benefices, who has either given or procured him a Benefice, or who has given one to any one of his Family, to the second Degree in the Collateral Line of Kindred or Affinity inclusive, and for all the Degrees in the direct Line. A Bailiff of a Lordship cannot be Judge in a Cause wherein his Lord is a Party, unless it be in Affairs which relate to the Demesnes, the Rights, the Rents, and the Leases of the Land.

VII.

7. When the Recusation ought to be offered.

The Challenging of the Judges is an Exception which ought to be taken at the Beginning of the Cause. But this Rule admits of two Exceptions; one is, when the Ground of the Challenge has happened since the Commencement of the Suit; and the other is, when the Party did not know of the Ground of the Challenge until after the Cause was begun. When Notice has been given of the Day that a Commissioner appointed by the Court is to set out, he cannot be challenged, unless a Petition to that Effect is presented three Days before his Departure.

VIII.

8. Proceedings in order to come at the Recusation.

In order to have a Judge debarred from giving Judgment in a Cause, the Reasons for which he is challenged, are set forth in a Petition which ought to be signed by the Party himself, or by his Proctor, authorized by a special Proxy from the Party [c]. Neverthelesss the Proctor, in the Absence of his Client, may demand that the Judge may forbear proceeding in the Cause, upon which Application a Delay will be granted him that he may hear from his Client. And during the said Delay, the Judge cannot proceed any further in the Cause.

[c] Non facile per procuratorem quis recusabitur, quoniam famæ causa est: nisi constet ei à tutore mandatum nominatim. *l. 39. ff. de procuratoribus & defensoribus.*

IX.

9. Judgment on the Matter of Recusation.

The Petition which contains the Grounds of the Recusation is communicated to the Judge, that he may declare whether the Facts mentioned in it be true or not, after which they proceed to give Judgment on the Point of Recusation, and the Judge, who is excepted against, is not suffered to be present at the Debates. If the Reasons for challenging the Judge are not relevant, or that the Party who offers them hath failed in the Proof of them, he ought to be condemned to pay a Fine. And the Judge who is challenged, may likewise demand a Reparation proportionable to the Injury that has been done him. But if he insists upon this Reparation, he cannot in that case act as a Judge in the Cause.

X.

10. Declaration of the Judge against whom there are grounds of Recusation.

Every Judge who knows of any just Cause of Challenge against him, ought to declare it. The Party ought to present his Petition of Recusation, within eight Days after the said Declaration has been intimated to him; otherwise he will not be admitted to give any Challenge, unless the Proctor of the Party who is absent, has desired time to acquaint his Client, and to receive a special Proxy from him.

See touching the Recusation of Judges the 24th Title of the Ordinance of 1667, and the Declaration of the 25th of May 1705. in relation to Conveyances and Assignments of Rights, which Persons engaged in Law-Suits procure, that they may have a Foundation to challenge the Judges.

ADVERTISEMENT.

We have explained in the sixth Title of the third Book of this Work, that which relates to the different Kinds of Proofs, by Writing, or by Witnesses; those which are drawn from the Answer of a Party to certain Facts and Articles, and that which concerns the different Sorts of Presumptions. We must now take Notice of what relates to

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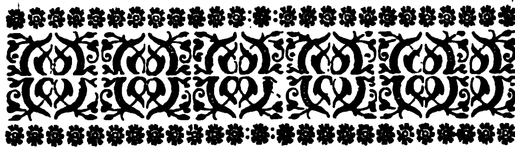
to the Proceeding that is to be observed with respect to these different Kinds of Proofs.



TITLE V.

Of several Sorts of Proofs of Facts that are controverted.

The CONTENTS.

1. *Verification of private Writings.*
2. *In what manner Writings are verified.*
3. *The Advantage of a Default, in case the Defendant does not appear.*
4. *Of comparing Writings together.*
5. *In what manner such Comparison is made.*
6. *Of the Charge of Forgery.*
7. *The Proceedings in a Charge of Forgery.*
8. *In what case a Criminal Prosecution is carried on against him who has exhibited a forged Deed or Instrument.*
9. *The Effect of a Declaration of the Party that he will not make any use of a Deed or Instrument.*
10. *The Charge of Forgery does not exclude other Objections that may be offered against the said Writing.*
11. *A Transaction founded on a counterfeit Deed.*
12. *Of Examination of Witnesses.*
13. *Proceedings after the Examination of Witnesses is finished.*
14. *The Report made by skilful Persons.*
15. *A View taken by the Judges themselves.*
16. *Answers of the Party to certain Facts and Articles.*
17. *Proceedings in order to have the said Answers.*
18. *If the Party can retract his Answers.*
19. *In what manner Communities are to give in their Answers.*

I.

1. Verification of private Writings.

WHEN a Writing that is exhibited by one of the Parties, in order to serve as a Proof of his Demand, or of his Defence, is only a private Writing, and is denied by the adverse Party; it must be verified, in order to make it appear that it was signed by the Party whose Name it bears.

II.

2. In what manner Writings are verified.

This Verification is to be made in presence of one of the Judges who are named Commissioners for the Cause, or of the Judge who is Reporter of the Cause, if it is appointed to be heard in a full Assembly. And in order to come at it, the Writing in question is presented to the Judge on the Day, and at the Hour, mentioned in the Notice given to the adverse Party; the Judge marks it, and communicates it to the Party [a]. The Parties agree together in naming skilful Persons for Comparators, or if they cannot agree, the Judge by virtue of his Office names for that Party who refuses to name on his Side. They give to the Comparators the Writings which are to be the Foundation of the Comparison, and which ought to be publick and authentick Writings, or private Writings which are not contested. And it is by these Writings that the Comparators examine the Subscription that is denied, and that they make their Report. When there are no authentick Writings, nor private Note which the Parties are agreed on, that may serve as a Foundation for the Comparison, they make the Person whose Handwriting is denied write something; or if he is dead, they examine Witnesses who were well acquainted with his Handwriting, and shew to every one of them the Writing which is the subject Matter in dispute.

[a] Sancimus, si quando tale aliquid contigerit, & quispiam voluerit secundum eas quæ ab adversario prolatæ sunt literas, fieri examinationem; non accusetur hoc tanquam non rectè sit factum. Cui enim ipse credidit, & quod protulit is contra quem, & ex quo suas affirmat allegationes, hoc non accuset, neque prohibeat accusationem literarum ad eum fieri: licet contingat esse documentum manu cujuscunque conscriptum. Neque enim ipse sibi resistit: & quæ affirmavit, hæc accusavit. Si vero etiam ex publicis archivis proferatur charta, velut de suscepto descriptio, mensæ gloriosissimorum Præfectorum: — & quod ex publicis archivis profertur, & publicum habet testimonium, etiam susceptible hoc esse ad collationem manuum ponimus. *Nov.* 49. *cap.* 2.

III.

3. The Benefit of a Default, when the Defendant does not appear.

When the Defendant against whom the Writings are to be verified, does not appear in obedience to the Summons, a Default is granted against him. The Benefit of which Default is, to have the Writing in question declared to be such as is alledged, in case it is pretended to be writ and subscribed by and with the proper Handwriting of the Defendant, or if it is said to be writ by another Hand, to proceed to the Proof of it by having it compared with other Writings by Persons skilled in that Art, whereof one is to be named by

the

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the Defendant, and the other by the Judge.

See touching the Declaration and Verification of private Writings, the 22d Title of the Ordinance of 1667, and the Edict of the Month December 1684.

IV.

4. Of the collating of Writings.

In Law Suits there is frequent occasion to make use of Writings, the Originals whereof either cannot or may not conveniently be produced; in which case Copies are procured to be collated by a publick Officer, who attests the Copies to agree with the Originals. If a collated Copy is to be made use of against any one, it is necessary that it should be collated in his Presence, or that he be duly cited to be present at the collating, that he may be able himself to judge of the Condition of the Writing, and of its being faithfully collated.

[*It is not necessary with us, that the Party concerned be cited to be present at the Collating of a Copy with an Original; because if it is duly attested by the proper Officer to be a true Copy, that is thought to be sufficient, when nothing appears to the contrary.*]

V.

5. In what manner Writings are collated.

This Collation is made by virtue of a Compulsory, that is, a Writ out of the Chancery, or an Order of the Judge, which permits the Compulsion. The Party is cited to appear at the Hour and Place where the Collation is to be made; and he who has the Writing in his custody is likewise cited to produce it. The Proceedings, as to the Compulsory, and the Collation of the Writings, cannot be begun by the Officer till an Hour after the Time appointed, when one of the Parties does not appear. One may procure to be collated in the Presence of the Judge who is appointed Reporter of the Cause, the Writings which are in his own possession, and of which he does not care to produce the Originals, or Writings which have been exhibited by the adverse Party, and from whence one hopes to draw some advantage, either in the Affair in dispute, or otherwise.

Touching the Verification and Collation of Writings, see the Ordinance of 1667. tit. 12.

VI.

6. Of the Charge of Forgery.

The Party against whom a forged Writing is produced, ought, with the Leave of the Judge, to offer himself ready to prove the Forgery of the said Writing. The Request which he gives in to that effect ought to be signed by the Party himself, or by his Proctor impowered by a special Proxy for that purpose. He must also deposit the Fine which he is to pay, in case he does not prove the Forgery, which differs according to the Quality of the Courts of Justice where the Matter is tried.

VII.

7. Proceedings in the Charge of Forgery.

Upon the Presenting of such Request, the Judge decrees that the Defendant shall declare within a certain Time, whether he intends to make use of the said Writing or no. If he declares that he will not make use of it, the said Writing is thrown out of the Cause. If on the contrary he purposes to make use of it, he must leave it in the Registry, and give notice to the adverse Party within the Space of twenty four Hours after such his Declaration of his Intention; the Plaintiff ought then to draw up his Charge of Forgery, and leave it in the Registry, and to procure an Order that in case there be any Minute taken of the Writing, the same be brought into the Registry, by the Person who has it in his custody. After which the Plaintiff gives in his Reasons to make good the Charge of Forgery. If the Judge does not think them to be admissible, he orders that, without having any regard to them, they proceed on to the Hearing of the Cause. If on the contrary they are admissible, he suffers them to be proved both by Deeds, and by Witnesses, and by a Comparison made by skilful Persons.

The Consent which the Party gives, that the Writing exhibited by him may be left out of the Cause, does not hinder the Attorney or Sollicitor Generals, or their Substitutes, from prosecuting the Person that has forged the Writing which is said to be forged.

VIII.

8. A Case where a Criminal Prosecution is carried on against him who has exhibited a forged Writing.

If he who has exhibited the forged Writing, is convicted to be the Author of the Forgery, the Criminal Prosecution is judged separately from the Civil Cause, and he is condemned to undergo a Punishment suitable to the Nature and Circumstances of the Crime. But if the Person who has exhibited the forged Writing is not the Author of the Forgery, the Incident of the Forgery is connected with the Civil Cause, in order to give Judgment on the Forgery when Sentence is given upon the Merits of the Cause. When the Plaintiff in the Charge of Forgery fails in his Proof, he is condemned to pay a Fine, to which the Judge may add other Punishments, according to the Nature

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ture of the Calumny, and the Quality of the Person to whom the Injury is done.

As to the Proceedings in the Charge of Forgery, see the 9th Title of the Ordinance of 1670.

IX.

9. Effect of the Declaration that one will not make use of the Writing.

He who has declared in a Cause that he will not make use of a Writing, cannot alter his Mind, because he is deemed in his Declaration to have owned the Forgery of the Writing, or at least to have looked upon it as useless [b]. But the Declarations made by a Party, and even Judgments that may be given against him in relation to the Forgery of a Writing, do not any ways prejudice a third Person who was not a Party in the Suit.

[b] Si adversarius tuus apud acta Præsidis Provinciæ, cum fides instrumenti quod proferebat in dubium revocaretur, non usurum se contestatus est: vereri non debes ne ea scriptura, quam non esse veram, etiam professione ejus constitit, negotium denuò repetatur. *l. 3. Cod. de fide instrumentorum.*

Si uteris instrumento, de quo alius accusatus falsi victus est, & paratus est (si ita visum fuerit) à quo pecuniam petis, ejusdem criminis te reum facere, & discrimen periculi pœnæ Legis Corneliæ subire, non oberit sententia, à qua nec is contra quem data est, appellavit, nec tu qui tunc crimini non eras subjectus appellare debuisti. *l. 2. Cod. ibid.*

X.

10. The Charge of Forgery does not exclude other Objections that may be made against the Writing.

Although one has used several Arguments to destroy the Inferences that are drawn from a Writing, yet one may in any Part of the Cause object against it that it is forged [c]. In the same Manner as he who has undertaken to prove that a Writing is forged, and who has not succeeded in that Charge, may nevertheless attack the said Writing by other means, and shew it to be of no force or validity [d].

[c] Cum quidem instrumentum protulerit, vel aliam chartulam, eique fidem imposuerit, postea autem persona contra quam ista chartula vel instrumentum prolatum est, quasi falsum hoc constitutum redarguere nitatur, ne diutius dubitetur, utrum necessitatem ei qui protulit, imponi oporteat repetita vice hoc proferre, an sufficiat fides jam approbata, sancimus, si quid tale eveniat, eum qui petit iterum eam chartam proferri, prius sacramentum præstare, *Quod existimans se posse falsum redarguere quod probatum est, ad hujusmodi veniat petitionem.* ——— Eandem autem copiam ei præstamus, donec causa apud judicem ventilatur. Si enim jam plenissimum finem accepit & neque per appellationem suspensa est, neque per solitam retractationem adhuc lis vivere speratur, tunc satis datum est hujusmodi querelæ indulgeri: ne in infinitum causæ tractentur, & sopita jam negotia per hujusmodi viam aperiantur, & contarium aliquid nostro evenire proposito. *l. 21. Cod. de fide instrum.*

[d] Eum qui inofficiosi querelam non tenuit, a falsi accusatione non submoveri placuit. Idem observatum, & si è contrario, falsi crimine instituto victus, postea de inofficioso actionem exercere maluerit. *l. 14. Cod. de inofficioso testamento.*

XI.

11. An Agreement founded on a forged Deed.

One may take out a Writ for the annulling of an Agreement that is founded on a forged Deed; but such Writ is not allowed, when previous to the Agreement Exception has been taken to the Deed as being forged, or when the Transaction has been in relation to the Forgery [e].

[e] Ipse significas, cum primum adversarii instrumenta protulerant, fidem eorum te habuisse suspectam. Facta igitur transactione, difficile est ut is qui provinciam regit, velut falsum, cui semel acquievisti, tibi accusare permittat. *l. 7. Cod. ad Leg. Cornel de falsis.*

XII.

12. Of the Proof by Witnesses.

It is often necessary, when the Parties disagree about the Facts, to have recourse to the Proof by Witnesses. In which case the Judge permits the respective Parties to examine Witnesses on the Facts that are deduced in an Allegation which is approved of by the Court. The Party which is most diligent obtains an Order of Court for the summoning of Witnesses, and of the adverse Party, to see them sworn. The Deposition of the Witnesses ought to be reduced into writing in Presence of the Judge, after the Witnesses have been first sworn, and have declared their Age, and their Quality. The Judge who takes the Deposition ought to examine the Witnesses apart, without the Presence of any Person besides the Register, unless the Examination be in open Court in a summary Way.

XIII.

13. The Proceedings after the Witnesses have been examined.

When the Examination of the Witnesses is finished, the Party on whose behalf they have been examined, procures an Act to be made thereof, which is intimated to the adverse Party, or the said adverse Party (in case they do not give him a Copy of the said Act after he has demanded it) gets an Act thereof to be drawn up himself. Afterwards the said adverse Party gives in his Exceptions to the Witnesses, or declares that he has none to give. In the next Place he demands a Copy of the Depositions of the Witnesses. The Exceptions against the Witnesses are to be decided before the Merits of the Cause. Such of the Parties as does not take care to have Witnesses examined within the Time prescribed by Law, are debarred from doing it afterwards.

See touching the Proceedings in the Examination of Witnesses the 22d Title of the Ordinance of 1667. And as to the Grounds of Exceptions to Witnesses, see the 6th Title of the 3d Book of the Civil Law in its Natural Order. §. 3.

XIV.

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XIV.

14. *Report made by skilful Persons.*

In such Suits where the Matter in question is about the Proof of a Thing which cannot be perfectly known, but by those who are well versed in the Practice of some Art, the Court directs a Report to be made by skilful Persons, on the Facts mentioned in the Order of Court which directs the said Report to be made [f]. Each of the Parties ought to name one skilful Person on their Part, and if one of them refuses to name any Person, the Judge ought to name one himself. He ought likewise, in virtue of his Office, to name a third skilful Person, when the two that are first named disagree.

[f] Mobilium vero rerum justis pretiis, æstimatione habitâ per eos quos utraque pars elegerit arbitros judicaturos, interposito juramento, simili modo usum fructum habeat. *l. 6. Cod. de secundis nuptiis.*

Æstimationem autem holerum, non solum ab hortulanis fieri, sed & à vocatis summariis, & ipsis horum peritiam habentibus, divinis nimirum propositis Evangeliis. *Nov. 16. cap. 1.*

There are at present in France, *some who have the Title of skilful Persons in some Arts as an Office, and none else but those who hold the said Office can be named as skilful Persons, either by the Parties, or by the Judge, in such Matters as depend on the said Arts. The Act or Certificate of their Report is drawn up by Officers who are called Actuaries.*

XV.

15. *A View taken by the Judge.*

Sometimes it is necessary that one of the Judges view upon the Spot the Condition of the Places, in order to make his Report thereof to the rest of the Judges. In which case a View is ordered to be made upon the Place, and in the same Order of Court the Commissary is named who is to go to take the View. The Commissary goes to the Place at the Time that has been intimated to the Parties, that they may be present when the View is taken.

See the Ordinance of 1667. tit. 2.

XVI.

16. *The Parties may be examined upon Interrogatories touching Facts that are pertinent.*

It is lawful for the Parties in any Part of the Cause to have one another examined upon Interrogatories touching Matters and Facts that are pertinent, and have relation to the Matter in dispute, either before the Judge himself, or in case the Party is absent, before the Judge who is substituted for that Purpose [g].

[g] Ubicunque æquitas Judicem moverit, æquè oportere fieri interrogationem, dubium non est. *l. 21. ff. de interrogat. in jure faciendis.*

XVII.

17. *The Proceedings in examining the Parties on Interrogatories.*

The Party who is to be interrogated, is cited either personally, or at his Dwelling House, by virtue of the Decree of the Judge [h]. If he appears in obedience to the Summons, he ought, after being sworn, to answer by Word of Mouth, and not in Writing, in a clear and distinct Manner, to the Facts proposed to him by the adverse Party, and likewise to such Facts as the Judge himself shall think fit to interrogate him upon. If the Party does not appear at the Time and Place appointed, or if he refuses to answer, the Facts are taken as confest and acknowledged for the Benefit of the Party who demanded his Adversary to be examined on Interrogatories. Nevertheless, the Party who has made Default may afterwards offer himself to undergo the Examination upon the Inrerrogatories, he paying the Charges of the Act made upon his Default, and also the Charges of the Examination upon the Interrogatories, without any hopes of recovering them back.

[h] Qui tacuit quoque apud Prætorem, in ea causa est, ut institutâ actione in solidum conveniatur, quasi negavit se hæredem esse: nam qui omnino non respondit, contumax est: contumaciæ autem pœnam hanc ferre debet, ut in solidum conveniatur, quemadodum si negasset: quia Prætorem contemnere videtur. *l. 11. §. 4. de interrogat. in jure faciendis.*

Nihil interest neget, quis, an taceat interrogatus, an obscure respondeat, ut incertum dimittat interrogantem. *ibid. §. 7.*

XVIII.

18. *If one may retract his Answer.*

He who in his Examination upon Interrogatories has averred a Fact, which he afterwards discovers to be false, may retract what he has set forth in his Answers: and regard ought to be had to his Retraction, when he proves that he was really mistaken, and especially when he accounts for the Manner how he came to discover his Mistake [i].

[i] Celsus scribit licere responsi pœnitere, si nulla captio ex ejus pœnitentia sit actoris. Quod verissimum mihi videtur. Maximè si quis posteà pleniùs instructus quid faciat, instrumentis vel epistolis amicorum juris sui edoctus. *l. 11. §. ult. ff. de interrogat. in jure faciendis.*

XIX.

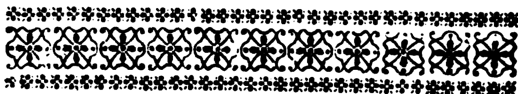
19. *In what manner Corporations are to answer to Interrogatories.*

Corporations ought to appoint a Syndick, and to give him a special Proxy, impowering him to answer to the Matters and Facts that have been intimated to them. One may likewise have those Persons examined upon Interrogatories who have acted by Order of the Corporation, in

in relation to the Facts which concern the Corporation.

See touching Examinations upon Interrogatories the Ordinance of 1667. tit. 10.

We have explained in the 3d Book, Title 6, and Section 6, of the Civil Law in its Natural Order, what relates to an Oath, which makes sometimes a new kind of Proof.



TITLE VI.

Of PEREMPTIONS.

The CONTENTS.

1. *What is the Peremption of an Instance.*
2. *The Instance being lost, is no interruption of the Prescription.*
3. *The Peremption of the Appeal implies a Confirmation of the Sentence.*
4. *In what Cases the Peremption is saved.*
5. *What hinders the Course of the Peremption.*
6. *When Peremption does not take place in the supreme Courts of Justice.*
7. *If Peremption takes place in the Instance of publick Sales.*
8. *What Affairs are not subject to Peremption.*

I.

1. What is the Peremption of an Instance.

PEREMPTION is a kind of Prescription, by which the Proceedings in a Cause, in an Instance, and in a Law-Suit, having been discontinued for the Space of three Years, are totally lost, annulled, and considered as if they had never been had at all [a].

[a] *A Suit begun although it be contested, yet if by the Lapse of three Years, it is discontinued, the same will have no effect to perpetuate or propagate the Action. But the Prescription shall have its course, as if the said Suit had never been begun or commenced, and the Party shall not be at liberty to alledge that the said Prescription hath been interrupted.* Ordinance of *Roussillon* of 1563. Art. 15.

II.

2. The Instance being lost is no interruption of the Prescirption.

When the Instance is lost for want of proceeding in the Cause for the Space of three Years, it does not interrupt the Prescription; so that if in an Action Personal, which prescribes in the Space of thirty Years, one had commenced an Action in the nine and twentieth Year, and discontinued the Proceedings for three Years, the Action would be barred by Prescription, and the Party would not be at liberty to commence a new one. But when the Action is not barred by Prescription, although the Instance be lost, yet the Party may begin a new Proceeding.

See the Ordinance of Roussillon *quoted on the foregoing Article.*

III.

3. The Peremption of the Appeal implies a Confirmation of the Sentence.

Appeals are liable to be perempted, and in that Case the Peremption is in the Eye of the Law a Confirmation of the Sentences; because the Appeal, which is a legal Proceeding, and which is to be considered as the principal Proceeding, is lost.

See the 2d Article of the Regulation made in the Parliament of Paris *the 23d of* March, 1692.

IV.

4. In what Cases the Peremption is saved.

The Peremption of the Instance is saved, when the Party who has acquired it, or his Proctor, by his Order, renews the Instance, gives in a Plea, and does any other Act in the Cause, or if any Decree or Order of Court is made, when it is opposed by the adverse Party. It is not reasonable that a Proctor should, thro' his inadvertency deprive his Client of a Right which has accrued to him.

See the 4th Article of the same Regulation.

V.

5. What hinders the Course of the Peremption.

The Death of either of the Parties, of the Proctors, or of the Judge who is appointed Reporter of the Cause, the Marriage of a single Woman or Widow, who by her Intermarriage comes under the Power of a Husband, hinders the Course of the Peremption, and the Action is prorogued to thirty Years.

VI.

6. When Peremption does not take place in the supreme Courts of Justice.

In the Supreme Courts of Justice, when a Cause has been set down in the List of Causes assigned for hearing, or when the Cause has been concluded and put into a state of being finally determined, there is no further room for Peremption to take Place, by any discontinuance of the Proceedings, because it does not then depend on the Party himself to have his Cause heard. It is not the same Thing with respect to the inferior Courts of Justice, where the Parties may require the Judges to give their Sentence, and after such Request made in due form, may interpose an Appeal, as from the Denial of Justice.

See the 2d Article of the Regulation of 1692.

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VII.

7. If Peremption takes place in the Instance of publick Sales.

Peremption does not take Place in Seizures and publick Sales of Immoveables, when Commissioners have been once named for that purpose, and Leases granted under the Authority of the Court pursuant to the said Nomination.

See the 3d *Article of the Regulation of* 1692.

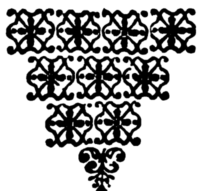
VIII.

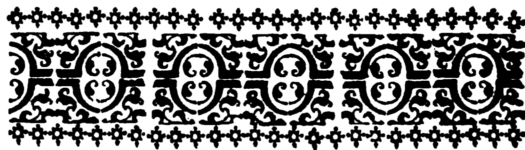
8. What Affairs are not subject to Peremption.

The Affairs which concern the Demesnes of the Crown, and the Proceedings in Criminal Prosecutions, where the King and the Publick have the principal Interest, are not subject to Peremption; because it is not reasonable that the Negligence of those who are charged with the Conduct of these Affairs should be prejudicial to the King, or to the Publick.

The Reader may perhaps wonder that he does not find here, the Law properandum 13. Cod. de judiciis, *which the Authors who have treated of the Practical Part of the Law, and who have compared the Practice of the Courts in* France *with the Civil Law, have all of them quoted on the Subject of Peremption of Instances. But there is a great Difference between the Tenor of the Law* properandum, *and that of the 5th Article of the Ordinance of* Roussillon. *For the Civil Law, in order to shorten Law-Suits, directs that the Judge shall pronounce Sentence whether the Parties be absent or present, whether the Proceedings have been continued, or discontinued; whereas according to the Ordinance of* Roussillon, *the Peremption of an Instance takes Place only in case the Proceedings have been discontinued for three Years together, and that the Party has acquired a Right thereby, although the Judge give no Sentence touching the Merits of the principal Cause.*

There are some of the Parliaments in France *where the Ordinance of* Roussillon *has not been registred and approved, and where Peremption of Instances does not take Place, and where likewise they do not follow the Disposition of the Law* properandum.





TITLE VII.

Of Sentences, their Execution, and of Costs.

The CONTENTS.

1. *Of the different Kinds of Sentences.*
2. *What Sentences are Legal.*
3. *In what manner the Sentences are drawn up.*
4. *Which of the Parties ought to be condemned in the Costs of Suit.*
5. *How the Fruits are to be liquidated in the Execution of Sentences.*
6. *If Interlocutory Decrees are executed provisionally.*
7. *What definitive Sentences are executed provisionally.*
8. *Of the Seizure of Moveables in Execution.*
9. *Of the Seizure of Immoveables.*
10. *Personal Arrests.*

I.

1. Of the different Kinds of Sentences.

WE give the Name of Sentence to whatever the Judge decrees, when he gives his Opinion in relation to the Matter in dispute before him. If that which the Judge decrees regards only the Matters which instruct the Cause, or tends only to introduce into the Cause things without which the Merits of the principal Cause cannot well be decided, the Sentence in such cases is called an Interlocutory Decree. If the Decree of the Judge orders one of the Parties to remain or to be put into Possession during the Law-Suit, the Sentence is Provisional. When the Judge pronounces a Decree touching the Merits of the Cause it is a Definitive Sentence.

II.

2. What Sentences are legal.

In order to make a Sentence a legal Sentence, it is necessary that it should be pronounced by a competent Judge, in the Form prescribed by Law, and that it be conformable to the Laws and Customs of the Country [a]. Thus a Sentence is null, when it has been pronounced by a Court that has not the proper Jurisdiction of the Cause, or on a festival Day, or without observing the Delays prescribed by Law.

2 [a] In

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[a] In eadem observatione numeramus & dies solis, quas dominicos rité dixere majores, qui repetito in se calculo revolvuntur in quibus parem necesse est habere reverentiam: ut nec apud ipsos arbitros, vel a judicibus flagitatos, vel sponte electos, ulla sit cognitio jurgiorum. *l. 7. Cod. de feriis.*

Sive pars, sive integra dilatio fuerit data: eò usque judicis officium conquiescat donec petiti temporis defluxerint curricula Feriæ autem sive repentinæ sive solemnes sint, dilationem temporibus non excipiantur, sed his connumerentur. *l. 7. Cod. de dilationibus.*

III.

3. In what manner the Sentences are drawn up.

The President of the Court ought at the breaking up of the Court, or some time the same Day, to see what the Register has taken down in Writing, sign the Minutes thereof, and set his Hand to every Judgment that is given. As to the Law-Suits where the Proceedings are in Writing, the Judgments bear Date from the Day that the Cause is concluded. It is the Reporter of the Cause who inserts the Date in the Process, before he delivers it into the Registry.

IV.

4. Which of the Parties ought to be condemned in the Costs of Suit.

Every Party that is cast in a Suit, whether it be before Judges, or before Arbitrators, ought to be condemned in Costs [b]. Nevertheless if there be many Points in a Cause, and one of the Parties prevails in some of the Points, and fails in others, the Judge may decree that the Costs of Suit be compensated, or he may condemn one of the Parties in some part of the Costs, and compensate the Overplus.

[b] Sive autem alterutrâ parte absente, sive utrâque præsente lis fuerit decisa: omnes judices, qui sub imperio nostro constituti sunt, sciant victum in expensarum causâ victori esse condemnandum. *l. 13. §. 6. Cod. de judiciis.*

See in the Ordinance of 1667, Art. 31. the Proceeding that is to be observed in the Taxation of Costs.

V.

5. How the Fruits are to be liquidated in the Execution of Sentences.

When a Party is condemned to make restitution of the Fruits, he must bring in kind those of the last Year. With respect to the Fruits of the foregoing Years, the Restitution that is to be made of them is to be regulated according to the Market Price of the four Seasons of each Year, taken from the Register that is kept of the Price of all Sorts of Grain each Market Day.

See the 30th Title of the Ordinance of 1667.

IV.

6. If Interlocutory Decrees are executed provisionally.

Interlocutory Decrees ought to be executed, notwithstanding any Appeal from them, when the Grievances which they do to the Party Appellant, are capable of being redressed when the Definitive Sentence is given. But when the Injury that the Party would suffer by the Execution of the Interlocutory Decree, cannot be afterwards repaired, the Appeal from the Interlocutory Decree suspends the Effect of it. If it happens, for Instance, that the Judge admits a Fact to be proved by Witnesses, and the adverse Party who insists that such Proof is not admissible, interposes an Appeal from the said Decree, one cannot proceed to the Examination of the Witnesses, before the Appeal has been determined.

VII.

7. What definitive Sentences are executed provisionally.

Judges may order their Sentences to be executed provisionally, when the Demand is founded upon Contracts, Obligations, and Promises, that are owned and acknowledged to be genuine; or when the Sum does not amount to one thousand Livres *French*, in Causes that are of a summary Discussion. And such are Servants Wages, the Hire of Day Labourers, the Fees of Physicians, *&c.* The Party in whose favour the Sentence is ordered to be executed provisionally, ought to give sufficient Security, by such Persons as are easy to be come at, and whose Ability is duly attested, before the Sentence is put in Execution.

VIII.

8. Of the Seizure of Moveables in Execution.

When a Party refuses to pay the Sum in which he is condemned, an Officer is ordered to seize his Moveables, and a Commissary is appointed to sell them in a publick Market-place to the highest and last Bidder, in order to pay with the Monies arising by the said Sale, the Creditors, and the Costs.

See touching Seizures and the taking of Moveables in Execution, the Ordinance of 1667, Title 33.

IX.

9. Of the Seizure of Immoveables.

The Immoveables belonging to the Debtor, are likewise taken in Execution, and sold by a Decree of the Court, to the highest Bidder, after due Publication, and observing the other Formalities prescribed by the Laws and Customs.

X.

10. Personal Arrests.

The personal Arrest of the Debtor is the harshest Way of obtaining the Execution of a Judgment, and it is not allowed to be made use of in all Sorts of Civil Debts, but only in certain Debts that are privileged, or in which the Debtor has been guilty of some Offence; or of an

Act

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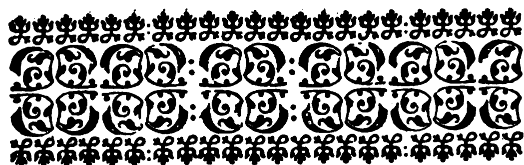
Act that carries something of a criminal Imputation with it. There are likewise some Persons who are privileged in this respect, such as Clergymen, who are not liable to be arrested for any Civil Debt of what Nature soever.



TITLE VIII.

Of the Ways of obtaining a Redress against Sentences, and of the Proceedings on Appeals.

The CONTENTS.

1. *What an Appeal is.*
2. *When it is too late to interpose an Appeal from a Sentence.*
3. *When the Appeal suspends the Execution of the Sentence.*
4. *Of the Desertion of the Appeal.*
5. *The Party may demand the principal Cause to be determined by the Judge of the Appeal, at the same Time that he determines the Grievance.*
6. *What one may do upon an Appeal for the better Defence of their Right.*
7. *Penalties against the Appellant who is cast.*
8. *The Judge made a Party to the Appeal.*
9. *Other Cases where the Judge may be made a Party to the Appeal.*
10. *The Judge who is properly made a Party to the Appeal, is liable to Costs and Damages.*

I.

1. What an Appeal is.

AN Appeal is a legal Remedy which the Law gives to Suitors, whereby they may have a Sentence which they conceive to be unjust reheard by a superior Court.

II.

2. When it is too late to interpose an Appeal from a Sentence.

A Party cannot interpose an Appeal from a Sentence which has been given by his own Consent, nor from a Judgment which he has willingly executed in whole or in part, nor from Judgments which have been intimated to him personally, whereof Notice has been left at his Dwelling-House, when he has been summoned three Years after such Notice to enter his Appeal, and when he has suffered six Months to pass after the said Summons, without entring his Appeal. When the Sentence has been intimated to the Party, and he has not been afterwards summoned to enter his Appeal, he may enter it within ten Years from the Time that the Sentence was intimated to him. In the first Case the Church and Hospitals have for entring their Appeals six Years instead of three, and in the second Case they have twenty Years instead of ten. These Delays do not begin to run against Minors, nor against those who are absent out of the Kingdom on the King's Service, but from the Day that the first are of Age, and the others return into the Kingdom. If the Person to whom the Sentence has been intimated, dies within the three Years, his Heir or Executor ought to have a new Delay of one whole Year, over and above what remains to run of the three Years, before he is summoned to interpose his Appeal from the Sentence.

See the Ordinance of 1667. *title* 27.

[What is said in this Article touching the Time of entring Appeals, is peculiar to the Laws of *France*. For by the Civil Law, the Party who complained of the Injustice of a Sentence, was obliged to enter his Appeal from it within the Space of ten Days after the Date of the Sentence. *Cod. de appellat. l.* 6. *Auth. hodie*. And in *England* the Space of fifteen Days after Sentence is limited by Act of Parliament for entring Appeals. *Stat.* 24. *H.* 8. *cap.* 12.]

III.

3. When the Appeal suspends the Execution of the Sentence.

The Effect of the Appeal is to suspend the Execution of Sentences, except in certain Cases, where the publick Interest has made it necessary that Sentences should be executed provisionally [a].

[a] Appellatione interpositâ, licet à judice repudiata sit, in præjudicium deliberationis nihil fieri debere, & in eo statu omnia esse, quo tempore pronunciationis fuerunt, sæpissimè constitutum est, *l.* 3. *Cod. de appellat.*

IV.

4. Of the Desertion of the Appeal.

If the Appellant does not renounce his Appeal within eight Days after it has been intimated, the Party appellate may take out what they call Letters of Anticipation, in order to proceed upon the Appeal [b]; or if the Party appellate has not taken out Letters of Anticipation, nor the Appellant prosecuted his Appeal, within the

Time

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Time limited for each of them, according to the Usage of the respective Courts, the Party appellate takes out Letters of Desertion, by virtue whereof he demands of the Judge from whose Sentence the Appeal is interposed that the Sentence be put in execution; and of the Judge before whom the Appeal is lodged that the same may be declared deserted. The Desertion of the Appeal is no Obstacle why the Party may not appeal anew upon his refunding the Expences of the Desertion, provided he be still within the Time of appealing.

[b] Si quis libellos appellatorios ingesserit, sciat se habere licentiam arbitrium commutandi, & suos libellos recuperandi, ne justæ pœnitudinis humanitas amputetur. *l.* 28. *Cod. de appellat.*

V.

5. The Party may demand the principal Cause to be determined by the Judge of the Appeal, at the same Time that he determines the Grievance.

In hearing the Merits of an Appeal from a Grievance upon an Incident, one may demand that the principal Cause be brought before the same Judge who is to determine the Appeal; and he has a Right to determine the principal Cause also, provided he gives Sentence on the principal Cause and the Grievance at one and the same Time.

[According to the Practice of the Courts in *England*, which are guided by the Rules of the Civil and Canon Law, when the Judge of the Appeal pronounces for the Grievance, he retains the principal Cause of course; because the inferior Judge who has done a Grievance in an Incident of the Cause, is not to be trusted with the principal Cause. But if the Judge of the Appeal from a Grievance, pronounces against the Appeal, and in consequence of his Sentence that the inferior Judge has done no Grievance remits the Cause back to him, yet the Party appellate may nevertheless retain the principal Cause before the Judge of the Appeal, and the Appellant cannot decline it, because he has already voluntarily submited himself to the Jurisdiction of the said Judge, by bringing his Appeal before him. *Clarke's Praxis in Curiis Ecclesiasticis. tit.* 253.]

VI.

6. What one may do upon an Appeal for the better Defence of their Right.

In an Appeal one may plead new matter [c], have his adverse Party examined on Interrogatories, produce Witnesses [d], make new Demands which have a connection with the principal matter in dispute, so as to have them all decided together; and in general he may do every Thing that may tend to inform the Judge more fully, touching the merits of the principal Cause that has been decided in the first Instance.

[c] Si quid autem in agendo negotio minus se allegasse litigator crediderit, quod in judicio acto fuerit omissum: apud eum qui de appellatione cognoscit persequatur: cum votum gerentibus nobis nihil aliud in judiciis, quam justitiam, locum habere debere, necessaria res fortè transmissa, non excludenda videatur. Si quis autem post interpositam appellationem necessarias sibi putaverit esse personas, per quas apud judicem, qui super appellatione cognoscet, veritatem possit ostendere, quam existimavit occultam, hocque fieri judex perspexerit: sumptus iisdem ad faciendi itineris expeditionem præbere debebit. *l.* 6. §. 1. & 2. *Cod. de appellat.*

[d] Per hanc divinam sanctionem decernimus ut licentia quidem pateat in exercendis consultationibus, tam appellatori quam adversæ parti, novis etiam adsertionibus utendi, vel exceptionibus, quæ non ad novum capitulum pertinent, sed ex illis oriuntur, & illis conjunctæ sunt quæ apud anteriorem judicem noscuntur propositæ. Sed & si qua dicta quidem allegatio monstrabitur, vel instrumentum aliquod prolatum, probationes tamen illo quidem defuerint tempore, verum apud sacros cognitores sine procrastinatione præberi poterunt: id quoque eos admittere, quo exercitatis jam negotiis pleniore subveniatur veritatis lumine. *l.* 4. *Cod. de temp. & reparat. appellat.*

[*What is said in this Article of pleading new matter in an Appeal, is to be understood of Appeals from Definitive Sentences. For that is not allowed in Appeals from a Grievance done in an Interlocutory Decree, unless the Grievance be such as cannot be redressed in the Appeal from the Definitive Sentence. The Rule in Appeals from Grievances is, that they are to be heard* ex iisdem actis, *that is, that no more is to be brought before the Judge of the Appeal than what was before the Judge below.* Clement. lib. 2. tit. 12. de appellat. cap. 5.]

VII.

7. Penalties against the Appellant who is cast.

The Appellant who loses his Appeal ought to pay a Fine, and to be condemned in the Costs of the first Instance, as well as in those of the Appeal.

VIII.

8. The Judge made a Party to the Appeal.

One may appeal as from a Denial of Justice, and make the Judge a Party, when the Cause being ripe for hearing, he delays or refuses absolutely to decide it, provided the Party who calls on the Cause has made two formal Demands of Justice from the Judge, by leaving Notice of his Prayer either in the Registry of the Court, or at the Judge's House, or acquainting himself personally with it.

See the Ordinance of 1667. *tit.* 25.

IX.

9. Other cases where the Judge may be made a Party to the Appeal.

There are many other Cases in which the Judge may be made a Party to the Appeal from his Sentence, with the Permission of the Judge before whom the Appeal is brought [e]. As if he has given Sentence either out of Hatred, or Fa-

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vour to any of the Parties, if he has been bribed, if he has given Sentence contrary to the plain known Law, or if he has assumed the Cognizance of Causes which no ways belonged to his Jurisdiction.

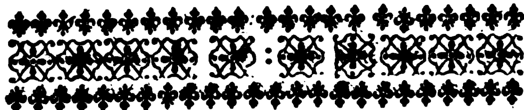
[e] Omnes cognitores & judices a pecuniis & patrimoniis abstineant, neque alienum jurgium putent suam prædam. Etenim privatarum quoque litium cognitor, idemque mercator, statutam legibus cogetur subire jacturam. *l.* 3. *Cod. ad Leg. Jul. repetund.*

Si quis scit venalem fuisse de jure sententiam, si quis pœnam vel pretio remissam, vel vitio cupiditatis ingestam, si quis postremò quâcunque de causâ improbum judicem potuerit approbare, is vel administrante eo, vel post administrationem depositam in publicum prodeat, crimen deferat, delatum approbet, cum probaverit & victoriam reportaturus & gloriam. *l.* 4. *ibid.*

X.

10. The Judge who is properly made a Party to the Appeal is liable to Costs and Damages.

The Judge who is declared to have been properly made a Party to the Appeal, ought to be condemned in Costs and Damages to the Party who has made him a Defendant in the Appeal.



TITLE IX.

Of the Decrees of Supreme Courts of Justice, and the Means of getting them revoked, or annulled.

The CONTENTS.

1. *Of petitioning the Court it self against the Decree, or applying to the King in Council to have it reversed.*
2. *In what stile the Writ for petitioning runs.*
3. *The Heads of Complaint to be suggested in a Petition for Redress against Decrees pronounced against Persons of full Age.*
4. *Reasons to be suggested in a Petition for Minors, and for the King.*
5. *Within what time the Petition ought to be lodged.*
6. *Proceedings upon the Petition.*
7. *If two Petitions may be preferred touching the same Affair.*
8. *Decrees pronounced by Sovereign Courts.*
9. *Of a third Sort of Opposition.*
10. *Of the Interpretations of a Decree.*

1. Of petitioning the Court it self against the Decree, or applying to the King in Council to have it reversed.

THERE lies no Appeal from Judgments given by Courts which the Sovereign has impowered to administer Justice in the last Resort [a]. But one may in certain Cases be relieved by the extraordinary Ways of obtaining leave from the King to present a Petition to the Court, setting forth the particular Errors and Defects of the Judgment complained of, or applying to the King's Council, in order to have the Judgment reversed as being directly contrary to the known and received Law of the Kingdom [b].

[a] Appellandi facultas (a sententiis Præfecti Prætorio) interdicta est. Credidit enim Princeps, eos qui ob singularem industriam, exploratâ eorum fide & gravitate, ad hujus officii magnitudinem adhibentur, non aliter judicaturos esse pro sapientiâ ac luce dignitatis suæ, quam ipse foret judicaturus. *l. unicâ* §. 2. *ff. de Officio Præfecti Prætorio.*

[b] Litigantibus in amplissimo prætorianæ præfecturæ judicio, si contra jus se læsos affirment, non provocandi, sed supplicandi licentiam ministramus: licet pro curiâ, vel qualibet publicâ utilitate, seu aliâ causâ dicatur prolata sententia. *l. unicâ. Cod. de sententiis præfectorum prætorio.*

[*In* England *there lies no Appeal from a Court of Delegates, which is impowered to judge finally of all Causes that are to be decided by the Civil or Canon Law. And the only Way of being relieved against a Sentence of a Court of Delegates, is by petitioning the King for a Commission of Review, appointing other Judges to review the Sentence complained of. But as this is not a Matter of Right which the Subject can claim, and is only pray'd as a meer Grace and Favour, the same is not readily granted unless upon extraordinary Occasions, when the Circumstances of the Case appear plainly to be such as deserve it.* Cok. 4. Inst. pag. 3. 41.]

II.

2. In what stile the Writ for petitioning runs.

The Writ in Form of a Petition runs in the Name of the King, who requires the Judges who have pronounced the Decree, that if what has been suggested in order to obtain the said Writ be duly verified, they put the Parties in the same State and Condition they were in before the Decree.

The Writ against Sentence given by the Presidial Courts, mentioned in the first Article of the Edict, is not taken out of the Chancery; it being sufficient to apply to the same Presidial by a bare Petition.

III.

3. The Heads of Complaint to be suggested in a Petition for Redress against Decrees pronounced against Persons of full Age.

The Heads of Complaint suggested in a Petition for Redress against Decrees pronounced against Persons of full Age, are eleven in number [c]. If there is any personal Deceit or Cousenage on the Part of any one of the Parties; if the Manner of proceeding prescribed by Law has not been observed; if Judgment has been given touching Things that were not demanded, or not disputed; if more has been

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been pronounced for than has been demanded; or if the Judge has omitted to give Sentence on any Point contained in the Demand; if there is a Contrariety of Decrees or Judgments in the last Resort, between the same Parties, on the same Heads, and in one and the same Jurisdiction; if there are Dispositions that are inconsistent with one another in the same Decree; if the Affairs wherein the King, the Church, or the Civil Government are concerned have not been communicated to the Advocates or Sollicitors General; if the Judgment has been founded on forged Deeds, or upon Offers which have been justly disallowed; or if the Party has newly recovered Writings of Importance to decide the Matter in dispute, which had been secreted by the Means of his Adversary.

[c] Præfecti etiam prætorio ex suâ sententiâ possunt in integrum restituere, quamvis appellari ab his non possit. Hæc idcirco tam varie; quia appellatio quidem iniquitatis sententiæ querelam: in integrum verò restitutio erroris proprii veniæ petitionem, vel adversarii circumventionis allegationem continet. *l.* 17. *ff. de minoribus* 25. *annis*.

Si quando de aliquâ causâ processerit definitiva sententia, & provocatio fuerit subsecuta: appellationis examinatores secundum leges quæ tempore definitivæ sententiæ obtinebant, terminum dare negotio: hoc eodem videlicet observando, & in retractandis amplissimæ Prætorianæ sententiis. *Nov.* 115. *tit.* 16. *cap.* 1.

Ultra id, quod in judicium deductum est, excedere potestas judicis non potest. *l.* 18. *ff. de communi dividundo.*

Falsam quidem testationem qua diversa pars in judicio adversus te usa est, ut proponis, solito more arguere non prohiberis: sed causa judicati in irritum non devocatur, nisi probare poteris, eum, qui judicaverit, secundum ejus instrumenti fidem, quod falsum esse constiterit, adversus te pronuntiasse. *l.* 3. *Cod. si ex falsis instrumentis vel testimoniis judicatum sit.*

IV.

4. Reasons to be suggested in a Petition for Minors, and for the King.

Minors, Clergymen, and Communities may apply for Redress against Decrees by Way of Petition, when they have not been defended, or when they have not been represented by Persons duly appointed. There is likewise room for presenting a Petition, in relation to Judgments which concern the Rights of the Crown and of the Demesnes, when the King's Council have not been called before the Conclusion of the Cause, to know whether they have any more Writings to produce, or any new Matter to alledge; of which mention ought to be made in the Decree.

V.

5. Within what time the Petition ought to be lodged.

The Writ for Leave to petition against a Decree must be taken out, intimated, and served on the adverse Party within six Months, to be computed, with regard to Majors, from the Day that they were served with a Copy of the Decree, or Judgment in the last Resort, either Personally, or by proper Notice left at the Dwelling-house; and with respect to Minors, to be computed from the Day that they arrive at the Age of their Majority. There is a whole Year's Delay from the Day of the Service of the Decree that is granted to Churches, Hospitals, Communities, and to those who are absent out of the Kingdom on Account of the Publick. The Heirs of him who dies within six Months from the Time of the Service of the Decree, have still a further Delay of six Months more from the Time that the Decree has been served on him anew. It is the same Thing in the Case of Incumbents of Church Benefices, who have a new Delay of one Year granted them for petitioning, after they have been served with a Copy of the Decree, when they have succeeded within the Year after the Service of the Decree on the former Incumbents, who did not resign in their Favour. When the Grounds of Complaint suggested in the Petition are, that the Sentence was founded on Deeds that are counterfeit, or that Writings, which are of importance to decide the Merits of the Cause, are newly found, which were kept up by the adverse Party; in that case the Delay runs only from the Day that the Forgery, or the Writings that were wanted are discovered, provided they have Proof thereof in writing. If the Petition is against a Sentence that has been given by a Presidial Court of the first Sort mentioned in the Edict, the Intimation and Service thereof must be within half the Time that is allowed either to Majors, or Minors, to Churches, to Communities, and to those who are absent out of the Kingdom on a publick Account, for obtaining Redress against Decrees that are final.

VI.

6. Proceeding upon the Petition.

The Petition must be argued in the same Court where the Decree complained of was pronounced, unless it be in such Courts where there is a particular separate Court appointed for the Hearing of Petitions, in which the Merits of the Petition must be argued, saving always the Liberty of remitting it to the whole Court, if the Parties are ordered to argue the Merits of it in full Assembly. In the Argument on these Petitions, the Counsel are to insist only on the Exceptions to the Manner and Form of the Proceedings, without entring into the Merits of the Cause. When the Suggestions in the Petition are declared to be sufficient, the Parties are restored to the same Condition they were in before the Decree, and then Sentence is afterwards given upon the Merits of the Cause.

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VII.

7. If two Petitions may be preferred touching the same Affair.

The Party whose Petition has been rejected, is not to be allowed to present another Petition, whether it be against the former Decree, or against that which has rejected his Petition, nor even against the Decree that has been made touching the Rescinding of the former Decree, when the Writ relating thereto has been duly entred [d].

[d] Si quis adversus præfectorum prætorio sententias duxerit supplicandum, victusque defuerit, nullam habebit licentiam iterum super eâdem causâ supplicandi. *l. 5. Cod. de precibus Imperatori offerendis.*

See in relation to Petitions of this nature, the 35th Title of the Ordinance of 1667.

VIII.

8. Decrees pronounced by Sovereign Courts.

When the Decrees pronounced by Sovereign Courts are directly contrary to Statutes and Ordinances, or to the known Customs, in that case the Application must be to the King's Council, in order to have them reversed. Thus the Suggestions in Petitions of the first Sort are drawn from the Quality and Act of the Party, but in this last Case the Suggestions must be taken from the Act of the Judge.

See in relation to the reversing of final Decrees, the Regulations touching Proceedings before the Council Board.

IX.

9. Of a third Sort of Opposition.

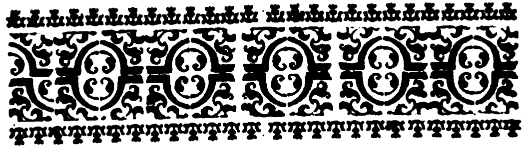
When any one finds himself aggrieved by a Decree to which he was not a Party, neither by a proper Appearance, nor by Default; he is always at liberty to make use of a third Sort of Opposition against the said Decree, whenever it is made use of against him [e]. And the Affair is decided in the same Manner as if the first Decree, to which no Regard is had, had it never been made.

[e] De unoquoque negotio præsentibus omnibus quos causa contingit, judicari oportet: aliter enim judicatum tantum inter præsentes tenet. *l. 47. ff. de re judicata.*

X.

10. Of the interpretation of a Decree.

When there is any Clause in a Decree, about the true Meaning whereof the Parties have just Cause to be divided, they apply to the Judges who pronounced the Decree for the Interpretation thereof. They ought to be very attentive to hinder the Parties, under the Pretext of asking for an Explanation of the Decree, from praying a Review of the whole Decree.



PART II.

Of the Order of Judicial Proceedings.

TITLE I.

Of Accusations, Complaints and Denunciations.

The CONTENTS.

1. *Different ways of accusing a Criminal.*
2. *Of Complainants, and of the Form of the Complaint.*
3. *Of the Accuser, and the Prayer which he makes.*
4. *When the Accuser may retract his Accusation.*
5. *In what manner the Information of a bare Informer is taken.*
6. *Who are the proper Parties in Criminal Prosecutions.*
7. *Penalties to which the Accuser is liable when the Accusation is malicious.*
8. *In what case the King's Proctor may be liable to Damages.*

I.

1. Different ways of accusing a Criminal.

THERE is a Distinction to be made in Matters criminal, between a Complaint, an Accusation and Denunciation.

II.

2. Of Complaints, and of the Form of the Complaint.

The Complainant is he who presents a Petition to the Judge, in which he complains of a Crime that has been committed, and therein sets forth the principal Circumstances of the Fact, and avers the Truth of them, without demanding any Reparation, without making himself a Party, and consequently without being obliged to advance any Thing for carrying on the Prosecution, or being intitled either to Damages or Costs, in case the Party accused be found guilty of the Crime laid to his Charge [a]. All the Sheets of the Petition of Complaint ought to be signed by the Party, or by his Proctor impowered by a special Proxy for that Purpose. And mention is made in the Minutes, and on the engrossed Peti-

 tion

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tion, of its being signed by the Party, or of his Refusal to do it.

[a] Libellorum inscriptionis conceptio talis est, Consul & dies. Apud illum prætorem vel proconsulem Lucius Titius professus est, se Mæviam Lege Julia de adulteriis ream deferre: quod dicat eam cum Caio Seio, in civitate illâ, domo illius, mense illo, consulibus illis, adulterium commisisse. Utique enim & locus designandus est, in quo adulterium commissum est: & persona cum quâ admissum dicitur, & mensis; hoc enim Lege Juliâ publicorum cavetur. Et generaliter, præcipitur omnibus qui reum aliquem deferunt. ——— Item subscribere debebit is, qui dat libellos, se professum esse, vel alius pro eo, si literas nesciat *l.* 3. *ff. de accusat. & inscriptionibus.*

See the Ordinance of 1670, *Title* 3.

III.

3. Of the Accuser, and the Prayer which he makes.

The Accuser is he who makes himself a Party to the Suit, either by his Complaint, or by a subsequent Act, who procures Informations to be taken, who carries on the Accusation in his own Name, and at his own Expences, and who concludes with a Prayer for Satisfaction of his Damages. In *France*, the Accuser never prays that any corporal Punishment be inflicted on the Party offending; because such Conclusions, or Prayers, are to be made by the King's Proctors, by the Proctors Fiscal of such Lords as have Jurisdiction within their Manors, or by Promoters of the Office in Ecclesiastical Courts, who are always the Parties principal in Criminal Prosecutions. Because those Persons who are intrusted with the Care of the Publick are more nearly concerned in the Punishment of Crimes, than the particular Persons who have been injured.

IV.

4. When the Accuser may retract his Accusation.

When the Complainant has made himself a Party to the Suit, whether it be by his Complaint, or by an Act which he may interpose in any Part of the Cause, provided it be before Judgment given, he may retract the same within twenty four Hours after the Time of his giving notice that he had made himself a Party. But such Declaration does not excuse him from paying the Costs which were incurred before his Retractation.

See the Ordinance of 1670, *Title* 3.

V.

5. In what manner the Information of a bare Informer is taken.

He who is only a bare Informer goes and declares to the King's Proctor, that such a Person, whom he names, has committed a Crime, and he relates the particular Circumstances of it. That Declaration is entred in the Register Book of the King's Proctor, or of the Proctor Fiscal of the Lordship, and the Informer sets his Hand to it. If the Informer cannot write, the Register of the Office takes it down in writing in the Presence of the Informer, and mentions the Reason why the Information is not signed.

See the Ordinance of 1670, *Title* 3.

VI.

6. Who are the proper Parties in Criminal Prosecutions.

The King's Attorney and Sollicitor General, and the Proctors Fiscal of Lords who have a Jurisdiction, being charged by virtue of their Office with the publick Revenge, ought to carry on the Prosecution against Criminals, although there be no Accuser, nor even Informer. In which case the Prosecution is at the Charge of the King, or of the Lord who has a Sovereign Jurisdiction for the Tryal of such Crimes.

VII.

7. Penalties to which the Accuser is liable, when the Accusation is malicious.

When the Accusation is judged to be malicious, the Accusers and the Informers are condemned to pay the Expences and Damages of the Party accused, and sometimes to suffer bodily Punishments, according to the Nature and Circumstances of the Calumny [b]. But the Accuser is excused, if he has not out of ill will preferred an Accusation which he knew to be ill grounded; if he had reason to believe that the Person whom he accused was really guilty, and if he was bound in Honour and in Point of Interest to prosecute the Criminal.

[b] Quisquis crimen intendit, non impunitam fore noverit licentiam mentiendi. *l.* 10. *Cod. de calumniatoribus.*

Sed non utique, qui non probat quod intendit, protinus calumniari videtur; nam ejus rei inquisitio arbitrio cognoscentis committitur; quia reo absoluto, de accusatoris incipit consilio quærere, qua mente ductus ad accusationem processit, & si quidem justum ejus errorem repererit, absolvit eum: si vero in evidenti calumniâ eum deprehenderit, legitimam pœnam ei irrogat. *L. unicâ* §. 3. *ff. ad Senat. Turpilianum.*

Qui non probasse crimen quod intendit, pronuntiatur: si culumniæ non damnetur, detrimentum existimationis non patitur. Non enim si reus absolutus est, ex eo solo etiam accusator qui potest justam habuisse veniendi ad crimen rationem, calumniator credendus est. *l.* 3. *Cod de calumniatoribus.*

The Ordinance of King Philip *the Fourth, in the Year* 1303, *is conformable to these two last Laws, and it requires nothing more to exempt any one from falling under the Penalty of Calumny, than barely that the Party accused be charged with the Crime by the Testimony of one Witness without Reproach, or that there be strong Presumptions against him.*

VIII.

8. In what Case the King's

The King's Proctor, or the Proctor Fiscal of the Lord within whose Jurisdic-

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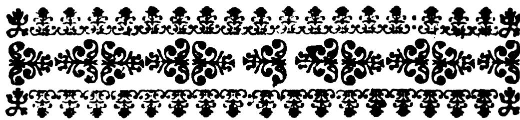
Proctor may be liable to Damages.

tion the Prosecution has been carried on, ought to name the Informer, after the Criminal has been acquitted; that he who has been rashly accused may have his recourse for Recovery of Damages [c]. If the King's Proctor, or the Proctor Fiscal of the Lord, have carried on the Prosecution without a previous Information, they themselves ought to be condemned to pay Damages to the Party accused; which ought not to take Place, except in the Case where the Accusation appears to be a manifest Calumny.

[c] Advocatum fisci, qui intentionem delatoris exequitur, in omnibus officii necessitas satis excusat. *l.* 5. §. 13. *de his quæ ut indignis auferuntur.*



TITLE II.

Of Informations, and Decrees.

The CONTENTS.

1. *A Relation of the whole Fact to be drawn up in Writing, after the Complaint is lodged.*
2. *The Inspection of wounded Persons by Surgeons.*
3. *When the Crime is established, the next Step is, to take the Information.*
4. *How Witnesses are compelled to give their Testimony.*
5. *Of the Circumstances which the Witness ought to explain before he deposes.*
6. *What he is to observe in giving his Deposition.*
7. *Publications of Monitions, to oblige Persons to discover what they know.*
8. *Different kinds of Decrees.*
9. *Rules that are observed in granting Decrees.*
10. *When to Arrest or Imprison a Person in a previous Information.*
11. *The gradual Conversion of Decrees from one to another.*
12. *Of the Excuses made by the Criminal.*

I.

1. A Relation of the whole Fact to be drawn up in writing after the Complaint is lodged.

THE first Thing that the Judge ought to do upon the Complaint made, either by a private Party, or by the publick Officers, is to examine whether any Crime has been really committed or not, to inform himself of all the Circumstances of the Time and Place where the Fact was done, and to draw up a Relation thereof in Writing; which he ought to lodge in the Registry within four and twenty Hours, together with the Cloaths, Moveables, and Arms which may be of service to convict the Criminal. And this is more especially to be observed, when any one has been killed or wounded [a].

[a] Item illud sciendum est, nisi constet aliquem esse occisum, non haberi de familiâ quæstionem. Liquere igitur debet, scelere interemptum, ut Senatusconsulto locus sit. *l.* 1. §. 24. *ff. de Senatuscon. Silaniano.*

II.

2. The Inspection of wounded Persons by Surgeons.

Those who are wounded may get their Wounds to be inspected by sworn Surgeons, who draw up a Relation thereof in Writing, in which they ought to set down distinctly the Condition of the Wound, of the Instrument with which it was given, of the Place where the Wound is, and of the Condition of the sick Person; that in case any Thing is to be decreed for Alimony, or for Medicines, the Allowance may be proportioned to the Condition in which the wounded Person appears to be, and to the Damage which his Family sustains by his Wound [b]. The Persons who prosecute others for Murder, may likewise procure the dead Corpse to be inspected, that it may appear from thence whether the Deceased died of his Wounds.

[b]. Ratio habeatur. ——— impensarum in curationem factarum, & operarum amissarum, quasque amissurus quis esset inutilis factus. *l.* 3. *ff. si quadrupes pauperiem fecisse dicatur.*

Si vulneratus fuerit servus non mortiferè, negligentiâ autem perierit, de vulnerato actio erit, non de occiso. *l.* 30. §. 4. *ad Legem Aquiliam.*

Si ex plagis servus mortuus esset, neque id medici inscitiâ aut domini negligentiâ accidisset, rectè de injuriâ, occiso eo agitur. *l.* 52. *ibid.*

See the Ordinance of 1670, *Title* 5.

III.

4. How Witnesses are compelled to give their Testimony.

When the Fact of the Crime is well established, the next Step is, to take the Information, that is, to examine the Witnesses in order to find out the true Author of the Crime. The Witnesses are procured by the Accuser, or by the publick Officer who carries on the Prosecution [c]. For it is the Part of the Accusers to bring Proof of what they alledge; and the Party accused is acquitted, if there is no Proof against him.

[c] Qui accusare volunt, probationes habere debent. ——— Actore enim non probante, qui convenitur, & si nihil ipse præstat, obtinebit. *l.* 4. *Cod. de edendo.*

IV.

5. Of the Circumstance which the

It being for the Interest of the Publick that Crimes do not go unpunished, Witnesses

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nesses may be compelled to give their Testimony, either by condemning them to pay a Fine in case of Refusal, or by Imprisonment, if they are Lay-Persons; and by a Fine, if they are Clergymen; and by seizing the Temporal Revenues of the Monastery, if the Witnesses are Monks. We must except from this Rule the Relations of the Party accused, who cannot be compelled to give their Testimony, no more than the Advocate or Proctor whom they have consulted in relation to the Accusation. For their Office obliges them to Secrecy as much as Confessors. Witnesses of both Sexes are examined, although they be under the Age of Puberty. It is the Judge's Business to examine in the Course of the Proceeding what Regard ought to be had to their Testimony.

See the 3d Section of the 6th Title of the 3d Book of the Civil Law in its Natural Order, where the Proofs of this Article are to be met with. The Reader may likewise consult the Ordinance of 1670, Title 6. It is this Ordinance which directs, contrary to the Roman *Law, that Witnesses shall be examined although they be under the Age of Puberty.*

V.

5. Of the Circumstances which the Witness ought to explain before he deposes.

The Witness when he appears before the Judge, ought in the first Place to produce the Summons with which he was served to oblige him to come and give his Testimony; in the next Place he is to be sworn; and then he declares every Thing that may serve to shew what Regard ought to be had to his Deposition, his Name, his Surname, his Age, his Quality, the Place of his Abode, if he is a Servant or Domestick to any of the Parties, if he is related to them by Blood or Affinity, and in what Degree.

See the Section of the Civil Law in its Natural Order quoted on the foregoing Article; as also the 6th Title of the Ordinance of 1670.

VI.

6. What he is to observe in giving his Deposition.

After this Declaration made by the Witness, which the Register is to set down in his Deposition on pain of Nullity of his Examination, he is to acquaint the Judge in a clear, distinct, and impartial Manner, with every Thing that he knows, which makes either for or against the Party accused [d]. His Deposition is taken down in Writing by the Register in presence of the Judge, after which it is read over to him, and he declares whether it be agreeable to his Mind, and whether he persists in it; then he signs it, or a Reason is set down why he does not sign it. Both the Judge and Register do also sign the Deposition, and the Judge signs each Page of it. It is the Judge that taxes the Charges and Allowance that is given to Witnesses.

[d] In criminalibus. ——— in quibus de magnis est periculum, omnibus modis apud judices præsentari testes: & quæ sunt eis cognita edocere: ubi. ——— erit opus omnibus observationibus, *Nov.* 90. *cap.* 5.

See the last quoted Section of the Civil Law in its Natural Order, and the Ordinance of 1670.

VII.

7. Publication of Monitions, to oblige Persons to discover what they know.

One may obtain permission from the Judge to have Monitions published, in order to oblige Witnesses by Ecclesiastical Censures to discover Facts within their Knowledge. One ought not to name, nor describe the Persons in the Monitions, unless it be impossible to avoid it, as in the Case of a Monition published in relation to a Fact of Adultery.

See the Ordinance of 1670, *Title* 17.

VIII.

8. Different kinds of Decrees.

When the Party accused is charged by Information, or other Proof, a Decree issues out against him. There are three kinds of Decrees; the First is to call him to answer to the Charge; the Second is to oblige him to appear in Person; and the Third is a Decree to take him into Custody. The only Difference between the two first Decrees is, that the Decree to answer does not imply, as the Decree for a Personal Appearance does, a Prohibition to a Judge, or other publick Officer, to act in his publick Capacity until he obeys the Order of Court; and that the first Decree supposes a less Degree of Proof, or a less Offence than the Second.

IX.

9. Rules that are observed in granting Decrees.

The Judge having seen the Conclusions of the King's Counsel upon the Informations, pronounces one of these three Decrees against the Party accused; according to the Quality of the Crimes, the Proofs, the Presumptions, and the Personal Arrest is more readily granted against a Vagabond, or one that is not known, than against a Person that has a fixed Abode; against one of a mean Condition, than against a Magistrate, or a Gentleman [e].

[e] De custodiâ reorum Proconsul æstimare solet, utrum in carcerem recipienda sit persona, an militi tradenda, vel fidejussoribus committenda, vel etiam sibi. Hoc autem vel pro criminis quod objicitur qualitate, vel propter honorem, aut propter amplissimas facultates, vel pro innocentiâ personæ, vel pro dignitate ejus, qui accusatur, facere solet. *l.* 1. *ff. de custodia & exhibitione reorum.*

See the Ordinance of 1670, *Title* 10.

X.

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X.

10. When to Arrest or Imprison a Person in a previous Information.

One may decree a Personal Arrest without a previous Information, when the Crime is notorious, that is to say, when it has been committed in the Presence of a great many People, when the Charge is for fighting a Duel, when the Persons accused are Vagabonds, and have no fixed Place of Abode, or for Crimes committed by Servants in the House of their Master. One may likewise imprison, without any previous Information, him who has been conducted to Prison with the publick Voice and Acclamation of the People, or who has been taken in the Fact, such as a Thief who has been surprized whilst he was committing the Theft, or on whom the Thing stolen has been found, the Murderer who has been seen with his Sword naked and bloody in the Place where the Murder was committed, the Adulterer who has been taken in the Act [f].

[f] Fur est manifestus, quem Græci ἐπ' αὐτοφώρῳ appellant, hoc est, eum qui deprehenditur cum furto. Et parvi refert, à quo deprehendatur, utrum ab eo cujus res fuit, vel ab alio. Sed utrum ita demum fur sit manifestus, si in faciendo deprehendatur, an vero & si alicubi fuerit deprehensus? Et magis est, ut & Julianus scripsit, & si non ibi deprehendatur ubi furtum fecit, attamen esse furem manifestum, si cum re furtivâ fuerit apprehensus priusquam eo loci rem pertulerit, quo destinaverat. *l.* 3. *ff. de furtis.*

See the Ordinance of 1670, *Title* 10.

XI.

11. The gradual Conversion of Decrees from one to another.

If he who has been ordered to answer to the Charge, does not appear within the Time that is fixed by the Order of Court, according to the Distance of the Place where he lives, the said Decree is converted into an Order for his personal Appearance; and if that Order is not complied with within the Time prefixed, then an Order issues for the Arresting of his Person.

See the Ordinance of 1670, *Title* 10.

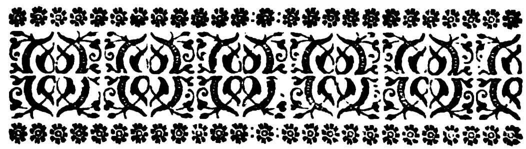
XII.

12. Of the Excuses made by the Criminal.

If the Criminal who is under an Order of Court to answer to the Charge, or who is cited to appear in Person, or against whom a Personal Arrest has been awarded, is not able to appear by reason of Sickness, or of a Wound, or Hurt, which does not allow him to go out of his House, without exposing himself to visible Danger, he gets his Excuse to be made by a Proctor impowered by a special Proxy for that purpose, signed before a Notary Publick [g]. He annexes to the Proxy the Report of an approved Physician, who has made Oath of the Truth of his Report before the Judge of the Place. A Copy of the Excuse is delivered to the King's Proctor, and to the adverse Party, and if the Reason alledged appear to be sufficient, Informations are had thereupon reciprocally; and in case the Facts are justified, a Supersedeas is granted, during which Delay the Criminal remains under Confinement in his own House, as in a Jail, and the Landlord of the House, or some other Person, becomes bound for his Appearance.

[g] Si quis judicio se sisti promiserit, & valetudine vel tempestate, vel vi fluminis prohibitus se sistere non possit: exceptione adjuvatur, nec immerito, cum enim in tali promissione præsentiâ opus sit: quemadmodum potuit se sistere, qui adversâ valetudine impeditus est. *l.* 2. §. 3. *ff. si quis cautionibus in judicio sistendi causâ factis non obtemperaverit.*

Pœnam contumacis non patitur, quem adversa valetudo, vel majoris causæ occupatio defendit. *l.* 53. §. 2. *ff. de re judicatâ.*



TITLE III.

Of Criminals that are in Contempt.

The CONTENTS.

1. *Enquiry after the Person that is in Contempt.*
2. *The Seizure of the Moveables, and Inventorying of the Immoveables, belonging to the Criminal.*
3. *Citation of the Criminal by publick Outcry.*
4. *Sentence against Criminals who do not appear, and the Manner of putting them in execution.*
5. *What is the Effect of Judgments pronounced against Persons in their Absence, when they do afterwards appear.*
6. *What Proceeding is had when the Person that is in Contempt surrenders himself.*

I.

1. Enquiry after the Person that is in Contempt.

WHEN the Decree for taking into custody the Party accused cannot be put in execution, diligent Search is made after him, and his Goods are seized and inventoried [a]. The Enquiry after him ought to be made at the Place of his settled Abode, or at the Place

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Place of his Residence, if he had any such within the Jurisdiction where the Crime was committed, provided the Enquiry be made within three Months after the Commission of the Crime, for which the Prosecution is carried on. When the Party accused has neither Domicil nor Residence within the Bounds of the Jurisdiction, the Decree is hung up at the Door of the Hall where the Court is kept. And Mention is made of the Hanging up the Decree in this Manner in the Citation against the Criminal; which serves instead of a Copy of the Act relating to the Enquiry and Search that is made after him, and which is left at his Mansion-house, or the Place of his Residence.

[a] Absens requirendus annotatus est, ut copiam sui præstet. Præsides autem provinciaraum circa requirendos annotatos hoc debent facere, ut eos quos adnotaverint edictis adesse jubeant: ut possit innotescere eis qui adnotati sunt. Sed & literas ad Magistratus ubi consistunt, mittere ut per eos possit innotescere, requirendos esse annotatos. *l.* 1. *ff. de requirendis reis, vel absentibus damnandis.*

Cum absenti reo gravia crimina intentantur, sententia festinari non solet, sed adnotari, ut requiratur: non utique ad pœnam, sed ut potestas ei sit purgandi se, si potuerit. *l.* 1. *Cod. de requirendis reis.*

II.

2. The Seizure of the Moveables, and Inventorying of the Immoveables, belonging to the Criminal.

After Enquiry has been made after the Person of the Criminal, they seize his Moveables, and the Fruits of his Real Estate, and Commissioners are appointed to take care of them, according to the Method observed in Seizures of Goods in Civil Causes. If among the Things that are seized there be any which cannot be kept, without Danger, or without too great an Expence, the Officer of the Court ought to cause them to be sold in the next Market Town, on the usual Market Day, and to deposit the Monies arising from the Sale in the Hands of a Person that is responsible.

See the Ordinance of 1670, *Title* 17.

III.

3. Citation of the Criminal by publick Outcry.

Enquiry having been made after the Person of the Criminal, and his Moveables being seized, he is cited to appear within fifteen Days; after the Expiration of which Time, and of a Day which is allowed him over and above for every ten Leagues Distance between the Place of his Abode, and the Court where he is cited to appear, he is again once more cited by publick Outcry to appear within a Week. The first of these two Citations is served at his Mansion-house, or the Place of his Residence, where he was sought for. The publick Outcry is made with the Sound of Trumpet before the Criminal's Mansion-house, or Place of Residence, if he has any, in the publick Market Place, and at the Door of the Hall where the Court is held, where a Copy of the Act narrating the said Proceeding ought to be affixed.

See the same Ordinance, and the same Title.

IV.

4. Sentence against Criminals who do not appear, and the Manner of putting them in execution.

When the Contempt has been sufficiently proved, the Judge orders the Witnesses to be repeated to their Depositions, that is, to declare whether they persist in what they have deposed, and decrees that such Repetition of the Witnesses shall have the same Effect, as if they had been confronted with the Party accused [b]. After the Witnesses have been repeated, the Judge declares the Contumacy to be well proved, and by the Judgment the Criminal is condemned, if there is sufficient Proof against him arising from the Informations that have been taken against him. For his Contumacy alone, without a Proof of the Crime, is not sufficient Ground for his Condemnation. When the Sentence imports Death, it is Executed by hanging up his Effigie in the Market Place. And the Sentences which condemn the Criminals to other Corporal Punishments, to publick Penance, or to perpetual Banishment, are executed against those that are absent by writing them on a Board, which is likewise hung up in some publick Place. The Sentences which inflict other Sorts of Punishments, are notified at the Dwelling-house of the absent Criminal, or the Place of his Residence, or posted up at the Door of the Hall where the Court is held. The Act reciting the Execution of the Criminal in Effigie is inserted at the bottom of the Judgment. The Effect of this execution is, to prorogue the Time of Prescription, so that the Criminal who would have prescribed against the Punishment due for the Crime by the Space of twenty Years, does not acquire the said Prescription till after the Expiration of thirty Years from the Day of the Execution.

[b] Non semper compelleris ut adversus absentem pronunties, propter subscriptionem patris mei, quâ significavit etiam contra absentes sententiam dari solere. Id enim eo pertinet, ut etiam absentem damnare possis, non ut omnimo de necesse habeas. *l.* 1. *Cod. quomodo & quando judex sententiam proferre debeat.*

See the Ordinance of 1670, *Title* 17.

V.

5. What is the Effect of Judgments pronounced against Per-

So soon as the Persons who are condemned for their Contempt in not appearing are taken Prisoners, or surrender themselves; all the Proceedings against them are

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sons in their Absence, when they do afterwards appear.

are annulled with respect to the Punishment, that is, they serve to no other purpose but as Citations, and a new Proceeding is commenced against the Criminals [c]. But with regard to Fines, to the Contumacy Fees, to Money Concerns, and to Confiscations, it is necessary to distinguish three different Times [d]. If the Criminal surrenders himself, or is taken within a Year after the Execution of the Judgment pronounced against him for his Contempt, he recovers his Moveables and Immoveables that were distrained, as also the Monies arising from the Sale of his Moveables that have been disposed of, deducting the Charges, and he paying the Fine to which he was condemned. If the Contempt is purged after the Year from the Execution of the Judgment, but within five Years after the said Execution, the Criminal does not recover his Moveables and Immoveables that have been seized, and the Party who prosecutes ought to be paid his Charges of the Prosecution, but the Nonpayment thereof will not stop the further Proceedings in the Prosecution, and the giving of Judgment. If the Criminal surrenders himself after the five Years, the Pecuniary Mulcts, the Fines and Confiscations, are put in Execution, as if they had been pronounced by Decrees, made in presence of the Parties. We must except the Case, where the King grants to the Criminal Letters for purging his Contempt. For if the Judgment that has been given in this Case does not carry with it a Confiscation of the Criminal's Estate, they restore to him all his Moveables and Immoveables, but make no Restitution of the Fines, of the Sums of Money decreed to be paid to the Prosecutor, or of the Fruits and Profits that have been made of his Lands and Tenements while under Seizure.

[c] Quod jussit vetuitve Prætor, contrario imperio tollere & repetere licet, de sententia contra. *l.* 14. *ff. de re judicatâ.*

[d] Mandatis cavetur, intra annum requirendorum bona obsignari, ut si redierint, & se purgaverint, integram rem suam habeant. Si neque responderint, neque qui se defendant, habebunt: tunc post annum bona in fiscum coguntur. *l. ult ff. de requirendis vel absentibus damnandis.*

By the Civil Law the Criminal had not his Goods delivered back to him, if he did not surrender himself within a Year after he was pronounced to be in Contempt, even although he had been acquitted from the Crime laid to his Charge.

In summa sciendum est, nulla temporis præscriptione, causæ defensione summoveri eum, qui requirendus annotatus est. *l.* 4. *ff. de requirendis vel absentibus damnandis.*

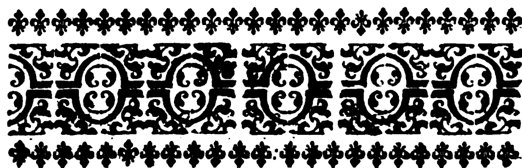
See the Ordinance of 1670. *Title* 17.

As to the Question, whether he that is condemned by Default, and dies within the five Years from the Time that the Judgment was put in execution, is reckoned to be civilly dead from the Day of the Execution. See the Remark on the 36th *Article of the* 3d *Section of the* 1st *Title of the* 2d *Part of the Civil Law in its Natural Order.*

VI.

6. What Proceeding is had when the Person that is in Contempt surrenders himself.

When the Criminal that has been condemned by Default is brought into Prison the Judge examines him upon Interrogatories, and then they proceed to confront him with the Witnesses. However, if the Witness who has been repeated is dead either a Natural or Civil Death, or if he has been absent a long Time, there is no other Confrontation of the said Witness with the Criminal but by his Deposition; and in that Case no Regard is had to any Objections made against the Witness but what are justified by Writing.



TITLE IV.

Of the arresting, imprisoning, and interrogating of Criminals.

The CONTENTS.

1. *What is to be done after the Criminal is carried to Prison.*
2. *How the Prisoner is to be treated in Prison.*
3. *Women and Men ought to be kept apart.*
4. *How the Prisoner is provided with Necessaries.*
5. *Of the Examination of the Criminal.*
6. *The Manner of examining the Criminal.*
7. *What Method is observed with respect to those who do not understand the Language, or those who are deaf and dumb.*
8. *Of one that stands mute.*
9. *Although the Criminal confesses the Fact upon his Examination, yet the Prosecution is carried on against him as if he had denied it.*

10. *Criminal*

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10. *Criminal Causes decided without repeating the Witnesses, and without Confrontation.*

I.

1. What is to be done after the Criminal is carried to Prison.

ASSOON as a Criminal is taken up by virtue of an Order or Decree for arresting him, or by Hue and Cry, or being taken in the Fact, he is carried to Prison. And so soon as he is brought into Prison, he is to be registred, that is, the Jailer, or he who keeps the Register of the Jail, ought to write down in his Book, all the Leaves whereof are signed and marked by the Judge, the Name, the Surname, the Quality of the Prisoner, and of the Party at whose Instance he is arrested, the Judgment by virtue whereof he was arrested, and the Domicil which he has made choice of in the Place where the Prison is situated. If the Prisoner had Papers, Cloaths, and Moveables in his Possession at the Time when he was taken up, the Officer, or Bailiff who carried him to Prison, draws up an Inventory or Account of them, which he signs himself, and gets two Witnesses to attest it. They deposit in the Registry such Part thereof as will serve to defray the Charges of the Proceeding, and the Surplus is delivered to the Prisoner who signs the Inventory; if he refuses to sign it, particular Mention is made of such his Refusal.

See the Ordinance of 1670, *Title* 13.

II.

2. How the Prisoner is to be treated in Prison.

Prisons were not established as a Punishment of the Guilty, but only as a Means to secure their Persons until they are brought to a Tryal [a]. For which Reason it is that they ought to be secure, and yet built in such a Manner as not to endanger the Health of the Prisoners [b]. However for the greater Security of the Prisoners it is necessary to take greater or lesser Precautions, according to the Condition of the Persons, and the Nature of the Crimes for which they stand committed. The Jailer cannot shut the Prisoners up in Dungeons, nor put them in Irons, nor release them from thence, when they are in that condition, without an express Order signed by the Judge. He is obliged to visit, at least once a Day, the Criminals who are shut up in Dungeons, and if he finds any of them to be sick, to give advice thereof to the King's Proctors, or those of the Lords within whose Prisons they are confined, that they may cause them to be visited by Physicians and Surgeons, and to be removed into more airy Rooms, if it be found necessary for restoring them to their former Health.

[a] Carcer enim ad continendos homines, non ad puniendos haberi debet. *l.* 8. §. 9. *ff. de pœnis.*

[b] In quacunque causa reo exhibito, sive accusator existat, sive eum publicæ sollicitudinis cura produxerit, statim debet quæstio fieri, ut noxius puniatur, innocens absolvatur. ——Intereà verò reum exhibitum non per ferreas manicas, & inhærentes ossibus mitti oportet, sed proliziores catenas, si criminis qualitas etiam catenarum acerbitatem postulaverit, ut & cruciatio desit, & permaneat sub fidâ custodiâ. *l.* 1. *Cod. de custodia reorum.*

III.

3. Women and Men ought to be kept apart.

Women and Men who are Prisoners ought to be confined in separate Apartments, in order to prevent all occasions of Scandal or Debauchery [c].

[c] Quoniam unum carceris conclave permixtos secum criminosos includit; hac lege sancimus, ut etiamsi pœnæ qualitas permixtione jungenda est, sexu tamen dispares diversa claustrorum habere tutamina jubeantur. *l.* 3. *Cod. de custodiâ reorum.*

IV.

4. How the Prisoner is provided with Necessaries.

Criminals who are committed to Prison, are supplied with Bread, Water, and Straw, at the Expences of the King, or of the Lords of Manors in whose Prisons they are confined. But if they are not shut up in the Dungeons, they may procure Victuals and other Necessaries to be sent to them into Prison, or they may buy them of the Jail-Keeper. The Jailer is to give an Acquittance for whatever he receives, and he is strictly enjoined not to take any Thing from the Prisoners by Way of Advance, either for their Diet, their Lodging, or the Fees of the Prison. He is likewise prohibited to take Money or Provisions from Prisoners newly brought into Jail under pretext of fresh Fees, even although they should offer them freely and of their own accord. The senior Prisoners are likewise forbidden to insist on any such Custom or Usage.

See the Ordinance of 1670, *Title* 13. *The same Ordinance enjoins the King's Proctors, and also those of Lords of Manors who have Prisons, to visit the Prisons once every Week, and there to hear the Complaints of the Prisoners, that they may see that they be not inhumanely treated by the Jail-Keepers.*

V.

6. Of the Examination of the Criminal.

The Jailer ought not to suffer any Person to have access to the Prisoners who are committed for Crimes, until they have been examined [d]. Their Examination ought to be begun by the Judge, at farthest within four and twenty Hours after their Commitment. The Judge is required to examine them himself. The Criminal, who is sworn to declare the Truth,

 is

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is obliged to answer to the Questions himself, without the Assistance of any Adviser [e]. They shew him the Moveables, the Cloaths, and the Writings which may serve to prove the Charge against him. The Judge is at liberty to re-examine him as often as he shall think fit. It is the Duty of the Judge to act on these Occasions with the utmost Prudence, so as to take all possible Ways for discovering the Truth, without perplexing the Criminal with subtle Questions, and without laying a Trap to ensnare him.

[d] Sed & caput mandatorum extat, quo divus Pius, cum provinciæ Asiæ præerit, sub edicto proposuit, ut Irenarchæ, cum apprehenderint latrones, interrogent eos de sociis & receptatoribus. *l. 6. ff. de custodiâ & exhibitione reorum.*

[e] Ad crimen judicii publici persequendum frustra procurator intervenit, multoque magis ad defendendum. *l. 13. ff. de publicis judiciis.*

VI.

6. The Manner of examining the Criminal.

While the Judge is examining the Criminal, either on such Questions as he himself thinks fit to propose, or upon Instructions given him either by the Party who prosecutes for his civil Interest, or by him who prosecutes on account of the Publick, the Register takes down in writing the Questions proposed by the Judge, and the Answers made by the Criminal, without making any Interlineation. At the End of each Sitting the Questions and Answers are read over to the Criminal. Each Page is marked, and ought to be signed by the Judge, and also by the Criminal, if he can, and is willing to sign his Name, or Mention is made that he refuses to sign it. When there are several Criminals, they are examined separately. The Examinations are communicated to the Party who prosecutes for his civil Interest, and also to him who carries on the Prosecution for the publick Account.

See the Ordinance of 1670, Title 4.

VII.

7. What Method is observed with respect to those who do not understand the Language, or those who are deaf and dumb.

When a Criminal does not understand the Native Language of the Country in which he is examined, he has an Interpreter given him, who after being duly sworn, explains to the Criminal the Questions, and to the Judge, the Answers made thereto by the Criminal. The Examination is signed by the Judge, by the Interpreter, and by the Criminal, or Mention is made of his Refusal to sign it. If the Criminal is deaf or dumb, or both deaf and dumb, so that he cannot hear the Judge, or is not able to make him any Answer, he has a Curator assigned him, who receives private Instructions from him, and who after having taken an Oath truly and faithfully to defend the Criminal, answers to the Questions proposed by the Judge, and gives in Exceptions to the Witnesses. The Deaf and Dumb Person who can write, may write down his Answers and sign them, as also the Exceptions against the Witnesses, which ought likewise to be signed by the Curator.

See the Ordinance of 1670, Title 14, and Title 18.

VIII.

8. Of one that stands mute.

With regard to the Criminal who stands mute, and refuses to answer when he is able, the Judge admonishes him three several Times to answer, at each of which Times he declares to him if he does not answer, he shall be proceeded against as a Person standing mute, and that he shall not afterwards be admitted to answer to the Questions to which he refuses to answer.

[*The Manner of proceeding against a Criminal who stands mute, and refuses to answer, is different by the Law of* England *according to the Nature of the Crime with which he stands charged. For if a Man be arraigned upon an Indictment of High-Treason, and stand mute, he shall have such Judgment, and incur such Forfeiture, as if he had been convicted by Verdict, or had confessed it. But it is otherwise in the Case of Petit Treason, Murder, or other Felony. In which Cases, the Person standing obstinately mute, forfeits his Goods, and is remanded back to Prison, where he is laid naked on his Back in some dark Room, with Hands and Legs extended, and Weights put on his Breast, which are increased, until he agrees to plead to the Indictment, or expires under the Torture.* Coke 3. Inst. Pag. 14. Hales's Pleas of the Crown, Pag. 227.

IX.

9. Although the Criminal confesses the Fact upon his Examination, yet the Prosecution is carried on against him, as if he had denied it.

Although the Criminal upon his Examination has acknowledged himself to be guilty of the Crimes laid to his Charge, yet nevertheless they proceed to repeat and confront the Witnesses, and go on with the Criminal Prosecution in the same Manner, as if he had denied the Facts of which he is accused; because it may so happen that Fear, Trouble, or Weakness of Mind, may make the Criminal confess Crimes which he has not committed [f]. It is necessary that the Prisoner's Confession be supported by other Proofs, in order to his being condemned to corporal Punishment.

[f] Divus severus rescripsit, confessiones reorum pro exploratis facinoribus haberi non oportere, si nul-

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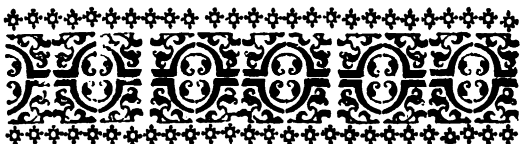
la probatio religionem cognoscentis instruat. *l.* 1. §. 17. *ff. de quæstionibus.*

X.

10. Criminal Causes decided without repeating the Witnesses, and without Confrontation.

If the Crime which has given occasion to the Criminal Prosecution, is not of the Number of those which are to have corporal Punishments, the Person accused, the Party who prosecutes in the Name of the Publick, and the Party who has a Civil Interest in the Prosecution, may agree to have the Matter determined barely upon the Information, and the Examination of the Party accused upon Interrogatories. In which case the Court proceeds to give Judgment in the Cause, after having examined the Petitions, and the Answers, if the Parties have thought fit to give in any in the Delays which have been granted to them. There are some Matters of so slight a Concern, that the Judge ought not to suffer the Cause to be carried on by repeating of Witnesses, and Confrontations; he orders in that Case that the Parties proceed as in ordinary Causes, and that the Informations be turned into a summary Examination of Witnesses, allowing the Party accused to examine Witnesses also on his Part. However the Judge may direct the ordinary Proceeding in Criminal Causes to be resumed, in case he discovers afterwards that the Matter requires it.

See the Ordinance of 1670, *Title* 14, *and Title* 20.



TITLE V.

Of Repeating the Witnesses, Confrontations, the Rack and Torture.

The CONTENTS.

1. *Repeating of Witnesses.*
2. *The Manner of Confrontation.*
3. *Effects of the Depositions of the Witnesses who have not been repeated.*
4. *In what Cases the Criminal is condemned to the Torture.*
5. *Execution of the Sentences which condemn one to the Torture.*
6. *What is observed in putting the Criminal to the Torture.*
7. *Precautions touching the Declarations.*
8. *One is not put twice to the Torture.*
9. *The Torture given for the Discovery of the Accomplices.*

I.

1. Repeating of Witnesses.

THE Witness who has been examined ought to be repeated, that it may appear, whether he perseveres in his Deposition. The Witnesses are summoned in order to their being repeated, as well as to their being first examined. They are first sworn, then their Deposition is read over to them, and they are asked if they will add any Thing to it, or take any Thing from it, or if they will have it to stand as it is. The Register writes down the whole Proceeding in a Paper separate and distinct from the other Proceedings, and reads it over to the Witness who is repeated. The Judge marks and signs all the Pages of the Act of repeating the Witness, and the Witness himself sets his Hand to it, or if he does not, mention is made of his Refusal. The Witness is not to be repeated any more, altho' the Party accused was not present when he was repeated.

See the Ordinance of 1670, *Title* 15.

II.

2. The Manner of Confrontation.

In order to proceed to the Confrontation which ought to follow the Repeating of the Witness, the Party accused is brought Face to Face with the Witness; they are both sworn, and the Judge requires them to declare whether they know one another. Then they read the first Articles of the Deposition of the Witness, which mention his Name, his Age, his Quality, &c. After which the Party accused is required by the Judge to declare what Objections he has to offer against the Witness, if he has any, and he is told that he will not be allowed to make any Objection after he has heard the Deposition read. The Criminal having made his Objections, or declared that he has none to make, the Deposition of the Witness is read; and when the Criminal observes any Contrariety in it, or any Circumstance that may tend to justify him, he may desire the Judge to require the Witness to acknowledge that Part of the Deposition. The Act of Confrontation of the Witness with the Criminal, which contains all that has been said by the one or the other, is writ in a separate Paper. The Judge marks and signs all the Pages of it, and he causes it to be signed by the Criminal, and by the Witness, and if it is not signed by them, mention is made of their Refusal. The same Formalities are to be observed in confronting Criminals with one another.

See the Ordinance of 1670, *Title* 15.

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The Criminal may at any Time whilst the Cause is depending offer Objections against the Witnesses, provided he verify them by some Proof in Writing.

III.

3. Effects of the Depositions of the Witnesses who have not been repeated.

When the Proceedings in the Cause are looked into and examined, they read the Depositions of the Witnesses who have neither been repeated, nor confronted, when they tend to acquit the Criminal, and the Judge ought to have regard to them. For the Rule in all Criminal Prosecutions is, to be more inclinable to acquit the Criminal than to condemn him. When the Prosecution has been carried on by Default, through the Contumacy of the Criminal in not appearing, the repeating of the Witness to his Deposition, is equivalent to Confrontation, in case the Witness dies before he can be confronted with the Party accused.

See the same Ordinance.

IV.

4. In what Cases the Criminal is condemned to the Torture.

In order to lead a Condemnation of the Criminal to the Torture, it is necessary that the Crime with which he is charged be such as deserves the Punishment of Death [a], that it appear that there are strong Proofs against the Criminal, and that nevertheless the said Proofs are not sufficient to condemn him to Death thereupon [b]. The Judges who condemn the Criminal to undergo the Torture, may decree by the same Order, that the Proofs shall remain whole and intire. In this Case they may condemn the Party accused to all Sorts of corporal Punishments, excepting the Punishment of Death, which they are not to pronounce against the Party accused, unless there appear afterwards new Proofs.

[a] In criminibus eruendis, quæstio adhiberi solet. Sed quando, vel quatenus id faciendum sit videamus, & non esse à tormentis incipiendum, & divus Augustus constituit, neque adeo fidem quæstioni adhibendam. Sed & epistola divi Hadriani ad Sennium Sabinum continetur. Verba rescripti ita se habent: ad tormenta servorum ita demum veniri oportet, cum suspectus est reus, & aliis argumentis ita probationi admovetur, ut sola confessio servorum deesse videatur. *l.* 1. *in princ.* & §. 1. *ff. de quæstionibus.*

[b] Edictum divi Augusti, quod proposuit Vivio Avito & Lucio Apponiano Consulibus, in hunc modum extat: Quæstiones neque semper in omni causâ & personâ desiderari debere arbitror, & cum capitalia & atrociora maleficia non aliter explorari & investigari possunt, quam per servorum quæstiones, efficacissimas eas esse ad requirendam veritatem existimo, & habendas censeo. *l.* 8. *ibid.*

Oportet autem judices nec in his criminibus, quæ publicorum judiciorum sunt ad investigationem veritatis, à tormentis initium sumere, sed argumentis primum verisimilibus probabilibusque uti. Et si veluti certis indiciis ducti, investigandæ veritatis gratiâ ad tormenta putaverint esse veniendum. *l.* 8. *Cod. de quæstionibus.*

V.

5. Execution of the Sentence which condemns one to the Torture.

The Sentences which condemn Criminals to the Torture, ought to be drawn up and signed immediately after they are pronounced, and the Judge who is the Reporter of the Cause, together with another of the Judges, go and intimate the Sentence to the Criminal. But those Sentences cannot be put in execution, when they are not pronounced by a Court from which there lies no Appeal, until they have been affirmed by a Decree of the Supreme Court to which the Appeal lies; because that the Damage which the Party suffers by those Interlocutory Sentences, cannot be repaired in an Appeal from the Definitive Sentence.

See the Ordinance of 1670, Title 19.

VI.

6. What is observed in putting the Criminal to the Torture.

Before the Criminal is put to the Torture, the Judge interrogates him, and he is afterwards tortured in Presence of the Judge [c]. An Act is drawn up of all that passes at the Torture, of the Confessions, and the Denials made by the Criminal, that one may be able to judge by what has passed at the Torture, what Credit is to be given to the Declarations of the Criminal. The Judge may remit a Part of the Rigours of the Torture, if the Criminal confesses the Fact; but if he prevaricates, the Rigours of the Torture are increased, however with such Precautions that the Criminal may suffer pain, without being exposed to die under the Torture, or to be disabled for the remainder of his Days [d], when there is not a sufficient Proof of the Crime, to condemn him to Death.

[c] Tormenta autem adhibenda sunt, non quanta accusator postulat; sed ut moderatæ rationis temperamenta desiderant. —— Plurimum quoque in excutienda veritate etiam vox ipsa, & cognitionis subtilis diligentia adfert. Nam & ex sermone, & ex eo, quâ quis constantiâ, quâ trepidatione quid diceret, vel cujus existimationis quisque in civitate suâ est, quædam ad illuminandam veritatem in lucem emergunt. *l.* 10. §. 3, & 5. *ff. de quæstion.*

[d] Quæstionis modum magis est judices arbitrari oportere. Itaque quæstionem habere oportet, ut servus salvus sit, vel innocentiæ vel supplicio. *l.* 7. *ff. de quæstionibus.*

VII.

7. Precautions touching the Declarations made under Torture.

Assoon as the Criminal is taken from the Rack, the Judge ought to interrogate him anew touching the Facts which he has confessed or denied [e]. It is necessary to act with a great deal of Precaution, when Judgment is to be given upon the Declarations made

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made by a Criminal whilst he is under the Torture, because it often happens that a guilty Person that is robust and resolute resists the Pains of the Torture, and that an innocent Person, who is of a weak and fearful Constitution, owns himself to be guilty of a Crime which he has not committed.

[e] Quæstioni fidem non semper, nec tamen numquam habendam Constitutionibus declaratur: etenim res est fragilis, & periculosa, & quæ veritatem fallat. Nam plerique patientiâ, sive duritiâ tormentorum ita tormenta contemnunt, ut exprimi eis veritas nullo modo possit. Alii tantâ sunt impatientiâ, ut in quovis mentiri, quam pati tormenta velint. Ita fit, ut etiam vario modo fateantur, ut non, tantum se, verum etiam alios comminentur. *l.* 1. §. 23. *ff. de quæstionibus.*

Divus Severus rescripsit, confessiones reorum pro exploratis facinoribus haberi non oportere, si nulla probatio religionem cognoscentis instruat. *l.* 1. §. 17. *ff. de quæstionibus.*

Si quis ultro de maleficio fateatur, non semper ei fides adhibenda, nonnunquam enim aut metu, aut quâ aliâ de causâ in se confitetur. *ibid.* §. 27.

VIII.

8. One is not put twice to the Torture.

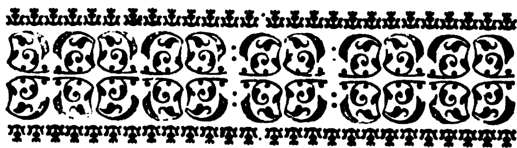
Although new Proofs are afterwards discovered, yet the Criminal cannot be put to the Torture twice for the same Fact.

IX.

9. The Torture given for the Discovery of the Accomplices.

Sometimes it is ordered by the Sentence of Death, the condemned Person shall be put to the Torture, in order to make him discover his Accomplices.

See the Ordinance of 1670, *Title* 19.



TITLE VI.

Of Sentences of Condemnation, or Acquittal, and of Enlargements for a Time.

The CONTENTS.

1. *When is the Criminal admitted to the Proof of the Facts which serve for his Defence.*
2. *The Manner of making the said Proof.*
3. *The Examination of the Criminal on the Stool.*
4. *Rules to be observed in the Tryal of Criminals.*
5. *When Sentence is pronounced against the Persons that are condemned.*
6. *The Criminal is allowed to make Confession of his Sins.*
7. *When one is condemned to make a publick Acknowledgment of his Offence, and refuses to do it.*
8. *Criminals ought to be brought speedily to their Tryal.*
9. *When a more ample Information is necessary.*
10. *The Criminal acquitted.*

I.

1. When is the Criminal admitted to the Proof of the Facts which serve for his Defence.

AFTER the Judges have examined the Proceedings in the Cause that is carried on against the Party accused, they direct him to make Proof of the Facts which he has alledged for his Defence in his Examination upon Interrogatories, and at his Confrontation with the Witnesses, if the said Facts be of such a Nature as that they may serve for his Justification in case the Truth of them be made to appear [a]. The said Facts are particularly mentioned in the Order which directs the Proof of them.

[a] Cogniturum de criminibus Præsidem oportet ante diem palam facere, custodias se auditurum: ne hi, qui defendendi sunt, subitis accusatorum criminibus opprimantur, quamvis defensionem quocunque tempore postulante reo, negari non oportet: adeo ut propterea, & differantur, & proferantur custodiæ. *l.* 18. §. 8. *ff. de quæstionibus.*

II.

2. The Manner of making the said Proof.

Assoon as they have read to the Criminal the Decree which admits him to the Proof of Facts which he alledges for his Defence, he is required to name his Witnesses, which he ought to do off Hand. The same Witnesses are summoned at the Instance of the publick Prosecutor, and are examined by the Judge. The Party accused deposites the Charges of this Examination, if he is able to do it, if not, they are advanced by the Party who carries on the Prosecution for his Civil Interest, and when there is no such Party, they are paid either out of the King's Exchequer, or by the Lords of the Manor who have the Criminal Jurisdiction within their own Limits. The Examination of the Witnesses being finished, their Depositions are communicated to the Party who has the Civil Interest, and to the Publick Prosecutor. After which the Parties give, if they think fit, Petitions, to which they may annex such Writings as they conceive may be of Service in the Decision of the Cause.

See the Ordinance of 1670, *Title* 28.

III.

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III.

3. *The Examination of the Criminal on the Stool.*

The last Expedient which the Judges are to make use of, for discovering the Truth of the Facts, is to interrogate the Criminal on the Stool, when the Prayer made by the publick Prosecutor, or the Sentence which is appealed from, tends to inflict Corporal Punishment; or behind the Bar, when the Sentence, or the Prayer of the publick Prosecutor does not extend to Corporal Punishment.

See the Ordinance of 1670, *Title* 14. *and the Declaration of the* 18th *of* September 1682.

IV.

4. *Rules to be observed in the Tryal of Criminals.*

One ought not to proceed to the Tryal of a Criminal in the Afternoon, when the Crime of which he is accused is of so high a Nature that it may deserve the Punishment of Death, either Natural or Civil, of the Gallies, or a Temporary Banishment. When the Prayer of the publick Prosecutor, is to have Corporal Punishment inflicted on the Party accused, there ought to be at least three graduate Judges to assist at the final Examination, and the giving of Judgment, and even in such Judgments from which there lies no Appeal. The Judgments which are given in the final Decision of the Cause, or in Incidents, which arise in the Proceedings, are according to the mildest Opinion, unless it be carried for the severest Punishment by a Majority of one Voice, in such Judgments from which there lies an Appeal, or by a Majority of two Voices when the Judgment is final without any Appeal from it.

V.

5. *When Sentence is pronounced against the Persons that are condemned.*

The Certainty of Death being more harsh than Death itself, it would be barbarous to acquaint the Criminal with the Punishment to which he is condemned, a long Time before he is to undergo it [b]. And it is for this Reason that the Sentences are put in Execution the same Day that they are pronounced; unless there be some Reason for deferring the Execution of it, as in the Case of an Appeal, which would suspend the Effect of the Sentence, or in the Case of a Woman who seeing herself condemned to Death, should declare that she was with Child [c]. For the Judge ought, upon such Declarations, to direct her to be visited by a Jury of Matrons, and if she is found to be with Child, to put off the Execution of the Judgment, until after she is brought to Bed.

[b] Cum reis manifestâ probatione convictis spatium temporis ante sententiam datur, facultas supplicandi, vel quibusdam malignis artibus tam Præsidum quam Officialium, pœnas evitandi criminosis patet, cum & in homicidii crimine, & in aliis detectis gravioribus causis ultio differenda non sit. *l.* 18. *Cod. de pœnis.*

[*In* England *the Practice is different from that of some other Countries, where condemned Criminals are conveyed to the Place of Execution immediatly after they have received Sentence of Death. Whereas in* England *it is thought to be more humane to such unfortunate Persons, to allow them some few Days to compose their Thoughts, and to prepare themselves for such a great Change, rather than to hurry them out of this World before they have had any serious Thoughts of making their Peace with God.*]

[c] Prægnantis mulieris consumendæ damnatæ pœna differtur, quoad pariat. Ego quidem & ne quæstio de ea habeatur, scio observari, quamdiu pregnans est. *l.* 3, *ff. de pœnis.*

[*This Practice of respiting the Execution of Women big with Child, is restrained in* England *to such only as are found to be quick with Child. Altho' it seems to be reasonable to extend this Indulgence more generally in favour of the innocent Fruit of the Womb, whether it be advanced to that Maturity as to be quick or not. Because that the Woman is certainly found to be with Child, nothing ought to be done to prevent that Child which is formed in the Womb from having its natural Birth. It is in a Manner making the innocent Babe to suffer for the Guilt of the Mother.*]

VI.

6. *The Criminal is allowed to make Confession of his Sins.*

Before the Criminal is put to Death, he is allowed to make Confession of his Sins, and to receive Absolution if he is penitent, and he is attended by a Minister in Holy Orders even to the Place of Execution.

See the Ordinance of Charles *the 6th of the 11th of* February 1396. *and the Ordinance of* 1670, *Title* 25.

[In *England* condemned Persons are admitted to partake of the Sacrament of the Lord's Supper, if they desire it, and express a sincere and hearty Contrition for their Sins in general, and more particularly for the Facts which have brought them to that unhappy End.]

VII

7. *When one is condemned to make a publick Acknowledgment of his Offence and refuses to do it.*

When the Person who is condemned to make a publick Acknowledgment of his Offence, refuses to obey the Order; after three Admonitions, he is condemned to undergo a severe Punishment.

See the Ordinance of 1670, *Title* 25.

VIII.

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VIII.

8. Criminals ought to be brought speedily to their Tryal.

The greatest Dispatch that is possible ought to be given in bringing Criminals to their Tryal, and such Causes ought to have the Preference before all others, that the Criminal may not languish too long Time under the dreadful Horrors of a Prison, if he is innocent, and that he may undergo the Punishment due to his Crime, if he is guilty [d].

[d] De his quos tenet carcer inclusos, id apertâ definitione sancimus, ut aut convictos velox pœna subducat, aut liberandos diuturna custodia non maceret. *l.* 5. *Cod. de custodia reorum.*

IX.

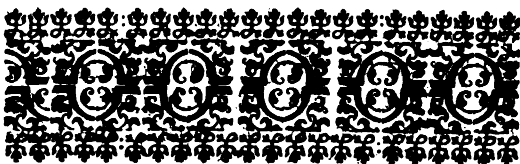
9. When a more ample Information is necessary.

When the Facts are not sufficiently cleared up, so as to acquit or condemn the Party accused, the Judges order a fuller Information to be taken within a certain Time, and that in the mean while the Prisoner shall be set at liberty, upon his giving his Juratory Caution to appear again whenever he is required, upon pain of Conviction; or that he shall remain in Prison until a more ample Information is taken of the Case.

X.

10. The Criminal acquitted.

When the Accusation is declared to be groundless, there being no Proof against the Party accused, he is acquitted, and is left at liberty to sue for his Damages.



TITLE VII.

Of Appeals.

The CONTENTS.

1. *Difference between an Appeal from the intermediate Proceedings in the same Cause, and an Appeal from a Definitive Judgment.*
2. *If the condemned Person does not appeal himself, an Appeal ought to be entred in his behalf by another.*
3. *If there are several Persons accused, they are all sent to the superior Judge.*
4. *The Person who is condemned upon the Appeal, is sent back to the Place from whence he was brought, there to have the Judgment put in Execution.*
5. *When the condemned Person dies before Judgment is given upon the Merits of the Appeal.*
6. *The Manner of Proceeding in order to purge the Memory of a Deceased Person who has been condemned by Default.*

I.

1. Difference between an Appeal from the intermediate Proceedings in the Cause, and an Appeal from a Definitive Judgment.

IN Criminal Causes we must distinguish between an Appeal from the intermediate Proceedings in the Cause, and an Appeal from the Definitive Judgment. The first Appeal does not suspend the Effect of the Order or Decree, and does not stop the further Proceedings in the Cause, unless the superior Judge has inhibited any further Proceeding upon view of the Charge and Informations. It is for the Interest of the Publick, that Criminals should not too easily escape the Punishment which they have merited by their Crimes [a]. With Respect to the Appeal from Definitive Judgments, or an Interlocutory Decree, which cannot be afterwards repaired, such as a Decree condemning one to the Torture, the Appeal in that Case vacates the Judgment; so that if the Judge, notwithstanding the Appeal, should cause his Sentence, which inflicts Corporal Punishment, to be put in Execution, he would be severely punished by the superior Judge.

[a] Reus condemnatus provocavit. ——— provocationis remedio condemnationis extinguitur pronunciatio. *l.* 1. §. *ad Senatusconsultum Turpilianum.*

Lege Juliâ de vi publicâ tenetur, qui cum imperium potestatemve haberet, civem Romanum adversus provocationem necaverit, verberaverit, jusseritve quid fieri, aut quid in collum injecerit, ut torqueatur. *l.* 7. *ff. ad Legem Juliam de vi publicâ.*

II.

2. If the condemned Person does not appeal himself, an Appeal ought to be entred in his behalf by another.

If the Party accused who has been condemned to Corporal Punishment, by the Sentence of a Court from which there lies an Appeal does not interpose an Appeal from the said Sentence, the Party who appears for the publick Interest in the said Prosecution ought to interpose an Appeal for him; because the Condemned Person ought not to be suffered to renounce the Right which he has to defend his Life and his Honour before the superior Judge [b].

[b] Non tantum ei qui ad supplicium ducitur, provocare permittitur: verum alii quoque nomine ejus; non tantum si ille mandaverit, verum quisquis alius provocare voluerit: neque distinguitur, utrum necessarius ejus sit, necne: credo enim humanitatis ratione omnem provocantem audiri debere: ergo & si ipse adquiescit sententiæ, nec quærimus, cujus interfit. Quid ergo, si resistat, qui damnatus est, adversus provocationem? Nec velit admitti ejus appellationem, perire festinans? Adhuc putem differendum supplicium. *l.* 6. *ff. de appellationibus.*

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III.

3. If there are several Persons accused, they are all sent to the superior Judge.

When there are several Persons accused of one and the same Crime, they ought all of them to be sent, together with the Proceedings in the Cause, to the Judge who has the Right to determine the Merits of the Appeal, although there be but one of the Prisoners who has appealed, or who has been condemned [c]; because it may so happen that one of them who is more steady and more dextrous than the others to find out Objections against the Witnesses, and to enforce the Facts which serve for their Justification, may bring the others off, or procure a Mitigation of the Punishment. Besides, the Judge has an Opportunity of being more throughly instructed, when he hears what every one of the Persons accused have to offer in their Defence.

[c] Si in unâ eâdemque causâ unus appellaverit, ejusque justa appellatio pronuntiata est: ei quoque prodest qui non appellaverit. *l. 2. Cod. si unus ex pluribus appellaverit.*

IV.

4. The Person who is condemned upon the Appeal is sent back to the Place from whence he was brought, there to have the Judgment put in Execution.

When the Judgment that is given in the Appeal from the Sentence pronounced by the inferior Court, condemns the Criminal to Corporal Punishment, the Person condemned is sent back to the Place from whence he was brought, in order to have the Judgment put in Execution there [d]. For Crimes ought to be punished in the Place where they were committed; unless there be ground to fear that the condemned Person may make his escape, when they are transporting him to the Place of Execution.

[d] Desertorem auditum ad suum ducem cum elogio Præses mittet: præterquam si quid gravius ille desertor, in eâ provinciâ, in quâ repertus est, admiserit: ibi enim eum plecti pœnâ debere, ubi facinus admissum est, divi Severus & Antoninus rescripserunt. *l. 2. ff. de re militari.*

V.

5. When the condemned Person dies before Judgment is given upon the Merits of the Appeal.

Seeing the Appeal vacates and extinguishes the Judgment, if the Person that is condemned departs this Life before the superior Judge has determined the Merits of the Appeal, the Prosecution cannot any longer be carried on for the Punishment of the Crime, not even by pecuniary Punishments, such as the Confiscation of Goods, unless the Crime be of the Number of such Crimes for which a Prosecution may be carried on against the Corpse of Persons deceased [e]. One may nevertheless in all sorts of Crimes, continue the Proceeding with Respect to the Civil Interest, in order to have Restitution of what the Deceased had taken, or to oblige the Executors or Administrators of the Deceased to repair the Damage which the said Deceased, whom they represent, had done to a third Person.

[e] Si quis cum capitali pœnâ vel deportatione damnatus esset, appellatione interpositâ, & in suspenso constitutâ, fati dum functus est, crimen morte finitum est. *l. 6. Cod. si reus vel accusator mortuus fuerit.*

Defunctis reis publicorum criminum, sive ipsi per se ea commiserunt, sive aliis mandaverunt, pendente accusatione, præterquam si sibi mortem consciverint, bona successoribus eorum non denegari notissimi juris est. *l. 5. ibid.*

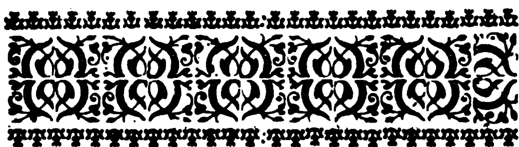
Modestinus respondit, morte reæ, crimine extincto, persecutionem eorum, quæ scelere adquisita probari possunt, fisco competere posse. *l. 9. ff. de jure fisci.*

VI.

6. The Manner of proceeding in order to purge the Memory of a deceased Person, who has been condemned by Default.

When he who is condemned by Default for his Contumacy in not appearing, dies within the Space of five Years from the Time of Condemnation, it is lawful for the Widow, the Children, and the Heirs of such condemned Person to appeal from the Sentence of Condemnation, or to apply for Relief to the Judges themselves who pronounced the Sentence of Condemnation, if the same has been pronounced by Judges in the last Resort, from whose Decrees there lies no Appeal. But after the five Years of his Contumacy are elapsed, one cannot be admitted to purge the Memory of the Deceased, either by way of Appeal, or Application to the same Court, without having first obtained Letters of Licence from the Prince for that Purpose. The Heirs who are desirous to purge the Memory of their deceased Ancestor, cause the Party who has the Civil Interest in the Cause, and the Party who prosecutes for the Publick, to be cited, in order to see Proceedings carried on within the usual Terms of Delay prescribed for Civil Causes. The Judgment which is given is founded upon the Accusation, the Informations, the Proceedings and the Writings upon which the Condemnation by Default is grounded. Nevertheless the Parties may on both sides produce all the Writings which they judge may any way help to clear up the Facts, which have given Occasion for the said Criminal Prosecution.

TITLE



TITLE. VIII.

Of Pardons, Remissions and Abolitions.

The CONTENTS.

1. *Of Letters of Abolition.*
2. *Of Letters of Remission.*
3. *Of Pardons.*
4. *Review of the Proceedings in a Criminal Cause.*
5. *The Recalling of one from Banishment, Commutation of Punishment, and the Reinstating one in the same condition they were before Condemnation.*
6. *Letters of Abolition and Remission must be registred.*

I.

1. Of Letters of Abolition.

THERE is no Crime whatsoever but what the King may grant an Abolition of. The Letters which he grants for that purpose ought to be registred when they are conformable to the Informations. However the Judges to whom the Letters are directed may give in their Remonstrance against it to the King, when the Crime is of so heinous a Nature that it would be of dangerous Consequence to grant an Abolition of it. The King does not usually grant Letters of Abolition for Duels, premeditated Assassinations, nor for Rapes committed by Violence [a]. In case the Facts suggested in the Petition, upon which the Letters of Abolition have been obtained, are found to be false, the Criminal loses the Benefit of the said Letters, after the Sovereign has been informed of the Truth of the Facts.

[a] Fallaciter incusantibus accusationis abolitio non dabitur. —— Abolitio non dabitur in illis criminibus (ut in violatâ Majestate, aut patriâ oppugnatâ vel proditâ, aut peculatu admisso, aut sacramentis desertis, omniaque quæ jure veteri continentur,) in quibus judex non minus accusatorem ad docenda quæ detulit, quam reum ad purganda quæ negat, debet urgere. *l.* 3. *Cod. de abolitionibus.*

Et si non cognitio, sed executio mandatur, de veritate precum inquiri oportet. Ut si fraus intervenerit, de omni negotio cognoscatur. *l.* 4. *Cod. si contra jus, vel utilitatem publicam, vel per mendacium fuerit aliquid impetratum.*

Et si legibus consentaneum sacrum oraculum mendax precator attulerit, careat penitus impetratis. Et si nimia mentientis inveniatur improbitas, etiam severitati subjaceat judicantis. *l.* 5. *ibid.*

II.

2. Of Letters of Remission.

The same Rule is observed in Letters of Remission, as in Letters of Abolition.

III.

3. Of Pardons.

Pardons are usually granted in Cases where no Corporal Punishment is to be inflicted, and which nevertheless cannot be altogether excused; for Instance, if one happens to be engaged in a Fray, where a Man has been killed, although he did not strike the Deceased.

[*In* England *the Word* Pardon *is of a more extensive Signification, and takes in all Crimes whatsoever, where the Punishment due by Law is forgiven and pardoned. And some Pardons, are of Course and Right, as when a Person is convict of Manslaughter, or of killing another in his own Defence. Other Pardons are of Grace, and flow only from the meer Mercy and Clemency of the Prince.* Hales's Pleas of the Crown. pag. 250.]

IV.

4. Review of the Proceedings in a Criminal Cause.

Sometimes the King grants unto condemned Persons a Review of the Proceedings, although the Judgment has been given by a Court from which there lies no Appeal [b]. When the Proceedings have been reviewed by the Judges commissioned for that purpose, they may either acquit the Person accused, or condemn him to Corporal Punishment.

[b] Litigantibus in amplissimo Prætorianæ Præfecturæ judicio, si contra jus se læsos affirment, non provocandi, sed supplicandi licentiam ministramus: licet pro curiâ, vel qualibet publicâ utilitate, seu aliâ causâ dicatur prolata sententia. Nec enim publice prodest singulis legum adminicula denegari: ita videlicet, ut intra biennium tantum nostro numini contra cognitionales sedis Prætorianæ Præfecturæ sententias post successionem Judicis numerandum, supplicandi eis tribuatur facultas. *l. un. Cod. de sententiis Præfectorum Prætorio.*

V.

5. The recalling of one from Banishment, Commutation of Punishment, and the reinstating one in the same condition they were before Condemnation.

When a Criminal has been condemned to a Corporal Punishment, or a Punishment which is attended with Infamy, the Sovereign may by his Letters Patent recall him from Banishment, or release him from the Gallies, and may commute his Punishment, and even restore the condemned Person to his Estate and his good Name, impowering him to contract and to sue in Courts of Justice [c].

[c] Relegati sive in insulam deportati, debent locis interdictis abstinere. —— nam contumacia ejus cumulat

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cumulat pœnam: & nemo potest commeatum, remeatumve dare exuli, nisi Imperator, ex aliqua causa. *l. 4. ff. de pœnis.*

Cum salutatus esset à Gentiano, & Advento, & Opilio Macrino, Præfectis Prætorio, clarissimis viris Rem Amicis, & Principalibus Officiorum, & utriusque Ordinis viris & processisset, oblatus est ei Julianus Licinianus, ab Opilio Ulpiano tunc Legato in insulam deportatus: tunc Antoninus Augustus dixit, *Restituo te in integrum Provinciæ tuæ*, & adjecit: *Ut autem scias, quid sit in integrum restituere, honoribus, & ordini tuo, & omnibus cæteris te restituo. l. 1. Cod. de sententiam passis & restitutis.*

Cum patrem tuum in metallum damnatum fuisse proponis, ejus quidem bona merito a fisco occupata sunt: nec ideò quod ex indulgentia mea pœna tantummodo metalli liberatus esset, etiam bonorum restitutionem impetravit; nisi speciale beneficium super hoc fuerit impetratum. *l. 2. Cod. ibid.*

[*As to what is mentioned in this Article touching the Commutation of Punishments by the Sovereign, it is to be observed, that in* England *it is held as a Maxim in Law,* Non alio modo puniatur quis quam secundum quod se habeat condemnatio. *So that the King cannot by any Warrant under the Great Seal alter the Execution, otherwise than the Judgment of the Law doth direct. In case of High Treason, Beheading is Part of the Judgment, and therefore the King may pardon all the rest saving Beheading, as is usually done in case of Nobility. But if a Man being attainted of Felony, be beheaded, it is no Execution of the Judgment; because the Judgment is, that he be hanged, until he be dead.* Coke 3d Instit. pag. 52. 212. Bracton, lib. 3. fol. 104.

VI.

6. Letters of Abolition and Remission must be registred.

Criminals who have obtained Letters of Remission, or Abolition, cannot have them registred, unless they themselves be Prisoners and entred as such in the Jailer's Book or Calendar. The presenting of the Letters does not stay the Criminal Proceedings in the Cause, so that they may notwithstanding proceed to repeat the Witnesses, and confront them with the Parties accused. Notice is given of the said Letters to the Party who has the Civil Interest, with Intimation to appear and shew Cause, if he has any, why they should not be allowed and registred.

See the Ordinance of 1670, Title 16.

[*In* England, *he who claims the Benefit of a Pardon must plead it. And he that pleads a General Pardon by Parliament, wherein there are Exceptions, must aver that he is none of the Persons excepted. But of a General Pardon by Parliament without Exception, the Court* ex Officio *must take notice. And he that pleads a particular Pardon, must shew it under Seal.* Hales's Pleas of the Crown. pag. 252. Coke's 3d Instit. pag. 234.]

Here endeth the Supplement to the fourth Book of the Publick Law.

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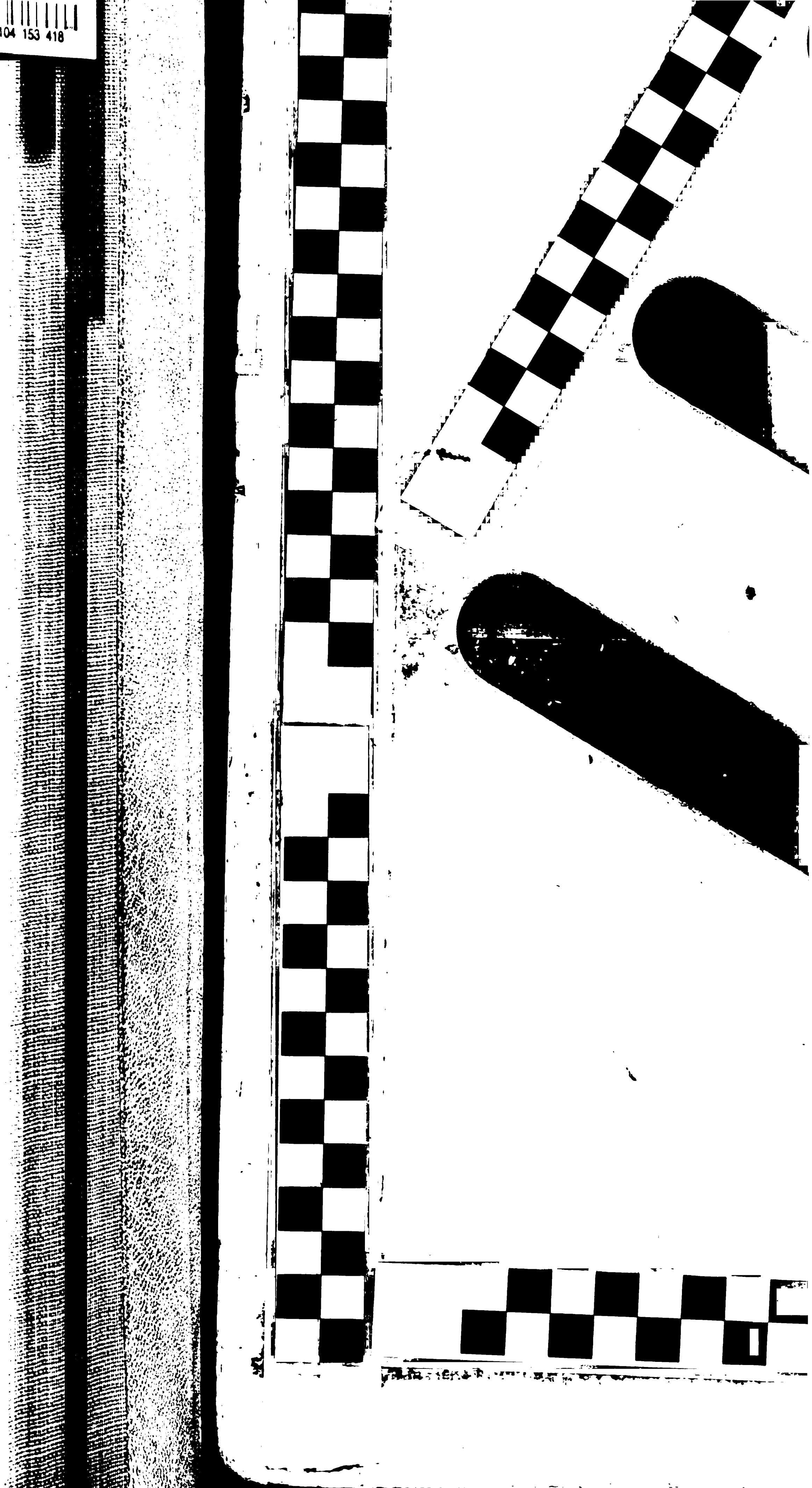

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