make the legacy to depend on the will of the said executor, but they would show 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 cheerfulness.[u]

SECTION IX.

OF THE RIGHT OF ACCRETION.

3262. *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 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 being called together to the same succession, one of them either would not or could not take his part therein.

3263. 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

[u] *L. 75, D. de legat.* 1.

Digitized by Google

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.

3264. *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.

3265. This question is decided by the Roman law in favor 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 a 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, insti-

[a] *L. 7, D. de reg. jur.;*—§ 5, *Inst. de hæred. inst.*

Digitized by Google

tuting, 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 although 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]

3266. 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 called by their proximity, they ought to share the succession between them, so the same equity demands that the inheritance should remain entire 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 expressly ordered 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 was contrary to the law of nature. And it might even be alleged in favor 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

[b] *V. l.* 41, *in fin. D. de vulg. et pup. subst.;*—*l.* 2, § 2, *D. de bon. poss. sec. tab.;*—§ 5, *Inst. de hæred. instit.*

Digitized by Google

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, although the testamentary heir who should remain the only one of the two instituted by the testator would not be universal heir, and 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, although 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 a universal title, as two coheirs

Digitized by Google

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 customs, 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] And it is known that several interpreters have been of opinion, that in divers cases every testator, although 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]

3267. 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.

3268. *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

[c] See the second section of the second title of the second book.

[d] *L.* 6, *D. de test. mil.*; — *l.* 2, *Cod. eod.*

[e] *Ulp. tit.* 24, § 12.

[f] See, concerning all that has been said for the heir at law, the remark on the sixth article.

Digitized by Google

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 although 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 that one may be able to judge thereof by their connection, 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 rendered so intricate, that some interpreters have said, that there is not one matter in the law of so great difficulty as this is; although 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 lawsuits, and would have

g *L. 9, D. de suis et legit. hæred.*

Digitized by Google

been attended with no manner of inconvenience. 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 inconveniences, 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.

3269. 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 although, this view having engaged us in an inquiry 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 founda-

Digitized by Google

tion of the remarks which are still to be made. But we thought ourselves 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.

3270. 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 coheirs 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 explained; so that the foundation of their right of accretion is their union with one another, because of the quality of coheirs or coexecutors 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 manners in which executors and legatees of one and the same thing may be linked or joined together in a testament.[h]

3271. The first is that which joins them by the thing itself that is devised to them, although 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

[h] *L.* 142, *D. de verb. signif.*

[i] *L.* 89, *D. de legat.* 3.

Digitized by Google

a legatee, and gives afterwards and separately the same house to another legatee by another clause. We make choice of this example, because, although 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 anyways exact in his affairs, yet the examples of it are frequent in the Roman law.

3272. The second manner is that which joins together the executors or legatees both by the thing and by the expression of the testator;[1] 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.

3273. 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]

3274. 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. We should be often mistaken, if we always understood it so; and we should 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]

3275. 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

[1] *L.* 142, *D. de verb. signif.*; — *l.* 89, *D. de legat.* 3.

[n] *L.* 142, *D. de verb. signif.*

[m] *D. l.* 89, *D. de legat.* 3.

[o] *L.* 89, *D. de legat.* 3.

Digitized by Google

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 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.

3276. 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, et tota legata singulis data esse, partes autem concursu fieri. L.* 80, *D. 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.*

Digitized by Google

un. § 11, *Cod. de cad. toll.*;—*l.* 33, *D. 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.

3277. 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 inquiry would only perplex the reader to no purpose: as, for example, the differences which the ancient 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 ancient 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 by others, in which they have suffered the ancient difference between these two sorts of legacies, which have been just now mentioned, to subsist, although 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

[p] § 2, *Inst. de leg.*;—*Ulpian. tit.* 24, §§ 3 *et* 4.

[q] *Ulpian. tit.* 24, §§ 12 *et* 13.

Digitized by Google

the interpreters to charge those with stupidity or negligence, who were employed to collect out of the books of the ancient 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 ancient law, and for having by that means left in several places texts contrary to others which they have inserted.[r]

3278. One may judge by all these reflections, 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 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 rendered clear and certain, we have composed 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 although Justinian did make a law,[s] one part whereof is in relation to this matter, and 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.

3279. 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 legacies, to fiduciary bequests and substitutions,

[r] *Cujac. ad titul.* 24 *Ulp.*

[s] *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 expressly by the name of *jus accrescendi*: which shows 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, *no.* 9.]

Digitized by Google

and that the rules which shall be explained in this section relate chiefly only to testamentary successions. For although, 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.

ART. I.

3280. *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 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 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]

II.

3281. *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 the right of accretion, because the vacant portion accrues to the portions of the others.[b]

III.

3282. *Accretion among Coheirs at Law.* — Among coheirs at law there is always a right of accretion: for the inheritance be-

[a] See the following articles.

[b] See the articles which follow.

Digitized by Google

longs 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]

IV.

3283. *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 as 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]

V.

3284. *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

[c] *L.* 9, *D. de suis et legit. hæred.*

[d] This is a consequence of our rule, *that the dead gives seizin to the living.* For this heir having succeeded before his death, his right would be vested in him, and would pass to his heirs.

[e] See the articles which follow. See the eighth article.

[f] *L.* 142, *D. de reg. jur.*; — *l.* 89, *D. de legat.* 3. Although this distinction has been ex-

Digitized by Google

shall see in the articles which follow the use of these three sorts of conjunction or union.

VI.

3285. *Among Coheirs or Coexecutors 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 a universal right, which comprehends all the goods and all the charges, and this right is indivisible, that is, one cannot be heir only for a part, so as that the other part remain vacant and be without heirs, the portions 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.[s]

REMARKS ON THE PRECEDING ARTICLE.

3286. 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 noways against the law of nature if the vacant portion were left to the heir at law;

plained 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.

[s] *L.* 53, § 1, *D. de acq. vel omitt. hæred.*; — *l.* 35, *eod.*; — *l.* 6, *C. de impub. et aliis substit.*; — *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.

Digitized by Google

although 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 inventory: 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 entered 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 or equity: and the same thing 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.

3287. *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]

VIII.

3288. *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

[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, *D. 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.

Digitized by Google

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 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.[1]

IX.

3289. *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 them. 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, although 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, although he was instituted heir only for a portion, ought to accept the whole inheritance.[1]

X.

3290. *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 coexecutors; for the right to the inheritance being a universal right, and indivisible, there is always among coheirs or coexecutors a right of accretion; but legacies being restrained to the things bequeathed, which may be divided at least by estimation, although the things should be indivisible in their own nature, it is not ne-

[1] *L.* 63, *D. de hæred. inst.;* — *l. un.* § 10, *C. de caduc. toll.* See the following article.
[1] See the sixth article, and the texts cited on it.

Digitized by Google

cessary 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]

XI.

3291. *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]

XII.

3292. *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 bequeathed 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 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 entire to each of the two legatees; and in this case, they both accepting the legacy, their con-

[m] See the following articles.

[n] *L.* 80, *D. de legat.* 3;—*l.* 3, *D. de usufr. accresc.;*—*Ulp. tit.* 24, § 12. See the fifteenth article.

Digitized by Google

currence 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 entire 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]

[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 ancient law of the Romans, that each of those legatees had the whole (*Ulp. tit.* 24, §§ 12 *et* 31), 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 et potuerint et 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 et fideicommissis imponentes, et antiquam dissonantiam in unam trahentes concordiam. Hoc autem ita fieri sancimus, nisi testator apertissime, et 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 et 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, *D. de legat.* 1.

Although this last law be taken out of the Digest, yet those who are acquainted with the style of the ancient lawyers, the authors of the texts which are collected together in

Digitized by Google

XIII.

3293. *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 separated 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 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.

XIV.

3294. *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

the Digest, and with that of Tribonian, will easily perceive that these expressions are of his style; 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 ancient 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 although 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.

[p] *L.* 1, *D. de usufr. accresc.*

Digitized by Google

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]

XV.

3295. *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 itself, that is, by the inheritance. From whence it follows, that the inheritance ought to go entire 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 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]

[q] *L.* 16, § 2, *D. de legat.* 1; — *l. un.* § 3, *C. de caduc. toll.*

[r] *D. l. un.* § 4.

[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, *D. 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 favor of a person to whom the testator could not 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 favor 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 show 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.

Digitized by Google

SECTION X.

OF THE RIGHT OF TRANSMISSION.

3296. 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 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.

3297. Although the right of transmission in the Roman law respects successions of intestates as well as testamentary successions, and 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 seizin 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.

3298. 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

Digitized by Google

has outlived his father happens to die before he has entered 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]

3299. 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 favor 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 have 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 ancient law subsists, which does not give the transmission to children who are not emancipated, but only to those who, being under the father's juris-

[a] *L. 4, C. qui adm. ad bon. possess. poss.;—l. 2, C. ad senat. Orph.*
[b] *L. 9, D. de suis et legit. hæred.*
[c] *L. un. § 5, C. de caduc. toll.*
[d] *L. un. Cod. de his qui ante apert. tab.;—l. un. § 5, Cod. de caduc. toll.*

Digitized by Google

diction, 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, or before they had entered upon it.[e] And this rule was so strictly observed, that although 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 favor that the Emperor Antoninus excepted the case of absence on account of the public.[f]

3300. There was another exception in favor 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]

3301. 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.

3302. This difference between the condition of legatees and that of heirs or executors, as to what concerns the right of transmission,

[e] *L.* 7, *Cod. de jure delib.*;—*l. un.* § 5, *C. de caduc. toll.*

[f] *L.* 86, *D. 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, *D. de senat. Silan.*;—*l. penult. C. de his quib. ut ind.*

[h] See the tenth, eleventh, and twelfth articles of this section.

Digitized by Google

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 favor which was granted them, to distinguish their condition from that of the heirs or executors, in what concerns transmission. And as this favor 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 entering upon the inheritance.[l]

3303. 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 rule, *the dead gives seizin 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

[i] See the nineteenth article of the fifth section of this title, and the remark that is made upon it.

[l] *L. un.* § 2, *D. quando dies usufr. leg. ced.*; — *ll.* 2 *et* 8, *D. quando dies leg. ced.* But if this legatee of a 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.

[m] See the preface to this second part, no. 7.

Digitized by Google

acquire their right to the succession the very moment that it is open, although the death of the person to whom they succeed be unknown to them, and 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.

3304. 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.

3305. 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 outlived 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, although 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.

3306. 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

Digitized by Google

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 seizin 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 favorable for the said heirs or executors than for legatees, whom the testator has less considered 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]

3307. 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 which he knows 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.

[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.

Digitized by Google

3308. 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 should 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 considered 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 favor 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.

3309. It seems reasonable to conclude from all these reflections, that, since neither natural equity nor reason renders 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

Digitized by Google

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 seizin 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 lawsuits. It is without doubt upon these considerations, that, although 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 seizin to the living*, is become universal throughout the whole kingdom in testamentary successions, as well as in successions of intestates.

3310. It is to be remarked on this matter of transmission, that it contains some particular rules which would be of necessary use, even although transmission should 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.

3311. 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 pleased to have recourse to that section at the same time that he reads this.

ART. I.

3312. *Definition of Transmission.* — Transmission is the right which heirs or executors, or legatees, may have to convey down

Digitized by Google

to their successors the inheritance or legacy which belongs to them, in case they die before they have exercised their right.[a]

II.

3313. *To what Transmission is limited.* — It results from the definition explained in the preceding article, that when the heir or executor has entered 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.

III.

3314. *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, or 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]

IV.

3315. *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, or that of the legatee, was at the time of his death. And this depends on the rules which shall be explained hereafter.[d]

[a] *L.* 7, *in f. C. de jure delib.* See the preamble of this section.

[b] This is a consequence of the definition of the right of transmission.

[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*.

[d] This is a consequence of the preceding articles.

Digitized by Google

V.

3316. *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 although their rights have the testament for their title, yet nevertheless, if it happens that they die before the testator, although after making 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 the death.[f]

VI.

3317. *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 show 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]

VII.

3318. *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

[e] Pro non scriptis sunt iis relicta qui vivo testatore decedunt. *Ex* §§ 2 *et* 3, *l. un. C. de caduc. toll.*

[f] *L.* 4, *D. de his quæ pro non script.*

[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 their default; as is, for example, this expression, that the testator gives to such a one and his heirs.

Digitized by Google

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.

VIII.

3319. *The Testamentary Heir who dies within the Time 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]

REMARKS ON THE PRECEDING ARTICLE.

3320. We have not set down in the article that which is said in the text cited, 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 inventory.

3321. 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 rigor.

3322. And seeing by the ordinance of 1667 the delay for de-

[h] See the first article of the third section, *In what Manner a Succession is acquired.*

[i] *L.* 37, *D. de acq. vel om. hæred.*

[l] *L.* 19, *C. de jure delib.*

[a] *L.* 19, *C. de jure delib.*

liberating is only, as has been already mentioned, of forty days after the inventory, 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 rigor 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 rigor: 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]

3323. 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 favor 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, although 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, although he had done nothing to show his acceptance of the inheritance, provided only that he had not renounced

[b] See the ordinance of 1667, tit. 7, art. 4.

[c] *L. 2, D. quis ordo in bon. poss. servet.; — l. 8, C. qui adm. ad bon. possess. poss.*

Digitized by Google

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.

3324. The reader may join to these considerations the reflections 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 seizin to the living*, extends to testamentary successions.

IX.

3325. *When the Institution or Substitution of an Heir is Conditional, he has no Right to transmit, unless the Condition be come to pass.* — If an institution of a testamentary heir, or a substitution, was conditional, and the condition not being come 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 the succession fell, or 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]

X.

3326. *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

[m] § 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.

Digitized by Google

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]

XI.

3327. *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 although 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]

XII.

3328. *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]

[n] See the preamble of this section, and the first, second, and third articles of the ninth section of *Legacies*.

[o] *L.* 5, § 1, *D. quand. dies legat. vel fideic. ced.*; — *l. un.* § 1, *in f. C. de cad. toll.*; — *l.* 5, *D. quand. dies legat. vel fid. ced.*

[p] *L.* 41, *D. de cond. et dem.*; — *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 expressly comprehend the heirs of him in whose favor the disposition is made, it is limited to his person, that is, 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*.

[q] See the twelfth and thirteenth articles of the eighth section.

[r] This 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.

Digitized by Google

XIII.

3329. *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 noways 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 has obliged his heir to restore the inheritance to another person when the said heir shall die; or a testator hath charged his 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.[a]

SECTION XI.

OF THE EXECUTION OF TESTAMENTS.

3330. 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 the death or absence of such parties,

[a] *L.* 11, § 6, *D. de legat.* 3; — *l.* 81, *D. de acquir. vel om. hæred.*

Digitized by Google

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.

3331. 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 testament; whereas the use of executors of testaments is so much approved and favored by our customs in France, that they ordain all the movable goods of the succession to be put into the hands of those to whom the testator commits this function; and for this reason the executors are obliged to make an inventory 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, ordain a certain sum of money to be put into his hands, for executing the dispositions which he shall commit to his care.

3332. Although these dispositions be not common to all the customs, and 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 everywhere 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.

ART. I.

3333. *The First Security for the Execution of Testaments is, that they be known, and deposited in some Public 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 public notaries, who take down the minutes or in-

[a] See the eighteenth and nineteenth articles of the third section.

Digitized by Google

structions thereof, that they may give out attested copies thereof to those 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 public in a court of justice, and enrolled, that is, entered in the public register, that the memory of them may be preserved.[c]

II.

3334. *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]

[b] See the fifteenth article of the first section of *Partitions* among coheirs or coexecutors.

[c] When testaments contain substitutions, they ought to be made public, as shall be said in its proper place. See the end of the preamble to the third title of the fifth book.

[d] In testamentis quædam scribuntur, quæ ad auctoritatem duntaxat scribentis referuntur, nec obligationem pariunt. Hæc autem talia sunt, si te hæredem solum instituam et 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, *D. de ann. legat. et fideic.* Si quis Titio decem legaverit, et rogaverit, ut ea restituat Mævio: Mæviusque fuerit mortuus, Titii commodo cedit, non hæredis, nisi duntaxat ut ministrum Titium elegit. *L.* 17, *D. de legat.* 2.

Si testator designaverit per quem desiderat redemptionem fieri captivorum, is qui specialiter designatus est legati vel fideicommissi habeat exigendi licentiam: et 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. et 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 shows 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 Leo, 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

Digitized by Google

III.

3335. *Execution of a Disposition committed to the Testamentary Heir, or to another Person.* — The testator who names several testamentary heirs, and who confides more in one of them than in the others, may charge him in particular with the execution of some dispositions of his testament, empowering 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, although he should give him nothing for his trouble, in consideration of the quality of the testator, and of that of the executor, or though he should leave him a legacy for his pains, as it is lawful for him to do.[e]

IV.

3336. *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]

V.

3337. *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

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 although 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.]

[e] *L.* 107, *D. de legat.* 1; — *l.* 96, § 3, *eod.* See the texts cited on the foregoing article.

[f] See the seventeenth law, *D. de leg.* 2, cited on the second article.

[g] See the forty-sixth article of the eighth section, and the seventh article of the tenth section of *Legacies.*

Digitized by Google

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]

VI.

3338. *Execution of Dispositions which are neglected.* — If, the testator having named nobody 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]

VII.

3339. *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 how he has disposed 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 testator had a mind to trust to his own integrity, as in the case of the fifth article; and he may likewise put down in his account the charges which he has been at in executing the testament.[k]

[h] See the twenty-eighth law, *Cod. de episc. et cler.*, cited on the second article. See the following article, and the remark upon it.

[i] *L.* 28, § 1, *C. de episc. et clerc.* According to the usage in France, it is the duty of the king's council 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 ecclesiastics who are intrusted with the administration of the goods belonging to the churches, and other persons who may have any interest in the said legacies.

[k] This is a consequence of the function of the executor of a testament.

Digitized by Google

TITLE II.

OF AN UNDUTIFUL TESTAMENT, AND OF DISHERISON.

3340. The liberty which the ancient Roman law gave to parents to disinherit their children without any cause, as has been observed in the preface to this second part,[a] was followed by so great a number of disherisons,[b] that it was found necessary to set bounds to it, by giving to the children who should pretend to be unjustly disinherited, whether by their fathers, or mothers, or other ascendants, the right of complaining of those dispositions which were called undutiful, because they were contrary to the duty of parents, which ties them to leave their goods to their children, who have done nothing to deserve the being deprived of them. And at last Justinian regulated by an express law the causes which might deserve disinheriting.

3341. They called the action which the law gave to children against the testaments in which they were disinherited the *Querela*, that is, the complaint of undutifulness; and it was permitted likewise to make such a complaint against excessive donations and marriage portions given to some of the children, or to other persons, if the said dispositions were undutiful, that is, if they did not leave to all the children their legitime, or child's part.

3342. Besides the disinheriting, which may be either just or unjust, 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 testament, which is called in the Roman law *preterition*, and is distinguished from an express disherison by this difference, that whereas a disherison may be just if there are just causes for it, preterition cannot but be unjust, there being no cause assigned.

3343. To soften what a complaint of undutifulness might contain in it that might be injurious to the memory of the testator, they gave to this complaint in the Roman law the pretext of a presumption that the testator had not the free use of his reason, and that it was for want of his right senses that he made such a disposition.[c] But in our usage we do not observe this precaution, and we charge the testator very freely with inhumanity, in-

[a] See the preface, no. 7. [b] *L.* 1, *D. de inoff. test.* [c] *L.* 2, *D. de inoff. test.*

Digitized by Google

justice, and hardship, or with having been influenced by passion, and the instigations of a mother-in-law, or of some other persons.

3344. The same equity which made the complaint of children to be received against the undutiful testaments of their parents, made likewise the complaints of fathers and mothers, and other ascendants, to be received against the testaments of their children, who deprived them of their successions without just cause, whether by expressly disinheriting them, or passing them by without taking any manner of notice of them in their testaments.

SECTION I.

OF THE PERSONS WHO MAY COMPLAIN OF A TESTAMENT, OR OTHER UNDUTIFUL DISPOSITION.

3345. 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]

3346. 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]

Art. I.

3347. *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 explained in their place,[a] cannot disinherit them, unless they have some one of the causes which shall be explained in this title.[b]

[a] *L.* 29, § 1, *D. 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.*

[a] See the second section, *In what Manner Children succeed.*

[b] *Nov.* 1, *in præf.* § 2;—*l.* 1, *D. de inoff. testam.;*—*Nov.* 115, *c.* 3. See the first, second, and third articles of the second section.

Digitized by Google

II.

3348. *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 the causes which shall be likewise explained in this title.[c]

III.

3349. *Preterition of Children hath the same Effect as Disherison without Cause.* — If a father, or other ascendant, without expressly 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]

IV.

3350. *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 are no descendants to exclude them from the succession, hath the same effect as the preterition of children in the testaments of their fathers. For although, by the order of nature, parents are not called to succeed to their children, and 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]

V.

3351. *Parents cannot disinherit their Children, although they leave them their Child's Part by other Dispositions.* — Although a testator who has children leave them their legitime or child's part by some donation, legacy, or other disposition; yet he may not disin-

[c] Omnibus tam parentibus quam liberis de inofficioso licet disputare. *L.* 1, *D. de inoff. testam.* Nam etsi parentibus non debetur filiorum hæreditas, propter votum parentum, et naturalem erga filios caritatem; turbato tamen ordine mortalitatis, non minus parentibus quam liberis pie relinqui debet. *L.* 15, *D. 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.

[d] Hujus verbi *de inofficioso testamento* vis illa est, docere immerentem se, et ideo indigne *præteritum*, vel etiam exhæreditatione summotum. *L.* 5, *D. de inoff. testam.*; — *l.* 3, *eod.*; — *Nov.* 115, *c.* 3. See the texts quoted on the first article.

[e] See the texts cited upon the first article, as also upon the third article.

Digitized by Google

herit 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]

REMARKS ON THE PRECEDING ARTICLE.

3352. It may be remarked on the text cited, 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; although it be certain that the author of those extracts which are commonly called authentics, 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 authentic *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 own opinion; seeing in the authentic *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, et si per fideicommissi relinquat occasionem.* These are the terms of that eighteenth novel, which he has contracted in that authentic *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 authentic *Novissima*, and having in the authentic *Non licet* made no mention of the necessity of this institution, it seems plain enough that he did not believe that this hun-

[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: et ipsas nominatim ingratitudinis causas parentes suo inseruerint testamento. *Nov.* 115, *c.* 3.

Digitized by Google

dred 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 there said, that fathers and mothers, and other ascendants, cannot disinherit their children, nor pass them over in silence in their testaments, even although they had left them their filial portion by some 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, et 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, although 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 show 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, although the children had their child's part left them by donations, legacies, or fiduciary bequests, he meant only other dispositions, and not the testament itself, 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 although 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

Digitized by Google

should be in the testament itself 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, although the testator had given to his children by some other title their child's part. But even although 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.

3353. 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.

3354. We have not made this remark in opposition to the ordinary sense every body gives to this hundred and fifteenth novel, nor to condemn the usage of this sense thereof, which has passed

[a] *Nov.* 158, *c.* 1.
[b] *Ll.* 29, 30, 31, 32, *C. de inoff. test.;*—*v. l.* 8, § 6, *D. eod.*

Digitized by Google

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 the 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 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 in annulling 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, inventories, 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.

3355. *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]

VII.

3356. *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 chil-

g *L.* 8, § 16, *D. de inoff. testam.*; — *v. Nov.* 115, *c.* 3, *in f. et cap.* 4, *in f.* See hereafter the fifth article of the fourth section, and the sixteenth article of the fifth section of *Testaments.*

Digitized by Google

dren 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 entered the complaint in his own lifetime.[i]

REMARKS ON THE PRECEDING ARTICLE.

3357. 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 honor of his memory, which is not the case of this text; the sequel of which shows, 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 to share in the inheritance from which their father has been excluded, unless they justify his memory, and get the disherison annulled. And although 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, *D. de conjung. cum emanc. lib. ejus*, yet this text has relation to a sort of disinheriting which was frequent in the ancient 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, *D. de liber. et post.* But the disherison which a son may have deserved by his bad conduct

[h] *L.* 34, *C. de inoff. testam.;—d. l. in f.;—l.* 6, § *ult. D. eod.*
[i] *L.* 36, *in f. C. eod.*

Digitized by Google

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.

3358. *An Involuntary Preterition.* — If a father or mother, who had two or more children, having disposed of their goods among them by a testament, happened 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 through 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 childbed 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.[1] 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]

IX.

3359. *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]

[1] *L. 3, C. de inoff. test.*
[m] See the sixth article of the fifth section of *Testaments.*
[n] *L. 2, D. de lib. et post.*

Digitized by Google

X.

3360. *Provision for the Son who is disinherited, pending the Appeal from the Sentence given in his Favor.* — 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 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]

XI.

3361. *The Portion of a Child whose Disherison subsists accrues to the other Children.* — 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, 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]

XII.

3362. *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

[o] *L.* 27, § 3, *D. de inoff. testam.*

[p] *L.* 17, *D. de inoff. test.;* — *v. l.* 16, *eod.;* — *l.* 1, § 5, *D. 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, *D. de inoffic. testam.*

Digitized by Google

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]

XIII.

3363. *The Favor 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 favor 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]

XIV.

3364. *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]

[q] *L.* 32, *C. de inoff. testam.;—ll.* 29, 30, *et* 31, *eod.* See the fifth article, and the remark that is there made on it.

[r] Si imperator sit hæres institutus, posse inofficiosum dici testamentum, sæpissime rescriptum est. *L.* 8, § 2, *D. 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 although 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.

[s] *L.* 1, *D. de inoff. test.;—l.* 21, *C. eod.;—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

Digitized by Google

SECTION II.

OF THE CAUSES WHICH RENDER A DISHERISON JUST.

ART. I.

3365. *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 lifetime 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 honor, 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 through 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]

II.

3366. *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 possession, as shall be mentioned in the following article. But although 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.

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, although the testator should have neither brothers nor sisters?

[a] *L.* 19, *in f. D. de liber. et post hæred. inst. vel exhæred.*; — *l.* 5, *D. de inoff. test.*

[b] *L.* 3, *eod.*; — *l.* 4, *eod.*; — *l.* 18, *C. eod.*

[c] See the articles which follow.

[d] *Nov.* 115, *c.* 3.

Digitized by Google

III.

3367. *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 have neglected to perform those offices towards him which that condition may have required;[l] if by any violence, or other unlawful way, they had hindered 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 had taken up an infamous profession, which his father did not follow;[q] if a daughter prefers an infamous life to a married state.[r]

[e] *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 et 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.

[l] Si quis de predictis 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 filias extiterit, et 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 φαρμάκων, 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; et 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, et dotem

Digitized by Google

IV.

3368. *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 employed 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]

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 his 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.

Although 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. Edict of *Henry* II., in the year 1556. Ordinance of *Blois*, art. 41. 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?

[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, et 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.

Digitized by Google

V.

3369. *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]

VI.

3370. *The Husband is not deprived of his Wife's Dowry, for the Ingratitude of his Wife towards the Parents who gave it.*—Although parents may deprive their ungrateful children of their estate, and even revoke donations which they may have made in their favor, 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 act of his wife.[d]

SECTION III.

OF OTHER CAUSES WHICH MAKE THE COMPLAINT AGAINST A TESTAMENT, AS BEING UNDUTIFUL, TO CEASE.

ART. I.

3371. *The Complaint against a Testament, as being Undutiful, ceases by the Approbation of the Testament.*—If the person who is disinherited, although 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]

[b] By the ancient Roman law, the son who was disinherited, and who had a mind to bring his complaint, was obliged to make it appear that he was unjustly disinherited. *L.* 5, *D. de inoff. test.*;—*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.

[c] See the second article of the section of *Donations.*

[d] *L.* 69, § 6, *D. de jure dot.*;—*v. l.* 24, *C. eod.*

[a] *L.* 31, *in f. D. de inoff. test.* See the following articles.

Digitized by Google

II.

3372. *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, although 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 through 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]

III.

3373. *What a Guardian does for his Minor ought not to hurt himself, nor what he does to himself to be of any Prejudice to his Minor.* — 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 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 this minor, as being forged, if in the said testament,

[b] *L.* 10, § 1, *D. de inoff. test.*; — *l.* 5, *D. de his quæ ut indig. aufer.* See the seventh and eighth articles.

[c] § 4, *Inst. de inoff. testam.*; — § 5, *eod.*; — *l.* 22, *D. de his quæ ut ind.*

Digitized by Google

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.

IV.

3374. *He who approves of the Testament by any Act, is excluded from entering 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]

V.

3375. *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 entering his complaint, after he knew he was disinherited, and, 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 stripped him, without being able to allege 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]

[d] *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.

[e] *L.* 23, § 1, *D. de inoff. test.*; — *l.* 8, § 10, *eod.*; — *l.* 8, § 1, *C. eod.*

[f] *L.* 2, *C. in quib. caus. in integr. test. nec n. est*; — *l.* 14, *in f. C. de inoff. test.*; — *l.* 8, § *ult. D. eod.*

Digitized by Google

Remarks on the Preceding Article.

3376. Although this prescription of five years may seem to be too short a time to extinguish a demand of an inheritance, and 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 his right remains entire 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 honor, 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 alleged 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.

3377. *If the Action of Complaint is let drop for Want of Prosecution, it is not afterwards received.* — If a son who is disinherited, having entered 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.[8]

VII.

3378. *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

[8] *L.* 8, § 1, *D. de inoff. test.*

testament which he pretends to be forged, having first entered 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 although 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 forged, the disherison cannot subsist, even although it had been ratified in judgment.[h]

VIII.

3379. *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 were some nullity in the form of the testament, and that for the quicker despatch, 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.[k]

SECTION IV.

OF THE EFFECTS OF THE COMPLAINT AGAINST A TESTAMENT, AS BEING UNDUTIFUL.

ART. I.

3380. *If the Testator has left less than the Legitime or Portion due by Law, it ought to be made up.* — If the complaint of unduti-

[h] *L.* 14, *C. de inoff. test.*

[i] *L.* 16, *C. de inoff. testam.*

[k] *L.* 8, § 12, *D. 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.

Digitized by Google

fulness 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]

II.

3381. *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 entire portion which he would have had in the inheritance, if there had been no testament at all.[b]

III.

3382. *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 be-

[a] *L.* 32, *C. de inoff. test.*; — *l.* 30, *eod.* See the fifth article of the first section, and the remark upon it.

[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 shown 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.

Digitized by Google

cause 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]

IV.

3383. *Extravagant Donations and Dowries are diminished to make up the Legitime, or Portions due by Law to Children or Parents.*— 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 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 although 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]

V.

3384. *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

[c] *L.* 19, *D. 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.

[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 these titles, the substance of which is comprehended in this article. See the third article of the third section of the following title.

Digitized by Google

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]

Remarks on the Preceding Article.

3385. By the ancient 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, *D. de injust. rup. irr. fact. test. Cum inofficiosum testamentum arguitur, nihil ex eo testamento valet. L.* 28, *D. 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 although it does happen from hence that the condition of the legatees proves to be more favorable than that of the person who is instituted heir or executor, whom the testator, nevertheless, valued more than the

[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, et dari illis quibus fuerint derelicta, et tanquam in hoc non recissum 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, et libertatibus, et 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.*

Digitized by Google

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 favorable as that of the legatees, seeing the dispositions in which they are concerned do not the same injury to the person disinherited.

TITLE III.

OF THE LEGITIME, OR LEGAL PORTION DUE TO CHILDREN OR PARENTS.

3386. 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.

3387. The legal portion of children was, by the ancient 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.

3388. 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 his 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

* See the fifth article of the seventh section of *Testaments*, and the remark made there upon it.

[a] Quarta debitæ portionis. *L.* 8, § 8, *D. 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.

Digitized by Google

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.

3389. 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.

3390. 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 movable and immovable; 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 favor 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 legatees; 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.

[c] *L.* 116, *D. de legat.* 1.

Digitized by Google

3391. It is not our business to examine here which of these two laws is most just 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.

3392. 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.

SECTION I.

OF THE NATURE OF THE LEGITIME, OR LEGAL PORTION, AND TO WHOM IT IS DUE.

3393. 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 although 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]

3394. 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

[d] See what has been said on this subject in the preface to this second part, no. 7.

[a] See, concerning these renunciations, what has been said in the preamble to the second section of *Heirs and Executors* in general.

Digitized by Google

made in the preamble of the first section, *In what Manner Fathers and Mothers succeed.*

ART. I.

3395. *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]

II.

3396. *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]

III.

3397. *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 own name, or by representation, as has been explained in its proper place.[c]

IV.

3398. *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 de-

[a] *L.* 8, § 11, *D. de inoff. test.*; — *l.* 5, *C. de inoff. don.*; — *Nov.* 18, *cap.* 1, *in f.* See the following article.

[b] See the articles which follow, and the first title of the second book.

[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 second book, title 1, section 2.

Digitized by Google

gree alive, and grandchildren 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 grandchildren 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]

V.

3399. *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 grandchildren 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]

VI.

3400. *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]

VII.

3401. *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

[d] This is a consequence of the foregoing article, and of the order of the succession of children.

[e] This is a consequence of the same order.

[f] *Nov.* 1, *in præf.* § 2.

[g] See the second book, title 2, section 1, article 5. 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 third section of the same second title.

Digitized by Google

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; although 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]

VIII.

3402. *Brothers have no Legitime.* — Although 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 inheritance that the law gives them, and in all other cases they may be deprived by testament of all share in the inheritance.[i]

SECTION II.

WHAT IS THE QUOTA OR QUANTITY OF THE LEGITIME, OR LEGAL PORTION.

ART. I.

3403. *Different Quotas 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]

II.

3404. *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.

[h] See the second book, title 2, sect. 1, art. 6.
[i] See the last article of the first section of the preceding title.
[a] Substantiæ pars. *Nov.* 18, *cap.* 1. Definita mensura. *D. c.*
[b] See the following articles.

Digitized by Google

III.

3405. *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]

IV.

3406. *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]

V.

3407. *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]

VI.

3408. *The Legitime of the Ascendants is the Third Part of the Estate.* — Seeing the legitime, or legal portion, of the ascendants is not more favorable 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]

Remarks on the Preceding Articles.

3409. It is certain that a legitime is due to ascendants, seeing the law gives them a right to complain of the undutifulness of

[c] *Nov.* 18, *c.* 1.

[d] *Nov.* 18, *c.* 1.

[e] See the said articles, and the second book, tit. 1, sect. 2.

[f] *Nov.* 18, *cap.* 1, *in fine.*

Digitized by Google

their children's 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 expressly 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, the legitime of the children has been 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 ancient 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 ancient 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 et nos constituimus.* Which can be applied to nothing else but to the regulation in his eighteenth novel.

3410. This first question concerning the legitime of ascendants

Digitized by Google

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 a 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.

3411. Of these two parties, one pretends that the legitime of parents is always the same, namely, 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 shown 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

* See the seventh article of the first section of the second title of the second book.

Digitized by Google

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 testament, would be only an eighth part, and yet, nevertheless, their legitime would be a third; which, they say, would be a great inconvenience.

3412. 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 ancient 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.

3413. 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

Digitized by Google

have, in case he succeeded alone to the person dying intestate, or that nobody 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 ancient 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.

3414. The other difficulty then that remains is to know whether Justinian, when he granted the favor 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 anyways 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 although 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 as ought to make any change in them.

3415. It seems reasonable to conclude from all these reflections, 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

Digitized by Google

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.

SECTION III.

OUT OF WHAT GOODS THE LEGITIME IS TAKEN, AND HOW IT IS REGULATED.

ART. I.

3416. *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.

II.

3417. *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 them-

[a] Tertia propriæ substantiæ pars. *Nov.* 18, c. 1.

Digitized by Google

selves, 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]

III.

3418. *Goods given away in the Testator's Lifetime 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 lifetime 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]

IV.

3419. *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]

V.

3420. *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

[b] *L.* 36, *C. de inoff. test.*

[c] See the title of *Partitions.*

[d] *L.* 1, *C. de inoff. donat.*; — *v. tot. h. tit. et l. un. C. de inoff. dot.*; — *Nov.* 92. See the fourth article of the fourth section of the foregoing title.

[e] *Nov.* 92.

Digitized by Google

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]

VI.

3421. *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]

VII.

3422. *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]

VIII.

3423. *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 the

[f] *L.* 29, *in f. C. de inoff. test.* See the title of the *Contribution of Goods.*
[g] *Nov.* 18, *c.* 3.
[h] *L.* 32, *C. de inoff. test.*

Digitized by Google

children of the same father, or of the same mother, although by different marriages, will have each of them their legitime, according as the number of them all together shall demand.[1]

TITLE IV.

OF THE DISPOSITIONS OF THOSE WHO HAVE MARRIED A SECOND TIME.

3424. 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.

3425. The motives of these 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

[1] *Nov.* 22, *c. ult.*

[a] 31, *q.* 1, *c.* 11, 12, 13.

[b] 1 *Tim.* 3, 2; —*dist.* 26, *et tit. de bigam. non ordin.*; —*v. Nov.* 6, *c.* 5.

Digitized by Google

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 his or her own proper goods in favor 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 favor of the children of those persons who marry again.[c]

3426. It is these rules which restrain in favor 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.

3427. 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.

3428. 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 herself 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]

3429. Of these several sorts of punishments, there is only that

[c] *Nov.* 2, *c.* 2, § 1; — *Nov.* 22, *c.* 23.

[d] *L.* 1, *C. de sec. nup.*

[e] *D. l.* 1; — *l.* 2, *eod.*; — *l.* 12, *C. de admin. tut.*

[f] *L. un. C. de senat. Claud. toll.*

[g] *L. un. C. de mulier. quæ se propr. serv. junx.*

Digitized by Google

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 although the incontinency of a woman who marries again within her year of mourning gives her justly a bad reputation, and great inconveniences 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 favor of such husbands, and that they should be even *interdicted the free administration of their estates.*[i]

3430. 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. et ult. de sec. nup.*

[i] Ordinance of *Blois*, article 182.

Digitized by Google

SECTION I.

OF THE SEVERAL SORTS OF GOODS WHICH PERSONS CONTRACTING A SECOND MARRIAGE MAY BE POSSESSED OF.

ART. I.

3431. *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 the wife 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]

II.

3432. *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]

III.

3433. *Goods which the Husband acquires from the Wife, or the Wife from the Husband, by their Marriage.* — We must reckon among the goods which the husband acquires from the wife, or the wife from the husband, by their contract of marriage, all and every thing that is stipulated by the contract itself, or given by the law or by custom without stipulation, in favor 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]

[a] There can be no goods which are not comprehended in this division.

[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.

[c] See the first and following articles of the second section, and the texts cited on those articles.

Digitized by Google

IV.

3434. *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]

V.

3435. *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]

VI.

3436. *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]

SECTION 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.

ART. I.

3437. *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 what-

[d] See the first and second sections, *In what Manner Fathers succeed*, &c.

[e] See, touching these sorts of goods, the third section.

[f] We must compare the articles of this section with those of the two following sections, according as they have relation to one another.

Digitized by Google

soever, are appropriated to the common children from the moment of the second marriage,[a] as shall be explained by the rules which follow.

II.

3438. *The Children acquire the Property of the said Goods by the Second Marriage of their Father or Mother.*—Of all the sorts of goods mentioned 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]

III.

3439. *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 choose among the 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]

[a] See the following articles, and the texts cited on them.

[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 *et* 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 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.

[c] *Nov.* 22, c. 25.

Digitized by Google

IV.

3440. *We do not distinguish the Origin of the Goods in which the Husband or Wife has Gain.* — Whether the wife's marriage portion was of her own proper goods, or whether it came from some other hand, and, in consideration of her marriage, her father, or some other persons, had given it to her; all the gains and advantages which may accrue to the husband out of these sorts of goods are considered 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]

V.

3441. *These Gains accrue to the Children, although 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, although 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]

VI.

3442. *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 favor 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

[d] *Nov.* 22, *c.* 23, *in f.*
[e] *Nov.* 22, *c.* 26, § 1; — *l.* 7, *C. de sec. nupt.*; — *d. l.* 7, *in f.*

Digitized by Google

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 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]

Remarks on the Preceding Article.

3443. 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 et viri sunt et mulieris. Nov.* 2, *cap.* 2, *in fin. Communis mulieris et 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

[f] *Nov.* 22, *c.* 46, § 1, *in f.*

[g] *D. c.* 46, § 2.

[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.

Digitized by Google

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.

SECTION III.

OF THE DISPOSITIONS WHICH PERSONS WHO HAVE MARRIED TWICE MAY MAKE OF THEIR OWN PROPER GOODS.

ART. I.

3444. *The Person who marries twice cannot give more to the Second Husband or Wife than what is equal to the Share of such of his or her Children as has the least Share.* — Although the father or mother who has married a second time retain the property of all the goods, excepting what is appropriated to the children of the first marriage, pursuant to the rules explained in the preceding section; and 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 the 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 favor of the second husband, nor to the husband to dispose in favor 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 or after the death of the giver, 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 time shall have left to the child to whom he or she has 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 movables 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

Digitized by Google

II.

3445. *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 favor 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]

III.

3446. *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, so 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]

IV.

3447. *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 favor of them all that the diminution is ordained.[d]

than what they have given to such of their children to whom they have given the least share of their estates.

[b] *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.

[c] *Nov.* 22, *cap.* 28.

[d] *Nov.* 22, *cap.* 27.

Digitized by Google

V.

3448. *The Children of divers Marriages take each of them the Goods which their Parents 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 although the second marriage have not been followed by a third, yet the children of this second marriage have the same right, and the same approbation 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 children of different marriages, are divided among all the children 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]

VI.

3449. *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 had a usufruct which the deceased husband or wife had left by any disposition whatsoever, such usufructuary would keep it, although he or she married a second time, unless it had been left on condition that the right to it should cease upon 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]

[e] *Nov.* 22, *c.* 29; — *l.* 4, *in f. C. de sec. nupt.*
[f] *L.* 4, *D. ad senat. Tertull. et Orphit.*; — *d. l.* 4, *C. de sec. nupt.*
[g] *Nov.* 22, *c.* 32.
[h] *L. ult. C. de bon. mat.*

Digitized by Google

BOOK IV.

OF LEGACIES, AND OTHER DISPOSITIONS MADE IN VIEW OF DEATH.

3450. 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, although 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, although 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 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.

3451. 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 to legacies and fidu-

Digitized by Google

ciary 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 although 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.

3452. 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.

SECTION I.

OF THE NATURE AND USE OF CODICILS, AND OF THEIR FORM.

ARTICLE I.

3453. *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]

II.

3454. *To make a Codicil, one must have Power to make a Testament.* — Although the codicil do not contain the institution of an executor, as a testament, yet nobody can make a codicil if he has not a right to make a testament. For the liberty of disposing of

[a] § 2, *Inst. de codic.*; — *l.* 2, *C. eod.*

41 *

Digitized by Google

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]

III.

3455. *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 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 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]

IV.

3456. *One may make several Codicils, which may subsist all together.* — Besides the difference between a testament and a 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 a 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

[b] *L.* 6, § 3, *D. de jure cod.*

[c] See, touching the causes which make this incapacity, the second section of *Testaments.*

[d] § 1, *Inst. de cod.*

[e] *L.* 8, *D. de jure cod.*

[f] See the eighth article.

[g] § *ult. Inst. de codic.*

[h] *L.* 1, *D. de injust. rupt.*; — § 2, *Inst. quib. mod. test. infirm.* See the first article of the fifth section of *Testaments.*

Digitized by Google

them,[l] except the changes which a testament or the last codicils may have made.[l]

V.

3457. *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]

VI.

3458. *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]

VII.

3459. *Difference between the Two Sorts of Codicils.* — It follows from the two foregoing articles, that there is a difference between

[l] *L.* 6, *D. de jure codic.*

[l] See the eighth article.

[m] *L. penult. D. testam. quemad. aper.*; — *l.* 16, *D. 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.

[o] *L.* 16, *D. de jure codic.*

[p] *L.* 8, § 1, *D. de jure codic.*

[q] *L.* 2, § 2, *eod.*

Digitized by Google

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.

VIII.

3460. *The Codicil hath its Effect, although it be not expressly 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 although it be not expressly 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]

IX.

3461. *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]

[r] Intestato patrefamilias mortuo, nihil desiderant codicilli: sed vicem testamenti exhibent. Testamento autem facto, jus sequuntur ejus. *L.* 16, *in f. D. de jure codic.* We may give to this text the meaning explained in this article, although it has another which shall be mentioned in the remark on the fourth article of the following section.

[s] § 1, *in f. Inst. de codic.*; — *l.* 3, § 2, *D. de jure codic.*

[t] *L.* 5, *in f. D. de jure codic.*

[u] *L.* 6, *D. de jure codic.*; — § 2, *Inst. de codic.*; — *l.* 27, § 1, *D. de condit. inst.*

Digitized by Google

X.

3462. *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]

XI.

3463. *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]

SECTION II.

OF THE CAUSES WHICH ANNUL CODICILS.

ART. I.

3464. *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]

[x] *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.*

[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.

[a] See the text cited on the tenth article of the first section, and the remarks 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 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.

Digitized by Google

II.

3465. *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]

III.

3466. *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]

IV.

3467. *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]

REMARKS ON THE PRECEDING ARTICLE.

3468. 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. D. 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

[b] *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.

[d] See the fourth, fifth, and eighth articles of the first section.

[e] Rupto testamento posthumi agnatione, codicillos quoque ad testamentum pertinentes non valere, in dubium non venit. *L.* 1, *C. de codic.*

Digitized by Google

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*, *D. de jure cod.*

3469. 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 through forgetfulness, or because he had been surprised 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 favorable.* And if equity requires that the birth of a child should annul in its favor 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, although 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 savor 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 there is no testament. Neither have we put down the contrary in this article; but we have contented ourselves 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 at-

* See the fifteenth article of the fifth section of *Testaments*.

Digitized by Google

tended 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 connection 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, had 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 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 favor 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?

3470. 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 are still to be seen at this day, several lawsuits which are occasioned by the difficulties which arise from certain cases which are pretended to be excepted from the rule of

Digitized by Google

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 lawsuits. 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.

3471. *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 also annul 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]

SECTION III.

OF DONATIONS MADE IN PROSPECT OF DEATH.

3472. It is necessary to distinguish, in these terms of *donation in prospect of death*, two different ideas of two things which they signify in their common acceptation with us. For we may understand by these terms the deed or writing which contains the disposition of the donor, as we understand by the word *codicil* the writing which contains the legacies; and we may likewise understand by these terms of *donation in prospect of death*, the very disposition itself, 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 term, which has both senses, and which signifies equally the disposition of the person who gives, and the writ-

[f] See the fifth section of *Testaments*.

Digitized by Google

ing which contains the said disposition; which may proceed from hence, that usually the terms *donation in prospect of death* are 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.

3473. It was necessary to observe the distinction of these two meanings which the terms *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 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 itself, 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.

3474. 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 lifetime 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 that have their Effect in the Lifetime of the Donor*, 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.

ART. I.

3475. *Definition of a Donation made in Prospect of Death.* — A donation made in prospect of death is a disposition made by him

Digitized by Google

who, not being willing to strip himself in his lifetime 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 favor with it, and that he should have it rather than his heirs.[a]

Remarks on the Preceding Article.

3476. 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 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, *D. de mort. caus. donat;*— § 1, *Instit. de donat.*

3477. 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 revocable, 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 lifetime, 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, through 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

[a] Mortis causa donatio est, cum quis habere se vult quam eum cui donat: magisque eum cui donat, quam hæredem suum. *L.* 1, *D. de mort. caus. donat.;*—§ 1, *in f. Inst. de donat.*

Digitized by Google

our usage it is indifferent whether the person who makes the donation because of death be in immediate danger of it, or not. And they must all of them be in writing, and made in due form.

3478. 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 immovable goods, or of sums of money, or of other things that are not actually delivered to the donee; for what is actually delivered, 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.

3479. 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, *et* 21, *D. de mort. causa donat. et capion.*

II.

3480. *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 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 favor 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 expressly for that

Digitized by Google

purpose, or whether it be contained in a codicil, either under the name of legacy, or under that of donation.[b]

III.

3481. *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]

IV.

3482. *Who may make Donations in Prospect of Death.* — The same persons who may or may not make testaments or codicils, may 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]

V.

3483. *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]

VI.

3484. *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.

[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.

[c] See the text cited on the tenth article of the first section of *Codicils*, and the remark there made upon it. Quinque testibus præsentibus. *L. ult. C. de donat. caus. mort.*

[d] See the second section of *Testaments*.

[e] See the two preceding sections.

[f] § 1, *Inst. de donat.*; — *v. l. ult. C. de donat. caus. mort.*

Digitized by Google

TITLE II.

OF LEGACIES.

3485. 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.

3486. 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 distinguished 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.

3487. 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 although 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 favor is not called the inheritance, even although 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 a universal legacy.

3488. 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 dispo-

Digitized by Google

sitions, 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.

3489. 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 ancient 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 reality some difference between legacies and particular fiduciary bequests, and that we shall be obliged to make use of this term *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.

3490. 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]

3491. 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, although, as has been just now remarked, they have been made

[a] Per omnia exæquata sunt legata fideicommissis. *L.* 1, *D. de legat.* 1.

[b] *V. tit. Inst. de fideicom. hæred. et tit. de sing. reb. per fideicom. relict.*

Digitized by Google

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 explained in the second section of the third title of the fifth book.

3492. 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 explained 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.

3493. It is not needful to explain here the different kinds of legacies which had been in use in the Roman law. For although 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 ancient 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 forbade 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

[c] § 2, *Inst. de legat.*; — *l.* 1, *C. comm. de legat.*

[d] § *ult. Inst. de legat.*; — *l. un. C. de his quæ pœn. nom.*

Digitized by Google

his order, to give to such a one the sum of so much. And although such a legacy seems to be approved by Justinian, contrary to the ancient 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.

SECTION I.

OF THE NATURE OF LEGACIES, AND OF PARTICULAR FIDUCIARY BEQUESTS.

3494. 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.

ART. I.

3495. *Definition of a Legacy.*— A legacy is a particular disposition, because of death, in favor of some person, either by a testament or a codicil.[a]

II.

3496. *Definition of a Particular Fiduciary Bequest.*— A particular fiduciary bequest is a disposition by which the executor or a legatee is entreated to restore, or to give to a third person, a certain thing.[b]

III.

3497. *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 a 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 entreaty to his executor, or whether he commands him, or, without addressing himself to the executor, explains his will, the executor will be

[e] *V. d. § ult.*
[a] *L.* 36, *D. de legat.* 2; — § 1, *Instit. de legat.*; — *l.* 116, *D. de legat.* 1.
[b] *Inst. de sing. reb. per. fideicom. relict.*
[c] *L.* 1, *D. de legat.* 1; — *l.* 87, *D. de legat.* 3; — § 1, *Instit. de donat.*

Digitized by Google

bound to execute it.[d] And it is the same thing if it is a legatee whom the testator requires or entreats to give or remit a sum of money, or any other thing, to a third person.[e]

IV.

3498. *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]

V.

3499. *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 place.[g] And as for the nature and characters of these dispositions, we must join to what has been said of that matter in the first three 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.

VI.

3500. *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 favor 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 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]

[d] *L.* 2, *C. com. de legat.*

[e] *L.* 1, *C. comm. de leg.* See the seventh article.

[f] See the following article.

[g] See the third section of *Testaments*, the first section of *Codicils*, and the third article of the third section of the same title.

[h] See the two following sections.

Digitized by Google

VII.

3501. *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]

VIII.

3502. *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]

IX.

3503. *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]

X.

3504. *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 favorable, are preferred before all his dispositions, of what kind soever they be.[n]

[i] Eorum, quibus mortis causa donatum est, fideicommitti quoquo tempore potest. *L.* 77, § 1, *D. 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.

[l] *L.* 19, § *ult. D. de leg.* 1.

[m] *L.* 5, § 1, *D. de leg.* 2.

[n] *L.* 66, § 1, *D. de leg. Falc.*

Digitized by Google

SECTION II.

WHO MAY GIVE LEGACIES, AND WHO MAY RECEIVE THEM.

3505. 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.*

Art. I.

3506. *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]

II.

3507. *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]

III.

3508. *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]

IV.

3509. *Persons unworthy of Legacies.*— We must not rank in the number of persons incapable of legacies those who render

[a] See the second section of *Testaments.*
[b] See the fourteenth article, and those that follow, of the second section of *Testaments.*
[c] See the same second section of *Testaments.*

Digitized by Google

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]

V.

3510. *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 favor. For although the testament were confirmed against his pretension, yet seeing it did not anyways injure the honor 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]

VI.

3511. *Particular Rules concerning Persons who may receive Legacies.* — Although, 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

[d] *L.* 25, *C. de legat.*

[e] See the third section of *Heirs and Executors* in general.

[f] *L.* 7, § 1, *D. de his quæ ut ind. auf.* See the second and following articles of the third section of an *Undutiful Testament.*

Digitized by Google

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]

VII.

3512. *One may bequeath Alimony to a Person incapable of other Legacies.* — The incapacity of inheriting or receiving a benefit by some disposition made in prospect of death does not comprehend legacies of alimony. For 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]

VIII.

3513. *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]

IX.

3514. *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, although 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 con-

[g] See the following articles.

[h] *L.* 3, *D. de his quæ 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 favor 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.

[i] *L.* 17, § 2, *D. de leg.* 1.

Digitized by Google

dition, although different in respect of the inheritance, is the same in the legacy.[l]

X.

3515. *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 deprived of his legacy. For it was free for him to abstain from one of the two favors, 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 meddling in the affairs of the inheritance, and leave it to those who were called to the succession with him.[n]

XI.

3516. *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, although the testator had died without knowing who had done him that good office.[o]

XII.

3517. *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 distinguished, all the children will have their share in it. But, in

[l] *L.* 67, § 1, *D. de leg.* 1.
[m] *L.* 17, § 2, *D. de leg.* 1.
[n] *L.* 87, *eod.*; — *l.* 12, *C. de leg.*
[o] *L.* 5, *D. de reb. dub.*

Digitized by Google

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, although the legacy were destined only for one child, yet, none of them being distinguished from the others, it would go to them all.[p]

XIII.

3518. *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 public buildings, for maintaining the poor, or for other charitable uses, or for the public 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]

SECTION III.

WHAT THINGS MAY BE DEVISED.

3519. As to things which 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

[p] *L.* 17, § 1, *D. de leg.* 2; — *v. l.* 24, *eod.*; — *l.* 67, § 2, *D. de legat.* 2; — *d. l.* 67, § 7.

[q] *L.* 177, *D. de leg.* 1; — *l.* 122, *eod.*

[r] *L.* 2, *D. de reb. dub.*

[s] *L.* 20, *D. de reb. dub.*

Digitized by Google

profits of a thing for some time, or during his life, such as a 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.

ART. I.

3520. *One may devise every Thing that is in Commerce.* — One may devise all sorts of things, movables or immovables, 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]

II.

3521. *One cannot devise Things that are Public or Consecrated.* — Since one can devise only what may pass to the use of the legatee, the legacy of a public 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]

III.

3522. *One may bequeath a Thing belonging to another Person.* — Although 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.

REMARKS ON THE PRECEDING ARTICLE.

3523. Although it may seem somewhat strange that one can bequeath a thing which he has no right to dispose of, and espe-

[a] *L.* 41, *D. de legat.* 1. See the following article.

[b] Campum Martium, aut forum Romanum, vel ædem sacram legari non posse constat. Sed et ea prædia Cæsaris quæ in formam patrimonii redacta, sub procuratore patrimonii sunt, si legentur, nec æstimatio eorum debet præstari. *L.* 39, § *penult. et ult. D. 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 public use, such as a church or church-yard. For the legacy of a house in which there was a chapel for the use of the said house would comprehend the chapel, in the same manner as the legacy by an ecclesiastic of his silver-chapel would take in the consecrated plate belonging to it.

[c] Non solum testatoris vel hæredis res, sed etiam aliena legari potest. § 4, *Inst. de leg.*

Digitized by Google

cially 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 article 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.

3524. 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 reflection 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*, although that decretal be only in a particular case, where the legatee, being in possession 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

Digitized by Google

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 itself.

IV.

3525. *A Testator may bequeath a Thing which he knows is not his own.* — 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 itself 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 of it, for he who is the demandant is obliged to establish his right.[f]

V.

3526. *The Legacy is Null if the Testator thought that the Thing he bequeathed was his own.* — 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]

VI.

3527. *Exception to the foregoing Rule.* — If the legacy of a thing which the testator took to be his own, and which was not so, had been given in favor 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

[d] § 4, *Inst. de leg.*; — *l.* 30, § *ult. D. de leg.* 3.
[e] *D.* § *ult. in f.*
[f] § 4, *in f. Inst. de leg.* See the following article.
[g] § 4, *Inst. de leg.*; — *l.* 36, *in f. D. de usu et usufr. leg.*

Digitized by Google

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 itself, if he could agree for it with the proprietor at a reasonable price.[h]

VII.

3528. *If the Thing belongs to the Testamentary Heir or Executor, it is equal whether the Testator know or be ignorant of this Fact.* — 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 although 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 to the contrary, that he, having a mind to leave this legacy, would not have been diverted from doing it, although he had known that the thing belonged to his testamentary heir or executor.[i]

VIII.

3529. *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, although 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]

[h] *L.* 10, *C. de legat.*

[i] § 10, *Inst. de legat.*; — *l.* 13, *C. eod.*

[l] *L.* 67, § 8, *D. de legat.* 2.

IX.

3530. *If the Legatee has acquired by a lucrative Title what was bequeathed to him, the Legacy will be Null.* — If after 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 itself, 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, although he came by it another way, since by that the intention of the testator would be accomplished.[m]

X.

3531. *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 legatee 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 itself, 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.

XI.

3532. *Two Legacies of one and the same Sum are not two Legacies of the same Thing.* — We must not reckon among lega-

[m] § 6, *Inst. de legat.*; — *l.* 21, § 1, *D. de legat.* 3; — *l.* 88, § 7, *in f. D. de leg.* 2.
[n] § 6, *in f. Inst. de legat.*

Digitized by Google

cies of one and the same thing, those 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 legatee 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]

XII.

3533. *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]

XIII.

3534. *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 legatees, 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 shown in the following title.[q]

[o] *L.* 87, *D. de legat.* 2.

[p] *L.* 5, § 2, *D. de leg.* 1.

[q] Liberationem debitori posse legari jam certum est. *L.* 3, *D. de liber. leg.* Omnibus debitoribus ea quæ debent recte legantur: licet domini eorum sint. *L.* 1, *D. eod.*

Digitized by Google

Remarks on the Preceding Article.

3535. It appears from the two texts cited, 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 reflection 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 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 a 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 diminution which the customs make of all dispositions made in prospect of death in favor of the heirs of blood. But although there should be no cause for diminishing or reducing the same, and the question were not 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, in the hands of a third person, that he might deliver up the same after his death to his debtor; seeing there would

* *L.* 3, § 2, *D. de liber. leg.*

Digitized by Google

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 public, 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.

3536. *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 although 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 anyways 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 favor of the company, the legacy would be common both to the one and the other.[s]

XV.

3537. *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.

[r] *L.* 3, § 3, *D. de liber. leg.*

[s] *D. l.* 3, § 4.

Digitized by Google

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]

XVI.

3538. *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 entire 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 to the prejudice of the children, under pretext of the favor that ought to be shown to the grandfather.[u]

Remarks on the Preceding Article.

3539. 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 under his tuition, and had gathered 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.

3540. It may be observed in relation to the accounts of the administration which fathers may have of the estates of their chil-

[t] *L.* 8, § 2, *D. de liber. leg.* See the third article of the second section of *Interest, Costs, and Damages.*

[u] *L.* 28, § 3, *D. de liber. leg.*

Digitized by Google

dren, 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.

3541. *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 legatee 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.[1]

Remarks on the Preceding Article.

3542. We have not put down in this article that which is said in the 5th section, *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 act and deed, and that a debtor is not ignorant that he is indebted, and that his goods are mortgaged for his debts, whether he has laid any particular thing in pawn in the hands of his creditor, or 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 57th law, *de legat.* 1, it is said that the legatee is not bound to redeem the thing bequeathed, although 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;

[1] *L.* 6, *C. de fideic.*;—*l.* 57, *in f. D. de legat.* 1;—*v. l.* 15, *D. de dote prælег.*;—§ 5, *Inst. de legat.* See the fifteenth article of the eleventh section.

Digitized by Google

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 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 movables 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 legatee to redeem the thing bequeathed, it would seem that the burden of it ought always to lie on the testamentary heir.

XVIII.

3543. *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 which 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]

XIX.

3544. *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

[y] *L.* 17, *D. de leg.* 3; — *l.* 24, *D. de leg.* 1.
[z] *L.* 5, *D. de trit. vin. vel ol. leg.*; — *l.* 8, § 2, *D. de leg.* 2.

Digitized by Google

whence it should be taken, the said quantity would be due, although 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]

XX.

3545. *An Indefinite Legacy of Movables.* — When a testator hath bequeathed movables, such as his hangings and other furniture of his house, or the movables 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 movables 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]

XXI.

3546. *The Legacy of a Thing specified 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 there were not found in the succession either diamond ring or 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.

XXII.

3547. *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 suit of hangings; but indefinitely and in general a horse, a suit

[a] *L.* 3, *D. de trit. vin. vel de legat.*

[b] *L.* 12, *D. de legat.* 2.

[c] *L.* 28, *D. de instr. vel instr. legat.*; — *l.* 7, *D. de aur. arg.* See the thirteenth and fourteenth articles of the following section.

[d] *L.* 32, § 5, *D. de leg.* 2.

Digitized by Google

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 legatee choose 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 tenth article of the seventh section of *Testaments*, and the others which shall be explained in the seventh section of the title of *Legacies*.

XXIII.

3548. *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 public use or for some particular person.[f]

XXIV.

3549. *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 seventh 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]

[e] *L.* 37, *D. de legat.* 1; — *l.* 110, *eod.* See the second and following articles of the seventh 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 choose, which shall be explained in the fifth article of the seventh section.

[f] *L.* 49, § *ult. D. de legat.* 2.

[g] *L.* 71, *D. de leg.* 1.

Digitized by Google

SECTION IV.

OF ACCESSORIES TO THINGS BEQUEATHED.

ART. I.

3550. *Definition of Accessories.*—An accessory to a thing bequeathed is that which, not being part of the thing itself, has, nevertheless, such a connection with it, as that it ought not 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]

II.

3551. *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, although 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 movables that are in it, unless the testator have expressed the same.[b]

III.

3552. *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, although 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

[a] Quæ rebus accedunt. *L.* 1, § 5, *depos.* Ut vestis homini, equo capistrum. *D.* §.
[b] See the articles which follow.

Digitized by Google

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.

IV.

3553. *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 legatee 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 plaster, with intent that they should always remain there; for these sorts of things are of the nature of immovables. But there will be no movable 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]

V.

3554. *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 otherwise ordered by his testament.[e]

VI.

3555. *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

[c] *L.* 18, § 3, *in f. D. de instr. vel instrum. leg.*
[d] *L.* 21, *D. de instr. vel instrum. leg.*; — *l. ult. D. de suppell. legat.*
[e] *L.* 10, *D. de legat.* 2; — *l.* 44, § 4, *D. de leg.* 1; — *l.* 39, *D. de leg.* 2. See the seventh and eighth articles. See the fourteenth article of the sixth section of *Testaments.*

Digitized by Google

even new rights, or if he had purchased grounds in order to enlarge, either a park, or some other land or tenement belonging to the said estate. For all these sorts of augmentations 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]

VII.

3556. *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 of 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 otherwise by the disposition of the testator, and the circumstances which might explain his intention.[g]

VIII.

3557. *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

[f] This is a consequence of the preceding article.

[g] *L.* 24, § 2, *D. de leg.* 1; — *l.* 10, *D. 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.

Digitized by Google

with the land to the legatee, unless it should appear that the testator intended to revoke the legacy, as has been said in the fifth article. And if, for example, a testator, having devised a place in a town to build in, 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 legatee. But if he had built in a ground which he had devised either a house or other conveniences necessary for a farm to which he had joined the said ground, giving the said farm to another legatee, 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]

IX.

3558. *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 through 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 through his own ground: and this accessory is such, that it is the intention of the testator that it should follow the legacy.[i]

X.

3559. *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 legatee, 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

[h] *L.* 44, § 4, *D. de leg.* 1. The circumstances mentioned in the article show clearly enough the change of the will of the testator.

[i] *L.* 15, § 1, *D. de usufr. legat.* Although this text speaks only of the service that is necessary to the legatee of a 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 his own lands, in making one ground to serve for the necessary passage to another.

Digitized by Google

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]

XI.

3560. *The Legatee 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]

XII.

3561. *The Movables of Houses, whether in Town or Country, are not Accessories to them.* — The legacy of a house in the town does not comprehend the movables that are in it, unless they are expressly added by the testator. Nor does the legacy of a house in the country take in what movables 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]

XIII.

3562. *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 movables 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]

[l] *L.* 4, *D. de servit. leg.*
[m] *L.* 10, *D. de servit. præd. urb.; — d. l. in f.*
[n] *L.* 2, § 1, *D. de instr. vel instrum. legat.*
[o] *L.* 21. *eod.*
[p] *L.* 12, *D. de instr. vel instrum. legat.*
[q] *L.* 18, § 3, *in f. eod.*

Digitized by Google

XIV.

3563. *The Legacy of a House with its Movables.* — If a testator had devised a house with all its movables, this legacy would comprehend all the movables 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 movables, laid up and destined either for sale, or for the use of another house, the legatee would have no right to them.[r] And if, on the contrary, some movables of this house should chance to be somewhere else at the time of the testator's death, as if a suit 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]

XV.

3564. *Papers are not comprehended in a Legacy of all Things found in a House.* — 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 legacy, which would comprehend all the movable 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.

XVI.

3565. *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

[r] *L.* 44, *D. de leg.* 3. [s] *L.* 86, *eod.*

[t] *L.* 44, *D. de leg.* 3; — *l.* 32, § 2, *D. de usu et usuf. et red. leg.* It follows from these texts, that this legacy would comprehend the money, if it were not excepted.

[u] *L.* 86, *D. 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*. *L.* 15, § 2, *in fine*, *D. de re jud.* We see by this text the distinction between rights and things corporeal.

Digitized by Google

that is made of them, and not by their value: so that the accessory is frequently of a much greater value than the thing itself 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.[z]

SECTION V.

OF LEGACIES OF A USUFRUCT, OR A PENSION, OR ALIMONY, AND OTHER THINGS OF THE LIKE NATURE.

3566. WE have not put down in this section the rule of the Roman law by which it is ordered, that, if a testator had bequeathed a 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.

ART. I.

3567. *A Legacy of a Usufruct.* — When a testator bequeaths a 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 legatee the rules relating to usufruct, which have been explained in the title of the said matter.[a]

II.

3568. *A Legacy of a 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 legatees 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

[z] *L. 44, D. de ædil. ed.; — l. 6, § 1, D. de aur. arg. mund.*
[a] See the end of the preamble of the title of *Usufruct.*
[a] See the title of *Usufruct.* See the ninth article of the preceding section.

Digitized by Google

being called to the propriety thereof upon condition of their surviving the others.[b]

III.

3569. *The Usufruct of Movable Things.* — Since one may bequeath the usufruct of movable 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 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.

IV.

3570. *How the Legacy of a Portion of the Fruit 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 would 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]

V.

3571. *The Burden on a Legacy of a Usufruct passes to the Executor, if the Legacy does not take Place.* — If the legatee of a usufruct had been burdened by the testator with a fiduciary bequest to some other person, and the said legatee 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 although this bequest regarded only the person of the legatee because of his usufruct, and the said usufruct does not subsist any longer; yet the enjoyment of the thing bequeathed, which was burdened with this fiduciary bequest,

[b] *L.* 11, *D. de reb. dub.*
[c] See the third section of *Usufruct.*
[d] *L.* 32, § 2, *D. de usu et usufr. leg.*
[e] *L.* 21, *D. de ann. legat.*

Digitized by Google

does not go to the testamentary heir or executor but with this charge.[f]

VI.

3572. *The Difference between an Annual Legacy, and a Legacy of a 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 legatee, either during a certain time, or during his life. And there is this difference between a legacy of this nature, and a legacy of a 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 a 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 legatee 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]

VII.

3573. *Another Difference.* — There is likewise this difference between the legacy of a usufruct and an annual legacy, that a legacy of a usufruct cannot be perpetual, because it would annul the right of property; but an annual legacy may be perpetual, whether it be in favor of a corporation or of the heirs of some family.[h]

VIII.

3574. *Another Difference.* — There is also this other difference between these two kinds of legacies, that if the lands which are subject to a usufruct should produce nothing, the right of the usufructuary would be of no use. But the legacy of a certain quan-

[f] *L. 9, D. de usu et usufr. leg.*

[g] *L. 4, D. 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.

[h] *L. 22, C. de leg.*

Digitized by Google

tity of corn, wine, or other things, is altogether independent of what may be reaped in the harvest or vintage. And even although 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 was no crop, provided that the other years could supply the said deficiency, and that the intention of the testator were not contrary thereto.[l]

IX.

3575. *An Annual Legacy is acquired at the Beginning of the Year.*— Annual legacies accrue to the legatee when the year begins; and although 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 beforehand.

X.

3576. *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]

XI.

3577. *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 ecclesiastics of such a parish, or to some other such like use, upon some festival or so-

[l] *L.* 17, § 1, *D. de ann. leg.*; — *l.* 13, *D. de trit. vin. vel ol. leg.*

[l] *L.* 1, *C. quando dies leg. vel fid. ced.*; — *v. l.* 5, *D. de ann. leg.*; — *l.* 12, *D. quando dies leg. ced.* See the sixth article.

[m] *L.* 20, *D. quand. leg. ced.*

Digitized by Google

lemnity which should return every year, as on a saint's day, or on some festival of some of the mysteries of religion, without mentioning expressly that the said charity or dole 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]

XII.

3578. *Legacies of Alimony are for Life.*—Legacies of alimony, or of a maintenance, last during the life of a legatee, 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]

XIII.

3579. *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 favorable, if a testator had devised such a legacy to last only until the legatee should attain the age

[n] Cum quidam decurionibus divisiones dari voluisset die natalis sui: Divi Severus et Antoninus rescripserunt, non esse verisimile testatorem de uno anno sensisse, sed de perpetuo legato. *L.* 23, *D. de ann. leg.*

Attia fideicommissum his verbis reliquit, quisquis mihi hæres erit, fidei ejus committo, uti det ex reditu canaculi mei et horrei, post obitum, sacerdoti, et hierophylaco, et 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, et in eo officio fuerint, debitum sit, an etiam his, qui in locum eorum successerunt? Respondit, secundum ea quæ proponerentur, ministerium nominatorum designatum, cæterum 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.*

Although 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.

[o] *L.* 14, *D. de alim. vel cib. leg.*

Digitized by Google

of puberty, it would not end till he had attained the age of full puberty, that is, eighteen years complete in males, and fourteen in females.[p]

XIV.

3580. *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]

XV.

3581. *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 of the testator,[r] as has been said in another place.[s]

XVI.

3582. *How a Legacy of Alimony which the Testator had been used to give in his Lifetime is regulated.* — If he who always gave 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 imme-

[p] *L.* 14, § 1, *D. de alim. vel cib. leg.* See, touching these two sorts of puberty, the remark on the eighth article of the second section of *Persons.*

[q] *L.* 6, *D. de alim. vel cib. leg.*; — *l.* 7, *eod.*; — *l. ult. eod.*

[r] *L.* 22, *D. de alim. vel cib. leg.*

[s] See the twelfth article of the sixth section of *Testaments.*

Digitized by Google

diately preceding his death, whether he had given more before that time, or less.[t]

XVII.

3583. *A Legacy of Alimony is due, although the Legatee 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 legatee, 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 although the motive of the testator was barely that the legatee should be maintained, and he has had his maintenance, yet this was a charge that the testator imposed 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 legatee, 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]

XVIII.

3584. *Legacies of Alimony are favorable.* — Legacies of alimony are distinguished from the greater part of other legacies, by the consideration of the necessity that renders them so favorable, 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 favor of poor persons, it might be ranked in the number of legacies to pious uses, which are the subject-matter of the ensuing section.

[t] *L.* 14, § 2, *D. de alim. vel cib. leg.*

[u] *L.* 10, § 1, *D. de alim. vel cib. leg.*; — *l.* 18, § 1, *eod.*

[x] See the sixth article of the second section.

Digitized by Google

SECTION VI.

OF LEGACIES TO PIOUS USES.

ART. I.

3585. *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.

II.

3586. *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 motive 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 shown in the article which follows.

III.

3587. *Difference between a Legacy to Pious Uses, and a Legacy which regards the Public 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, although they be destined for a public good, if that good be any other than a work of piety or charity. Thus, a legacy destined for some public ornament, such as the gate of a city, for the embellishment or conveniency of some public 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]

[a] Dispositiones pii testatoris. *L.* 28, *C. de episc. et cler.*
[b] It is in this motive that the essential part of legacies to pious uses does consist.
[c] *L.* 117, *D. de leg.* 1; — *l.* 122, *eod.*

Digitized by Google

IV.

3588. *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]

V.

3589. *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 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]

REMARK ON THE PRECEDING ARTICLE.

3590. What is said in the text cited, that, if the testator has named nobody for the execution of his legacies to pious uses, the bishop of the place may demand the sum bequeathed, in order to

[d] Si quis in nomine magni Dei et 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 to belong to the testator's parish church.

[e] Si quidem testator designaverit per quem desiderat redemptionem fieri captivorum, is qui specialiter designatus est, legati vel fideicommissi habeat exigendi licentiam: et 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. et cler.*

Digitized by Google

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 governors of a hospital or an almshouse, 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.[e]

VI.

3590¼. *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 a 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 noways 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]

[e] See the edict of 1561, the ordinance of *Moulins*, art. 73, that of *Blois*, art. 65 and 66, and that of *Melun*, art. 10.

[f] Legatum civitati relictum est, ut ex reditibus quotannis in ea civitate memoriæ 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, et primoribus civitatis, dispiciendum est, in quam rem converti debeat fideicommissum, ut memoria testatoris alio et licito genere celebretur. *L.* 16, *D. de usu et usuf. et red. leg.*

Although 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.

Digitized by Google

VII.

3591. *Privilege of Legacies to Pious Uses.* — Since legacies for works of piety and charity have a double favor, both that of their motive for holy and pious uses, and that of their utility for the public good, they are considered as being privileged in the intention of the law.[g]

SECTION VII.

OF LEGACIES OF ONE OF SEVERAL THINGS, AT THE CHOICE OF THE EXECUTOR, OR OF THE LEGATEE.

3592. 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 legatee shall have the choice of the person: *Homine generaliter legato, arbitrium eligendi quem acciperet, ad legatarium pertinet. L.* 2, § 1, *D. de opt. vel el. leg.* And it is said in another law, that if a testator hath bequeathed in general a silver basin, he having several, and not distinguishing which basin he intends to give, the testamentary heir will have it in his choice to give which basin he pleases. *Sed etsi lancem legaverit, nec apparuerit quam, æque electio est hæredis quam velit dare. L.* 37, *in fine*, *D. de leg.* 1.

3593. 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 ancient Roman law between legacies which were called *per vindicationem*, and those that were called

g See the sixth article of the eighth section, and the remark on the fourth article of the second section of *Codicils*.

The favor 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 favor 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*.

Digitized by Google

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 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, although 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 choosing than that which charges the testamentary heir to give to the legatee.

3594. We have been obliged to make this reflection 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 favors 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

[a] See the preamble of the ninth section of *Testaments*.
[b] *V. Ulp. tit.* 24, § 14.
[c] § 2, *Inst. de legat.*

Digitized by Google

section what has been said in those articles, the reader may have recourse to them, and join them here.

ART. I.

3595. *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 legatee or to the executor.[a]

II.

3596. *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 twenty-second article of the third section of this title, and on the rules which follow.[b]

III.

3597. *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, although he has not given the choice either to the executor or to the legatee, 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. Dennis, 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

[a] See the following articles.

[b] See the twenty-second article of the third section of this title, and the tenth article of the seventh section of *Testaments*. See the following rules.

Digitized by Google

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 satisfied 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]

IV.

3598. *A Legacy left to the Choice of the Executor.* — If a testator had bequeathed a silver basin, having several of that sort, the executor would be at liberty to give which silver basin he pleased.[e] For the legatee 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, although of the same kind, might be of different qualities, good or bad, such as horses, hangings, the liberty of choosing, which the executor would have, would not extend to a power of choosing a suite 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]

V.

3599. *A Legacy left to the Choice of the Legatee.* — When a testator gives to the legatee the right of choosing 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 legatee has the liberty to choose the most precious of them.[g] And to put the legatee in a condition to make this choice, the executor is obliged to

[c] *L.* 37, § 1, *D. de leg.* 1; — *l.* 39, § 6, *D. de leg.* 1.

[d] See the sixth, seventh, and other following articles of the seventh section of *Testaments.*

[e] *L.* 37, *in f. D. de leg.* 1.

[f] *L.* 110, *D. de leg.* 1. See the twenty-second article of the third section, and the eighth and tenth articles of the seventh section of *Testaments.*

[g] *L.* 2, *D. de opt. vel elect. leg.*

Digitized by Google

show 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 act of the executor, had not appeared, the legatee, who, without knowing any thing of them, had made his choice, might choose anew after he came to the knowledge of them.[h] But if among all these things there should be any one that was 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 legatee, especially if the executor is willing to make up to the legatee 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 legatee does not extend so far as to put it in his power to hurt the executor.[i]

VI.

3600. *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 legatee 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 legatee, 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.[k] 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.[l]

[h] *Ll.* 4 *et* 5, *eod.*

[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 legatee to abuse it when he has it. Homine legato, actorem non posse eligi. *L.* 37, *D. de leg.* 1. See the tenth article of the seventh section of *Testaments.*

[k] *L. ult.* § 1, *C. comm. de legat.*

[l] Arbitri officium invocandum est. *L.* 13, *in f. D. 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.

Digitized by Google

VII.

3601. *He who has the Choice ought not to defer it.* — When the testator hath given power to choose, whether it be to the executor or to the legatee, 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.[m]

VIII.

3602. *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 legatee 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 legatee 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 legatee had suffered damages because one of them was not delivered to him, the executor would be accountable for the same.[n] 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 legatee, he might oblige the executor either to choose for him one of the things that were present, or to give him the value of one of the things that were absent.[o]

[m] 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, *D. 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.

[n] See the text cited upon the preceding article, which may agree as well to the delay of the executor as to that of the legatee.

[o] *L.* 47, § 3, *D. de leg.* 1.

Digitized by Google

IX.

3603. *Penalty when the Legatee defers to make the Choice.* — If the choice belongs to the legatee, 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 (whichsoever he should choose) 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, and might have been able to sell the horse which the legatee would have left him, and would not have been obliged to keep both the horses, might recover against this legatee costs and damages for that expense and that loss, according to the circumstances.[p]

X.

3604. *If there remain only one of the Things whereof the Choice was bequeathed, it belongs to the Legatee.* — If after the death of the testator, and before the election, whether it were to be made by the legatee 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 legatee, and the others to the executor.[q] But if there remains only one of them, it belongs to the legatee. For although his legacy was of a right to choose, and there is now no room left for choice, yet the intention of the testator was that the legatee should have one of them; and therefore he ought to have that which is the only one that remains.[r]

XI.

3605. *If, after the Choice is made, the Thing chosen perishes, the Legatee bears the Loss of it.* — If after that he who was to choose,

[p] See the text cited on the seventh article, in which these words are to be remarked: Ne venditio quandoque eligente legatario interpelletur.

[q] 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 legatee 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*.

[r] 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 legatee's, as much or rather more than the choice would do that which should be chosen.

Digitized by Google

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 legatee, 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.[s]

XII.

3606. *He who has made his Choice cannot change and make another.* — The executor or legatee, who has once made his option, whether judicially or extrajudicially, by mutual consent, cannot afterwards change or make another choice. For the right of choosing, which the testator had given him, is consummated by this first choice.[t]

XIII.

3607. *The Choice cannot be made before the Executor has accepted the Succession.* — The legatee who has the right of choosing 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.[w]

XIV.

3608. *The Legatee of what shall remain after the Choice of another will have all, if no Choice is made.* — If a testator had bequeathed one or two things out of many at the choice of one legatee, and the remainder of them to another, and he who had this choice would not make use of his right, all the things would belong to the second legatee, 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 legatees would comprehend them all, if he took none of them.[x]

[s] Stichum aut Pamphilum, utrum hæres meus volet Titio dare: si dixerit hæres Stichum se velle dare, Sticho mortuo liberabitur. *L.* 84, § 9, *D. de leg.* 1.

Although 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 legatee has himself made the choice.

[t] *L.* 84, § 9, *D. de legat.* 1; — *l.* 20, *D. de opt. vel elect. leg.*; — *l.* 5, *D. de legat.* 1; — *l.* 11, *in f. D. de legat.* 2.

[w] *L.* 16, *D. de opt. vel elect. legat.*

[x] *L.* 17, *D. de opt. vel elect. leg.*

Digitized by Google

XV.

3609. *The Right of Election passes to the Heir or Executor of the Legatee.* — If the legatee who had a right to choose dies without having made a choice, he transmits to his heir or executor both his right to the legacy and the right of election.[y]

SECTION VIII.

OF THE FRUITS AND INTEREST OF LEGACIES.

3610. 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.*

3611. 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 legatee, 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.

Art. I.

3612. *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

[y] *L.* 19, *D. 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.*

Digitized by Google

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 itself: 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]

II.

3613. *If the Testator has regulated the Fruits and Revenues of the Legacy, his Will will serve as a Rule.* — If a testator had 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 ordered. Thus, he who devises a land may order it to be delivered either after the harvest is over, or after some years, during which space of time he leaves the enjoyment of it to his executor.[c]

III.

3614. *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]

[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, *D. de verb. obl.*

[c] *L.* 5, *C. de necess. serv. hæred. inst.* See, touching the interest of money, the fourth article.

[d] In legatis et fideicommissis fructus post litis contestationem non ex die mortis consequuntur, sive in rem sive in personam agatur. *L. ult. C. de usur. et 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, *D. de leg.* 3; — *l.* 23, *D.*

REMARKS ON THE PRECEDING ARTICLE.

3615. 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 legatee 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 legatee from the moment of the testator's death; and although the legatee 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 legatee 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]

de leg. 1; — *ll.* 8, 39, *D. 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 of 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*.

[a] *L.* 86, § 2, *D. de leg.* 1; — *l.* 64, *in f. D. de furt.*; — *l.* 80, *D. de legat.* 2.

Digitized by Google

3616. 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 legatee 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 favor of legacies to pious uses, having ordained, with respect to these sorts of legacies, that no inquiry should be made whether the legacy had ever been demanded, but that it should suffice that, the testamentary heir not having delivered the legacy, he should be reckoned guilty of delay *ipso jure*, that is to say, by the effect of the law itself.[b]

3617. 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 legatee might have reaped by his industry, and that he is only liable for those which he has really and truly gathered; 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 gathered before the death of the testator, and not of those which have been gathered since his death; but what right could the legatee pretend to the fruits which accrued to the testator in his lifetime? 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 entering to the inheritance, for they belong to him, and he recovers them from those who had gathered them. So that his condition ought to be the same as to the fruits of both these

[b] See the last article.

Digitized by Google

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 legatee from the time of the testamentary heir's entering 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 legatee 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 legatee himself ought to take the thing bequeathed to him; and besides, the distinction of these two sorts of legacies hath been abolished, 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 legatee 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.

3618. We relate here the several sentiments of those interpreters, to show 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 favor 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

Digitized by Google

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 it was not his fault that the legatees had no knowledge of the testament, and had not received their legacies, the circumstances 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 public living in the place where the testator had his abode, and it having by that means been known and made public, there were some of the legatees whose place of abode was unknown, or even whose persons were not known, or who were absent in a remote country, so that it was 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 legatees, 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 a 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 enjoyed 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 public 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 through 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 allege. But this law being founded only on the presumption of the integrity of the executor, and on the consequences of the public good, which demands that all occasions of lawsuits should be cut off as much as is possible, it would

Digitized by Google

be altogether useless for justifying the conscience of an executor, who, although nobody 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.

3619. *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 although they be not acquitted at the time appointed, yet interest is only due from the time of the demand;[c] unless the testator had ordered that the legatee should have the interest.[d]

V.

3620. *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 legatee profits of another sort than the fruits of the 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 legatee, although the executor had not been guilty of any delay in delivering the same.[e]

VI.

3621. *The Fruits and Interest of Legacies to Pious Uses are due without any Demand.* — The executor who does not pay the legacies to pious uses within the time regulated by the testator, if he has 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

[c] *L.* 1, *C. de usur. et fruct. legat.*

[d] The interest in this case would not be usurious; for it would not be a loan, but the liberality of the testator, which would increase the legacy.

[e] *L.* 26, *D. de legat.* 3; — *l.* 8, *D. de usur.*; — *l.* 39, *eod.*

Digitized by Google

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.[f]

Remark on the Preceding Article.

3622. Although the justice of this rule be founded, not only on the favor 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 a hospital, and others who happen to be intrusted with this care; yet this is not always precisely observed, lest such a strictness should happen sometimes to degenerate into rigor. And it is even prudent for governors 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 favor of hospitals, and incline them to dispose to some other uses of what they had piously designed for the poor.

SECTION IX.

HOW THE LEGATEE ACQUIRES HIS RIGHT TO THE LEGACY.

3623. 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 show their use.

Art. I.

3624. *The Legatee acquires his Right at the Instant of the Testator's Death.* — Seeing the legatee acquires his right by a testament, or other disposition made in consideration of death, and

[f] *L.* 46, §§ 4 *et* 5, *C. de episc. et cler.*; — *v. Nov.* 131, *c.* 12.

Digitized by Google

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.

II.

3625. *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 legatee happens to have children.[b] And the right to these several legacies accrues differently to the legatees by the following rules.

III.

3626. *The Pure and Simple Legacy is acquired at the Moment of the Death of the Testator.* — If the legacy was pure and simple, the legatee 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 movable 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 legatee, 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]

IV.

3627. *As also the Conditional Legacy, the Condition whereof is fulfilled before the Testator's Death.* — If, a legacy being condi-

[a] Si purum legatum est, ex die mortis dies ejus cedit. *L.* 5, § 1, *D. 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.*

[b] Purum legatum. *L.* 5, § 1, *D. quand. dies legat. vel fideic. ced.* Legatum sub conditione relictum. *D. l.* § 2.

[c] *L.* 5, § 1, *D. quand. dies leg. vel fideic. ced.*; — *l.* 80, *D. de legat.* 2; — *l.* 75, § 1, *eod.*; — *l.* 64, *in f. D. de furt.*; — *l. ult. C. quand. dies leg. vel fideic. ced.*; — *l.* 3, *eod.*

[d] See the tenth section.

Digitized by Google

tional, 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 legatee would acquire his right to it at the time of the testator's death.[e]

V.

3628. *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 although the condition should depend on his own act, and 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 act, till it shall have come to pass.[f]

VI.

3629. *Three Sorts of Legacies necessary to be distinguished for the Effect of the Right of the Legatee.* — It is necessary to distinguish three sorts of legacies, with regard to the time at which the legatee 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]

VII.

3630. *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 legatee's right 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 legatee may demand the legacy. Thus, when the legacy is pure and simple,

[e] See the sixteenth article of the eighth section of *Testaments*.

[f] *L.* 5, § 2, *D. quand. dies leg. vel fideic. ced.*; — *l. un.* § 7, *C. de caduc. toll.*

[g] See the following articles.

Digitized by Google

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 legatee, 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]

VIII.

3631. *The Legatee 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 legatee 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]

IX.

3632. *Two Cases in which there can be no Transmission.* — Of what nature soever the legacy be, if the legatee 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 legatee 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]

X.

3633. *The Conditional Legacy is not transmitted if the Condition be not come to pass.* — If the legacy is conditional, and the legatee dies before the condition of the legacy be fulfilled, he dies without

[h] *L.* 9, *D. ut legat. seu fideic. caus. caveat;* — *l.* 21, *D. quando dies leg. vel fideic. ced.;* *l.* 213, *D. de verb. signif.*

[i] *L.* 5, *D. quand. dies leg. vel fideic. ced.;* — *l.* 1, § 2, *D. de condit. et demonstr.*

[l] See the fifth article of the tenth section of *Testaments.*

Digitized by Google

having had any manner of right to the legacy: so that he transmits no right to his heir or executor.[m]

XI.

3634. *The Legacy is transmitted, although the Legatee 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 legatee 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]

XII.

3635. *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 legatee can have no manner of right.[p] Thus, for example, if a testator bequeaths a sum of money in case the legatee be married at the time of the testator's death, or that he have children, or that he be provided of an office, these are conditional legacies, although the word *condition* be not expressed in the testament. But if the testator devises a land or tenement, on condition that the legatee 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 legatee the charge of this service, but it will not make the legacy conditional; and if the legatee 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 legatee.

XIII.

3636. *The Legatee who leaves his Wife big with Child transmits*

[m] See the eleventh article of the tenth section of *Testaments.*

[n] See the texts cited on the seventh and eighth articles of this section, and the third article of the tenth section of *Testaments.*

[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.

Digitized by Google

the Legacy left him on Condition that he have Children. — If the condition of a legacy were, that the legatee should have children, the testator having ordered 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 legatee 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 legatee 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]

XIV.

3637. *Indecent or impossible Conditions do not suspend the Legacy.* — If the testator had made the legacy to depend on a condition that was either unjust, indecent, or impossible, seeing this condition would be of no manner of obligation, as has been shown in its proper place, this legacy would be of the nature of a pure and simple legacy, and the legatee happening to die before he received it would transmit his right to his heir or executor.[r]

XV.

3638. *Legacies left to an uncertain Time are Conditional.* — *Example.* — 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 legatee 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 legatee in case he should arrive at the age of majority, this legatee happening to die before he attained the age of majority, his heir or executor would have no right to the legacy.[s]

[q] *L.* 18, *D. quand. dies legat. ced.*; — *l.* 20, *D. ad senat. Trebell.*

[r] *L.* 5, §§ 3 *et* 4, *D. quand. dies leg. ced.* See the eighteenth article of the eighth section of *Testaments.*

[s] Si cui legetur cum quatuordecim annorum erit: certo jure utimur, ut tunc sit quatuordecim annorum, cum impleverit. *L.* 49, *D. 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, *D. de condit. et dem.*; — *v. l.* 74, § 1, *D. ad senat. Trebell.*

Digitized by Google

REMARK ON THE PRECEDING ARTICLE.

3639. We must take notice, that we have added to the texts quoted on this article the citation of the 74th law, § 1, *D. 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 completed; 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 favorable; 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 complete. 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 suit with our usage.

XVI.

3640. *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; as if he should charge him to give or deliver when he should die such a house or land, or other thing, to a legatee. For although 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 legatee 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 legatee 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.[1]

[1] *L.* 4, *D. quand. dies leg. vel fid. ced.*;—*l.* 13, *in f. eod.* See the thirteenth article of the eighth section of *Testaments*, and the remark which is there made on it.

Digitized by Google

XVII.

3641. *The Legatee 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 legatee, or of the executor. For although, if the legatee 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 legatee 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 legatee. Thus, although the legatee should die before the election were made, yet he would transmit his right to his heir.[u]

XVIII.

3642. *Legacies annexed to Persons are not transmitted.* — Legacies which are annexed to the person of the legatee, such as a 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]

XIX.

3643. *An Annual Legacy contains several.* — The legacy of a sum of money to be paid every year to a legatee 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 legatee; 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

[u] *L.* 19, *D. de opt. vel elect. leg.* See the fifteenth article of the seventh section.

[x] *L.* 8, § 3, *in f. D. de liber. leg.*; — *l.* 39, § 4, *D. de leg.* 1; — *l.* 6, *D. de servit. legat.*

[y] See the sixth and ninth articles of the fifth section.

Digitized by Google

fallen due, but also of the year which he had begun, and which his death has interrupted.[a]

XX.

3644. *Example of a Legacy annexed to the Person of the Legatee.* — 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 that he should give every year to their mother a certain pension for the maintenance of the youngest son, and the eldest son should chance to die before this time had 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 although, 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, although 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]

XXI.

3645. *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 suspense; the legacy is nevertheless vested in the legatee, and he has his right secure.[b]

[a] *L.* 10, *D. quand. dies leg. ced.*; — *l.* 12, *eod.*; — *d. l.* § 1; — *l.* 1, *C. eod.*; — *d. l.* 12, § 3.

[a] *L.* 21, § *ult. D. de ann. leg.* It must be observed on 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*.

[b] *L.* 7, *d. l.* §§ 1 *et* 2, *D. quand. dies leg. ced.* See the nineteenth article of the fifth section of *Testaments*, and the remark that is there made on it.

Digitized by Google

XXII.

3646. *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 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 legatee 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 legatee. For although 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 act of a third person, it is altogether foreign to the testator's intention, and ought not to hurt the legatee.[c]

REMARK ON THE PRECEDING ARTICLE.

3647. It is said in the text cited, 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 legatee, unless the testator had devised to him alternatively either the land which he had in marriage with his wife, or the sum of money. But although 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 act of a third person, and not from the intention of the testator, ought not to prejudice the right of the legatee. And if the widow chooses 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.

[c] *L.* 6, § 1, *D. quand. dies leg. ced.*

Digitized by Google

XXIII.

3648. *The Legacy, with which the Person who is substituted Executor is charged, is acquired 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 it so fell out that the legatee 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 legatee. 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 legatee, which happened 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 considered in the second title of the fifth book, if the person substituted to the pupil were charged with the legacy.[e] And although 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.

SECTION X.

OF THE DELIVERY AND WARRANTY OF THE THING BEQUEATHED.

ART. I.

3649. *The Legatee 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 legatee ought to have

[d] See the fifteenth article of the first section of *Heirs and Executors* in general.

[e] *L.* 1, *D. quand. dies leg. ced.*; — *l.* 7, §§ 3 *et* 4, *D. eod.*

Digitized by Google

the thing that is bequeathed; and in what terms soever the bequest be conceived, even although the testator should ordain that the legatee 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]

II.

3650. *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 legatee; and if it perishes, or is damaged, through 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]

III.

3651. *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]

IV.

3652. *The Legacy ought to be delivered 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 is 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

[a] *L.* 1, § 2, *D. quod. leg.* If the legacy were of an immovable 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 movables 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 legatee 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 delivered either by the executor of the testament, or by the heir.

[b] *L.* 47, §§ 4 *et* 5, *D. de legat.* 1. See the eleventh article of the first section of *Substitutions* direct and fiduciary. See the eleventh article of this section.

[c] *L.* 32, *D. de leg.* 2.

Digitized by Google

the executor must cause it to be transported thither at his own charges.[d]

V.

3653. *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 before the death of testator the horse had run away, or some of the cattle strayed, the executor would not be bound to make search after the horse or herd, and to bring it back; and if the legatee would reap the benefit of the legacy, he would be obliged to be at this expense himself. But if this case had happened after the death of the testator, the executor would be obliged to be at this expense, pursuant to the rule explained in the second article.[e]

VI.

3654. *The Legatee is liable to Costs and Damages for not receiving his Legacy.* — If the thing bequeathed were of such a nature as that, the legatee delaying to receive it, the executors should by his delay suffer some loss or damage, the legatee would be bound to make it good. Thus, for example, if it were a legacy of cattle, the legatee would 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 through the legatee's default of receiving wine, corn, or other things which should take up places or movables 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 legatee 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]

VII.

3655. *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

[d] *L.* 47, *D. de leg.* 1; — *l.* 38, *D. de judic.*; — *l. un. C. ubi fideic. pet. op.*
[e] *L.* 8, *D. de legat.* 2; — *l.* 108, *D. de legat.* 1.
[f] *L.* 8, *D. de trit. vin. vel ol. leg.*

Digitized by Google

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 movables and papers belonging to the inheritance should be, in order to have an inventory 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]

VIII.

3656. *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 his or her children or grandchildren 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 expressly ordered some security to be given.[h]

IX.

3657. *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

[g] *L.* 1, *D. ut legat. seu fideic. serv. caus. cav.*; — *d. l.* 1, § 10; — *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.

[h] *L.* 6, *d. l.* § 1, *C. ad senat. Trebell.* Although 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.

Digitized by Google

his death, and, the said house having perished, or being damaged without any fault of his, he had rebuilt it, or repaired it, this expense 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]

X.

3658. *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.[k]

XI.

3659. *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 although it were by an accident, he will be accountable for it. For if the thing bequeathed had been delivered, the legatee might have perhaps either prevented the loss of it, or might have sold it.[l]

XII.

3660. *All other Loss, whereof nothing can be imputed to the Executor, falls on the Legatee.* — If it was the legatee 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 nothing could be imputed to the executor.[m]

[i] *L.* 58, *D. de leg.* 1. See the twelfth article of the first section of direct *Substitutions.*

[k] *L.* 39, § 5, *D. de leg.* 1.

[l] *L.* 39, § 1, *D. de leg.* 1; — *l.* 47, § *ult. eod.*; — *l.* 3, *C. de usur. et fruct. leg.*; — *l.* 108, § 11, *eod.* If it were lands or houses that were devised, and 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 movable thing.

[m] *L.* 26, § 1, *D. de legat.* 1.

Digitized by Google

XIII.

3661. *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 suit of hangings, without specifying any particular suit, 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 legatee 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 a useful bequest.[n]

XIV.

3662. *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 movable, 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.[o] 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 share, his coheirs would be bound to warrant the said land or tenement,[p] pursuant to the rules explained in their place.[q]

[n] *L.* 29, § 3, *D. de leg.* 3; — *l.* 58, *D. de evict.*; — *v. l.* 71, § 1, *D. de leg.* 1. See the following article.

[o] *L.* 45, § 11, *D. de legat.* 1; — § 4, *Inst. de legat.* See the fifth article of the third section.

[p] *L.* 77, § 8, *D. de legat.* 2.

[q] See the sixth article of the first section and the first article of the third section of *Partitions.*

Digitized by Google

XV.

3663. *If he who evicts the Thing from the Legatee is obliged to restore the Price, it will go to the Legatee.* — If the legatee of lands or houses be evicted of them, and 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.[r]

XVI.

3664. *The Executor cannot be restored against the Payment of a Legacy, although 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.[s]

XVII.

3665. *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 although 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

[r] *L.* 78, § 1, *D. de legat.* 2.

[s] *L.* 2, *C. de fideicomm.*

simple, since he might acquit a legacy that was null from the beginning, as has been shown in the sixteenth article.[t]

XVIII.

3666. *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 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 favor 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 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 outlived the executor.[w]

SECTION XI.

HOW LEGACIES MAY BE NULL, REVOKED, DIMINISHED, OR TRANSFERRED TO OTHER PERSONS.

ART. I.

3667. *A Legacy may be either Null at first, or become so afterwards.* — A legacy may be null two ways, either by reason of a

[t] Post mortem suam rogatum restituere hæreditatem, defuncti judicio et antequam sui munus impleat, posse satisfacere, id est restituere hæreditatem, quarta parte vel retenta, vel omissa, si voluerit, explorati juris est. *L.* 12, *C. de fideic.*

Although 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.

[w] *L.* 41, § 12, *D. 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 to 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.

Digitized by Google

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 public.[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 legatee 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]

II.

3668. *A Legacy may be either revoked, or diminished, 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 legatee to another,[k] according as the second dispositions alter the former, as shall be hereafter explained.

III.

3669. *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.[1]

[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.

[h] See the eleventh article, and those that follow.

[i] See the twenty-second and twenty-third articles.

[k] See the twenty-fourth article.

[1] *L.* 29, *D. de reg jur.*;—*l.* 201, *eod.*;—*l.* 1, *D. 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

Digitized by Google

IV.

3670. *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, although 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.[m]

V.

3671. *Another Example of this Rule.*—If the legacy was vicious and null in its origin, by reason of the nature of the thing bequeathed, as if it was a public 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 although 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.[n] And it would be the same thing if, a testator having bequeathed a thing which belonged to the legatee, it should happen afterwards that this legatee had alienated it before the testator died. For although 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 legatee's own, it remains so for ever after.[o]

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.

[m] See the second article of the second section of *Testaments*.

[n] 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, *D. de leg.* 1. See, in relation to the last words of this last text, the following article.

[o] See the third and eighth articles of the third section.

Digitized by Google

VI.

3672. *An Exception to this Rule as to Conditional Legacies.* — The rule explained in the preceding article 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 was 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 legatee; 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 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 suspense until the event either annuls it or makes it valid.[p]

VII.

3673. *The Legacy is Null if the Legatee was dead before the Testament was made, or if he dies before the Testator.* — The legacy becomes null if the legatee dies before the testator. For it was only at the moment of the testator's death that the legatee'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 legatee had been dead before the testament was made, the testator knowing nothing of his death.[q]

VIII.

3674. *The Charge imposed on the Legacy which proves to be Null passes to him who reaps the Benefit thereof.* — If, in the case

[p] *L.* 4, *D. de reg. Caton.*; — *l.* 41, § 2, *in f. D. de legat.* 2; — *l.* 62, *D. de hæred. inst.*; — *l.* 18, *D. de leg.* 2; — *l.* 1, § 2, *D. 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, *D. de hæred. inst.*

[q] *L.* 4, *D. de his quæ pro non scrip. hab.*; — *l. un.* § 2, *C. de cad. toll.* See the fifth article of the tenth section of *Testaments.*

Digitized by Google

where the legacy happens to be null because of the legatee's dying before the testator, the said legacy had been accompanied with some charge, as if the testator had obliged the legatee 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 favor 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.[r]

Remarks on the Preceding Article.

3675. It is to be observed on this article, that we have set down in it only the case where the legatee happens to die before the testator, and not the case where he was dead at the time of making the testament, although 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 legatee was dead before the testament was made, not only was the legacy null, but also the charge annexed 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 legatee 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 legatee 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 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 if a testator had charged a legatee, who was already dead be-

[r] *L. un.* § 4, *C. de caduc. toll.*
[a] *L. un.* § 3, *C. de caduc. toll.*
[b] See the text cited on this eighth article.
[c] *D.* § 3; — *l.* 17, *D. de leg. Corn. de fals.*; — *l. ult. D. de his quæ pro non script. hab.*

Digitized by Google

fore 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.

IX.

3676. *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 legatee 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 legatee 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 public use; these legacies, which would have been useful if the testator had died before these events, are null after they have happened.[1]

X.

3677. *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

[1] *L.* 3, § 2, *D. de his quæ pro non script. hab.*; — *v. l.* 12, *D. 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.

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, and 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 explained, every one of which sufficiently explains the cause which distinguishes it from the cases to which these rules ought to be applied.[u]

XI.

3678. *Divers Ways of revoking Legacies.* — *Example.* — 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 otherwise 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 tacitly revoked by such a disposition. And this daughter, having these lands for her dowry, cannot pretend a second effect of this legacy.[x]

XII.

3679. *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 afterwards he obliged the debtor to pay it, the legacy would be revoked.[y] For it was not a sum of money to be received that was bequeathed, but an acquittance. Thus the payment annuls the legacy.

XIII.

3680. *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 legatee of it who was to have it from him.[z]

[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.

[x] *L.* 11, *C. de legat.*

[y] *L.* 7, § 4, *D. de liber. leg.*

[z] Si rem suam testator legaverit, eamque necessitate urgente alienaverit, fideicommis-

Digitized by Google

REMARKS ON THE PRECEDING ARTICLE.

3681. We have thought proper to leave out of this rule that which is added in the first of the texts cited, 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.[a] *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 legatee, although he belonged to the testator at the time of his death, unless the legatee 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 the 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]

3682. As to what concerns the case of a sale which the testator

sum peti posse; nisi probetur, adimere ei testatorem voluisse. Probationem autem mutatæ voluntatis ab hæredibus exigendam. *L.* 11, § 12, *D. de leg.* 3.

Si rem suam legaverit testator, posteaque eam alienaverit; Celsus putat, si non adimendi animo vendidit, nihilominus deberi. Idemque Divi Severus et Antoninus rescripserunt. § 12, *Inst. de leg.*

[a] *V. l.* 15, *D. de adim. vel transf. leg.*

[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*.

Digitized by Google

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.

XIV.

3683. *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 legatee, 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 legatee; but one cannot be presumed to give it away to another except freely, preferring the donee to the legatee.[a]

REMARKS ON THE PRECEDING ARTICLE.

3684. It is said in another law, that although the donation be found to be null, yet the legacy nevertheless is revoked;[*] which is founded upon this, that the donation, although it be in itself null, yet 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 although 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 legatee that his legacy was annulled. But if it was the donor himself that had procured the deed of gift to be vacated, and he afterwards had made no change in his testament,

[c] See the sixth article of the first section of *Proofs*.

[a] *L.* 18, *D. de adim. vel transf. legat.*

[*] *L.* 24, § 1, *D. de adim. vel transf. legat.*; — *v. l.* 3, § *ult. D. de instr. vel instrum. leg.*

Digitized by Google

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?

XV.

3685. *The Pawning of the Thing bequeathed does not revoke the Legacy.* — Although 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, although 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.

XVI.

3686. *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, although 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, although it be wholly repaired piecemeal and by degrees. Thus, the legacy of a flock of sheep is not revoked, although there remain not one of the first that were bequeathed.[c]

[b] See the seventeenth article of the third section. *L.* 3, *C. de leg.*; — § 12, *Inst. de leg.*

[c] *L.* 24, § *ult. D. de leg.* 1; — *l.* 65, § *ult. D. de leg.* 1. See the following article. The changes of the parts that make up a whole do not hinder the thing from being considered as being always the same, although there remain not one of the first parts of which it

Digitized by Google

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.

XVII.

3687. *The Legacy of a Flock of Sheep subsists although 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 legatee such as it is at the time that it falls due to him, whether it be increased since the time of making the testament, or lessened. And although there should be left one mare only of a stud, or only one sheep of a flock, although it could not be said that this one sheep was a flock, or that one mare a stud, yet, seeing this remnant 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 legatee of that house.[d]

XVIII.

3688. *If the Thing bequeathed changes its Nature, the Legacy is revoked.* — If the changes of the thing bequeathed be such as, though the matter or substance thereof may remain, yet the thing itself 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

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 considered as being the same, although 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, *D. de judiciis.*

[d] *L.* 21, *D. de legat.* 1; — *l.* 22, *eod.*

[e] Lana legata, vestem quæ ex ea facta sit, deberi non placet. *L.* 88, *D. de legat.* 3.

[f] Item quæro: si probari possit, Seiam uniones et hyacintos quosdam in aliam speciem

Digitized by Google

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 legatee 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 legatee would have no right at all to these remains.[i]

XIX.

3689. *If there remains nothing of the Thing bequeathed 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 legatee; 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

ornamenti, quod postea pretiosius fecit additis aliis gemmis et margaritis convertisse: an hos uniones vel hyacintos petere possit, et hæres compellatur ornamento posteriori eximere, et præstare? Marcellus respondit, petere non posse. Nam quid fieri potest, ut legatum vel fidei commissum durare existimetur, cum id quod testamento dabatur, in sua specie non permanserit? nam quodammodo extinctum sit. *L.* 6, § 1, *D. de aur. arg.*

[g] Sed et materia legata, navis, armariumve ex ea factum non vindicatur. *D. l.* 88, § 1, *D. 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, *D. 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 legatee, unless the testator changed his will. *Si lana legetur et vestimentum ex ea fiat, legatum consistere; si modo non mutaverit testator voluntatem.* *L.* 44, § 2, *D. 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.

Digitized by Google

should chance to die, the legatee would have none of the harness.[l]

XX.

3690. *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 bequeathed the house furnished, or the house with all its furniture, he had added that he bequeathed likewise such a particular suit 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 show 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]

XXI.

3691. *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

[l] *Ll.* 1 *et* 2, *D. de pecul. leg.*

[m] *L.* 80, *D. de reg. jur.*; — *l.* 12, § 46, *D. de instr. vel instrum. leg.*; — *l.* 18, § 11, *eod.*; — *l.* 9, *D. de suppell. leg.*

[n] *L.* 99, § *ult. D. de legat.* 3; — *v. l.* 15, *D. de pec. leg.*

Digitized by Google

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 legatees.[o]

XXII.

3692. *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]

XXIII.

3693. *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 legatee will have no right.[q]

XXIV.

3694. *The Legacy being transferred, it is taken away from the First Legatee.* — 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 legatee is so far annulled by this legacy to a second, that, although it should happen that the second legatee should die before the testator, yet the first legatee would have nothing of the legacy: for the first disposition, which

[o] *D. l.* 99, *in f.*
[p] *L.* 8, *D. de leg.* 1. See the fifth and sixth articles of the fourth section.
[q] *L.* 24, § 3, *D. de leg.* 1.

Digitized by Google

was in his favor, 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 legatee, unless it were annexed to the person of the first legatee, or that it was the intention of the testator not to charge the second legatee with that burden.[s]

XXV.

3695. *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 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 legatee.[t]

XXVI.

3696. *If the Legatee renders himself unworthy of the Legacy, it is revoked.* — A legacy which was good, and made in due form, might be annulled, although the testator should make no manner of disposition, either express or tacit, to revoke it, if it should happen that the legatee should render himself unworthy of it by any of the causes explained in their proper place.[u]

XXVII.

3697. *Legacies are diminished without the Act of the Testator, by the Falcidian Portion.* — Although the testamentary heir or

[r] *L.* 8, *D. de adim. vel transf. legat.*

[s] *L.* 95, *D. de condit. et dem.*

[t] *L.* 3, § 7, *D. 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.

[u] See the said causes in the third section of *Heirs and Executors* in general.

Digitized by Google

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, purely and simply. But if he only takes upon him this quality with the benefit of an inventory, 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.[1]

TITLE III.

OF THE FALCIDIAN PORTION.

3698. By the Falcidian portion, which took its name from the author or inventor 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 way 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 overvalue 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 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 in the affairs of the succession were to be attended with this consequence.

3699. 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 reg-

[1] See the following title, and that of *Heirs or Executors with the Benefit of an Inventory.*

Digitized by Google

ulate 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.

SECTION I.

OF THE USE OF THE FALCIDIAN PORTION, AND WHEREIN IT CONSISTS.

ART. I.

3700. *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]

II.

3701. *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 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 although 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 choose 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 the father for his use, as a debt due to him. For although the father had the liberty of choosing any

[a] *L.* 1, *D. ad leg. Falc.*
[b] *L.* 66, *D. ad leg. Falc.*; — *l.* 39, § 1, *D. de verb. signif.*

Digitized by Google

one of them to give it to, yet his failing to make the choice rendered him debtor to them all for what he was obliged to restore.[c]

III.

3702. *And likewise the Funeral Expenses.* — It is necessary also to deduct out of the goods the funeral expenses, which are preferred not only before legacies, but even before the debts, although there should not be effects enough in the succession to satisfy all the creditors. And this expense ought to be moderated so as not to exceed what is necessary.[d]

IV.

3703. *The Executor has not the Falcidian Portion unless he make an Inventory.* — The executor cannot demand the Falcidian portion if he has not claimed the benefit of an inventory, and does not make it appear, by an inventory 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 inventory, cannot pretend to the Falcidian portion, although it were true that the goods were not sufficient to answer all the charges.[e]

V.

3704. *The Heir at Law has Right to the Falcidian Portion.* — Although 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]

VI.

3705. *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

[c] *L.* 6, *C. ad leg. Falc.*; — *l.* 54, *D. ad leg. Falc.*

[d] § 3, *Inst. de leg. Falc.*; — *l. penult. D. de relig.*; — *l.* 1, § *ult. D. ad leg. Falc.* See the eleventh section of *Heirs and Executors* in general.

[e] *Nov.* 1, *c.* 2; — *d. c.* 2, § 2. See the tenth article.

[f] *L.* 18, *D. ad leg. Falc.*

[g] *L.* 77, § 1, *D. de legat.* 2.

Digitized by Google

be excepted from it, pursuant to the rules which shall be explained in the last two sections of this title.

VII.

3706. *The Falcidian Portion is taken out of the Goods which are found in the Succession at the Time of the Testator's Death.*— 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 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]

VIII.

3707. *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 legatees, 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]

IX.

3708. *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 legatees will not thereby suffer any diminution of their legacies; unless they had

[h] *L.* 56, *D. ad. leg. Falc.* See the following article.

[i] *L.* 15, § 6, *in f. eod.*

[l] See the first of the texts cited on the preceding article, and that cited on the tenth article.

[m] *L.* 9, *D. ad leg. Falc.*

Digitized by Google

given occasion to those losses by some fault which might be laid to their charge.[n]

X.

3709. *Difference between the Heir or Executor with the Benefit of an Inventory, and him who hath not that Benefit.* — Although the heir or executor does not accept the inheritance simply, but with the benefit of an inventory, 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 inventory, 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 legatees 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]

XI.

3710. *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 them, either in his testament, or by some other disposition, neither the testamentary heir on his part, nor the legatees on their part, would 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, so it is the truth of the value of the goods that ought to regulate them.[p]

[n] *L.* 30, *D. ad leg. Falc.* See the tenth article of the first section of *Heirs and Executors* in general.

[o] *L.* 73, *D. 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.

[p] *L.* 15, § *ult. D. ad leg. Falc.*; — *l.* 62, § 1, *eod.*

Digitized by Google

XII.

3711. *The Valuation of the Goods ought to be made with the Knowledge of all the Legatees.* — 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 legatee 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]

XIII.

3712. *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 lawsuit 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

[q] *L.* 1, § 6, *D. si cui plusq. per leg. Falc. lic. leg. esse dic.*

Digitized by Google

these goods in dispute would make to the legacies, if in the event they should be found to be part of the inheritance, the legatees 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]

XIV.

3713. *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 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 the share which he was to have had out of the legacies for his Falcidian portion.[s]

XV.

3714. *Goods discovered after settling 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 discovered some goods of the inheritance which were unknown to the legatees; as if there had fallen to the testator in his lifetime 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 legatees 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

[r] *L.* 73, § 1, *D. ad leg. Falc.;*—*l.* 63, *eod.* See the fourth article of the second section. See the latter end of the tenth article of this section.

[s] *L.* 11, *D. ad leg. Falc.* See the following article. *L.* 50, *D. ad leg. Falc.;*—*l.* 51, *eod.;* —*l.* 52, § 1, *eod.*

Digitized by Google

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, belong to the executor,[u] except those which may have proceeded from the things bequeathed, and which for the same reason would belong to the legatees, according to the rules explained in the eighth section.

XVI.

3715. *If the Thing bequeathed cannot be divided, the Falcidian Portion is regulated by Estimation.*—Although the Falcidian portion diminishes the legacies, and takes off something from every one of them, and 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 itself; yet 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 legatee the value of what his legacy may amount to, or that the legatee 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, although 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]

[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.

[x] *L.* 80, § 1, *D. ad leg. Falcid.* See the ninth section of *Heirs and Executors* in general.

Digitized by Google

SECTION II.

OF THE DISPOSITIONS THAT ARE SUBJECT TO THE FALCIDIAN PORTION.

ART. I.

3716. *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]

II.

3717. *The Favor of the Legacy or of the Legatee does not hinder the Falcidian Portion.* — The favorableness of the legacies doth not exempt them from being subject to the Falcidian portion; whether it be that the favor respects the quality of the legatee, even although it were a legacy left to the prince,[b] or that it respects the use of the legacy itself, as if it were a legacy for alimony.[c]

REMARKS ON THE PRECEDING ARTICLE.

3718. We have not set down in this rule the exception that is made to it by the greatest part of the interpreters, in favor 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 would have been necessary in order to abol-

[a] See the places quoted in this article.
[b] *L.* 4, *C. ad leg. Falc.*
[c] *L.* 89, *D. ad leg. Falcid.*

Digitized by Google

ish the ancient 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 hæderes ..... si enim propter hoc a 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 nowise 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 Falcidian portion shall take place if the testator hath not expressly forbidden it, adds for a reason, that it may so happen that there are in his testament legacies to pious uses, which would make this prohibition of the testator's favorable, *forsan etiam quædam juste et pie relinquenti.* Which would not be a reason for favoring 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

[a] Ad municipia quoque legata, vel etiam quæ Deo relinquuntur, lex Falcidia pertinet. *L.* 1, § 5, *D. 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. et cler.*

Digitized by Google

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 show 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 alleges 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 exist in these words of this novel that have 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 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.

3719. *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 it would not be just that before this

Digitized by Google

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 legatees 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]

IV.

3720. *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

[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, *D. 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 et si legata quædam pure, quædam sub conditione relicta efficiant, ut, existente conditione, lex Falcidia locum habeat: pure legata cum cautione 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, et si principali testamento quædam sub conditione legata sunt, quæ an debeantur incertum est: et 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 legatees should suffer a defalcation of their legacies. But if this is no error of the transcribers, and 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 legatees who would not wait for the event, obliging himself to pay them their whole legacies in case the conditional legacies should have no effect.

Digitized by Google

as other legacies, according as it may be estimated: and the legatee ought to restore to the executor the share of the said estimation that shall be necessary for making up the Falcidian portion.[e]

V.

3721. *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 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 legatee 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 assurance of the 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]

VI.

3722. *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]

REMARKS ON THE PRECEDING ARTICLE.

3723. We have thought proper to give to the text cited the sense that is explained in the article. For as it would be unjust to

[e] *L. 7, D. ad leg. Falcid.*

[f] *L. 1, § 10, D. ad leg. Falcid.*

[g] *L. 22, § pen. et ult. D. ad leg. Falcid.*

Digitized by Google

reckon this debt among the goods of the inheritance, so it would not be equitable that the other legatees, 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 chargeable for payment of their legacies; and 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 although 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 legatees make of their legacies, but only because of the diminution which the inheritance suffers by the legacies.

VII.

3724. *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 a usufruct; and this third manner depends on the rule which follows.[h]

VIII.

3725. *The Falcidian Portion is due out of a Legacy of a Usufruct, and in what Manner it is regulated.* — Seeing the legacies of alimony, of yearly pensions, of annuities, of a usufruct, and others of the like nature, consist only in a revenue which is to cease by

[h] See the following article.

Digitized by Google

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 a usufruct, or of a pension, or of alimony, may be regulated at the price which the legatee 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 legatee, 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 legatee, he might become a debtor to the inheritance. And likewise, on the other hand, the diminution which this legatee 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 legatee 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.[1]

Remarks on the Preceding Article.

3726. Seeing it was not possible to reconcile all the texts cited, 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 reflections which we have been obliged to make on their different dispositions.

3727. It is said in the first text, that, to regulate the Falcidian portion of a legacy of a usufruct, the ancients 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 ancients is not approved, because one may take the fourth part of a legacy of a usufruct, as well as of other legacies. And afterwards it is there

[1] *L.* 1, § 9, *D. ad leg. Falc.;* —*d. l.* § 16;—*l.* 47, *eod.;* —*l.* 55, *eod.;* —*l.* 68, *eod.*

Digitized by Google

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 ancients, 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 a usufruct at the price which the legatee might get for it, if he had a mind to sell it.

3728. 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 legatee, 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.

3729. 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.

3730. 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 a usufruct, is regulated differently according to the age of the legatee. 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 legatee may have to live, according to his age, and that the legatee pay the Falcidian portion of this sum total. Thus, for example, if the legatee of a 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

Digitized by Google

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 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 legatee who was thirty-five years old, and ten for a legatee who was fifty years old; so that they never reckoned more than thirty years.

3731. It is easy to judge, by the different dispositions of all these laws, what are the difficulties which result from them, and the inconveniences 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 a 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, who arrive at fifty. Thus, if a legatee of a 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 although it were certain that a legatee of a usufruct would live thirty years, or even although 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 a usufruct, or of an annuity of a thousand 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 twenty thousand 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

Digitized by Google

legatee? The one would be very soon, and the other very late; and every one of these ways would be attended with strange inconveniences. 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 legacy of a pension of one thousand livres which was computed to last thirty years, and a sixth part was to be taken off from it for the Falcidian portion, which would amount to five thousand 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 the legatee had to live, and that, if he should live only five years, all his usufruct would be consumed by the Falcidian portion?

3732. 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 although 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 a 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, although 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 a 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 legatee, in order to make the legatee pay the Falcidian portion of that sum total. This computation, even although it

Digitized by Google

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 a usufruct by the age of the legatee 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 there would be too great inconveniences in deferring the regulation of the Falcidian portion to another time; whereas, without doing wrong either to the legatee 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 a usufruct, according to the age of the legatee, 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 a 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 legatee, 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.

SECTION III.

OF THOSE TO WHOM THE FALCIDIAN PORTION MAY BE DUE OR NOT.

ART. I.

3733. *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 inventory, he can-

Digitized by Google

not 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 inventory of the goods, is no further 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.

II.

3734. *The Beneficiary Heir or Executor who defrauds, loses the Falcidian Portion of the Goods which he attempted to conceal.*— Although the heir or executor have made an inventory, 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 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, although 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, although it should appear to be unjust, yet, being intimated to the legatees, would not have the character of a fraudulent diverting the effects of the succession.[c]

III.

3735. *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 had 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]

[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.

[b] *L.* 6, *D. de his quæ ut ind.;—v. l.* 24, *D. ad leg. Falcid.;—l.* 48, *D. ad senat. Trebell.* See the following article.

[c] *L.* 68, § 1, *D. ad leg. Falc.*

[d] *L.* 59, *D. ad leg. Falc.*

Digitized by Google

IV.

3736. *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]

V.

3737. *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]

VI.

3738. *Legatees who are charged with Legacies have not the Falcidian Portion.* — If a legatee had his legacy burdened with some disposition in favor 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 legatees cannot claim this benefit in their own right.[h]

[e] *L.* 18, § 1, *D. si quis om. caus. test.* See the seventeenth article of the fifth section of *Testaments.*

[f] *L.* 77, *D. ad leg. Falc.* See the seventh and following articles of the fourth section.

[g] *L.* 8, *D. ad leg. Falc.*

[h] *L.* 47, § 1, *D. 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.

Digitized by Google

VII.

3739. *Unless it be that 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 legatee 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.[1]

SECTION IV.

OF THE CAUSES WHICH MAKE THE FALCIDIAN PORTION TO CEASE, OR WHICH DIMINISH IT.

ART. I.

3740. *The Testator may forbid taking the Falcidian Portion.* — Although 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]

[1] *L.* 32, § 4, *D. ad leg. Falc.* See the fifth article of the following section.

[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, *D. 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 ancient law the testator might forbid the Falcidian portion, and the contrary seems to be established by other laws (*L.* 27, *D. ad leg. Falc.*); 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 it is explained in the article. *Nov.* 1, *c.* 2, *in fine.*

Digitized by Google

II.

3741. *The Legacy of an Immovable, with a Prohibition to alienate it, is not subject to the Falcidian Portion.* — If a testator had devised some immovable thing, whether it were to some one of his own family or to some other person, and had directed that the said immovable should not be alienated, it being his intention that the same should always remain with the legatee and his successors; the executor of this testator could not pretend to have the Falcidian portion of an immovable 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 legatee and to his successors.[c]

III.

3742. *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]

IV.

3743. *The Falcidian Portion doth not take Place in Military Testaments.* — The dispositions of military testaments are not subject to the Falcidian portion.[e]

REMARKS ON THE PRECEDING ARTICLE.

3744. Is it a great favor 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 favor of his testamentary heir, whom he had a greater value for than for the legatees? Or shall this rule be reduced to

[c] *Nov.* 119, *c. ult.*

[d] See the first of the texts quoted on the first article.

[e] In testamento militis jus legis Falcidiæ cessat. *L.* 7, *C. ad leg. Falcidiam;* — *l.* 12, *C. de test. mil.;* — *l.* 92 *et l.* 17, *l. ult. D. eod.*

Digitized by Google

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 favor 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 rigor of the law, seeing it was not the intention of the testator to strip him of all the goods.

V.

3745. *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, although he himself bears it.* — If a legatee were charged with a yearly pension for alimony to some person, and his legacy were diminished by the Falcidian portion, but only so far as that there would remain still enough for the said alimony, this legatee would nevertheless bear the said charge entire, 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 legatee 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 favorable, as the other.[f]

REMARKS ON THE PRECEDING ARTICLE.

3746. 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 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 makes 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

[f] *L.* 21, § 1, *D. de ann. leg.*; — *l.* 25, § 1, *eod.*; — *l.* 77, § 1, *D. de leg.* 2.

Digitized by Google

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 favor 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 although 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 favor 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 legatee that is charged with it, although his legacy be thereby diminished or reduced to nothing.

VI.

3747. *What augments the Inheritance diminishes the Falcidian Portion.* — The diminution of legacies on account of the Falcidian portion may cease altogether, or be lessened, 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]

VII.

3748. *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 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 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

g See the following article.

h See the first title of the fifth book.

Digitized by Google

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.[1]

VIII.

3749. *The Fund of the Legatees whose Legacies are assigned them on a Portion of the Inheritance 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 renounced the inheritance, and his portion of the inheritance being overcharged with legacies, that of the other heir or executor who should remain alone were not burdened 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 legatees would be nothing the 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.[1]

IX.

3750. *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 the testator had charged both the heirs or executors with legacies, in such a manner as that the Falcidian

[1] *L.* 1, § 13, *D. ad leg. Falc.;* — *l.* 78, *eod.* See the latter part of this text in the following article.

[1] See the second of the texts cited on the preceding article.

Digitized by Google

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 legatees would have the advantage thereof, for the reason explained in the seventh article.[m] 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 legatees 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]

X.

3751. *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

[m] *L.* 87, § 4, *D. ad leg. Falc.* [n] *D. l.* § 5.

Digitized by Google

effect of a right of accretion, or of a substitution, 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 legatees 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 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]

XI.

3752. *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 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 those which may accrue to him by any other title. Thus, this legacy coming to him in the same manner that it would to another legatee, he does not reckon it as part of the Falcidian portion that is due to him.[p]

XII.

3753. *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

[o] This is a consequence of the preceding articles.

[p] *L.* 74, *D. ad leg. Falc.*; — *l.* 91, *eod.*; — *l.* 22, *eod.* See the following article.

Digitized by Google

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 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 was 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 satisfied by the said compensation.[q]

XIII.

3754. *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 other three 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]

XIV.

3755. *If the Legatee 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.* — If an executor who is charged with a conditional legacy had instituted the legatee for his executor, and the condition on which the said

[q] *L. 22, D. ad leg. Falc.; — v. l. 78, D. de hæred. instit.; — l. 15, D. de his quæ ut ind.*
[r] *L. 11, § 7, in f. D. ad leg. Falc.; — l. 20, C. de jur. delib.*

Digitized by Google

legacy depended did afterwards come to pass; since the benefit which this legatee would have by the said legacy would accrue to him by the title of legatee, 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]

XV.

3756. *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.

XVI.

3757. *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 was 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]

XVII.

3758. *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,

[s] *L.* 4, *D. ad leg. Falc.* [t] *L.* 8, *D. ad leg. Falc.*

[u] *L.* 45, *D. ad leg. Falc.*; — *l.* 73, § 4, *eod.* See the fourth article of the second section of the *Trebellianic Portion*. See the sixth article of the second section.

Digitized by Google

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]

XVIII.

3759. *Unless he paid, or had promised to pay, by an Error in Fact, and not in Law.* — If it was through 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 through 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 was ignorant that he had a right to retain it; he could not afterwards pretend to make any defalcation.[y]

XIX.

3760. *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, 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]

XX.

3761. *The Falcidian Portion of several Legacies due to one and the same Legatee may be retained out of that which is last paid.* — If an executor who is charged with divers legacies to one and the

[x] *L.* 1, *C. ad leg. Falc.*; — *l. ult. in f. C. eod.* See the second article of the second section of the *Trebellianic Portion.*

[y] *L.* 9, *C. ad leg. Falc.* See the second article of the second section of the *Trebellianic Portion.* See the first section of the *Vices of Covenants.*

[z] *L.* 58, *D. ad leg. Falc.*

Digitized by Google

same legatee 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]

XXI.

3762. *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]

[a] *L.* 16, *D. ad leg. Falc.*; — *d. l.* § 1.
[b] *L.* 89, § 1, *D. ad leg. Falc.*; — *v. l.* 2, *C. de usur. et fruct. legat.*

[By the word *executor*, as used in this title, the translator means what he has elsewhere denominated the *testamentary heir*. See Book 3, Title 1, Section 1. — Ed.]

Digitized by Google

BOOK V.

OF SUBSTITUTIONS AND FIDUCIARY BEQUESTS.

3763. 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.

3764. 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 rendered himself unworthy of it. And because in these last two 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 inventory, the executor having no medium between accepting the inheritance purely and simply, and renoun-

[a] *L. un. in pr. C. de cad. toll.*; — *v. Ulp. tit.* 17; — *l.* 1, *D. de jur. fisc.*

52 *

Digitized by Google

cing 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 inconveniences that have been remarked in the preamble of the third title of the first book, might oblige many executors to renounce the successions.

3765. 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 entreaty, 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 testator's;[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 entreaty, 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 spoken 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.

[b] § 1, *Inst. de fideicom. hæred.*
[c] *D.* § 1, *Inst. de fideicom. hæred.*
[d] *L.* 7, *D. de vulg. et pupill. subst.*;—§ *ult. Inst. de pupill. subst.*
[e] *L.* 15, *D. de vulg. et pupill. subst.*;—*l.* 6, *C. de testam. milit.*
[f] *L.* 41, *D. de testam. milit.*

Digitized by Google

But by our usage, it is indifferent whether the testator expresses himself in direct imperative terms, or in terms of entreaty; 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 *substitutions* is understood of those of this last kind, because they are much more frequent than either the vulgar or pupillary substitution; and in what manner soever they be conceived, whether in terms of entreaty, or in terms direct and imperative, they have, as we have just now said, the same effect.

3766. 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 legatee, if the testator intends that the thing bequeathed should pass to another successor, as shall be explained in its place.[5]

3767. 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 although there have been several called and substituted, 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

[5] See the second section of the third title of this fifth book.

Digitized by Google

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 estates in 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.

3768. 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.

3769. 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 Trebellianic 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.

Digitized by Google

TITLE I.

OF VULGAR SUBSTITUTIONS.

3770. 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.

SECTION I.

OF THE NATURE AND USE OF VULGAR SUBSTITUTION.

ARTICLE I.

3771. *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]

II.

3772. *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]

III.

3773. *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]

[a] Lucius Titius hæres esto, si mihi Lucius Titius hæres non erit, tunc Seius hæres mihi esto. *L.* 1, § 1, *D. de vulg. et pup. subst.*

[b] This is a consequence of the definition of this substitution.

[c] *L.* 36, *D. de vulg. et pup. subst.*

[d] *L.* 1, *D. de vulg. et pup. subst.* Although the rule explained in this article, which was

Digitized by Google

IV.

3774. *One may substitute either many to one, or one to many, and the Coexecutors 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 substitutes. And one may also substitute the coexecutors reciprocally to one another.[e]

V.

3775. *One may substitute to a Legatee.* — One may substitute, not only to an executor, but also to a legatee, 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]

SECTION II.

RULES PECULIAR TO SOME CASES OF VULGAR SUBSTITUTIONS.

ART. I.

3776. *Among Coexecutors mutually substituted to one another, the Shares of the Substitution are the same with those of the Institution.* — 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 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

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 naturalized, might institute them executors in this manner, that the succession might go to whichsoever of them should happen to be naturalized, and capable of succeeding him, at the time of his death.

[e] *L.* 36, § 1, *D. de vulg. et 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.

[f] *L.* 50, *D. de legat.* 2.

Digitized by Google

sixth part, and 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]

II.

3777. *The Reciprocal Substitution among Coexecutors 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]

III.

3778. *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 substitutes a third person to the coexecutor 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 coexecutors succeeds.[c]

[a] *L.* 24, *D. de vulg. et pup. subst.*; — *l.* 8, *in f. eod.*; — *l.* 5, *eod.*; — *l.* 1, *C. de impub. et al. subst.*

[b] *L.* 23, *D. de vulg. et pup. subst.*; — *l.* 45, § 1, *eod.*; — *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.

[c] *L.* 27, *D. de vulg. et pup. subst.* See the sixth article of the ninth section of *Testaments.*

Digitized by Google

IV.

3779. *The Institution of one of two, whichsoever 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, although the testator has 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 whichsoever 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 expressly substituted. And it would be the same thing between two legatees, called to a legacy by a disposition of the like nature.[d]

V.

3780. *If the Substitute dies before the Case of the Substitution, he does not transmit his Right to his Heir or Executor.* — 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 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]

VI.

3781. *He who is substituted to one of the Coexecutors is preferred before the Coexecutor 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 although the coexecutors 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]

[d] *Ll. 24, 25, et 26, D. de hæred. inst.*
[e] *L. 81, D. de acq. vel omitt. hæred.*
[f] *L. 2, § 8, D. de bonor. poss. sec. tab.*

Digitized by Google

VII.

3782. *Among Coexecutors, 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 whomsoever has any portion of it, if he be left all alone.[h]

VIII.

3783. *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 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 that time he was free from the paternal authority, although he were a minor.[i]

REMARKS ON THE PRECEDING ARTICLE.

3784. 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 humor. 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 im-

[g] *L. 6, C. de impub. et 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.*
[i] *L. ult. § 1, D. de vulg. et pup. subst.*

Digitized by Google

pose 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.

3785. 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 alternative conditions, that in default of the first condition the second may make the institution to have effect.

TITLE II.

OF PUPILLARY SUBSTITUTION.

3786. 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, no. 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 favor 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

[a] *L.* 8, § 5, *D. de inoff. testam.*

Digitized by Google

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 than because it is not the child himself who does this injustice to his mother, but that it is his father, whom the law hath empowered 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 administered without the help of such rules. However, these sorts of subtilties 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 alleged 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 hav-

[b] *L. 76, D. ad senat. Trebell.*

Digitized by Google

ing 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 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 preferred 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.

SECTION I.

OF THE NATURE AND USE OF PUPILLARY SUBSTITUTION, AND OF THOSE SUBSTITUTIONS WHICH ARE COMMONLY CALLED EXEMPLARY, COMPENDIOUS, AND RECIPROCAL.

ART. I.

3787. *Definition of Pupillary Substitution.* — 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 should succeed also to the said child, in case he should die before he were of age sufficient to make a will.[a]

II.

3788. *One may substitute to a Posthumous Child.* — 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]

[c] *L. ult. C. de instit. et substit.*

[a] *Inst. de pupill. subst.* See the text cited on the following article.

[b] *L. 2, D. de vulg. et pupill. subst.*

Digitized by Google

III.

3789. *The Pupillary Substitution comprehends the Vulgar.* — 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 comprehends both the one and the other case.[c]

Remarks on the Preceding Article.

3790. 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 connection 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.

3791. 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

[c] *L.* 1, § 1, *D. de vulg. et pup.;* — *l.* 4, *eod.*

Digitized by Google

he had expressed, especially if we suppose, as it is natural to suppose of almost all testators, that he who made such a disposition was ignorant of the connection which the Roman law made between the vulgar substitution and the pupillary. And we see even in a law, that although the vulgar substitution to a son under age comprehends the pupillary, yet that it 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.*[c] But if a testator had substituted after the pupillary manner to his son under age, without explaining himself in 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.

IV.

3792. *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 in any other manner of way.[d]

REMARKS ON THE PRECEDING ARTICLE.

3793. 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 connection 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 favorable than that of the testamentary heirs, as hath been remarked in other places.[e] 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 although the same be observed in many places, yet we have

[c] *L. 4, C. de imp. et al. subst.*
[d] *Instit. de pupill. subst.*
[e] See the eighth article of the preface to this book.

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.

3794. *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 favor of this substitute, if he had been capable of making a testament.[e]

VI.

3795. *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 labors who is not arrived at the age of puberty.

[e] § 2, *Inst. de pup. subst.*; — *l.* 2, *D. de vulg. et pup. subst.* See the remarks on the preceding article.

[f] See the text cited on the second article.

Digitized by Google

VII.

3796. *This Substitution ends when the Infant attains the Age of Puberty.* — The pupillary substitution remains in suspense 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 although 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]

VIII.

3797. *Substitution to a Child in a State of Madness, which is called Exemplary.* — Those who have children or grandchildren that are mad may substitute to them as to children under age, although 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 favor 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]

IX.

3798. *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 labor 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 favor of other persons than those very brothers, or some of them.[k]

X.

3799. *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 although he to whom the father had substituted in this manner had made no testament,

[g] § 8, *Inst. de pupill. subst.*

[h] *L.* 9, *C. de imp. et al. subst.*

[i] *L.* 9, *C. de imp. et al. subst.*

[k] *D. l.* 9, *in f.*

Digitized by Google

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, although his madness did afterwards return upon him.[l]

XI.

3800. *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.[m]

REMARKS ON THE PRECEDING ARTICLE.

3801. We have endeavoured 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. et 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 mothers, or other ascendants, 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

[l] *L. 9, C. de impub. et al. subst.* See the fourth article of the second section of *Testaments.*

[m] Humanitatis intuitu parentibus indulgemus, &c. *L. 9, C. de impub. et 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 expressly 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, *D. de vulg. et 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.

Digitized by Google

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 favor 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, 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 employed 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

* *Fabrot. in* § 1, *Inst. de pup. subst.*

Digitized by Google

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 entire, and that they had a mind to set bounds to it, it would have been proper to have expressed them, and not to have left obscurities and ambiguities which divide the most able interpreters.

XII.

3802. *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 the 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 shown in the article which follows.

[o] *L.* 15, *D. de vulg. et pup. subst.*; — *l.* 8, *C. de impub. et al. subst.* Although these laws speak only of a compendious substitution made by a soldier in direct terms, and 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 empowered 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

XIII.

3803. *Effect of the Three Substitutions in the Compendious one.* — Of these three substitutions, comprehended in the said expression of compendious substitution, the first, which 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]

XIV.

3804. *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.

XV.

3805. *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 person; 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 execu-

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 ought to take place at what age soever the child should happen to die.

[p] See the texts cited on the foregoing article.

[q] See the texts cited on the twelfth article, and the remark on the fourth article.

Digitized by Google

tors, whether they be his children or others, to succeed to him, and ordains that their shares of the inheritance shall 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]

SECTION II.

PARTICULAR RULES CONCERNING SOME CASES OF PUPILLARY SUBSTITUTIONS.

ART. I.

3806. *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 although they be 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]

II.

3807. *Not even although 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 both the one and the other had entered to the suc-

[r] *L.* 4, § 1, *D. de vulg. et pup. subst.*; — *l.* 37, § 1, *D. de hæred. inst.* Although 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.

[a] *L.* 10, § 2, *D. de vulg. et pup. subst.*; — *l.* 20, *C. de jur. delib.* See the fourth article of the first section, and the remark that is there made on it.

Digitized by Google

cession, the case of the pupillary substitution happening afterwards by the death of the son 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]

III.

3808. *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]

IV.

3809. *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 otherwise the intention which he might have therein.[e]

V.

3810. *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

[b] *L.* 20, *C. de jure delib.*

[c] *L.* 4, § 1, *D. de vulg. et pup. subst.*

[d] *L.* 4, § 2, *D. de vulg. et pup. subst.*

[e] *D.* §.

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]

VI.

3811. *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 was, 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]

VII.

3812. *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 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 if, 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

[f] *L.* 4, *C. de impub. et 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.

[g] *L.* 10, *C. de impub. et al. subst.*

Digitized by Google

of him who should die last, and who ought to succeed to the other, was that the two successions should go to him.[h]

VIII.

3813. *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 the father had substituted another person, having entered 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 although, 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]

Remarks on the Preceding Article.

3814. Although 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 shows that the right of the substitute, which seemed to be extinguished by the infant's entering to the inheritance, is not so in reality, and is only in suspense, to revive again in 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

[h] *L.* 34, *D. de vulg. et pup. subst.*; — *l.* 11, *D. de bon. poss. sec. tab.*; — *l.* 9, *D. de reb. dub.* See the eighteenth article of the first section of the following title, and the remarks on the twelfth article of the second section, *How Children succeed.*

[i] *L.* 44, *D. de re judic.*

Digitized by Google

father, he would be his heir, *suus hæres*, and have a right to the estate actually vested in him, although 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 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 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 seeing, 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 only accepts the succession 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.

3815. 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 empowers 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 although 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

[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*.

Digitized by Google

explained it. Thus it would seem that, the testamentary heir dying while he was deliberating, it could not be said that the substitute was 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 does 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 substitute, dies before he has known that he was instituted heir, or only without renouncing the inheritance, although he has done nothing which shows 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 although 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, of 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.*

Digitized by Google

TITLE III.

OF DIRECT AND FIDUCIARY SUBSTITUTIONS.

3816. 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 legatee, to a second who succeeds after the first, they were called fiduciary bequests, as has likewise been observed in the same place.

3817. 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 concerning the distinction that was made in the Roman law between direct and imperative terms, and terms of entreaty and request to the testamentary heir, as to what relates to these substitutions or fiduciary bequests. We presume that the reader has not forgotten 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 entreaty 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

Digitized by Google

Roman law to terms of fiduciary bequests, and of prayer and entreaty, in all sorts of testaments, and to direct terms in the testaments of soldiers, who had the privilege of making 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 direct expressions and of expressions by way of prayer and entreaty 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 the law of Justinian's, that laws regard things, and not words: *Nos enim non verbis, sed ipsis rebus legem imponimus.*

3818. 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 first two sections of this title, and in the third some rules that are common to both the one and the other.

3819. 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 lawsuits, 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

[a] *L.* 15, *C. de testam.*

[b] *L.* 2, *C. comm. de legat.*

Digitized by Google

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, although 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 was composed by Tribonian, the same which he made use of with respect to other novels, of which an ancient 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]

3820. 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 movables, 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 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 substi-

[c] 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.

Digitized by Google

tuted, 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 although 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 to 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.

3821. Besides this regulation which has set bounds to the degrees of substitutions, in order to put a stop to the inconveniences 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 lifetime 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]

3822. 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

[d] The edict of the month of May, 1553; — Ordinance of *Moulins*, article 57.

Digitized by Google

to a substitution. Thus we say that a testator has substituted such a one to his executor, or to a legatee. And we say likewise, that he has substituted or entailed such an estate, such a land.

SECTION I.

OF SUBSTITUTIONS OR FIDUCIARY BEQUESTS OF AN INHERITANCE, OR A PART OF ONE.

ART. I.

3823. *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]

II.

3824. *Who may substitute.* — The liberty of substituting is the same with that of instituting executors and bequeathing legacies; and whoever can name executors or legatees may also substitute to them other persons to take one after another the goods which he shall have appropriated to them.[c]

III.

3825. *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

[a] § 2, *Inst. de fideic. hæred.*; — *Inst. de sing. reb. per fideic. rel.*

[b] *D.* § *de fideic. hæred.*; — *l.* 16, § 7, *D. ad senat. cons. Trebell.*; — *l.* 78, § 9, *eod.*

[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.*

[d] § 8, *Inst. de fideic. hær.*

Digitized by Google

said executor should think fit to make choice of: and the liberty of this choice which the said executor will have will be noways 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 chooses none of them singly.[f]

IV.

3826. *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 although 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.

V.

3827. *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 Trebellianic portion,[i] of which we shall treat under the following title.

[e] *L.* 7, § 1, *D. de reb. dub.*
[f] See the twelfth article of the second section of *Legacies*.
[g] *L.* 114, § 3, *in f. D. de leg.* 1.
[h] *L.* 17, *D. ad senat. Trebell.*; — *d. l.* 114, § 6, *D. de leg.* 1. See the following article.
[i] See the fourth title.

Digitized by Google

VI.

3828. *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.[k]

VII.

3829. *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 received, 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.[l]

VIII.

3830. *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.[m]

[k] *L.* 18, *D. ad senat. Trebell.*; — *d. l.* § 2; — *l.* 57, *eod.* See the following article, and the fourth title. *V. l.* 32, *eod.*

[l] *L.* 16, *C. de fideic.*

[m] § 2, *in f. Inst. de fideic. hæred.* See the texts cited on the first article under the letter *b*.

Digitized by Google

IX.

3831. *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 the person in whose favor 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.[n]

X.

3832. *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.[o]

[n] *L.* 26, *D. 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 they be due by the nature of the engagement, as to which the reader may consult the preamble of the title of *Interest, Costs, and Damages.*

[o] 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, *D. ad senat. Trebell.*

Although this text relates to another rule, explained in the fourth article of the second section of the *Trebellianic 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

Digitized by Google

XI.

3833. *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, although 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.[p]

XII.

3834. *The Executor recovers the Expenses 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 Trebelliànic portion, but all the expenses he has been at on account of the inheritance.[q]

XIII.

3835. *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 had squandered away and dissipated the effects thereof, or committed other frauds, he might be obliged to restore the said effects to his son, although he were still under his father's jurisdiction, and although the fiduciary bequest were upon the 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

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.

[p] *L.* 22, § 3, *D. ad senat. Trebell.*; — *l.* 58, § 1, *eod.*; — *l.* 108, § 12, *D. 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 a 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 was 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.

[q] *L.* 22, § 3, *D. ad senat. Trebell.* See the ninth article of the tenth section of *Legacies*.

Digitized by Google

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.[r]

XIV.

3836. *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 has fraudulently kept back, he will be bound to restore them, together with the fruits or other revenues of the same, and likewise will be liable to costs and damages, if there be 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 will retain them.[s]

XV.

3837. *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.[t]

XVI.

3838. *Children charged with a Fiduciary Bequest retain their Legitime, or Child's Part.* — If a father or other ascendant, having

[r] *L.* 50, *D. ad senat. Trebell.* See the twentieth and twenty-first articles.

[s] *L.* 78, § *ult. D. 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.

[t] *L.* 1, § 2, *D. ad senat. Trebell.*

Digitized by Google

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.[u]

Remarks on the Preceding Article.

3839. 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 Trebellianic 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 Trebellianic portion the fourth part of the other two 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, although this deduction does not always amount to a half, and ought to vary according as the number of children varies the quota of their legitimes or filial portions, pursuant to the rules explained in the title of the *Legitime or Filial Portion*.

3840. 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 Trebellianic 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 although 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, although only in the cases where they are burdened with substitutions or fiduciary bequests, ought to be received as favorably in the provinces which are governed by the

[u] *Nov.* 39, *c.* 1;—*l.* 32, *C. de inoff. testam.* See the title of the *Legitime.*

Digitized by Google

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 everywhere.

3841. 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 Trebellianic portion in the case of substitutions, because children are not commonly charged with substitutions, unless it be in favor of their own children, or of the descendants of the person who has made the substitution, whereas legacies may be in favor 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 ancient 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 Trebellianic portion in favor of ascendants who are charged with fiduciary bequests by their descendants.

XVII.

3842. *The Wife's Jointure, and 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

Digitized by Google

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.[1]

Remarks on the Preceding Article.

3843. We might gather as a consequence from the last of the texts cited, that the double deduction of the legitime and of the Trebellianic portion, of which mention has been made in the remarks 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 Trebellianic portion, in all probability he would have expressed it; and seeing that 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 Trebellianic fourth part, and to have said, that, if the legitime and the Trebellianic portion were not sufficient, the surplus should 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 Trebellianic 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 sen-

[1] *L.* 22, § 4, *D. ad senat. Trebell.*; — *Nov.* 39, *c.* 1.

Digitized by Google

timent of some, this deduction on account of jointures and marriage portions should be extended beyond the first degree of the substitution, and if 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.

3844. *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.[y]

XIX.

3845. *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 favor of other descendants of the same testator, brothers, uncles, or nephews to the said executor, or in favor 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 testa-

[y] *L. 34, D. 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.

Digitized by Google

tor could not have been to prefer the substitutes to these children.[z]

XX.

3846. *The Executor ought to make an Inventory, 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 inventory of the goods, in order to preserve the right of the substitute. And this inventory ought to be made either in presence of the substitute, if he can be there; or if he is not present, or even is 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 inventory, the executor is bound to give security, if the circumstances require it, and unless the testator has discharged him from giving any.[a]

XXI.

3847. *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 ascendant, 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 the said executor had contracted a second marriage.[b]

SECTION II.

OF SUBSTITUTIONS OR PARTICULAR FIDUCIARY BEQUESTS OF CERTAIN THINGS.

3848. Seeing particular fiduciary bequests of certain things are of the nature of legacies, as has been shown in the title of *Legacies*, we must apply to these fiduciary bequests the rules of that title which are applicable to them.

[z] *L.* 102, *D. de condit. et dem.;*—*v. l. jubemus, C. ad senat. Trebell.;*—*l.* 30, *C. de fideic.*

[a] *L.* 1, *D. ut legat. seu fid. serv. caus. cav.;*—*d. l.* § 10;—*l.* 1, *C. ut in poss. legat. vel fid. s. c. m.;*—*Nov.* 1, *c.* 2, § 1;—*l.* 2, *C. ut in possess. leg. vel fid. s. c. m.* See the fourth article of the first section of the *Falcidian Portion.*

[b] *L.* 6, *C. ad senat. Trebell.*

Digitized by Google

ART. I.

3849. *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]

II.

3850. *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]

III.

3851. *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]

IV.

3852. *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 he entreats him 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]

[a] *Inst. de sing. reb. per fideic. relict.*

[b] *Inst. de sing. reb. per fid. rel.*; — § 1, *eod.*; — *l.* 50, *D. de legat.* 2.

[c] See the following articles.

[d] *L.* 11, § 19, *in f. D. de legat.* 3; — *l.* 115, *D. de leg.* 1; — *l.* 118, *eod.*; — *l.* 2, *C. comm. de legat. et fid.*; — *l.* 67, § *ult. D. de legat.* 2. See the forty-seventh article of the eighth section of *Testaments*.

Digitized by Google

V.

3853. *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 favor of those of that family to which the same was appropriated.[f]

VI.

3854. *One may make a Fiduciary Substitution in Favor of Persons to be born.* — One may make a fiduciary substitution of a particular thing either in favor of certain persons, naming them, or of persons that are not as yet born, but who may be born,[g] or even indefinitely in favor 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]

VII.

3855. *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 succeeding, which depends on the following rules.[i]

VIII.

3856. *Different Manners of regulating this Order.* — The testators may regulate differently the order of the fiduciary substitutes,

[e] See the articles which follow.

[f] See the twelfth article.

[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] *L.* 57, § 2, *D. ad senat. Trebell.*

[i] See the following articles.

Digitized by Google

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 that of a legatee, if he substitutes to him.[k]

IX.

3857. *A Fiduciary Substitution made indefinitely either to one of a certain Family, or to a certain Family.* — If the fiduciary substitution be indefinite in favor 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[1] whom he should please to pitch on, even although he should leave it to the remotest of the family, preferring him to those who were in a nearer degree.[m] 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 otherwise of the intention of the testator by circumstances which might discover the same.[n]

Remarks on the Preceding Article.

3858. 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 duchy, county, or barony, should remain in his

[k] See the texts cited on the following article.
[1] *L.* 67, *D. de legat.* 2.
[m] *D. l.* 67, § 2;—*l.* 114, § 17, *D. de legat.* 1.
[n] *L.* 32, § *ult. D. de legat.* 2; —*l.* 69, § 3, *eod.*

Digitized by Google

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 lawsuits 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 either the degrees, or the eldest of each degree, or 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.

3859. *If the Executor who was to choose 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 choose 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 nobody 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 the whole.[o]

XI.

3860. *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 choosing him from among others, derives his right only from the testator, and not from the person who has chosen him, although 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 fidu-

[o] *L.* 67, § 7, *D. de legat.* 2.

Digitized by Google

ciary substitution, it would not be in effect a legacy: for he would not thereby give any thing that was his own, since he would only leave what he was obliged to restore, having only the liberty of choosing the person to whom he was to restore it. Thus, he could much less impose on this fiduciary substitute any condition, or any charge.[p]

XII.

3861. *The Prohibition to alienate does not oblige, unless it be made in Favor 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 favor 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.[q]

XIII.

3862. *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 although the persons substituted should be the descendants of this testator, and he had an equal affection for them all, yet his expression would mark that he left it to his son to choose 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

p *L.* 67, *D. de legat.* 2; — *d. l.* § 1, *in f.*; — *l.* 7, § 1, *D. de reb. dub.*

q *L.* 114, § 14, *D. de legat.* 1.

Digitized by Google

by an alienation or other disposition of the executor who is charged with the substitution.[r]

XIV.

3863. *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 otherwise 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 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 rendered him incapable, as if he was fallen lame, or become blind, this fiduciary bequest would be estimated in money.[s]

XV.

3864. *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 rule 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.[t]

XVI.

3865. *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

[r] *L.* 114, § 15, *D. de legat.* 1; — *d. l.* 114, § 17. See the ninth article, and the remarks made on it.

[s] *L.* 11, § 17, *D. de legat.* 3; — *l.* 14, § 2, *eod.*

[t] *L.* 26, *D. de legat.* 3. See the third article of the eighth section of *Legacies*, and the remarks there made upon it; as also the ninth article of the first section of this title.

Digitized by Google

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.[u]

XVII.

3866. *The Legatee charged with a Fiduciary Bequest which proves to be Null reaps the Benefit of it, and not the Executor.*— If, a legatee 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 legatee would reap the benefit of it. For it was a charge upon his legacy, which ceases in his favor.[x]

SECTION III.

OF SOME RULES COMMON TO FIDUCIARY SUBSTITUTIONS OF AN INHERITANCE, AND TO THOSE OF PARTICULAR THINGS, AND TO TACIT FIDUCIARY SUBSTITUTIONS.

3867. 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.

ART. I.

3868. *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 favor 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]

[u] *L.* 2, *C. de fideic.*

[x] *L.* 38, § 6, *D. de legat.* 3.

[a] § 1, *Inst. de vulg. subst.* Although 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.

Digitized by Google

II.

3869. *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]

III.

3870. *One may substitute the same Persons who 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]

IV.

3871. *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]

V.

3872. *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 re-

[b] *Inst. de vulg. subst.* The same remark is to be made on this text that has been made on the preceding article. See, concerning the degrees of substitutions, the preamble of the first section.

[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.*

[d] See the second section of *Heirs and Executors* in general, and the preamble to the same section.

Digitized by Google

store 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 expressly named.[e]

VI.

3873. *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 to the persons to whom the testator could not give, are considered in the eye of the law as if they had stolen 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]

VII.

3874. *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]

Remarks on the Preceding Article.

3875. It is necessary to observe on this article and on the text that is here cited, 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

[e] See the texts cited on the following article.

[f] *L.* 46, *D. de hæred. petit.*; — *l.* 18, *D. de his quæ ut ind.*; — *l.* 103, *D. de legat.* 1; — *l.* 10, *D. de his quæ ut indig.*

[g] *L.* 3, § 5, *D. de jur. fisci.*

Digitized by Google

reaped the benefit of a tacit fiduciary bequest which was made in favor 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 favoring of the cause of the exchequer too much, they required a strict proof of the fraud, as appears from the text cited 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 favor of their tutor or guardian, is extended to his children; and this is expressly regulated so by some customs.

VIII.

3876. *One cannot restore the Goods that are substituted before the Time of the Substitution comes, if the too precipitate Restitution turns*

[a] *Ulp. tit.* 15 *et* 16.

[b] *L.* 25, *D. de his quæ ut ind.*

Digitized by Google

to the Prejudice of the Substitute. — The executor or legatee 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 beforehand to the substitute the goods which are subject to the fiduciary substitution, provided 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 legatee 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 favor of the executor, and no other persons had any interest therein, he might without difficulty pay the same before the term.[i]

IX.

3877. *A Donation has the Effect of an Election of a Substitute, whom the Donor was empowered to choose.* — If he who was charged with a fiduciary bequest or substitution at the time of his death, in favor of some one of his children whom he should think fit to choose, had given in his lifetime 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 although the liberty of this choice ought to last until the

[h] See the seventeenth and eighteenth articles of the tenth section of *Legacies*.

[i] *L.* 15, *D. de ann. leg.*

death of the person charged with this fiduciary substitution, and it would be for 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.[k]

X.

3878. *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.[l]

XI.

3879. *Order of the Substitutes in divers Degrees.* — If a father who had several children, having instituted his wife his executrix, had entreated 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 choose, 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 choose whomsoever she should think fit from among 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 choose 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.[m]

[k] *L.* 77, § 10, *D. de leg.* 2.
[l] *L.* 76, § 5, *D. de legat.* 2.
[m] *L.* 57, § 2, *D. 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.

Digitized by Google

XII.

3880. *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 substitution: 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 favorable, 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.[n]

XIII.

3881. *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.[o]

XIV.

3882. *The Prescription of Lands substituted, which are alienated by the Usufructuary, divests the Substitute of the Property*

[n] *L.* 11, *C. de transact.*; — *l.* 16, *C. de pact.*

[o] *L.* 70, § *ult. D. 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 enrolled, 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 enrolled, the right of the substitutes would be preserved against all purchasers and other occupiers.

Digitized by Google

thereof. — If a legatee of a usufruct of lands which are subject to a fiduciary substitution had disposed of the property of the said lands, by his testament, in favor 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.[p]

XV.

3883. *The Fiduciary Substitution after the Death of the Executor or Legatee is not open by their Civil Death.* — If it should happen that the executor or legatee, who is charged with a fiduciary substitution that ought to 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 security of the substituted goods, by precautions to be taken between the fiduciary substitute and those to whom the substituted goods should go.[q]

XVI.

3884. *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 he had children who survived him, this fiduciary substitution would remain without any effect. And even although these children should renounce the succession of

[p] *L.* 36, *D. de usu et usuf. et red. legat.* We must make the same remark on this article which has been made on the preceding.

[q] *L.* 48, § 1, *D. de jure fisci.* As to the precautions mentioned in the article, see the third article of the second section of the *Falcidian Portion.*

Digitized by Google

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.[r]

Remarks on the Preceding Article.

3885. 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.

3886. 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 precisely decide 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 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

[r] *L.* 114, § 13, *D. de leg.* 1;—*l.* 1, *C. de cond. ins.;* — *v. l.* 6, § 2, *C. ad senat. Trebell.;*— *l.* 85, *D. de hæred. inst.*

Digitized by Google

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 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 children's renouncing their father's succession made it still more necessary to have added, that although they were not heirs to their father, yet they would nevertheless reap the benefit of the fiduciary substitution.

3887. We may add to these reasons, although 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 favor 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 favor of such of his children as he shall think fit to choose, or of other persons.

3888. 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 further, 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 decid-

* Deficientibus superioribus conjecturis, negarem et 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.

Digitized by Google

ing them by other principles than those of the laws, and taking afterwards their own decisions for new principles, from which they raise and resolve in the same manner other questions. Thus it is that they have perplexed this matter of substitutions, which, although in itself sufficiently intricate, 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 ourselves 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.

TITLE IV.

OF THE TREBELLIANIC PORTION.

3889. By the Trebellianic portion is meant the fourth part which the laws appropriate to executors who are charged with a universal fiduciary bequest of the whole inheritance, or of a part of it, which distinguishes the Trebellianic portion from the Falcidian portion. For the Falcidian portion relates to legacies and to particular fiduciary bequests of certain things.

3890. This fourth part was called the Trebellianic 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 inconveniences in this last decree of the senate, which it would be to no purpose to mention here, Justinian

Digitized by Google

confounded the two decrees 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 Trebellianic portion has ever since been applied to this fourth part that is taken out of the fiduciary substitutions of inheritances. But this Trebellianic 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 Trebellianic 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 Trebellianic portion, it is necessary that we should join them to those which shall be explained in this title, in which we shall confine ourselves 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 Trebellianic 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.

3891. 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 in the sixteenth article of the first section of *Direct and Fiduciary Substitutions.* The reader ought not to be surprised that he finds in this title only a few articles; for it was necessary that we should confine ourselves 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.*

Digitized by Google

SECTION I.

OF THE USE OF THE TREBELLIANIC PORTION, AND WHEREIN IT CONSISTS.

ART. I.

3892. *Definition of the Trebellianic Portion.* — The Trebellianic portion is the fourth part of the inheritance, which ought to remain to the executor who is charged to restore it.[a]

II.

3893. *It takes Place for an Executor who has but a Part of the Inheritance.* — If he who is charged with a fiduciary substitution be heir or executor for a part only of the inheritance which he is charged to restore, he will have the Trebellianic 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 Trebellianic portion of his own share.[b]

III.

3894. *The Testator may, in Lieu of the Trebellianic Fourth Part, assign to the Executor either Houses, Lands, or some other Thing.* — Although 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, 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]

[a] § 5, *Inst. de fideic. hæred.*
[b] § 2, *in f. eod.*; — § 8, *in f. eod.*
[c] § 9, *Inst. de fideic. hæred.*; — *l.* 30, § 3, *D. ad senat. Treb.*; — *l.* 2, *C. eod.*; — *l.* 47, § 1, *D. ad leg. Falc.*

Digitized by Google

SECTION II.

OF THE CAUSES WHICH MAKE THE TREBELLIANIC PORTION TO CEASE, OR WHICH DIMINISH IT.

ART. I.

3895. *The Testator may forbid the Deduction of the Trebellianic Portion.* — If the testator has expressly forbidden the deduction of the Trebellianic 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]

II.

3896. *The Executor who restores voluntarily the whole Inheritance, without retaining any Thing, cannot afterwards demand the Trebellianic Portion.* — If the executor who might have retained the Trebellianic 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]

III.

3897. *The Fiduciary Substitute, who is charged with a Second Restitution, has no Right to the Trebellianic 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 Trebellianic portion out of it, although the executor who had restored the inheritance to him had retained his fourth part: for the Trebellianic 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]

[a] *L.* 1, § 19, *D. ad senat. Trebell.;* — *Nov.* 1, *c.* 2, § *ult.;* — *d.* § *in f.* See the last article, and the remark that is there made on it.

[b] *L.* 68, § 1, *D. ad senat. Trebell.* See the fifteenth and sixteenth articles of the fourth section of the *Falcidian Portion.*

[c] *L.* 47, § 1, *D. ad leg. Falc.;* — *l.* 1, § 19, *D. ad senat. Trebell.;* — *l.* 55, § 2, *eod.*

Digitized by Google

IV.

3898. *How the Fruits are reckoned or not reckoned as Part of the Trebellianic 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 Trebellianic 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 through the negligence of the substitute, would not be reckoned as part of the Trebellianic portion due to the said executor.[e]

V.

3899. *The Fruits are not reckoned to the Children as Part of their Trebellianic Portion.* — The rule explained in the preceding article, which reckons to the executor the fruits as part of his Trebellianic 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 favor 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 although the testator had ordained that those fruits should be reckoned as part of it.[f]

VI.

3900. *Penalty of the Executor who is charged to restore the Inheritance, and who has not made an Inventory of the Effects.* — Seeing the Trebellianic portion is a fourth part of the inheritance, the executor who pretends to retain this fourth part ought to show

[d] *L.* 18, § 1, *D. ad senat. Trebell.*; — *l.* 52, § 5, *eod.*

[e] *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.

[f] *L.* 6, *C. ad senat. Trebell.*

Digitized by Google

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 inventory of all the goods of the inheritance: which lays a double tie on this executor to make the said inventory, both for his own interest, that he may establish his right to the Trebellianic 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 inventory of the goods, would be very justly deprived of the Trebellianic 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 inventory could be anywise imputed to his want of fidelity, or to his neglect.[g]

REMARKS ON THE PRECEDING ARTICLE.

3901. 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, although the executor who is charged with a fiduciary substitution of the inheritance has neglected to make an inventory of the goods, he is not for that omission to be deprived of the Trebellianic portion. And the chief foundation on which they build their opinion is, that, the privation of the Trebellianic 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 inventory; 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 inventory, in order to justify the fidelity of the executor in making the restitution; and they

[g] See the texts cited on the twentieth article of the first section of *Direct and Fiduciary Substitutions*.

Digitized by Google

add, that whatever the laws have regulated in the matter of the Falcidian portion is common to the Trebellianic 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 inventory 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 inventory, obliges the executor to satisfy, not only the entire legacies, but also the fiduciary bequests: *Non retinebit Falcidiam, sed complebit legatarios et fideicommissarios;* which words those of the other party restrain to fiduciary bequests of particular things, and that with very good reason.

3902. 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 Trebellianic portion for want of an inventory; 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 inventory 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 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 inventory in order to preserve his Trebellianic portion. There are also other cases in which it would not be just to deprive the executor of the Trebellianic portion for his not having made an inventory; as, for example, if the executor were a minor, and his guardian had omitted to make the said inventory, 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 sub-

Digitized by Google

stitute 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 was charged with a fiduciary substitution in favor of his own children: if, for example, the substitution were only for the benefit of one of the children, and the circumstances should give ground to presume, that some favor had been shown 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 favor 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 both his legitime and also the Trebellianic 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 inventory. 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 inventory he should forfeit the Trebellianic portion, as he would forfeit the Falcidian portion on the same account, there being the same reasons for both. And although 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 inventory 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 inventory 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.

3903. 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.

Digitized by Google

Digitized by Google

APPENDIX.

Digitized by Google

Digitized by Google

EXPLANATION

OF THE MANNER IN WHICH THE TEXTS OF THE ROMAN LAW ARE REFERRED TO IN THE FOREGOING TREATISE.

THE several parts of the CORPUS JURIS CIVILIS, which are principally referred to in *The Civil Law in its Natural Order*, are the *Institutes*, *Digest* or *Pandects*, *Code*, and *Novels*.

The INSTITUTES are divided into four *books*, each of which is divided into *titles*, which are severally subdivided into *sections* or *paragraphs*.

The DIGEST is divided into fifty *books*, each book into *titles*, each title into *laws* (sometimes also called *fragments*), and many of the laws into *sections* or *paragraphs*. Books 30, 31, and 32, which treat of legacies and trusts, are not divided into several titles, but contain each of them a single title only, with the same rubric, namely, *de legatis et fideicommissis*.

The CODE is divided into twelve *books*, each book into *titles*, each title into *laws*, and the laws frequently into *paragraphs* or *sections*, in the same manner with the Digest.

The NOVELS, or NEW CONSTITUTIONS, are numbered, and divided into chapters.

The several books, titles, laws, and paragraphs are numbered consecutively. The titles only have a rubric.

The general plan of reference to the Institutes, Digest, and Code is by the rubric of the *title*, or, where the rubric is long, by the first two or three words of it, with the number of the *law*, and also of the *paragraph* where the law cited is thus divided. The words of the title are usually abbreviated.

Digitized by Google

The Digest is denoted by the letter *D.*; the Institutes, by the letter *I.*, or the abbreviation *Inst.*; the Code, by the letter *C.*, or *Cod.*; the Novels, by the letter *N.*, or *Nov.*

The letter *L.* is used to designate a *law*; the sign §, a *paragraph* or *section* of a law.

The mode of reference will be best explained by a few examples.

L. 2, *D. de fidej. et mand.* — This reference denotes the second law of the title of the Digest *de fidejussoribus et mandatoribus*, which will be found by reference to the subjoined table to be the first title of the forty-sixth book.

L. 29, § 6, *D. mand.* — This refers to the sixth section or paragraph of the twenty-ninth law of the title of the Digest *mandati vel contra*, which is the first title of the seventeenth book.

L. 10, § *ult. D. mand.* — The last paragraph of the tenth law of the same title of the Digest.

L. 1, *C. de fidej. min.* — The first law of the title of the Code *de fidejussoribus minorum*, which is the twenty-fourth title of the second book.

§ 1, *Inst. de duob. reis.* — Institutes, the first paragraph of the title *de duobus reis stipulandi et promittendi*, which is the sixteenth title of the third book.

L. pen. C. de non num. pec. — The last law but one of the title of the Code *de non numerata pecunia*, which is the thirtieth title of the fourth book.

The abbreviation *eod.* denotes the title given in the reference next immediately preceding: thus, *L.* 9, § *ult. eod.*, immediately following the reference *L.* 20, § 2, *D. de pign. act.*, denotes the last paragraph of the ninth law of the title of the Digest *de pignoratitia actione vel contra*, which is the seventh title of the thirteenth book.

If the last reference be to a different part of the Corpus Juris Civilis from the first, the part referred to is designated by the proper letter or abbreviation: thus, *L. ult. Cod. eod.*, following immediately after *L.* 4, *D. in quib. caus. pign. vel hyp. tac. contr.*, which is the second title of the twentieth book of the Digest, denotes the last law of the Code contained in the title bearing the same rubric with the title of the Digest referred to, namely, the fifteenth title of the eighth book, *in quibus causis pignus vel hypotheca tacite contrahitur*.

The words *in fine*, or the abbreviations *in fin.*, *in f.*, denote that the particular passage referred to is *at the end* of the law or paragraph thus designated.

Digitized by Google

The letters *D. l.* denote the ***said law***, that is, the law designated by the reference next immediately preceding. *D. ll.* are used when more than one law is referred to. *D. t.*, the ***said title***. *D.* §, the ***said section*** or ***paragraph***.

Some of the titles contain but a single law. When this is the case, the reference is in this form: *L. un. C. ut caus. post pubert. ads. tut.*, or the only law in the title of the Code *ut causæ post pubertatem adsit tutor*, which is the forty-eighth title of the fifth book.

The words ***in principio***, or the abbreviations ***in pr.***, ***in prin.***, denote the ***beginning*** of the law, or of the other particular part referred to. Where a law is divided into several paragraphs, the first is not numbered, and is referred to in this manner. Thus, by *L.* 1, ***in prin.*** *D. de calumniat.*, is meant the paragraph at the beginning of the first law of the title of the Digest *de calumniatoribus*, which is the sixth title of the third book.

L. 71, ***in f. princ.*** *D. de fidej. et mand.*—At the end of the paragraph commencing the law seventy-first, &c.

The letter *V.*, as *V. l.* 1, § 3, &c. (that is, ***see*** the passage referred to), indicates that the law designated is referred to, not as directly, but only by analogy, supporting the principle to which it is cited.

L. un. § 7, *versic. sin autem*, *Cod. de rei ux. act.*—This refers to the seventh paragraph of the only law of the Code, book fifth, title thirteen, *de rei uxoriæ actione*, &c., at the sentence commencing with the words ***sin autem***.

The three books 30, 31, and 32 of the Digest, which treat of legacies and trusts, each of which contains but a single title, with the rubric *de legatis et fideicommissis*, are referred to as *de legat.* 1, *de legat.* 2, *de legat.* 3. Thus, *L.* 37, § 5, *D. de legat.* 3, denotes the Digest, book 32, law 37, § 5.

According to a still more ancient mode of reference, which occurs once or twice, the initial words of the law cited are given instead of its number. Thus, *L. si ut certo*, *D. Commodati vel contra*, denotes the fifth law of the sixth title of the Digest, book 13.

Digitized by Google

A TABLE

OF THE RUBRICS OF THE SEVERAL TITLES OF THE INSTITUTES, DIGEST, AND CODE, ARRANGED IN ALPHABETICAL ORDER.

A.

de Abigeis. D. 47, 14. C. 9, 37.
de Abolitionibus. C. 9, 42. D. 48, 16.
de Acceptilatione. D. 46, 4.
de Acceptilationibus. C. 8, 44.
de Accusationibus et inscriptionibus. D. 48, 2. C. 9, 2.
de Acquirenda et retinenda possessione. C. 7, 32.
de Acquirenda vel amittenda possessione. D. 41, 2.
de Acquirenda vel omittenda hereditate. D. 29, 2. C. 6, 30.
de Acquirendo rerum dominio. D. 41, 1.
de Acquisitione per arrogationem. I. 3, 10.
de Actione rerum amotarum. D. 25, 2.
de Actionibus. I. 4, 6.
de Actionibus emti et venditi. D. 19, 1. C. 4, 49.
de Actore a tutore vel curatore dando. C. 5, 61.
de Ademtione legatorum. I. 2, 21. D. 34, 4.
de Ademtione libertatis. D. 40, 6.
Ad exhibendum. D. 10, 4. C. 3, 42.
de Adimendis vel transferendis legatis. D. 34, 4. I. 2, 21.
Ad legem Aquiliam. D. 9, 2. I. 4, 3. C. 3, 35.
Ad legem Corneliam de falsis. C. 9, 22. D. 48, 10.
Ad legem Corneliam de sicariis. D. 48, 8. C. 9, 16.
Ad legem Fabiam de plagiariis. C. 9, 20. D. 48, 15.
Ad legem Falcidiam. D. 35, 2. C. 6, 50. I. 2, 22.
Ad legem Juliam de adulteriis. D. 48, 5. C. 9, 9.
Ad legem Juliam de ambitu. C. 9, 26. D. 48, 14.
Ad legem Juliam majestatis. D. 48, 4. C. 9, 8.
Ad legem Juliam peculatus, etc. D. 48, 13. C. 9, 28.
Ad legem Juliam repetundarum. C. 9, 27. D. 48, 11.
Ad legem Juliam de vi publica. D. 48, 6. C. 9, 12.
Ad legem Juliam de vi privata. D. 48, 7. C. 9, 12.
Ad legem Viselliam. C. 9, 21.
de Administratione et periculo tutorum et curatorum, etc. D. 26, 7.
de Administratione rerum ad civitates pertinentium. D. 50, 8.
de Administratione rerum publicarum. C. 11, 30.
de Administratione tutorum vel curatorum, etc. C. 5, 37.
Ad municipalem et de incolis. D. 50, 1.
de Adoptionibus. I. 1, 11. C. 8, 48.
de Adoptionibus et emancipationibus, etc. D. 1, 7.
Ad SC. Macedonianum. C. 4, 28. D. 14, 6.
Ad SC. Orphitianum. I. 3, 4. C. 6, 57. D. 38, 17.
Ad SC. Tertullianum. I. 3, 3. C. 6, 56. D. 38, 17.
Ad SC. Trebellianum. D. 36, 1. C. 6, 49.
Ad SC. Turpillianum, etc. D. 48, 16. C. 9, 42. 45.
Ad SC. Velleianum. D. 16, 1. C. 4, 29.
de Advocatis diversorum judiciorum. C. 2, 7.
de Advocatis diversorum judicum. C. 2, 8.

Digitized by Google

de Advocatis fisci. C. 2, 9.
de Ædificiis privatis. C. 8, 10.
de Ædilitiis actionibus. C. 4, 58.
de Ædilitio edicto, etc. D. 21, 1.
de Æstimatoria actione. D. 19, 3.
de Agentibus in rebus. C. 12, 20.
de Agnoscendis et alendis liberis, etc. D. 25, 3. C. 5, 25.
de Agricolis, et censitis, et colonis. C. 11, 47.
de Agricolis et mancipiis dominicis, etc. C. 11, 67.
de Albo scribendo. D. 50, 3.
de Aleatoribus. D. 11, 5. C. 3, 43.
de Alendis liberis ac parentibus. C. 5, 25. D. 25, 3.
de Alexandriæ primatibus. C. 11, 28.
de Alienatione judicii mutandi causa facta. D. 4, 7. C. 2, 55.
de Alimentis pupillo præstandis. C. 5, 50.
de Alimentis vel cibariis legatis. D. 34, 1.
de Alluvionibus, et paludibus, et pascuis, etc. C. 7, 41.
de Annali exceptione Italici contractus tollenda, etc. C. 7, 40.
de Annonis civilibus. C. 11, 24.
de Annonis et capitatione administrantium, etc. C. 1, 52.
de Annonis et tributis. C. 10, 16.
de Annuis legatis et fideicommissis. D. 33, 1.
An per alium causæ appellationum reddi possunt. D. 49, 9.
An servus pro suo facto post manumissionem teneatur. C. 4, 14.
de Apochis publicis, etc. C. 10, 22.
de Apostatis. C. 1, 7.
de Apparitoribus comitis Orientis. C. 12, 57.
de Apparitoribus magistrorum militum, etc. C. 12, 55.
de Apparitoribus præfecti annonæ. C. 12, 59.
de Apparitoribus præfecti urbi. C. 12, 54.
de Apparitoribus præfectorum prætorio, etc. C. 12, 53.
de Apparitoribus proconsulis et legati. C. 12, 56.
de Appellationibus et consultationibus. C. 7, 62.
de Appellationibus et relationibus. D. 49, 1.
de Appellationibus recipiendis vel non. D. 49, 5.
Apud eum, a quo appelletur, aliam causam agere compellendum. D. 49, 12.
de Aquæductu. C. 11, 42.
de Aqua et aquæ pluviæ arcendæ. D. 39, 3. C. 3, 43.
de Aqua quotidiana et æstiva. D. 43, 20.
A quibus appellare non licet. D. 49, 2.
Arbitrium tutelæ. C. 5, 51.
de Arboribus cædendis. D. 43, 27.
Arborum furtim cæsarum. D. 47, 7.
de Argenti pretio, quod thesauris in fertur. C. 10, 76.
de Assertione tollenda. C. 7, 17.
de Assessoribus, et domesticis, et cancellariis judicum. C. 1, 51. D. 1, 22.
de Assignandis libertis. D. 38, 4.
de Assignatione libertorum. I. 3, 8.
de Athletis. C. 10, 53.
de Atiliano tutore, etc. I. 1, 20.
de Auctoritate et consensu tutorum et curatorum. D. 26, 8.
de Auctoritate præstanda. C. 5, 59.
de Auctoritate tutorum et curatorum. I. 1, 21.
de Auri publici persecutoribus. C. 10, 72.
de Auro, argento, etc., et statuis legatis. D. 34, 2.
de Auro coronario. C. 10, 74.

B.

de Bonis auctoritate judicis possidendis, etc. C. 7, 72. D. 42, 5. 6.
de Bonis damnatorum. D. 48, 20.
de Bonis eorum, qui ante sententiam vel mortem sibi consciverunt, vel accusatorem corruperunt. D. 48, 21. C. 9, 50.
de Bonis libertorum. D. 38, 2.
de Bonis libertorum et jure patronatus. C. 6, 4. D. 37, 14.
de Bonis maternis et materni generis. C. 6, 60.
de Bonis proscriptorum seu damnatorum. C. 9, 49.
de Bonis, quæ liberis in potestate constitutis, etc., acquiruntur. C. 6, 61.
de Bonis vacantibus et de incorporatione. C. 10, 10.
de Bonorum possessione contra tabulas. D. 37, 4. C. 6, 12. 13.
de Bonorum possessione ex testamento militis. D. 37, 14.
de Bonorum possessione furioso, etc., competente. D. 37, 3.
de Bonorum possessione secundum tabulas. D. 37, 11. C. 6, 11.
de Bonorum possessionibus. I. 3, 9. D. 37, 1.

C.

de Cadaveribus punitorum. D. 48, 24.
de Caducis tollendis. C. 6, 51.
de Calumniatoribus. D. 3, 6. C. 9, 46.
de Canone frumentario urbis Romæ. C. 11, 22.
de Canone largitionalium titulorum. C. 10, 23.
de Capiendis et distrahendis pignoribus tributorum causa. C. 10, 21.
de Capitatione civium censibus eximenda. C. 11, 48.
de Capite minutis. D. 4, 5.
de Capitis deminutione. I. 1, 16.
de Captivis et de postliminio, etc. D. 49, 15.

de Carboniano edicto. D. 37, 10. C. 6, 17.
de Castrensianis et ministerianis. C. 12, 26.
de Castrensi omnium palatinorum peculio. C. 12, 31.
de Castrensi peculio. D. 49, 17.
de Castrensi peculio militum et præfectianorum. C. 12, 37.
de Censibus. D. 50, 15.
de Censibus, et censitoribus, etc. C. 11, 57.
de Cessione bonorum. D. 42, 3.
de Classicis. C. 11, 12.
de Cloacis. D. 43, 23.
de Codicillis. I. 2, 25. D. 29, 7. C. 6, 36.
de Cohortalibus principibus, etc. C. 12, 58.
de Collatione æris. C. 10, 29.
de Collatione bonorum. D. 37, 6.
de Collatione donatorum vel relevatorum, etc. C. 10, 28.
de Collatione fundorum fiscalium, etc. C. 11, 73.
de Collatione fundorum patrimonialium, etc. C. 11, 64.
de Collationibus. C. 6, 20.
de Collegiatis et chartopratis, etc. C. 11, 17.
de Collegiis et corporibus. D. 47, 22.
de Collusione detegenda. D. 40, 16. C. 7, 20.
de Colonis Illyricianis. C. 11, 52.
de Colonis Palæstinis. C. 11, 50.
de Colonis Thracensibus. C. 11, 51.
de Comitibus consistorianis. C. 12, 10.
de Comitibus et archiatris sacri palatii. C. 12, 13.
de Comitibus et tribunis scholarum. C. 12, 11.
de Comitibus, qui provincias regunt. C. 12, 14.
de Comitibus rei militaris. C. 12, 12.
de Commeatu. C. 12, 43.
de Commerciis et mercatoribus. C. 4, 63.
Comminationes, epistolas, etc., auctoritatem rei judicatæ non habere. C. 7, 57.
Commodati vel contra. D. 13, 6.
de Commodato. C. 4, 23.
Communia de legatis et fideicommissis, etc. C. 6, 43.
Communia de manumissionibus. C. 7, 15.
Communia de successionibus. C. 6, 59.
Communia de usucapionibus. C. 7, 30.
Communia prædiorum, tam urbanorum, quam rusticorum. D. 8, 4.
Communia utriusque judicii, tam familiæ erciscundæ, quam comm. div. C. 3, 38.
Communi dividundo. D. 10, 3. C. 3, 37.
de Communi servo manumisso. C. 7, 7.
de Communium rerum alienatione. C. 4, 52.
de Compensationibus. D. 16, 2. C. 4, 31.
de Concubinis. D. 25, 7. C. 5, 26.
de Concussione. D. 47, 13.
de Condictione causa data, causa non secuta. D. 12, 4.
de Condictione ex lege. D. 13, 2.
de Condictione ex lege, et sine causa vel injusta causa. C. 4, 9.
de Condictione furtiva. D. 13, 1. C. 4, 8.
de Condictione indebiti. D. 12, 6. C. 4, 5.
de Condictione ob causam datorum. C. 4. 6.
de Condictione ob turpem causam. D. 12, 5. C. 4, 7.
de Condictione sine causa. D. 12, 7.
de Condictione triticiaria. D. 13, 3.
de Conditionibus et demonstrationibus, etc. D. 35, 1.
de Conditionibus insertis tam in legatis, quam in fideicommissis et libertatibus. C. 6, 46.
de Conditionibus institutionum. D. 28, 7.
de Conditis in publicis horreis. C. 10, 26.
de Conductoribus et procuratoribus sive actoribus prædiorum fiscalium, etc. C. 11, 71.
de Confessis. D. 42, 2. C. 7, 59.
de Confirmando tutore vel curatore. D. 26, 3. C. 5, 29.
de Conjungendis cum emancipato liberis ejus. D. 37, 8.
de Consortibus ejusdem litis. C. 3, 40.
de Constituta pecunia. C. 4, 18. D. 13, 5.
de Constitutionibus principum. D. 1, 4. C. 1, 14.
de Consulibus, etc., et de præfectis et magistris militum, et patriciis. C. 12, 3.
de Contractibus judicum vel eorum, qui sunt circa eos, etc. C. 1, 53.
de Contrahenda emtione, et de pactis inter emtorem et venditorem, etc. D. 18, 1.
de Contrahenda emtione et venditione. C. 4, 38.
de Contrahenda et committenda stipulatione. D. 8, 38.
de Contraria tutelæ et utili actione. D. 27, 4.
de Contrario judicio tutelæ. C. 5, 58.
de Conveniendis fisci debitoribus. C. 10, 2.
Creditorem evictionem pignoris non debere. C. 8, 46.
de Crimine expilatæ hereditatis. C. 9, 32. D. 47, 19.
de Crimine peculatus. C. 9, 28. D. 48, 13.
de Crimine sacrilegii. C. 9, 29.
de Crimine stellionatus. C. 9, 34.
de Cupressis ex luco Daphnensi, etc., non excidendis. C. 11, 77.
de Curationibus. I. 1, 23.
de Curatore bonis dando. D. 42, 7.
de Curatore furiosi vel prodigi. C. 5, 70.
de Curatoribus furioso et aliis extra minores dandis. D. 27, 10.
de Curiosis et stationariis. C. 12, 23.
de Cursu publico, etc. C. 12, 51.
de Custodia et exhibitione reorum. D. 48, 3.
de Custodia reorum. C. 9, 4.

Digitized by Google

D.

de Damno infecto, et de suggrundiis et protectionibus. D. 39, 2.
Debitorem venditionem pignoris impedire non posse. C. 8, 29.
de Debititoribus civitatum. C. 11, 32.
de Decanis. C. 12, 27.
de Decretis ab ordine faciendis. D. 50, 9.
de Decretis decurionum super immunitate concedenda. C. 10, 46.
de Decurialibus urbis Romæ. C. 11, 13.
de Decurionibus et filiis eorum. D. 50, 2. C. 10, 31.
de Dedititia libertate tollenda. C. 7, 5.
de Defensoribus civitatum. C. 1, 55.
de Delatoribus. C. 10, 11.
Depositi vel contra. D. 16, 3. C. 4, 34.
de Desertoribus et occultatoribus eorum. C. 12, 46.
de Dignitatibus. C. 12, 1.
de Dilationibus. C. 3, 11. D. 2, 12.
de Discussoribus. C. 10, 30.
de Distractione pignorum. D. 20, 5. C. 3, 28.
de Diversis officiis et apparitoribus judicum, etc. C. 12, 60.
de Diversis prædiis urbanis et rusticis templorum et civitatum, etc. C. 11, 69.
de Diversis regulis juris antiqui. D. 50, 17.
de Diversis rescriptis et pragmaticis sanctionibus. C. 1, 23.
de Diversis temporalibus præscriptionibus, et de accessionibus possessionum. D. 44, 3.
de Dividenda tutela, etc. C. 5, 52.
de Divisione rerum et qualitate. D. 1, 8. I. 2, 1.
de Divisione stipulationum. I. 3, 18.
Divortio facto, apud quem liberi morari et educari debeant. C. 5, 24.
de Divortiis et repudiis. D. 24, 2.
de Doli mali et metus exceptione. D. 44, 4.
de Dolo malo. D. 4, 3. C. 2, 21.
de Domesticis et protectoribus. C. 12, 17.
de Donationibus. I. 2, 7. D. 39, 5. C. 8, 54.
de Donationibus ante nuptias, etc. C. 5, 3.
de Donationibus causa mortis. C. 8, 57. D. 39, 6.
de Donationibus inter virum et uxorem. D. 24, 1. C. 5, 16.
de Donationibus, quæ sub modo vel conditione, etc., conficiuntur. C. 8, 55.
de Dote cauta, non numerata. C. 5, 15.
de Dote prælegata. D. 33, 4.
de Dotis collatione. D. 37, 7.
de Dotis promissione et nuda pollicitatione. C. 5, 11.
de Duobus reis constituendis. D. 45, 2.
de Duobus reis stipulandi et promittendi. I. 3, 16. C. 8, 40.

E.

de Edendo. D. 2, 13. C. 2, 1.
de Edicto divi Hadriani tollendo, etc. C. 6, 33.
de Effractoribus et expilatoribus. D. 47, 18.
de Emancipationibus liberorum. C. 8, 49. D. 1, 7.
de Emendatione propinquorum. C. 9, 15.
de Emendatione servorum. C. 9, 14.
de Emtione et venditione. I. 3, 23. D. 18, 1.
de Eo, cui libertatis causa bona addicuntur. I. 3, 11.
de Eo, per quem factum erit, quo minus quis in judicio sistat. D. 2, 10.
de Eo, qui pro tutore prove curatore negotia gessit. D. 27, 5. C. 5, 45.
de Eo, quod certo loco dari oportet. D. 13, 4.
de Episcopali audientia, etc. C. 1, 4.
de Episcopis et clericis, etc. C. 1, 3.
de Equestri dignitate. C. 12, 32.
de Erogatione militaris annonæ. C. 12, 38.
de Errore advocatorum, etc. C. 2, 10.
de Errore calculi. C. 2, 5.
Etiam ob chirographariam pecuniam pignus teneri posse. C. 8, 27.
Etiam per procuratorem causam in integrum restitutionis agi posse. C. 2, 49.
Eum, qui appellaverit, in provincia defendi. D. 49, 11.
de Eunuchis. C. 4, 42.
de Evictionibus. C. 8, 45.
de Evictionibus et duplæ stipulatione. D. 21, 2.
de Exactoribus tributorum. C. 10, 19.
de Exceptione rei judicatæ. D. 44, 2.
de Exceptione rei venditæ et traditæ. D. 21, 3.
de Exceptionibus. I. 4, 13.
de Exceptionibus, præscriptionibus et præjudiciis. D. 44, 1.
de Exceptionibus seu præscriptionibus. C. 8, 36.
de Excoctione et translatione militarium annonarum. C. 12, 39.
de Excusationibus artificum. C. 10, 64.
de Excusationibus munerum. C. 10, 47.
de Excusationibus tutorum vel curatorum. I. 1, 25. D. 27, 1. C. 5, 62.
de Excusationibus veteranorum. C. 5, 65.
Ex delictis defunctorum in quantum heredes conveniantur. C. 4, 17.
de Exercitoria actione. D. 14, 1. C. 4, 25.
de Exheredatione liberorum. I. 2, 13.
de Exhibendis et transmittendis reis. C. 9, 3. D. 48, 3.
de Expensis ludorum publicorum. C. 11, 41.
Expilatæ hereditatis. D. 47, 19. C. 9, 32.
Ex quibus causis infamia irrogatur. C. 2, 12. D. 3, 2.
Ex quibus causis majores XXV. annis

Digitized by Google

in integrum restituantur. D. 4, 6. C. 2, 54.
de Exsecutione rei judicatæ. C. 7, 53.
de Executoribus et exactoribus. C. 12, 61.
de Extraordinariis cognitionibus, etc. D. 50, 13.
de Extraordinariis criminibus. D. 47, 11.

F.

de Fabricensibus. C. 11, 9.
de Falsa causa adjecta legato vel fideicommisso. C. 6, 44.
de Falsa moneta. C. 9, 24.
Familiæ erciscundæ. D. 10, 2. C. 3, 36.
de Famosis libellis. C. 9, 36. D. 47, 10.
de Feriis. C. 3, 12.
de Feriis, et dilationibus, et diversis temporibus. D. 2, 12. C. 3, 11.
de Fide et jure hastæ fiscalis, etc. C. 10, 3.
de Fideicommissaria hereditatis petitione. D. 5, 6.
de Fideicommissariis hereditatibus. I. 2, 23.
de Fideicommissariis libertatibus. D. 40, 5. C. 7, 4.
de Fideicommissis. C. 6, 42. D. 30–32.
de Fide instrumentorum. D. 22, 4.
de Fide instrumentorum, et amissione eorum, et apochis, etc. C. 4, 21.
de Fidejussoribus. I. 3, 20.
de Fidejussoribus et mandatoribus. D. 46, 1. C. 8, 41.
de Fidejussoribus, et nominatoribus, et heredibus tutorum et curatorum. D. 27, 7.
de Fidejussoribus minorum. C. 2, 24.
de Fidejussoribus tutorum vel curatorum. C. 5, 57.
de Fiduciaria tutela. I. 1, 19.
de Filiisfamilias, et quemadmodum pro his pater teneatur. C. 10, 60.
de Filiofamilias minore C 2, 23.
de Filiis officialium militarium, qui in bello moriuntur. C. 12, 48.
Finium regundorum. D. 10, 1. C. 3, 39.
de Fiscalibus usuris. C. 10, 8.
de Fluminibus, ne quid in flumine publico ripave ejus fiat, etc. D. 43, 12.
de Fonte. D. 43, 22.
de Formulis et impetrationibus actionum sublatis. C. 2, 58.
de Fructibus et litium expensis. C. 7, 51.
de Frumento Alexandrino. C. 11, 27.
de Frumento urbis Constantinopolitanæ. C. 11, 23.
de Fugitivis. D. 11, 4.
de Fugitivis colonis patrimonialibus, etc. C. 11, 63.
de Fundis et saltibus rei dominicæ. C. 11, 66.
de Fundis limitrophis, etc. C. 11, 59.
de Fundis patrimonialibus, etc. C. 11, 61.
de Fundis rei privatæ, et saltibus divinæ domus. C. 11, 65.
de Fundo dotali. D. 23, 5. C. 5, 23.
de Fundo instructo vel instrumento legato. D. 33, 7.
de Furibus balneariis. D. 47, 17.
Furti adversus nautas, caupones, stabularios. D. 47, 5.
de Furtis. D. 47, 2.
de Furtis et servo corrupto. C. 6, 2. D. 11, 3.

G.

de Generali abolitione. C. 9, 43.
de Gladiatoribus penitus tollendis. C. 11, 43.
de Glande legenda. D. 43, 28.
de Gradibus cognationis. I. 3, 6.
de Gradibus, et affinibus, et nominibus eorum. D. 38, 10.
de Grege dominico. C. 11, 75.

H.

de Hæreticis, et Manichæis et Samaritis. C. 1, 5.
de Heredibus instituendis. I. 2, 14. D. 28, 5. C. 6, 24.
de Heredibus tutorum vel curatorum. C. 5, 54.
de Hereditariis actionibus. C. 4, 16.
de Hereditate vel actione vendita. D. 18, 4. C. 4, 39.
de Hereditatibus decurionum, naviculariorum, etc. C. 6, 62.
de Hereditatibus, quæ ab intestato deferuntur. I. 3, 1.
de Hereditatis petitione. D. 5, 3. C. 3, 31.
de Heredum qualitate et differentia. I. 2, 19.
de His, quæ ex publica collatione illata sunt, non usurpandis. C. 10, 73.
de His, quæ in testamento debentur, etc. D. 28, 4.
de His, quæ pœnæ causa relinquuntur. D. 34, 6.
de His, quæ pœnæ nomine in testamento vel codicillis scribuntur. C. 6, 41.
de His, quæ pro non scriptis habentur. D. 34, 8.
de His, quæ sub modo legata seu fideicommissa relinquuntur. C. 6, 45.
de His, quæ ut indignis auferuntur. D. 34, 9.
de His, quæ vi metusque causa gesta sunt. C. 2, 20. D. 4, 2.
de His, qui accusare non possunt. C. 9, 1.
de His, qui ad ecclesias confugiunt. C. 1, 12.
de His, qui ad statuas confugiunt. C. 1, 25.
de His, qui a non domino manumissi sunt. C. 7, 10.
de His, qui ante apertas tabulas hereditatem transmittunt. C. 6, 52.
de His, qui a principe vacationem impetraverunt. C. 10, 44.
de His, quibus ut indignis hereditates auferuntur, etc. C. 6, 35.

Digitized by Google

de His, qui effuderint vel dejecerint. D. 9, 3.
de His, qui ex officio, quod administrarunt, conveniuntur. C. 11, 38.
de His, qui ex publicis rationibus mutuam pecuniam acceperunt. C. 10, 6.
de His, qui in ecclesiis manumittuntur. C. 1, 13.
de His, qui in exsilium dati, vel ab ordine moti sunt. C. 10, 59.
de His, qui in priorum creditorum locum succedunt. C. 8, 19.
de His, qui latrones vel aliis criminibus reos occultaverint C. 9, 39.
de His, qui non impletis stipendiis sacramento soluti sunt. C. 10, 54.
de His, qui notantur infamia. D. 3, 2. C. 2, 12.
de His, qui numero liberorum vel paupertate excusationem meruerunt. C. 10, 51.
de His, qui parentes vel liberos occiderunt. C. 9, 17.
de His, qui potentiorum nomine titulos prædiis affigunt, etc. C. 2, 15.
de His, qui per metum judicis non appellaverunt. C. 7, 67.
de His, qui se deferunt. C. 10, 13.
de His, qui sibi adscribunt in testamento. C. 9, 23.
de His, qui sponte munera publica subeunt. C. 10, 43.
de His, qui sui vel alieni juris sunt. D. 1, 6. I. 1, 8.
de His, qui veniam ætatis impetraverunt. C. 2, 45.
de Homine libero exhibendo. D. 43, 29.
de Honoratorum vehiculis. C. 11, 19.

I.

de Iis, per quos agere possumus. I. 4, 10.
de Iis, qui sui vel alieni juris sunt. I. 1, 8. D. 1, 6.
de Immunitate nemini concedenda. C. 10, 25.
de Impensis in res dotales factis. D. 25, 1.
de Imponenda lucrativa descriptione. C. 10, 35.
de Impuberum et aliis substitutionibus. C. 6, 26.
de Incendio, ruina, naufragio, etc. D. 47, 9.
de Incertis personis. C. 6, 48.
de Incestis et inutilibus nuptiis. C. 5, 5.
de Incolis, et ubi quis domicilium habere videtur, etc. C. 10, 39.
de Indictionibus. C. 10, 17.
de Indicta viduitate et lege Julia Miscella tollenda. C. 6, 40.
de In diem addictione. D. 18, 2.
de Infamibus. C. 10, 57.
de Infantibus expositis liberis et servis, etc. C. 8, 52.
de Infirmandis pœnis cœlibatus et orbitatis, etc. C. 8, 58.
de Ingenuis. I. 1, 4.
de Ingenuis manumissis. C. 7, 14.
de Ingratis liberis. C. 8, 50.
de In integrum restitutione minorum XXV. annis. C. 2, 22.
de In integrum restitutione postulata, ne quid novi fiat. C. 2, 50.
de In integrum restitutionibus. D. 4, 1.
de Injuriis. I. 4, 4.
de Injuriis et famosis libellis. D. 47, 10. C. 9, 35. 36.
de Injusto, rupto, irrito facto testamento. D. 28, 3.
de In jus vocando. D. 2, 4. C. 2, 2.
In jus vocati ut eant, aut satis vel cautum dent. D. 2, 6.
de In litem dando tutore vel curatore. C. 5, 44.
de In litem jurando. D 12, 3. C. 5, 33.
de Inofficiosis donationibus. C. 3, 29.
de Inofficiosis dotibus. C. 3, 30.
de Inofficioso testamento. I. 2, 18. D. 5, 2. C. 3, 28.
In quibus casibus tutorem vel curatorem habenti tutor vel curator dari potest. C. 5, 36.
In quibus causis cessat longi temporis præscriptio. C. 7. 34.
In quibus causis coloni censiti dominos accusare possint. C. 11, 49.
In quibus causis in integrum restitutio necessaria non est. C. 2, 41.
In quibus causis militantes fori præscriptione uti non possunt. C. 3, 25.
In quibus causis pignus vel hypotheca tacite contrahitur. D. 20, 2. C. 8, 15.
de In rem verso. D. 15, 3. C. 4, 26.
de Inspiciendo ventre custodiendoque partu. D. 25, 4.
de Institoria actione. D. 14, 3.
de Institoria et exercitoria actione. C. 4, 25. D. 14, 1.
de Institutionibus, et substitutionibus, et restitutionibus sub conditione factis. C. 6, 25.
de Instructo vel instrumento legato. D. 33, 7.
Inter alios acta, etc., aliis non nocere. C. 7, 60.
de Interdictis. I. 4, 15. C. 8, 1.
de Interdictis, et relegatis, et deportatis. D. 48, 22.
de Interdictis sive extraordinariis actionibus. D. 43, 1.
de Interdicto matrimonio inter pupillum et tutorem, etc. C. 5, 6.
de Interrogationibus in jure faciendis, etc. D. 11, 1.
de Inutilibus stipulationibus. I. 3, 19. D. 8, 39.
de Irenarchis. C. 10, 75.
de Itinere actuque privato. D. 43, 19.

Digitized by Google

J.

de Judæis et cœlicolis. C. 1, 9.
Judicatum solvi. D. 46, 7.
de Judiciis. C. 3, 1.
de Judiciis, et ubi quisque agere vel conveniri debeat. D. 5, 1.
de Judiciis publicis. D. 48, 1. I. 4, 18.
de Jure aureorum annulorum. D. 40, 10. C. 6, 8.
de Jure codicillorum. D. 29, 7. I. 2, 25. C. 6, 36.
de Jure deliberandi. D. 28, 8.
de Jure deliberandi, et de adeunda vel acquirenda hereditate. C. 6, 30. D. 29, 2.
de Jure dominii impetrando. C. 8, 34.
de Jure dotium. D. 23, 3. C. 5, 12.
de Jure emphyteutico. C. 4, 66.
de Jure fisci. D. 49, 14. C. 10, 1.
de Jure immunitatis. D. 50, 6.
de Jurejurando propter calumniam dando. C. 2, 59.
de Jurejurando sive voluntario, sive necessario, sive judiciali. D. 12, 2. C. 4, 1.
de Jure liberorum. C. 8, 59.
de Jure naturali, gentium et civili. I. 1, 2.
de Jure patronatus. D. 37, 14. C. 6, 4.
de Jure personarum. I. 1, 3.
de Jure reipublicæ. C. 11, 29.
de Jurisdictione. D. 2, 1.
de Jurisdictione omnium judicum, et de foro competente. C. 3, 13.
de Juris et facti ignorantia. D. 22, 6. C. 1, 18.
de Justitia et jure. I. 1, 1. D. 1, 1.

L.

de Latina libertate tollenda, etc. C. 7, 6.
de Legationibus. D. 50, 7. C. 10, 63.
de Legatis. I. 2, 20. C. 6, 37.
de Legatis et fideicommissis. D. 30–32.
de Legatis præstandis contra tabulas bonorum possessione petita. D. 37, 5.
de Lege Aquilia. I. 4, 3. D. 9, 2. C. 3, 35.
de Lege commissoria. D. 18, 3.
de Lege Cornelia de falsis et de SC. Liboniano. D. 48, 10. C. 9, 22.
de Lege Fabia de plagiariis. D. 48, 15. C. 9, 20.
de Lege Falcidia. I. 2, 22. D. 35, 2. C. 6, 50.
de Lege Fusia Caninia tollenda. I. 1, 7. C. 7, 3.
de Lege Julia ambitus. D. 48, 14. C. 9, 26.
de Lege Julia de annona. D. 48, 12.
de Lege Julia repetundarum. D. 48. 11. C. 9, 27.
de Lege Pompeia de parricidiis. D. 48, 9.
de Lege Rhodia de jactu. D. 14, 2.
de Legibus, senatusque consultis et longa consuetudine. D. 1, 3. C. 1, 16.
de Legibus, et constitutionibus principum, et edictis. C 1, 14.
de Legitima agnatorum tutela. I. 1, 15.
de Legitima agnatorum successione. I. 3, 2.
de Legitima parentum tutela. I. 1, 18.
de Legitima patronorum tutela. I. 1, 17.
de Legitima tutela. C. 5, 30.
de Legitimis heredibus. C. 6, 58.
de Legitimis tutoribus. D. 26, 4.
de Libellis dimissoriis, qui apostoli dicuntur. D. 49, 6.
de Liberali causa. D. 40, 12. C. 7, 16.
de Liberatione legata. D. 34, 3.
de Liberis et postumis heredibus instituendis vel exheredandis. D. 28, 2.
de Liberis exhibendis, item ducendis. D. 43, 30. C. 8, 8.
de Liberis præteritis vel exheredatis. C. 6, 28.
de Libertinis. I. 1, 5. C. 10, 56.
de Libertis et eorum liberis. C. 6, 7.
de Libertis universitatum. D. 38, 3.
de Litigiosis. D. 44, 6. C. 8, 37.
de Litis contestatione. C. 3, 9.
de Litorum et itinerum custodia. C. 12, 45.
de Litterarum obligatione. I. 3, 21.
Locati conducti. D. 19, 2.
de Locatione et conductione. I. 3, 24.
de Locatione prædiorum civilium, etc. C. 11, 70.
de Locato et conducto. C. 4, 65.
de Locis et itineribus publicis. D. 43, 7.
de Loco publico fruendo. D. 43, 9.
de Longi temporis præscriptione, quæ pro libertate, etc., opponitur. C. 7, 22.
de Lucris advocatorum, et concussionibus officiorum, etc. C. 12, 62.
de Luitione pignoris. C. 8, 31.

M.

de Magistratibus conveniendis. D. 27, 8. C. 5, 75.
de Magistratibus municipalibus. C. 1, 56.
de Magistris sacrorum scriniorum. C. 12, 9.
de Majuma. C. 11, 45.
de Maleficis et mathematicis, etc. C. 9, 18.
de Mancipiis et colonis patrimonialium, etc. fundorum. C. 11, 62.
de Mandatis principum. C. 1, 15.
Mandati vel contra. D. 17, 1. C. 4, 35.
de Mandato. I. 3, 26.
de Manumissionibus. D. 40, 1.
de Manumissionibus, quæ servis ad universitatem pertinentibus imponuntur. D. 40, 3.
de Manumissis testamento. D. 40, 4.
de Manumissis vindicta. D. 40, 2.
de Mendicantibus validis. C. 11, 25.
de Mensoribus. C. 12, 28.
de Metallariis et metallis, etc. C. 11, 6.
de Metatis et epidemicis. C. 12, 41.
de Metropoli Beryto. C. 11, 21.
de Migrando. D. 43, 32.

Digitized by Google

de Militari testamento. I. 2, 11. D. 29, 1. C. 6, 21.
de Militari veste. C. 12, 40.
de Minoribus XXV. annis. D. 4, 4.
de Modo mulctarum, quæ a judicibus infliguntur. C. 1, 54.
de Monopoliis et conventu negotiatorum illicito, etc. C. 4, 59.
de Mortis causa donationibus et capionibus. D. 39, 6. C. 8, 57.
de Mortuo inferendo et sepulcro ædificando. D. 11, 8.
de Mulieribus, in quo loco munera, etc., vel honores agnoscant. C. 10, 62.
de Mulieribus, quæ se propriis servis junxerunt. C. 9, 11.
de Muneribus et honoribus. D. 50, 4.
de Muneribus et honoribus non continuandis inter patrem et filium, etc. C. 10, 40.
de Muneribus patrimoniorum. C. 10, 41.
de Municipibus et originariis. C. 10, 38.
de Murilegulis, etc. C. 11, 7.
de Mutatione nominis. C. 9, 25.

N.

de Natalibus restituendis. D. 40, 11.
de Naturalibus liberis et matribus eorum, etc. C. 5, 27.
de Naufragiis. C. 11, 5.
Nautæ, caupones, stabularii ut recepta restituant. D. 4, 9.
de Nautico fœnore. D. 22, 2. C. 4, 33.
de Nautis Tiberinis. C. 11, 26.
de Navibus non excusandis. C. 11, 3.
de Naviculariis, etc. C. 11, 1.
de Necessariis servis heredibus instituendis vel substituendis. C. 6, 27.
Ne Christianum mancipium hæreticus, vel Judæus, vel paganus habeat, etc. C. 1, 10.
Ne de statu defunctorum post quinquennium quæratur. D. 40, 15. C. 7, 21.
Ne fidejussores vel mandatores dotium dentur. C. 5, 20.
Ne filius pro patre, vel pater pro filio emancipato, vel libertus pro patrono, vel servus pro domino conveniatur. C. 4, 13.
Ne fiscus rem, quam vendidit, evincat. C. 10, 5.
Ne fiscus vel respublica procurationem alicui patrocinii causa in lite præstet. C. 2, 18.
Negotiatores ne militent. C. 12, 35.
de Negotiis gestis. D. 3, 5. C. 2, 19.
Ne liceat in una eademque causa tertio provocare, etc. C. 7, 70.
Ne liceat potentioribus patrocinium litigantibus præstare, etc. C. 2, 14.
Nemini licere signum salvatoris Christi, etc., aut sculpere, aut pingere. C. 1, 8.
Ne operæ a collatoribus exigantur. C. 10, 24.
Ne pro dote bona quondam mariti addicantur, etc. C. 5, 22.
Ne quid in flumine publico fiat, quo aliter aqua fluat, etc. D. 43, 13.
Ne quid in loco publico fiat. D. 43, 8.
Ne quid in loco sacro fiat. D. 43, 6.
Ne quid oneri publico imponatur. C. 11, 4.
Ne quis eum, qui in jus vocabitur, vi eximat. D. 2, 7.
Ne quis in sua causa judicet, etc. C. 3, 5.
Ne quis liber invitus actum reipublicæ gerere cogatur. C. 11, 36.
Ne rei dominicæ vel templorum vindicatio temporum præscriptione summoveatur. C. 7, 38.
Ne rei militaris comitibus vel tribunis lavacra præstentur. C. 1, 47.
Ne rusticani ad ullum obsequium devocentur. C. 11, 54.
Ne sanctum baptisma iteretur. C. 1, 6.
Ne sine jussu principis certis judicibus liceat confiscare. C. 9, 48.
Ne tutor vel curator vectigalia conducat. C. 5, 41.
Ne uxor pro marito, vel maritus pro uxore, vel mater pro filio conveniatur. C. 4, 12.
Ne vis fiat ei, qui in possessionem missus est. D. 43, 4.
Nihil innovari appellatione interposita. D. 49, 7.
de Nili aggeribus non rumpendis. C. 9, 38.
Non licere habitatoribus metrocomiæ loca sua ad extraneum transferre. C. 11, 55.
de Non numerata pecunia. C. 4, 30.
de Novationibus et delegationibus. D. 46, 2. C. 8, 42.
de Novi operis nuntiatione. C. 8, 11. D. 39, 1.
de Noxalibus actionibus. I. 4, 8. D. 9, 4. C. 3, 41.
de Nudo jure Quiritum tollendo. C. 7, 25.
Nulli licere in frenis, etc., margaritas, etc., aptare, etc. C. 11, 11.
de Numerariis, actuariis, et chartulariis, etc. C. 12, 50.
de Nundinis. D. 50, 11.
de Nundinis et mercationibus. C. 4, 60.
de Nuptiis. I. 1, 10. C. 5, 4.

O.

de Oblatione votorum. C. 12, 49.
de Obligationibus. I. 3, 13.
de Obligationibus et actionibus. D. 44, 7. C. 4, 10.
de Obligationibus ex consensu. I. 3, 22.
de Obligationibus, quæ ex delicto nascuntur. I. 4, 1.

Digitized by Google

de Obligationibus, quæ quasi ex contractu nascuntur. I. 3, 27.
de Obligationibus, quæ quasi ex delicto nascuntur. I. 4, 5.
de Obsequiis parentibus et patronis præstandis. D. 37, 15.
de Obsequiis patrono præstandis. C. 6, 6.
de Officio assessorum. D. 1, 22. C. 1, 51.
de Officio civilium judicum. C. 1, 45.
de Officio comitis orientis. C. 1, 36.
de Officio comitis rerum privatarum. C. 1, 33.
de Officio comitis sacrarum largitionum. C. 1. 32.
de Officio comitis sacri palatii. C. 1, 34.
de Officio comitis sacri patrimonii. C. 1, 35.
de Officio consulis. D. 1, 10.
de Officio diversorum judicum. C. 1, 48.
de Officio ejus, cui mandata est jurisdictio. D. 1, 21.
de Officio ejus, qui vicem alicujus judicis vel præsidis obtinet. C. 1, 50.
de Officio judicis. I. 4, 17.
de Officio juridici. D. 1, 20. C. 1, 57.
de Officio magistri militum. C. 1, 29.
de Officio magistri officiorum. C. 1, 31.
de Officio militarium judicum. C. 1, 46.
de Officio præfecti annonæ. C. 1, 44.
de Officio præfecti augustalis. D. 1, 17. C. 1, 37.
de Officio præfecti prætorio. D. 1, 11.
de Officio præfecti prætorio Africæ, etc. C. 1, 27.
de Officio præfecti prætorio Orientis et Illyrici. C. 1, 26.
de Officio præfecti urbi. D. 1, 12. C. 1, 28.
de Officio præfecti vigilum. D. 1, 15. C. 1, 43.
de Officio præsidis. D. 1, 18.
de Officio prætorum. D. 1, 14. C. 1, 39.
de Officio proconsulis et legati. D. 1, 16. C. 1, 35.
de Officio procuratoris Cæsaris vel rationalis. D. 1, 19.
de Officio quæstoris. D. 1, 13. C. 1, 30.
de Officio rectoris provinciæ. C. 1, 40.
de Officio vicarii. C. 1, 38.
de Omni agro deserto, etc. C. 11, 58.
de Operibus publicis. D. 50, 10. C. 8, 12.
de Operis libertorum. D. 38, 1. C. 6, 3.
de Operis novi nuntiatione. D. 39, 1. C. 8, 11.
de Operis servorum. D. 7, 7. C. 3, 33.
de Optione vel electione legata. D. 33, 5.
de Ordine cognitionum. C. 7, 19.
de Ordine judiciorum. C. 3, 8.
de Origine juris, etc. D. 1, 2.

P.

de Pactis. D. 2, 14. C. 2, 3.
de Pactis conventis tam super dote, quam super donatione ante nuptias et paraphernis. C. 5, 14.
de Pactis dotalibus. D. 23, 4.
de Pactis inter emtorem et venditorem compositis. C. 4, 54.
de Pactis pignorum et de lege commissaria in pignoribus rescindenda. C. 8, 35.
de Paganis, et sacrificiis, et templis. C. 1, 11.
de Palatiis et domibus dominicis. C. 11, 76.
de Palatinis sacrarum largitionum et rerum privatarum. C. 12, 24.
de Partu pignoris et omni causa. C. 8, 25.
de Pascuis publicis et privatis. C. 11, 60.
de Patria potestate. I. 1, 9. C. 8, 47.
de Patribus, qui filios suos distraxerunt. C. 4, 43.
de Peculio. D. 15, 1.
de Peculio ejus, qui libertatem meruit. C. 7, 23.
de Peculio legato. C. 33, 8.
de Pecunia constituta. D. 13, 5. C. 4, 18.
de Pedaneis judicibus. C. 3, 3.
de Penu legata. D. 33, 9.
de Perfectissimatus dignitate. C. 12, 33.
de Periculo eorum, qui pro magistratibus intervenerunt. C. 11, 34.
de Periculo et commodo rei venditæ. D. 18, 6. C. 4, 48.
de Periculo nominatorum. C. 11, 33.
de Periculo successorum parentis. C. 10, 61.
de Periculo tutorum et curatorum. C. 5, 38.
de Perpetuis et temporalibus actionibus. I. 4, 12.
Per quas personas nobis acquiratur. I. 2, 9. C. 4, 27.
Per quas personas nobis obligatio acquiratur. I. 3, 28.
de Petitione hereditatis. C. 3, 31. D. 5, 3.
de Petitionibus bonorum sublatis. C. 10, 12.
de Pignoratitia actione vel contra. D. 13, 7. C. 4, 24.
de Pignoribus et hypothecis, etc. D. 20, 1. C. 8, 14.
de Pistoribus. C. 11, 15.
de Plus petitionibus. C. 3, 10.
Plus valere quod agitur, quam quod simulate concipitur. C. 4, 22.
de Pœna judicis, qui male judicavit, etc. C. 7, 49.
de Pœna temere litigantium. I. 4, 16.
de Pœnis. D. 48, 19. C. 9, 47.
Pœnis fiscalibus creditores præferri. C. 10, 7.
de Pollicitationibus D. 50, 12.
de Ponderatoribus et auri illatione. C. 10, 71.
de Popularibus actionibus. D. 47, 23.
de Possessoria hereditatis petitione. D. 5, 5.
de Postliminio reversis et redemtis ab hostibus. C. 8, 51.
de Postulando. D. 3, 1. C. 2, 6.

Digitized by Google

de Postumis heredibus instituendis vel exheredandis. C. 6, 29.
de Potioribus ad munera nominandis. C. 10, 65.
de Præbendo salario. C. 10, 36.
de Prædiis decurionum sine decreto non alienandis. C. 10, 33.
de Prædiis et aliis rebus minorum sine decreto non alienandis. C. 5, 71.
de Prædiis et omnibus rebus naviculariorum. C. 11, 2.
de Prædiis tamiacis et de his, qui ex colonis dominicis, etc., procreantur. C. 11, 68
de Præfectis prætorio sive urbi et magistris militum in dignitatibus exæquandis. C. 12, 4.
de Præpositis agentium in rebus. C. 12, 21.
de Præpositis laborum. C. 12, 18.
de Præpositis sacri cubiculi, etc. C. 12, 5.
de Præscriptione longi temporis, etc. C. 7, 33.
de Præscriptione XXX. vel XL. annorum. C. 7, 39.
de Præscriptis verbis et in factum actionibus. D. 19, 5. C. 4, 64.
de Prætoribus, et honore præturæ, et collatione, etc. C. 12, 2.
de Prætorio pignore, etc. C. 8, 22.
de Prævaricatione. D. 47, 15.
de Precario et Salviano interdicto. D. 43, 26. C. 8, 9.
de Precibus Imperatori offerendis, etc. C. 1, 19.
de Primicerio, et secundicerio, et notariis. C. 12, 7.
de Primipilo. C. 12, 63.
de Principibus agentium in rebus. C. 12, 22.
de Privatis carceribus inhibendis. C. 9, 5.
de Privatis delictis. D. 47, 1.
de Privilegiis corporatorum urbis Romæ. C. 11, 14.
de Privilegiis domus Augustæ vel rei privatæ, etc. C. 11, 74.
de Privilegiis eorum, qui in sacro palatio militant. C. 12, 29.
de Privilegiis scholarum. C. 12, 30.
de Privilegiis urbis Constantinopolitanæ. C. 11, 20.
de Privilegio dotis. C. 7, 74.
de Privilegio fisci. C. 7, 73.
de Probationibus. C. 4, 19.
de Probationibus et præsumtionibus. D. 22, 3.
de Procuratoribus. C. 2, 13.
de Procuratoribus et defensoribus. D. 3, 2.
Pro derelicto. D. 41, 7.
Pro donato. D. 41, 6.
Pro dote. D. 41, 9.
Pro emtore. D. 41, 4.
de Professoribus et medicis. C. 10, 52.
de Professoribus, qui in urbe Constantinopolitanæ docentes ex lege meruerunt comitivam. C. 12, 15.
Pro herede vel pro possessore. D. 41, 5.
de Prohibita sequestratione pecuniæ. C. 4, 4.
Pro legato. D. 41, 8.
Pro quibus causis servi pro præmio libertatem accipiunt. C. 7, 13.
Pro socio. D. 17, 2. C. 4, 37.
Pro suo. D. 41, 10.
de Proxeneticis. D. 50, 1. C. 5, 1.
de Proximis sacrorum scriniorum, etc. C. 12, 19.
Publicæ lætitiæ vel consulum nuntiatores, etc., ne quid accipiant immodicum. C. 12, 64.
de Publicanis, et vectigalibus, et commissis. D. 39, 4.
de Publiciana in rem actione. D. 6, 2.
de Publicis judiciis. I. 4, 18. D. 48, 1.
de Pupillari substitutione. I. 2, 16.

Q.

de Quadriennii præscriptione. C. 7, 37.
de Quadrimenstruis brevibus. C. 1, 42.
Quæ in fraudem creditorum facta sunt, ut restituantur. D. 42, 8. C. 7, 75.
Quæ res exportari non debeant. C. 4, 41.
Quæ res pignori obligari possunt, etc. C. 8, 17.
Quæ res pignori vel hypothecæ datæ obligari non possunt. D. 20, 3.
Quæ res venire non possunt, et qui vendere vel emere vetantur. C. 4, 40.
Quæ sententiæ sine appellatione rescindantur. D. 49, 8. C. 7, 64.
Quæ sit longa consuetudo. C. 8, 55.
de Quæstionibus. D. 48, 18. C. 9, 41.
de Quæstoribus, et magistris officiorum, etc. C. 12, 6.
Quando appellandum sit, et intra quæ tempora. D. 49, 4.
Quando civilis actio criminali præjudicet, etc. C. 9, 31.
Quando decreto opus non est. C. 5, 72.
Quando de peculio actio annalis est. D. 15, 2.
Quando dies legati vel fideicommissi cedit. C. 6, 53.
Quando dies legatorum vel fideicommissorum cedat. D. 36, 2.
Quando dies ususfructus legati cedat. D. 7, 3.
Quando et quibus quarta pars debetur ex bonis decurionum, etc. C. 10, 34.
Quando ex facto tutoris vel curatoris minores agere vel conveniri possunt. D. 26, 9. C. 5, 39.
Quando fiscus vel privatus debitoris sui debitores exigere possit vel debeat. C. 4, 15.

Digitized by Google

Quando Imperator inter pupillos, vel viduas, vel alias miserabiles personas cognoscat, etc. C. 3, 14.
Quando libellus principi datus litis contestationem faciat. C. 1, 20.
Quando liceat ab emtione discedere. C. 4, 45.
Quando liceat unicuique sine judice se vindicare, etc. C. 3, 27.
Quando mulier officio tutelæ fungi potest. C. 5, 35.
Quando non petentium partes petentibus accrescant. C. 6, 10.
Quando provocare non est necesse. C. 7, 64. D. 49, 8.
Quando tutores vel curatores esse desinant. C. 5, 60.
Quarum rerum actio non datur. D. 44, 5.
Quemadmodum civilia munera indicuntur. C. 10, 42.
Quemadmodum servitutes amittuntur. D. 8, 6.
Quemadmodum testamenta aperiantur, inspiciantur, et describantur. C. 6, 32. D. 29, 2.
Qui admitti ad bonorum possessionem possunt, etc. C. 6, 9.
Qui ætate se excusant. C. 5, 68.
Qui ætate vel professione se excusant. C. 10, 49.
Qui bonis cedere possunt. C. 7, 71.
Quibus ad conductionem bonorum fiscalium accedere non licet. C. 11, 72.
Quibus ad libertatem proclamare non licet. D. 40, 13. C. 7, 18.
Quibus alienare licet, vel non. I. 28.
Quibus ex causis in possessionem eatur. D. 42, 4.
Quibus ex causis majores in integrum restituuntur. C. 2, 54. D. 4, 6.
Quibus ex causis manumittere non licet. I. 1, 6.
Quibus modis jus patriæ potestatis solvitur. I. 1, 12.
Quibus modis obligatio tollitur. I. 3, 29.
Quibus modis pignus vel hypotheca solvitur. D. 20, 6.
Quibus modis re contrahitur obligatio. I. 3, 14.
Quibus modis testamenta infirmantur. I. 2, 17.
Quibus modis tutela finitur. I. 1, 22.
Quibus modis ususfructus vel usus amittitur. D. 7, 4.
Quibus muneribus excusentur ii, qui post impletam militiam vel advocationem per provincias suis commodis vacantes commorantur, etc. C. 10, 55.
de Quibus muneribus vel præstationibus nemini liceat se excusare. C. 10, 48.
Quibus non competit bonorum possessio. D. 38, 13.
Quibus non est permissum facere testamentum. I. 2, 12.
Quibus non objicitur longi temporis præscriptio. C. 7, 35.
de Quibus rebus ad eundem judicem eatur. D. 11, 2.
Quibus res judicata non nocet. C. 7, 56.
Qui dare tutores vel curatores possunt, et qui dari possunt. C. 5, 34.
Qui et adversus quos in integrum restitui non possunt. C. 2, 42.
Qui et a quibus manumissi liberi non fiunt, et ad legem Æliam Sentiam. D. 40, 9.
Qui et ex quibus causis manumittere non possunt. I. 1, 6.
Qui legitimam personam standi in judiciis habeant vel non. C. 3, 6.
Qui manumittere non possunt, et ne in fraudem creditorum manumittatur. C. 7, 11.
Qui militare possunt vel non possunt, etc. C. 12, 34.
Qui morbo se excusant. C. 5, 67;—10, 50.
Qui non possunt ad libertatem pervenire. C. 7, 12.
Qui numero liberorum se excusant. C. 5, 66.
Qui numero tutelarum. C. 5, 69.
Qui petant tutores vel curatores, et ubi petantur. D. 26, 6. C. 5, 31.
Qui potiores in pignore vel hypotheca habeantur, etc. D. 20, 4. C. 8, 18.
Qui pro sua jurisdictione judices dare darive possunt. C. 3, 4.
Quis a quo appelletur. D. 49, 3.
Quis ordo in possessionibus servetur. D. 38, 15.
Qui satisdare cogantur, vel jurato promittant, etc. D. 2, 8.
Qui sine manumissione ad libertatem perveniunt. D. 40, 8.
Qui testamenta facere possint, et quemadmodum testamenta fiant. D. 28, 1. C. 6, 22. 23.
Qui testamento tutores dari possunt. I. 1, 14. D, 26, 2. C. 5, 28.
Quod cujusque universitatis nomine vel contra eam agatur. D. 3, 4.
Quod cum eo, qui in aliena potestate est, negotium gestum esse dicetur. I. 4, 7. D. 14, 5. C. 4, 26.
Quod falso tutore auctore gestum esse dicatur. D. 27, 6.
Quod jussu. D. 15, 4. C. 4, 26.
Quod legatorum. D. 43, 3. C. 8, 3.
Quod metus causa gestum erit. D. 4, 2. C. 2, 20.
Quod quisque juris in alterum statuerit, ut ipse eodem jure utatur. D. 2, 2.
Quod vi aut clam. D. 43, 24.
Quomodo et quando judex sententiam proferre debeat, etc. C. 7, 43.
Quo quisque ordine conveniatur. C. 11, 35.

Digitized by Google

Quorum appellationes non recipiuntur. C. 7, 65.
Quorum bonorum. D. 43, 2. C. 8, 2.
Quorum legatorum. C. 8, 3. D. 43, 3.

R.

de Raptu virginum seu viduarum, nec non sanctimonialium. C. 9, 13.
Ratam rem haberi et de ratihabitione. D. 46, 8.
de Ratiociniis operum publicorum, et de patribus civitatum. C. 8, 13.
de Rebus alienis non alienandis, etc. C. 4, 51.
de Rebus auctoritate judicis possidendis seu vendendis. D. 42, 5. C. 7, 72.
de Rebus creditis et jurejurando. C. 4, 1.
de Rebus creditis, si certum petetur, et de condictione. D. 12, 1.
de Rebus dubiis. D. 34, 5.
de Rebus eorum, qui sub tutela vel cura sunt, sine decreto non alienandis, etc. D. 27, 9.
de Rebus incorporalibus. I. 2, 2.
de Receptatoribus. D. 47, 16.
de Receptis arbitris. C. 2, 56.
de Receptis, qui arbitrium receperunt, etc. D. 4, 8.
de Regula Catoniana. D. 34, 7.
de Regulis juris. D. 50, 17.
de Reis postulatis. C. 10, 58.
de Re judicata. C. 7, 52.
de Re judicata, et de effectu sententiarum, et de interlocutionibus. D. 42, 1.
de Rei uxoriæ actione, etc. C. 5, 13.
de Rei vindicatione. D. 6, 1. C. 3, 32.
de Relationibus. C. 7, 61.
de Religiosis et sumtibus funerum. D. 11, 7. C. 3, 44.
Rem alienam gerentibus non interdici rerum suarum alienatione. C. 4, 53.
de Re militari. D. 49, 16. C. 12, 36.
de Remissione pignoris. C. 8, 26.
de Remissionibus. D. 43, 25.
Rem pupilli vel adolescentis salvam fore. D. 46, 6.
de Replicationibus. I. 4, 14.
de Repudianda bonorum possessione. C. 6, 19.
de Repudianda vel abstinenda hereditate. C. 6, 31.
de Repudiis, et judicio de moribus sublato. C. 5, 17.
de Reputationibus, quæ fiunt in judicio in integrum restitutionis. C. 2, 48.
de Requirendis reis. C. 9, 40.
de Requirendis vel absentibus damnandis. D. 48, 17.
Rerum amotarum. C. 5, 21.
de Rerum divisione et qualitate. I. 2, 1. D. 1, 8.
de Rerum permutatione. D. 19, 4.
de Rerum permutatione, et præscriptis verbis. C. 4, 64.
de Rescindenda venditione, etc. D. 18, 5. C. 4, 44.
de Restitutionibus militum et eorum, qui reipublicæ causa absunt. C. 2, 51.
de Revocandis donationibus. C. 8, 56.
de Revocandis his, quæ in fraudem creditorum alienata sunt. C. 7, 75. D. 42, 8.
de Ripa munienda. D. 43, 15.
de Ritu nuptiarum. D. 23, 2.
de Rivis. D. 43, 21.

S.

de Sacrosanctis ecclesiis, etc. C. 1, 2.
de Salgamo hospitibus non præstando. C. 12, 42.
de Salviano interdicto. D. 43, 33.
de Satisdando. C. 2, 57.
de Satisdatione tutorum et curatorum. I. 1, 24.
de Satisdationibus. I. 4, 11.
de Secundis nuptiis. C. 5, 9.
de Seditiosis, etc. C. 9, 30.
de Senatoribus. D. 1, 9.
de Senatusconsultis. C. 1, 16. D. 1, 3.
de SC. Claudiano tollendo. C. 7, 24.
de SC. Macedoniano. D. 14, 6. C. 4, 28.
de SÇ. Orphitiano. I. 3, 4. D. 38, 17. C. 6, 57.
de SC. Silaniano et Claudiano. D. 29, 5.
de SC. Tertulliano. I. 3, 3. D. 38, 17. C. 6, 56.
de Sententiam passis et restitutis. D. 48, 23. C. 9, 51.
Sententiam rescindi non posse. C. 7, 50.
de Sententia, quæ sine certa quantitate profertur. C. 7, 46.
de Sententiis adversus fiscum latis retractandis. C. 10, 9.
de Sententiis et interlocutionibus omnium judicum. C. 7, 45.
de Sententiis ex periculo recitandis. C. 7, 44.
de Sententiis præfectorum prætorio. C. 7, 42.
de Sententiis, quæ pro eo, quod interest, proferuntur. C. 7, 47.
de Separationibus. D. 42, 6. C. 7, 72.
de Sepulcro violato. D. 47, 12. C. 9, 19.
de Servis exportandis, etc. D. 18, 7.
de Servis fugitivis, et libertis, mancipiisque civitatum, etc. C. 6, 1.
de Servis reipublicæ manumittendis. C. 7, 9.
de Servitute legata. D. 33, 3.
de Servitutibus. I. 2, 3. D. 8, 1.
de Servitutibus et aqua. C. 3, 34.
de Servitutibus prædiorum rusticorum. D. 8, 3.
de Servitutibus prædiorum urbanorum. D. 8, 2.

Digitized by Google

de Servo corrupto. D. 11, 3. C. 6, 2.
de Servo pignori dato manumisso. C. 7, 8.
Si adversus creditorem. C. 2, 38.
Si adversus creditorem præscriptio opponatur. C. 7, 36.
Si adversus delictum. C. 2, 35.
Si adversus donationem. C. 2, 30.
Si adversus dotem. C. 2, 34.
Si adversus fiscum. C. 2, 37.
Si adversus libertatem. C. 2, 31.
Si adversus rem judicatam restitutio postuletur. C. 2, 27.
Si adversus solutionem a tutore vel a se factam. C. 2, 33.
Si adversus transactionem vel divisionem in integrum minor restitui velit. C. 2, 32.
Si adversus usucapionem. C. 2, 36.
Si adversus venditionem. C. 2, 28.
Si adversus venditionem pignorum. C. 2, 29.
Si ager vectigalis id est emphyteuticarius petatur. D. 6, 3.
Si aliena res pignori data sit. C. 8, 16.
Si a non competente judice judicatum esse dicatur. C. 7, 48.
Si antiquior creditor pignus vendiderit. C. 8, 20.
Si a parente quis manumissus sit. D. 37, 12.
Si certum petatur. C. 4, 2.
Si communis res pignori data sit. C. 8, 21.
Si contra jus vel utilitatem publicam, etc., fuerit aliquid postulatum vel impetratum. C. 1, 22.
Si contra matris voluntatem tutor datus sit. C. 5, 47.
Si cui plus, quam per legem Falcidiam licuerit, legatum esse dicetur. D. 35, 3.
Si curialis relicta civitate rus habitare maluerit. C. 10, 37.
Si de momentanea possessione fuerit judicatum. C. 7, 69.
Si dos constante matrimonio soluta fuerit. C. 5, 19.
Si ex falsis instrumentis vel testimoniis judicatum sit. C. 7, 58.
Si ex noxali causa agatur, quemadmodum caveatur. D. 2, 9.
Si ex pluribus tutoribus vel curatoribus omnes vel unus agere, etc., possint. C. 5, 40.
Si familia furtum fecisse dicetur. D. 47, 6.
Si in causa judicati pignus captum sit. C. 8, 23.
Si in communi eademque causa in integrum restitutio postuletur. C. 2, 26.
Si in fraudem patroni a libertis alienatio facta sit. C. 6, 5. D. 38, 5.
Si ingenuus esse dicetur. D. 40, 14.
Si is, qui testamento liber esse jussus erit, post mortem domini, etc., surripuisse, etc., quid dicetur. D. 47, 4.
de Silentiariis et decurionibus eorum. C. 12, 16.
Si liberalitatis imperialis socius sine herede decesserit. C. 10, 14.
Si major factus alienationem factam sine decreto ratam habuerit. C. 5, 74.
Si major factus ratum habuerit. C. 2, 46.
Si mancipium ita fuerit alienatum, ut manumittatur, vel contra. C. 4, 57.
Si mancipium ita venierit, ne prostituatur. C. 4, 56.
Si mater indemnitatem promisit. C. 5, 46.
Si mensor falsum modum dixerit. D. 11, 6.
Si minor a hereditate se abstineat. C. 2, 39.
Si minor se majorem dixerit, vel major probatus fuerit. C. 2, 43.
Si mulier ventris nomine in possessione calumniæ causa esse dicetur. D. 25, 6.
Sine censu vel reliquis fundum comparari non posse. C. 4, 47.
de Singulis rebus per fideicommissum relictis. I. 2, 24.
Si nuptiæ ex rescripto petantur. C. 5, 8.
Si omissa sit causa testamenti. C. 6, 39.
Si pars hereditatis petatur. D. 5, 4.
Si pendente appellatione mors intervenerit. D. 49, 13. C. 7, 66.
Si per vim vel alio modo absentis turbata sit possessio. C. 8, 5.
Si pignoris conventionem numeratio pecuniæ secuta non sit. C. 8, 33.
Si pignus pignori datum sit. C. 8, 24.
Si plures una sententia condemnati sunt. C. 7, 55.
Si post creationem quis decesserit. C. 10, 68.
Si propter inimicitias creatio facta sit. C. 10, 66.
Si propter publicas pensitationes venditio fuerit celebrata. C. 4, 46.
Si quacunque præditus potestate, etc. sibi suppositarum jurisdictioni suæ adspirare tentaverint nuptias. C. 5, 7.
Si quadrupes pauperiem fecisse dicatur. I. 4, 9. D. 9, 1.
Si quid in fraudem patroni factum sit. D. 38, 5. C. 6, 5.
Si quis aliquem testari prohibuerit vel coegerit. D. 29, 6. C. 6, 34.
Si quis alteri, vel sibi sub alterius nomine, vel aliena pecunia emerit. C. 4, 50.
Si quis cautionibus in judicio sistendi causa factis non obtemperaverit. D. 2, 11.
Si quis eam, cujus tutor fuerit, corruperit. C. 9, 10.
Si quis ignorans rem minoris esse sine decreto comparaverit. C. 5, 73.
Si quis Imperatori maledixerit. C. 9, 7.

Digitized by Google

Si quis in jus vocatus non ierit, etc. D. 2, 5.
Si quis jus dicenti non obtemperaverit. D. 2, 3.
Si quis omissa causa testamenti ab intestato, etc., possidet hereditatem. D. 29, 4.
Si rector provinciæ, vel ad eum pertinentes, sponsalitia dederint. C. 5, 2.
Si reus vel accusator mortuus fuerit. C. 9, 6.
Si sæpius in integrum restitutio postuletur. C. 2, 44.
Si secundo nupserit mulier, cui maritus usumfructum reliquit. C. 5, 10.
Si servitus vindicetur, vel ad alium pertinere negetur. D. 8, 5.
Si servus aut libertus ad decurionatum adspiraverit. C. 10, 32.
Si servus exportandus veneat. C. 4, 55.
Si servus extero se emi mandaverit. C. 4, 36.
Si tabulæ testamenti exstabunt. D. 37, 2.
Si tabulæ testamenti nullæ exstabunt, unde legitimi. D. 38, 6. C. 6, 14.
Si tutor vel curator falsis allegationibus excusatus sit. C. 5, 63.
Si tutor vel curator intervenerit. C. 2, 25.
Si tutor vel curator magistratus creatus appellaverit. D. 49, 10.
Si tutor vel curator non gesserit. C. 5, 55.
Si tutor vel curator reipublicæ causa absit. C. 5, 64.
Si unus ex pluribus appellaverit. C. 7, 55.
Si unus ex pluribus heredibus, etc., partem suam debiti solverit vel acceperit. C. 8, 32.
Si usufructus petatur, vel ad alium pertinere negetur. D. 7, 6.
Si ut omissam hereditatem, etc., acquirat. C. 2, 40.
Si vendito pignore agatur. C. 8, 30.
Si ventris nomine muliere in possessionem missa, eadem possessio dolo malo ad alium translata esse dicatur. D. 25, 5.
de Societate. I. 3, 25.
de Solutionibus et liberationibus. D. 46, 3. C. 8. 43.
de Solutionibus et liberationibus debitorum civitatis. C. 11, 39.
Soluto matrimonio dos quemadmodum petatur. D. 24, 3. C. 5, 18.
de Spectaculis, et scenicis, et lenonibus. C. 11, 40.
de Sponsalibus. D. 23, 1.
de Sponsalibus, et arrhis sponsalitiis, et proxeneticis. C. 5, 1.
de Sportulis et sumtibus, etc., et executoribus litium. C. 3, 2.
de Statu hominum. D. 1, 5.
de Statuis et imaginibus. C. 1, 24.
de Statu liberis. D. 40, 7.
Stellionatus. D. 47, 20.
de Stipulatione servorum. I. 3, 17. D. 45, 3.
de Stipulationibus prætoriis. D. 46, 5.
de Stratoribus. C. 12, 25.
de Studiis liberalibus urbis Romæ et Constantinopolitanæ. C. 11, 18.
de Suariis et susceptoribus vini, etc. C, 11, 16.
de Successione cognatorum. I. 3, 5.
de Successione libertorum. I. 3, 7.
de Successionibus sublatis. I. 3, 12.
de Successorio edicto. D. 38, 9. C. 6, 16.
de Suffragio. C. 4, 3.
de Suis et legitimis heredibus. D. 38, 16.
de Suis et legitimis liberis, et ex filia et nepotibus ab intestato venientibus. C. 6, 55.
de Summa trinitate et fide catholica, etc. C. 1, 1.
Sumtus injuncti muneris ad omnes collegas pertinere. C. 11, 37.
de Sumtuum recuperatione. C. 10, 67.
de Suppellectile legata. D. 33, 10.
de Superexactionibus. C. 10, 20.
de Superficiebus. D. 43, 18.
de Superindicto. C. 10, 18.
de Susceptoribus, præpositis et arcariis. C. 10, 70.
de Suspectis tutoribus et curatoribus. I. 1, 26. D. 26, 10. C. 5, 43.

T.

de Tabulariis, scribis, etc. C. 10, 69.
de Tabulis exhibendis. D. 43, 5. C. 8, 7.
de Temporibus et reparationibus appellationum, etc. C. 7, 63.
de Temporibus in integrum restitutionis, etc. C. 2, 53.
de Termino moto. D. 47, 21.
Testamenta quemadmodum aperiantur, inspiciantur et describantur. D. 29, 3. C. 6, 32.
de Testamentaria manumissione. C. 7, 2.
de Testamentaria tutela. D. 26, 26. C. 5, 28. I. 1, 14.
de Testamentis, et quemadmodum testamenta ordinentur. C. 6, 23. D. 28, 1.
de Testamentis ordinandis. I. 2, 10.
de Testamento militis. D. 29, 1. C. 6, 21. I. 2, 11.
de Testibus. D 22, 5. C. 4, 21.
de Thesauris. C. 10, 15.
de Tigno juncto. D. 47, 3.
de Tironibus. C. 12, 44.
de Tractoriis et stativis. C. 12, 52.
de Transactionibus. D. 2, 15. C. 2, 4.
de Tributoria actione. D. 14, 4.
de Tritico, vino, vel oleo legato. D. 33, 6.
de Tutelæ, et rationibus distrahendis, et utili curationis causa actione. D. 27, 3.

Digitized by Google

de Tutelis. I. 1, 13. D. 26, 1.
de Tutore vel curatore, qui satis non dedit. C. 5, 42.
de Tutoribus et curatoribus datis ab his, qui jus dandi habent, etc. D. 26, 5.
de Tutoribus vel curatoribus illustrium, etc. C. 5, 33.

U.

Ubi causæ fiscales vel divinæ domus, etc., agantur. C. 3, 26.
Ubi causa status agi debeat. C. 3, 22.
Ubi conveniatur, qui certo loco dare promisit. C. 3, 18.
Ubi de criminibus agi oporteat. C. 3, 15.
Ubi de hereditate agatur, etc. C. 3, 20.
Ubi de possessione agi oporteat. C. 3, 16.
Ubi de ratiociniis tam publicis, quam privatis agi oporteat. C. 3, 21.
Ubi et apud quem cognitio in integrum restitutionis agitanda sit. C. 2, 47.
Ubi fideicommissum peti oporteat. C. 3, 17.
Ubi in rem actio exerceri debeat. C. 3, 19.
Ubi petantur tutores vel curatores. C. 5, 32.
Ubi pupilli educari debeant. C 5, 49.
Ubi pupillus educari vel morari debeat, et de alimentis ei præstandis. D. 27, 2.
Ubi quis de curiali, vel cohortali, aliave conditione conveniatur. C. 3, 23.
Ubi senatores vel clarissimi civiliter vel criminaliter conveniantur. C. 3, 24.
Unde cognati. D. 38, 8. C. 6, 15.
Unde legitimi. D. 38, 7. C. 6, 15.
Unde liberi. C. 6, 14. D. 38, 6.
Unde vi. C. 8, 4. D. 43, 16.
Unde vir et uxor. D. 38, 11. C. 6, 18.
de Usucapione pro donato. C. 7, 24.
de Usucapione pro dote. C. 7, 28.
de Usucapione pro emtore vel transactione. C. 7, 26.
de Usucapione pro herede. C. 7, 29.
de Usucapione transformanda, etc. C. 7, 31.
de Usucapionibus et longi temporis possessionibus. I. 2, 6. D. 41, 3.
de Usu et habitatione. I. 2, 5.
de Usu, et usufructu, et reditu, et habitatione, et operis per legatum, etc., datis. D. 33, 2.
de Usufructu. I. 2, 4.
de Usufructu accrescendo. D. 7, 2.
Usufructuarius quemadmodum caveat. D. 7, 9.
de Usufructu earum rerum, quæ usu consumuntur vel minuuntur. D. 7, 5.
de Usufructu, et habitatione, et ministerio servorum. C. 3, 33.
de Usufructu, et quemadmodum quis utatur fruatur. D. 7, 1.
de Usuris. C. 4, 32.
de Usuris, et fructibus, et causis, etc. D. 22, 1.
de Usuris et fructibus legatorum seu fideicommissorum. C. 6, 47.
de Usuris pupillaribus. C. 5, 56.
de Usuris rei judicatæ. C. 7, 54.
de Usurpationibus et usucapionibus. D. 41, 3.
Ut actiones ab herede et contra heredes incipiant. C. 4, 11.
Ut armorum usus inscio principe interdictus sit. C. 11, 46.
Ut causæ post pubertatem adsit tutor. C. 5, 48.
Ut dignitatum ordo servetur. C. 12, 8.
Ut ex legibus senatusveconsultis bonorum possessio detur. D. 38, 14.
Ut in flumine publico navigare liceat. D. 43, 14.
Ut in possessione legatorum seu fideicommissorum causa esse liceat. D. 36, 4.
Ut in possessionem legatorum seu fideicommissorum servandorum causa mittatur, etc. C. 6, 54.
Ut intra certum tempus criminalis quæstio terminetur. C. 9, 44.
Uti possidetis. D. 43, 17. C. 8, 6.
Ut legatorum seu fideicommissorum servandorum causa caveatur. D. 36, 3.
Ut lite pendente, vel post provocationem aut definitivam sententiam nulli liceat Imperatori supplicare. C. 1, 21.
Ut nemini liceat in emtione specierum se excusare, etc. C. 10, 27.
Ut nemini liceat sine judicis auctoritate signa rebus imponere alienis. C. 2, 17.
Ut nemo ad suum patrocinium suscipiat rusticanos, etc. C. 11, 53.
Ut nemo invitus agere vel accusare cogatur. C. 3, 7.
Ut nemo privatus titulos prædiis suis vel alienis imponat, etc. C. 2, 16.
Ut nulli patriæ suæ administratio sine speciali permissu principis permittatur. C. 1, 41.
Ut nullus ex vicaneis pro alienis vicaneorum debitis teneatur. C. 11, 56.
Ut omnes judices, tam civiles, quam criminales, post administrationem depositam quinquaginta dies in civitatibus, etc., permaneant. C. 1, 49.
Ut quæ desunt advocatis partium judex suppleat. C. 2, 11.
de Utrubi. D. 43, 31.
de Uxoribus militum et eorum, qui reipublicæ causa absunt. C. 2, 52.

V.

de Vacatione et excusatione munerum. D. 50, 5.

Digitized by Google

de Vacatione publici muneris. C. 10, 45.
de Variis extraordinariis cognitionibus, etc. D. 50, 13.
Vectigalia nova institui non posse. C. 4, 62.
de Vectigalibus et commissis. C. 4, 61.
de Venatione ferarum. C. 11, 44.
de Vendendis rebus civitatis. C. 11, 31.
de Venditione rerum fiscalium cum privatis communium. C. 10, 4.
de Ventre in possessionem mittendo et curatore ejus. D. 37, 9.
de Verborum et rerum significatione. C. 6, 38.
de Verborum obligatione. I. 3, 15.
de Verborum obligationibus. D. 45, 1.
de Verborum significatione. D. 50, 16.
de Vestibus holoveris et auratis, etc. C. 11, 8.
de Veteranis. D. 49, 18. C. 12, 47.
de Veteranorum et militum successione. D. 38, 12.
de Veteri jure enucleando, etc. C. 1, 17.
de Veteris numismatis potestate. C. 11, 10.
de Via publica et itinere publico reficiendo. D. 43, 11.
de Via publica, et si quid in ea factum esse dicatur. D. 43, 10.
Vi bonorum raptorum. I. 4, 2. C. 9, 33.
Vi bonorum raptorum, et de turba. D. 47, 8.
de Vi et vi armata. D. 43, 16. C. 8, 4.
de Vindicta libertate et apud concilium manumissione. C. 7, 1.
de Vulgari substitutione. I. 2, 15.
de Vulgari et pupillari substitutione. D. 28, 6.

Digitized by Google

Digitized by Google

INDEX.

Digitized by Google

Digitized by Google

INDEX.

[The numbers, except those to which the letter *p.* is prefixed, refer to the paragraphs; those which are accompanied by the letter *p.* refer to the pages at the commencement of the first volume, which contain the *Treatise of Laws*.]

ABSENCE, two sorts of, as regards prescription, 2222, note.
ACCIDENTS, the engagements formed by, 1596.
    happen by act of God or of man, 1597.
    by act of man either with or without fraud, 1598.
    different effects of, as to the consequence of loss, 1599.
ACCOMPLICES in frauds on creditors, 1647.
ACCOUNT, by some customs, need not be given by fathers of the estates of their children, 3540.
ACCOUNTS of merchants, tradesmen, &c., prescribe in six months, 2194.
ACCRETION, the right of, defined, 3262.
    in legal successions, 3263.
    in testamentary successions, 3264.
    how considered by the Roman law, 3265.
  difference between the two sorts of, 3266.
  the right of, among legatees, 3267.
    difficulties attending it in testamentary dispositions, 3268.
    inasmuch as it depends, 1. on the will of testators, 2. on the rules prescribed by the Roman law, 3268.
    remarks on, founded on the rules of the Roman law, 3269.
    its foundation, 3270.
    difficulties in understanding, 3276.
    difficulties in the Roman law, 3277.
    difference arising from the codicillary clauses, 3278.
    Justinian's law concerning, 3278.
    the same as the English right of survivorship, 3278, note *s*.
    its use, 3280.
    definition of, 3281.
    always exists among coheirs at law, 3282.
    depends on the manner in which the executors or legatees are joined, 3283.
    which may be in three manners, 3284.
    always exists among coheirs and coexecutors, 3285.
    and is regulated according to their portions in the inheritance, 3286.
    but not always reciprocal among them all, 3287.
    obtains among coheirs who are not conjoined, 3288.

Digitized by Google

ACCRETION.
the right of, may or may not exist between legatees of the same thing, 3289.
exists between legatees conjoined by the thing, 3291.
how, where the same thing is given to two persons by two different clauses, 3292.
does not exist among legatees by portions, 3293.
cases of, between joint legatees, 3294.
is a consequence of conjunction by the thing, 3295.
annexed to the thing, 3295, note *s*.
ADULTS, and minors, how distinguished by the Roman law, 2220, note.
ADVICE, or recommendation, 1137.
AGE, 89.
of majority and minority, 104, 105.
AGNATION, 2801.
ALIENS do not succeed, 2502.
incapacity of, ceases by naturalization, 2511.
effect of the incapacity of, 2529.
the exchequer is heir to the estates of, 2669.
ANNUITIES, arrears of, do not produce interest, 1954, note.
ANTICHRESIS, 1684.
ARBITRATORS, should give their award within the time limited, 1106.
may have power given them to extend the time, 1107.
delay for instructing the cause, 1108.
cannot retract or change their award, 1109.
must give judgment together, 1110.
their power limited by the compromise, 1111.
who may be arbitrators, 1112.
women cannot be, 1113.
ASCENDANTS, the succession of, 2844.
who are ascendants, 2849.
who are the grandfathers and ancestors, 2850.
are of both sexes, 2851.
how the father and mother succeed, 2852.
the nearest exclude the remoter, 2853.
a kind of representation among, 2854.
brothers and sisters of the whole blood succeed with ascendants, 2855.
when the ascendants, brothers, and nephews succeed together, 2856.
have the right of transmission, 2860.
of bastards, 2861.
the rights which some ascendants have, exclusive of others, in the goods of the children, 2862.
the father has no right in the property of goods acquired by the children, 2871.
but has usufruct of goods of his children who are not emancipated, 2872.
but not the usufruct of the son's peculiar patrimony, 2873.
nor of the gifts of the prince, 2874.
nor of that given on condition that the father shall not have such usufruct, 2875.
the father succeeding to his son with the brothers, has not the usufruct of their portions, 2876.
his duty in relation to goods of which he has the usufruct, 2877.
he has the property of all he reaps from the usufruct, 2878.
if he suffer the son to enjoy the profits, they belong to the son, 2879.
have alimony and other necessaries out of their children's estate, 2880.
parents bound to nourish and maintain their children, 2881.

Digitized by Google

ASCENDANTS.
parents and children not bound for each other's debts, 2882.
the mother not bound to maintain children except in case of the neglect of the father, 2883.
have two sorts of rights in the goods of their children, 2885.
the things given by, revert to them, 2886.
the father takes back the profits which have proceeded from his goods, 2887.
the change in the rights of, by second marriages, 2888.
ASSIGNMENT of litigious rights, 2272, note.
AWARDS, the authority of, 1094.
usual to fix a time when arbitrators shall pronounce, 1097. (See ARBITRATORS.)

BANKRUPTCY, and discomfiture, the difference between them, 2344, note.
BASTARDS, defined, 76.
the succession of, 2455.
do not succeed to intestates, 2497.
of bounties which may be given to, 2498 – 2501.
incapacity of, ceases by marriage of parents, 2510.
but only for the time to come, 2515.
effect of the incapacity of, 2528.
the exchequer is heir to the estates of, 2671.
BENEFICES, possession of, 2141, note.
BILLS OF EXCHANGE, the nature of, 1193.
three parties to, 1194.
characteristics of the covenants respecting, 1195 – 1198.
regulated by the ordinance of 1673, 1199.
the engagements of those receiving money in order to pay the same in another place, 1200.
BIRTH, eve of, how computed, 3013.
the tie of, and principles of the laws which are the consequences of it, p. 13.
BISSEXTILE, 2391, note.
BORROWER of things to be restored in specie, his engagements, 574.
what care he is to take, 575.
what, if he borrow for the lender's interest, 576.
what, if the thing is lent for the common interest, 577.
what, where the contract regulates the degree of care, 578.
not responsible for accidents, 579.
distinction made by the divine law, 579, note *m*.
of the care he should take of the thing lent more than of his own, 580.
when he agrees to be accountable for accidents, 581.
estimation of the thing lent, 582.
accountable for accidents, if the thing is put to another use than that for which it was lent, 583.
penalty for misusing the thing, 584.
if the thing be damaged, 585.
cannot keep the thing by way of compensation for a debt, 586.
must bear expenses necessary for the use of the thing, 587.
of things to be restored in kind, must repay at the term agreed on, 664.
is not discharged by accident, 665.
liable to pay interest after the term and demand, 666.
of other things than money, must repay their value, 667.
time and place of estimation of the value of such things, 668.
must make payment in the same quantity and quality, 669.

Digitized by Google

BORROWER.
liable for interest on the value of such things, 670.
not liable for interest on interest, 671.
BROKERS, the use of, 1201 – 1203.
the office of, 1204.
the lawful use of brokage, 1205.
the engagements of, 1206.
engagements of those who employ them, 1207.
the salary of, 1208.

CALUMNY in the Roman law, 1973, note.
CATONIAN RULE, 2534.
CAUTIONS. (See SURETIES.)
CESSION OF GOODS, 2238, 2328.
additional respite by the French law, 2329.
the respites of the Roman law, 2330.
not allowed to all debtors, 2331.
why refused by the customs of France, 2332.
defined, 2333.
does not wholly discharge the debtor, 2336.
comprehends rights acquired after the cession, 2338.
must be made under oath, 2339.
does not immediately divest debtor of property in goods, 2340.
debtor must own himself to be such, 2341.
does not discharge sureties, 2342.
has its effect as to all the creditors, 2343.
CIVIL LAWS, how distinguished, p. 78.
CODICIL, definition of, in the Roman law, 2978.
how distinguished from testament; formalities and use of, 3451.
defined, 3453.
cannot be made by one incapable of making a testament, 3454.
may be made either with or without a testament, 3455.
several may be made and all subsist, 3456.
makes a part of the testament, if there be one, 3457.
to be executed by next of kin, if there be no testament, 3458.
difference between the two sorts of, 3459.
has effect, though not mentioned in subsequent testament, 3460.
cannot impose a condition on which the institution of heir or executor shall depend, 3461.
must be attested by five witnesses, 3462.
formalities of, depend on usage of places, 3462, note x.
certain rules of testaments apply to, 3463.
null, if wanting in the necessary formalities, 3464.
or if revoked by a second, 3465.
or by a subsequent testament, 3466.
and in case of the birth of a child, 3467.
but only where there is also a testament, 3468.
of those who have made no testament, subsists without distinction, by the Roman law, 3469.
inconveniences and want of equity of this rule, 3469.
by the customs, all dispositions are codicils, 3470.
other causes of annulling, 3471.
CODICILLARY CLAUSE, defined, 3090.

Digitized by Google

CODICILLARY CLAUSE.
must have the formalities of a codicil, 3091.
difficulties arising from the use of, 3092.
origin of, in the Roman law, 3093.
intention of testator, 3094.
may, perhaps, be supplied, 3095.
difficulties as to the effect of, 3096.
effect of, considered, 3097.
had its origin in the niceties of the Roman law, 3100.
questions arising from the use of, 3101.
use and consequences of these questions, 3102.
whether testator's will shall have the effect of, 3103.
expressions in wills equivalent to, 3104.
COGNATION, 2801.
COLLATERALS, 2915.
defined, 2916.
three kinds of brothers, 2917.
various degrees of, 2918 - 2922.
three orders of, 2923 - 2925.
succession of, by the customs of France, 2926.
brothers first in order, 2927.
brothers of whole blood exclude others, 2928.
children of brothers of whole blood concur with their uncles, 2929.
representation among, 2929, note.
children of brothers of whole blood exclude brothers of half blood, 2930.
brothers by father's or mother's side alone, concur together, 2931.
children of brothers of half blood represent their fathers, 2933.
representation limited to brother's children, 2934.
the nephew preferred to an uncle of same degree, 2935.
all others succeed according to their proximity, 2940.
(See CONSANGUINITY.)
COLLATION OF GOODS, 2943.
its origin, 2944.
defined, 2947.
what ought to be restored, does not come under the head of collation, 2948.
all children obliged to make, 2949.
made in two cases, 2950.
how regulated, 2951.
of revenues, 2952.
expenses laid out on goods subject to, recovered, 2953.
of the heir who is bound to collate, 2954.
goods divided into as many portions as there are heirs, 2955.
no collation but among children, 2956.
ceases, if children abstain from the inheritance, 2957.
to whom to be made, 2958.
two sorts of goods of children, 2959.
goods acquired otherwise than from ascendants not subject to, 2960.
nor the peculiar patrimonies of sons, 2961.
nor what the father was bound to give his son, 2962.
nor expenses of education, 2963.
things given to children as an advantage over what the others have, not subject to, 2964.
dowries and donations in favor of marriage subject to, 2965.

Digitized by Google

COLLATION OF GOODS.
of dower, where husband is insolvent, 2966.
all other donations are brought into the succession, 2967.
whatever may be reckoned as a part of the legitime is subject to, 2968.
due whether deceased were testate or not, 2969.
dowry given a daughter by her paternal grandfather subject to, 2970.
things that have perished without fault of donee not subject to, 2973.
what is consumed by use subject to, 2974.
COMMUNITIES, 111.
their incapacities, 111, note *a*. (See CORPORATIONS.)
COMPENSATION, 2287.
some debts not to be compensated, 2288.
defined, 2289.
prevents the circuit of two payments, 2290.
takes place though the debts be not equal in quantity, 2291.
has effect of itself, and by virtue of law, 2292.
accounts should be stated year by year, and compensation made as the sums fall due, 2293.
may be made by the judge, 2294.
one compensates only in his own right, 2295.
both debts must be clear and liquid, 2296.
there must be no exception to annul the debt, 2297.
debts not due cannot be compensated, 2298.
no compensation against debts of public taxes, 2299.
no compensation in a thing deposited or lent, 2300.
in crimes and offences, 2301.
of debts equal in the sums, but otherwise unequal, 2302.
we can only compensate what may be given in payment, 2303.
COMPROMISES, their use, 1094.
why so called, 1095.
defined, 1098.
manner of proceeding in, 1099.
oblige only to the penalty, 1100.
general or particular, 1101.
expires at the time limited, 1102.
and by the death of either party, 1103.
one cannot compromise accusations of crime, 1104.
nor cases which relate to the state or honor of persons, 1105.
CONDITIONS, in testaments, defined, 3212.
the nature of, 3325, note *m*.
in testaments and covenants, their difference, 3327, note *p*.
in covenants, 205, 224.
(See COVENANTS, DONATIONS, SALE, TESTAMENT.)
CONDEMNED PERSONS, the exchequer heir to, 2669.
CONFESSIONS, three ways of obtaining them, 2081 – 2083.
of the party serve as proof, 2086.
through an error of fact, may be rectified, 2087.
through an error of law, cannot be revoked, 2088.
CONFISCATIONS, 2457.
CONSANGUINITY, 2825.
the degrees of, 2830.
the lines of, 2831.
line of ascendants, 2832.

Digitized by Google

CONSANGUINITY.
line of descendants, 2833.
collaterals, 2834.
divers lines of ascendants and descendants, 2835.
lines of ascendants by father's side and mother's side, 2836.
multiplication of ascendants and their lines, 2837.
difference between lines of ascendants and descendants, 2838.
divers lines of collaterals, 2839.
three orders of collaterals, 2840.
proximity of, not regulated by order of lines, 2841.
situation of lines of collaterals, 2842.
(See COLLATERALS, ASCENDANTS, DESCENDANTS.)
CONTESTATION OF SUIT, 1949, note *f*.
CONTRIBUTION, where goods are sacrificed for common safety, 1617.
estimation of value, 1617, note.
all goods saved contribute, 1618.
except ship's provisions, 1619.
precaution for the security of, 1620.
of damage to the ship, 1621.
where masts are cut away, 1622.
does not take place where ship is cast away, 1623.
where goods taken out to lighten a ship are lost in the lighter, 1624.
where, in such case, the ship is cast away, and not the lighter, 1625.
where a vessel is saved from wreck by throwing goods overboard, but is afterwards lost, 1626.
if one recover goods thrown overboard in the first danger, 1627.
ceases when goods thrown overboard are recovered, 1628.
where goods remaining in the ship are damaged by throwing other goods overboard, 1629.
CORPORATIONS AND COMMUNITIES, 1435-1438.
engage to ratify acts of their syndics, 1448.
and to allow their expenses, 1449.
engagements of, how limited, 1450.
how the directors of, are bound in their own names, 1451.
engagements of, not divided among the members, 1452.
succeed by testament, 2505.
COSTS. (See DAMAGES.)
COUNTER LETTERS, 2032.
cannot prejudice third persons, 2033.
COVENANTS, nature, use, and various kinds of, 140-142.
meaning of the word, 144.
defined, 145.
the subject-matter of, 146.
of four sorts, 147.
not obligatory without a cause, 148.
in donations, acceptance forms the covenant, 149.
some have a name, some not, but all oblige the parties thereto, 150.
perfected by mutual consent, 151.
obliging by the intervention of a thing, 152.
written, or unwritten, 153.
written, may be made before a notary, or signed only by the parties, 154.
unwritten, how proved, 155.
made before a notary, prove themselves, 156.

Digitized by Google

COVENANTS.

a signature contested must be proved, 157.
made before notary, how perfected, 158.
may be made by proxy between absent persons, 159.
who may enter into, 160.
must be made with knowledge and freedom, 161.
no one can covenant for others, or to their prejudice, 162.
except proxies, 163.
and certain others, according to the power given them, 164.
where one treating for a third person undertakes for his consent, 165.
are in the place of laws, 166.
obscurities and doubts to be interpreted by intention of parties, 167.
or by the usages of the place, 168.
different clauses interpreted by each other, 169.
intention followed rather than words, 170.
fraudulent obscurity, &c., interpreted against party using it, 173.
alternative obligation is in the choice of the party obliged, 174.
for things whose value may be more or less, 175.
the price estimated at common rate, 176.
time and place of estimation of things, 177.
expressions having no sense rejected, 178.
errors in the writing of, 179.
limited to matters of which they treat, 180.
interpretation of judicial covenants, 181.
three sorts of engagements in, 182.
the reciprocal performance of, 183.
suspension of the performance of, 184.
penalties for non-performance, 185.
without a term of payment or delivery, 186.
place of performance, 187.
obligee not in delay till the last moment of the term expires, 188.
care which one intrusted with the property of another by covenant is bound to take, 189.
no one accountable for accidents, 190.
he who reaps the profit shall bear the loss, 191.
in which the estimation of value is referred to arbitration, 192.
perfect integrity required in all, 193.
contractors must deal honestly as to third persons, 194.
the liberty of taking advantage does not extend to fraud, 195.
delays for performance are arbitrary, and depend on circumstances, 196.
all manner of pacts may be added to, 198.
ordinary engagements may be altered, 199.
deceit and fraud excluded from all, 200.
in all, every one may renounce his own right, 201.
particular pactions limited to their subject-matter, 202.
conditions in, 203.
defined, 204.
condition and burden used indifferently, 205.
the events provided for by conditions, of three sorts, 206.
conditions of three sorts, according to their effect, 207.
express and tacit conditions, 208.
conditions on which the accomplishment depends, 209.
effect of the event of such condition, 210.

Digitized by Google

COVENANTS.
condition on which the dissolution depends, 211.
effect of the event of such condition, 212.
consequences of conditional covenants, how regulated, 213.
conditions relating to past or present time have their effect immediately, 214.
impossible conditions annul, 215.
the effect of conditions passes to heirs, 216.
condition independent of deed of contractor has its effect immediately, 217.
condition depending on the deed of contractor may suffer a delay, 218.
unless such delay destroy the essence of the contract, or cause damage, 219.
of him who hinders the accomplishment of condition, 220.
clauses of nullity and penal clauses, 221.
their effect, 222.
non-performance of one contractor does not annul, 223.
concerning an uncertain event, 224.
which are null, defined, 225.
null, of which the nullity is not yet known, 226.
causes of the nullities of, 227.
persons incapable of contracting by, 228.
different degrees of such incapacity, 229.
liable to be annulled may become valid, 232.
a natural obligation, 233.
annulled by mistake and violence, 234.
concerning things public and holy, null, 235.
annulled by change of the thing sold, 236.
obligations without a cause are null, 237.
null by fault of one contractor, their effect, 238.
annulled, the consequences of, 239.
nullity must be declared by sentence of a court, or by consent, 240.
which are null are void also as to third persons, 241.
difference between nullity and dissolution, 242.
causes which dissolve, 243.
the latter covenants derogate from the first, 244.
new, are without prejudice to the rights of third persons acquired by former covenants, 245.
dissolved by the event of a condition, 246.
effect of clauses of nullity, 247.
dissolved by agreement, 248.
dissolved and annulled by fraud, 249.
dissolved in some cases by damage without fraud, 250.
of the events which dissolve, 251.
dissolved for non-performance, 252.
effects and consequences of dissolution, 253.
accessory, dissolved with the principal covenant, 254.
must be dissolved by authority of justice, or by consent, 255.
COZENAGE IN MORTGAGING, 1677. (See STELLIONATE.)
CREDITOR AND DEBTOR, defined, 649.
CREDITORS, acts to defraud, 1630.
such frauds of several sorts, 1631.
fraud by assignment of movables, 1631.
by the Roman law a debtor might renounce a succession, in fraud of his creditor, 1632.
what debtors do to defraud their creditors is revoked, 1633.

Digitized by Google

CREDITORS.
fraudulent bounties, 1634.
of alienation to purchasers for a valuable consideration, 1635.
of alienations to purchasers knowing to the fraud, 1636.
such purchaser shall make restitution, 1637.
the intention to defraud must be followed by the effect, 1638.
divers ways of defrauding, 1639.
a dowry settled to defraud creditors, 1643.
receiving only what is due commit no fraud, 1644.
exception to this rule, 1645.
engagements following from frauds on creditors, 1646 – 1649.
accomplices of frauds on, 1647.
punishment of debtor who defrauds, 1648.
where a tutor participates in a fraud on creditors, 1649.
three sorts of, 1732.
privileges of creditors of two kinds, 1733 – 1735.
Privilege defined, 1736.
priority of time does not affect privileged creditors, 1737.
effect of the privilege, 1738.
privilege of the seller, 1739.
privilege of one who lends money for a purchase, 1740.
privilege of him who lends to preserve the thing, 1741.
privilege for improvements, 1742.
effect of this privilege, 1743.
privilege of architects and workmen, 1744.
privilege of him who lends to the undertaker of a work, 1745.
privilege of carriers, 1746.
privilege on the fruits of an estate for the payment of rent, 1747.
privilege of a quitrent and of the pension due from an emphyteutical tenant, 1748.
privilege on the movables of a tenant, 1749.
of the movables of under-tenants, 1750.
privilege for the rents of other buildings, 1753.
privilege of the king, 1754.
where a creditor has a mortgage prior to that of the king, 1755.
king preferred before all creditors, having neither mortgage nor privilege, 1758.
privilege of funeral charges, 1759.
privilege of law charges, 1760.
privilege on goods of public depositaries, 1761.
further privilege by the customs of France, 1761, note.
privilege as to the deposit in being, 1762.
who innovate, lose their privilege, 1763.
concurrence of creditors for several deposits, 1764.
the effect of privileges, 1765.
difference of privileges, as to appropriation of goods, 1766.
competition and preference among privileged creditors, 1767.
having the same privilege, preference among, 1768.
three orders of, 1769.
Substitution explained and defined, 1770, 1771.
the simplest is assignment, 1772.
effect of assignments, 1773.
other ways of substitution, 1774.
by authority of justice, 1775.

Digitized by Google

CREDITORS.
by payment made to the creditor, 1777.
assignment substitutes to the mortgage and to the privilege, 1779.
substitution without assignment, 1780.
how a third person may acquire the right of, 1781.
how he may acquire the privilege of, 1782.
how the privilege may be acquired without substitution, 1783.
where a creditor pays off a prior creditor, 1784.
a purchaser substituted to the creditor whom he pays off, 1785.
substitution by attachment, 1786.
substitution is void after payment, 1787.
validity of substitutions, &c., depends on the state of the creditor's right at the time, 1788.
CRIMES AND OFFENCES, p. 32.
public and private, by the Roman law, 2637.
CURATORS, 1279.
usage as to, 1402-1407.
of madmen, 1408.
when a minor is mad, 1409.
madness to be proved judicially, 1410.
a son may be curator to a mad father or mother, 1411.
when a son, under jurisdiction, is mad, 1412.
a husband cannot be curator of a mad wife, 1413.
madness with lucid intervals, 1414.
the infirmities which require a curator, 1415.
of prodigals, 1416.
a prodigal must be proved such, 1417.
a son cannot be curator to a prodigal father, 1418.
duration of the curatorship of prodigals, 1419.
to the effects of an absent person, 1420.
to a child unborn, 1421.
to a succession, 1422.
to goods relinquished by a debtor to creditors, 1423.
a creditor may be curator to the goods of his debtor, 1424.
power of, 1425.
oath and administration of, 1426.
difference between curators and tutors, 1427.
engagements of, 1428.
action of those appointed to persons, 1429.
action of those appointed to goods only, 1430.
action of those appointed to the goods of an absent person, 1431.
action of him whose charge is at an end, 1432.
effect of the action of curators, 1433.
have mortgage for their security, 1434.
CUSTOMS, p. 79.
and usages the interpreters of laws, p. 83.
and laws abolished by disuse, p. 83.

DAMAGE occasioned by faults which do not amount to a crime, 1546.
occupant liable for damage by any thing thrown from a house, 1547.
the prohibitions of so throwing things extend to all places, 1548.
occupant also liable to a fine, 1549.
if any one is killed, 1550.

Digitized by Google

DAMAGE.
if there are several occupants, 1551.
where one occupies the whole house and lets chambers, 1552.
of those who take scholars or apprentices, 1553.
where things are thrown out with design to hurt, 1554.
where things are hung out, so that they fall, 1555.
from tiles falling, 1557.
done by living creatures, 1558.
master of cattle answerable for damage done by them, 1560.
and also to a fine, 1561.
cattle doing damage to be driven out without violence, 1563.
various kinds of, by horses, oxen, dogs, and wild beasts, 1564-1571.
by the fall of a building, 1572.
owner of ruinous building may be summoned to demolish it, 1573.
permission may be given to provide against such danger, 1574.
negligent proprietor liable for damages, 1575.
where the building falls before the proprietor has been warned, 1576.
to superfluous ornaments of a building thrown down by another, 1577.
where the house falls by accident after the owner has been warned, 1578.
where the decayed house is owned by several, 1579.
new works prohibited, 1580.
a new work which one may make, even to his neighbour's inconvenience, 1581.
a new work that one cannot do to his neighbour's prejudice, 1582.
one cannot change the ancient course of waters, 1583.
judicial prohibition to innovate, 1584.
building in public places prohibited, 1585.
where there is no intention of doing harm, 1586.
occasioned by failure of delivery, 1587.
caused by an innocent act, 1588.
precautions to be used in works from which damage may arise, 1586.
from ignorance of what one is obliged to know, 1587.
from fire, 1591.
done to avoid imminent danger, 1592.
where one neglects to prevent damage that he is bound to prevent, 1593.
from an accident preceded by some act that gave occasion to it, 1594.
when such accident was preceded by an unlawful fact, 1595.
DAMAGES, of several sorts, and their causes, 1900.
may be reduced to two kinds, 1901.
may be also distinguished by the intention, 1902.
he who is answerable for, should indemnify, 1903.
difference between interest, and costs and damages, 1904.
for non-payment of money, are uniform, 1905.
how judged and regulated, 1917.
as to the quality of the act of the person from whom they are due, 1918.
as to the events which follow such act, 1919.
present, and damages to come, how estimated, 1929.
reparation regulated by a view of the cause and consequences thereof, 1931.
a vulgar distinction concerning, 1932.
reparation regulated by the judge, or by skilful persons, 1933.
certain damages regulated by the judge alone, 1935.
costs in a lawsuit, 1941.
restitution of fruits, 1943.
defined, 1960.

Digitized by Google

DAMAGES.
two questions, 1. whether any are due, 1961.
2. in what they consist, 1962.
the estimation of damages, 1964.
for which reparation may be demanded are of two sorts, 1965.
either for a loss sustained, or for a failure of profit, 1966.
difference in, as respects fraud, 1967.
whether or not caused by negligence or other fault, 1968.
may be due, though not occasioned by any fault, 1969.
of consequences which appear remote, yet enter into the estimation of, 1970.
estimate of, for losses which depend on future events, 1971.
the prudence of the judge in estimating, 1972.
against litigious persons, 1973.
the stipulation of a sum in lieu of, 1974.
estimated in money, 1975.
one may be the cause of loss and not liable for damages, 1976.
questions relating to, 1977.
DECISIVE OATH, 2083, 2084.
DEFAMATORY LIBELS, 2558, note.
DELEGATION may be made in two manners, 2316.
all delegations imply novation, 2317.
defined, 2318.
can be only by consent of all concerned, 2319.
and assignment, difference between, 2320.
the assignment of a debt, or the obligation of a third person, does not constitute, 2322.
to the creditor, or to another by his order, 2323.
is a kind of novation, 2324.
the person delegated cannot revive the former obligation, 2325.
nor use the exceptions he had against the person who delegated him, 2326.
DELIVERY, defined, 270.
of movables, how made, 271.
of immovables, 272.
the clause of precarious possession tacitly understood, 273.
of things incorporeal, 274.
the first effect of, is the translation of the full property, 275.
effect of, where the seller was not owner, 276.
another effect is the right to prescribe, 277.
effect of, between the buyers of the same thing, 278.
the time of, 279.
the place of, 280.
damages for delay of, 281.
wherein such damage consists, 282.
consequences of gain or loss which do not enter into such damage, 283.
damages due though sale be annulled, 284.
seller cannot annul the sale by failure to deliver, 285.
hindered by accident, 286.
where seller is in danger of losing the price, 287.
where seller and buyer are both in delay, 288.
DEPOSIT, the use of, 679.
demands particular fidelity in the depositary, 680.
sequestration, 681 – 683.
of things immovable, 684.
wagers, 685.

Digitized by Google

DEPOSIT.
necessary deposits, 686, 733.
of things distrained, 687.
of the goods of travellers, 690.
defined, 691.
should be gratuitous, 692.
immovables may be deposited, 693.
people may deposit goods of others; even thieves, 694.
of restitution to the owner, 695.
when the thing may be restored to another than the owner, 696.
may be taken back at the owner's pleasure, 697.
of the place where the thing should be restored, 698.
depositary charged with the produce, 699.
where depositary has leave to use the thing, 700.
where the thing belongs to several, 701.
where depositary becomes insolvent after payment of his portion to one of several coheirs, 702.
several owners may agree that any one of them may call for the thing, 703.
a thing deposited with several persons, 704.
if depositary use the thing without leave, 705.
of a thing for the benefit of depositary, 706.
of a coffer containing many things, 707.
of the expenses of keeping the thing, 708.
depositary shall recover the charges of preserving the thing, 709.
and charges of transportation, 710.
of the discharge of depositary, 711.
foundation of the care of depositary, 712.
the care required of depositary, 713.
fraud or negligence of depositary, 714.
of a depositary negligent in his own affairs, 716.
where the thing is lost without depositary's fault, 717.
where the degree of care is regulated by agreement, 718.
of a depositary who offers himself, how far accountable, 719.
of a depositary who has sold the thing, and bought it again, 720.
if depositary delay restitution, 721.
where the thing may be restored in one of many places, 722.
of the executor or administrator of depositary, 723.
if executor of depositary sell the thing, 724.
the circumstances excusing such an act, 724, note *q*.
depositary cannot detain the thing in compensation for a debt, 725.
necessary deposit defined, 733.
such deposit is by agreement, 734.
the duty of depositary of a necessary deposit, 735.
DEROGATORY CLAUSES, 3110.
defined, 3111.
unknown to the Roman law, 3112.
and contrary to it, 3115.
reasons offered for the invention of, 3113.
inconveniences and dangers of, 3114.
DESCENDANTS, who are children, 2791.
who are descendants, 2792.
all descendants included under the name of children, 2793.
bastards not included, 2794.

Digitized by Google

DESCENDANTS.
of children born in the seventh or eleventh month, 2795.
posthumous, stilborn children, and monsters, 2797 - 2799.
a child born during marriage presumed legitimate, 2800.
children succeed by equal portions, 2801.
grandchildren succeed by representation with children of first degree, 2802.
as also among themselves, if there are no children of the first degree, 2803.
how children of different marriages succeed, 2805.
they take the rights of their fathers and mothers, 2806.
the portion of the child unborn, 2807.
curator of such child, 2808.
provision for a widow big with child, 2809.
provision for the child whose state is questioned, 2810.
exclude ascendants, 2812.
where the father and son die at the same time, 2813.
of the mother and child at the breast who die at the same time, 2814.
children have the right of transmission, 2821.
provision for children while deliberating, 2822.
fathers have the usufruct of successions falling to their children, 2823.
rights which pass to those of the family who do not succeed to the estate, 2824.
DETENTION, three causes of, 1. the right of property, 2119.
2. the will of the owner, 2120.
3. usurpation, 2121.
which the owner cannot take away, 2140.
DISCOMFITURE, OR INSOLVENCY, 2344.
defined, 2345.
a creditor possessing a pledge preferred as to that pledge, 2346.
the seller preferred as to the thing sold by him, 2347.
where a debt is conditional, 2348.
DISCUSSION among several tutors, 1339.
in favor of a third possessor, 1704.
in favor of sureties, 1866.
judicial sureties may be prosecuted without discussion, 1867.
DISHERISON, 3340.
of the action given to children in case of, 3341.
distinction between preterition and, 3342.
insanity of testator presumed therein, 3343.
action given likewise to ascendants, 3344.
law as to bastards, 3345.
children cannot be disinherited without cause, 3347.
nor parents, or other ascendants, 3348.
children may not be disinherited even though a legacy be left them, 3351.
in the Code of Justinian, 3352, 3353.
children of the person disinherited excluded from the inheritance, 3357.
null, unless the child be clearly designated, 3359.
of alimony for the son, pending the appeal of the executor, 3360.
the portion of a child whose disherison subsists accrues to the other children, 3361.
but not where the son had only delayed the bringing of his action, 3361, note *p*.
where less than the legitime is left, 3362.
cannot be made to subsist by the favor of the executor, 3363.
where the emperor is instituted heir, 3363, note *r*.
children may not be disinherited without just cause, 3365.
causes of disinheriting children, 3366, 3367.

Digitized by Google

DISHERISON.
of parents, divers causes of, 3368.
causes to be proved by executor, 3369.
of the burden of proof by the ancient Roman law, 3369, note *b*.
a husband may not be deprived of his wife's dowry by reason of her ingratitude, 3370.
has its effect where the party has once approved of the testament, 3371.
where the party disinherited accepts a legacy, 3372.
where the party disinherited is guardian to a legatee, 3373.
where the party has approved the testament by certain acts, 3374.
complaint against, to be made within five years, 3375.
the justice of this prescription, 3376.
if the action commenced be dropped, it may not be subsequently revived, 3377.
cannot subsist where testament is forged, 3378.
DISPENSATION OF AGE, 2393.
DIVISION, the benefit of, among sureties, 1871, note.
DONATIONS, are of two sorts, 906.
those taking effect in life, and those after death, their difference, 907.
consequence of this difference, 908.
"To give and to retain avails nothing," 909.
divers ways of giving, 912.
between man and wife, 913.
abolished by the Roman law, 914.
except those taking effect after death of donor, 915.
dispositions of various Customs in relation to, 916.
defined, 918.
no donation without acceptance, 919.
where the donee is incapable of accepting, 920.
he who gives only what he is bound to makes no donation, 921.
remuneratory, 922.
are irrevocable, 923.
what may be given, 924.
may be of all or of part of donor's goods, 925.
not augmented by fruits reaped after the gift, 926.
either pure and simple, or conditional, 927.
conditions of three sorts, 928.
when perfected, admit no new burdens, 929.
difference between the motives and conditions of, 930.
reservation of the usufruct, 931.
registration of, 932.
alimony afforded from motives of liberality, 933.
the first engagement of donor is, not to revoke, 934.
the second, delivery of the thing, 935.
reservation of the use and profits is instead of delivery, 936.
the third engagement, warranty, 937.
if fraud of the donor occasion loss to donee, 938.
donor cannot be obliged to perform more than he is able without being reduced to want, 939.
interest of the things given, 940.
the first engagement of donee is to acquit charges, 941.
the second, gratitude, 942.
of ingratitude not resented by donor, 943.
of revocation, where children are afterwards born to the donor, 944.

Digitized by Google

DONATIONS IN PROSPECT OF DEATH, 3472.
two significations of the term, 3472.
distinguished from those which take effect in lifetime of donor, 3474.
defined, 3475.
three kinds of, by the Roman law, 3476.
by the civil law, those near death may not make donations to take effect in lifetime, 3477.
that is, of immovables, unless delivered, 3478.
other usages of Roman law respecting, 3479.
wherein they differ from, or agree with, codicils, 3480.
the formalities of, 3481.
who may make, 3482.
rules of codicils apply to, 3483.
and also those of legacies, 3484.
DOWRY, foundation of the rules of, 828.
distinction between goods of the dowry and the paraphernalia, 829.
remarks on the privileges of, 831 - 834.
defined, 835.
enjoyed by husband for the charges of marriage, 836.
in what manner the husband is master of, 837.
consists of money or other things estimated, 838.
estimation makes the thing to be at the husband's peril, 839.
consequences of this estimation, 840.
may be of all, or of a part of the woman's estate, 841.
profits of, which are not revenues, 842.
stones taken out of a quarry are revenues, 843.
of lands purchased with the wife's portion, 844.
of the gains of the wife or husband surviving, 845.
the husband cannot alienate lands he got in marriage with the wife, 847.
nor subject them to services or other burdens, 848.
the alienation of, 849.
settlement of, implies the condition that the marriage be accomplished, 850.
the father endows his daughter, 851.
a woman not under paternal jurisdiction settles her own dowry, 852.
presumed to be given by the father from his own estate, 853.
dos profectitia, 854.
proceeding from father, reverts, if he survive, 855.
foundation and use of this right, 856.
so reverting, subject to profits due to the husband, 857.
if the father is a prodigal, 858.
coming from other ascendants, 859.
reversion of, as to strangers, 860.
what a father owes his daughter not considered as a dowry, 861.
settled by the mother, 862.
warranty of, 863.
the husband's engagements concerning, 864.
of the care he should take of the goods pertaining to, 865.
of his diligence against debtors, 866.
if the husband innovate the obligation, it is at his own peril, 867.
if he receive interest from a debtor of the dowry, 868.
how prescription may be imputed to the husband, 869.
restitution of, 870.
accessions of, 871.

Digitized by Google

DOWRY.
to whom to be restored, 872.
restitution may be diminished by the husband's gains, 873.
and by repairs and other charges, 874.
three sorts of expenses of, 875.
necessary expenses, 876.
annual and ordinary expenses to be borne by husband, 877.
ground charges are taken out of the fruits, 878.
useful expenses, how recovered, 879.
how we are to judge of necessity or usefulness of such expenses, 880.
if the repairs of, perish by accident, 881.
expenses for pleasure, 882.
repairs for pleasure, 883.
when settled to defraud creditors, 1642.
cannot be prescribed during marriage, 2223.
(See PARAPHERNAL GOODS.)

EMANCIPATION OF CHILDREN, 2867. (See PERSONS.)
ENGAGEMENTS, the several kinds on which society is founded, p. 8.
the spirit of the second law in all, p. 19.
demand the use of a government, p. 20.
are the foundation of the particular laws which relate to them, p. 21.
general rules arising from, p. 22.
are instead of laws, p. 22.
formed without a covenant, 1271 - 1275.
of those who manage the affairs of others without their knowledge, 1453 – 1455.
to continue an affair begun, 1456.
the care to which they are bound, 1457.
of the neglect of such affairs, 1458.
an affair undertaken without necessity, 1459.
of him who manages only one affair, 1460.
of accidents, 1461.
if the absent person die before the affair is ended, 1462.
interest of minors received on account of absent persons, 1463.
of him who manages the affair of one person believing it to belong to another, 1464.
if a woman manages the affair of an absent person, 1465.
of those who act through necessity, 1466.
a case where the most exact care is not required, 1467.
of him whose business has been managed by another without his knowledge, 1468.
1. to ratify and execute what has been well done, 1469.
2. to reimburse his expenses, 1470.
excessive expenses reduced, 1471.
3. to pay interest on money advanced, 1472.
unnecessary expenses, 1473.
if what has been usefully done perish by accident, 1474.
of approbation of what has been ill done, 1475.
of expenses incurred from motives of liberality, 1476.
such expenses to be judged by circumstances, 1478.
formed by accidents, 1596.
of things left on another's land by an inundation, 1602.
of things thrown into the sea in danger of shipwreck, 1603.
provision of victuals in a common danger, 1604.
of repairing changes in the condition of places caused by an accident, 1605.

Digitized by Google

ENGAGEMENTS.
if such changes cannot be repaired, 1606.
of mixture of things belonging to several persons, 1607.
one may seek for what he has left in another's ground, 1608.
are reciprocal and not reciprocal, 1609.
all accidents causing gain or loss do not form engagements, 1610.
of him who has found a thing lost, 1601, 1612.
of him who recovers what he had lost, 1613.
of him on whose ground the property of another has been thrown by accident, 1613, 1614.
the rights of such person, 1615.
contribution in case of loss of goods thrown overboard for common safety, 1616–1629.
following from frauds on creditors, 1646.
the consequences which add to engagements and strengthen them, 1650.
three ways of annulling or diminishing, 2236.
EQUITY, pp. 37, 85.
ERROR of fact, defined, 1224.
of law, defined, 1225.
there can be no ignorance of the law of nature, 1226.
difference between errors of fact and law, 1227.
of minors, does them no prejudice, 1228.
of persons of full age, has divers effects, 1229.
of fact which is the only cause of a covenant, 1230.
if not the only cause of the covenant, 1231.
ignorance of facts is presumed, 1232.
of fact, caused by fraud, 1233.
effect of, to be judged by circumstances, 1234.
of computation, 1235.
in law, not sufficient to annul covenants, 1236.
in law, if the only cause of the covenant, 1237.
of customs, 1237, note.
of law, of no avail in certain cases, 1239.
of law, when not the only cause of the covenant, 1240.
ESSOINS, or the excuses of witnesses, 2058.
ESTIMATION of goods sacrificed at sea, 1617, note.
EXCEPTIONS AND DISPENSATIONS, their foundation and nature, p. 60.
two sorts of exceptions to laws, p. 90.
EXCHANGE, 444.
rules of the Roman law concerning, 445.
the rules of sales apply to, except those of price, 446, 450.
defined, 447.
no distinction of buyer and seller, 448.
eviction in, 449.
of lands mortgaged for other lands, 1648, note.
EXCHEQUER in the place of heir to condemned persons, 2669.
and to the estates of aliens, 2670.
and to bastards, 2671.
and to those who have no relations, 2672.
EXECUTOR, need not be mentioned by name, 3039.
may be unknown to testator, 3041.
must be certainly described, 3042.
cannot be a witness, 3058.
nor can his children, father, or brothers, 3061.

Digitized by Google

EXECUTOR.
distinction of direct and oblique words in the institution of, abolished, 3098.
renouncing the inheritance, 3125.
the executor first instituted preferred, 3183.
his condition, 3186.
his inconveniences, 3187.
the use and necessity of, 3334.
must give an account, 3339. (See HEIR.)
EVICTION, defined, 371.
of tenant, 484.

FACTORS, the bounds of their power, 1185.
where one is substituted to take charge of a ship or cargo, by the one intrusted with it, 1186.
of minors or women employed as, 1187.
where several partners employ one factor, all are bound, 1189.
are not obliged in their own names, 1191.
how the power of factors expires, 1192.
FALCIDIAN PORTION, whence its name, 3698.
applies only in provinces governed by written law, 3699.
defined, 3700.
not to be taken out till debts are paid, 3701.
and funeral expenses, 3702.
executor cannot have, unless he make an inventory, 3703.
the heir at law has a right to, 3704.
all dispositions made in view of death subject to, 3705.
computed according to value of goods at testator's death, 3706.
which are valued according to their worth at that time, 3707.
losses of goods fall on executor if he accept purely and simply, 3708.
difference between such executor and one with the benefit of an inventory, 3709.
not regulated by the estimate of testator, 3710.
valuation of goods should be with knowledge of all concerned, 3711.
precaution as to uncertain goods, 3712.
diminished by diminution of charges and new funds, 3713.
and by discovery of other goods, 3714.
regulated by estimation if the thing bequeathed cannot be divided, 3715.
ceases in certain cases, 3716.
not diminished by favor of the legacy, 3717.
whether legacies to pious uses are exempt from, 3718.
how regulated where there are conditional legacies, 3719.
legacy of a service is subject to, 3720.
legacy of the payment of a debt not due, subject to, 3721.
legacy of a debt due from an insolvent debtor not subject to, 3722.
equity of this rule, 3723.
three sorts of legacies to be provided for, 3724.
due from legacy of a usufruct, and how regulated, 3725.
how this rule is deduced, 3726.
the various provisions of different texts, 3727 – 3730.
the provisions of the sixty-eighth law concerning, 3731.
equitable manner of regulating, 3732.
only the beneficiary heir has a right to, 3733.
of goods concealed by executor, is lost to him, 3734.
also that of legacies which he has attempted to suppress, 3735.

Digitized by Google

FALCIDIAN PORTION.
the heir at law renouncing his right by testament does not lose his right to, 3736.
where several executors are charged with different legacies, 3737.
legatees charged with legacies have no right to, 3738.
except where a diminution happens on account of the executor, 3739.
testator may forbid taking, 3740.
legacy of an immovable not to be alienated is not subject to, 3741.
when testator is a debtor to his executor, 3742.
dispositions of military testaments not subject to, 3743, 3744.
where a legatee is charged with an annual pension, 3745, 3746.
diminished by what augments the inheritance, 3747.
and by what comes to the executor in that quality, 3748.
executor remaining alone does not contribute to legatees having assignments on the portion of the other executor, 3749.
and so in the case of a pupillary substitution, 3750.
rule concerning, in case of accretion or substitution, 3751.
not diminished by legacy to one executor to be taken from the share left to the other, 3752.
between coexecutors, who are legatees, 3753.
where the executor is instituted for several shares of the inheritance, 3754.
not diminished by the accomplishment of a conditional legacy, where the legatee succeeds to the executor, 3755.
charge on one executor augments only his share of, 3756.
how estimated, when payment of legacy is deferred, 3757.
cannot be deducted by executor who has paid or promised to pay whole legacy, 3758.
unless he have done so through an error of fact, 3759.
not lost by the mere effect of time, 3760.
of several legacies to one legatee retained out of that which is last paid, 3761.
executor claiming without right is liable for interest, if he delay payment of legacies, 3762.
FIDUCIARY BEQUESTS, definition and use of, 3490.
particular, two sorts of rules concerning, 3491.
particular, defined, 3496.
(See LEGACY.)
FORCE, the nature of, and its effects on liberty, 1241.
every kind of force, violence, and threat unlawful, 1244.
rule of the Roman law concerning, 1246.
defined, 1247.
covenant to which a party has consented through force is null, 1248.
divers ways of using force, 1249.
if a magistrate use unlawfully his authority, 1250.
where used on another than him whose consent it is intended to obtain, 1251.
what is done by force is null, 1252.
effects of, to be judged by circumstances, 1253.
used to obtain a compliance with that which is just, 1254.
counsel and authority do not impose force, 1255.
what is done by authority of a court of justice is not force, 1256.
FORFEITURES, 2457.
by the Roman law, 2669, note.
FRAUD, defined, 1259.
judged by the quality of the fact and the circumstances, 1260.
never presumed, but must be proved, 1261.
dolus re ipsâ, 1262.
(See CREDITOR.)

Digitized by Google

FRIENDSHIP, the nature and kinds of, p. 26.
difference between friendship and the love enjoined by the second law, p. 27.
a natural consequence of the second law, p. 28.
is mutual and free, p. 28.
and conjugal love, their difference, p. 29.
and love of parents and children, their difference, p. 30.
its use in society, p. 30.
FUNERAL CHARGES, 2651 - 2653.
are privileged, 2654.
regulated by the estate and quality of the deceased, 2655.
unreasonable dispositions of testator respecting, 2656.
how recovered back if any other than the heir has paid them, 2657.

GOVERNMENT, the order of, to keep men within their engagements, p. 19.

HABITATION, 970.
defined, 977.
extends to the whole family, 978.
extends to the whole house, or a part, 979.
the right of, may be transferred, 980.
the right of, is for life, 981.
expires by death of usufructuary, 1006.
HEIR AND EXECUTOR, 2461.
defined, 2463.
two sorts of heirs, 2464.
the heir is in the place of the deceased, 2470.
the engagement of, has three characters, 2471.
is irrevocable, universal, and indivisible, 2472 - 2474.
esteemed such from the death of the person whom he succeeds, 2477.
who divests himself of the inheritance, remains liable for all the charges, 2479.
who sells his right, is reputed heir, 2480.
where the portions of heirs are not regulated they will be equal, 2482.
who may be heir, 2483.
married daughters excluded by some customs of France, 2484.
other incapacities by these customs, 2486.
all persons may be heirs, if there be no cause excluding them, 2487.
two sorts of incapacity, as to causes, 2489.
stillborn children and monsters, 2490.
children who die as soon as born succeed, 2491.
whether a child born alive before its time inherits, 2492.
a child born after the mother's death inherits, 2495.
mad, deaf, and dumb persons, and prodigals, inherit, 2496.
aliens do not succeed, 2502.
professed monks do not succeed, 2503.
nor persons condemned to death, or those civilly dead, 2504.
corporations and communities succeed by testament, 2505.
children unborn when the succession fell succeed, 2506.
who unworthy of being heir or executor, 2546.
difference between the usage of France and the Roman law, 2547.
who is unworthy, excluded from the inheritance, 2549.
the causes which render him unworthy, 2550, 2562.
who is unworthy restores the fruits and interest, 2563.
difference between the causes that render heirs unworthy, 2564.

Digitized by Google

HEIR AND EXECUTOR.
if the cause subsist at the time of the testator's death, 2565.
if the cause had ceased at that time, 2566.
distinction of causes with respect to the two kinds of succession, 2567.
who can have no heirs or executors, 2568.
persons incapable of making a testament cannot have testamentary heirs, 2570.
bastards dying intestate have no heirs but their children, 2571.
aliens have no heirs or executors, 2572.
monks have either testamentary heirs or heirs at law, 2573.
condemned persons have no heirs, 2574.
persons who have no relatives have no heirs at law, 2575.
the rights of, 2576, 2577.
first, to accept the succession and take possession of the goods, 2578.
entrance on the inheritance takes effect from the date of the death, 2579.
may renounce the inheritance, 2580.
may deliberate whether or not to accept, 2581.
may demand that legacies and bequests be reduced, 2583.
may sell or otherwise dispose of the inheritance, 2584.
transmits the inheritance to his heir, 2585.
does not succeed to certain rights, 2586.
rights of heirs of blood to the legitime, 2587.
right of partition among, 2588.
accretion, 2589.
collation of goods, 2590.
reversion, 2591.
the engagements of, to the succession by the effect of acceptance, 2592.
a general engagement for all the charges of the inheritance, 2594.
the particular engagements of, are of two kinds, 2595.
the charges which may be imposed on, 2596.
the charges to which he is liable, 2597.
two engagements of deceased do not pass to, 2598.
1. public offices, 2599.
2. engagements made by mutual consent, 2600.
all lawful charges may be imposed on, 2601.
dispositions regulating these charges, 2602.
what necessary for the validity of these dispositions, 2603.
1. the person must be capable of disposing, 2604.
2. they must be in favor of persons capable of receiving, 2605.
3. they must be in due form, 2606.
4. they must be within the bounds prescribed by law, 2607.
difference of effect of these rules, 2608.
how these dispositions should be performed, 2610.
bound for all the charges of the inheritance, 2611.
for charges of successions that deceased had inherited, 2612.
for substitutions and fiduciary bequests deceased had inherited, 2613.
for all other charges, debts, and demands on the succession, 2614.
for damages by any crime of the deceased, 2615.
for debts payable after his death, 2616.
for funeral expenses, 2617.
a plan of the rights and charges of, 2618.
bound for debts though they exceed the inheritance, 2621.
three kinds of engagements and debts, 2622.
creditors of the deceased preferred to those of the heir, in goods of the inheritance, 2624.

Digitized by Google

HEIR AND EXECUTOR.
creditors of heir preferred to those of the deceased, in goods belonging to the heir, 2625.
creditors without mortgage or privilege share equally, 2626.
creditors of deceased come in all alike on the goods of the heir, 2627.
separation of goods of, from those of the inheritance, 2628.
bound for the debts, personally, each for his share, and hypothecarily for the whole, 2629.
mortgage or privileged debt, divided with respect to, 2630.
how all the debts are divided among, 2631.
debts are divided, even against the exchequer, 2632.
division not hindered by insolvency of an heir, 2633.
debts divided according to portions of the inheritance, 2634.
engagements of, on account of the crimes of the deceased, 2635.
principles of the Roman law, 2636.
usage of France respecting, 2642.
these usages conform to those of the canon law, 2645.
distinction between the pecuniary punishment and the civil interest, 2648.
how liable to pecuniary punishment, 2649.
always bound for the civil interest, 2650.
engagements of heirs to each other, 2658.
should inform each other of what they have, or know of, the inheritance, 2660.
of the care they should take of the common goods, 2661.
should divide the profits they have made, 2662.
should reimburse each other the interest of money advanced, 2663.
should bring into the inheritance all goods which ought to be brought in, 2665.
one cannot make changes in the goods without the consent of all, 2666.
engagement to come to a partition, 2667.
universal donee is in the place of heir, 2674.
the purchaser of an inheritance is in the place of, 2675.
the curator to a vacant succession represents, 2676.
may deliberate whether or not to accept, 2682.
informs himself by the inventory, 2683.
curators are named while he deliberates, 2684.
and perishable things are sold, 2685.
pressing charges are acquitted, 2686.
alimony allowed to children while they deliberate, 2687.
many heirs successively have each the right of deliberation, 2688.
who dies while deliberating transmits his right, 2689.
with the benefit of an inventory, 2690.
punishment of, for concealing effects, 2694.
engagements of, to the succession, 2705.
he who acts as heir should know that he is heir, to be charged as such, 2721.
and the act must proceed from no other cause, 2722.
the heir at law, who does not know that there is a testament, does not approve it by declaring himself heir, 2723.
acts of, how to be distinguished, 2724.
when one is forced to act as heir, 2727.
precautions to be taken by, 2728.
accepting the inheritance, 2729.
renouncing the inheritance, 2735.
the heir of blood may be testamentary heir, if he is instituted, 2991.
his duties, if he accept the inheritance, 2991.

Digitized by Google

HEIR AND EXECUTOR.
must take the place of deceased after his death, 2997.
heir at law may not renounce the execution of a testament, so as to succeed as if to an intestate, 3134.
(See Executor, Inheritance, Partition, Substitution, Succession, Testament, Transmission.)
HUSBAND AND WIFE, how they succeed to each other, 2942.
(See Dowry.)
HYPOTHECARY ACTION, prescribes in forty years by the Roman law, 1797, note.

INCAPACITY, different kinds of, have different effects, 2507.
difference with respect to the two kinds of succession, 2508.
some incapacities cease, others last always, 2509.
of bastards ceases by marriage of their parents, 2510.
of aliens, by naturalization, 2511.
of monks, by the nullity of their vows, 2512.
of condemned persons, by pardon, 2513.
may cease for time past and future, or only for the future, 2514.
of bastards and aliens ceases only for the future, 2515, 2516.
of monks and condemned persons may cease for both, 2517, 2518.
three different times to be considered as to the incapacity of testamentary successions, 2520.
one time only to be considered in the succession of intestates, 2521.
effect of, happening after the succession of an intestate is open, 2522.
of bastards, the effect of, 2528.
of aliens, the effect of, 2529.
of monks, the effect of, 2538.
of condemned persons, the effect of, 2539.
takes place only from the time of condemnation, 2540.
if the condemnation subsist, the incapacity subsists, 2541.
ceases in some cases, 2542.
difference between the Roman and French law, 2543.
one cannot bequeath to one incapable by the intervention of other persons, 2545.
INHERITANCE, comprehends only the goods and rights transmissible to a successor, 2467.
may be without goods, 2468.
divided among the heirs, 2475.
not accepted, represents the deceased, 2476.
effect of the acceptance of, 2729.
possession not necessary to one's becoming heir, 2730.
acceptance relates to the time of death, 2731.
acceptance obliges to pay all charges, 2732.
and gives the right of transmission, 2733.
effect of acceptance as to goods which do not remain in the inheritance, 2734.
every heir may renounce, 2735.
how he may renounce, 2736.
heir should know his right, 2737.
heir who has renounced, cannot retract, 2738.
one cannot renounce in part, 2739.
(See Heir.)
INNKEEPER, the engagements of, 1172.
are either express or tacit, 1173.
how accountable for the act of his servants, 1174.

Digitized by Google

INNKEEPER.
the care to which he is bound, 1175.
answerable for thefts, 1176.
accountable for the acts of his family, 1177.
and for the acts of servants done in the inn, 1178.
INSOLVENCY. (See DISCOMFITURE.)
INSTITUTION OF HEIRS, by contract, 2443.
received in France, 2444.
but prohibited by the Roman law, 2445.
essential principles relating to, 2445 – 2450.
INTEREST, why fixed, and costs and damages undetermined, 1906.
a natural cause of difference between them, 1909.
consequences of this difference, 1912.
exceptions to the rule fixing interest, 1914.
defined, 1944.
in what it consists, 1945.
when due, 1947.
purchaser of lands owes interest of the price, 1948.
due after the demand of a debt, 1949.
of costs of suit, 1949, note *g*.
may be stipulated when not due otherwise, 1950.
of marriage portions, 1951.
due from those who convert the money of others to their own profit, 1952.
on interest cannot be demanded, 1953.
is due on other revenues than interest, 1954.
to what the prohibition of interest on interest refers, 1955.
a case where interest on interest is due, 1957.
arises from four causes, 1958.
how to judge whether it be due or not, 1959.
INTERROGATION of a party ordered by the judge, 2089.
the party should answer clearly and precisely, 2090.
the use of interrogations, 2091.
of answers to, made through an error of fact, 2092.
the effect of interrogations, 2093.
the answers are not decisive in favor of those making them, 2094.
difference between them and a demand to see writings of one of the parties, 2095.
INVENTORY. One may become heir with the benefit of an inventory, 2690.
to be made in due form, 2691.
must include all the goods, 2692.
omissions in, may be supplied, 2693.
punishment of heir for diverting the goods, 2694.
heir with the benefit of, bound only for the value of the goods, 2695.
the legacies are reduced, 2696.
the heir who is a creditor preserves his debt, 2697.
and is allowed his expenses, 2698.
such heir should sell the movables, 2699.
heir only bound to give an account, 2700.
not bound to observe the order of creditors in paying the debts, 2701.
he may pay legacies if creditors do not appear, 2702.
lands so given in payment remain subject to mortgages, 2703.
the benefit of an inventory, 3138.

JURISDICTION. Agreement between the spiritual and temporal jurisdiction, p. 45.

Digitized by Google

KINDRED. The ties of kindred and affinity, and their principles, p. 15.
(See CONSANGUINITY.)

KINGS, the protectors and defenders of the laws of the church, p. 48.

LAW. The first principles of all laws unknown to the pagans, p. 1.
the certainty of these principles, p. 2.
the knowledge of the first principles of laws attained by the knowledge of man, p. 3.
the first law of man, p. 6.
the second law of man obliges to unity, p. 6.
society founded on these two laws, p. 7.
relation of the state of man in this life to the exercise of the first law, p. 8.
to the exercise of the second law, p. 9.
laws of spiritual powers which relate to temporal things, p. 46.
of temporal powers concerning spiritual things, p. 46.
the nature and spirit of laws, and their kinds, p. 49.
two sorts of laws, immutable and arbitrary, p. 49.
examples of, their nature and origin, pp. 50, 51.
the difficulties arising from the immutable laws, the first cause of arbitrary laws, p. 51.
the immutable laws implied in these sorts of arbitrary laws, p. 54.
the second cause of arbitrary laws, matters of which the use has been invented, p. 54.
natural matters have arbitrary laws and invented matters have natural laws, p. 55.
few arbitrary laws in natural matters, p. 56.
many in arbitrary matters, p. 56.
of the Roman Law, the Canon Law, the Ordinances, and the Customs, p. 56.
the particular rules of the law of nature are nowhere collected but in the body of the Roman law, p. 57.
the justice and authority of all laws: difference between that of natural and arbitrary laws, p. 58.
the distinction of immutable laws: of those which admit or not of dispensation and exception, p. 59.
the importance of distinguishing the characters and spirit of the laws, p. 61.
examples of the distinction between immutable and arbitrary laws, p. 62.
the danger of violating natural law under pretext of preferring it to an arbitrary law, p. 64.
discernment of the spirit of the laws necessary for deciding questions, p. 66.
the necessity of studying the laws of nature, p. 66.
natural laws regulate what is past, and what is to come, though never promulgated, p. 82.
arbitrary laws regulate only the time to come, after publication, p. 82.
natural laws which seem sometimes as if abolished, p. 70.
different effects of some natural laws, p. 71.
Divine and Human, Natural and Positive, p. 72.
distinction of the laws of religion and those of policy, p. 73.
the Law of Nations, p. 76.
the Public Law, p. 77.
Private Law, p. 77.
the Civil Law, p. 77.
division of laws in the Roman law, p. 78.
divers ways of dividing laws under different views, p. 78.

Digitized by Google

LAW.

written law: Customs, p. 79.
where new laws have relation to old ones they should be interpreted by each other, p. 82.
in force to be presumed useful and just, p. 83.
customs and usages the interpreters of, p. 83.
laws and customs abolished by disuse, p. 83.
the laws and customs of neighbouring places serve as examples and rules, p. 84.
laws to be judged by their whole tenor, p. 84.
the intent of, to be followed rather than the terms, p. 84.
defect of expression, how supplied, p. 85.
laws which are interpreted favorably, p. 85.
laws which are strictly interpreted, p. 85.
the rigor of the law; equity, p. 85.
the divers uses of laws, p. 86.
they restrain what is indirectly against their intention, p. 87.
not made for one single case, p. 87.
extent of, according to their design, p. 88.
importance of distinguishing three sorts of laws, p. 89.
a general idea of the subject-matters of all laws, p. 92.
remarks on the ordinances, customs, the Roman law, and the Canon law, p. 93.
all matters of law have a natural order, p. 96.
the foundation of this order, p. 96.
remarks on the matters of the public law, p. 103.
what we understand by law and rule, 5.
these terms used without distinction, 6.
the science of, consists in knowledge of the written rules, 7.
rules of, defined, 8.
two sorts of laws or rules, 9.
which are the rules of the law of nature, 10.
which are the arbitrary rules, 11.
the rules of, also divided into three kinds, 12.
two ways of abusing the rules, 13.
exceptions are rules, 14.
exceptions are of two kinds, 15.
laws ought to be known, 16.
arbitrary rules of two sorts, written laws and customs, 17.
whence customs derive their authority, 18.
of nature determines what is past and what is to come, 19.
arbitrary law determines only what is to come, 20.
the effect of new laws as to what is past, 21, 22.
when new laws begin to have their effect, 23.
abolished or changed in two ways, 24.
wherein the use and authority of, consist, 25.
punish what is done in fraud of them, 26.
and annul or restrain what is done contrary to their prohibition, 27.
general, and not made for particular persons or cases, 28.
and comprehend all cases to which their intention may serve as a rule, 29.
equity is the universal law, 30.
of the use and interpretation of rules, 31, 34.
to be interpreted by equity, 35.
the intention of the lawgiver, in arbitrary laws, regulates the use of this equity, 36, 37.

Digitized by Google

LAW.
several views necessary for the interpretation of, 38.
two kinds of interpretations, 39.
the spirit of laws, 40.
natural laws misapplied when consequences follow contrary to equity, 41.
arbitrary laws misapplied when consequences are opposed to the intention of the lawgiver, 42.
the rigor of the law, 43.
mitigated by equity, 44.
when to follow equity, and when the rigor of the law, 45, 46.
the rigor of, when it must be followed, has its equity, 47.
the interpretation of obscurities and ambiguities in, 48.
to be interpreted by its motives and whole tenor, 49.
how an omission may be supplied, 50.
when we must go to the prince for interpretation of, 51.
must be followed, though its motive be unknown, 52.
laws which are liberally interpreted, 53.
what laws to be construed strictly, 54.
certain laws not to be extended beyond what their words expressly mention, 55.
grants of princes to be interpreted favorably, 56.
laws to be interpreted by one another, 57.
and by ancient usage and practice, 58.
when to be interpreted by customs, 59.
extend to every thing essential to their intention, 60.
of the extension of laws which permit any thing, 61.
of the extension of laws which forbid any thing, 62.
tacit prohibitions, 64.
how rights are acquired by the effect of, 65.
how one may renounce such rights, 66.
has effect, independently of the will of particular persons, 67.
danger of misapplying the rules of, 68.

LAWSUITS, p. 32.

LEASE, 453.
annulled by a sale, 486.
may be dissolved by legatee, 487.
from one having only a usufruct, 491.
of what estates they are made, 494.

LEASE, PERPETUAL, or emphyteutical, 544.
definition of, 545.
may be made of all lands, 546.
the difference between perpetual and other leases, 547.
perpetuity of the emphyteutical lease, 548.
perpetual lease shares the right of property, 549.
property direct and useful, 550.
mutual engagements resulting from perpetual lease, 551.
perpetual tenant bears losses by accident, 552.
he cannot commit waste, 553.
may be ejected for non-payment of rent, 554.
if ejected, is not reimbursed for improvements, 555.

LEASES OF FARMS, 493.
defined, 494.
what other things may be farmed out, 495.
difference between leases of houses and farms, 497.

Digitized by Google

LEASES OF FARMS.
the effect of the uncertainty of events, 498.
accidents of two sorts, 499.
renewing of, 500.
effects of a tacit renewal of, 501.
how the farmer should use the lands, 503.
the farmer who shares the fruits with the owner bears the loss of all accidents, 505.
the effect of accidents in a lease for only one year, 506.
where an inconsiderable loss happens without an extraordinary accident, 507.
where the loss is considerable, 508.
compensation of good and bad years, 509.
the loss of seed and tillage falls on farmer, 510.
the farmer cannot quit his farm, 511.
what the proprietor is bound to furnish to the farmer, 512.
movables and tools given to the farmer, 513.
of repairs made by the farmer, 514.
the expenses he has been at, the lease being interrupted, 515.
improvements made by the farmer, 516.
if the farmer is molested by the proprietor, 517.
of the trouble which the proprietor could not prevent, 518.
LEGACY, validity of, where the executor renounces, 3145.
which has relation to two things, how interpreted, 3166, 3177.
shall take effect, though the testator mistake as to the name, 3168.
words necessary to give meaning to, may be supplied, 3169.
obscurity in, how cured, 3170, 3171.
of a house includes the garden which pertains to it, 3172.
that which is evident from the terms of, is not interpreted, 3173.
the terms to be taken in the sense given by common usage, 3174.
and regard to be given to the destination of the testator, 3174, 3175.
of a second testament to be paid by the executor instituted by the first, 3184.
but not the legacies of the first, if different from those of the first, 3185.
is valid independently of the motive explained by the testator, 3206.
with a term of uncertain time, is conditional, 3223, 3224.
due at the time of legatee's death, 3225.
for a work is to be regulated according to the estate of the testator, 3257.
given on condition that the executor approve thereof, is not conditional, 3261.
may begin to be due, or cease, on a certain day, 2997, note *a*.
conditional, security for payment of, 3236.
how distinguished from testament, 3450.
the rules of testaments apply to, 3488.
the name of, comprehends particular fiduciary bequests, 3489.
rules of, to apply to donations and fiduciary bequests, 3492.
with a penalty affixed, allowed by Justinian, 3493.
definition of, 3495.
particular fiduciary bequests and donations because of death, of the same nature, 3497.
wherein consists the validity of these dispositions, 3498.
their nature and formalities, 3499.
what essential to their validity, 3500.
may be charged on executors and legatees, 3501.
left to several, to be divided among them, 3502.
due only after all debts are paid, 3504.
who may give, 3506.

Digitized by Google

LEGACY.

the incapacity of giving, 3507.
who may receive, 3508.
who unworthy of, 3509.
particular rules for determining who may receive, 3511.
of alimony may be received by all persons, 3512.
may be left to executors, if more than one, 3513.
to two executors, how divided, 3514.
not to be taken from heir who renounces the inheritance, 3515.
may be left to a person unknown, if sufficiently described, 3516.
may be left to one person among many, 3517.
and to towns or corporations duly established, 3518.
legacies distinguished into two sorts, 3519.
every thing in commerce may be devised, 3520.
but not things public or consecrated, 3521.
a thing belonging to another may be bequeathed, 3522, 3523.
rules of the Roman law concerning such bequests, 3524.
valid where testator bequeaths what he knew was not his, 3525.
but null unless proved that he knew it to be so, 3526.
exception in favor of certain persons, 3527.
of a thing belonging to heir or executor, valid, 3528.
null where thing bequeathed belongs to legatee, 3529.
and where legatee has already acquired it by a lucrative title, 3530.
of same thing to same legatee by two testaments, 3531
two legacies of the same sum, not the same thing, 3532.
of land or tenement reduced to the estate of the testator in the premises, 3533.
to a debtor of his debt, 3534, 3535.
of a debt due from two, acquits only the legatee, 3536.
of respite of payment discharges debtor from interest on it, 3537.
by a son to his father of discharge from giving an account of his guardianship of him, 3538, 3539.
of a thing pawned, 3541.
such thing to be redeemed by the heir, 3542.
of things not yet in being, 3543.
of a certain quantity of corn of such a crop, 3544.
of movables, what it comprehends, 3545.
of a specified thing void, if it be not found, 3546.
of a thing indetermined, how understood, 3547.
of a work to be done, 3548.
of a house or land void, if testator had none, 3549.
accessories to, defined, 3550.
two sorts of, 3551.
accessories, how to be distinguished, 3552.
accessories to a house, 3553.
the edifice and augmentations accessory to lands, 3554.
also lands purchased by testator after devise, 3555.
when such additions are not accessories, 3556.
augmentations having the effect to revoke, 3557.
of land includes service necessary to the enjoyment of the same, from other grounds of the inheritance, 3558.
reciprocal service between legatees of adjoining houses, an accessory to, 3559.
legatee shall have the use of, as bequeathed, 3560.
of a house, what are accessories to, 3561.

Digitized by Google

LEGACY.
of a country-house, what its accessories, 3562.
of a house with all its movables, 3563.
what not comprehended thereby, 3564.
accessories to, judged by their use, and not their value, 3565.
of a usufruct, 3567.
of a usufruct to two persons, the property thereof to the survivor, 3568.
of the usufruct of movables, 3569.
of a portion of fruits, subsists after land is sold, 3570.
of a usufruct with a charge thereon, if declined by legatee, passes with the charge to the heir, 3571.
of a usufruct and an annual legacy, their differences, 3572 – 3574.
annual, accrues when the year begins, 3575.
payable in several years, not an annual one, 3576.
of a charity, whether or not perpetual, 3577.
of alimony lasts for life, 3578.
of alimony until puberty, 3579.
of alimony comprehends clothing and lodging, 3580.
and is regulated by circumstances of testator and legatee, 3581.
and by the amount last given by testator in his lifetime, 3582.
of alimony due though legatee has been otherwise supported, 3583.
legacies of alimony are favorable, 3584.
legacies to pious uses, defined, 3585.
distinguished from other legacies by the motives, 3586.
difference between such and legacies for the public good, 3587.
when not destined for any particular use, how applied, 3588.
of the execution of legacies to pious uses, 3589.
who may demand the sum so bequeathed, 3590.
how such legacies shall be applied if they cannot take effect according to the will, 3591.
privilege of legacies to pious uses, 3592.
of one of several things at the choice of the executor or of the legatee, 3592.
per vindicationem and *per damnationem*, distinction between, by the Roman law, 3593.
no such distinction in the civil law, 3594.
of one of several things, may be in three ways, 3595.
1. where no mention is made who shall have the choice, 3596.
2. where the expression used determines the choice, 3597.
3. where left to the choice of the executor, 3598.
left to the choice of legatee, 3599.
but neither heir nor legatee shall abuse this liberty of election, 3599, note *i*.
left to the choice of a third person, 3600.
the delay of a year not according to our usage, 3601.
he who has the choice ought not to delay it, 3601.
of fraudulent delay after citation, 3601, note *m*.
penalty for such delay of executor, 3602.
penalty when the legatee delays, 3603.
if only one thing whereof the choice was bequeathed remain, it belongs to the legatee, 3604.
if, after choice, the thing chosen perish, the loss shall fall on the legatee, 3605.
the choice once made, may not be changed, 3606.
choice cannot be made till the executor has accepted the succession, 3607.
legatee of remainder after the choice of another, has all if no choice be made, 3608.
the right of election passes to the heir or executor of legatee, 3609.

Digitized by Google

LEGACY.

the fruits and interest of, 3610.
the fruits of lands, 3611.
three sorts of things may be bequeathed, 3612.
if testator have regulated the fruits of the legacy, his will shall serve as a rule, 3613.
the fruits of, due only from the time they are demanded, 3614, 3615.
except in case of fraud of executor, 3614, note *d*.
exception by Justinian in favor of legacies to pious uses, 3616.
different interpretations of this rule, 3617.
of money, interest on, due from time of demand, 3619.
of profits which are neither fruits nor interest, 3620.
to pious uses, the fruits and interest of, due without demand, and the executor accountable for them, 3621.
such rule not to be rigidly enforced, 3622.
how legatee acquires his right to, 3623.
right to, acquired at the instant of testator's death, 3624.
is pure and simple, or conditional, 3625.
pure and simple, acquired at the moment of testator's death, 3626.
conditional also, if condition has been fulfilled, 3627.
otherwise, does not vest till condition comes to pass, 3628.
three sorts of, as to the effect of legatee's right, 3629.
difference between time when legacy may be acquired, and time when it may be demanded, 3630.
transmitted, or not, to heirs of legatee, according to the condition in which his right was at death, 3631.
in two cases there can be no transmission of, 3632.
conditional, not transmitted, if condition be not fulfilled, 3633.
pure and simple, transmitted though legatee die before the term of payment, 3634.
what legacies truly conditional, 3635.
transmitted to posthumous child of legatee, 3636.
not annulled by indecent or impossible conditions, 3637.
left to an uncertain time, conditional and not transmitted, 3638 – 3640.
is transmitted though legatee die before making his election, 3641.
annexed to persons, not transmitted, 3642.
an annual, contains several legacies, 3643.
annexed to the person of legatee, example of, 3644
vests in legatee, though executor's right is in suspense, 3645.
example of one whose effect is suspended and is transmitted, 3646.
with which the person who is substituted executor is charged, is acquired by testator's death, 3648.
may not be taken from executor without his consent, 3649.
should be delivered by the executor or the heir, 3650.
without term or condition due from the acceptance of the succession, 3651.
to be delivered in the place where it was at testator's death, 3652.
of a horse or other animal that has run away, 3653.
security for the payment of, 3655.
parents charged with fiduciary bequest for their children should give security, 3656.
the use of this rule depends on circumstances, 3656, note *h*.
an executor charged with, may recover such charges as he has been at on account of it, 3657.
taxes and other charges on, to be acquitted by executor, 3658.
if the thing perish after delay of executor to deliver it, he is accountable for it, 3659.

Digitized by Google

LEGACY.
other losses fall on legatee, 3660.
bequeathed indefinitely must be warranted by executor, 3661.
warranty of a thing not particularly named, 3662.
validity of, voluntarily paid by executor, cannot afterwards be disputed by him, 3664.
nor of one paid before condition accomplished, 3665.
except where a third person is interested, 3666.
may be either null at first, or may become so, 3667.
may be revoked, diminished, or transferred, 3668.
null in the beginning, remains null, 3669 - 3671.
the Catonian rule of the Roman law, 3669, note *l*.
exception in case of a conditional legacy, 3672.
null if legatee die before testator, or before the testament was made, 3673.
such nullity does not annul charge in favor of a third person, 3674.
distinction made by the Roman law, 3675.
originally valid may become null by change, 3676.
qualifications of this rule, 3677.
divers ways of revoking, 3678.
of a debt revoked by payment, 3679.
revoked by alienation of the thing bequeathed, 3680, 3681.
case of sale by necessity, 3682.
annulled by donation of the thing bequeathed, 3684.
revoked though such donation be null, 3684.
not revoked by the pawning of the thing, 3685.
nor by such changes as reform the thing, 3686.
of a flock, subsists, though only one remain, 3687.
revoked by a change of nature of the thing, 3688.
annulled, if only accessories of the thing remain, 3689.
particular expressions derogate from general, 3690.
diminished by diminution of thing bequeathed, 3692.
and by separating a part of land devised to join it to another, 3693.
transferred to another, null as to first legatee, 3694.
revocation of one of two legacies, which does not annul either, as intended, 3695.
may be annulled if legatee render himself unworthy, 3696.
diminished by the Falcidian portion without the deed of the testator, 3697.
(Sse TESTAMENT, TRANSMISSION.)
LEGAL SUCCESSIONS, 2787 - 2790.
LEGATEE, more favored than the executor, 3192 - 3198.
distinguished from executor by being particular successor, 3485.
and because appointed, not only by testament, but by codicil, 3486.
universal, 3487.
may be charged with legacies to others, 3501.
of several legacies may not accept those only that are without any charge, 3503.
whether or not one who receives his legacy shall lose his right to the inheritance, 3510.
not receiving his legacy liable for costs and damages, 3654.
may apply to court of justice if in danger of losing his legacy through the executor, 3655, note *g*.
of lands, shall have their value if evicted, 3663.
LEGITIME, or the legal portion, 3386.
what by the ancient Roman law, 3387.
reasons for this proportion, 3388.
augmented by Justinian, 3389.

Digitized by Google

LEGITIME.
distinctions made by the customs of France, 3390.
reasons for these different rules, 3391.
the rules relating to, respect either the persons to whom portions are due, or the quality of the portions, 3392.
daughters renouncing their inheritance for a marriage portion, excepted, 3393.
of mothers out of the successions of their children, 3394.
defined, 3395.
due to descendants and ascendants, 3396.
to all children capable of inheriting, 3397.
of children of first degree regulated by their number, 3398.
of children of remoter degrees, by the stocks of whom they are descended, 3399.
due only to the nearest ascendants, 3400.
where there are many ascendants of the same degeee, on both sides, 3401.
brothers have no right to, 3402.
the quota of, how regulated, 3403.
of children regulated according to their number, 3404.
if there be four, or less, they have a third of the estate, 3405.
if five, or more, a moiety thereof, 3406.
those coming by representation have only one share among them, 3407.
of ascendants is a third of the estate, 3408, 3409.
where testator leaves one ascendant and brothers of whole blood, two opinions exist, 3410.
by one, is a third of the share that ascendant would have had, if there had been no testament, 3411.
by the other, is, in all cases, a third of inheritance, 3412.
consequences of the law of Justinian concerning, 3413, 3414.
for ascendants the same as for children, when they have a third, by that law, 3415.
estimated according to value of the whole estate, 3416.
demand of, in effect a demand for partition, 3417.
to be taken also out of goods alienated in lifetime, 3418.
and from donations of children renouncing the inheritance, 3419.
all goods liable to be brought into hotch-pot, in case of partition, contribute to, 3420.
revenues of, due from the moment the succession is open, 3421.
not subject to change, delay, or condition, 3422.
of children of different marriages not distinguished, 3423.
LENDER of things to be restored in specie cannot take back the thing till after the use, 588.
how in the case of a precarious loan, 589.
of defects of the thing loaned, 590.
of expenses laid out on the thing borrowed, 591.
of thing to be restored in kind, must be the owner of the thing, 659.
or he conveys no property to the borrower, 660.
must engage that the thing be fit for its use, 661.
must not exact more than what he has lent, 662.
payment of part of a debt which is not controverted, 663.
(See LOAN.)
LESSEE, the engagements of, 466.
how the thing hired should be used, 467.
misusing the thing hired, 468.
what care he should take of it, 469.
accountable for the acts of his servants, 470.

Digitized by Google

LESSEE.
of damage done by an enemy of, 471.
who quits possession for fear of some danger, 472.
who leaves the premises leased, 473.
repairs, 474.
who absconds, 475.
bound to restore the thing and pay the rent, 476.
the movables of, and fruits, mortgaged for the rent, 477.
of house may be turned out, if owner should want it, 478.
and likewise, if he wish to repair the house, 479.
and for non-payment of the rent, 480.
and if he make a bad use of the house, 481.
liable for interest on rent from the time of demand, 482.
(See Lease, Letting and Hiring.)
LESSOR, is bound to procure free enjoyment of the thing leased to the lessee, 483.
liable for damages in case lessee is evicted, 484.
but not when disseized by a superior force, 485.
liable for damages if house become inconvenient, 488.
bound to reimburse lessee charges he has been at to preserve the thing hired, 489.
expressing himself obscurely shall have his words interpreted against him, 492.
(See Lease, Lessee, Letting and Hiring.)
LETTING AND HIRING, 451 - 454.
defined, 456.
who is lessor and who lessee, 457.
accomplished by bare consent, 458.
what things may be let, 459.
if a thing that is not one's own, 461.
the rent may be in money or a part of the fruits, 462.
the lowness of rent does not vacate leases, 463.
underletting, 464.
leases pass to heirs or executors, 465.
engagements of the lessee, 466 - 482.
engagements of the lessor, 483 - 492.
of the defects of the thing hired, 490.
LOAN of things to be restored in specie, 556.
of precarious loans, 557.
the distinction of little consequence in the civil law, 558.
of things to be restored in specie, defined, 559.
precarious loan defined, 560.
does not oblige but by delivery of the thing, 561.
the lender remains proprietor of the thing, 562.
both movables and immovables may be lent, 563.
of things consumed in the using, 564.
of things belonging to another, 565.
the lender regulates the manner and time of the use, 566.
limited to the natural and ordinary use of the thing, 567.
the time of, limited to the continuance of the use for which the thing is lent, 568.
of restitution of the thing, 569.
may be for the convenience of either party, or both, 570.
precarious loan ended by the lender's death, 571.
who may borrow or lend. 572.
the engagements of, pass to heirs and executors, 573.
of things consumed in the using, 593.

Digitized by Google

LOAN.
two characters of things that are lent, 594.
of the word *Loan*, 598.
how distinguished from sale, 600.
from exchange, 601.
from the loan of things to be restored in specie, 602.
from the contract of letting and hiring, 603.
what it has in common with these contracts, 604.
of things to be restored in kind, defined, 647, 648.
creditor and debtor defined, 649.
what may be lent in this way, 650.
delivery necessary to form the engagement, 651.
other obligations converted into loan, 652.
the obligation of, cannot exceed the thing lent, 653.
of the change of the value of money, 654.
of the change of value of provisions, 655.
a loan in appearance, which is a sale, 656.
of a thing to be sold in order to lend the price of it, 657.
money deposited in order to be lent, 658.
of money to sons under the paternal jurisdiction forbidden, 672.
such loan may be made to a son emancipated, 677.
if the obligation has been acquitted by the son, or approved by the father, it is valid, 678.
(See BORROWER AND LENDER.)
LORDS OF MANORS, heirs to those dying within their manors, without heirs, 2672, note.

MAN, his nature, and religion, p. 6.
MANDATES, signification of, 1121.
in the Roman law, 1122.
MARRIAGE, the divine institution of, p. 12.
two engagements in, 823.
1. the engagement of the persons, 824.
2. the covenants concerning the goods, 825.
tacit condition in contracts of, 830.
all lawful pacts may be made in a contract of, 846.
of the dispositions of those marrying a second time, 3424.
distinctions made by the laws of church and state in respect to second marriages, 3424.
reasons for such distinctions, 3425.
taken from the Roman law, 3426.
punishment of second marriages, 3428.
abolished by our law, 3429.
two sorts of rules as to second marriages, 3430.
three sorts of goods belong to persons marrying a second time, 3431.
two sorts of goods which husband and wife may have from one another, 3432.
goods which husband and wife acquire from each other by marriage, 3433.
goods coming from common children, 3434.
goods coming by other titles, three several sorts of, 3435.
goods subject to different rules, 3436.
in case of second marriage, children shall have the goods which come from their other parent to the one marrying again, 3437.
the parent having only the use of such goods during life, 3438.

Digitized by Google

MARRIAGE.
such property accrues to children by equal portions, 3439.
no distinction made as to origin of goods in which husband or wife have their gains, 3440.
such gains accrue to children though not heirs, 3441.
if a child die intestate, the mother has no right in such goods, but they go to the other children, 3442.
this rule subsequently extended to the father, 3443.
bequest to second husband or wife, limited to portion left to the child having the least share, 3444.
if such rule be evaded, disposition is reduced, 3445.
goods to be computed as found at the time of death, 3446.
such diminution goes to all the children equally, 3447.
children of divers marriages take each the goods the parent had by that marriage from which they descend, 3448.
surviving parent having a usufruct left by the deceased one, does not lose it on marrying again, unless left on that condition, 3449.
MARRIED WOMEN, incapable, by some customs, of making a will, 3049.
MASTERS OF SHIPS, the engagements of, 1180.
answerable for the acts of their servants, 1181.
of persons undertaking the carriage of goods, 1182.
the care to which they are bound, 1183.
the engagements of, by their agents, 1184.
MINES, right of the king to the product of, 2151, note.
MINOR, his engagements to the tutor, 1357.
ought to allow all reasonable expenses, 1358.
stewards, 1359.
of alimony to parents, brothers, and sisters of the minor, 1360.
his estate mortgaged to the tutor, 1362.
the immovables of, cannot be alienated without necessity, 2395.
formalities to be observed in the sale of, 2396.
of sale by the tutor without observing these formalities, 2397.
(See RESTITUTION, TUTOR.)
MINORITY, ends at twenty-five, 2391.
dispensation of age, 2393.
MONKS, do not succeed, 2503.
incapacity of, ceases by the nullity of their vows, 2512.
effect of the incapacity of, 2538.
MORTGAGE, a consequence of engagements, 1651.
origin of, 1652.
difference between the Roman and civil laws as to movables in relation to, 1654-1656.
signification of the words *pawn* and *mortgage*, 1657.
is for the security of obligations, 1658.
for a conditional debt, 1659.
for a future loan, of no effect, 1660.
on an estate in expectation, 1661.
whether it extend to the whole estate, or is limited to a part thereof, 1662.
when a debtor makes a new purchase, having mortgaged *all* his estate, 1662, note *f*.
accessories of, 1663.
living creatures cannot be mortgaged, 1663, note *m*.
the proceeds of the thing mortgaged, which is separated from it, not subject to, 1664.

Digitized by Google

MORTGAGE.
of buildings erected on lands mortgaged, 1665.
when a house mortgaged is burned and rebuilt by the debtor, 1666.
changes of the land do not extinguish, 1667.
of lands purchased from the fruits of land mortgaged, 1668.
when such lands are exchanged, 1668, note *r*.
of one estate to two creditors at the same time, 1669.
in such case the one in possession is preferred, 1670.
of the undivided portion of one of several coheirs, 1671.
of creditor on lands of a deceased debtor, extends to every portion of such lands for the whole debt, 1672.
all the coheirs of a creditor deceased have their security on what was mortgaged to such creditor, 1673.
is undivided, 1674.
what cannot be sold cannot be mortgaged, 1675.
one may mortgage land not his own, 1676.
cozenage or stellionate, 1677.
tutor or guardian may mortgage, 1678.
of things incorporeal, 1679.
rents and obligations, how subject to, 1679, note.
things that cannot be mortgaged, 1680 - 1683.
antichresis, 1684.
the creditor who has a right to the issues and profits of lands mortgaged may farm them out, 1685.
one may mortgage his estate for the debt of another, 1688.
approbation of the persons whose property has been mortgaged by another, 1689.
conventional and legal, 1690, 1697.
conventional, how established, 1691.
is either general or special, 1692.
special, is of two sorts, 1693.
either simple or privileged, 1694.
acquired in three ways, 1695.
express or tacit, 1696.
the first effect of, is the right to sell the pledge, 1699.
second, the right to follow the thing mortgaged, 1700.
third, the preference of the first creditor, 1701.
fourth, security for all the consequences of the debt, 1702.
these effects follow, whether the mortgage be general or special, 1703.
discussion in favor of a third possessor, 1704.
general and special, as respects discussion, 1704, note.
how a subsequent creditor may secure his mortgage against prior creditors, 1705.
sale of the thing mortgaged, 1707.
stipulation that the pledge shall belong to the creditor, in default of payment, 1709.
where several things are mortgaged for the same debt, 1710.
whether debtor may release the thing mortgaged, by giving another thing in its place, or by offering bail, 1711.
where several things are engaged for the same debt, whether debtor can release one, 1712.
moneys from the fruits of the thing mortgaged to be applied first to payment of interest, then of the debt, 1713.
effect of, before the term of payment, 1714.
for a conditional debt, 1715.
of a second creditor, its effect on a thing engaged to another, 1716.

Digitized by Google

MORTGAGE.
of the expenses the creditor has laid out upon the thing mortgaged, 1717.
improvements of the pledge made by the creditor, 1718.
creditor does not lose his debt if evicted from the premises, 1719.
how the creditor is put in possession of his pledge, 1721.
debtor cannot take back the pledge without consent of creditor, 1722.
limited to the right which the debtor had, 1723.
effect of, depends on the effect of obligation, 1724.
engagement of the creditor to take care of the pledge, 1725.
if it perish by accident, 1726.
if creditor use the pawn, 1727.
if creditor receive from the sale of pledge more than the debt comes to, 1728.
if he enjoy the fruits in lieu of interest, 1729.
if the pledge receive augmentation, 1730.
the creditor cannot acquire property in the pledge by prescription, 1731.
of the crown, 1755, 1756.
is extinguished by payment, 1789.
by novation, 1790.
by the oath of the debtor and by judgment, 1791.
and by every thing that is instead of payment, 1792.
by consigning the debt, if creditor refuse to receive payment, 1793.
revives if the payment does not subsist, 1794.
becomes extinct if the pledge ceases to be in commerce, 1795.
or if it perish, 1796.
annulled, if the debt is extinguished by prescription, 1797.
lost to creditor, if debtor loses his right to the pledge, 1798.
redhibition of the thing mortgaged, 1799.
creditor consenting to alienation of the pledge loses his mortgage, 1800.
where the creditor consents that his pledge be engaged to another, 1801.
revives, if the alienation does not take effect, 1802.
how we should understand the creditor's consent to the alienation, 1803.
(See SEPARATION, DISCUSSION, NOVATION.)

NOVATION, 2304.
defined, 2305.
never presumed, but must appear, 2306.
changes in a former obligation do not innovate it, 2307.
of several debts into one, 2308.
annuls mortgages and other accessories of the obligation, 2309.
who may innovate, 2310 – 2313.
by a third person, 2314.
all debts may be innovated, 2315.
(See DELEGATION.)

OATH, the uses of, 2096 – 2099.
defined, 2100.
not taken unless directed, 2101.
how a matter is referred to the oath of the party, 2102.
the judge may order the oath without the request of the party, 2103.
if the party refuses to swear, the fact will be held as confessed, 2104.
the fact may be referred back to the oath of the other party, 2105.
where the party, being willing, is excused from swearing, 2106.
reference to the adversary's oath may be revoked, 2107.

Digitized by Google

OATH.
these cases depend on the discretion of the judge, 2108.
decisive, where a matter is referred to the oath of the party, 2109.
and extinguishes the action, 2110.
where writings proving the contrary, are subsequently found, 2111.
this oath used only in civil matters, 2112.
the effect of, with respect to persons interested with the parties, 2113.
neither benefits nor hurts third persons, 2114.
only parties interested, or those representing them, can refer a matter in dispute to the oath of the party, 2115.
OWNERS IN COMMON, 1479.
may be so in two ways, 1480.
donees or legatees of the same thing, 1483.
coheirs, coexecutors, 1484.
heir or executor of a partner, 1485.
purchasers of shares undivided, 1486.
engagements of, 1488.
1. care of the thing, 1489.
2. communication of profits, 1490.
3. reimbursement of expenses and interest, 1491.
of damage to the thing, 1492.
no proprietor can make any change in the thing without consent of the others, 1493.
penalty for so doing, 1494.
if they suffer such change, 1495.
he shall restore things as they were, 1496.
he who has consented to the change cannot retract, 1497.
engagement to divide, 1498.
if the thing cannot be divided, 1499.
charge on one of lands that are divided, 1500.
wrong done in the partition, 1501.
warranty, 1502.
of the deeds and writings belonging to, 1503.
of things not lawful to be divided, 1504.
things acquired by evil means, 1505.
OWNERS OF ADJOINING LANDS, 1506.
difference between houses and lands, 1507.
distance from the confines for building, &c., 1508.
of partition walls, 1509.
of regulating the confines, 1512.
who may sue for regulation, 1513.
when to be discussed, 1514.
must not plant or build within a certain distance of the confines, 1515.
of encroachment, 1516.
if there are no landmarks, 1517.
of him who removes landmarks, 1518.
power of those appointed to settle confines, 1519.
lands separated by a highway, 1520.
lands with a brook running through, 1521.

PARAPHERNAL GOODS, what are, 884, 885.
difference between dowry and, 886.
different usages and customs concerning, 887, 888.
defined, 889.

Digitized by Google

PARAPHERNAL GOODS.
the wife may dispose of, 890.
in what manner she may enjoy, 891.
if they consist in rents, debts, or movables, 892.
husband's care of, when delivered to him, 893.
how distinguished from goods of the dowry, 894.
what the wife is possessed of without an apparent title belongs to the husband, 895.
PARTITION, 2740.
defined, 2744.
may be considered as an exchange or sale, 2745.
all the goods and charges of the inheritance are divided, 2747, 2748.
warranty for evictions and for charges, 2749.
coparceners are equal in condition, 2750.
if the equality cannot be exact, 2751.
what deceased owed to the heir, a part of the charges, 2752.
goods which cannot be divided sold at public auction, 2753.
if an heir become a purchaser, 2755.
the deeds of the succession, 2756.
who is plaintiff in a demand of, 2757.
a new partition, 2758.
wrong done in partition, 2759.
three ways of making, 2760.
three sorts of goods of a deceased person, 2762.
when goods bequeathed or substituted enter into, 2763.
particular legacies to heirs do not enter into, 2764.
goods to be restored do not enter into, 2765.
nor things of ill use, as books of magic, 2766.
the revenues of each heir enter into, 2767.
expenses to be deducted therefrom, 2768.
the heir recovers charges he has been at in cultivating the lands, 2769.
heir recovers necessary and useful expenses, 2770.
three kinds of expenses, 2771 – 2775.
damages against heir who delays partition, 2776.
of an estate mortgaged, 1671, note *x*.
(See HEIRS.)
PARTNERSHIP, its origin and use, 737 – 741.
defined, 742.
of the shares of partners in the common property, 743.
of their shares in the gain or loss, 744 – 746.
the difference of contributions and of portions, 747.
the shares may be equal, though the contributions be unequal, 748.
of inequality in the share of loss and gain, 749.
one partner may be discharged of all loss, 750.
fraudulent, is unlawful, 751.
unlawful partnerships, 752.
differs from other contracts in the extent of the engagements, 753.
can be contracted only by mutual consent, 754.
the difference between holding of things in common and partnership, 755.
heir or executor of a partner, not a partner, 756.
even if so stipulated in the contract, 757.
a partner of one, not a partner of the others, 758.
may be contracted without writing, 759.
persons who buy a thing together not partners, 760.

Digitized by Google

PARTNERSHIP.
partners may make all lawful pacts, 761.
pacts concerning the duration of, 762.
penal clauses, 763.
pacts regulating the shares, 764.
of gifts under color of partnership, 765.
either general or particular, 766.
to what profits it extends, 767.
of profits does not extend to inheritances, 768.
of all manner of estate and goods excludes nothing, 769.
even a personal reparation of damage to one partner, 770.
of the personal condemnation of one partner, 771.
unlawful profits do not enter into, 772.
limited to the things put into the community, 773.
when the contract is obscure, how interpreted, 774.
the debts of the community and of the partners, 775.
what a partner may or may not take out of the common stock, 776.
of the extraordinary expenses of a partner, 777.
unlawful expenses of a partner, 778.
requires unity and fidelity among the partners, 779.
of the care and vigilance of partners, 780.
partners responsible for deceit and gross faults, 781.
accidents, 782.
if a partner appropriate to himself, or convert to his own use, partnership property, 783.
use of the common thing without fraud, 784.
loss or damage caused by a partner, 785.
the service which he may do, not compensated by such loss, 786.
a partner answerable for the act of the person whom he has taken into partnership for his share, 787.
loss and gain occasioned by the under-partner, 788.
the expenses of partners, 789.
the particular loss of a partner occasioned by the affairs of the community, 790.
particular gains or losses on account of the partnership, 791.
losses of the joint stock common to the partners, 792.
insolvency of a partner, 793.
one partner cannot bind the others unless empowered by them, 794.
a partner cannot take out his capital from the common stock, 795.
of him who proposes a partner and answers for him, 796.
benefit of partners as to what they owe one another, 797.
if the partner be unworthy of this benefit, 798.
this benefit cannot be claimed by sureties, heirs, or executors, 799.
one partner can do nothing in the affairs of the community against the will of the others, 800.
dissolved by the consent of partners, 801.
may be broken by each partner when he pleases, 802.
a partner is not freed from his obligations by a fraudulent renunciation of, 803.
unseasonable renunciation of, 804.
unseasonableness to be judged by the interest of the whole community, 805.
profit after the renunciation, 806.
a fraudulent and unseasonable renunciation never permitted, 807.
the renunciation of no use till known to the other partners, and meanwhile is prejudicial to the party renouncing, 808.

Digitized by Google

PARTNERSHIP.
the term being expired, every one may withdraw, 809.
dissolved by consent, 810.
ceases when the thing for which it was contracted ceases to be, 811.
where a partner becomes incapable of contributing, 812.
may be broken off by the guardian of a prodigal or a madman, 813.
dissolved by the death of a partner, 814.
the civil death of a partner, 815.
sharing of profits, losses, and charges, 816.
the rights and engagements of the heir or executor of a partner, 817.
how he shares the profits and losses, 818.
is bound to make good the engagements of the deceased, 819.
and is bound for the faults of the deceased, 820.
not interrupted by death of a partner if the death is not known, 821.
in a farm as to the heirs or executors of a partner, 822.
the act of one partner binds all, 1190.
PATERNAL POWER, 101, note *i*.
(See PERSONS.)
PAWN, defined, 1617. 1658
living creatures may be put in pawn, 1663, note *m*.
a debtor may borrow his own goods which are in pawn, 1686.
if not sufficient for payment of the debt, the debtor is accountable for the surplus, 1687.
creditor cannot take the pawn by force from the debtor, 1698.
agreement as to the sale of, 1708.
where the debtor fraudulently gives one thing for another, 1720.
(See MORTGAGE.)
PAYMENT, 2240.
defined, 2241.
how the debtor acquits himself, 2242.
applies to all engagements, 2243.
of what was not due, 2244.
one may pay before the term, 2245.
effect of, 2246.
made by another than the debtor, 2247.
frees the sureties and mortgages, 2248.
made to obtain an assignment of the debt, 2249.
sale of the pawn does not acquit the debt, except insomuch as is raised by the sale, 2250.
several acquittances of several debts made by one payment, 2251.
two obligations of the same debtor acquitted by one payment, 2252.
the effect of general or particular acquittances, 2253.
alleged by a debtor, must be proved by him, 2254.
of rent for three years last past, proves that of former years, 2255.
the creditor is not obliged to divide his payment, 2256.
divers ways of making, 2257.
delegation is payment, 2258.
an assignment of a debt without warranty is payment, 2259.
novation is payment, 2259.
the oath of the debtor is instead of, 2261.
if the thing due perishes, 2262.
if the creditor succeeds to the surety, or the surety to the creditor, 2263.
consignment of the debt when creditor refuses to receive payment, 2264.

Digitized by Google

PAYMENT.
must be of that which is due, 2265.
of work to be made by a certain man, 2266.
cession of goods makes payment in another thing than what was due, 2267.
of some other thing in lieu of money, 2268.
where the creditor is evicted from part of the land taken in payment, 2269.
must be in money not suspected, 2270.
persons jointly bound for the same debt, and sureties, may pay, 2271.
any person may pay for another, 2272.
to a common creditor by one with the money of another, 2273.
an attorney may make or receive payment, 2274.
to one who has no power to give an acquittance, 2275.
tutors and curators may make and receive payment, 2276.
to one of many creditors, each of whom has a right to the whole, 2277.
one of several coheirs can receive only his own portion, 2278.
made to one accused of crime, 2279.
the debtor of several debts may pay either, 2280.
is applied to particular debts at the choice of the debtor, 2281.
applied to that debt which it is most advantageous to the debtor to acquit, 2282.
the overplus after discharge of one debt to be applied to the others, 2283.
first to be applied to the discharge of interest, 2284.
even though the acquittance name both principal and interest, 2285.
how the proceeds of things mortgaged for several debts are to be applied, 2286.
PECULIUM, 2459, note.
PEREMPTION of instance, 2195.
PERSONS, how the civil law distinguishes persons, 69.
what is the state of persons, 70.
two sorts of qualities make the state of persons, 71.
difference between the Roman and civil law in respect to, 72.
distinctions of persons made by nature, 73.
distinction of, by the sex, 74.
difference between Roman and civil law, in regard to the state of women, 74, note *a*.
distinctions by birth and of the paternal authority, 75.
lawful issue and bastards, 76.
stillborn children, 77.
abortive children, 78.
children unborn, 79.
posthumous children, 80.
children born after the mother's death, 81.
hermaphrodites, 82.
eunuchs, 83.
madmen, 84.
deaf and dumb, 85.
madness does not change the state of, 86.
monsters, 87.
when reckoned among children, 88.
distinction of persons by age, 89.
distinctions of, by the civil law, 90.
the three chief distinctions of, by the Roman law, 91.
another distinction in France; nobility, 92.
burgesses, 93.
vassals, 94.
distinction of, in Great Britain; nobility and commoners, 95.

Digitized by Google

PERSONS.
villains, 96.
slaves, 97.
freemen, 98.
causes and consequence of slavery, 99.
manumised persons, 100.
who are fathers of a family, and who sons, 101.
of the paternal power, 101, note *i*.
emancipation does not change the natural right of the paternal power, 102.
who are masters of their own rights, 103.
who are of ripe age and who of unripe age, 104.
minors and majors, 105.
prodigals, 106.
natural-born subjects and strangers or aliens, 107.
their incapacities, in France, 107, note *g*.
of civil death, 108.
professed monks and nuns, 109.
clergymen, 110.
communities, 111.
their incapacities, 111, note *a*.
POLICY, the spirit of, p. 41.
and religion have laws in common, p. 74.
laws of temporal policy, p. 75.
POSSESSION, its use, 2117.
property and detention, difference between them, 2117.
and property should not be confounded, 2118.
distinction between that which is of right and that which is of fact, 2122.
civil and natural, 2123.
divers meanings of the word, 2124.
connection between property and, 2125, 2128.
and property acquired and preserved, the one by the other, 2126.
defined, 2127.
there cannot be two possessions of the same thing, 2129.
what may be possessed, 2130.
consisting in rights only, 2131.
is preserved without actual detention, 2132.
of living creatures, 2133.
bare detention without some right is not properly called possession, 2134.
one may possess by others, 2135.
precarious possession, 2136.
is either honest or knavish, 2137.
surreptitious possession, 2138.
possessor is presumed to be the right owner, 2139.
often separated from the actual detention, 2140.
possessors maintained in their right till a better title is proved, 2141.
of church benefices, 2141, note.
of him who has held for a year preferred where two claim to be possessors, 2142.
the question of, to be decided before that of property, 2143.
demand of, to be made within one year, 2144.
adjudged in favor of the most probable title, or the thing is sequestered, 2145.
the right to, acquired with the property, 2146.
difference between acquiring the right to possess and acquiring actual possession, 2147.

Digitized by Google

POSSESSION.
often gives the property, 2148.
in these cases, is a title for the property, 2149.
gives title to what no other has a right to, 2150.
as when one finds precious stones, &c., 2151.
acquired by hunting and fishing, 2152
by capture from an enemy, 2153.
of a thing abandoned, 2154.
of a thing lost, where the owner cannot be found, 2155.
of a treasure found, 2156.
of what nature adds to lands, belongs to the master of the ground, 2157.
of buildings acquired to the master of the ground, 2158.
and so of what is planted in the ground, 2159.
of what is added to movables, 2160.
in what it consists, 2161.
by the bare laying of hands on the thing, 2162.
which is taken only by delivery, 2163.
what delivery gives possession, 2164.
delivery and taking possession of movables, 2165.
of immovables, 2166.
of rights, 2167.
can be only of a thing certain and determined, 2168.
how preserved, 2169.
may be retained by other persons, 2170.
one may take possession by himself or by an agent, 2171.
the possessor succeeds to the right of his author, 2172.
lost by the intention of alienating or relinquishing, 2173.
things lost or thrown into the sea are not relinquished, 2174.
is lost, by adverse possession for a year, 2175.
1st effect of, is the enjoyment, 2176.
2d, in certain cases, to give the property, 2177.
3d, by long possession, to acquire the property, 2178.
4th, to make the possessor be considered as master, 2179.
effect of a fair and honest possession, 2180.
of a knavish possession, 2181.
by force, 2182.
not interrupted by force, 2234.
PRESCRIPTION, nature and use of, 2183.
abolished by the divine law, 2184.
of all sorts of rights, 2186.
reduced in France to thirty years, 2190.
and *usucapio*, difference made by the Roman law, 2193.
other prescriptions by the ordinances of France, 2194.
defined, 2196.
effect of, 2197.
when acquired, 2198.
the possessor joins to his possession that of his author, 2199.
and may sometimes join the possession of another person, 2200.
acquired only by a continued possession, 2201.
not hindered by intervals without apparent possession, 2202.
not interrupted by an interval without a possessor, 2203.
what may be prescribed, 2204.
rights and actions prescribed, 2205.

Digitized by Google

PRESCRIPTION.
applies to certain things out of commerce, 2206.
services prescribe, 2207.
acquired only by honest and fair possession, 2208.
without a title, 2209.
where the possessor has lost his title, 2210.
of him who purchases fairly and honestly of an unjust possessor, 2211.
effect of a good and bad conscience in the same case, 2212.
heir or executor answerable for the knavery of the deceased, 2213.
but not the donee or legatee, 2214.
of arrears of rent and annual duties, 2215.
may be acquired by the possession of others, 2216.
ceases when the law renders it useless, 2217.
what cannot be prescribed, 2218.
of debts due at a certain time or on a certain condition, 2219.
does not run against minors, 2220.
if a major is interested with a minor, 2221.
in what sense it does not run against absent persons, 2222.
wife's dowry cannot be prescribed during marriage, 2223.
warranty does not prescribe, 2224.
hindered by knavery of the possessor, 2225.
where several possessions are joined, a good conscience is necessary in each of them, 2226.
those who possess for others cannot prescribe, 2227.
possessor cannot change the title of his possession, 2228.
hindered by a vice in the title, 2229.
some vices annul the title, but do not hinder prescription, 2230.
interrupted by a judicial demand, 2231.
and by a demand by one of many creditors, 2232.
and by demand made against one of many debtors, 2233.
PRESUMPTIONS, are of two sorts, 1999.
some have the force of proofs, 2000.
defined, 2064.
are strong or weak, 2068.
the foundations of, 2066.
are conclusive or uncertain, 2067.
of proof by the force of, 2069.
of the regard that should be had for, 2070.
the effect of, depends on certain rules, 2071.
a fact which cannot be presumed, but must be proved, 2072-2075.
example of one that proves nothing, 2076.
in the proof of an ancient fact, 2077.
example of another kind, 2078.
respecting the secret intentions of persons, 2079.
PRETERITION, how distinguished from disherison, 3342.
of children has same effect as disherison without cause, 3249.
and also of parents, 3250.
involuntary, 3258.
(See DISHERISON.)
PRINCIPLES, of two sorts; one that may be reduced to rules; the other not, p. 80
PRIVILEGE. (See CREDITORS.)
PROCURATION, or letter of attorney, defined, 1125.
may be conditional, 1130.

Digitized by Google

PROCURATION.
may confer an indefinite or limited power, 1132.
for the affair of a third person, 1135.
to manage the affairs of a third person, its effect, 1136.
(See PROXY.)
PRODUCTION of papers, 2095.
PROOFS. What is a proof, 1995.
different sorts of, 1996.
defined, 2003.
are of two sorts, 2004.
facts which do not require proof, 2005.
he who advances a fact must prove it, 2006.
defendant must prove facts on which his defence rests, 2007.
either party may prove the contrary of facts alleged by the adversary, 2008.
both are free to allege facts and prove them, 2009.
provided such facts are relevant, 2010.
a thing adjudged is held to be true, 2011.
the effect of, depends on the prudence of the judge, 2012.
the judge should examine, 1. if they are according to form, 2013.
2. if they are conclusive, 2014.
by writing, 2015.
Public Registers, 2018.
what are written proofs, 2019.
their use, 2020.
written proofs are the strongest, 2021.
by witnesses not received against writing, 2022.
unless it be pretended that the writing is forged, 2023.
written acts have not the force of, unless in due form, 2024.
the witnesses to a written act are not admitted to prove the contrary, 2025.
written acts have effect only against the parties thereto and their representatives, 2026.
no man can make a title to himself by his own evidence, 2027.
the original of written acts must be produced, 2028.
when copies may be used, 2029.
where mention is made of one deed in another, 2030.
deeds that contradict each other, 2031.
of counter letters, 2032.
counter letters cannot prejudice third persons, 2033.
by witnesses, 2034.
difference between proof by chance witnesses and by witnesses in deeds, 2035.
examination of witnesses *ad futuram rei memoriam* abolished in France, 2036.
its inconveniencies, 2037.
general inquest about customs abolished in France, 2038.
PROXIES, mandates, and commissions, their origin and use, 1114.
various kinds of, 1115-1118.
what common to all kinds of, 1119.
the rules of, common to commissions, 1120.
defined, 1126.
how the covenant is formed, 1127.
if the proxy is present, 1128.
of the manner of giving the power, 1129.
may be general or special, 1131.
PROXIMITY, 2825. (See CONSANGUINITY.)

Digitized by Google

PROXY.
his function is gratuitous, 1133.
may be constituted for an affair in which he himself is also interested, 1134.
how engagement is formed between the proxy and him who appointed him, 1138.
expenses laid out by, 1139.
if he have laid out more than the owner would have done, 1140.
interest of money advanced by, 1141.
appointed by two or more persons, 1142.
of the losses sustained by, 1143.
bound to execute the order if he accepts, 1144.
order to be executed fully, 1145.
extent of the power, 1146.
of the care proxies and other agents are obliged to, 1147.
may better the condition of him who employs him, but cannot make it worse, 1149.
who buys at a higher price than he was authorized to give, 1150.
bound to give an account, 1151.
a proctor cannot stipulate for a share of what may be recovered in a lawsuit, 1152.
power of one having a general procuration, 1153.
must have a special power for transacting or alienating, 1154.
non-performance of the procuration, 1155.
two proxies for the same thing, 1156.
if one of them transact without the other, 1157.
power of, ends by revocation, 1158.
and by the naming of a second, 1159.
may discharge himself after acceptance, 1160.
is bound to inform his principal, 1161.
who is unable to execute the commission or inform his principal, 1162.
procurations expire by the death of the giver or the acceptor, 1163.
who continues to act, being ignorant of the death of his principal, 1164.
if his heir or executor act for him after his death, 1165.
PUPILLARY SUBSTITUTION. (See SUBSTITUTION.)

QUASI CONTRACTS, 1277, note.
QUESTIONS of fact, and questions of law, 1961, note.

RECEIVERS OF WHAT IS NOT DUE, 1520.
obliged to restore, 1524.
of payment made by one thinking himself to be debtor, when he was not, 1525.
payment by a third person for a debtor, 1526.
creditor does not give back what has been paid before the term, 1527.
if one pay by mistake or willingly what is not due, 1528.
of payment made in a doubtful case, 1529.
of him who owes one of two things, 1530.
restitution of a thing which one has without a just title, 1533.
payment which debtor need not have made, 1534.
of unlawful acts, 1535.
three sorts of, 1536 - 1539.
the engagements of, 1540.
1. restitution of money with interest, 1541.
2. care of the thing, 1542.
restitution of the fruits, 1542.
augmentation of the thing, 1543.
where one has sold what belonged to another, 1544.

Digitized by Google

RECEIVERS OF WHAT IS NOT DUE.
the owner bound to refund what has been laid out in preserving the thing, 1545.
REDHIBITION, defined, 397.
seller should declare defects of thing sold, 398.
what defects are intended, 399.
of immovables, 400.
buyer has his action though seller be ignorant of defects, 401.
of damages where the seller is ignorant, 402.
of damages where seller knew of such defects, 403.
restores both parties to the same condition, 404.
of changes happening to the thing before, 405.
where defects are evident, or declared by seller, 406.
where they may easily be known or presumed, 407.
where seller declares the thing to have some quality which renders it better, 408.
where an estate is sold, "such as it is," 409.
ambiguity or other defect in the words of the seller interpreted against him, 410.
of deceit as to the thing sold, 411.
a defect of one thing out of a set, 412.
does not take place in public sales, 413.
of the time for bringing an action of, 414.
RELIGION, the most natural foundation of the order of society, p. 40.
and policy founded on the order and appointment of God, p. 41.
the spirit of, p. 41.
distinction between the ministry of the spiritual and temporal powers, p. 42.
their union for maintaining order, p. 43.
why the ministry of these two powers is placed in different hands, p. 43.
both established by God, p. 45.
the one subject to the other in their respective functions, p. 45.
and policy have laws in common, p. 74.
of the laws common to both, p. 75.
difference between the arbitrary laws of religion and those of human policy, p. 75.
RENTS AND OBLIGATIONS, how subject to mortgage, 1679, note.
(See LEASE, LESSOR, LESSEE.)
RESCISSION OF CONTRACTS, 2349.
and restitution signify the same thing, 2350.
rescissions prescribe in ten years, 2194, 2355.
defined, 2356.
a deed may be annulled without proof of fraud, 2357.
depends on the prudence of the judge, 2359.
should not be granted easily, 2360.
effect of, as to third persons, 2361.
heirs may be relieved in right of the deceased, 2362.
can only be demanded by a special proxy, 2363.
is hindered by ratification, 2364.
reciprocal effects of, 2365.
limitation of, 2366.
of part which has effect for the whole, 2367.
when to be demanded, 2368.
when time of prescription begins to run, 2369.
how computed as to heirs and executors, 2370.
of alienation of lands of a minor, 2398.
of improvements made on such lands, 2399.
of contracts in favor of majors, 2401.

Digitized by Google

RESCISSION OF CONTRACTS.
the vices of covenants are the cause of, 2403.
fraud between heirs, 2404.
of a partition, 2405.
of contracts of sale, 2406.
RESTITUTION, 2349.
defined, 2356.
against sentences or decrees, 2358.
of minors, the cause of, 2372.
is independent of the honesty or knavery of the party, 2373.
a minor is not relieved in all cases without distinction, 2374.
nor against what has been done for good cause, 2375.
nor when he cheats or does damage, 2376.
nor when guilty of crime, 2377.
nor if he has represented himself to be of age, 2378.
minors relieved in all other cases, 2379.
of minors extended to all acts or deeds without distinction, 2380.
minor relieved who has renounced or accepted an inheritance or legacy, 2381.
and if he has accepted an inheritance which becomes unprofitable, 2382.
if the succession so renounced has been cleared by another heir, 2383.
takes place for profits which minor should have had, 2384.
minor relieved from engagements which would run him into lawsuits, 2385.
and against a compromise, 2386.
and against an omission, 2387.
and in case of money borrowed and squandered, 2388.
between two minors, 2389.
not hindered by the authority of the tutor, 2390.
the surety of a minor, 2392.
hindered by the minor's ratification on coming of age, 2394.
of a purchase made by a minor, 2400.
of majors on account of absence or other cause, 2407.
against sentences by Roman law, 2407, note.
RESTITUTION OF FRUITS is a reparation of damages, 1978.
how far it extends, 1979.
signification of the word *Fruits*, 1980.
the unjust possessor bound to restore the fruits he has enjoyed, 1981.
the upright possessor not bound to restore such fruits, 1982.
the upright possessor restores the fruits after a legal demand, 1983.
the fruits cut down go to the upright possessor, 1984.
of revenues that come in successively, 1985.
ceases when the upright possessor is obliged to restore the fruits, 1986, 1987.
subject to the deduction of the expenses laid out on them, 1988.
fruits belong to the owner of land, and not to him who tills it, 1989.
unjust possessor bound to restore fruits lost through his negligence, 1990.
heir or executor of unjust possessor succeeds to his engagements, 1991.
estimation of fruits and other revenues, year by year, 1992.
how estimated in France, 1992, note.
of the revenues of movables, 1993.
no interest due for fruits till after a demand, 1994.
(See DAMAGES.)
REVERSION, the right of, 2889.
received both in ancient and modern Roman law and in France, 2890.
defined, 2893.

Digitized by Google

REVERSION.
of two sorts, 1. by law; 2. by agreement, 2894.
by agreement regulated by the agreement, 2895.
of things given in favor of marriage, 2896.
extends to mothers by the usage of France, 2897.
and sometimes to other donations than dowries, 2898.
this right does not hinder the profits of goods subject to the reversion, 2902.
whether the creditors of donee can hinder, 2905.
case of the mortgage or alienation of the goods, 2906.
nature and character of the right of, 2908.
when the donee commits a crime, 2909.
dispositions of donee by testament, 2910.
when regulated by covenant, 2912.
the father has the reversion of the dowry given by the grandfather on the father's side, 2914.
REVOCATION. (See LEGACY.)
RULES of the canon law, p. 46.
what the natural rules are, p. 51.
impossible to make a particular rule for every individual, p. 53.
how applied, p. 62.
two sorts of natural rules, p. 67.
are general, or common to several matters, or peculiar to one matter only, p. 88.
advice concerning the use of rules, p. 91.
(See LAWS.)

SALE, origin and use of the contract of sale, 256, 257.
definition of, 258.
perfected by bare consent of parties, 259.
how such consent is given, 260.
who may sell or buy, 261.
three engagements in the contract of sale, 262.
1. engagements that are expressed, 263.
2. engagements from the nature of the contract, 264.
3. engagements established by laws and usages of the country, 265.
engagements of seller are, 1. delivery of the thing sold, 266.
2. to take care of it till delivery, 267.
3. warranty, 268.
4. respects the faults of the thing sold, 269.
perfected by delivery, 275, note *a*.
not annulled by failure of seller to deliver, 285.
what care seller should take of the thing sold, 289.
such care may be regulated by agreement, 290.
if buyer is in delay, seller is discharged from care, 291.
the engagement of seller not to sell too dear, 294.
of buyer not to buy at too low a price, 295.
buyer engages to pay the price, 296.
the time and place of payment, 297.
if buyer do not pay, seller may detain the goods, 298.
delay of buyer caused by accident, 299.
the buyer in delay shall pay interest, 300.
three cases in which the buyer owes interest, 301.
if seller take back the goods for want of payment, the buyer must indemnify, 302.
dissolution of, for non-payment, 303.

Digitized by Google

SALE.
buyer cannot elude the sale by non-payment, 304.
other charges which buyer must make good, 305.
buyer in danger of eviction need not pay the price, 306.
buyer bound to take care of the thing in cases where the sale is liable to be dissolved, 307.
what things may be sold, 308.
things incorporeal may be sold, 609.
of things not yet in being, 310.
of an uncertain expectation, 311.
in gross and by bulk, 312.
by number, weight, and measure, 313.
by wholesale and retail, how perfected, 314.
upon trial, 315.
accessories are included in, 316.
some things separate from the edifice included in, 317.
the accessories of movables, 318.
of one of two things, 319.
of thing belonging to another, 320.
the price of, can be nothing else than money, 321.
where, instead of the price agreed on, the seller receives another thing in payment, 322.
one or more prices of the same thing, 323.
where the price is uncertain and unknown, 324.
the price of, is arbitrary, 325.
any pactions may be added to the contract of sale, 326.
depending on a condition, 328.
dissolved by a condition, 329.
of the earnest penny; its effect, 330.
where nothing is said of it in the contract, 331.
the clause of nullity, 332.
of the power of redemption, 333.
of changes in the thing sold, 334.
changes before accomplishment affect the seller, 335.
changes after sale affect the buyer, 336.
likewise changes between sale and delivery, 336, note *b*.
the seller bears losses happening after he is in delay, 337.
where both parties are in delay, 338.
of losses of things sold by number, weight, and measure, 339.
of profit and loss in case of a thing sold on trial, 340.
of one of two things, where one perishes, 341.
on condition, where thing perishes before the event of the condition, 342.
on condition, where the thing is diminished, but not destroyed, 343.
the party who should perform a condition cannot take advantage of his own nonperformance, 344.
loss must be borne by him whose fault occasions it, 345.
the fruits belong to him who is master at the time when they are gathered, 346.
of agreements providing for losses, 347.
how to determine who shall bear profit or loss, 348.
of sales that are null, 349.
of the causes which annul, 350.
persons in public office cannot sell or buy, by the Roman law, 351.
provisions of French ordinances concerning, 351, note *b*.

Digitized by Google

SALE.
tutors and guardians cannot buy of their wards, 352.
factors under same incapacity, 353.
heir burdened with a substitution cannot sell, 354.
minors, madmen, and prodigals cannot sell, 355.
things public cannot be sold, 356.
things consecrated, and immovables of corporations, cannot be sold, 357.
an estate entailed cannot be sold, 358.
dower lands cannot be sold, 359.
things of which the commerce is forbidden, 360.
depending on condition, null if condition do not come to pass, 361.
null through error of the contractor, 362.
of error of the quality of the thing sold, 363.
transacted through fraud or violence is null, 364.
rescission of, where price is less than half the value, 365.
time of estimation of price, 366.
how true value to be estimated, 367.
the buyer may restore, or make up the full price, 368.
this rescission independent of fraud, 369.
restitution of the fruits of the thing, 370.
eviction, 371.
other things diminishing the right of purchaser, 372.
warranty, 373 – 397.
divers kinds of troubles which dissolve, 381.
redhibition and abatement of price, 397 – 414.
other causes of the dissolution of, 415, 416.
difference between nullity and dissolution of, 417.
possessor cannot lose his possession but by the authority of justice, 418.
of damages, 419.
dissolution restores all to the same condition they were in, 420.
when annulled, seller is reinstated in his right, 421.
the power of redemption by covenant, 422.
with power of redemption implies a condition, 423.
where the power is granted after the contract is past, 424.
continuance of the power of redemption, 425.
of the fruits after an offer to redeem, 426.
conditional agreement to dissolve, 427.
its effect, 428.
may be vacated though there be no such clause, 429.
dissolution of, by consent, before performance, 430.
dissolution of, by consent, after performance, 431.
the causes of forced sales, 432.
forced sale defined, 433.
a forced sale for the public good, 434.
sale of provisions, 435.
a forced sale for a particular necessity, 436.
if the person who might be compelled consent to the sale, 437.
if he refuse to sell, 438.
effect of these kinds of sales, 439.
of fields lying near the highway, 440.
by decree of a court of justice, 441.
by auction, 442.
(See DELIVERY, REDHIBITION.)

Digitized by Google

SEPARATION OF GOODS between husband and wife, 896.
made in two cases, 897.
defined, 899.
cause of, 900.
effect of, 901.
the wife cannot alienate such goods, 902.
she may distrain husband's goods for her dowry, 903.
and also for her paraphernal goods deposited with the husband, 904.
and also for her gains, 905.
to secure creditors, 1804 - 1808.
defined, 1809.
independent of the mortgage, 1810.
legatees have the right of, 1811.
for a conditional debt, 1812.
cannot take place, if heir has already alienated the goods, 1813.
not prevented by the engagements of the executor, 1814.
may take place through several successions, 1815.
takes place when the debtor succeeds to his surety, 1816.
and when surety succeeds to debtor, 1816, note.
does not prejudice the right against the heir, 1817.
not prevented by privileges, 1818.
may be demanded by one of the heirs or executors, if a creditor, 1819.
prevented by confusion of goods, 1821.
and by novation, 1822.
difficulties concerning, regulated by the discretion of the judge, 1823.
SEQUESTRATION, 681 - 683.
how distinguished from a deposit, 728.
(See DEPOSIT.)
SEQUESTRATOR by consent of parties, defined, 726.
may be obliged to perform the trust by each of the parties who has named him, 727.
his possession and its effects, 729.
must account, 730.
how discharged, 731.
SERVICES, their origin and use, 1015.
have two characteristics, 1016.
are commonly settled by covenant, 1017.
defined, 1018.
in what they consist, 1019.
are for lands and tenements, 1020.
are of divers sorts, 1021.
two general kinds of, natural and those established for convenience, 1022.
of houses and lands, 1023.
the right of service comprehends accessories, 1024.
the right and use of, regulated by the title establishing them, 1025.
interpreted favorably for liberty, 1026.
may be established by authority of justice, 1027.
the right of, may be acquired by prescription, 1028.
the manner and use of, regulated by the ancient condition of the places, 1029.
lost or diminished by prescription, 1030.
are annexed to lands and tenements, 1031.
the right of service gives no right of property to the land which owes the service, 1032.

Digitized by Google

SERVICES.
one service may serve for two lands or tenements, 1033.
which appear to be useless, 1034.
of lands and tenements having several owners, 1035.
how preserved against prescription, 1036.
the possession of one owner preserves the service for all, 1037.
the privilege of one partner prevents the prescription from running against the others, 1038.
various services of buildings, 1039 – 1043.
the right of resting on another's building, 1044.
one cannot trespass on his neighbour's ground, 1045.
what one may do in his own ground to the inconvenience of his neighbour, 1047.
inconveniences which the neighbour ought or ought not to suffer, 1048.
various services of lands, 1049 - 1054.
the proprietor is bound to suffer the service, 1055.
and all works necessary for the use thereof, 1056.
the obligations of him whose wall ought to bear the building of another, 1057.
if necessary to repair a partition wall, 1058.
of repairing a wall that serves for supporting a building, 1059.
the proprietor of land owing a service may relinquish it, 1060.
if the estate to which service is due be divided, 1061.
when two services are due from one tenement to another, 1062.
he who has a right of service can innovate nothing, 1063.
overloading of a wall subject to service, 1064.
repairs for the use of the service, 1065.
of damage which is a natural consequence of the service, 1066.
he to whom a service is due cannot communicate it to others, or extend its bounds, 1067.
the right of, perishes with the land or tenement, 1068.
and on the confusion of the property of the two lands or tenements, 1069.
if proprietor afterwards sell the land which served, 1070.
where a land or tenement that is between two others hinders the use of the service, 1071.
prescription of, 1072.
different ways of prescribing, 1073.
prescription of, whose use is interrupted by intervals of time, 1074.
continuation of prescription from one possessor to another, 1075.
continues where an estate is sold by decree of court, 1076.
SOCIETY, a plan of, founded on the two first laws by two sorts of engagements, p. 8.
destination of man to society by two kinds of engagements, p. 10.
the first kind of engagements which unite men in society, p. 11.
the natural engagements of marriage and birth, p. 11.
the second kind of engagements, p. 16.
of two sorts, voluntary or involuntary, p. 17.
the troubles which disturb society, pp. 32, 33.
the state of, after the fall of man, and how God makes it to subsist, p. 33.
all disorders a consequence of man's disobedience, p. 33.
self-love the source of disorders in, p. 34.
and made by God to contribute to its subsistence, p. 35.
four foundations of the order of, p. 36.
God's government over, p. 37.
the authority which God gives to the supreme powers, p. 38.
religion the most natural foundation of the order of society, p. 40.

Digitized by Google

SOLIDITY, among debtors and creditors, its nature, 1824 – 1828.
among debtors, defined, 1829.
does not exist unless expressed, 1830.
does not hinder the division of the debt, 1831.
in all obligations, parties may bind themselves each for the whole, 1832.
the condition of such parties may be different, 1833.
relief of him who pays for the others, 1834.
does not cease by an action against one of them, 1835.
a personal exception of one debtor does not discharge the others, 1836.
a demand of the debt from one hinders prescription with respect to the other debtors, 1837.
among creditors, wherein it consists, 1838.
how acquired, 1839.
if one creditor demand the debt without the others, 1840.
if he innovate or assign the debt to others, 1841.
a demand by one interrupts the prescription against the other creditors, 1842.
one creditor cannot prejudice the others, 1843.
STELLIONATE, distinguished from fraud in general, 1257.
defined, 1263.
exception to the rule, 1264.
the effect of, 1265.
in mortgaging, 1677.
STEWARDS, 1309.
SUBSTITUTION, two significations of, 3763.
1. vulgar, 3764.
2. fiduciary or gradual, 3765.
the latter may be imposed on legatee, 3766.
difference between them, 3767.
pupillary, its three effects, 3768.
the Trebellianic portion, 3769.
vulgar, defined, 3771.
annulled as soon as executor accepts, 3772.
several degrees of, 3773.
the different modes of, 3774.
applies also to legatee, 3775.
among coexecutors mutually substituted, the shares of substitution are the same as those of the institution, 3776.
reciprocal, restrained to the survivors, when the case happens, 3777.
a third person substituted to a coexecutor, substituted to both, 3778.
an institution of two executors may imply reciprocal substitution of survivor, 3779.
substitute dying before the case of the substitution does not transmit his right, 3780.
the right of accretion gives place to substitution among coexecutors. 3781.
coexecutor accepting one share may not renounce those which fall void, 3782.
an executor substituted to himself, 3783.
explanation of this rule, 3784.
which implies two alternative conditions, 3785.
hardship of the Roman law, 3786.
pupillary, defined, 3787.
one may substitute to a posthumous child, 3788.
the pupillary comprehends the vulgar substitution, 3789.
origin of this rule, 3790.
comprehends the goods of the child, 3792.

Digitized by Google

SUBSTITUTION.
a result of the paternal authority given by the Roman law, 3793.
a testament making, disposes of two successions, 3794.
a child emancipated, not subject to, 3795.
pupillary, annulled when infant attains puberty, 3796.
exemplary, to children in state of madness, 3797.
none called to, except children of brothers of the heir who is mad, 3798.
at an end, if such madness cease, 3799.
all ascendants may substitute in this manner, 3800.
difficulty arising from this rule, 3801.
compendious, 3802.
comprehends three substitutions; when they take effect, 3803.
the difference of effect of these three, 3804.
reciprocal, which may be also among legatees, 3805.
one substituted to an infant cannot accept one succession without the other, 3806.
even though he be coheir or coexecutor with him, 3807.
reciprocal, between two infants, comprehends both cases, 3808.
between an infant under puberty and an adult, is vulgar, 3809.
where one is substituted to an infant and to another executor, is vulgar as to both, 3810.
where one is substituted to two infants, he succeeds only to him who dies last, 3811.
and to both, if they die together, 3812.
has its effect, where an infant, having entered on the succession, afterwards renounces it, 3813.
such renunciation has the same effect as if substitution had been open at the testator's death, 3814.
where executor dies while deliberating, 3815.
direct and fiduciary, 3816.
why no distinction is made between these terms, 3817.
direct, three modes of, 3818.
gradual, the degrees of, restrained by divers ordinances and usages, 3819, 3820.
dispositions containing substitutions and fiduciary bequests must be enrolled, 3821.
meaning of the word *substitute*, 3822.
or fiduciary bequest, defined, 3823.
who may substitute, 3824.
divers ways of substituting, 3825.
limited to goods that testator leaves, 3826.
executor charged with, may retain a fourth part of the inheritance, 3827.
fruits of goods substituted remain to executor, unless testator have otherwise directed, 3828.
a legacy to an executor comprehended in, unless otherwise directed, 3829.
may be either to a certain time, or on condition, 3830.
executor charged with, and delaying after demand, accountable for the fruits, and liable for costs and damages, 3831.
but not if substitute neglect to demand, 3832.
what care an executor charged with, is bound to take of the inheritance, 3833.
difference between such executor and one charged with a legacy, 3833, note *p*.
executor restoring inheritance to the substitute may retain expenses he has incurred, 3834.
a father charged with, who dissipates the effects, shall have them taken out of his hands, 3835.
punishment of an executor charged with, who fraudulently detains a part of the goods, 3836.

Digitized by Google

SUBSTITUTION.
charges pass with goods to the substitute, 3837.
children charged with fiduciary bequest not thereby deprived of their legitime, 3838.
and may also retain the Trebellianic portion, 3839.
origin and equity of this usage, 3840.
which, by some authorities, extends to legacies, 3841.
jointures and marriage portions are taken out of the substituted goods, 3842.
remarks on Justinian's law respecting this deduction, 3843.
when one is substituted to the survivor of two, does not take effect, where both die together, 3844.
ceases, where issue is born to a son charged with, 3845.
executor should make an inventory and give security to preserve rights of substitute, 3846.
even though a father or mother, except in two cases, 3847.
particular fiduciary bequests of certain things, 3848.
may be of all kinds of things, 3849.
either executors or legatees may be charged with, 3850.
different manners of substituting, 3851.
any expressions showing testator's intention sufficient, 3852.
different dispositions which have the effect of, 3853.
may be made in favor of persons to be born, 3854.
substitutes succeed successively, in the order given by the testator, 3855.
different manners of regulating this order, 3856.
made indefinitely to one of a family, 3857.
the intention of testator to be judged by circumstances, 3858.
if executor die without naming the substitute out of several, all have a share in the goods, 3859.
the substitute named by executor derives his right from testator only, 3860.
a prohibition to alienate does not bind, unless made in favor of some person, 3861.
prohibition to alienate lands out of the family does not take away the choice of one of such family, 3862.
the substitute shall have either the thing to be given him, or its value, 3863.
fruits and interest due from the time of delay, 3864.
an executor having paid a fiduciary bequest cannot revoke it, if it afterwards prove null, 3865.
legatee charged with, reaps the benefit of it, if it prove null, 3866.
rules for interpretation of testaments apply to, 3867.
may be in favor of one, or of many, 3868.
open to every degree, 3869.
all capable of succeeding are capable of being substituted, 3870.
persons incapable of fiduciary substitutions, 3871.
tacit fiduciary substitutions forbidden, 3872.
of persons who lend their names to such, 3873.
how tacit fiduciary substitutions are proved, 3874.
difference between Roman and civil law in respect to, 3875.
goods subject to, may not be restored before the time, unless it be without prejudice, 3876.
a donation has the effect of election of a substitute, where donor was empowered to choose one, 3877.
limits of the liberty of giving more to one substitute than to others, 3878.
order of substitutes in different degrees, 3879.
parties mutually substituted may mutually renounce, 3880.
prescription of substituted goods runs against both executor and substitute, 3881.

Digitized by Google

SUBSTITUTION.
prescription of lands substituted, alienated by usufructuary, divests substitute of his property therein, 3882.
not opened by the civil death of executor, 3883.
to an executor in case he die without issue, is of no effect if he leave children, 3884.
how, if the children are substituted, 3885.
different opinions concerning this, 3886.
difficulties and perplexities caused by interpreters, 3888.
of a surety to a creditor, 1887, note.
(See Creditor.)

SUCCESSIONS, their necessity and use, p. 31.
two ways of succeeding, p. 31.
to be distinguished from engagements, p. 31, 2408.
their nature and use, 2409.
three kinds of, 2410.
legal and testamentary, 2412.
the order of legal successions, 2415.
1. of children to parents, 2416.
2. of parents to children, 2417.
3. of collaterals, 2419.
legal, conformable to the order of nature, and consistent with natural affection, 2420.
testamentary, 2421.
whether testamentary or legal successions are most favorable, 2434.
three differences between them, 2438 - 2441.
of those who leave neither relations nor testament, 2451.
of husband and wife, 2452, 2453.
of the exchequer in default of heirs, 2453.
of bastards, 2455.
of aliens, 2456.
of persons of a servile condition, 2458.
defined, 2465.
two sorts of, 2466.
the charges of, of three sorts, 2469.
several successions of one heir to another, all pass to the last heir, 2478.
of intestates does not take place if there is a testament which subsists, 2481.
how acquired, and how renounced, 2704.
engagements of the heir to, 2705.
one may accept, either expressly or otherwise, 2706.
what are the acts of an heir, 2707.
he who receives payment as heir acts as heir, 2708.
so, if he pay a debt of the succession, 2709.
and if he take the goods, or reap the fruits, 2710.
although he does it by mistake, 2711.
he who meddles with the inheritance makes himself heir, 2712.
also, he who sells the succession, 2713.
also, the executor who renounces by collusion with the heir of blood, 2714.
also, he who embezzles the effects, 2715.
but not after he has renounced, 2716.
where the next of kin is instituted by testament, 2717.
a minor relieved against acts he has done as heir, 2718.
if his coheir is of full age, 2719.
succession to intestates, 2787 - 2790.
(See Heir.)

Digitized by Google

SURETIES (or CAUTIONS), their use, 1844.
the obligation of, is accessory to another obligation, 1845.
the use of, extends to all manner of engagements, 1846.
suretyships are of three sorts, 1847-1849.
defined, 1850.
surety may be given for all lawful engagements, 1851.
even for a natural obligation, 1852.
security may be given for a debt to be contracted, 1853.
can be bound for no more than the debtor, 1854.
but may be for less, 1855.
one may become surety without the knowledge of the debtor, 1856.
neither security nor warranty can be given in crimes, 1857.
security cannot be given in some lawful engagements, 1858.
security for a dowry, 1858, note.
are not discharged by the restitution of the principal debtor, 1859.
of minors and sons under jurisdiction, 1859, note.
of minors have action against them if not saved harmless, 1860.
the engagements of, 1861.
taken in a court of justice, 1862.
the heirs or executors of, 1863.
once accepted cannot be rejected, 1864.
for public officers, how far liable, 1865.
cannot be sued till after discussion of the principal debtor, 1866.
except in the case of judicial sureties, 1867.
and where the debtor is absent and has no visible estate, 1868.
discussion does not extend to goods alienated by the debtor, 1869.
cannot oblige the creditor to sue the debtor, 1870.
where there are several of the same thing, 1871.
if the obligation of one is annulled, the others answer for his portion, 1872.
have all the defences that the debtor has, 1873.
their engagements follow the obligation, 1874.
the debtor should save the surety harmless, 1875.
how indemnified, 1876.
may sue the debtor before demand by the creditor, 1877.
if the surety pay before the term, 1878.
may pay after the term, without demand, 1879.
if he pay what was not due, 1880.
if he pay being ignorant of the debtor's defence, 1881.
if he pay having a defence peculiar to himself, 1882.
if he make no defence, or neglect to appeal, 1883.
if he pay without informing the debtor, who pays a second time, 1884.
for a thing deposited or lent, 1885.
if the surety is discharged by the creditor, 1886.
the remedy of one who pays against the other sureties, 1887.
answer for each other, 1888.
no surety of an unlawful obligation, 1889.
obligation not annulled by a personal exception in favor of the principal debtor, 1890.
obligation void in case of fraud of the creditor, 1891.
circumstances which make the obligation of, to be void or valid, 1892.
discharged by the annulling of the obligation, 1893.
or by the innovation of the debt, 1894.
in a lease, not bound on the renewal, 1895.

Digitized by Google

SURETIES.
discharged by debtor succeeding to the creditor, or creditor to the debtor, 1896.
if creditor or debtor succeed to the surety, or the surety to either of them, 1897.
a suit by the creditor against one of several, does not discharge the others, 1898.
for the delivery of a thing that perishes, 1899.
(See DISCUSSION, DIVISION.)

SYNDICS, the use of, 1439.
by whom named, and how, 1440, 1441.
the person named included in the number of voters, 1442.
the power of, 1443.
duration of their power, 1444.
the care of, 1445.
the engagements of, 1446, 1447.

TESTAMENT, the use of, 2421.
authorized by the law of God, 2422.
origin and differences of the provisions of the Roman law and the customs of France respecting, 2423-2433.
can have effect only by death of testator, 2535.
definition of, in the Roman law, 2978.
in provinces governed by the customs, 2979.
the power of making, not especially a part of the public law, 2981.
written with the testator's own hand and without witnesses, 2982.
of poor country people, 2983.
among children restrained by Justinian, 2984, 2985.
how regulated by the customs of some provinces, 2986.
definition of, 2987.
essential characteristics of, 2988.
implies the disposal of all the goods, 2989.
takes effect only on the death of testator, 2990.
the heir of blood is testamentary heir, if instituted, 2991.
must contain the institution of an heir or executor, 2992.
will of testator is in the place of a law, 2993.
must contain the proper will of the testator, 2994.
two questions arise from, 2996.
takes effect on acceptance of the heir or executor, 2998.
divers kinds of, 2999.
of deaf and dumb, and blind persons, 3000.
of officers and soldiers in service, 3001.
made in time of a plague, 3002.
secret and private, 3003.
common to all having an interest therein, 3005.
validity and effect of, 3006.
the causes of incapacity of receiving a benefit by, 3007.
persons incapable by the Roman law of making, 3009, 3010.
who incapable of making, 3011.
males under fourteen, and females under twelve, incapable of making, 3012.
eunuchs under eighteen incapable of making, until permitted by the Emperor Constantine, 3012, note *b*.
sons under their father's authority cannot make, 3016.
madmen cannot make, 3017.
old, sick, and infirm persons may, 3018.
a prodigal may not, after interdiction, 3019.

Digitized by Google

TESTAMENT.
deaf and dumb persons cannot make, 3021.
unless they can write, 3022.
the deaf man who can speak may make a will, 3023.
and so dumb persons not deaf, if they can write, 3024.
blind persons may make, 3025.
aliens and foreigners cannot make, 3026.
a monk, after taking the vows, cannot make, 3027.
persons condemned to death cannot make, 3028.
bastards may make, 3029.
incapacity of aliens to make, considered, 3030.
valid at first, may become null, 3031.
who may be executors of, 3032.
who may receive benefit by, 3032.
incapacities of making and receiving benefit by, 3033.
persons incapable of making, but capable of receiving a benefit by, 3034.
persons incapable of both making and receiving by, 3035.
bastards may receive benefit by, 3036.
children unborn may receive benefit by, 3037.
children not conceived may receive benefit by, 3038.
heir need not be named by name, 3039.
reproachful terms used in, 3040.
persons unworthy cannot receive benefit by, 3044.
forms necessary in making, 3045.
use of forms, 3046.
seven witnesses required by the Roman law, 3047.
and in some provinces of France, 3048.
in others only two required, 3048.
witnesses must be present at the reading and signing of, 3049.
seven witnesses necessary in provinces governed by written law, 3050.
but not by the customs of some places, 3050, note *a*.
witnesses must all be present and see testator sign, 3051.
witnesses must be above fourteen years, 3052.
women cannot be witnesses to, nor can mad, deaf and dumb persons, prodigals, infamous persons, or aliens, 3053 – 3056.
capacity of witness considered at the time of making, 3057.
difference between contract and, 3064.
the father, children, and brothers of testator cannot be witnesses to, 3065.
several of the same family may be witnesses to, 3066.
may be made at any hour, 3067.
formalities for different kinds of, 3068.
formalities of military, 3069.
three kinds of military testaments, 3072.
1. those not in writing, 3073.
2. those signed by the testator, 3074.
3. those reduced to writing before witnesses, 3075.
what number of witnesses necessary to a military testament, 3076.
whether the presence of a notary is necessary, 3077.
made in the time of a plague, 3079.
secret testaments, 3081.
of persons who can neither read nor write, 3082.
secret, of deaf and dumb persons who can write, 3083.
secret, the opening of, 3084.

Digitized by Google

TESTAMENT.
verification of signatures of witnesses to secret, 3085.
of blind men, 3086.
a sort of testament fit for all persons, 3087.
when null for want of form, 3088.
simple formalities of, in the customs, 3105.
null by some customs, unless made a certain time before death, 3106.
formalities required by different laws, 3107.
the first testament is annulled or changed by a second, 3116, 3131.
even though not mentioned therein, 3117.
if the second be in due form, 3118.
or if formalities are dispensed with by law, 3119.
annulled by birth of a child, 3121, 3132.
unless it die before the testator, 3122.
null, if the children be not named, 3123.
or if they be unjustly disinherited, 3124.
null if testator die incapable, 3126, 3146.
not annulled by other changes, 3127.
revocation of, 3128.
may be entirely annulled, or only as to some particular disposition therein, 3130.
legacies of undutiful testaments subsist, 3133.
not annulled by renunciation of the heir to avoid the payment of legacies, 3134.
nor when he renounces by collusion with the next of kin, 3135.
when he renounces without such collusion, 3136.
provisions of the Roman law, 3137-3144.
incapacity of testator annuls all the dispositions of, 3146.
may be annulled by testator's rasing or tearing, 3147.
but not when defaced by chance, against his will, 3148.
and this may be proved by the notary and witnesses, 3148, note.
not annulled by explanatory additions thereto, 3149.
rasures and additions in, to be judged by circumstances, 3150.
made by threats or violence, null, 3151.
flattery not sufficient to annul, 3152, 3154.
null, with respect to him who forcibly hinders the revocation, 3153.
interpretation of, 3155.
difficulties in the interpretation of, 3156.
rules of interpretation, 3157.
modes of expression in, 3158.
1. where the meaning is clear, 3159.
2. where there is no meaning, 3160.
3. where the meaning is obscure, 3161.
to be interpreted from the whole tenor thereof, 3162.
covenants and testaments, difference in their interpretation, 3162, note.
testator's intention to prevail in case of ambiguity, 3163.
bequest in, not prejudiced by a false addition, 3164.
obscurities to be explained by circumstances, 3165.
of difficulties in interpretation, 3178.
rules of interpretation, 3179.
1. the will of the testator, 3180.
2. his esteem for the persons, 3181.
3. the heir of blood favored rather than a stranger, 3182.
two testaments of the same date, in due form, 3209.
views for the interpretation of, 3210.

Digitized by Google

TESTAMENT.
condition defined, 3212.
charges defined, 3213.
destinations defined, 3214.
motives defined, 3215.
description defined, 3216.
terms of time defined, 3217.
charges and conditions often confounded, 3218.
charges may operate as conditions, 3219.
destinations may have the effect of conditions, 3220.
motives may have the effect of conditions, 3221.
description may imply a condition, 3222.
conditions are considered as to the facts on which they depend, 3227.
conditions as to time, 3228.
conditions express and tacit, 3229.
conditions impossible or contrary to law and good manners, 3230, 3231.
conditions made with a view to procure a like benefit to the testator, void, 3232.
such dispositions forbidden by the Roman law, 3233.
mutual testaments, 3234.
made in acknowledgment of former benefits, 3235.
dispositions depending on more than one condition, 3236.
conditions to be interpreted in general by the will of the testator, 3237.
conditions depending on the act of the executor or legatee, 3238.
of conditions obliging not to do a certain thing, 3239.
conditions not depending on the act of the executor or legatee, 3240.
conditions depending on the act of a third person, 3241.
conditions depending partly on the act of the executor, and partly on some event, 3242 – 3244.
condition entirely dependent on a third person, 3245.
conditions depending on the act of a third person, which must necessarily be accomplished, 3246, 3247.
rules for judging of such conditions in order to give effect to the testator's intention, 3248.
how to distinguish conditional dispositions from those which are not so, 3249.
of the relation which conditions have to events, 3250.
where two executors are instituted and the condition does not happen, they succeed equally, 3251.
conditions accomplished before the death of the testator yet have their effect, 3252.
but if such condition is a fact that may be reiterated, it must be accomplished, 3253.
if a term be joined to a condition, it is necessary to wait till the term expire, 3254.
conditions may not be divided, 3255.
a condition imposed on several may be divided, 3256.
the condition "if A die without children," fulfilled if A and his son die at the same time, 3258.
condition of majority not accomplished by the dispensation of age, 3259.
means of securing the performance of the conditions of, 3260.
how different legatees of the same thing may be joined, 3270.
1. by the thing itself, 3271.
2. by the thing itself and expression of testator, 3272.
3. by word only, and not by the thing, 3273.
this distinction not exact, and does not apply equally to executors and legatees, 3274.
the execution of, and the duties of heirs, 3330.

Digitized by Google

TESTAMENT.
the duties of executors by customs of France, 3331.
precautions for insuring performance of these duties, 3333.
executors, their use and necessity, 3334.
overseers of, in England, 3334, note *d*.
execution may be committed to the testamentary heir or to some other person, 3335.
the execution of indefinite dispositions, 3337.
the execution of dispositions neglected by the heir, 3338.
undutiful testaments, 3340.
who may complain of them, 3345, 3346.
undutiful, annulled as to the undutiful disposition, 3355.
how the right of complaint of undutifulness passes to the heirs of the deceased, 3356.
collaterals may not complain unless an infamous person be instituted, 3364.
a complaint on the score of forgery does not bar a subsequent one for undutifulness, 3378.
nullity and undutifulness may be pleaded successively, 3379.
effect of complaint against, as undutiful, 3380.
where the person is reduced to a portion less than was due to him by law, 3380.
if declared undutiful, all the children succeed as if there had been no testament, 3381.
where the complaint augments the portion of the son instituted, 3382.
extravagant donations diminished, 3383.
undutiful, the legacies thereof subsist, 3384.
but by the ancient Roman law were void, 3385.
(See Heir, Legacy, Revocation.)
TESTATOR, the will of, a law to the executor and to the legatees, 2993.
may make two or more originals of his will, 3004.
rules for discerning the intentions of, 3177.
where the court changes the disposition of, 3199, 3205.
dispositions which are not to be executed, 3207.
when he may or may not derogate from the law, 3208.
precautions of testators in executing their wills, 3211.
to interpret the dispositions of, 3226.
THINGS, how the laws consider them, 112.
the foundations of the distinctions of, 113.
distinctions natural and made by law, 114.
what common to all, 115.
difference between Roman and civil law, 115, note *a*.
things public, 116.
things belonging to towns or other places, 117.
distinction of movables and immovables, 118.
immovables, 119.
trees and buildings, 120.
hanging fruits, 121.
accessories to buildings, 122.
movables, 124.
which are living or dead, 125.
animals, wild and tame, 126.
movables consumed in the using, 127.
distinctions formed by nature and by law, 128.
which enter into commerce and those which do not, 129.

Digitized by Google

THINGS.
consecrated to religion, 129.
corporeal and incorporeal, 130.
allodial lands and lands burdened with quitrents and other duties, 131.
mines, 132.
coin, 133.
treasure, 134.
another distinction of, made by the laws, 135.
purchase, 136.
inheritance, 137.
paternal estate, 138.
maternal estate, 139.
TRANSACTIONS, their use, 1077.
defined, 1078.
divers ways of transacting, 1079.
limited to their subject-matter, 1080.
with one of parties interested are of no prejudice to the others, 1081.
with any other than the adverse party are of no effect, 1082.
concerning a right are of no prejudice to a like right accruing subsequently, 1083.
the stipulation of a penalty may be added to, 1084.
with the surety of debtor, 1085.
have the force of judgments, 1086.
made null by fraud, 1087.
and by error, 1088.
derogating from a right of which the title is unknown, 1089.
grounded on forged writings, 1090.
not annulled by the damage suffered by one of the parties, 1091.
made to color an illegal act, null, 1092.
concerning a lawsuit in which judgment has been given, though the parties do not know it, 1093.
TRANSMISSION, the right of, 3296.
in the Roman law respects successions of intestates as well as testamentary successions, 3297.
its origin found in the natural order of legal succession, 3298.
limited in the Roman law to children *sui heredes*, 3298.
the right of, did not exist in testamentary successions unless the heir or executor had exercised his right, 3299.
existed in testamentary successions only for children, 3299.
in legal successions only for children not emancipated, 3299.
exception in favor of heirs dying within a certain time, 3300.
in the case of legatees, 3301.
the condition of legatees more advantageous than that of heirs and executors, 3302.
by the civil law, the succession of intestates takes place not only for children, but for all the next of kin, 3303.
of legacies given by the civil law to all legatees, 3304.
of testamentary successions, difficulty in respect to, 3305.
by the customs of Bourdeaux, 3306.
objections answered, 3307.
founded on principles of equity, 3308.
contains rules of necessary use, 3310.
defined, 3312.
how limited, 3313.
takes place as soon as the right to the inheritance vests, 3314.

Digitized by Google

TRANSMISSION.
depends on the condition in which the right is at the time of the death, 3315.
does not exist where testamentary heir or legatee dies before the testator, 3316.
unless so expressed in testator's will, 3317.
is acquired by the acceptance of the inheritance, 3318.
where the testamentary heir dies within the time allowed for deliberation, 3319.
where the heir, knowing of the legacy, dies without making any declaration concerning it, 3321.
time allowed for deliberation by the ordinance, 3322.
where the heir dies ignorant of his right, 3323.
does not take place where the institution of heir is conditional, and the condition does not come to pass, 3325.
of a legacy pure and simple, 3326.
of a conditional legacy, 3327.
of a legacy to an uncertain day, 3328.
in the case of substitutions and fiduciary bequests, 3329.
TREBELLIANIC PORTION, how distinguished from Falcidian, 3889.
why so called, 3890.
many rules of the Falcidian portion apply to, 3891.
defined, 3892.
due to an executor charged with a fiduciary substitution having only part of the inheritance, 3893.
testator may assign houses, lands, or money, in lieu of, 3894.
or may forbid the deduction of, 3895.
executor who has restored the whole inheritance may not afterwards claim, 3896.
a fiduciary substitute charged with a second restitution has no right to, 3897.
how the fruits are reckoned, or not, as a part of, 3898.
the fruits not reckoned to children as a part of, 3899.
an executor charged to restore the inheritance, who has made no inventory, is deprived of, 3900.
different opinions concerning this law, 3901.
different cases judged by circumstances, 3902.
TRUTH, what it is, 1996.
a thing adjudged is held for true, 2011.
TUTOR, the necessity of guardianships, 1276.
the nature of this engagement, 1277.
difference between Roman and civil law as to tutorships, 1278 – 1281.
tutorship defined, 1283.
duration of tutorship, 1284.
the nearest relations should be appointed, if there is no reason to the contrary, 1285.
may be named by the parents, 1286.
one or more may be named, 1287.
honorary, and onerary, 1288.
should be confirmed by the judge, 1289.
with or without surety, 1290.
the one who offers security preferred, 1291.
the father or grandfather is instead of, 1292.
who may be, 1293.
takes an oath of faithful administration, 1294.
tutorship is general and indefinite, 1295.
should take advice of the relations of their minors, 1296.
custom of France concerning this, 1297.
the council of the tutor, 1298.

Digitized by Google

TUTOR.

the function of, 1299.
his power and authority, 1300.
of the expenses which a tutor may lay out, 1301.
the administration of, reaches to all affairs, 1302.
extent and limits of his power, 1303.
who abuses his power, 1304.
whom the father had ordered to follow the mother's advice, 1305.
how the tutor acts for the minor, 1306.
effect of tutor's authority, 1307.
restitution of the minor notwithstanding the tutor's authority, 1308.
where a tutor has a claim against his minor, another tutor is substituted, 1309.
tutor cannot accept an assignment to a debt owing by his minor, 1310.
is obliged to act, 1311.
is to look after the minor's education, 1312.
the mother of a minor intrusted with his education unless otherwise provided, 1313.
if she marry again, 1314.
expenses of the minor, how regulated, 1315, 1316.
when the education of the minor is regulated by his father's will, 1317.
a minor without an estate, 1318.
the second engagement of tutor is the administration of the estate, 1319.
must make an inventory of minor's goods, 1320.
this being done, the deeds and writings are put into his hands, 1321.
and he is put in possession of the goods, 1322.
custom of France as to lands of minors, 1322, note.
should sell movables belonging to the minor, 1323.
cannot purchase the goods of minor, 1324.
if among movables there are some necessary for the use of the estate, 1325.
if tutorship is to last but a short time, 1326.
of movables of value, such as jewels, 1327.
should regard the advantage of the minor rather than the disposition of the father, 1328.
small and desperate debts to be sold, 1329.
of the money arising from sales, 1330.
who is a creditor of the minor, and who compounds with the other creditors, 1331.
must pay interest for moneys which he neglects to invest, 1332.
is allowed time to invest such moneys, 1333.
usage in France respecting this, 1333, note.
if the minor's revenues exceed the expenses, 1334.
of the revenues from new funds, 1335.
discharged, if he has no opportunity of investing to advantage, 1336.
if he neglect to invest, or to take his discharge, 1337.
the administration of two or more tutors, 1338.
division and discussion among several tutors, 1339.
which shall be preferred where there are many, 1340.
the obligations of honorary tutors, 1341.
the last engagement of, to give an account after his tutorship is ended, 1342.
obliged to give account during his administration, if necessary, 1343.
charge and discharge on tutor's accounts, 1344.
may charge all reasonable expenses, 1345.
the estate of, is mortgaged to the minor, 1346.
if a mother who is guardian marry again, 1347.
sureties of tutors, their obligations, 1348.

Digitized by Google

TUTOR.
should be discussed before surety is sued, 1349.
of those who certify tutors to be solvent, 1350.
of those who nominate a tutor, 1351.
heirs or executors of, 1352.
their duty, as to affairs begun before tutor's death, 1353.
as to new affairs, 1354.
if the heir of, assume the tutorship, 1355.
the surety discussed before the co-tutor, 1356.
allowed interest for money which he advances, 1361.
has a mortgage on the minor's estate, 1362.
privilege of, in his mortgage, 1363.
causes for which a tutor may be removed, 1371.
a tutor removed for dishonesty is branded with infamy, 1372.
punishable misdemeanours of, 1373.
the causes which render persons incapable, or excuse them from being tutors, 1374.
difference between incapacity and an excuse, 1375.
women cannot be guardians but to their own children, 1377.
mothers and grandmothers may be guardians, 1378.
the father-in-law may be tutor, 1378.
minors cannot be tutors, 1379.
the infirmities which render persons incapable of being, 1380.
a son of full age may be, 1381.
other causes for not confirming the nomination of, 1382.
excuses are of two kinds, 1383.
incapacity is an excuse, 1384.
those past seventy years of age excused, 1385.
the number of children is an excuse, 1386.
three tutorships excuse from a fourth, 1387.
or one burdensome tutorship, 1388.
enmity between minor's father and tutor excuses, 1389.
certain lawsuits excuse, 1390.
a lawsuit between the minor and next of kin to the tutor, 1391.
excuse on account of privilege, 1392.
ecclesiastical persons cannot be tutors, 1393.
poverty and want of industry excuse, 1394.
when nominated should act till discharged, 1395.
acceptance precludes all excuses, 1396.
of incapacity happening after the nomination, 1397.
privilege acquired after the nomination, 1398.
excuses happening after entering on office do not discharge, 1399.
when the tutor and minor live in different places, 1400.
excuses, no one of which alone is sufficient, 1401.
or guardian who participates in a fraud on creditors, how liable, 1649.
may mortgage the estate in his charge, 1678.
TUTORSHIP, at an end when minor is of age, 1364.
of several minors, 1365.
administration of, after majority, 1366.
terminated by death of the minor, 1367.
or by death of the tutor, 1368.
or by the civil death of either, 1369.
or by excuse or removal of the tutor, 1370.

Digitized by Google

UNDERTAKER, 457.
UNDERTAKINGS of work by the great, defined, 519.
the difference of undertakers, as they furnish the materials or not, 520.
of the architect who furnishes every thing, 522.
the conditions of, 523.
what things to be regulated by the judgment of skilful persons, 524.
undertakers answerable for ignorance, 525.
and for defects of materials they are to furnish, 526.
of the care they are bound to take, 527.
of the defect of the thing, 528.
the care of carriers and watermen, 529.
work to be done to owner's satisfaction, or the arbitration of a third person, 530.
work made according to the owner's direction, 531.
if the work perish, before it is approved, 532.
if an edifice perish while building, 533.
if the workman is to furnish every thing, and the whole perish, 534.
of accessories to the engagement of the undertaker, 535.
the engagements of the person who gives work to be done, 536.
he owes the price, with interest, if he be in delay, 537.
he may be discharged from advancing the price, in case of danger, 538.
if the thing perish through his act, or its own defect, 539.
if the work be not done at the time agreed, 540.
of the laborer whose fault it was not that he did not work, 541.
if the master delay to receive the work, 542.
if the undertaker is at any charge, 543.
UNIVERSAL DONEE is in the place of heir, 2674.
UNIVERSAL SUCCESSOR, the king is, in certain cases, 2673.
UNLAWFUL COVENANTS, of two sorts, 1266.
in what respect covenants are contrary to law, 1267.
null, and liable to punishment, 1268.
the effect of, 1269.
when one may or may not recover what is unjustly given, 1270.
whether condition of the receiver is better than that of the giver, 1270, note.
USE, how distinguished from usufruct, 969.
defined, 971.
when it implies the usufruct, 972.
he who has the use ought not to incommode the proprietor, 973.
cannot be transferred, 974.
accruing to husband or wife, is for both, 975.
lasts during life, 976.
of movables, its bounds and extent, 991.
expires by death of usufructuary, 1006.
and by limitation, 1007.
USUFRUCT, 948.
defined, 949.
of movables and immovables, 950.
comprehends all sorts of revenues, 951.
the usufructuary makes the fruits which he gathers his own, 952.
the rent of the lease belongs to the usufructuary as the fruits do, 953.
the revenues of, acquired successively, shared between the proprietor and usufructuary, 954.
the usufructuary may anticipate the harvest, 955.
increased or diminished by change in the estate, 956.

Digitized by Google

USUFRUCT.
changes which the usufructuary may make in the estate, 957.
trees blown down, 958.
dead trees, 959.
trees blown down may be employed in repairs, 960.
vine props, 961.
service accessory to, 962.
of conveniences not necessary for the enjoyment of, 963.
the usufructuary has the services, 964.
improvements and repairs which the usufructuary may make, 965.
such improvements cannot be taken away by him, 966.
usufructuary may sell, transfer, or give away his right, 967.
he may interrupt the lease, 968.
of movables, 982.
of things which perish in the use, 983.
of movables in a totality of goods, 984.
in what this usufruct consists, 985.
of living creatures, 986.
the usufructuary of a herd of cattle should supply out of the fruits the places of those who die, 987.
but not so, in the case of animals that do not produce young, 988.
of things consumed in the use gives a property in them, 989.
and use of things so consumed is the same thing, 990.
if the usufructuary of movables can let them, 991.
the usufructuary should make an inventory of the things subject to, 993.
and give security to make restitution, 994.
and preserve and take care of the things, 995.
should use the thing as a good husband would, 996.
should acquit the charges, 997.
and ought to make necessary repairs, 998.
a person having the bare use has the same engagements, 999.
of relinquishing a usufruct in order to avoid the charges, 1000.
the proprietor is bound to leave the enjoyment of the fruits and the use free, 1001.
he cannot change the place or thing even for the better, 1002.
he should remove obstacles against which he is bound to guarantee, 1003.
he should reimburse the usufructuary who has made repairs which he was bound to make himself, 1004.
the usufructuary enjoys the things in the condition in which he finds them, 1005.
use and habitation expire by death of usufructuary, 1006.
and when the time to which they were limited has elapsed, 1007.
restitution of, to a third usufructuary, 1008.
if the thing perish, 1009.
inundation, 1010.
of what remains of the land or tenement, 1011.
difference between universal and particular, 1012.
of changes in the land or tenement, 1013.
the remainder of the thing destroyed belongs to the proprietor, 1014.
(See Legacy.)
USURY, 607.
condemned by the divine law, 608.
what causes justify the receiving of profit in the contract of letting and hiring, 610 – 622.
prohibited by the law of God, and naturally unlawful, 623.

Digitized by Google

USURY.
of the objections of usurers in their defence, 625.
1. that they do a kindness, 625.
answer to this objection, 626 - 628.
2. loss, 3. want of gain, 629.
4. the profit of the borrower, 630.
its iniquity, 631.
the bad consequences of, 632.
prohibitions of, in the law and the prophets, 633.
forbidden at Rome, 633.
objection from the permission to the Jews to lend to strangers, 634.
answer to this objection, 635 - 638.
objection that the gospel has not forbidden usury answered, 639, 640.
objection from the liberty of usury under the Roman law, 641, 642.
unlawful without exception, 643.
the prohibitions of, reach to all usurious contracts, 644.
exception of cases where the term has elapsed, and a judicial demand of payment been made, 645.
exception of contracts for annuities, 646.

VALUATION, 443.
VICES OF COVENANTS; what they are, and examples, 1209 - 1213.
have a different effect as they are higher or lower in degree, 1215.
(See Error, Force, Fraud, Unlawful Covenants.)

WAGERS, 685.
WAR, p. 33.
WARRANTY, 373.
none against violence, casualty, or acts of the sovereign, 374.
in law and by deed, 375, 377.
the seller cannot be discharged from a warranty against his own deed, 378.
regulated by particular customs, 379.
of damages for eviction, 380.
where sale is dissolved by eviction, the seller must restore the price with damages, 382.
if the thing is not changed at time of eviction, 383.
if it be diminished, 384.
if it have increased in price, 385.
if the purchaser has made improvements, 386.
how such improvements to be estimated, 387, 388.
if seller have sold knowingly the goods of another, 389.
he who is bound to warrant cannot evict, 390.
where the purchaser who is molested does not give notice to the seller, 391.
the buyer is only bound to give notice of the disturbance to the seller, 392.
may be demanded before disturbance, 393.
of law in the sale of rights, 394.
in the sale of an inheritance, 395.
in the sale of a debt, 396.
of dowry, 663.
is reciprocal among coheirs, 2778.
two kinds of, 2779.
for the debts due from the succession of other charges, 2780.
may be otherwise regulated by the heirs, 2781.

Digitized by Google

WARRANTY.
against their proportion of the charges, 2782.
against new charges after the partition, 2783.
losses after partition, where they fall, 2784.
heir bound for a loss happening by his act, 2785.
heir who disposes of goods privately bears the loss that may happen on them, 2786.
WITNESSES to a written act are not admitted to prove the contrary, 2025.
examination of, *ad futuram rei memoriam*, abolished in France, 2036.
about customs and their evidence, 2039.
the use of, is infinite, 2040.
who may be a witness, 2041.
two qualities necessary in, probity and steadfastness, 2042.
whose probity is suspected, 2043.
interested in the facts, 2044.
interested in the party, 2045.
who are relations or allies, 2046.
who are friends, 2047.
who are enemies, 2048.
dependent on the party producing them, as domestics, 2049.
who waver in their deposition, 2050.
two, necessary to make a proof, 2051.
many may be produced, 2052.
how their evidence is to be judged, 2053.
whose integrity is unimpeached, may be mistaken, 2054.
may be compelled to give evidence, 2055.
should be interrogated by the judge, 2056.
must be sworn, 2057.
the excuses of, 2058.
who are exempt from attending by reason of their dignity, 2059.
living out of the jurisdiction of the court, 2060.
the advocate of a party cannot be a witness, 2061.
the expenses of, to be paid by the party summoning, 2062.
the punishment of false witnesses, 2063.
(See PROOF, TESTAMENT.)

END OF VOL. II.

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

JAC LDR FLd2
The civil law in its natural o
Stanford Law Library

3 6105 044 639 461

Digitized by Google