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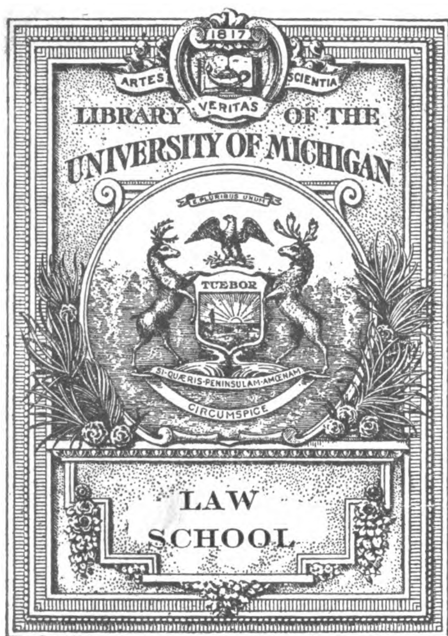

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A TREATISE ON THE LAW OF OBLIGATIONS, OR CONTRACTS.

By M. POTHIER.

TRANSLATED FROM THE FRENCH, WITH AN

INTRODUCTION, APPENDIX, AND NOTES,

ILLUSTRATIVE OF THE ENGLISH LAW ON THE SUBJECT.

BY WILLIAM DAVID EVANS, ESQ.,
BARRISTER-AT-LAW.

IN TWO VOLUMES,
THIRD AMERICAN EDITION.

VOL. I.

PHILADELPHIA:
ROBERT H. SMALL, MINOR STREET.

1853.

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ELOGE OF M. POTHIER,

PRONOUNCED UPON HIS DECEASE, IN THE UNIVERSITY OF ORLEANS BY M. LE TROSNE, THE KING'S ADVOCATE, IN THE PRESIDIAL OF ORLEANS.

FIRST PART.

M. POTHIER was born at Orleans, on the 9th of January, 1699, of an honourable family, his father was a Counsellor of the Presidial there. He was born with an extremely feeble constitution, which he strengthened by temperance and sobriety, and by the dispositions afterwards excited by study and application. The mind, like the body, by want of proper exercise, loses the use of its faculties, which are rendered torpid by inaction. The chief advantage of an instructor consists in subduing levity by application, in regulating and moderating the imagination, in forming the judgment, in giving resources to the mind, by accustoming it to reflect, to examine, to discuss. But talent in instructors is infinitely more rare, than suitable dispositions in pupils; and how many persons are rendered incapable of serious and connected study, for want of adequate cultivation.

Pothier was entirely destitute of such assistance. He lost his father at the age of five, and had no resources for his education, but in himself. The College of Jesuits was then very feebly supported, he studied there with advantage, because persons of genius, if placed in their proper course, are indebted for their progress only to themselves. The great authors of antiquity were his masters; as soon as he was capable of understanding their works, he conceived that relish for them, which is the surest harbinger of success. Assisted by a happy memory, and a great readiness of perception, he completed his store of erudition without assistance, and acquired a fund of literature, which he ever afterwards retained without having leisure to cultivate it, and that accuracy of discrimination, which is the most valuable fruit of a judicious study.

He graduated in the science of law, (*il fit son droit*) in the University of Orleans, upon which he was destined to reflect such great celebrity; and had there even less assistance in this pursuit than he had received at the college, in the cultivation of literature. The professors who then occupied the chairs of the university were absolutely indifferent to the progress of the students, and satisfied themselves with delivering some unintelligible lectures, without deigning

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to accommodate themselves to the capacity of their hearers. What they taught was not properly the science of jurisprudence, a science in itself so beautiful and luminous, but of which they presented nothing but the perplexities and contradictions foreign to its nature, and introduced by the incapacity and infidelity of the compilers of the pandects; instead of giving an instructive explanation of the texts, they entirely filled their lectures with the subtle questions invented and multipled in the schools of controversy.

From their mode of tuition, it might be supposed, that their only object was to exclude the students from the sanctuary of the laws, by the disgust which their instruction was calculated to excite; like the ancient Patricians, who in order to keep the people in subjection, concealed from them with so much care the formulæ of actions; and appropriated to themselves the knowledge of the laws, which they studiously enveloped with a veil of mystery. A tuition so defective could not satisfy the solid and judicious mind of Pothier: fortunately he was capable of surmounting it; he perceived the defects of it, and supplied by his own industry the want of other assistance. In every science the first steps are attended with the greatest difficulty; these he surmounted by the serious study of the institutes, assisted by the commentaries of Vinnius, and thus prepared himself for penetrating to the very sources of juridical science; and it was ordained that he should exhibit in the intercourse of civil life the most striking example of every social virtue, and become the oracle of jurisprudence to his contemporaries and posterity.

He decided upon embracing the functions of magistracy, and was received a counsellor of the Presidial, in 1720. His choice of situation entirely determined that of his studies: from that time literature was only admitted as a transient amusement, and he was afterwards obliged entirely to abandon it, by the multiplicity of his occupations; but from these flowers he had gathered the most valuable fruits, an acquaintance with the best authors, and the habit of writing in Latin, which became so necessary to him. In conversation with his friends, his memory presented the finest passages of Horace, and of Juvenal, to whose force and energy he was principally attached, and he recited them with a spirit peculiar to himself.

For the first ten or twelve years after his reception, he joined to the study of jurisprudence that of religion and theology, which he was fond of deriving from their sources, and principally from St. Augustin, and those great men, the Messieurs de Port Royal, for whom he had the highest veneration. M. Nicole was always his favourite author, as he is of all judicious persons, who prefer solidity of reasoning to the charms of eloquence.

But this particular study never infringed upon the duties of his employments. His great facility, and a rigorous economy of his time, gave him sufficient opportunity for both. He was the first magistrate in the bailliage of Orleans, who exercised the right of giving an opinion in the cases which they are appointed to report, while under twenty-five years of age; and never was a deviation made from the general practice with greater advantage. While he

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was beginning in his study to acquire that fund of knowledge, which from the most assiduous application of fifty years became so rich and extensive, he was learning the application of it at the Palace by that practice, of which nothing can supply the deficiency. To this he added frequent conversations with an advocate of great erudition; his very walks were conferences; and he most frequently associated with a friend, with whom he had learned Italian, and they discussed the questions that occurred to them in that language, for the sake of preserving their familiarity with it.

He had scarcely attained his majority, (25), when the extent of his acquisitions was perceived at the Palace. When he had to study any subject, he composed a treatise upon it, being persuaded that the best, and perhaps the only method of becoming master of a science is to discuss it in writing. The necessity of a just conception, in order to produce a just expression, of arranging his ideas in proper order, of contemplating them in their various aspects, habituates the mind to application, and accustoms it to accuracy and method; an advantage which can never be acquired by reading, however frequently repeated.

Pothier no sooner began to study the digest, than he perceived that invincible attraction, which Mellebranche experienced in the reading of Descartes. He felt his vocation and followed it.

The laws of the Romans form a more interesting part of their history than their victories and conquests. But if the knowledge of them had been nothing more than an object of curiosity, the labour of Pothier would have only been of moderate utility, and we may be assured, that he would not have undertaken it. But the Roman laws will be regarded in all ages, and all nations, as the real source of right and justice. After deducting what particularly concerns the manners of the people, their constitution, and forms of procedure, the remainder is derived from the real principles of justice and injustice, applied to the various actions and relations arising in the intercourse of society.

The civil law became therefore the principal object of his studies; he was fixed to it by that attachment, which is the pledge and harbinger of success. But the farther he advanced in this labour, the more sensible he became of the imperfection and disorder of the compilation of the Roman laws which is at present extant. He was not disgusted with this defect; without his knowledge he was destined to repair it. Every jurist, since the discovery of the pandects, had felt the inconvenience of this disorder, and had surmounted it for himself by dint of application; but none of them had ventured to remove the difficulty for others. It would not have occured to Pothier, if he had not been engaged in it in a manner which prevented his declining it. He had begun the employment for his own use; but his modesty did not allow him to form the design of completing and publishing it. He judged of the difficulty of the attempt by the ill success of Vigelius, a celebrated German, who had attempted it; but he had finished the paratitles upon the pandects, and this was making a start. He had also formed a plan for restoring the order of the

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texts, and had executed it with respect to several important titles. He communicated one of these essays to M. Prevôt de la Janés, Counsellor of the Presidial and professor of French law; who judging of the possibility of success from the specimen which he saw, devised a method of overcoming the modesty of Pothier.

He apprised the Chancellor D'Aguesseau of the merit and talents of the author, of his plan and his success. The Chancellor, who discerned all the importance of the undertaking requested M. de la Janés to encourage Pothier to proceed; and at length he promised what was desired of him and devoted himself entirely to accomplishing the engagement. He sent the Chanceller several specimens of his progress, with which that magistrate expressed great satisfaction and invited him to come and converse with him respecting the undertaking, and communicated his own views of its perfection in a letter, which equally manifest his great erudition and his sentiments concerning the performance,*

* It may be acceptable to insert some extracts from the letters of the Chancellor to M. Pothier, they are to be found in the Cabinet of M. de Janés, who collected them. These letters manifest the erudition of the Chancellor, his esteem for the author, and the idea that he had formed of this work, the execution of which he had very much at heart. The approbation of such a man as D'Aguesseau is the highest of commendations.

The first letter has not been found, the second is as follows:

"I have received your work upon the title De Solutionibus, and shall take the advantage of the first moment of leisure to examine it with all the attention due to a work of much difficulty if rightly executed, and of which the mere undertaking is laudable. I shall communicate to you with pleasure my reflections upon it, in order to assist you in affording to the public the fruit of your labour."—Feb. 7, 1736.

Third letter: "I am highly gratified with what I have seen of the work which you have undertaken, and which is pretty far advanced, upon the Roman jurisprudence; and I discover in it an order, a neatness, and a precision, which will render it as useful as the undertaking it is laudable. It appears to me that it may be carried to a still greater degree of perfection, and a few remarks which I made in reading it may have that tendency. As it would occupy much time to go at length into this subject in writing, I should be happy to have some conversation with you, in order that I may lay my thoughts more fully before you: your vacation is approaching; and if you would take the opportunity of passing two or three days at Paris, I shall be proud to be acquainted with a man of your merit, and to impart to you my reflections. But if you have no other reasons for bringing you here, you had better give me notice of the time when you think of coming, in order that I may acquaint you whether I shall be at leisure at any particular time that may be convenient to you. The good use which you make of your leisure induces me to pay this attention to your time, which you will regard as a proof of the esteem with which I am, &c."—Sept. 8, 1736.

Pothier went to Paris in consequence of this letter, and had a conference with the Chancellor, who sent him on the 24th September, a paper containing his view of the perfection of the work. It may be seen that Pothier availed himself of it. The Chancellor ends this little memoir by a comparison of the work of Vigelius with the plan of Pothier, which is so superior to it. He thus expresses himself:

"The work of Vigelius, who had in contemplation a plan very similar to that of Pothier would be of great service to him: there is something better, and more useful in the design of Pothier, because he only uses the terms of the laws, and gives the texts in its purity; instead of which, Vigelius writes almost always in his own terms, without confining himself to the expressions of the jurists, and contents himself with stating the principles of the laws which he refers to."

Pothier was accustomed to send parts of his work at different times to D'Aguesseau, giving him an account of his progress, as may be observed by the answers relating to them.

"I observe with pleasure the perseverence with which you continue to apply to a work so vast and laborious, as that of which you have already completed a consider-

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To show the extent and value of the labours of M. Pothier, it is necessary to give a sketch of this work.

The law of the twelve tables was the foundation of the Roman civil law. This celebrated law, the principles of which were obtained by sending an embassy into Greece, and which so many great men have extolled above the most vaunted works of the philosophers, was of singular brevity and simplicity. By degrees, the aid of interpretation was found necessary in applying it to the multitude and variety of occurrences; this, from time to time, occasioned an immense number of commentaries and explanations. These various expositions of the law of the twelve tables were the source of what is called the Civil Law, in a strict sense: and as contra-distinguished from the laws, (jus prudentum interpretatione, vel disputatione fori introductum,) of which it had not either the character or authority. The Prætors adopted this jurisprudence, by which they found a method

able portion. I have long reproached myself for my silence, with regard to the last specimens you sent to me; but besides that I have not had so much time as I could have wished to write to you upon this subject, I think it will be better to let you advance in your work, with which I have been much pleased, because the remarks which may be made upon it will come with more advantage after a revision of the whole performance. It were to be wished that you had assistants capable of diminishing your labours, by dividing them with yon. You will favour me by acquainting me from time to time with your progress."—Jan. 1, 1739.

"I could not find time sooner to answer your letter respecting your great work. I perceive with pleasure, that you go on with indefatigable application, and invincible courage. The analysis which are to be placed at the head of each title will be of great use to students; they form, as it were, the elements of civil jurisprudence; you will be the first to profit by the views which this work gives you, by bringing what you have done so well to a still greater perfection. It would be very desirable for you to find some one who could assist you with regard to the notes: I cannot sufficiently praise the constancy and diligence, with which you continue to devote yourself to a work so painful and immense, nor assure you with how much esteem I am, &c."—Aug. 23, 1740.

"You will take the trouble of letting me know to what the necessary expense of a copy of this work will amount."—June 10, 1741.

M. Pothier made a journey to Paris in 1742, as appears by the following letter:—"I have placed your first memoir in the hands of M. d'Argenson, who is not less disposed than myself to procure for you every accommodation which you may have occasion for, in the impression of the great work which you have nearly finished with indefatigable labour. I am to hear from him to-morrow morning, and if you will call at my house in Paris, on Wednesday morning, I shall be able to give you a more precise answer."—March, 3, 1742.

M. Pothier published his prospectus in 1744, and received the following letter from the Chancellor on the occasion:—"I received with much pleasure the prospectus of your great work; you know how much I approved the design, and the different specimens of it which I have seen. The last which you have printed completes the favourable idea I had formed of your work, and the form of the impression and the character seem convenient. I shall take care to have it announced in the Journal des Scavans, in order to procure immediately the greatest number of subscriptions possible. They will not wait long if the impression of the public always correspond with the merits of a work."—Dec. 6, 1744.

"I doubt not, you will employ this year as usefully as the others, in finishing and printing the great work which has occupied you so long, and which appears to have met with a more favourable reception from the public. If the two titles, De Verborum Significatione, and De Diversis Regulis Juris Antiqui, are entirely finished on your part, I should be glad if you would send them to me, or bring them when you have occasion to visit Paris, because I have taken some views of these two titles, from which I think you may derive some advantage, in order to give them all the perfection necessary, if you have not already anticipated me."—Jan. 10, 1745.

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of mollifying the law of the twelve tables, and of mitigating its excessive strictness; and as the new jurisprudence was not as yet invariably fixed, they announced by their edicts, at the commencement of their magistracy,* the principles by which they intended to judge. The formulæ invented for the prosecution of actions were likewise a part of the civil law, which had become so considerable even in the time of Cicero, that he was induced to complain of its immensity.

But what prodigious accessions did it afterwards receive, not only by the Senatus consulti which under Tiberius acquired the force of laws, and by the constitutions of the emperors, but still more by the decisions, the consultations, and the writings of the jurists, Trebatius, Labeo, Capito, Sabinus, Proculus, Julianus, Africanus, Caius, Scævola, Papinian, Paulus, Ulpian, Aquila, and many others too numerous to mention. Their decisions had not the force of law in themselves, but by usage they had acquired a very great authority; they were consulted and followed in judicial determinations, and were regarded as a kind of unwritten law.

The civil law, derived from so many different sources, had in a series of time become an immense collection, and its extent was so vast as to threaten its ruin. The changes which took place in the constitution, in manners and religion, after Constantinople had become the seat of Empire, had necessarily produced several alterations in the ancient law, and the knowledge and the study of it had by degrees fallen into neglect.

It therefore became very desirable to construct from so many scattered materials a single and regular edifice. How fortunate would it have been if so important a work had been executed in a more learned and enlightened age, instead of being deferred to the sixth century, when it was undertaken by the order of Justinian, at a time when taste had degenerated, and barbarism had begun to disfigure the Roman Empire.

A work which would have demanded one of those illustrious jurists who had not appeared for many ages, was committed to Tribonianus. But although he was very unequal to the undertaking, he might have rendered it less defective if he had employed the requisite time, and had executed it with more mature reflection. He had to peruse and abstract the works and particular treatises of a multitude of jurists, forming two thousand volumes; he had to compare the texts, to arrange them in a suitable order, to retrench a great number, adhering only to what was essential; to select upon every subject what was most important; to remove contradictions, without neglecting to show the different opinions of the most distinguished jurists upon controverted questions; to preserve the knowledge of the ancient law, and to establish the alterations which had been made in it.

He allotted only three years to this labour; and with what negligence and disorder was it executed!

The ancient law is disfigured, not only by want of accuracy, but frequently by design; several texts are altered by interpolated addi-

* Originally the Prætors judged without any restriction.

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tions, for the purpose of accommodating them to the new system. We are deprived of the knowledge of the ancient manners and laws which still existed in the time of Justinian; and the traces which are left are rendered very obscure; so that it is only by dint of labour, examination and conjecture, that we can distinguish what was then perfectly clear, and might easily have been preserved from confusion. We have only some scattered fragments of the law of the twelve tables, of which all the texts ought to have been inserted, and applied to their different subjects. Irreconcilable antinomies are left in a work invested with the authority of law, by blending the ancient jurisprudence with the modern, and by inserting the contradictory opinions of jurists of different sects, without indicating the causes of this opposition, and forming a decision between them.

The learned, since the revival of letters and the invention of printing, have laboured with incredible diligence to repair as much as possible the defects occasioned by the inaccuracy, the incapacity, and the infidelity, of the compilers of the pandects. Literature and juridical science afford each other a mutual assistance. The knowledge of the Roman law has acquired a new aspect, by the study of the Latin language, of history, and of ancient monuments, by the prevalence of sound criticism, and by the researches of antiquity; and men of letters have in the pandects discovered the solution of several obscure facts and usages.

The jurists have availed themselves of these lights to dissipate the obscurity which overwhelms the compilation of Tribonianus, they have penetrated by discussion into the sense of difficult texts; they have developed the ancient law; they have re-established the purity of the texts, reconciled many antinomies, and given reasons for those which would not admit of reconciliation; so that nothing remains to be wished for with respect to the discussion and understanding of the texts. The difference between the gloss of Accursius and the commentaries of Alciatus, proceeds from the times in which they wrote. Accursius flourished in the beginning of the thirteenth century, and Alciatus wrote in the reign of Francis I.

It is thus that the sciences are brought to perfection by the accumulation of successive labours, producing by degrees a fund of riches and knowledge, which, without suffering any loss, is continually increasing. Every scholar adds the fruit of his studies, and facilitates the success, abridges the labour, and removes the difficulties of those who follow him. They may go so much the farther as they find the road already formed, and are thus enabled in a shorter time to pass a greater space. What pains and time would have been spared to those who have devoted themselves to the study of jurisprudence by the work of Pothier, if it had appeared some ages sooner.

In fact, notwithstanding all the pains and researches of so many jurists, for a period of six hundred years, the pandects still retained a very sensible defect, which was extremely prejudicial to the study and ready comprehension of the laws, in the disorder in which the texts are placed, not only in each title, but frequently dispersed in titles to which they have no relation.

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The principal object of the work of Pothier was to remedy this disorder. It is entitled Pandectæ Justinianæ in novum Ordinem digestæ, and forms three volumes in folio.

He preserved the arrangement of titles, which is the order of the perpetual edict, upon which the jurist had commented; and under these titles he arranged all the texts in a methodical order, not only by changing their place in the title, but also by extracting laws from titles where they were misplaced; and inserting them under those to which they had the greatest relation.

At the head of each title is an introduction containing an exposition of the subject treated under it, and the texts which contain the definitions and first principles. Clear and full divisions in the course of the title facilitate the understanding of it, and assist the memory. The laws follow each other by easy transitions, which discover their relation, and indicate their connection. All the additions of the author are distinguished by Italics, so that the purity of the text is completely preserved.

The author applied himself to develop the ancient law, to elucidate it, and to indicate the changes which it underwent. He directed his researches to the other parts of the digest which contain the traces of it, to the institutes and constitutions of Justinian which record for the purpose of abrogating it, to the paraphrase of Theophilis, the fragments which remain of the twelve tables, the works of the ancient jurists, and the vestiges of it which are discovered in history, and the other monuments of antiquity.

Of the laws of the code, some are conformable to the jurisprudence of the pandects; others change and abrogate it, but are still necessary for understanding the texts which were altered by Tribonianus, for the purpose of adapting them to the new system. The laws of the code which confirm the ancient jurisprudence are stated entire, being those of the Emperors anterior to Constantine. The subsequent laws, which it is easy to distinguish by their diffuse and barbarous style, are only cited by way of extract.

Lastly, the author has placed short but sufficient notes to such passages as are attended with difficulty, either on account of antinomies, or of alterations in the text; these notes are most frequently taken from Cujas, the greatest jurist since the revival of letters.

He unquestionably perused and consulted a great number of books for the purpose of accomplishing this great work. His own library was considerable, and he had also the use of the public library founded by M. Prousteau, doctor of the University, the greater part of which relates to jurisprudence. But the books which he studied thoroughly and continually, as might easily be perceived by the condition of them in his library, were the pandects themselves, and the code, which he must have read over a great many times, and rendered so familiar as to have all the texts in a manner present together; the works of Cujas, and those of Dumoulin.

The two concluding titles of the digest are, De Verborum Significatione and De Regulis Juris. Pothier rendered these titles very important and extensive. They contain 275 pages in folio. In that

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De Regulis Juris he has comprised an abridgment of the whole law, collecting from all the books of the digest and arranging in excellent order those principles which are so fertile in their consequences, and which the Roman jurists expressed with such distinguished precision.

It appears that it was the chancellor who first conceived the idea of this part of the work, and recommended it at the beginning of the undertaking; that M. Pothier, after having completed these two titles, proposed to publish them as a separate work, but that he assented to the recommendation of the chancellor, who pointed out to him the advantage that would result from terminating the work by this collection, which presents a valuable abstract of it formed from the titles themselves.

The composition of this great work occupied M. Pothier more than twelve years, and more than twenty-five, if we include, as is reasonable, the time which was employed in qualifying himself for it. He was assisted in the execution by M. de Guienne, an advocate in the parliament, his intimate friend, and I may also take the liberty of naming him as my own. Pothier, who, though he had a great fund of literature, was not fond of a polished and ornamental style, furnished him with the materials. There would have been no preface, or only a very short one, if it had not been undertaken by M. de Guienne. He also contributed a considerable part of the commentary upon the law of the twelve tables, which is at the beginning of the second volume.

With respect to the body of the work, although he only undertook the correction of the proofs, his labour was much more extensive and advantageous. He was a person of great exactness, not easily satisfied, a good critic, and a suitable associate for Pothier, who, attending only to the substance, would have neglected several matters of detail which contribute materially to the perfection of a work. He had not the extent of knowledge, or the great facility of Pothier, and on that account was not the less adapted for the labour of revision. If he met with a text which required to be elucidated, or which might be placed with more advantage in a different situation; or observed the neglect of a commodious transition, he communicated his remarks and objections to Pothier, which produced from him an alteration in the arrangement, an explanation, or a note.

Another intimate friend of Pothier was M. Rousseau, advocate, and professor of French law at Paris. Their attachment was of long standing. It was formed at Paris, where Pothier had frequently spent some time, both before 1730 and afterwards. He had there conferred with several celebrated advocates, who kept up an intercourse with him, and entertained all the esteem for him which he merited. But his correspondence with Rousseau was continual, and always turned upon their common studies. They met every year during their vacations.

M. Rousseau had great information, an excellent judgment, so ready an elocution, that it was difficult to follow him in the discussion of a question, and such a wonderful memory, that he not only recollected matters of substance, but cited without preparation the

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authorities by which he supported his opinion. It was from him, that Pothier learned what is called actual jurisprudence, which he did not always approve, but which it is necessary to know; a kind of versatile legislation, unfortunately too prevalent, and which would scarcely exist but for the imperfection of the laws.

Pothier had the highest respect for the opinion of Rousseau; they generally, but not always, coincided in their sentiments. In several passages of his treatises Pothier adduces the sentiments of Rousseau, either to combat them or to confirm his own or to leave the reader to judge for himself upon certain questions with respect to which, without offering any judgment, he states the reason that may be urged in support of one opinion, and afterwards presents the opposite opinion of Rousseau.

The pandects formed a work of great magnitude, very expensive to print, written in Latin, and upon a subject the study of which is with us very much neglected. It was difficult to find booksellers willing to undertake it; they were afraid that the sale would be impossible, or at least very slow. The impression however went off with sufficient expedition, because the greatest part of it was taken by foreigners.

The only criticism which he had to encounter, was that of a journalist at Leipsic, who, either from jealousy that his own country had not the honour of so great an undertaking, or for some other motive, attacked it with acrimony, and spoke of it as a work in which there was nothing new or interesting, as a thing without merit, undertaken with a view to procure a reputation at a slight expense, and which wanted that fund of erudition, with which all juridical writings were formerly, and those of the Germans still are overloaded.

The friends of Pothier knew him well enough to be satisfied that he would not take the trouble of writing an answer. One of his colleagues undertook this charge, and he was first shown the criticism, accompanied with the answer printed as a letter addressed to the authors of the Journal des Scavans. In this letter it was shown that the German critic had not been sensible, either of the merit or of the object of the work; that the author had not proposed to make a commentary to engage in discussions of erudition; but on the contrary to diminish the study of the commentaries which is still more laborious than that of the laws, to render the texts mutual commentaries to each other, and to illustrate them by the manner in which they were connected and arranged.

While the first volume of the Pandects was printing, Pothier fell dangerously ill; upon returning from a visit to one of his colleagues at Sologne, he came home on horseback with a fever. He had never before been ill; for although of a feeble temperament, he had preserved his health by regularity. The fever was to him a new and unknown visitation, he struggled against it for some days without knowing what it was; and then instead of sending for his physician he went out to consult him, and ask him what was the cause of the indisposition which he suffered.

The physician immediately perceived what it was, and directed him

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to return home and go to bed. The illness became very serious, and his life was despaired of.

Happily the disorder was overcome; but his recovery was not complete: he was deprived of the use of his limbs, and submitted with great composure to this privation which continued so long, that it was apprehended it would never be removed. He felicitated himself in having preserved the power of diligence and application. He appropriated a greater portion of his time to study, which the sedentary life that he was obliged to lead gave him a greater liberty of doing, and had given up the hopes of ever recovering the use of his limbs, after having tried several remedies without effect, when it was conceived that his power of walking might be prevented not so much by any absolute defect as by long disuse, he was advised to endeavour to walk by the assistance of two pullies, fixed in a groove attached to the beam of his chamber, which held him by the arms and allowed him to move his limbs, without their having to bear the weight of his body. He submitted to this attempt, and by degrees recovered the use of his legs which only retained a degree of stiffness. He had been a great walker before his illness. He afterwards walked sufficiently from necessity, for the further he advanced in age the more his occupations multiplied, so as to preclude any remission. When he was pressed to take exercise, he answered that he had sufficient in passing between his own house and the court.

The study of jurisprudence had already began to revive in the University of Orleans. M. Prevôt de la Janés, counsellor of the Presidial, and professor of French law, had perceived that extensive knowledge is not sufficient for a person whose office is to instruct, that it only renders him useful to himself in a situation instituted for the utility of others; unless he can give a relish to his instructions, and inspire a love of study. He was a person of very considerable merit and information, of a polished mind, and very agreeable conversation. He was fond of young men, and had the art of attaching them to him, and inspiring them with an ardour for success. This talent is the more particularly necessary in a professor of law, who has no other authority than that of reason and persuasion. His pupils are in that critical interval which separates youth from manhood; and are often the more enamoured of independence in proportion to the eagerness with which they have longed for the time that was to give them the possession of it; and if they happen to have retained a fondness for study, will naturally prefer the charms of literature to the austerity and dryness of jurisprudence.

M. de la Janés died in the month of October, 1749. The chancellor was very warmly solicited for his situation. He well knew the merit of Pothier, and wished to give it to him: Pothier on his side also desired the appointment, as well from his attachment to young persons as for the pleasure of instruction. But it was not his character to solicit, and his timidity was an impediment which it required some assistance to overcome. I am not certain whether M. Gilbert de Voisins removed this obstacle by offering him the chair on the part of the chancellor, or whether Poither had the courage to sur-

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mount his natural disposition, so far as to intimate to M. Gilbert, that he should be flattered by the appointment. However this may be, he received it with general approbation. His satisfaction could only be diminished by the regret of having M. Guyot for his opponent, and of seeing him disappointed of a situation, which he could not have failed to obtain against any less formidable competitor. He had only wished for the appointment on account of the pleasure of communicating instruction; and he hoped to repair the failure of M. Guyot, by inducing him to accept a division of the emoluments. A conflict of generosity passed between them upon this occasion equally honourable to both; Pothier pressed and solicited the division as a favour, M. Guyot persisted in refusing it; and a few years afterwards received a joint appointment.

There is a complaint of the study of law falling into decay. The cause of this decline is the more serious, and the more difficult to be removed, as it is connected with the general state of manners in the kingdom, with the frivolity of the age, and with the dissipation of young persons who are introduced into society much too early. The most able and best intentioned masters can only struggle against this prevailing cause, and oppose it by their assiduity, their application, and their courage. Their success, notwithstanding all their exertions, will be confined to a small number of pupils desirous of profiting by their assistance.

Pothier succeeded a professor who had began to inspire emulation; and he found in those who still compose the university, colleagues impressed with the same views and the same zeal as himself.

The most celebrated men are not always the ablest masters, and even the depth of their knowledge seems to render this function the more painful to them; and to be an obstacle to the success of their instructions. The labour of composition has nothing but what is agreeable to a person who has pursued the regular study of a science; who has made himself master of it as a connected whole; and is familiar with all its parts. The ideas which he possesses crowd upon him, and claim an arrangement from his pen; if his mind is disposed with method, they assume without effort their natural order. The difficulties which occur are so far from repelling him, that they are an additional attraction. The necessity of forming a decision upon important questions compels him to look for objections, and to assure by discussion the truth of the sentiment which he embraces.

But the talent of instruction is altogether different, and is seldom combined with an extent of knowledge. To descend to the first elements, in order to be understood; to vary the information and the manner of presenting it, to be wholly occupied with others, and entirely forgetful of oneself; to be accommodated to the level of every capacity, so that the lowest intellect may comprehend what is presented without complaining of neglect; to appear to have no knowledge beyond what is communicated at the moment; to return to the same points for the purpose of impressing them; to descend from principles to consequences by an easy gradation; to avoid stating more at a time than can be done conveniently and without overload-

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ing the hearers; to express every thing with method and clearness; to be satisfied that the hearers go along with you, and to take them by the hand to assist their progress. Such is the talent of an instructor; and such in a superior degree was that of Pothier. He had even the skill of so entirely concealing the superiority of the master; that the students supposed themselves to be conversing with a friend. His lectures were conferences, in which he supported the attention by questions, that enabled young men to direct their private studies with more advantage. The question was addressed only to one, and all endeavoured to find the answer. All were in expectation, because the next question might be addressed to themselves. If the answer was difficult in itself, the manner of putting the question would lead to the solution, indicating it to attentive minds, and at the same time leaving them the pleasure of inquiry and the honour of the discovery. The most trivial objection, even such as manifested either a want of proficiency, or the ignorance of a first principle, was attended to, and answered with kindness.

Whoever knows the effects of emulation, knows the efforts which men are capable of making when animated by so powerful an incentive, and can appreciate the progress which young persons who are favourably disposed will make under such a master; and his interesting manner of communicating instruction was admirably adapted to increase the number of them. I have already said, that Pothier only desired his appointment on account of the pleasure of conveying instruction, and that was the only advantage which he reserved to himself, as he divided the emoluments between the poor and his pupils. Instead of the examination in French law which used to terminate the course of studies, he substituted a public disputation on the subjects of tuition in the preceding year. The young men who chose to engage in the contest, prepared themselves for a long time before by serious application, none would venture to enter the list without a confidence if not of victory at least of honour. The public who take an interest in the success of youthful efforts, felt a pleasure in attending this conflict, of which the university was the judge. The palm of victory was a medal of gold, adjudged in public, the other competitors were not without their reward, they received medals of silver.

It may easily be supposed that the combatants were not very tender towards each other; the disputation of each competitor occupied a sitting, during which all the others were his opponents and he had to oppose each of them in their turns. The manner of proposing questions, and that of answering them, were equally taken into consideration in awarding the judgment. As they were all aware that the treatises which had been lectured upon during the preceding year, were as familiar to their opponents as themselves, they found it necessary to carry their researches further, and derived their arguments either from the text of the civil law, or the authors who had reference to the subject; and the conflict was so serious that the judges were sometimes obliged to repress the ardour of it, and interpose, either for correcting a deviation from the subject proposed, or

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to state with greater clearness the question which had been couched in an intricate form for the purpose of embarrassing the antagonist.

Pothier was not satisfied with encouraging his own pupils; nothing personal ever entered into his views; the students of the two first years who were destined afterwards to come under his tuition equally participated in his favours, and frequently even in the first year they were attracted to his lectures, by the love of study and the pleasure of information. The examination upon the Institutes, and the Thesis of Bachelors, became occasions of public resort; and the zeal of Pothier was always perfectly seconded by that of the other professors.

During the course of five and twenty years how many ornaments has this seminary presented to the magistracy and the bar.

After completing his great work on the Pandects, Pothier entered on an immense career which only terminated with his life. He had formerly composed treatises for his own private use upon all the subjects of French law. The duty of instruction led him to go over them anew; and those treatises are in manuscript in the hands of several persons. He would have retouched them still farther if he could have found time to have attended to their publication.

In 1740, Pothier had, in conjunction with M. Prevôt de la Janés and M. Pousse, published an edition of the custom of Orleans, with notes. This edition being out of print, and the bookseller being desirous of another, he requested Pothier to revise it. He undertook the charge with pleasure, but instead of a mere revision he produced a work entirely different, and much more important and useful. At the head of each custom he added a summary treatise on the subject: a kind of commentary infinitely more useful than notes; which being only relative to a single article, give the mind no connected view, and are as detached as the text which they interpret. He subjoined notes to the articles requiring elucidation, and there are constant references from the notes to the introduction of the title, and from the introduction to the body and notes; connecting the whole work together. Obliged to restrain himself by the limited nature of his subject, he has adapted his style accordingly; so that this work presents an excellent abridgment of his treatise. It contains every thing which is essential to know, stated with neatness and precision; and whoever has these two volumes may attain an adequate knowledge of customary law.

This work is not less valuable with respect to the custom of Paris than to our own, from the great affinity subsisting between them, and it forms a complete body of customary jurisprudence, the more valuable as coming from a civilian. For it must not be supposed that the customary law is entirely separate from the Roman, and that a mere knowledge of the customs is sufficient for composing a treatise upon the subjects which they embrace.

In our legislation, which is almost entirely positive and arbitrary, reason has scarcely any influence in the establishment of principles. The customs of different provinces may be contradictory, and in fact often are so, and yet they are all true. For whatever is arbitrary is only a single matter of fact; and cannot in its nature be a substan-

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tive and independent truth. There are doubtless many of these detached truths or factitious principles, in all legislation; for matters of detail can only be regulated by positive law. Unfortunately our legislation is so full of them as hardly to contain any thing else; and those positive laws which would be no longer arbitrary, if they were founded upon any reasons of real necessity or utility, are for the most part arbitrary in the strictest sense of the term. But the jurist like the magistrate, makes no alteration in the laws; he only teaches or explains them as he finds them established, and he reasons justly upon these arbitrary principles when he deduces from them their proper consequences; when he correctly distinguishes between the opposite interests which arise from their interpretations, and applies in a skilful and judicious manner, the superior rules of true distributive justice to their construction. He unquestionably enjoys a greater satisfaction when he is directly engaged in the application of these rules themselves, and investigating the pure principles of natural right, the adaption of which to the multiplicity of actions, and the various relations of society, is already so extensive. But since to these laws, at once so simple in themselves, and so fertile in their consequences, so many others have been added which are merely arbitrary, it becomes requisite to study the laws last mentioned, in order to regulate the various interests and actions which depend upon them. But what a difference is there when these matters, however consistent with the real principles of justice, are treated of by a person who never having studied any thing else, plods servilely within the narrow circle of human institution, and by a jurist who, possessing the powers of taking a wider range, respects this legislation because it exists, but who avails himself of the spirit of decision, and the extended views which the science of jurisprudence supplies for the discussion and interpretation of positive law.

Such, in an eminent degree, was the talent of Dumoulin, who applied in so superior a manner the wisdom and intelligence of the Roman law, to the explication of our own municipal usages; such was the talent of Loyseau, of our commentator Lalande, and a very few others, who may be selected from the crowd of practicians and commentators by which we are overwhelmed.

Such was the talent of Pothier, and it is this circumstance which has so greatly enhanced the merit of his researches upon customary law; and which excites our regret for his want of leisure to publish all that he had composed upon these subjects. But almost every man of science has excited the same regret. In the sciences, and especially in those which require a very extensive study, the greater part of life is employed in acquiring the knowledge requisite for communicating instruction; and there is not afterwards sufficient time for the execution of all the plans which are projected. Genius and learning inspire resolution, and produce designs, which are obstructed by the shortness of life. If we were to dwell too intently upon this circumstance, we should fall into languor and inaction, and we should not even attempt what is actually in our power, unless we were instigated by the hope of accomplishing what is beyond it.

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Pothier would have found sufficient time for satisfying every wish with respect to customary law, if he had not engaged in another work, which was attended with the most happy consequences. He undertook to compose a treatise in French upon a subject the most important, and of the most necessary and frequent application of any in the science of jurisprudence, and the principles of which can only be collected from the Pandects — the substance of obligations and contracts, intermixing some discussions confined to the particular laws of France.

He published in 1761, the Treatise on Obligations in two volumes, as the foundation of the other treatises which he intended afterwards to present. This work had the most favourable reception, and has passed through two editions. It will always be regarded as a classical and essential production. It engaged the greatest share of the author's application, and required the most profound and extensive knowledge of jurisprudence. He discussed with equal penetration and perspicuity, the principles respecting the divisibility and indivisibility of obligations; a matter extremely subtle, and which had been developed by Dumoulin in a particular work of great learning, but very difficult of comprehension. The subject required a precision and method which were wanting in Dumoulin, whose profundity of learning seemed injurious to his perspicuity.

The Treatise on Obligations announced a connected series of dissertations upon the different species of contracts. The author fulfilled this engagement. Every year produced a new work. We are ignorant what he projected further; but it is probable that he would have given the public his works on French law.

His Treatises on Contracts have the advantage, of not only embracing the knowledge of the civil law, and the application of its principles to the cases which occur in courts of justice; but likewise of affording the surest directions upon matters of conscience. The subjects are discussed with reference both to legal and moral obligation; and while he gives us information how the rights resulting from our contracts can be judicially enforced; he teaches us to be just, to forbear demanding any thing inconsistent with equity, and to abstain from violating the rights of others, even when it can be attempted with success; a most valuable part of jurisprudence, which constitutes the essence of morality, and is of much greater extent and exactness than can be attained by any judicial determinations.

Jurists alone can hold that balance of immutable justice, of which human justice presents no more than a faint shadow and an inanimate resemblance; it is for them alone to ascend a tribunal superior to those which can be erected by human authority, and to pronounce with rectitude upon the rights and duties of mankind.

This part of ethics is, doubtless, likewise within the province of theologians, and they ought to have a knowledge of it, but their information should be received from jurists. Let them not be ashamed of consulting the Roman laws: they will there find upon almost every subject, pure, exact, and luminous decisions, without the knowledge of which it would be difficult to instruct persons as to the direction

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of their conduct, without incurring the risk either of misleading them by erroneous decisions in favour of their own interest, which is always too ready in illuding the dictates of integrity; or of alarming and disturbing their consciences by too severe restrictions. On this account Pothier did not like to see matters of right discussed by theologians or casuists, and upon these points, he frequently confuted the author of the conferences of Paris, who in other respects possesses very great excellence. They ought to feel the obligation which he has conferred upon them, by enabling them to apply the principles of justice to the infinite variety of cases arising from agreements; and can have no just apprehension of being mistaken in following the decision of a person of such enlightened understanding.

The style of Pothier is simple, easy, and for the most part rather negligent. It accorded with his character, which was totally destitute of affectation and parade; but at the same time, it is extremely accurate, and cannot be charged with being too diffuse; an advantage which is superior to any other in works, that are read only for the purposes of instruction, and the want of which cannot admit of any compensation.

His modesty induced him to say, that he wrote only for the use of his scholars. Some journalists, who were better qualified to judge of the frivolous publications of the day, than to appreciate the value of juridical inquiries, confining themselves to this superficial view, and deciding upon the intrinsic merit merely by this simplicity of the style, did not hesitate to repeat the judgment which the modesty of the author had pronounced. But the force of truth will always obtain from those, who are competent to form an adequate judgment, the sentence that his treatises upon contracts are not only calculated for teaching the rudiments of jurisprudence; but that the most accomplished jurists will read them with advantage, as containing a perfect representation of their science, and that the treatise on obligations is a work of the most distinguished excellence.

Pothier himself admitted, that he wrote without any regard to style. He attended only to the matter, and expressed his ideas as he first conceived them. But as he had a very correct mind, his ideas always presented themselves with proper order, and fell into a regular arrangement. His plan comprised his whole subject, his definitions are always exact, his divisions clear and methodical; his reasons for doubting and deciding are placed in a luminous point of view, and the solution finds the reader instructed by the discussion, and prepared to acquiesce in the justness of the decision. He more than once did me the honour to submit his manuscripts to my revision, for the purpose of correcting any negligence, or prolixity: I undertook this commission whenever he requested it; my remarks were neither numerous nor of much importance, notwithstanding the liberty which he gave me, or rather notwithstanding my wish to please him by paying the attention which he desired. I felt, that if I had composed the work, I should have written otherwise in general, because every person has his peculiar manner of writing; but if I offered to polish the style, or to present the questions in a different manner, I perceived that it would be

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necessary to new model the whole, and that the style was the result of the substance, so that it could hardly ever be changed without a loss of perspicuity. The same thing was experienced by some others, to whom he gave a similar commission.

In jurisprudence as in medicine, the theory of the science acquired by study, cannot be carried into effect without the habits of practice. Pothier was equally a master of this part of the subject, and although the forms of procedure are very tiresome to a scientific jurist, he conquered the aversion to them; and has left manuscript treatises on civil and criminal proceedings.*

To the acquisition of such extensive knowledge, he united all the excellencies of a magistrate in a superior degree. Zeal for the support of justice, assiduity, promptitude, and dispatch, disinterestedness, integrity, firmness, attachment to his fraternity, nor was there any virtue incident to his station, which he did not possess in an eminent manner.

He had great satisfaction in finding his tribunal surrounded by the pupils whom he had taken by the hand to lead there, whom he had formed by his lessons, and whom he continued to instruct by his counsels and examples. None of them could complain of his using that tone of superiority, which his age and merit might have reasonably allowed.

What precision, what perspicuity, prevailed in his reports! Without going into useless details, he retrenched the extrinsic matter which is often introduced by the parties, and only presented the cause itself, and the grounds of argument on the respective sides.

In the judgment of criminal affairs, there is less room for the science of a jurist. The object of inquiry is only the proof of a fact. But what attention, what justness of mind, especially upon delicate occasions, is requisite in weighing the indicia and circumstances, in distinguishing the degrees of probability, in avoiding to confound it with certainty, and in drawing the line between moral certainty and judicial?

Pothier evinced an equal justice and penetration in this part of his duty. He was equally adapted to all the functions of magistracy, and completely fulfilled them. Care was only taken to avoid assigning to him cases, in which it was foreseen that the question† might be directed, as he could not support the spectacle; a weakness which proceeds more from the sensibility of the physical organs, than from moral sentiment. In other respects, he did not decline any of the functions of magistracy; with which, towards the end of his life, he was very much engaged, in consequence of the death of the other magistrates.

The Presidial of Orleans is indebted to him for its re-establishment. Had it not been for the emulation which he excited, and the persons whom he induced to embrace the magistracy, the company would have now consisted only of a few ancient members; whereas the last twenty years have been its most brilliant epocha, rendering

* These are now printed with his works.

† Torture.

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it a single exception amidst the general decline of tribunals. But can we flatter ourselves, that this generation will be replaced? Can we expect that this partial cause will be attended with permanent consequences, and produce an exception from the more general causes, which are occasioning the second order of magistracy to fall into decay? I stated the causes of their decline in a public discourse in the year 1763. They certainly have not diminished since that time; and the great man who, in this district repressed the influence of causes that have been so powerful in every other, who singly sustained the credit of his tribunal when it was on the verge of ruin, who so greatly extended its splendour and utility, is now no more, and it is certain that he will not be replaced.

Should there hereafter arise any other person equally great as a jurist, (to the formation of which character his works may essentially contribute,) where will the man be found who to his depth of knowledge, his justness and penetration, will join in an equal degree the qualities of the heart; a man so good, of such simplicity, so modest, in every way so respectable? He seemed out of his place among us by the purity and simplicity of his manners, which were entirely remote from the fashions of the times.

It would be much easier to give an account of his works, than an idea of his virtues; and this part of his panegyric which yet remains, will appear very imperfect to those who had the happiness of enjoying his intimacy, and the example of his private life.

SECOND PART.

The life of a man of science is seldom very fertile in events, which are calculated to interest our curiosity. Simplicity and uniformity are its character, and its only æras are those of his works. His history is like that of a nation, whose government has been long exempt from ambition, friendly to peace, solely occupied with the care of rendering its subjects happy, and enlightened in the means of doing so. The annals of such a people will be very barren; when you have learned its constitution and administration, you know its history; it will be the same in one age as in another, because the character of order is uniformity.

The agitation of the passions is the cause of events, and history is only the recital of the effects produced. The life of a man of science is the more happy, as it is the less replete with interesting occurrences.

Sometimes he is carried against his inclinations amidst the storms of life, to which he is naturally a stranger. Circumstances remove him from his proper sphere, and subject him to the passions of others, or raise him to situations which expose him to their contradiction. His life then becomes interesting at the expense of his repose.

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Pothier had never any ground of complaint from the passions of himself or others. Nothing disturbed the tranquillity of his mind, no adventitious circumstances deranged the plan and uniformity of his life. Nothing occurred to give him pain except the loss of his friends, to whom he was attached with great sincerity.

Perfectly free from all pecuniary anxiety, he consecrated the whole of his life to his functions, and the study of jurisprudence; he had no other duties to fulfil, nor any other inclination to gratify.

He never had the smallest disposition to marry. He said that he had not sufficient courage for it, and that he admired those who had.

Celibacy is doubtless the best and wisest course for a man frugal of his time, exclusively devoted to study, aud peculiarly anxious for tranquillity. This condition separates him from the generality of mankind, it secures him from many evils, and, by limiting the objects of his attachment, relieves him from the principal sources of anxiety.

No person ever availed himself of this advantage more than Pothier; he wished to enjoy it in its full extent, and thought himself excused from all attention to domestic affairs. His negligence in this respect would have been culpable in the head of a family. The fault in him became respectable from the motive which occasioned it. It originated from a sincere disregard for affluence, and a most disinterested character of mind. He, however, saw only the negligence that was produced by this sentiment, and reproached himself for it in the society of his friends.

He was appointed Echevin* in 1747. We must take the liberty of observing, that this appointment was rather inconsiderate. Why should it be wished to have a person, whose time is so valuable, devote a portion of it to functions, which would be much better performed by others? Why compel a person, to whom the care of his own patrimony was too burthensome, to charge himself with the pecuniary affairs of the public? he therefore attended very little to the duties of this employment.

He was no wise calculated for the details of domestic affairs, he was too indifferent to matters of interest, to study or attend to them. Fortunately he had a faithful domestic, who obliged him to undertake the most essential concerns, and relieved him from attending to those which did not require his personal interposition.

He never attempted to increase his fortune, and only left it as he found it. His disinterestedness was not occasioned by the affluence of his fortune, which was more than sufficient for all his purposes; but proceeded from the nature of his character, and from a real indifference for riches.

If he had been much more opulent, he would not have lived in a different manner, he would have made much larger donations, and would have been more incumbered by a more extensive fortune, in case he had condescended to take the trouble of giving it an additional attention. If he had consented to take more pains, it would only have been from a motive of economy in favour of the poor. He

*An officer who has the charge of the pecuniary affairs of a town.

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preferred indemnifying them by the frugality of his life, by which he was enabled to be more generous than his fortune would seem to allow. He was justified in thinking, that he discharged his duty towards them by the disposition of a superfluity, which was the more considerable, as what he applied in necessaries was very limited. He regretted even the amount which his domestics expended in these necessaries on account of his health, and they sometimes found it requisite to conceal from him the price which they gave for provisions. The Dames de Pauvres were always sure of finding a resource in him; he received their visits with gratitude and respect, he was pleased with making them the depositories of his bounty, because he wished it to be applied with discretion; and by confiding it to them, he was easy with respect to the distribution, and did not think it requisite to ask for any account.

But how many persons, whose indigence was accompanied by a certain elevation in society, applied to him with confidence for assistance, and received an effectual relief, the value of which was enhanced by the tenderness with which it was administered? How many children did he put forward in life, by defraying the charge of their apprenticeship; a relief the more durable, as it prevents the accession of poverty? How often have distant provinces experienced the benefit of his charities, for which there was no other solicitation than a knowledge of the miseries that excited them?

How many good works did he perform in secret, and which were known only to Omniscience? In times of general calamity, he would have exhausted the whole of his income, and left himself destitute of necessaries, if his superintendant had not taken the precaution of reserving something for daily expenditure; he concealed his money from her for the purpose of charity, and she was obliged to conceal it from him for mere subsistence. This did not require very great management, as he never knew the amount of his money, and gave her his keys whenever she asked for it. As long as he found any money he took it to give away, and she could only check this excess by threatening to take up goods upon credit. When his coffer was exhausted, the replenishing it was also the care of his superintendant; she was obliged to discover where money was due to him, and prevail upon him to sign receipts to enable her to obtain it.

So many virtues and good works were concealed from the knowledge of the public by an extreme modesty, and the same disposition so entirely influenced all his actions, that it was the virtue which he had the greatest difficulty in concealing. It arose from a sincere humility, by which he really preferred others to himself, and prevented his conceiving himself to be possessed of a merit which was conspicuous to every other person.

Equally disinterested with respect to reputation and fortune, he took no more pains for the one than the other; but there was this difference, that he never did any thing which had the effect of advancing his fortune, whilst every day was adding to his reputation, which extended without his knowledge, and contrary to his wishes, and any intimation of it was by no means favourably received. He

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was as much adverse to commendation as others are to reproach, and it was easy to observe by his embarrassment and his countenance, that he was seriously displeased with it.

To be indulgent to others, to be afraid of failing in what is due to them, to forbear exacting any thing for ourselves, is the true character of politeness; and this politeness was as prevalent in his character, as the modesty which occasioned it. He was only deficient in that superficial politeness, with which the generality of persons are fully satisfied, and which they so frequently pervert by expressing sentiments that they do not feel; he was deficient in the manners which are only acquired in the commerce of the world, and which are dispensed with in persons who have been more conversant with books than society, especially when they have nothing of that coarseness and asperity, which are sometimes contracted by a habit of study and retirement, without themselves being conscious of it.

Pothier's deportment was very different from this. Nothing could be imputed to him but an excess of diffidence, which rendered him timid and embarrassed in the company of strangers; or when he was forced by the duties of propriety to appear in a more extended circle. Upon these occasions he found himself out of his element, and generally requested one of his friends to accompany him, which he regarded as a signal favour.

Nature is frugal of her gifts, and does not always impart a variety of them to the same individual; but who would not prefer the allotment of Pothier, however destitute of exterior advantages? There was nothing prepossessing in his figure; his stature was tall, but ill connected; in walking, his body inclined on one side, his gait was singular and inelegant; in sitting, he was embarrassed by the length of his legs, which he kept twisted together, (*entrelassoit par des coutours redoublés.*) There was a peculiar awkwardness in all his actions: at table it was almost necessary to cut his meat for him; if he wanted to mend the fire he placed himself upon his knees, but did not succeed in accomplishing his purpose. The simplicity of his manners, and of his whole appearance, might excite a favourable impression with respect to the goodness of his character; but gave no indication of the superiority of his mind. To have an idea of that, it was necessary either to judge of him by his reputation, or to have an intimate knowledge of him; a transient visit must have wakened the idea that was previously entertained of him. There was, however, a spirit and vivacity in his eyes, which indicated the quickness of his penetration; but they did not acquire animation until he became interested by the conversation.

He was always the readiest to indulge a pleasantry upon his own figure and want of address. He used to relate in a good humoured manner, that in passing a coffee house at Paris, in his robe, the young men came out to point at him.

When he was at Paris, upon the invitation of M. D'Aguesseau, who wished to know and converse with him upon the work in which he was engaged, he called at the Hotel de la Chancellerie, and was told that the Chancellor could not be seen. He went away, and in-

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tended to return home the following day, if his friends had not detained him. He called again the next day, when the Chancellor, upon being informed that he was in his anti-chamber, came out to him, and received him with a distinction, which afforded considerable surprise to those who had only formed a judgment of him from his appearance.

He was mild and affable in society, gay and open with his friends, of a frankness in conversation that unbosomed all his thoughts, his tranquillity was never disturbed, nor his serenity overclouded. He had a simplicity which it is pleasing to meet with in men of superior minds, as it tends to moderate the awe inspired by their merit. This simplicity would sometimes have the appearance of singularity, sometimes it was the result of an excess of reason, if we may use that expression to distinguish it from the ordinary mode of thinking and acting. For even the most sensible persons in many cases follow the common opinion, in opposition to the dictates of good sense; and it is very rare to meet with a person, whose opinions, being solely governed by the pure sentiments of reason, cannot appear otherwise than singular.

He was averse to contention and dispute, was never personally offended with contradiction, and wondered at any person being displeased at another differing from him in opinion. But he strongly adhered to his opinion, not from an attachment to it as his own, but because he thought it correct, and the extent of his information would not suffer him to remain undecided. He defended it with firmness, and used a freedom of opposition, which he equally admitted to others; he argued with living persons in the same manner as he discussed the sentiments of an author, without feeling any other interest than the discovery of the truth. Authority alone did not impose upon him, because it is not a reason, it was only an additional motive for discussing a subject with greater care, and giving his reasons a force and clearness, which might counterbalance the weight of authority.

There was, therefore, a great advantage to be gained from stating objections to him, and entering into disputation with him. The attack excited him to relinquish his accustomed tranquillity, it forced him to resume the consideration of the question, to discuss it in all its aspects, to weigh the opposite arguments, and to establish his sentiment with a fulness, and an energy peculiar to himself.

But when he really felt an interest in a proceeding or an opinion, (and what interest could affect him but that of truth, of justice, of public utility?) his modesty and the mildness of his character did not prevent his maintaining his sentiment with a considerable degree of warmth and vivacity. If he was strongly contradicted upon these occasions, he would sometimes forget his moderation, become animated and irritated by resistance. The words then pressed upon him for utterance, and he could not express at once all that he wanted to say; and from his wish to persuade, he enfeebled the powers of persuasion, which naturally belonged to him. A harshness of expression would sometimes escape him that his heart would have disavowed; and which was certainly not instigated by any acrimony of sentiment;

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and which the zeal that incited it would have excused, if people were not ordinarily more sensible to exterior effects, than to the motives producing them, which is so far reasonable that they can only form a judgment of the latter from the former. Whoever had seen him at these moments, would have thought him eager for victory, susceptible of resentment, and no wise averse to exciting it in others; but the judgment formed upon these impressions would have been very erroneous. No man was ever more simple, more mild, more devoted to peace, more remote from animosity. He never had occasion to pardon; for pardon supposes offence, which he was incapable of feeling. A failure in the attention that was due to him could not irritate his disposition; and he was still less susceptible of hatred than of anger. His reason, as well as his religion, would have precluded it from entering into his heart; and it may be added that it was equally impossible to conceive a hatred against him, or even to feel a coldness towards him.

His zeal and ardour upon these occasions were as great as his indifference with respect to matters of etiquette and ceremony, or the pretensions and interests of his company.

This manner of thinking and judging arose from the principles of his character, which was naturally inimical to contention, upon subjects that did not appear worthy of it. He supposed all other persons to have as much simplicity as himself, to be equally replete with that reason which rises above exterior circumstances, and equally indifferent with respect to what only concerns the manner of things, without having any relation to their substance.

To this mode of thinking, and to the openness of his character, we may attribute his custom of expressing his opinion aloud at the audience. Scarely had an advocate opened a cause before he became master of it; he anticipated all the arguments of the respective parties, and had formed a judgment within himself almost before the bar could perceive what was the matter in dispute. He had afterwards only to observe the manner in which the case was supported and defended. If it was a cause of slight importance, he allowed his mind to amuse itself with other subjects; if he exercised his attention, he could scarcely avoid intimating his concurrence or dissent by his gestures, or by a half utterance, so that his opinion was known well enough previous to going to consultation.

But he allowed himself much greater liberty when he presided. The fondness for dispatch, which is confessedly laudable, but which ought to be kept within proper limits, carried him away, and made him forget the patience that is proper for a judge, and is due to the parties. The party that fails in a contest ought not to have the opportunity of complaining that he has not been heard. Nobody will ever accuse Pothier of entertaining a wish to dictate the judgment and concentrate the whole authority of the tribunal in himself: his real disposition was too well known for even malignity to infer from these outward appearances, that he was actuated by any personal consideration. But he wished for expedition, and in causes of small importance he did not think that it was possible to proceed too

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rapidly. If the advocates wandered from the point in question, he was in haste to bring them back to it; but if they advanced an improper argument, or maintained a false principle, he could not command his impatience, and interrupted them for the purpose of fixing them to the true principles and arguments of the cause. The audience sometimes degenerated into dissertations and a kind of conference. His friends sometimes remonstrated with him upon the subject, which he approved, but he was not master of his conduct. In any other person this manner of presiding would have appeared at least singular. But he was so respected, and so remote from all intention of giving offence, that every thing coming from him was assented to.

These details may perhaps not be considered as misplaced on the present occasion. We have a pleasure in knowing even the slight faults of illustrious persons, perhaps because it seems to place them more nearly upon a level with ourselves; perhaps also because these trifling defects commonly accompany an excellence of disposition, and are only the too prominent consequences of it. They are calculated to depict the man as he was, and to give a more familiar representation of his character.

It is a great advantage, especially in the sciences which require continual assiduity, and for which human life is always too short, to be disengaged from any foreign pursuit that cannot be followed without injury to the principal object; and there is much merit in resisting the wish for extensive erudition; especially when it is flattered by the facility of success. Pothier might, without neglecting jurisprudence, have been allured by some particular study, and applied himself to it in the vacations. He had certainly been attached to mathematics and literature, and had already sufficient knowledge of them to afford an inducement to extend it. He had formerly studied geometry, which, although originally incapable of producing an accuracy of judgment, is so well calculated to bring it to perfection. He had likewise an inclination and taste for literature; but having acquired sufficient for the purposes of utility, he could only increase his stock of it by way of relaxation, for which he never found sufficient leisure.

The study to which he most devoted himself for the first ten or twelve years of his magistracy, was religion. He endeavoured to enlighten his faith and to advance his piety. His attachment to religion arose from an intimate conviction, founded upon a knowledge of its evidences, and strengthened by the love and practice of its precepts. With what contempt therefore did he regard the new philosophers. He could never speak of them without indignation. He bewailed the progress of infidelity and the corruption of morals, which is the effect of it.

We lament the shortness of his life, we regret that he had not time to complete so many other treatises which he had projected. Could he have accomplished those which we have, if he had applied himself to extraneous pursuits? It was only by a rigorous economy of his time, in conjunction with his facility and penetration, that he could be equal to the performance of so many different occupations.

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Nothing can be more admirable, since nothing is more rare than the discretion and moderation, which he used in the labours of composition. That kind of labour which is the most pleasant and flattering, easily obtains a preference. A man of science is impatient under the pressure of occupations that divert him from his favourite employment, and avoids them as much as possible. Pothier might very easily have conceived, that the publication of his works was a benefit of more permanent utility, than so many other services which he rendered the public, and have deemed this preference a sufficient excuse for neglecting his other duties.

We may entertain the same opinion; and regret the time which was so meritoriously employed, but of which no traces remain. He, however, could not have thought or acted in such a manner, without ascribing to his works a greater importance than his modesty would have allowed.

Besides, he made it a principle to reconcile all his duties with each other. Sparing of his time with regard to recreation, he was prodigal of it for the purposes of utility; and never evinced a greater partiality for one avocation than another. No person was more assiduous in his attendance at the court; and he never omitted his lectures. Upon retiring to his study, he examined the procedures on which he was to report; received visits which are often made without any necessity, with a patience very uncommon in a person so much engaged; he gave advice and answered letters, the number of which increased as his reputation extended: how many contests has he prevented by the prudence of his counsel! how many family contests has he terminated by an amicable arrangement! the confidence of the public rendered him a voluntary tribunal.

Although he devoted a large portion of the day to employment, it was often fully occupied without admitting any parts of it to be allotted to composition. He had a talent of leaving an employment and resuming it with equal facility. He always quitted it without fatigue; because his moderation extended even to his studies, which he never continued during the night. His supper, which he took at seven, closed the labours of the day. This plan was only deviated from on Wednesdays, when he deferred the hour of supper until eight; on account of a conference which he had with all the young magistrates, and with several advocates, whose pride it was to have been and to continue his pupils. These conferences were continued without interruption for more than forty years. They were at first held at the house of M. Prevôt de Janés, and upon his decease Pothier had them at his own.

In the course of a life thus occupied, a short journey to Rouen and Havre in 1748 was almost the only voluntary interruption of his regular pursuits. He had always entertained a wish to behold the sea, for he was not indifferent to the contemplation of nature, and a view of the immensity of the ocean to those who have not been accustomed to it is truly impressive, as bespeaking the greatness of Him who formed that repository for the formidable element, and assigned it its proper bounds. On his return from Havre he remained some

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time at Paris with M. Guyenne, for the purpose of conferring with him respecting his edition of the pandects. I had the honour of being his companion upon this journey. M. l'Huillier, lieutenant particulier was also of the party; I was then in my first year of law, and the journey was no interruption to my study, I had the institutes with me, and the best commentary possible was the conversation of Pothier, who explained them to me.

While he was engaged in the composition of his great work, he was obliged for the purpose of avoiding interruption in it, to withdraw in some degree from his other occupations. This was previous to his having the appointment of professor.

He went to pass a part of the summer at Lu, where he had the advantage of repose and solitude.

After obtaining the professorship in 1750, he only went there during the vacation; and the time which is usually allotted, even by the most assiduous, to relaxation, was that in which he was the most fully occupied, as he was then least subject to interruption. From Lu in a great degree proceeded his various treatises. He always had a horse there and was fond of riding. It is easy to form an idea of his appearance on horseback. His rides consisted in going every Sunday to mass at St. Andrew de Chateaudun, and paying visits to his friends, among whom were several of his colleagues, but he never slept from home.

Orleans ranked at the same time among her citizens two men of rare and equal excellence in different kinds, and for thirty years these two, each worthy of the other, resided together in the small mansion of Lu.

At the age of 88 M. Pichart (Canon of St. Aignan) still laments the loss of one whom he had not expected to survive, or rather tranquil as to the lot of his friend, he only deplores the misfortune of the public. As profound in the knowledge of the holy scriptures, as Pothier was in the science of the law, he was employed on those learned commentaries on the sacred books which are equally replete with genuine piety, and valuable information. Their relaxations consisted in a walk of an hour ofter dinner, and a conversation of the same length after supper; for Pothier breakfasted too early to have the company of his friend at that time. It may readily be conceived that their conversation would have considerable interest; Pothier, although commonly silent, was otherwise upon subjects adapted to his inclination, and he always found in M. Pichart a great facility of speech, and an extensive fund of literature, both sacred and profane. He had sufficient knowledge to support a conversation upon the subjects which were familiar to M. Pichart, and the field was sufficiently large for their amusement. But he also wished to converse with him respecting the Roman law, and spoke in such high terms of the pandects, that his friend could not forbear reading them; it is superfluous to ask whether he was satisfied with having done so.

The reputation of Pothier was necessarily extended with the diffusion of his works; and he had during the course of his life all the celebrity which a man of science can enjoy. The voice of the public

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acknowledged him as the great jurist of his age, or rather as the greatest since the time of Dumoulins, with whom he was frequently classed. Without waiting for his death, the weight of authority was given to his decisions, and the highest tribunals have acted upon the citation of his works; an honour above suspicion, and the greatest which a jurist can receive.

This sentiment prevailed not only in France, but amongst foreigners, by whom he was as much esteemed as by his countrymen. His, indeed, are not works the utility of which is confined to any given space. Wherever the science of jurisprudence shall be known and cultivated; wherever men shall engage in contracts, and have occasion to appeal to the principles of justice for deciding the controversies that may arise from them; the name of Pothier will be known; his works will be studied and consulted. The authority of so illustrious a jurist is properly that of a legislator; or rather surpasses it, in as much as it participates in the laws of justice; and as these immutable laws which are adapted to all mankind are superior to the versatile, transitory and arbitrary dispositions which men have been pleased to erect into laws.

If Pothier had only applied his assiduity to the municipal and particular laws of his own country, his reputation would have been confined to the same limits; but he is a jurist for all times and all places; he is likely to have even greater celebrity in countries where jurisprudence is cultivated with attention, than in France where it is so much neglected, where places are purchased, and the price which is given for them is a dispensation from study and from learning. And we may even add, that if he was a stranger to his country, by the simplicity of his manners, he was still more so by the course of his studies.

If he had been born in Germany, the princes there would have disputed which of them should have attached him to their court, and those who could not fix him with themselves, would have felt a pride in distinguishing him by titles of honour. With us he lived as the most ordinary person, and without receiving any distinction. He was himself very far from either desiring or supposing that he deserved any. But it seems surprising that no steps were taken, for discharging the obligations which were due to him from the country, by conferring some distinction that would reflect a greater honour upon those who procured such a reward for modest merit, than upon him who received it.

It is equally astonishing, that as his excellence was so well known, he was never consulted upon subjects of legislation; and that his talents were never resorted to for the reformation of the laws. He would have been the soul of a council of legislation. But, by a singular fatality, the existence of merit is less rare than the employment of it in its proper sphere.

It is not for us to complain of this neglect, or to regret that his merit was not raised to a more suitable elevation. We possessed him to ourselves, in prejudice of the general utility that would have arisen from his exertions, if the functions of a magistrate and professor, if

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the many private benefits that we incessantly received from him had not occupied the whole of his life. Every citizen had the benefit of his counsels, for from whom did he ever withhold his information? Every man of worth could name him as his friend. The poor deplore him as their father. His gentleness and propriety attracted a universal attachment and respect. It is not every one who can appreciate the excellence of the jurist; but the heart is the most essential portion of the man, and of that perhaps the people are the surest judges.

His death was therefore a general grief. The public are not always just; their view of the worth which is before them is sometimes dimmed; prone rather to criticism than to admiration, frugal of their esteem, and dealing it out with caution and restriction; they cannot agree to render justice to merit, until it has departed from them. But the charge cannot be applied to the character of Pothier; death has only confirmed the sentiments of the public, without augmenting them, which is the most exalted panegyric, and the most perfect proof of exalted and untarnished merit.

However extended the life of such a man may be, his death when it occurs is to the public premature. The death of Pothier, appeared the more so as from his age, which was only 73, and the regularity of his life, a much longer duration of it might have been hoped for. To himself it would have been sudden if the whole of his life had not been a continued preparation for it. He had experienced neither the infirmities of an advanced period of life, nor the decay of old age; no weakness of intellectual faculties, no bodily pains, none of those apprehensions of the approach of death, from which even the most pious life is not always a protection.

He was snatched away by an illness of six days. The fever, although severe, had not the appearance of danger; on the first of March he felt himself better and got up. He was supposed to be recovering, and he entertained the same opinion. In the evening he fell into a lethargy, and on the following day he terminated a life so precious in the eyes of God and man.

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INTRODUCTION.

PART I.

The science of jurisprudence, although one of the most important and interesting, which can occupy the human understanding, has not been distinguished by an attention proportionate to its intrinsic excellence. It has been too generally estimated as a mere collection of positive rules, the knowledge of which was no otherwise desirable than as it might be conducive to immediate interest or security, or of technical forms, the instruments of professional employment. Even those whose avocations have given them the opportunity of correcting so palpable an error, have too frequently acted upon the same impression, and limited their regards of law as a science to the practice of it as an art.

Jurisprudence is by the ablest writers regarded as a moral science; and any controversy which may arise with respect to the propriety of the term, must be verbal and unimportant. It certainly is a science which regards the conduct of men in a state of society; but which regards it under a particular aspect. Morality, so far as relates to its obligatory character, is founded upon an individual sentiment of rectitude and propriety; jurisprudence is referable to a rule of conduct maintained by coercive authority: the effect of jurisprudence is to maintain and define an extensive portion, but only a portion of the duties enjoined by the principle of morality; while it is one of the attributes of morality to conform to the more positive precepts of jurisprudence.

The definition of jurisprudence, which is contained in the preliminary title of the institutes, as being the knowledge of things human and divine, the science of what is just and unjust. "*Divinarum atque humanarum rerum notitia, justi atque injusti scientia,*" has, so far as relates to the first member of it, been the source of considerable altercation between the jurists and philosophers: the latter claiming it as their own exclusive attribute, whereas the former, who ascribed to themselves the study of true and not of false philosophy, applied the definition which the stoics had before given to philosophy, to the science of jurisprudence.

Heineccius has a particular dissertation upon the contest arising from this definition, in the result of which he concurs with what had been before observed by his master Vinnius, that it was not intended to assert generally, that a knowledge of all things human and divine,

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was included in the science of jurisprudence, but that the first part of the definition was explained and qualified by the last, and that the meaning of the whole is such a knowledge of things human and divine, as relates to what is just and unjust.

Perhaps the object and purpose of the definition was not very fully considered, at the time of its being applied, (for in every step of the preliminary title above referred to, we meet with terms and definitions which have a character very opposite to that of mathematical precision.) It is perfectly clear, that a considerable portion of general science is requisite to the practice of law and administration of justice in any extensive degree, and that a mere acquaintance with the particular rules and institutes of his own profession, will be a very inadequate foundation for the character of a perfect lawyer: for, independent of those principles of reasoning, which from particular cases can elicit a general principle, and having discovered the principle, can trace the consequences of it, independent of the application of the rules arising from the common principles of justice and equity, it is manifest that except in certain limited departments, the objects of inquiry relate much more to particular circumstances of fact, than to any dispute respecting the rules of law; and a day's attendance at Guildhall, or the sittings of Westminster, will show the great diversity of subjects, upon which some degree of previous knowledge is essentially requisite, as the course of trade, the common occurrences of society; the question of sanity or insanity, and not to mention other particulars, the whole class of cases which turn upon the charge of negligence in any occupation or employment, but the actual pursuit of all the minute ramifications of particular knowledge would be in itself impossible, and would prevent an adequate attention to studies of a more imperious nature. The leading rule upon this subject therefore appears to be, to acquire such a general habit of attention and observation, as will facilitate the powers of perception upon any particular subject; and whilst an absolute acquisition of that extensive knowledge, which may be at all times adequate to the purposes of professional utility, is admitted to be unattainable, the cultivation of as large a portion of it as circumstances and opportunities will allow, is very strongly to be recommended and enforced, a very considerable portion being essentially requisite to the attainment of any useful and honourable degree of professional eminence.

But though the definition of Ulpian inculcates a very useful precept, that of Heineccius, as being the practical habit of rightly interpreting laws, and duly applying them to particular cases—*Habitus practicus, leges recte interpretandi, adplicandique rite quibusvis speceibus occurrentibus*—is much more accurate and precise.

If I may be admitted to suggest a definition of my own, I would, in the first place, speak of general jurisprudence, as that science which regards the rights and obligations of individuals in a state of society, as they are capable of being protected and enforced by judicial authority: and of particular jurisprudence, as a knowledge of the rights and obligations of individuals in particular communities,

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as they are actually protected and enforced by judicial authority; and combining the two, I would apply the general term of jurisprudence to the science, which regards the rights and obligations of individuals in a state of society, as capable of being protected and enforced by judicial authority, accompanied with a knowledge of the manner in which they are actually protected and enforced in particular communities.

This definition includes the objects to which the science may be applied, and the knowledge of its actual application, the general principles inherent in the nature of the subject, and the modification of them under particular circumstances, the grounds of obligation which are incident to all communities without distinction, and the particular forms and institutions, by which in different countries those grounds of obligation are diversified and maintained.

The state of information which is to satisfy the full extent of this definition, requires a full and accurate knowledge, as well of the general principles of natural justice as of all the particular systems of human law, whether conformable to or deviating from those original principles, whereas any subordinate knowledge is a partial application of the science of jurisprudence.

In endeavouring upon a former occasion to illustrate the judicial character of an eminent magistrate, I considered it as a deduction from his general conduct, during a long and active discharge of the important duties of his situation, that he regarded jurisprudence as a rational science, founded upon the universal principles of moral rectitude, but modified by habit and authority; and although there may not apparently be much of novelty or peculiarity in the sentiment, expressed by this description, I believe it will be found upon a careful examination, that it is a sentiment, the practical attention to which has been very far from corresponding to the speculative assent which it must necessarily command, and to its intimate connection with the welfare of society. The instances, of acting upon a similar impression are of frequent occurrence, but they are too much detached and insulated; the deficiency is in the cultivation of those inquiries, which will assist the mind in contemplating the science of jurisprudence as a regular and connected system, in which a familiarity with the whole is essentially conducive to an accurate discrimination of the respective parts, in which the relative influence of principle and authority is adjusted, with as much precision as is consistent with the quality of the subject; in which principle is not necessarily required to have the support and assistance of authority on the one hand, or allowed to assume an undue and inconvenient control over it on the other, and by which the operation of authority itself is regulated, according to those fixed and certain principles which are most conducive to its utility and support. Too much reliance is placed upon the facility, with which the mind can accomplish those important purposes, according to the instantaneous exigence of the particular occasion; too little application is given to the means by which that facility may be most effectually acquired.

The contrast and opposition between right and wrong is, it is true,

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in many cases sufficiently strong to prevent the possibility of error, but the boundaries between conflicting claims are in other cases very far from being accurately defined; a correct estimate of the relative force of opposite arguments, can only be formed by an adequate investigation of all the different principles of decision, connected with or related to the object of inquiry; a diversity in circumstances apparently slight and insignificant, may in reality be sufficiently great to affect the very ground and propriety of the decision.

A subject which from its essential character, cannot always be susceptible of absolute precision, must often require the assistance of analogy; but analogy is a source of argument which demands a very comprehensive acquaintance with the various and sometimes opposite subjects from which it may be deduced. If a resemblance between what is sought and what is known is acknowledged to be perfect and complete, the term analogy ceases to be applicable, for the subject has already acquired the character of certainty; if a resemblance, although limited, is unopposed, it may without difficulty be acted upon and assented to; but a partial resemblance or affinity to one subject may be opposed, by a different resemblance or affinity to another; and the preponderance of similitude, or the grounds for preferring a smaller similitude in what is more important to a greater similitude in what is less so, may in many cases require a very acute and attentive discrimination; but it must always be remembered, that analogy, however judiciously conducted, is but a secondary and inferior ground of judgment; that it reaches only to conjecture and probability, and consequently in its greatest eminence can never attain the height of certainty and demonstration.*

There is no part of jurisprudence in which an accurate discrimination is more essential, than in determining the proper limits within which those principles which in themselves are so important shall be applied: for a decision, which is perfectly correct as resting upon abstract reasoning, may be manifestly erroneous as opposing the mandatory dictates of authority; and on the other hand, a mere decision of arbitrary authority may acquire an influence to which it is not legitimately entitled by assuming the rank and character of a principle. And although certain general principles have an universality of application which is wholly independent of circumstances, there are others which, however correct, are of such inferior value as merely to induce a preponderance of argument, and with reference to which the certainty of a rule of conduct is of infinitely greater

* By the common law, a person convicted of grand larceny, having suffered the punishment of his offence, is a competent witness, but persons convicted of petty larceny remained wholly incompetent. The statute 31 Geo. 3, c. 35, recites this, and enacts that no person shall be an incompetent witness by reason of a conviction for petty larceny. The question arose in an inferior court, whether a person convicted of petty larceny, whose punishment had not been expired, could be examined. The court decided that he could not, for the legislature could not intend to place convictions of petty larceny in a different situation from those for grand larceny: the legislature had declared that the witness should not be incompetent; the court decided that he was so; this was a false application of analogy, for it was analogy opposed to demonstration.

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importance, than the exact and minute propriety of the rule which happens to be adopted. Few principles of jurisprudence are of higher value, than that which inculcates a just and proper acquiescence in authority.

Whatever can assist in the acquisition of an adequate knowledge of the general principles of judicial reasoning, of their various relations, or oppositions, of the propriety of their application under existing circumstances, of their limits and restrictions, must certainly be admitted to form a valuable object of scientific inquiry.

Positive and local law is in itself an object merely of peculiar obligation and concern; the acquisition of a knowledge of it is, therefore, in its immediate application, a matter of confined and limited interest, while the very term of general jurisprudence imports an object which has no local boundary; but if juridical practice, according to the beautiful exposition of Blackstone, is greatly assisted by the social quality of other sciences, by history, by logic, by mathematics, by experimental philosophy; if even the illustrations of poetry can properly be connected with the administration of justice, surely it must be acknowledged that an extensive and familiar acquaintance with the judicial system of other countries, is in a peculiar degree calculated to produce a similar effect; the analogy of subject is the most immediate and direct; an elucidation of the questions arising in one society, may be deduced from the resemblance, or even from the contrast which is found in the institutions of another; and by an enlarged and general acquaintance with different systems, an accurate distinction will be formed between those great and fundamental principles, which being deduced from natural reason, are equally diffused over all mankind, and are not subject to alteration by any change of time or place, with respect to which there is, "a striking uniformity among all nations, whatever seas or mountains may separate them, or how many ages soever have elapsed between the periods of their existence, and those laws which, proceeding merely from positive institution, are consequently as various as the wills and fancies of those who enact them;"* and while the course of inquiry is beneficial to the jurist, in promoting the objects of his profession, it will be no less interesting to the philosopher in investigating the permanent attributes and casual varieties of the human character. If the history of laws is less engaging than the details of battles, and the chronicles of events, the disadvantage will arise, not from the nature of the subject, but from the manner of presenting it.

In matters of evidently positive institution, a striking resemblance and conformity are sometimes discovered between the systems of different countries, which may be the effect either of casual coincidence of imitation, or of some common cause; but whatever may be the origin of the conformity, if the general principles of the subjects are analogous, the particular exposition of any incidental question in the one country may be facilitated by the previous discussion of it in the other. Sometimes a system, which upon the whole has a manifest

* Sir Wm. Jones's prefatory discourse to the speeches of Isæus.

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superiority, may be susceptible of improvement from adopting the accidental particulars of another confessedly inferior, provided they have an adequate capacity to blend and assimilate with the foreign stock, into which they are ingrafted.

The danger to be principally avoided, in rendering one system of jurisprudence subservient to the improvement of another, is mere servility of imitation; whereas the purposes of utility can only be attained by a careful and judicious discrimination. Wherever a question arises, with respect to the incorporating an adventitious rule of decision, it is essentially necessary to weigh with mature deliberation its nature, its tendency and effects, and in particular its adaptation to the system already established. The general excellence of any system of jurisprudence, is by no means sufficient to warrant the imitation of any of its particular decisions, without cautiously ascertaining the excellence of the decision as resting upon its own inherent merit; the source, and nature, and relations of the decision, are to be duly taken into consideration; it must be examined whether it was the result of any local or temporary cause, the consequence of any peculiarity in the general system of which it constitutes a part; or whether it was founded upon principles of universal application. The particular circumstances which rendered it necessary in Rome, to enact the Lex Pappia Poppæa, for the discouragement of celibacy, can have no legitimate operation in directing the judgment of an English tribunal, with regard to the validity of a condition in restraint of marriage.* However excellent a disposition may be, considered with reference to the principles of abstract reasoning, it cannot be followed with propriety, if the consequence of it would be inconsistent with the authority or principles already subsisting in the society where it is proposed. Whatever may be the wisdom of a regulation, or the advantage of imitating it, it cannot be supplied by judicial construction, if in its nature and character it is merely matter of positive institution; for it is only in applying the principles of correct analogous reasoning, under circumstances of a similar character, that the benefit of conformity can be properly obtained; but there is no analogy of character between legislative provision in one community, and judicial interpretation in another. It is desirable to define and reduce to certain regulations, subjects of general occurrence, so far as is consistent with a proper liberty of conduct, and the regulations adopted from their intrinsic excellence may be very proper objects of imitation; but it is impossible with any correctness to consider this regulation in the same point of view, as the decisions which are illustrative of a common principle, whether in the same community or another. Before the statute of frauds, it would have been palpably absurd to have rejected parole evidence of a contract of sale, to the value of 10*l.* because the ordonnance of Moulines, excluding such evidence in cases exceeding the value of 100 livres, had been found beneficial in France. It would be equally erroneous to decide a question respecting the freight of goods, upon a mere

* See Stackpole *v.* Beaumont, 3 Ves. 96.

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principle of conformity to the ordonnance of Louis XIV., accompanied by a favourable opinion of the utility of the enactment; for, although this ordonnance is in many respects an exposition and application of the law of natural reasoning, it in others is avowedly a mere exertion of positive authority. I have some doubt whether this principle has always been sufficiently attended to in practice. In the well known case of *Luke* and *Lyde*, 2 Burr. 882, 1 Bl. Rep., the ordonnance of Louis is referred to generally, as one amongst other authorities of foreign law in support of the decision.

In the essay which I some time ago submitted to the public on Bills of Exchange, I had more than once occasion to advert to instances, in which the positive institutions of particular countries appeared to have been erroneously regarded as general principles of mercantile law.

In surveying the laws as well as the manners of other countries, certain peculiarities are continually discernible; which excite a triumphant exclamation at their strangeness and absurdity. It however very frequently will be discovered upon a fair investigation, that their introduction was occasioned by some adequate motive of convenience and advantage, that their continuance has rendered them so habitually familiar, and that so many more essential circumstances have acquired an intimate and fixed connection with them, that an alteration in them might be attended with greater prejudice than utility. Whatever we have been long accustomed to we necessarily look at without emotion; and although it would be ridiculous to imitate the apparently unaccountable singularities of others, the mere existence of such singularities cannot reasonably be considered as a motive for discrediting the general excellence with which they may be connected, by those who reflect upon the impression which would be naturally excited by circumstances, which from their constant occurrence are unnoticed by themselves. The letter of the ambassador of Bantam, is a happy exemplification of this idea with respect to the ordinary course of our general manners. It would not be necessary to call in the aid of foreigners, in order to excite a smile at many of the seeming, together perhaps with some real, absurdities which have ingrafted themselves into our laws. Our various introductions of John Doe and Richard Roe, our solemn process upon the disseisin by Hugh Hunt, our casually losing and finding a ship (which never was in Europe) in the parish of St. Mary le Bow in the Ward of Cheap, our trying the validity of a will by an imaginary wager of five pounds, our compassing and imagining the king's death by giving information which may defeat the attack upon an enemy's settlement in the Antipodes, our charge of privately picking a pocket or forging a bill *with force of arms*, of neglecting to repair a bridge, *against the peace of our lord the king, his crown and dignity;* are circumstances which, looked at by themselves, would convey an impression of no very favourable nature, with respect to the wisdom of our jurisprudence; but we know, and we also know that it is the judgment of those who have no motives of partiality, that the general character of that jurisprudence cannot be the theme of too exalted a panegyric, and the

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reflection may prevent our hastily drawing unfavourable conclusions with respect to the juridical wisdom of other countries, in consequence of our inability to account, upon any principles of rationality, for some of their particular institutions.

To form a perfect and adequate system of general jurisprudence, it would be requisite, after taking a comprehensive view of the different modes of government and legislation, of their prevalence in different ages and countries, of the causes of their stability or decline, of their advantages and defects, with respect as well to their natural tendency, as to their particular relations and connections to proceed to the examination of the respective objects of judicial science; to the qualities, which are applicable to all persons in general, and to the special circumstances of discrimination, whether proceeding from natural causes or particular and accidental relations, to the different subjects of property, and the modes of their acquisition, dereliction, or transfer, to the causes of personal obligation, whether arising from compact, from accident, from injury, or from neglect; to the public duties resulting from the relation of each individual to the community, of which he forms a member; to the acts of aggression by which the general interest and security of that community may be violated, and the means by which they may be repelled with respect to all these subjects, tracing the nature of the consequences which would result from the nature of the subjects themselves, in respect to the duties of morality, operating upon the personal conscience of the individual, examining how far the obligation thence deduced is peculiar to that particular sphere, and necessarily dependant upon the voluntary exertion of the will, and how far it may on the other hand admit of coercion or require modification from external authority, by reducing to certain limits and giving a particular direction to the performance of duties, which in their character are indefinite and imperfect, and ascertaining the subjects upon which natural reason is no otherwise concerned, than in requiring that it should receive a certain and definite quality from positive law. Having completed the examination so far as relates to the nature and character of the respective subjects of inquiry, it must be continued in its several parts, by an historical investigation of the manner in which the different principles have been applied; in which they have been conformed to, or varied from, in the different systems which have actually prevailed; to which must be added a relation of the various modes of administering justice, and carrying into execution and effect the provisions of the law, and more especially of the manner of ascertaining, in cases of dispute, the existence of the facts to which those provisions are to be applied. To stamp a proper value upon the production, it must neither be too much confined to slight and superficial allusion, nor enter too extensively into minute particulars of laboured and professional detail.

It is unnecessary to mention how distant we are from the period in which a fabric of such extent and importance can be completely erected, and how small a progress has as yet been made towards it; but from the co-operation of various hands, the object may possibly be at length accomplished. Some may employ their assiduity in the

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procuring of materials, others their skill in adapting them to the design; the work may progressively advance in its respective parts upon a principle of unity and combination, which may tend to the completion of it as a whole. Some valuable contributions have been already made to this important purpose. The historical law tracts of Lord Kaims, are conducted upon a very judicious system of investigating the natural principles of some of the most important objects of juridical science, and tracing the application of them in the laws of Rome, of Scotland, and of England; but a comparison between the laws of Scotland and England, conducted, I think, with great fairness, is apparently the leading object of the undertaking; to an inhabitant of the southern part of the island the work will be less attractive, than it might easily have been rendered, in consequence of the terms and institutions of the Scotch law being treated as already familiarly known, and the general phraseology is in many cases of a character to which the English reader is unaccustomed. The view of the distinction of ranks in society, by Professor Miller, is a highly interesting and important publication. It perhaps may be considered as referable more particularly to the state of manners in the different stages of civilization; but the connection between manners and laws, which pervades the inquiry, attaches considerable value to the work, as conducive to the improvement of the science of jurisprudence. It is much to be regretted that the public have not more extensively the benefit of any permanent traces of the instructions of this eminent person, which occasioned such general resort to the seminary of which he was a member; according to the unanimous testimony of his merits, he had a very peculiar felicity in presenting the objects of his science, in a form which was equally adapted to the purposes of amusement and information. A great accession would be made to literature and science by an accurate view of the lectures which were so attractive in their delivery; and although the vivacity, the happy illustration, the engaging manner of the Professor would be lost, the materials which remained could not be otherwise than highly conducive to the assistance of those who were desirous of prosecuting a similar course of investigation.

The introduction of Dr. Croke to the case of *Horner* v. *Liddiard* has been very far from attracting an attention commensurate to its interest and importance. The case which it precedes, like every other judgment of Sir William Scott, affords an accurate, an instructive, and an elegant view, of the subject to which it immediately relates;* but certainly there is some perversion of relative importance, in rendering that case the principle, and the essay which precedes it, the accessary. With respect to space (which I admit affords no very important argument,) the case occupies about a fifth part of the extent of the introduction; but in addition to this minor consideration, the analytical view of the principles which regulate so important a subject, as the intercourse between the sexes, the valuable effects resulting from the permanent connection of marriage, and from the

* The nature of the connection between illegitimate children and their parents.

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discouragement of promiscuous intercourse, adultery, and concubinage; together with the historical survey of the application of these principles, and of the consequent distinctions between the legitimacy and illegitimacy of the offspring, traced through the several periods and divisions of society, conducted with an ability in every respect adequate to the undertaking, will convince every one who has the satisfaction of reading the performance, that the learned writer has done great injustice to his own share of the publication, by assigning it a subordinate character.

The essay on the Law of Bailments, is a work of which commendation would be manifestly superfluous. So exquisite a specimen of the application of literature to jurisprudence, however long it might have been fated to experience an unmerited neglect, could not but at length receive the meed of approbation. But whatever assent has been given to its very distinguished merit, it cannot be denied that it has as yet produced a very limited effect in exciting a disposition to concur in the accomplishment of the grand and important design, of which it may be regarded as a part and model. Its very excellence has perhaps contributed to the diminishing its incidental advantage, for any attempt to emulate can only excite a mortifying comparison, until the task shall fall into the hands of another Sir William Jones; but while others will justly despair of approaching the same standard of perfection; while they look with distant admiration at the excellence, which they are conscious of their inability to attain, their industry and zeal for the promotion of so desirable an object will not entirely be misdirected; and while contemplating the specimen before them as a model, they disclaim the idea of competition, they may still enjoy the satisfaction of contributing in an inferior degree to the attainment of the valuable purposes which that model was originally intended to promote.

The translation of the speeches of Isæus, by the same admired writer, with his prefatory discourse and commentary, are also to be regarded as very valuable materials for the same important purpose.

It is manifest, that in every endeavour to contribute to the advancement of general jurisprudence, the Roman law must occupy no inconsiderable portion of attention, both on account of its intrinsic excellence, and the extensive influence which it has had upon almost every judicial system in modern Europe. In directing our attention to this subject, we shall perhaps find little to admire, and still less to imitate, with respect to the constitution of the authorities from which it immediately derived its obligatory character. If, in one place, we are disposed to revolt at the excessive magnitude of imperial power, in another, we shall not find much greater room for approbation in the prevalence of popular sedition. In the various distributions of authority, whether legislative or judicial, we shall not be disposed to resort to Rome for models of perfection; but in the opinions, which the Roman jurists deduced from the pure source of genuine philosophy, we shall meet with innumerable instances of the admirable union of wisdom with justice, in which the force of truth is so strongly manifest, that to be assented to, it is only requisite to be seen. We

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shall see a force and energy of expression, a felicity of illustration, and a conciseness and elegance of diction, indicating the operation of minds, possessing a comprehensive command of the whole of a subject, which is perceptible in its influence on every individual part. We shall meet in their original sources with many principles and maxims, to which we are habitually familiar, and which, from neglecting a more extensive range of investigation, we have been accustomed to consider as entirely our own. We shall meet with instructive, and frequently with perfect guides in the exposition of the various questions, which are of continual occurrence in an extensive range of social intercourse; and which, in the absence of positive authority, must be decided upon general grounds of rational jurisprudence, wherein those doctrines, which are most universally assented to, when clearly and perspicuously proposed, are not always in themselves the most immediately obvious. Even where it is impossible to expect a similarity in the subjects of inquiry, we shall receive valuable lessons, with respect to the most judicious course of investigation. A very cursory examination will satisfy us, that of the important remains of this celebrated system, the mandates of authority bear a very small proportion to the deductions of reason. It is true, that these remains are transmitted to us in a very imperfect and mutilated state; that the hasty and unskilful compilation of Tribonianus has obscured much of the excellence of Ulpian and Papinian; that the work professing to be a digest of all that was valuable in preceding authorities, is so totally destitute of arrangement, that many important passages are classed with titles, with which they have not any kind of connection; and that in general, the opinions having the force and efficacy of laws, which are collated under each particular title, are placed in a succession merely accidental, and destitute of all regard to order and propriety. It was a foolish vanity in Justinian, to ordain that all future appeals to the existing law should be referable to his own authority; that the correct investigation of the opinions of the jurists who preceded him, should be absolutely precluded; and that the compilation made under his auspices, should be the only standard to be afterwards referred to. It is a question of controversy, how far the exercise of his power was extended, whether it consisted merely in prohibiting appeals to the volumes that had been previously resorted to, or whether it included their absolute annihilation. But, after every deduction on account of the pride of Justinian, and the inadequacy of Tribonianus, it should be regarded as matter of satisfaction, that the collection was actually ordained. It might in other hands have been composed with greater care or judgment; but that it was composed at all, was a circumstance that must, in the eyes of impartiality, be always considered as favourable to judicial science. The law had at that period attained a very cumbersome and inconvenient immensity and was dispersed through a great number of different volumes; the period of its authority was (unknown to the Emperor) at the eve of its extinction. If not wholly annihilated in the ages succeeding, it was confined within limits, which, in proportion to its former dominion and its subsequent influence, were perfectly insignificant; and in

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the long series of ages involved in darkness and ignorance, there is the highest probability, that the greater part of the materials that had been thus united into one compact system, would have perished. Whether at any period the digest had been wholly lost, and its restoration was wholly the effect of an accidental discovery of a single copy at Amalfi, or whether some other copies of it had been still retained, is chiefly a question of antiquarian curiosity; for it is certain that, during the lapse of several centuries, the knowledge of it was very limited and confined; that the copies known to be in existence were extremely few, and that its continuance to the æra of resuming its more than pristine consequence, during a period when so many other treasures of learning fell into irremediable decay, was the result of accident.

The reference which continually occurs to the two systems, or, as they are usually called, schools of jurisprudence, the maxims of which are supposed to be frequently confused in the compilation of Tribonianus, renders it desirable to state an outline of their principal distinction, which cannot be done more satisfactorily than by inserting the following extract from Gravina:

"Jurisprudence was divided into two families, the Cassiani, and the Proculiani. The separation originated with Atteius Capito, the pupil of Ofilius, and Antistus Labeo, the pupil of Trebatius, both of which instructors had been under the tuition of Tubero. Capito adhered more closely to what had been transmitted by those who had preceded him, and was principally attached to written authority. Labeo, with a certain ardour of mind, gave more scope to his disposition, and, trusting to the effects of his wisdom, took a greater range, and inclined in favour of novelty. He therefore introduced many things which were unknown to, or unattempted by, the ancients. Their respective scholars adopted the spirit of their preceptors. Capito was succeeded by Sabinus, from whom originated the appellation of the *Sabinians*. Cassius, who succeeded Sabinus, was the origin of the term *Cassiani*. Labeo was succeeded by Proculus, Nerva the elder, and Pegasus, whence arose the *Proculeiani* and *Pegasiani*. The first received from Capito the reverence for antiquity, the others from Labeo the freedom of invention. This difference, which arose in the reign of Tiberius, continued until the time of Antonius.

"The contention of these sects at length wore out towards the decline of jurisprudence, and as the ardour of the opposite dispositions began to cool. Many traces of this dissention remain in the books of the law, and we have still many remains of the conflict between the opposite schools; which Tribonianus was not sufficiently able to guard against, although Justinian held out a wonderful promise of congruity. This promise has infinitely perplexed the ingenuity of those who, relying on his veracity, have chosen to ascribe the difficulties arising from a repugnancy of opinions rather to their own ignorance, than to the negligence of the compilation, of which Cujas affords several instances. It is, therefore, of considerable importance to know which sect any jurist belonged to: and, as their

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principal difference consists in the Sabinians inclining to equity, and the Proculeians adhering to strict law; their opposite opinions being introduced into one entire system have occasioned the occurrence of different and even opposite decisions in some parts of the law."

The inconveniences arising from the injudicious manner in which the compilation of the digest was committed, may be in a great measure obviated by the more accurate arrangement in which the law is presented by Domat; and I conceive more particularly by the important labours of Pothier, in his edition of the digest, of which I have never had an opportunity to obtain an inspection; but of which, a very particular and satisfactory account is given in the Eloge, whereof a translation is prefixed to the present volume.

The most eligible course of conducting the study of the Roman law, appears to be the use of the Institutes; which are a well arranged and accurate compendium, with the accompaniment of some able commentary, and a reference to the different passages in the other parts of the law, which the commentary points out for the purpose. I am not so familiarly conversant with the numerous expositions of this law, as to be enabled to pronounce which of them is absolutely entitled to preference on the ground of comparative excellence; but there can be no difficulty in confirming the reputation which is justly attached to Vinnius, as one of the most valuable and instructive. It may here not be irrelevant to notice the omission in the institutes, and consequently in the various writers by whom that work is used as the basis of their instructions, of one of the most important objects of juridical inquiry, the doctrine of evidence, respecting which the more extensive collections of the digest and code furnish very valuable information. This subject, like most of the other branches of judicial science, has not been deficient in its particular commentaries, of whom the most celebrated are Menochius and Mascardus. Of the former, I am not in a condition to make any particular observation. The latter, in the compass of four large folios, presents a full and well digested view of the nature of evidence in general, and of the different proofs which are applicable to the various controversies that may occur in the administration of justice. Everhardus has also given a very extensive and perspicuous view of the different applications of the general principles of evidence; and although the entire perusal of these works may be, perhaps, considered as an appropriation of too large a portion of time to an auxiliary science, the occasional reference to them will be found materially to facilitate the exposition of many important questions of daily occurrence amongst ourselves.

For attaining an historical view of the Roman jurisprudence in its origin, its progress, its principal institutions, and the cultivation of it as a science subsequent to its modern revival, the work of Gravina may be confidently recommended as presenting every important information in a satisfactory and engaging manner; and this study will be found not less valuable for its assistance in the illustrations of classical learning, than for its connection with the science of jurisprudence. A mere summary, but very able and elegant exposition

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of the same subject is contained in the history of Gibbon. The writings of Heincccius seem adapted to a more extended and particular course of study. Taylor's Elements of Civil Law are, perhaps, more than any other work, calculated to assist in the exposition of the mutual relation of the legal science, and the general literature of ancient Rome. Dr. Brown's Lectures adopting the arrangement of Blackstone's Commentaries, will in a peculiar degree facilitate a comparison between the laws of Rome and England. Hopperus de Arte Juris, may be very judiciously resorted to as a ground-work of general jurisprudence, with a fabric, the materials of which are almost entirely Roman. It is, however, in many cases subject to the observation, that the general principles are rather adapted to the particular system, where the system should only have been resorted to as illustrative of the principles. The existence of particular institutions seems, in many instances, to be regarded as a sufficient evidence of their inherent necessity or propriety. My own partiality for this subject, regarded as an auxiliary science, might enable me to increase the catalogue;* but an acquaintance much more extensive and familiar than any which I have had the opportunity of acquiring, would be very insufficient to appreciate and particularise the advantage which might be derived from resorting with proper discretion and moderation to the numerous other jurists, whose writings evince the degree of regard which has been paid to the mandate of Justinian, *ut nemo neque eorum qui in præsenti juris peritiam habent, neque qui postea fuerint audeat commentarios iisdem legibus adnectere.*

In adverting to the laws which have been the subject of the preceding observations, it will be requisite (as indeed it is requisite in every other inquiry) to have an adequate view of the object, intention, and bearing of any particular proposition, and of the subject with which it is connected, before an adequate judgment can be formed, by a mere perusal of the words, of its justness and propriety. This consideration occurred to me very forcibly, upon perusing a triumphant comparison of the description of liberty given by Sir William Blackstone, with that of Florentinus, or as it is expressed with the absurd definition of Justinian's institutes, as being *naturalis facultas ejus, quod cuique facere libet nisi si quid vi aut jure prohibetur*—a kind of liberty which it is said must exist even under the greatest despotism —a slight attention would however have shown, that the subjects intended to be described in the two places, and the respective applications of the term by which they are denoted, are essentially different; that the one concerns the character of the relation existing between the members of a community, and the governing authority as being marked by freedom or despotism; that the other was confined to the peculiar state of certain individuals, as contrasted with others in the same society, to the distinction between freemen and slaves, and their respective attributes according to the provisions of

* Mr. Butler's Horæ Juridicæ, of the existence of which I was not apprised at the time of committing this introduction to the press, cannot be mentioned in too favourable terms of recommendation.

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the law, to the legal right of exercising their own will, and the legal obligation of obedience to the will of another: and that although no country is so despotic, but that a man may do whatever is not prevented by law or force, the distribution of the inhabitants of some countries may render it necessary to show, that a person who is by force constrained in his actions, may still be free in respect to his legal rights and character. I have dwelled more particularly upon this instance, because I conceive that even where the definition of the civil law has not been the object of reprehension, the application of it has not been unfrequently founded upon the same mistaken notion of its object.

It is well known that previous to the revival of the Roman law, as an object of general attention, the feudal system had acquired a very extensive influence over the greater part of Europe, and that the same causes operating upon different countries, had produced in their legal institutions a very considerable similitude, accompanied as was natural, with several local pecularities. This system being primarily referable to the tenure of land, and only affecting other subjects incidentally, would readily admit of a coalition with the Roman law, as affording a general exposition of the rights and obligations of persons resulting from the principles of natural reason, and having very little interference with the existing institutions to which it might be attached. As a rule of private life, therefore, it might readily and in perfect consistency with the institutions which already prevailed in different countries, be admitted as a useful guide of judicial determination. ' The admiration of its excellence, with respect to the exposition of general principles, would in many instances naturally lead to an imitation of its particular regulations in other respects, when there was no repugnancy to the municipal systems previously existing; and a general partiality having been admitted, the same spirit of imitation would in many cases lead to an alteration of the usages already established so far as it could be done consistently with the favourite maxims of each particular community. The change would in some instance operate gradually and imperceptibly; in others, it would result from the immediate interposition of positive authority; sometimes it would originate from a mere fondness for novelty, at other times be dictated by a genuine spirit of improvement. But under all the various modifications in which the new system of law was introduced, it would in many respects have an aspect essentially different from that by which it was distinguished in its original and native authority. It would no longer form an entire and independent subject, but would receive a character and impression from the adventitious systems, with which it was incorporated: the distribution of public authority, whether legislative, executive, or judicial, would continue to be governed by the pre-existing law of the respective communities, and this circumstance alone would form no inconsiderable difference in the respective systems of jurisprudence. In many other respects the jurisprudence of Rome was local and peculiar. Parental authority, in the modern countries of Europe, has very different limitations from those which appear in the collections of Justinian. The

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doctrine of adoption, and emancipation is a subject which has not at present any existence. The vassalage of the feudal system had but a slight analogy to the servitude of Rome. The duties of freedom and the rights of patronage; the source of so many legal regulations, had no longer any existence. Many of the principles of the Roman law respecting private transactions were rejected as trifling subtilties. On the other hand, many regulations of a positive nature were deemed proper objects of imitation; and the Roman law, in respect to contracts, testaments, and some other subjects of general interest, has been very extensively adopted in most of its leading particulars, and though the imitation has in every case been partial and limited, and there has been considerable diversity in the manner and degrees in which it has been pursued, the reference to a common origin, and the use of similar terms has produced a very considerable conformity between the different systems in which this principle has prevailed. Throughout the greater part of Europe the law of one country may, in its principal features, be generally regarded as the law of another; and the juridical writers of different countries may be regarded as illustrating a common science, almost as much as the writers upon any general subject of physical research. It is manifest that this conformity between different countries, wherever it can be attained without prejudice to more important advantages, must be attended with considerable convenience, and very much facilitate the cultivation of a general intercourse.

At a period subsequent to the revival of the Roman law as a subject of general study, the pursuits of commerce acquired a magnitude and importance unknown to former ages, and contracts were introduced with a view to its security and facility of which no traces had occurred in preceding ages. The necessary communication subsisting between the persons engaged in traffic induced a similarity of habit and character, and an institution of common usages between the inhabitants of different nations, from which a system was gradually formed, which acquired the name of the law and customs of merchants, and which, subject to the particular effect of some positive regulations, acquired by a kind of tacit consent an extensive influence and authority in several countries, which were interested in maintaining and extending the general intercourse.

To proceed to a more particular application of the general principles already referred to, the law of France previous to the revolution, (with which this publication is more particularly connected) is founded on a combination of the Roman law, the feodal system, the general lex mercatoria, and several positive institutions and local customs. The Roman law had a very different degree of influence in different parts of the country. In the provinces bordering upon Italy, which were called the Pays de droit ecrit, it was considered as the municipal law; in the other parts of France, called the Pays de coutumes, the common law was deemed to consist in certain usages subsisting among themselves, and the Roman law was only regarded as written authority with respect to the principles of natural justice; but even in these the application of it was very general and exten-

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sive, and it appears to have been the rule most frequently applicable with respect to the ordinary occurrences of society. A great diversity of customs prevailed in the different provinces of France, the inconveniences of which were much felt and complained of, and many very able writers were engaged in their illustration. Pothier, among his other public services, presented a very valuable exposition of the customs of Orleans. In many cases where the custom of a particular province was silent, it was a general principle to decide in conformity to the custom of Paris; the direct authority of which extended over a part of the kingdom nearly equal to that of all the others united. The term coutume was applied not only to the subsisting usage, but to the district in which it prevailed. The legislative power of France, during the later ages of the monarchy, was vested in the king, and was exercised by his issuing ordonnances and edicts, which only differed from each other by the former commonly embracing a variety of subjects, while the latter were usually confined to a single object. These acts of legislation were not deemed to have acquired the force of laws, until they had been registered in the parliaments, and sometimes registration having taken place in one parliament and not in the other, the law was obligatory in the first, and inoperative in the last. The registering an ordonnance was not an act respecting which the parliaments had, properly speaking, any discretionary authority; but their compliance with the order of the sovereign for this purpose was frequently delayed, and a remonstrance presented submitting it to reconsideration. These remonstrances were, I conceive, never received with very great favour, and it is well known that they were the frequent occasion of violent conflicts between the parliaments, more especially that of Paris, and the crown.

The administration of justice resided in the several parliaments and inferior jurisdictions of the provinces and other districts; but from the cases which have occurred before the parliament of Paris it is evident that it entertained a jurisdiction, at least in some cases, upon subjects arising without the limits of the province. The jurisdiction of the parliaments was principally exercised in appeals from inferior tribunals, but there were some cases in which they exercised original authority. In case of dissatisfaction with the judgments of the parliament, an application might be made to the council, who had an authority to refer the case to the consideration of a different parliament, but not to reverse the judgment of their own authority. The number of tribunals established in France for different purposes, and the number of members of each tribunal was very great. The sale of judicial offices appears to have been partly prohibited by law, but it is notorious that the practice of it was very prevalent.

From the number of judicial appointments, and apparently from the facility of acquiring them, it appears to have been common to regard them as a direct object of professional pursuit, and to enter upon the administration of law without any previous practice of it as an advocate.

These situations were open to persons at a very early stage of life. In the Eloge included in the present volume, mention is made of

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Pothier, taking a more active part in the court of which he was a member when under the age of 25 years, (the common period of majority in France) than had been usual in the same district. In the addresses which it was the duty of D'Aguesseau, in his capacity of Advocate and Procureur General, to make to the parliament of Paris, upon the opening their sessions, we see an affectation of frivolity frequently expatiated upon, as a prevalent foible inconsistent with a due regard to the duties and dignities of their situation.

The subjects, of which the laws take cognizance, were more extensive than those with which we are familiar in England. Among other instances, which is called questions of a state were very prevalent; these consisted in suits for establishing the relation of persons as members of a family, without any reference to rights of property dependant upon such relation, and were always treated as objects of very solemn and important attention. The conduct of parties in their domestic relations, such as the making an adequate provision for the adult members of their family, seems also to have fallen under the direction of legal authority.

According to the common administration of justice, the complainant presented a memorial containing the ground of his demand with the legal arguments by which it was supported, and making a formal conclusion in some degree analogous to the prayer of the bill in Chancery, stating the judgment which the Court was desired to pronounce; and a similar memorial with the exception of the conclusion was presented on the part of the defendant; and the merits of the respective parties were also discussed by the oral pleadings of the advocates; after the discussion of the parties was complete, the case was referred to one of the judges, or, as they were called, counsellors of the court, to report upon. It was the duty of this Judge, who, with reference to the particular case, was called the reporter, to state, (as I conceive, in writing) the nature of the demand, the facts admitted and disputed, the points of law arising out of those facts, the evidence by which the disputed facts were supported, and the legal arguments adduced upon the respective points; to these, as well as I can collect, the opinion of the reporter was sometimes added and sometimes not probably at his own discretion. The report was communicated to the other members of the court; and the judgment was formed upon a private deliberation; the sentence alone was disclosed, the opinions of the particular judges being given under an obligation of secresy. In the parliament of Paris, and probably in the other parliaments, duties similar to those of the reporter devolved upon the advocate general; who upon such occasions acted as an assessor, and his review of the case was, in common with the advocates of the parties, denoted by the term plaidoyers, or pleadings.* They were manifestly addressed orally to the court, and after stating fully and distinctly the several points and arguments which had been relied upon by the opposite parties, he submitted his own impressions with respect to them, taking a very comprehensive view of the several legal

* See the two pleadings of D'Auesseau, subjoined to the following volume.

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considerations which might tend to influence the determination, and ending with a formal conclusion, stating in technical language the judgment which, according to the circumstances, he deemed it would be right to pronounce.

In this course of proceeding, as in all others, the interests of justice might suffer from the personal carelessness and ignorance of the officers into whose hands they were committed; but the general tendency of the proceeding was manifestly to secure a deliberate and adequate attention in the judge to the arguments which those to whom the interests of the parties were confined might deem it material to adduce; and the sudden momentary impression, which experience shows not always to be the least strong where it is the most erroneous, would not prevent the possible advantage that might eventually result from a more deliberate consideration. To render justice perfect, every effort should be made to render it satisfactory so far as that object can be accomplished, consistently with its purity and accuracy; and nothing can more effectually promote the satisfactory administration of justice than to convince the parties who have an interest in it that those considerations which to them have appeared essential were not slurred over with indifference or inattention; that if they were not found entitled to assent, they at least were not hastily rejected as unworthy of examination.

The great purposes of justice can never be much assisted, by answering a serious proposition with a contemptuous ejaculation.

Forensic discussions appear to have been generally conducted with a spirit of science; and considerable attention was paid to that kind of eloquence, which is calculated to present the substance of the argument in its most attractive and convincing form, without an unreasonable addition of ornament purely adventitous. The Causes Celebres et Interessantes, form a very engaging selection of cases, which for the most part amuse the attention by their interest and vivacity, while they conduce to the extension of legal knowledge by their accuracy and good sense. I am induced to think that the administration of the law was, notwithstanding strong prohibitions against it, not unfrequently exposed to the influence of private solicitations. The occurrences stated in one of the pieces of Marmontel, called "Tales of an Evening," describes the solicitation of various parties to the advocate general, with respect to his report; and although publications of this description may not appear the proper sources of information respecting the course of judicial practice, it is obvious that, even in offering an imaginary representation, a circumstance would not be alluded to as matter of familiar occurrence, for which there was no foundation in reality. I have also in works more immediately referable to the subject, met with incidental remarks upon the impropriety of the practice, although I cannot at present refer to particular passages.

There appears also to have been an undue interposition of regal authority, in directing the decision which should be governed solely by unprejudiced opinion. Some passages in an extract from ordonnances relative to proceedure, made by D'Aguesseau, contain a mani-

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fest reference to this circumstance as a matter of ordinary occurrence; and his letters in his official capacity of chancellor show frequent instances of directions to the judges with respect to the course of their conduct; and other instances reprehending the judgments which they had given; and although the particular cases, so far as I have adverted to them, are composed solely of intimations founded upon the justice and propriety of the subject, it is obvious that such an interposition is open to perversion for improper purposes. The positive and absolute control which the crown possessed over the members of the tribunals, as well as over other subjects of the country, by arbitrary mandates of banishment and imprisonment, had necessarily a tendency very detrimental to that independence of judicial proceeding, which is one of the most effectual safeguards of right and liberty. In the administration of criminal judicature, we find many circumstances which have been very properly the subject of reprehension, and are with great justice contrasted with the superior excellence of the criminal law of England; the course of secret examination, the application of torture for the purpose of extorting confession, the horrid torments which converted justice into cruelty, the involving the members of a family in the guilt of a relative, not merely by the indirect effect of confiscation, but by a direct and immediate sentence, are some of the particulars with respect to which the inhabitants of this country enjoy an honourable and valuable distinction.

The writers of France have certainly contributed in an essential degree to the general promotion of judicial science: many of the positive institutions of the country upon mercantile subjects contain a wisdom and equity that have rendered them justly models for imitation, and in many cases, where they are not founded solely upon the direct application of authority, they may be regarded as a correct and judicious exposition of general principles. Upon the whole, although a mere fashion of imitating, without examination, the law of France would be a manifest absurdity, it must on the other hand be evident, that an attention to it conducted with discretion will frequently afford extremely valuable information and suggestions.

In attempting to offer any general observations respecting the jurisprudence of our own country, I very sensibly feel the arduous nature of my present undertaking; but I enter upon this subject with the confidence, that however inadequate I may be to do justice to the unparalleled excellencies of our constitution, no person could engage in such an inquiry with a firmer conviction of their value and extent; no person could come to the discussion of the subject with a more sincere spirit of attachment to them; and if I venture to suggest any remarks respecting the instances, in which some practical improvement may be adopted, I flatter myself it will be acknowledged that those suggestions are intimately connected with its acknowledged and existing principles, and are wholly referable to such accidental circumstances as are the natural effects of a long revolution of time, and a gradual alteration in the situation of the country. I hope it will appear that any slight acquaintance which I may have acquired

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with the juridical systems of other countries has confirmed the preference to our own "they are only my visits, but this is my home." The surest practical test of the excellence of a government is the comparative comfort which for a succession of ages, and independently of the personal qualities of persons in authority, or other adventitious circumstances, is enjoyed by the great body of the people, subject to its control and enjoying the benefit of its protection; and the application of this test will surely not be attended with any considerable difficulty. Although much of the actual happiness of each individual must result from circumstances peculiar to himself; it is impossible, where a general effect appears to be produced, to doubt the operation of a general cause. The gradation of society in this country, to the sovereign on the throne from the inmate of the meanest cottage, with no abrupt and sensible intervals, is greatly calculated to promote the common enjoyment and satisfaction, and to render the several classes of which the community is composed mutually subservient to the benefit of each other. While the affluent receives the assistance of the industrious, the industrious participate in the benefit of that affluence, which gives their exertions a proper direction and a suitable reward. The general state of society presents no obstacle to the well directed spirit of individual advancement; no man looks at him who is next above himself as placed in a situation of inaccessible superiority; and however powerful the operation of particular contingencies must necessarily be, however numerous the failure of individual exertion, the great sum of public felicity is manifestly much enlarged by the perception that there are no absolute impediments to discourage the spirit of exertion, or check the progress of improvement. While the greater and more distinguished instances of advancement must from their very nature be the portion of a few, the possibility of their attainment may animate the dispositions of all; and while the particular pursuit is often attended with disappointment in its ultimate object, the intermediate progress becomes a valuable acquisition, and even the least successful competitors have an almost infinite superiority of enjoyment over any which could be possibly attained in the fancied state of general equality, or commonly expected in a society where the various ranks were distinguished by marked and distant intervals of separation. While that absolute inviolability is attached to the person of the sovereign, which shall protect the general harmony of the community from being disturbed by the machinations of factious ambition, the splendours of the sovereign are the splendours of the country, the powers of the sovereign are the active but regulated energies of the country, their exercise (subject to the common influence of human infirmity) may be often accompanied by error, but the situation of the personage in whom they are invested can seldom offer an inducement to pervert them by design; and while the sacredness of his character affords a security from personal responsibility, the highest exertions of his prerogative are incompetent to prevent the responsibility of those who violate the legal rights of his meanest subject. The stations of dignity which follow those immediately resulting

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from the relation of kindred to the crown, present to all who are engaged in the offices of religion and justice a pledge and representation of the honour and importance attached to their respective avocations; the numbers engaged in actual competition for these elevated distinctions are small, but to manifest and evince the propriety of such flattering distinctions, is an interest which affects and pervades the whole. The hereditary portion of the legislature, receiving frequent accessions in individuals, distinguished by their valour or their learning, offers an honourable motive to useful exertion, and at the same time induces a peculiar degree of interest in supporting the permanence and stability of institutions of general benefit to the community, and opposes a strong barrier against the enterprises of rash experiment. The other source of legislative authority has a more immediate connection with the general mass of the community. The fiction that ascribes, contrary to all historical fact, the idea of a personal and actual representation of each individval member of the community to this important branch of the constitution, has been the source of much reflection upon the discrepency between the actual practice and the theory, which though merely a deduction from it, is treated as its essence and foundation.

It may readily be agreed, that if it were proposed to frame a new legislative assembly, with authorities similar to those of the House of Commons a considerable variation from the present system of election might be deemed advisible; but the existing constitution of the House of Commons was not formed upon any principles of theoretical investigation, but resulted in a great degree from several accidental circumstances; and I think it is at least very much to be doubted whether it would be attended with any real advantage to alter a fabric which has been so long riveted and cemented together. A mere change would be naturally attended with detriment, and it would be very far from judicious to make the matter a subject of hazardous experiment; even those who entertain the opinion that actual improvement might be attained, may find it not unimportant to consider whether the whole advantages of the measures which they would wish to adopt would clearly and unequivocally counterbalance the probable mischief that might accompany it. The scheme of universal suffrage, which by many is regarded not only as a perfect theory, but as a natural right that cannot be withheld without oppression, has never appeared to me to be that which would be most beneficial in the framing an entirely new constitution; for although it is perfectly clear that the rights and interests of every member of society are equally sacred, it by no means follows, that all the members of society are equally enlightened in respect to the means of securing and promoting the general advantage of the whole, that all are actuated by an equal interest and regard for its maintenance and preservation: the actual experience of popular elections does not evince that there is the greatest concern for the public interest, where there is the nearest approach to universal suffrage, or that the qualities of a useful legislator are identified with those of a popular candidate. There is a sufficient universality of representation for

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every purpose of practical utility, when there is a sufficient community of interest between the members of the legislature and the general body of society: when the makers of the law have the same objects to promote, and the same obligations to fulfil, as the individuals most remote from any concurrence in their appointment; when they are discouraged from assuming any improper or dangerous prerogatives to themselves, by the reflection that after a limited period they are to return to the ordinary mass of society: when a public discussion prevents the surreptitious introduction of measures hostile to the general principles of the constitution, or the general welfare of the public; when the persons constituting the legislative assembly are collected from almost all the various classes of men which have sufficient elevation in society to render them proper depositaries of a share in the charge of supporting the common benefit. The permanence of one branch of the legislature and the fluctuation of the other are together a great security against mutual encroachments, on regularity and order on the one side, or on freedom on the other, in acts which must require their mutual concurrence. I am far from supposing the existence of an Utopian state of absolute perfection, in which no personal considerations interfere with the dictates of public duty; but with respect to practical consequences, there does not appear to be an adequate reason for thinking that a different plan of parliamentary election would afford a greater security against the influence of the common defects and imperfections of human nature.

It may here not be irrelevant incidentally to observe, that objects of general legislation have not of late received any very considerable attention and that discussions unconnected with any temporary political agitation for the most part excite very little interest. The large additions which are annually made to the statute book are almost entirely referable to the immediate exigencies of government, or to matters of very limited concern. I am by no means disposed to recommend an officious disposition to introduce changes in the law, without adequate motives of apparent utility; but the various alterations which result in the application and effect of laws from the mere lapse of time, require a correspondent alteration in the laws themselves; the various inconveniences which are actually experienced in the course of practice point out the necessity and propriety of meeting existing evils with adequate remedies.

The variety of detached and independent provisions, made with reference to similar objects, are frequently calculated to embarrass and mislead, and manifest the great advantage that would result from a systematic and connected view of the law, upon each particular subject of material importance, and the reducing it into proper order, by supplying deficiencies, and removing defects. The practice of making successive alterations upon the principle of reference to prior divisons, frequently introduces a set of amended amendments and explained explanations, of which even the enumeration is perfectly ludicrous, and of which the actual consequences are often extremely inconvenient; when, probably, the entire new modelling of the whole would be attending with smaller trouble, than probably adapting the

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addition to the pre-existing system. Sometimes a legal provision is introduced to effectuate a desirable object, but with respect to which the particular interest of its supporters on the one side is only opposed by a general and contingent interest, which may happen to attach to any individuals of the community on the other; and it would be a very useful though certainly not a very splendid application of vigilance and talent, to prevent such provisions being extended in opposition to the justice, which may be fairly due to those who may happen to be eventually affected by them. The composition and expression of acts of parliament is a matter which appears to be by no means regarded with an attention equal to its importance. To take an adequate and comprehensive view of the subject, for which it is intended to provide; to contemplate the several effects which it may produce with relation to the various occurrences that may fall within its operation; to pay a peculiar regard to the perspicuity of the language; to avoid the opposite extremes of a vague generality and a verbose minuteness of detail, are objects of no light or superficial attainment; but require extensive knowledge and understanding, and very deliberate and attentive consideration. How far this attention is applied, I fear it would reflect no peculiar credit on British legislation to inquire. A circumstance which is sometimes complained of, and I conceive with justice, is the overloading an act of parliament, prepared upon due consideraton by persons who have applied a regular and connected attention to the subject, with additional clauses suggested by others to whom it is newly presented; the accordance of these provisions, with the regular production to which they are superadded, can only be secured by a very cautious and judicious examination; and although I am far from offering an objection to any proper attempts to ameliorate the proposals which may be offered for the improvement of the law, I think it highly requisite that every interference for the purpose should be accompanied with adequate circumspection. It is a common observation, that members of the legal profession are not in general distinguished for parliamentary talent. Whether the habits acquired by forensic discussion are peculiarly inconsistent with political altercation, I am not prepared or at present concerned to examine, but can have no difficulty in affirming, that the professional gentlemen who have the honour of seats in the legislature, would confer a very extensive obligation on the country, by applying a suitable assiduity to the objects that have been just referred to. It is observable that in the exposition of acts of parliament, *the wisdom of the legislature*, or *the idea of the legislature*, or *the intention of the legislature*, is sometimes referred to in a manner which appears to indicate a suppositon, that every syllable in every act of parliament is weighed with the most scrupulous attention by a considerable portion of those invested with legislative authority; that all the consequences and relations of every provision are scrutinized with the greatest accuracy; that there is no redundancy of expression, or mistake of legal inference. Possibly there may be upon the whole considerable utility in the admission of this principle, without inquiring too strictly how far all those attributes which are applied of course

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to whatever is stamped with legislative authority would be ascribed to the materials, if the stamp were out of the question; but it is clear that this consideration affords an additonal motive for those, who are solicitous of promoting the excellence of our judicial system, to exert their talents in rendering the fact as nearly as possible conformable to the supposition.

That portion of the law of England which is not founded upon written authority admits as extensively as any system of jurisprudence that has ever existed, the influence of general principles of justice and propriety. Those parts of the common law which are of a positive nature are of course partly founded upon causes of a local and peculiar nature, and partly derived from the various countries from which the present inhabitants derive their origin, the respective laws, like the respective languages, forming consistent parts of a general combination. Many similarities are known to exist between the laws of England and those of Germany, from which we in a great measure derived the model of our most valued institution, the trial by jury. I am enabled to speak with a greater degree of personal knowledge, of a very great affinity subsisting in many respects between the laws of England and France. The immediate effects of the Norman Conquest upon the juridical state of England are sufficiently notorious; and in the existing laws of the respective countries, as they stood previous to the æra of the late awful revolution, many traces still remained of the common origin, which could be resorted to with mutual benefit in the investigation of subjects which had not acquired an adventitious character from peculiar circumstances. The custom of Brittany, as expounded by D'Argentré, is well known to reflect considerable light upon our system of real property.* Much as the introduction of the Roman law amongst us was opposed by our ancestors, and much as we are indebted to them for the motives and effects of their resistance, our earliest writers derived their maxims of rational jurisprudence from this celebrated system; and even with respect to some matters of a more positive nature, the principle of imitation is manifestly discernible. While most of the countries in which the Roman law is received with authority, and acted upon as a part of their own immediate constitution, have rejected the formalities of actions, and the several strict and technical rules with which they were accompanied, the spirit of those formalities has prevailed in England very extensively; the allegations in the Roman tribunals with its exceptions and replications, have a great analogy to our science of special pleading in the circumstance of bringing the matter in dispute to a precise and distinct point of affirmation and denial; although, with respect to verbosity and compression, the two systems are distinguished by a striking contrast and opposition; but in most other countries, the statements of the opposite parties are entirely informal, and often leave the matter in variance very indistinct and unintelligible. The necessity that engagements, to acquire an obligatory force, should either be founded upon an adequate consideration, or be marked by a certain peculiar solemnity, is common to England and Rome;

* It is suggested to me as this sheet is passing the press, that there is a valuable work by Mr. Houard, illustrative of the conformity of the Norman and English law of real property.

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the effects of a deed in the one are very similar to those of a stipulation in the other; and the term nudum pactum is adopted from the ancient system into the modern, to denote the invalidity of an engagement not attended by either of these essential requisites; but this doctrine does not prevail in most of the modern systems. The functions of the prætor in committing causes to the decision of judges appear to have a resemblance evidently more than accidental to the office of the chancellor, in issuing original writs; the jurisdicton of the same officer in mitigating the strictness of law, is the professed and avowed object of imitation in the English proceedings in equity. I apprehend that the excessive jealousy which formerly prevailed with respect to the law in question, so as to render even the knowledge of it a matter of terror, is now pretty generally dissipated; but there still appears to be a disinclination to the study of it, while at the same time many of the particular cases in which it has been resorted to for the purposes of illustration, are acknowledged to form some of the most valuable materials of our judicial system. Perhaps the excellent commentaries of Sir William Blackstone may not have been wholly inoperative in continuing the former prejudice; for although he very sufficiently acknowledges the general merits of the Roman law, he frequently takes the opportunity afforded by particular subjects, of placing in a conspicuous point of view the superiority of the laws of England; a circumstance which, in referring to, I by no means offer to censure, for it is clearly the attribute of a valuable member of society to render his fellow citizens daily sensible of the peculiar advantages of the constitution under which they live. If the design of effectuating this purpose has been the cause of exciting a less favourable impression of a different system than is consonant to its real excellence, or of repressing a disposition to cultivate it with an adequate attention, it is certain, as well from the example as from the more direct opinions of the learned commentator, that the consequence is merely contingent and accidental. Besides the more general analogies which have been above alluded to, and beside the acknowledged excellence of the civil law, regarded only as a collection of written reason, it must be recollected that certain courts in England, and the ordinary courts of Scotland, acknowledge the course of that law as the general basis of their proceedings; and although the discussions in the first instance are conducted by advocates particularly connected with the courts referred to, the inquiry in the last resort admits the participation of advocates and judges of the English law; and with respect to cases arising in Scotland, the argument and decision are for the most part entirely under the management and direction of English lawyers.

It would be superfluous to dwell at length upon the characteristic excellencies which distinguish the administration of the law of England, and which have been the subject of such just and general admiration. The appointment to judicial situations is founded upon a long experience in the practice of the law, upon a well established reputation of learning, ability, and integrity: the very suspicion of impurity of conduct is a sentiment which never enters for a moment into the most heated imagination; the interference of the executive powers of the state is absolutely unknown; all judicial proceedings

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are conducted with the most perfect publicity; and the general mass of the community have an extensive participation in the application of those laws, to the operation of which all are equally subject, and the purity of which every member of society has an equal interest to preserve; a participation which is not a favourite distinction conferred upon particular individuals, but an honourable duty, which every person possessing a very moderate portion of real property is in his turn called upon gratuitously to discharge, a duty which in the immediate exercise of it may slightly affect the convenience of the individual, but which adds to his general importance in society, which enlarges a valuable familiarity with his rights and obligations, and which is effectually compensated by the security that he derives from the exercise of a similar duty by those who have a common interest with himself in the fair and equal distribution of justice. It appears to me that whatever defects may accompany the administration of the law, they result either from the natural infirmities of temper which are inseparably connected with human nature, and which no constitution of government can entirely prevent the effect of, or from circumstances that may be obviated in a manner perfectly consistent with the spirit and principles of the existing system. Whatever may be the frame and constitution of the law itself, the complexion of it will in some degree be necessarily affected by the particular habits and dispositions of those who are intrusted with its exposition; and of course will fluctuate according to the different characters of those on whom that distinction may be successively conferred. To preserve a proper medium between too rigid and inflexible an adherence to precedent and authority, too strict and literal a construction, and too unlimited a discretion, is an object which requires the most accurate judgment and the most assiduous attention: with whatever propriety this medium may commonly be observed, there will occasionally be some deflection from it, and the deflections of the same individual, be the frequency of them greater or less, will for the most part be influenced by the general bent of his disposition; and from the inclination on the one side or the other, a certain fashion will arise, which cannot be wholly prevented, but which it is desirable as far as possible to correct. The most effectual means of accomplishing this purpose, will be by an habitual consideration of the principles which connect the latitude or strictness of judicial discrimination with the general interest of the community. The effects of requiring precedents, of adhering to precedents, or of deviating from precedents, of investigating or foregoing the investigation of principles, differ in infinite degrees according to the infinite variety of subjects, and no reasoning can be correct which attempts to decide the subject universally and indiscriminately by the application of a general rule. In the absence of precedent, the recurrence to principle is a liberty which is pretty commonly admitted; although to what extent the admission shall be carried is a subject upon which there is much diversity of opinion. Wherever an opposition to precedent is proposed, the discussion of its propriety must assume the supposition that the precedent is contrary to principle, for otherwise there is nothing in dispute; as if it is contended that the principle and the precedent are in unison, the

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argument assumes a different shape and turns upon an entirely different question. I conceive that nothing can be more repugnant to a true conclusion upon this subject, than the attempting to fix an universal rule as applicable promiscuously to all kinds of cases; and that nothing, on the contrary, can tend more essentially to the correct exposition of the subject, than a due attention to the effects which would result from the adherence to an erroneous precedent, or set of precedents on the one hand, or a deviation from them on the other, and a careful examination of the preponderance of detriment or advantage, as applied to the different and opposite subjects upon which the question may be proposed. I have in various instances in the following sheets, entered into particular discussions with reference to this principle, and have upon one occasion dilated upon the subject with considerable particularity. The leading points which appear to me to deserve consideration are, 1st. Whether the precedent is merely referable to arbitrary questions of positive law, or affects the general principles of right and justice. 2d. Whether the consequences of a recurrence from precedent to principle will have the effect of disturbing property held under a confidence of the existing state of the law, or will chiefly have a mere prospective operation by correcting in future what has been erroneous in the past. Fully agreeing that the general presumption is in favour of the rectitude and propriety of the precedent that has been established, and that it is incumbent on those who assail, to demonstrate its impropriety, I conceive that the spirit of adherence is often carried too far, that the admitted presumption is too often rested upon as an absolute conclusion, and that arguments submitted in opposition to it are repelled with too frequent acrimony, and without an adequate attention to the several considerations which are properly calculated to influence the decision. On the other hand, when a spirit of reform happens to be the prevailing sentiment, sufficient attention is not always paid to the propriety of retaining what might have perhaps been otherwise more judiciously arranged at first, but cannot now be subverted without inducing greater prejudice than advantage.

It may have the appearance of presumption to advert to the duty of affording to every advocate of every party an equal and impartial attention, and of requiring equally from all the same respectful deference; to allude to the impropriety of admitting an almost dictatorial familiarity from one, and repressing another by a mandatory authority or a supercilious indifference, whatever may be the difference between their respective ranks and talents; or to imagine the possibility of private intimacy being allowed to influence the reciprocal demeanor of the advocate and the judge. I firmly believe that all who have occupied the higher stations in the administration of justice, for a long succession of years, would justly revolt at the suggestion of having knowingly or intentionally afforded a subject for the application of such reflections. That similar effects have not occasionally resulted from inadvertence, I cannot equally affirm; and without insinuating the slightest reference to particular circumstances or persons, it is difficult to believe that the imputation of a particular

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advocate having the ear of a court, which is not unfrequently applied in fact, is always applied without foundation. The unfavourable influence of such a preference upon the due administration of justice must be extremely manifest; and the duty of guarding with anxious solicitude against its unconscious and inadvertent operation cannot too extensively awaken the attention of even those depositories of public justice who would have the most indisputable right to repel with indignation the charge of intentional partiality. The same considerations will apply to giving a countenance in any other manner to the assumption of an undue superiority by one advocate over another, and the encouraging an imperious and dictatorial tone, with respect to the discussion of matters in dispute between them. Although it must be allowed that any such consequences will in superior courts be in a great degree prevented by the wisdom of the judge; yet the thing sometimes does exist, and when it does it militates against that equal and impartial distribution of justice which should be preserved with the most anxious circumspection, not only against those manifest encroachments which are open to immediate observation, but also against the more dangerous influence of causes that are only counteracted by vigilant attention, and are not accompanied by any intentional misconduct.

There are certainly many things incident to the situation of a judge which have a great tendency to fatigue the patience and irritate the temper; but in proportion to the internal tendency of any situation to excite particular infirmities, is the vigilance which it is requisite to apply in their correction; the petulence and ill temper of a judge are not the ridiculous and insignificant weakness of an individual, but a trespass on the rights of the public, which may be attended with consequences of the most extensive and permanent nature. But whatever necessity there may be for correcting the casual aberrations arising from particular infirmity, the subject acquires a great additional importance, when a similar objection can be applied to a prevalent system, and a connected principle. I allude to the excessive eagerness for expedition and despatch, which is often regarded as the highest mark of judicial excellence, and which is sometimes indulged to a degree that most essentially affects the dignity and interest of justice. No person has less inclination than myself to commend a dilatory and trifling prolixity in the administration of the law, or to withhold a proper approbation from any arrangements which may promote its celerity, so far as that object can be obtained consistently with the due preservation of its more important advantages. I cannot however but think that a greater degree of rapidity than this principle warrants not only has a frequent existence in practice, but too generally attracts an approbation to which it certainly is not entitled. This course of procedure may increase the advantage of the law as a trade, but can never promote the honour of it as a profession, or advance the excellence of it as a rule of conduct, or an instrument of justice. I think I shall not be suspected of wishing to encourage a disposition in advocates to consume unnecessarily and therefore improperly the time in which the public have so extensive an interest, or to claim a

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greater portion of that time than is requisite for the fair and adequate support of the interest for which they are engaged, and the exposition of the general principles of law and justice with which those interests are connected; but parties have a right to claim the serious and deliberate consideration of the topics which it is thought material and important to present on their behalf. No man should have an opportunity of asserting with truth that his arguments were slurred over with hurry and neglect. The earnestness to save a small portion of time may, contrary to the real demands of right and justice, involve a family in ruin; an effect which will most frequently occur in cases where the mere amount of the property in dispute is the most trifling and insignificant.

As the expressions of a judge in a particular case become afterwards a rule of law, they should be weighed with cautious accuracy and with full consideration of all the consequences, so as to prevent the mischiefs that must arise from exalting an error into a principle. The strongest opinions upon momentary impression are not always found to be the most accurate upon deliberate reflection; but after the impression has been peremtorily acted upon, the reflection may come too late to afford an effectual remedy.* The pleadings of D'Aguesseau, as Advocate General, among their other excellencies, contain a striking illustration of the principle, which I am endeavouring to inculcate; it is impossible to read any of those compositions, without perceiving that no argument which had been deemed material by the parties was dismissed without a deliberate examination, or with no other notice from the advisers of the court, than a captious interruption, or a contemptuous sneer. The feelings of personal interest might render a party dissatisfied with the reasons which were assigned for an opinion in opposition to them, but he never could complain that he had not been fully heard, or that having been heard, it was only to be treated with derision, acrimony, or neglect. The course of proceeding never produced any of those scrambles for attention, which certainly are not unknown in the English tribunals. Perhaps it may be thought with truth, that the immense quantity of business which is brought before our courts would not allow a perfect imitation of that full and minute exposition of the arguments of the parties, which appears in the pleadings alluded to; and the difference between the functions of an assessor, who is to elucidate all the points which may be material for the consideration of the court, and that of the judge, who, if any one point is sufficient to warrant a decisive conclusion on either side, may dispense with examining the others, will in many cases render it superfluous; but the spirit and temper of them may be recommended, where the precise mode and form of their

* I conceive that the publication of Nisi Prius determinations and the admissions of them as legal authorities, may be attended with considerable detriment, unless the use of them is regarded only as evidence of the familiar course of practice, or as illustrative of the principles of accurate reasoning; to consider them as binding, in opposition to what, upon investigation, may appear to be the true legal consideration upon any subject would be giving them a station to which they have no pretensions on the ground of utility.

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arrangement cannot or need not be applied. The prevalence of that attachment to celerity, which may sometimes not undeservedly incur the charge of precipitation, must in a great measure be ascribed to the vast quantity of business which a very small number of persons is appointed to discharge, and which absolutely demands that every regard should be paid to expedition, which is not attended with the prejudice of justice.

When an argument is conducted by the advocates engaged in it upon certain principles, I think it very seldom beneficial for the court to ground its determination upon some detached consideration kept in reserve by themselves, and which would perhaps have admitted of explanation or correction, and even upon due attention may have been declined by the counsel as irrelevant to the real question in dispute. The fair and correct course, when observations occur as material, which have not been adduced in argument, is to suggest them to the attention of the counsel, and to allow them to receive a full and unprejudiced discussion.

Wherever the nature of the subject will admit the facts to be ascertained, and the law resulting from them to be reserved for more serious consideration, it is extremely desirable that the judge should not stop the course of proceeding in a trial, on account of his own impressions of the law, since if he commit an error in admitting the investigation of the facts to proceed, the only injury which can arise, is an unnecessary consumption of time; whereas, if he erroneously intercept the course of inquiry, he occasions an unnecessary, and frequently a very detrimental expense and delay in the renewal of an examination, which might have been perfected without prejudice in the first instance. Every court should always study to promote such an arrangement, as will have the effect, if their own original sentiments should be wrong, of admitting the consequences of them to be rectified with the greatest facility.

The law has in most cases afforded the parties engaged in litigation, an opportunity of a solemn and full discussion of any legal questions, connected with, or affecting the matter in dispute. The general disposition of the judges to allow such discussions, whenever the legal advisers of the parties are of opinion that there is a proper ground for it, has very much brought into disuse the proceeding by which the same effect is in the power of the parties themselves, and a bill of exceptions is so little in use, that although it is advowedly no mark of disrespect to the judge, whose opinion it subjects to further inquiry; it is, when resorted to, almost always accompanied by an apology. Sometimes, however, judges decline allowing the reservation of a case upon points which counsel, after deliberate consideration, conceive to be material; and upon applying for a new trial, the report, from the hurry and confusion which frequently accompany a trial at Nisi Prius, does not always fully enable the party to obtain the advantage which he would have had, upon the more formal mode of taking his objection; and even the discussion in the superior courts is now and then conducted more summarily and with less attention than it would be, if subject to further revision. The

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expenses of a bill of exceptions is sometimes objected to, but I much doubt whether it is not commonly exceeded by that of a second trial at the assizes. The principal defect in taking this course is that it can only be rendered available upon a writ of error, and I conceive that a considerable improvement might be introduced by admitting a note of an objection to be tendered at the trial, with liberty to turn it into a bill of exceptions, in case of an adverse decision.

It has sometimes been regretted by the court of King's Bench, that justices in quarter sessions, who exercise an extensive though not a very conspicuous authority, should not be under a legal obligation to submit their opinions to reconsideration; but Lord Kenyon, recently before his death, rather intimated a disapprobation of the facility with which such revision was allowed, and expressed a wish that justices would not suffer cases to be reserved, except where they entertained a doubt upon the point which they decided. I have had an opportunity of seeing this opinion very extensively acted upon, and cannot but think that the magistrates would act at least as judiciously, in presuming that persons of professional knowledge and experience would not require such revision without an adequate motive, than in taking for granted the absolute infallibility of judgments pronounced upon the impression of the moment, in courts where legal science is certainly only an accidental quality, and where the determination often depends not so much upon the superior reason of the case, as upon the superior adroitness of the advocate engaged in it. The greatest degree of confidence is not an infallible criterion of the greatest degree of accuracy; and in practice I have commonly found the greatest readiness in admitting a revisal of their opinion, in those who were possessed of the greatest rectitude of judgment and I may add, that I have seldom seen that facility abused by improper applications. In this reference, as well as in many others in the following pages, to courts of quarter sessions, I am influenced not so much by any considerable importance in the immediate subject as by a reflection upon the extensive principles which ought to actuate the administration of justice in all its ramifications, and the deviations from which are best illustrated by instances produced from sources, in their nature more peculiarly subject to them.

It is certain that the great principle of *Magna Charta, nulli negabimus, nulli vendemus justitiam*, is too often frustrated, in consequence of the expense, at which alone the claims of justice can be attained, and that the maxim, that the law is equally open to the rich and the poor, will too frequently admit the reply given by Mr. Horne Tooke to Lord Kenyon, that "so is the London tavern;" the obtaining a verdict for a debt of forty shillings is often attended with an expense of more than forty pounds, when possibly the only fruit of it will be, the imprisonment of the defendant's person: so that, according to common prudence, it will be generally more adviseable to forego a just claim, or to submit to an improper demand for a moderate amount, than to agitate the question in judicial contest. A notion is sometimes entertained that it is desirable to render the law expensive and inaccessible in order to prevent and repress the spirit

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of litigation; this is merely an instance of the common error of arguing against the use of any subject, from the abuse by which it may be perverted; and the argument, if true in principle, would go the length of excluding the interference of the law altogether. I agree that it is desirable to discourage a wanton and vexatious habit of litigation as extensively as a due and proper attention to the effectual preservation of right and justice will admit, but further than it is impossible to proceed without inducing the consequence that has been mentioned; and any arrangement which may prevent the failure of justice from an apprehension of expense, must in its general effect be a desirable object.

In almost every country there is a provision for alloting causes to different tribunals of greater or inferior dignity, according to their relative value or importance; the attention of the higher courts being confined to subjects which have a certain degree of magnitude. To advert to countries, the laws of which have a connection with, or relation to, those of our own; in Ireland there is a process called civil bill, for recovering in a summary manner, before barristers appointed with a salary for every county, all debts under the value of 20*l.*: in Scotland, the sheriff, who is always an advocate, is a judicial officer with a permanent appointment, and has cognisance of civil causes to a considerable amount: in America, debts under the amount of ten pounds are recoverable before justices of peace.

In most corporate towns in England, civil justice is administered at a comparatively inconsiderable expense; and nothing can be more clear than that the same effect might be generally and effectually obtained, with very great facility, in respect to the country at large, in perfect conformity to the existing laws and constitution, by merely correcting the effects that have resulted from the long efflux of time since the present distribution of legal authority was established, by giving to the county court, directly and immediately, that jurisdiction which it already possesses derivatively by a writ of justices, by rendering its process effective in attaching to it the general incidents of a court of record; and substituting for the assistance of the person who may happen to have the appointment of under-sheriff, the regular attendance of a professional judge selected by the crown. One of the great effects of such a regulation would be, affording an opportunity to the judges of the superior courts to apply a larger portion of time to the more important cases to which their inquiries would be confined, than can at present be allowed, amidst the multiplicity of business, from a great portion of which they might be relieved without the slightest detriment to the public.

To object to any such arrangements on the broad ground of discouraging innovation, would be completely ridiculous, provided the measure upon fair examination should be found to have the prospect of real utility. It has long since been observed by one of the most enlightened of mankind, that the greatest innovator is time. Refusing to adapt a change of conduct to a change of circumstances, is as little consistent with wisdom, as offering to continue for the man the measure of habiliments which was suited to the boy.

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Considerations of economy are still less calculated to interfere in the scale of reason with the admission of such regulations, as upon a fair and correct inquiry might appear to be useful and judicious. Economy and prudence do not depend upon merely counting the sum of money which is appropriated to any beneficial purpose, but upon proportioning the amount of the expense to the value of the object; refusing to incur a small expense for the purpose of obtaining a great advantage is not frugality, but imbecility. There can be no doubt but that the real advantage of justice will be promoted, by acting with a spirit of liberality to those intrusted with the administration of it, and that a due and adequate encouragement to useful services is more than compensated by its natural effects. But to speak of restraints of economy upon the present subject, would be quite absurd. The public have an important interest in the easy acquisition of justice: the persons actually engaged in litigation are comparatively few; but no one can tell that he is not the man, on whom the lot may fall to be placed in the alternative of losing an actual right, or submitting to a wrongful claim on the one hand, or of incurring a disproportionate expense on the other. Considering the charges which attend the administration of justice, as a matter of public concern, without making the distinction whether they are sustained by a general fund, or by the particular individuals who may have occasion to claim the protection of the law; the debtor and creditor account would present a saving, by making such a general provision as would diminish the aggregate charge of individual expense; and the amount of that saving produced by the alterations alluded to would be almost incalculable; and to the advantage of a saving in expense, that of preventing the frequent failure of justice would be a most important addition. When we advert to the actual amount, which would be requisite for the various purposes that have been alluded to, we shall easily be convinced that the mere interest for a single year of a sum which is often without emotion raised in the temporary exigencies of the state of war, would be more than adequate to establish a permanent fund, sufficient for completely meeting every expense that can be incurred by improving and ameliorating the system of the law, for providing with the greatest liberality for those who may be engaged in its administration, and compensating the losses which might be occasioned by the alteration, and consequently that an annual charge equal to the annual interest of that sum would be attended with the same effect. If the pressure of war is an acute disease which requires a strong and instantaneous remedy, the effectual and easy acquisition of justice is part of the daily food which contributes to our activity and comfort.

With respect to the study of the law of England, although a liberal course of education has been generally recommended and extensively followed by its professors; it certainly cannot be pretended that it has been immediately conducted upon the principle of considering it in itself as a liberal and general science, until the recent æra of the publication of Blackstone s Commentaries; a work allowed by general assent to afford a more beautiful specimen of elegant litera-

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ture than has in any other instance been applied to a professional subject, which has greatly facilitated the acquisition of juridical knowledge, while it has improved the judgment of maturer experience, and given a convincing proof to the cultivators of general literature, that if the science of English law has not been often presented in an elegant form, the defect has not been occasioned by the nature of the subject. It is to be regretted that several other productions which, without affecting to challenge a competition with the admirable composition already mentioned, are very extensively calculated to promote the same desirable purposes, have not met with a reception proportionate to their merit and importance; the works which more particularly call for this observation, are the lectures of Mr. Sullivan and Mr. Wooddeson, the History of the Law by Mr. Reeves, and the pleasing Dialogues of Eunomus, which relate to the subject of the law considered on an extensive scale; to which, with reference to a particular topic, may be added, the Considerations on the Law of Forfeiture, by Mr. Yorke. It seems to be very much taken for granted that all elementary knowledge not derived from Blackstone is superfluous, and that after drawing from this rich fountain, any recourse to inferior sources would be almost detrimental; but whoever feels a disposition to avail himself of the example of Sir William Blackstone, as well as of the fruits of his talents and application, will, to an assiduous cultivation of the legal authorities of his own country, add a considerable attention to the culture and illustrations of the more general principles with which the legal authorities of every country are intimately connected.

It is sometimes mentioned, as a matter of preference to the science of English law, that its authorities are not derived from the speculations of writers in the closets upon theoretical suppositions, but from the decisions of the bench upon actual subjects of litigation between conflicting parties. I am perfectly ready to accede to the correctness of the principles upon which this preference is founded, and upon the abstract questions between adopting in practice the previous determination of a judicial tribunal upon the immediate proposition on the one hand, or the private sentiments of a juridical writer on the other, (the adequacy of talents being regarded as equal,) I think there can be no rational ground of dispute; since the very important purposes of legal certainty are greatly promoted, by giving to the former a kind of legislative authority, which shall not require any argument or ratiocination, in their support, but shall only be subject to correction when acknowledged upon due consideration to be founded upon erroneous principles. But I think the preference is carried too far, when it indicates a spirit of exclusion, since in point of reasoning the deductions of the writer (the same supposition being always assumed) will be of equal accuracy with those of the court; and although the superiority in case of conflict may be justly attributed to the latter, material advantage may in other cases be derived from the concurrence and assistance of the former, who does not require an implicit and submissive acquiescence in his authority, but only solicits a fair and candid examination of his reasons, and in some

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cases the balance in respect of accuracy may naturally incline in favour of the writer whose conclusions are founded upon the deliberate contemplation of an entire subject with all its bearings and relations, rather than of the judge, whose decisions may result from the instantaneous and partial view of it in a particular aspect, presented by the skilful advocate for a different purpose from that of establishing the correct and perfect exposition of the disputed proposition.

That part of the law which depends most upon universal principles and is of the most extensive use and application, the doctrine of personal contracts, has, until a recent period, received a very subordinate share of attention from juridical writers. The writers of the treatises which have contributed to introduce a different system, are yet for the most part at no advanced period of life. The examples which they have afforded of rational investigation and of recurrence to the arguments and illustrations of foreign writers, may greatly contribute to the advancement of our jurisprudence, by promoting a course of inquiry which will allow to precedents their proper value and effect, without absolutely requiring their assistance, or implicitly and indiscriminately relying upon their authority.

The law of Ireland is so entirely founded upon the law of England, that, subject to a few local peculiarities, it may be regarded as the same. So far as I can speak from general information several legislative regulations have been made in that country, which may be desirable objects of imitation. The published accounts of decisions in the Irish courts are not very numerous or important. The relations of particular proceedings which sometimes appear in the daily publications evince that more general cultivation is there applied to forensic eloquence, than can be asserted of the tribunals of our own country.

Nearly similar observations may be applied to the law of America. The authorities of the English laws are received there with great deference, and all the professional publications which appear in England are in very considerable request. Some valuable reports have been published, which indicate a scientific and enlightened investigation of juridical questions, and which the lawyers of the parent country need not feel a disgrace in resorting to for assistance. While the discussions of the American courts are conducted with reference to the juridical proceedings in England, it is obvious that the discussions in the English courts may receive a valuable illustration from cases in which similar questions have been agitated with competent ability and with full and adequate attention in America, since where the principles are the same, the consequences resulting from a proper deduction will of course be similar. There are also some judicious regulations established by legislative authority, amongst which may be mentioned the power of courts of law to submit the examination of matters of account to referees without requiring the assent of the parties.

In America the persons entrusted with the administration of justice, are competent to the functions of legislation; this in England is only admitted in so limited a degree, that the effects of the combina-

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tion can very seldom be detrimental, and may frequently be very beneficial; and I conceive that the general purity of justice is very much promoted, by precluding the ministers of it from diverting their attention from their appropriate functions, in order to become distinguished in the contests of party.

The general legislative provisions of England and Scotland have, since the union, been very much the same, and the leading principles of the feudal law, which are the foundation of many of the institutions of the former, and still prevail in undiminished vigour in the latter. But generally speaking, the two systems are entirely separate and distinct; and the law of Scotland has at least an equal affinity to the law of France, as to that of England. The Roman law has there been as extensively the model of imitation as in most of the countries on the Continent, and the juridical discussions appear to be conducted upon those philosophical principles of general reasoning, which are best calculated to lead to accurate conclusions. The criminal jurisprudence seems to have a vague and arbitrary character, which in many cases renders it inferior to the more certain jurisprudence of England, and as far as can be judged from a slight knowledge of its practical effects, to warrant an assumption of power which little accords with the sentiments of an English lawyer. In civil questions, the power of appeal fom the courts in Scotland to the supreme tribunal of the empire is more extensive than in the other parts of the United Kingdom, as it embraces decisions upon fact as well as upon law; and therefore such appeals are of much more frequent occurrence. Perhaps the attaching to the House of Lords an official character professionally conversant with the law of Scotland, would be found an improvement of considerable value. The House of Lords is for the most part with respect to these appeals another name for the Lord Chancellor, whose previous habits and studies are not naturally calculated to render him peculiarly intimate with the questions which he is empowered conclusively to decide. A doctrine has lately been stated as proceeding from high authority to which I think it is impossible to subscribe. Upon a general principle, that the law of Scotland and the law of England should be rendered as concordant as possible, a decision of the court of session was reversed, because it was at variance from some previous decisions of the Master of Rolls. So far as legal questions depend upon general principles, the law of England and of Scotland ought to be the same, as well as the laws of all other countries; and if a decision is erroneous, as deviating from those principles, it ought to be corrected by an immediate appeal to the principles themselves; but since the laws of England and of Scotland are entirely independent with respect to matters of local authority, and as the latter acknowledge no subordination to the former, the mere benefit of conformity is fanciful and insignificant, when attended with the effect of correcting a judgment by a standard to which it had no relation. The Scotch and English lawyer respectively apply for their information, and the advice which they communicate, to different sources; an English counsel, in giving an opinion, makes no inquiries into the opinions of

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the court of session, or a Scotch lawyer into the decisions of the Master of the Rolls, except collaterally and incidentally as they might apply to any other foreign source of information; but if the Scotch decisions are to be corrected by the decrees ef the Master of the Rolls, the English decisions, unless there is a subordination which will not be contended for, must be corrected in turn by the judgment of the court of sessions; for between two mutual, independent, co-ordinate authorities, acting upon similar rules and principles, there can be no recurrence to authority, or the recurrence must be reciprocal; and the House of Lords acting judicially has no more constitutional authority to subvert and new model the law of Scotland, for the purpose of rendering it conformable to the law of England, than the most inferior English tribunal has to subvert the law of England for the purpose of introducing an alteration which the judge of it may fancy by way of an improvement, from the law of Scotland.

PART II.

In making the preceding remarks, I perhaps may have subjected myself to the imputation of introducing a variety of topics, that have no immediate reference to the publication they are intended to accompany; but in presenting the treatise contained in the present volume to the English reader, my attention has naturally been drawn to a contemplation of the general principles which are calculated to enhance its utility; to an advancement of the rational cultivation of juridical science, and to the practical improvement which might be admitted in the administration of justice; and I have availed myself of the opportunity of suggesting some incidental observations, the consideration of which might not be wholly unimportant in pursuing so desirable an object. The leading particulars of the discussion cannot aspire to the praise of novelty, and I am perfectly conscious that they have repeatedly been presented with much superior ability. To expect that my own endeavours can be attended with effects that have hitherto but very imperfectly resulted from the exercise of talents which I contemplate with distant admiration, would be unwarrantable arrogance and vanity; but as I can at least assert the merit of entertaining a strong attachment to the proper objects of my profession, and to the pursuits by which its value and excellence may be most successfully promoted, I have, according to the best of my power, presented my contribution to the accomplishment of so desirable a purpose. Upon some of the topics alluded to in the foregoing pages, I of course can only profess to speak from a superficial and cursory acquaintance; upon others I have hazarded observations which have no higher authority than my own personal suggestions; but I hope that I have not materially incurred the charge of inaccu-

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racy of statement, or of offering assertions or remarks which have not been preceded by a fair and attentive consideration.

For a treatise, of which I now submit a translation to the public, any expression of commendation would be manifestly superfluous. The stamp of approbation from Sir William Jones is a decisive criterion of the sterling excellence to which it is affixed; and if my own share of the publication is entitled to the humble praise of fidelity I shall not be expected to offer an apology for my endeavour to second the intentions of that illustrious character, who declared as the result of his pre-eminent erudition, that he should consider himself as having in some degree discharged the debt which every man owes to his own profession, if his undissembled fondness for jurisprudence should never produce any greater benefit to his countrymen than an introduction to the writings of Pothier.

So far as this indisputable testimony can be assisted by any confirmation, it has the advantage of being supported by subsequent writers, who have regarded the science of law as requiring the application of other exertions, than the mere compilation of municipal authorities, and have deemed it beneficial to enrich their treatises from the treasures of foreign erudition, and some recent instances have occurred, in which the opinions of Pothier have been cited with approbation in the course of our judicial proceedings; but notwithstanding the acknowledged utility which would accompany the study of his writings, I conceive it is perfectly evident that the actual familiarity with them bears a very inconsiderable proportion to their merited celebrity.

It appeared to me that the utility of my undertaking would be increased by inserting the Eloge, which was pronounced recently after the death of Pothier. Compositions of this kind, after making every proper allowance for the attachments of friendship, and the colourings of professed panegyric, are calculated to afford a considerable idea of the person who is the subject of them; the likeness may be taken in the most flattering point of view, but the object would be defeated if the general remembrance was not preserved; and in the present instance, the representation which is transmitted to us is equally valuable as containing a perspicuous exposition of the labours of the jurist, and a lively and interesting portrait of the man. A sincere and ardent devotion to the duties of religion, a peculiar simplicity and benignity of disposition, a great disinterestedness of conduct, a strong attachment to the duties of his station and the improvement of the science with which it was connected, are the leading features. The enumeration of particular instances confirms the testimony of general excellence; and although the style and language of the commendation may be in some instances too inflated, the substance and effect of it are manifestly beyond the reach of suspicion.

The presidial in which Pothier held a seat was a court of subordinate rank; it exercised jurisdiction without appeal in cases of smaller value than 250 livres, which about the time of his decease was extended to 2000, but I conceive that it had original jurisdiction subject to appeal in cases of greater amount; it appears also from the Eloge,

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that it likewise exercised an authority in criminal cases. It is a striking instance of the effect of habit, when we see the friend of Pothier, and the admirer of his humanity, speak of his inability to behold the infliction of torture, as resulting more from the sensibility of physical organs, than from moral sentiment.

At a more advanced period of his life, Pothier received the appointment of professor of law in the university of Orleans, a situation for which he was peculiarly qualified, and in which his instructions justly advanced the university, as a seminary of juridical science, to a high degree of celebrity.

During the course of a long and useful life, he devoted himself to the performance of the duties in which he was engaged, with an unremitting assiduity, which is particularly delineated in the Eloge, and of which we very rarely meet with any similar instance.

I have already adverted to his edition of the pandects, which, so far as a judgment can be formed from the representation of it, must be more completely adapted to obviate the extreme confusion and want of arrangement that pervade the Roman law, than any of the numerous publications which have been devoted to that extensive subject; I regret my inability to speak from any personal acquaintance of a work, the merit of which must indisputably entitle it to a more extensive encouragement, and in consequence to a more general publication.

With respect to his writings which have a more peculiar and immediate reference to the municipal institutions of France, and in particular to the customs of the province of Orleans, it will not be necessary at present to make any farther observations, than that they are universally admitted to indicate the same degree of talent, which in his other writings is applied to subjects of more extensive interest.

The most valuable and important productions of his pen are acknowledged to be his Treatises on Obligations, and on the different Species of Contracts. The first of these treatises embraces the general principles, which in the others are traced in their particular application, to more confined and subordinate subjects.

In the discussions of the various topics which fell under his consideration, his inquiry embraces the common principles of natural justice, the decisions and institutions of the Roman law, and the more circumscribed jurisprudence of his own country, particularly illustrated by the usages of his province of Orleans. His inquiries are every where distinguished by their complete and perfect exposition of the subjects to which they relate, by their extensive learning, by their accurate arrangement, the perspicuity of their diction, the felicity of their illustrations, their fair and judicious examination of controverted questions. By some this fullness may perhaps be considered as redunant, and in a few instances the familiarity of the illustrations may excite a ludicrous impression, as when he refers to contracts, which being of a personal nature, determine with the death of the party, and adduces the instance of a contract with a barber, to shave a person twice a week at his country house.

The elegancies of composition received a very slender portion of

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the author's attention, and every other consideration was regarded as subordinate to the affording a clear, precise, and accurate familiarity with the subject under examination.

To an English reader the name of the principal treatise would have conveyed a more extensive idea, if the term Contracts had been substituted for that of Obligations, as we are familiar with the latter term, in a more confined application of it; but the object of the treatise is, to comprise the general doctrines which relate to the obligations between one individual and another, as well for the reparation of injuries, as for the performance of engagements. The principles applicable to obligations resulting from contracts, however, constitute the leading subject of the author's attention, and the reference to other topics may be considered as subordinate and incidental.

After a short preliminary article describing the import of the term Obligation, as denoting a legal tie which imposes a necessity of doing or abstaining from doing an act, and as distinguished from imperfect obligations, such as charity and gratitude, which impose a general duty, but do not confer a particular right, and from natural obligations, which have a definite object, but are not subject to any legal necessity, the treatise is divided into four parts, of which it may not be superfluous to offer a slight analysis, wherein I have endeavoured to facilitate the perusal of the treatise by the exposition of some terms, and the explanation of some points of law, of frequent occurrence.

The first part, which relates to the essence of OBLIGATION and its effects, is divided into two chapters. The first of these is referable to the essence of obligations, which requires that there shall be a cause from which the obligation proceeds, persons between whom it intervenes, and something which forms the object of it. The first section of the chapter relates to contracts, which are the most frequent causes of obligations. An agreement arises from the consent of two or more persons to form an engagement, or to dissolve or modify an engagement already subsisting; and a contract is defined to be an agreement, by which two persons or parties mutually promise, and engage themselves, or one promises the other to give him something, (which term is understood as equivalent to transfer and deliver, and not as denoting any gratuitous donation,) or to do or abstain from doing any act; and a distinction is made between contracts, and promises not intended to constitute any obligatory engagement, such as those made by a father for any indulgence to his son.

After pointing out the difference between a contract and a pollicitation, which means the offer of a promise before it is accepted and while it may be retraced, the author proceeds to take notice of three things, which are to be distinguished in every contract: those which are of its essence; those which are of its nature; and those which are accidental. These distinctions relate principally to particular modes and classes of contracts, such as sales, loans, &c. in which the absence of what is of the essence of any given contract prevents that contract having an existence, and either renders what purports to be a contract wholly void, or proves that it belongs to a different class. Whatever is of the nature of a given contract is implied and under-

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stood without being particularly mentioned, but may be expressly excluded; accidental circumstances are those which are not commonly implied, but may be introduced by positive stipulation.

This is followed by adverting to the several divisions of contracts: 1st. Into *reciprocal*, where each party is mutually obliged; and *unilateral*, where the obligation is wholly on one side, as in the case of a loan of money. 2d. Into *consensual*, which are formed by the mere agreement of the parties; and *real*, in which an actual delivery of some thing, (*rei*) was absolutely requisite as a pledge or deposit. 3d. Into contracts of *mutual interest*, contracts of *beneficence*, and *mixed* contracts: the first of which are subdivided into *commutative*, where each party intends to receive a full and absolute equivalent, as sales; and *aleatory*, where something is given on the one side for incurring a risk on the other, as insurance. 4th. *Principal* and *accessary* contracts. 5th. Contracts, which are, and those which are not, subject to particular forms. A discussion follows, respecting the several defects or vices that may occur in contracts, being, 1st. Error. 2d. Force. 3d. Fraud. 4th. Inequality, as between persons of full age. 5th. Inequality, as affecting minors. 6th. The want of a good consideration wherein reference is made to the illegality of contracts, but an intention of gratuity was allowed as a sufficient consideration. 7th. Want of obligation in the party contracting, or, in other words, an agreement giving the party an unrestrained liberty to perform his agreement or not. The more important of these defects are treated of with considerable particularity. The next article relates to persons capable of contracting, or incapable, whether in consequence of natural imbecility, such as idiots; or legal disability or protection, such as married women without the authority of their husbands, persons interdicted for prodigality, and minors. The ensuing discussion respecting the objects of contracts, is principally founded upon the maxim of the civil law, that no man can promise or stipulate (that is receive a promise,) except for himself, inasmuch as contracts have no effect, except as between the contracting parties. This is however rather a matter of technical subtilty and verbal distinction, for it is agreed that a man may personally undertake that an act shall be done by another, rendering himself responsible in case of non-performance. Several cases are then shown to which the principle of the objection does not apply, as where the party stipulating has an interest in the subject; where a man stipulates or promises as agent for another; where he stipulates or promises, for his heirs and successors, which he is also presumed to do without its being expressly mentioned, unless there is something personal in the nature of the contract; where the matter which concerns a third person is only the mode or condition of an agreement; the power of a man to stipulate a promise through the ministry of an agent introduces a dissertation respecting the nature and extent of an agent's authority, and the rights or obligations resulting from it. Under the title of the effects of contracts, there is only an exposition of the rule, that they cannot have any effect except between the contracting parties, and those succeeding to their interests; the effects which are common to con-

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tracts and other obligations being reserved for consideration in the succeeding chapter. Several rules are next given for the interpretation of contracts with suitable illustrations; these rules are rather founded upon general principles of logic and good sense, than upon legal reasonings, and are in a great measure applicable to other subjects as well as contracts. Formerly notaries who were churchmen, used to make parties confirm their contracts with an oath, for the purpose of drawing a cognizance of them as being spiritual matter before their own tribunals; but this usurpation was afterwards defeated: the obligation in point of conscience to discharge such an oath is examined with some particularity, especially in cases where the oath is procured by fraud or extorted by fear, and in which the learned professor is of opinion that no such obligation is incurred.

The contents of this first section may perhaps be regarded as of more extensive importance and utility than any other part of the treatise.

The second section mentions the other causes of obligation, which are, 1. Quasi-contracts, which with us would be treated by implication, as actual contracts. They differ from contracts, as not being founded upon actual consent; and also differ from injuries. Such are the cases of receiving money which ought to be refunded, the obligation of accounting for business done for another in his absence on the one hand, and remunerating the expenses sustained in doing so on the other. 2. Injuries and neglects, or as they are called *Delicta* and *Quasi Delicta;* and 3. Obligations founded upon mere natural or positive law, and not falling within the preceding divisions. The next section respecting the persons between whom an obligation may subsist, does not require any particular notice. The 4th section concerning the object and matter of obligations adverts, 1. To things which may be either particular, as a specific horse; or general, as a horse indiscriminately; they may be existing or expected, as the fruit of the vineyard in the ensuing year, but cannot be things not subject to commerce, as a bishopric; or things which the party in whose favour the obligation is contracted cannot enjoy, as an easement in his own land. 2. To acts which must be possible in their nature, not contrary to law or good manners, and capable of pecuniary appreciation to the person in whose favour the obligation is contracted.

The second chapter contains three articles: I. Of the effect of obligations on the part of the debtor, considering 1, obligations to give any thing the effect of which it is to give the thing accordingly; 2, in case of a specific thing to use a proper degree of diligence in its preservation; this diligence differs according to the different kinds of contracts, and the distinction respecting the degrees of diligence applied to the contract as being beneficial to both the parties, or only one of them, which foundation of the great discussion which has taken place respecting the law of bailments, and which may be considered as the great cause of the introduction of the name of Pothier to the English lawyer; 3, to answer for damage in case of improper delay, which is denoted by being *en demeure*, a subject to which very frequent references are made in the course of the treatise. Accord-

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ing to the law of France a person was in general only placed *en demeure*, in consequence of a judicial summons, or as it is more frequently called a judicial interpellation.—II. The effect of the obligation to do or not to do any act, is to subject the party to damages, for the contravention of his agreement, or for delaying to perform it, after being placed *en demeure* by a judicial interpellation. II. The effect of obligation on the part of the creditor consists in his right of suing for performance of the engagement.* 2. In a right of set-off, called a right of compensation where the mutual demands are of liquidated sums. 3. In serving as the foundation for other obligations such as the engagements of sureties. 4. In serving as the foundation of a novation or substantial contract. Art. III. Relates to *damages*, which term in the French law is always referred to conjunctly with that of interest, the combination being in

* In the printing of this article the following passages were omitted as being merely of local interest, but upon consideration it has been found advisable to supply the deficiency by inserting them here.

No. [153] of Pothier, add——"Observe that if the sale was made by an act before a notary, and the thing sold is any immoveable property, I have a right of hypothecation upon such property for the execution of the obligation, which I may enforce against my subsequent purchaser who is in possession of the estate. He may indeed refer me to a suit against the property of the seller (*a la discussion des biens de mon vendure*) for the damages to which I may be entitled for the non-performance of the obligation; but if this suit is ineffectual on account of the insolvency of the seller, the buyer will be obliged to give up the estate by a hypothecatory action unless he prefer paying the damages.

No. [154] of *Pothier*——This right is much stronger than an hypothecation. The creditor of a specific property charged with the satisfaction of his demand, may oblige the person in possession to relinquish the property, without referring him in the first place to the principal debtor, and without having the option of paying the damages for non-performance.

[155]——The means which the creditor has of compelling the debtor, or his heirs or universal successors, to give him what is due, are 1, commandment and execution; 2, simple demand.

The first consists in serving the debtor either personally, or at his domicil by a serjeant, with a command to what is due, and upon his refusal, selling his goods to satisfy the demand.

To support this right three things must concur. 1. The debt must be of a certain and liquidated sum of money, or a certain quantity of corn, wine, or the like (*especes fungibles.*) Observe that although there may be a seizure for a debt of this kind when the quantity is liquidated, there must be an appreciation previous to any sale. *Ordon. of* 1667, *tit.* 33. *art.* 2.

2. The creditor must commonly, and when there is no special custom to the contrary, have an executory title, that is either an act before notaries, in proper form by which the debtor has engaged to pay, or a judgment of condemnation, not suspended by any appeal or opposition.

3. The execution must be against the very person who has entered into the obligation, or against whom the judgment has been given: although his heirs succeed to his obligations, the creditor can only proceed against them by way of demand, unless they have given a new title, or the creditor has obtained a judgment of condemnation against themselves.

When these three things concur, the creditor is allowed to proceed by way of execution, and is not permitted to proceed by way of demand.

Simple demand is the course which is to be taken, when the creditor is not entitled to execution, it consists in assigning the debtor to appear before a competent judge, and obtaining a sentence of condemnation against him.

[156]——When the subject which is due is a specific thing and the debtor who is condemned to give it has it in his possession the judge at the request of the creditor may allow him to seize it and obtain possession of it, and it is not sufficient for the debtor to offer the amount of the damage sustained by the breach of his obligation.

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fact little more than a mere redundancy. In this article I have preserved the original expression, but in other parts of the treatise have only used the first term. Damages are defined to be the loss which a person has sustained by the gain which he has missed. The principles upon which these damages should be regulated are discussed with considerable minuteness, with reference to their being direct or incidental, and to the distinction between damages resulting from fraud or arising from imprudence and unintentional neglect.

The second part relates to the several *divisions* of obligations which are ranged in a preliminary chapter under seven principal heads; the first of these relates to the nature of the engagement, as being merely *civil*, merely *natural*, or *both* united; the second to the manner of contracting them, as being *absolute* or *conditional*, *general* or *subject to modification*, with respect to the time of payment, or other circumstances. The third, to the quality of the object, as being obligations *liquidated* or *unliquidated*, *divisible* or *indivisible*. The fourth, to the distinctions between *principal* and *accessary* with respect to the *nature of the engagement*, which is instanced by the delivery of the goods in a contract of sale being the principal, that of warrantry the secondary obligation. The fifth, into *primary* obligations, which are the immediate purpose of a contract, and *secondary* obligations, such as a penalty or damages in case of its infracture. The sixth, into *principal* and *accessary* obligations *with respect to the persons* who contract them. Several of these subjects are discussed at length in the following chapter. The last division relates to certain technical distinctions according to the law of France, which at the time of printing the translation I thought it preferable to omit; but as there are some occasional references to them in the course of the work, the omitted passage is here subjoined by way of note.*

There are a few other omissions in the translation arising from the same cause, which do not altogether amount to so much as three pages, and are in general noticed at the places where they occur.

One of the subjects mentioned in the note subjoined is very frequently referred to. A special hypothecation is analagous to a mortgage. A general hypothecation resulted from an act or written instrument passed before notaries, and certain other cases appointed

* Obligations considered with respect to their security and the means of obtaining payment are divided into privileged and not privileged; hypothecatory and chirographary, executory and not executory, obligations (*en corps*) subject to arrest and imprisonment, and ordinary civil obligations.

Privileged obligations, are those with respect to which a creditor has a privileged right against all the property, or certain property of the debtor in preference to the other creditors.

Hypothecatory obligations, are those which are contracted with the benefit of an hypothecation upon such part of the property of the debtor as is susceptible of it. Chirographary obligations are those which are not so. Executory obligations are those for the payment of which the creditor has an executory title against the debtor. Obligations subject to arrest are those for the payment of which the debtor may be constrained, by the imprisonment of his person. Those in which he cannot be so, are called civil and ordinary obligations. This subject is regulated by the ordinance of 1667.

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by law, and induced a right compelling payment, according to the order of priority by seizure and sale of the debtor's estates.

The second chapter refers to the division of obligations into civil and natural, which, in the Roman law, did not entirely accord with the ideas which we should form of these terms: for, on account of certain technical distinctions, many obligations were deemed natural which produced very considerable civil effects, but were merely destitute of a right of action. The subject denoted by Pothier, by the term natural obligations, may be defined, as moral obligations having a specific object, and which differ from imperfect obligations such as charity and gratitude, in the circumstances of the latter not having any such definite object; the difference is clearly indicated by observing that a person is not dispensed from the performance of a natural, that is a moral obligation, on account of the person to whom it is due being under an imperfect obligation of gratitude towards himself.

The third chapter upon the different modifications under which obligations may be contracted, gives a very instructive view of the nature of conditions, of the several kinds, and the circumstances requisite for their accomplishment, and includes several matters of very general application; it also contains a view of the effects which arise from appointing time or place of payment, of a liberty of paying another thing in lieu of that which is the subject of them, and of the doctrine of alternative obligations, by which a person engages to do one of several things; the option belonging to the person who is under the obligation, unless expressly given to the other party. There are some material differences between these two last modes of obligation. If a person is engaged to give a particular horse, with liberty to pay a sum of money in lieu thereof, and the horse dies without his fault, he is liberated from the payment of the money; but the contrary rule takes place in the case of an alternative obligation, which can only be discharged by actual payment, or by both parts of it becoming impossible.

The term obligation in solido, when applied to several creditors, imports that each of them individually and separately may sue for the whole performance of the obligation, and that a payment to one liberates the debtor from the demands of all the others; which kind of obligation was of very rare occurrence. An obligation in solido, on the part of several debtors, imported that each was solely and individually liable for the whole with respect to the creditor, although they might be entitled and subject to contribution among themselves; this is the common familiar case of several persons contracting a joint and several obligation. According to the Roman law, followed by that of France, if an obligation was contracted by or in favour of several persons in general terms, each was only entitled or subject to his particular portion, which is in direct opposition to the rule of the English law, whereby upon such a contract the demand in such a case is joint and must be made only by or against the whole. Obligations in solido might result either from the particular terms of the engagement, or from the nature of the contract, or other cause of the obligation, which in certain cases in-

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duced a more extensive liability, than was applicable to joint obligations in general. The nature of the obligations of several debtors in solido, is discussed with reference both to the creditor and the several debtors themselves, with considerable particularity.

The ensuing chapter is upon some particular kinds of obligations, considered with reference to the object of them; the first relating to obligations of an indeterminate thing of a particular kind, such as a horse, which may be either absolutely general or limited to a particular class, as a horse is the stud of the debtor; the principal points established upon this subject are that the creditor does not lose his right, in consequence of any article of the kind agreed upon perishing, unless the whole are extinguished, or unless the debtor has made a valid offer of any one in particular in which case the risk becomes determinate to that one and falls upon the creditor; the choice is in the debtor, unless there is a stipulation to the contrary, and in that case the debtor cannot lawfully part with any of the articles from which the creditor has a right to make his election. There is a discussion which is a striking instance of the subtility sometimes existing in the Roman law upon the question, whether a horse which belonged to the creditor at the time of contracting the engagement and which therefore could not at that time be the subject of an obligation to him, might in case he afterwards parted with it, be given to him in discharge of the obligation.

The other section in this chapter contains a curious discussion respecting invisible obligations, and turns principally upon points peculiar to the civil law. In speaking of obligations in solido, it was mentioned, that if an obligation was contracted by or in favour of several persons, each was debtor or creditor only for his own portion, unless there was a contrary agreement, and except in some particular cases; the same thing applied where a person left several heirs, each was debtor or creditor for his own individual portion, and each debtor was discharged by paying his own share; and here it may be as well to take notice, that an heir after accepting the succession became personally liable to the obligations of his ancestors, without reference to the sufficiency of the property, unless he was allowed expressly to take the succession with the benefit of an inventory; that the character of heir might be founded upon testament, as well as upon consanguinity, and that it embraced the two qualities in the English law, of heir and personal representive; our distribution of real and personal property not having any application, and the terms *real* and *personal* being used in a more general manner, the one as applicable to *things*, and the other to *persons*, and not as referable to different modifications of property. In the case of obligations in solido, each debtor was personally answerable for the whole, but the heirs of debtors in solido were only answerable, as in other cases for their separate proportions; in case of indivisible obligations, no part of the obligation was in general discharged unless the whole of it was so: this effect was principally applied to cases which would not admit of partial enjoyment; as a right of way, or other easement, which rights are distinguished by the names of servitudes; and to cases which

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were contemplated by the parties, as having a certain entirety of object, as the building of a house; in other cases the obligation might be rendered indivisible, by express contract. Although very few of the points contained in this section can be referred to, as having an immediate application to different systems of law, there are few passages which can be more justly recommended, as exhibiting succinct and judicious specimens of legal reasoning; in the same manner, as our doctrine of contingent remainders would be absolutely inapplicable in any other country; but Mr. Fearne's discussion of it may be recommended as an illustration of the perspicuity and spirit which are suitable to juridical discussions in general, and there is no subject so confined, but that the skilful examination of it will induce the development of principles of general importance, and sometimes principles which are so obvious when stated, that the discovery of them would not appear to indicate the slightest ability, are overlooked in cases where they would be sufficient to put an end to an existing difficulty. Columbus's egg afford a very useful lesson to those who imagine that they should discover without assistance, whatever they can see immediately upon its being shown to them.

The next chapter, respecting penal obligations, contains several points which have considerable analogy to the rules adopted upon the same subject in the English law.

The remaining chapter in this part relates to the accessary obligations of sureties, and others who acceded to the obligation of a principal debtor, and contains much valuable information. The term *fidejussores* or *cautions*, imports a distinct obligation, accessary to a preceding or contemporary obligation, of the principle of which it assures the performance: if two persons concur in contracting the obligation, although between themselves, the engagement of the one may be merely entered into for the sake and in behalf of the other; the particular system which prevails with respect to sureties, does not seem to be applicable so far as concerns the creditor. The points established respecting sureties are the following: that there must be a valid principal obligation, that the surety cannot be bound for more than the principal, but that he may be bound for less, and upon terms more beneficial; that the extinction of the obligation of the principal induces the extinction of that of the surety; that the surety may take advantage of exceptions to which the principal is entitled, with respect to the nature of the contract, called exceptions *in rem*, such as fraud, or violence, but not of exceptions founded upon any personal privilege. By the Senatus Consultum Valleianum of the Roman law, women were protected from engagements, which they entered into as sureties. This law was received in some of the provinces of France, and rejected in others, and some important discussions are introduced respecting the effect of the law, in case of a woman residing in one province, and having property in another. In examining on whose behalf an obligation may be contracted as surety, we meet with one of the numerous instances of stating what may appear rather superabundant, when it is mentioned that a person cannot become surety for or to himself;

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and the Roman law is cited as an authority in support of the proposition.

The surety when called upon for payment has a right to require the creditor to proceed, in the first instance, against the principal at the expense and risk of the surety. This right is called the exception of discussion. When one of several sureties was sued, the others being solvent, he had a right of compelling the creditor to divide the obligation among the respective debtors; this is called the exception of division, and both these rights are particularly considered.

The surety upon payment of the debt might have recourse against his principal, either as standing in the place of the creditor and exercising his right, or on his own account. The former of these powers (which was often very important in retaining a priority of hypothecation,) could only be preserved by requiring a subrogation, or assignment of action at the time of payment. The second was a common action, analogous to our action for money paid by the plaintiff for the use of the defendant; the circumstances which are requisite to maintain this action are fully stated. In some cases the surety had a right to compel payment by the principal before he was himself proceeded against. There is a particular article allotted to the question, whether the surety for the payment of an annuity can oblige the debtor to redeem it; and the conclusion seems to be in favour of that right, after a considerable duration of the annuity. The reference to annuities (which are called *rentes*,) is very frequent. By the law of France, all loans upon interest were usurious and illegal; supplies of money therefore were obtained by the sale of annuities, which in general did not cease with the death of either party, (for an annuity confined in the life of a party was particularly denoted by the term *rente viagere*) but continued as a permanent obligation against the heirs; the price was limited by law, so that the annuity could not, according to the last ordinances, exceed the amount of five per cent. on the purchase, the seller who was called the debtor of the annuity, was at any time entitled to redeem it, but never compellable to do so; any agreement for inducing such compulsion in favour of the creditor was void; and it forms a part of the discussion at present alluded to, whether such an agreement could be made with the surety, as it might enable creditors fraudulently to obtain a power of compelling redemption, by requiring to have a surety in his own interest, with such an engagement in his favour. The reply given to this objection is, that fraud is not to be presumed; and although the allowance of such an agreement may sometimes give an opportunity for the kind of fraud above mentioned, which is an inconvenience, yet if, under the pretext of this inconvenience, such an agreement, which is lawful in itself, was prohibited, there would result a still greater, which is, that persons frequently would not find money of which they have need for their business, for want of finding sureties who would contract an obligation, the duration of which was not limited. Perhaps if all the consequences of this argument were attended to, it would be found that the most general effect of a restriction respecting the compensation to be made for the use of money,

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is the prevention of accomodation which is mutually beneficial. By the Roman law, a surety could only recover a contribution from his co-sureties, in case he obtained a subrogation from the creditor, at the time of payment; but the contrary and evidently the more just and reasonable principle prevailed in France.

The other accessory obligations which are the subjects of discussion are, 1st. Those of persons directing the loan of money at their risk to others, who are called *mandatores pecuniæ credendæ.* This subject includes the two propositions which have been introduced, with such elaborate reasoning, into the English law, by the recent case of *Pasley* and *Freeman*, and *Haycraft* and *Creasy*. 2. The obligation of employers for the acts of their managers, such as factors, and masters of ships, which differ from the obligations contracted through the medium of agents, on behalf of their principals, and to which the principals only are liable, whereas in the case in question there is also a liability in the managers. 3. *Pacta constitutæ pecunæ;* by which a person, by making a promise for the payment of an existing debt, contracted a new obligation without extinguishing the former, which I conceive may be regarded as the real character of our action of *indebitatus assumpsit*, before the extension of it in *Slade's* case, to cases in which there was no other promise than the original contract, and which is also exemplified at present, by giving a promissory note which remains in the hands of the creditor, and by the usual count upon an account stated.

I conceive that the second part of the treatise may be considered upon the whole, as of a more local and technical nature than any of the others, although it certainly includes several discussions of very general importance and utility.

The third part relates to the different manner in which obligations are discharged, and the different bars and prescriptions against them, and begins with a chapter on real payment and consignation. The term payment, which with us is usually confined to a sum of money, is applied generally to any other mode of performing an agreement. The different requisites to a valid payment and satisfaction are fully examined, and rules are given for the application of payment, which in a great measure accord with our own decisions upon the subject; consignation is equivalent in its general effects to a tender of payment, but it was made under a judicial process, and the money was actually deposited which is denoted by the term *consigned*, for the use of the creditor, with a person appointed by the judge for the purpose.

The subject of the second chapter, is Novation, or the substitution of one engagement, as the satisfaction of another; it might take place either between the same parties or with the intervention of a new debtor, or creditor, or both; in which latter case it was more specially distinguished by the term delegation.

The third chapter relates to the release of debts, and includes a very curious discussion of the question, whether a creditor may lawfully receive a compensation for discharging a surety, without applying it to the reduction of the debt, which is answered in the affirma-

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tive, as the undertaking personally the risk before incumbent on the surety, is a valuable subject of remuneration, and the principal who has to pay no more than his own debt cannot have any ground for complaining of such an arrangement. The fourth chapter relates to compensation, or the right which by modern statutes has been introduced into the law of England, by the name of set-off, and contains several points in accordance with it, and illustrative of the general principle applicable to each. The fifth chapter relates to extinction by confusion or the same person becoming entirely and absolutely entitled to the right and subject to the obligation. The sixth, to extinction of the obligation by the extinguishment of the thing due; and the seventh to several other ways in which obligations are extinguished, viz. The lapse of time, the occurrence of a condition upon which it was agreed that the obligation should determine, and which is called a resolutory condition, and the death of the creditor, or debtor, when the contract or other obligation was of a personal nature. The eight and last chapter, relates to *fins de non recevoir* and prescriptions. *Fins de non recevoir*, are bars or estoppels to the maintenance of a claim of defence, such as a judgment, the effect of which will be mentioned, in speaking of the fourth part of the work, or the lapse of time within which it was necessary that the action should be instituted, and which was called prescription, answering to our statutes of limitation, and very analogous to them in its nature and effects.

The fourth part relates to the proof, as well of obligations as of their performance, and is a general view of the law of evidence. The first chapter relates to written evidence, and begins with authentic acts or instruments in writing passed before notaries, and carrying full credit against the parties, and all claiming under them, of what the act professes to impart; these acts might be impeached as false by a special process instituted for the purpose, but did not require any verification, in which respect they differ from acts under private signature. The evidence of private writings, and tradesmen's books is also examined. There is an article respecting copies, which principally relates to copies made by notaries in the presence of the parties, or after a judical summons. The second chapter relates to verbal evidence; the law of France, like that of England, would not allow verbal evidence to be given in contradiction or explanation of the contents of writings, but it went much further, as no verbal evidence could be given in matters of contract exceeding the value of one hundred livres; and this exclusion was not confined to the fact of making a contract but extended to the delivery of goods and the payment of debts. A person who had even deposited any articles in the custody of a friend, could not recover them again by the strongest testimony without having a written acknowledgment. In most cases, whether founded on contract or otherwise, no verbal evidence could be received without a previous judgment for the purpose. When such examination was allowed, it was taken and reported in writing. The examinations were distinguished by the name of the inquests of the respective parties. Two witnesses, except in a very few trifling cases, were necessary to prove the

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matter in dispute; the objections to the competence of witnesses, both on the ground of infamy, and of motives of partiality on account of relation or enmity to the parties in dispute, were much more numerous and extensive than with us.

The third and only remaining chapter is concerning confession, presumption, and certain oaths of the parties. Presumptions are divided into three kinds; presumptions *juris et de jure*, which are such as do not admit of any contradiction, such as the authority of a judgment, the decisory oath; *presumptiones juris*, which are established by legal authority, but are open to contradiction; and common presumptions, which are mere inferences. The authority of *res judicata* is very minutely and satisfactorily examined, including several principles of very general application.

The same section includes also a view of the law respecting civil *requête* which was an extraordinary remedy for obtaining relief against any judgment improperly obtained, and has some resemblance to our ancient writ of *audita querela*, and also to the authority of the court of Chancery, in granting injunctions, against judgments obtained at law. The decisory oath, was an oath that either party might tender or defer to the other, as to the existence or satisfaction of the demand; the party to whom it was deferred might decline taking it upon referring it back to the first. The oath that was hereupon taken was decisive of the matter in contest, which could not be revived by any evidence of its falsehood provided it was regularly deferred. The same proceeding obtains in Scotland under the term of the oath of verity. There is no occasion for such an institution in England, as either party can, by suit in equity, compel a discovery by the oath of the other without being bound to abide by it. The oath upon facts and articles was similar to an oath made by a defendant in answer to a bill of discovery; but I conceive could not be demanded *de jure*, as otherwise the decisory oath would never have been resorted to. The suppletory oath was administered by a judge to either of the parties for his own satisfaction, in consequence of his not forming a completely decisive opinion upon the evidence; and the oath called *juramentum ad litem*, was administered for the purpose of ascertaining the amount of the damage that had been sustained. A very great proportion of these third and fourth parts answers the description of Sir William Jones, of being equally good law at Westminster as at Orleans.

In the translation of this important work, I have endeavoured to convey to my readers a correct and faithful representation of the original, with what success it is not for myself to determine. The work does not aspire to elegance of diction; I have endeavoured to avoid an idiomatical turn of expression, and a redundancy of phrase, by the adoption of relative pronouns, but upon revising the work, I find more numerous instances than I could have wished, in which this liberty has not been sufficiently applied, and in which the phraseology may not be accordant to the English reader. For the purpose of increasing the utility of the work, I have substituted a running title expressing the contents of the particular division, for one applicable to the whole treatise; which I only mention as affording me the opportunity of

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expressing a wish that a plan, which is very much calculated to assist in the reference to any publication, was more universally adopted. I have also in most instances subjoined by way of note the passages of the Roman law, which are referred to in the course of the work. In countries where that law is at the elbow of every person interested in the subject this would be unnecessary; but as the possession of it in this country is not very general, I conceived that such an addition would in some degree enhance the utility of my undertaking. There are some cases of accidental omission, and others in which the insertion has not been made on account of some error in the reference, or on account of the passage being of disproportionate length, without affording any additional illustration.

To various parts of the treatise I have likewise added notes, when the relation of the law of England appeared to render it desirable; and in the second volume have engaged with the same view in more extensive dissertations. Many parts of the number relating to the law of evidence were composed previous to the appearance of the valuable publication on that subject by Mr. Peake; but the objects of two essays are sufficiently distinct to prevent their interference, the one being principally designed for the purpose of immediate practical reference, and the other endeavouring to assist the investigations of those who were desirous of taking a scientific view of the subject, suggesting to the consideration of the reader several observations, which could not in the practical exercise of the law be offered as authorities to the judgment of the court, in which I have frequently availed myself of the assistance to be derived from the labours of the gentleman just alluded to. In case any of my readers should look upon this part of the work as not entirely destitute of practical utility, it is printed in a manner which may allow of its being bound separately from the rest of the volume.

In the investigation of the subjects which have fallen under my attention, I have assumed the same liberty of observation which I have ventured to recommend to others; wishing to preserve a proper deference and respect to the dictates of judicial authority; but at the same time to maintain according to my ability the equally proper freedom of rational inquiry, and to subject to the test of fair examination the particular opinions, which appeared to be at variance with the correct principles of legal reasoning, and the real purposes of juridical improvement: by no means a friend to wanton innovation, but averse to the name of innovation being placed as an obstacle to every change, which, considered with a due regard to all its consequences and effects, may be really conducive to utility,—I have not been desirous of going out of my way for the purpose of meeting with objections; but when they have occurred in my progress, I have not been disposed to avoid the discussion of them. To offer any caution against placing a greater reliance upon my individual sentiments, than appears due to the reasoning by which they are accompanied, or against acting in practice upon the speculative opinions of an individual, rather than upon the precedents invested with the sanction of authority, would be not only unnecessary but ludicrous. I am not

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aware that I have any favorite doctrines or theories to support, except the two propositions, that the decisions which result from the principles of substantial justice shall not be sacrificed to the subtilties of artificial reasoning, where the opposite course can be pursued without an improper contravention of legal authority, and the courts of justice should not consider themselves restricted from the correction of erroneous precedents, where the benefit of the correction would be general, and the detriment confined to the parties who in the particular case had been misled by the preceding determination. But while I exercise the liberty which I contend for, with respect to the opinions of others, it would be highly censurable to entertain a presumptuous confidence in my own. I flatter myself that I have at all times been sufficiently guarded, to prevent the mistake of what is only offered as my own suggestions being considered as an actual representation of the existing rules of legal authority.

Several years have elasped, since I first communicated the intention of offering this work, with some other treatises, to the public; according to the course which I had then taken, my plan was to offer a treatise referable to the English law, with the assistance of the treatise of Pothier as a guide; after various circumstances had occurred to suspend the execution of this intention, I was induced to change my purpose, and commence my work anew by an entire translation, with the addition of such dissertations as might advance the beneficial purpose of communicating to the English lawyer one of the most esteemed juridical productions of another country.

Some adjudications having taken place in opposition to the opinions that had been expressed in my former publications, with respect to the effect of errors of law; it afforded me some satisfaction to meet with a treatise, the conclusions of which accorded with my own ideas, by the chancellor D'Aguesseau, I was induced to renew my consideration of the subjects with more particularity, and to prepare my view of the result for the inspection of the public, induced, I hope, rather by my sense of the high importance of the subject, than by an overweening attachment to the sentiment which had occured to myself. This examination and the treatise just referred to were originally intended as the subject of a detached publication; but a passage in the Treatise on Obligations has afforded me an opportunity of giving it an apposite introduction in the present volume. I have there enlarged with some particularity upon that liberty of discussion, respecting which it would perhaps be thought that I have said more than sufficient in the present Introduction and in different parts of the publication; but I have preferred incurring in this respect the charge of prolixity and repetitions, to presenting in a mutilated state what had occurred to me as forming an important part of a connected object.

In case I should resume the intention of perfecting a view of the law respecting several particular contracts, it will be done in conformity to my original plan and the specimen formerly exhibited. An entire translation of the treatises of Pothier, with an addition by way of note of the decisions of the English law, would in its nature

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be a work of greater utility, but would in all probability be regarded as too expensive. My preparations were in very considerable forwardness when I announced them to the public, but the present work, in addition to other pursuits and avocations, has almost withheld them from my contemplation, and I am only now about to feel myself at liberty to direct my attention to the reconsideration of the subject.

I have made some allusions to, and extracted some passages from my former essay, respecting the decisions of Lord Mansfield: a work which I undertook with the idea that such an undertaking, proceeding according to the arrangement of Blackstone's Commentaries, and conducted with the freedom already so often adverted to, accompanied by a high admiration of the exalted character before me, might have been deemed conducive to its professed object of facilitating the passage from the elementary to the more technical study of the law. That my disappointment has verified the predictions of those who pronounced, that the subject which had to myself appeared so intimately connected with the useful culture of the profession, would not be deemed of sufficient interest to attract attention, (independently of all considerations respecting the execution,) and that the work has remained three years almost entirely unnoticed, are subjects which I have perhaps no right to obtrude upon the public, as the speculation was my own concern, and the success or failure of it is a matter of importance only to myself; but as the same views which have actuated me, in the composition of the present volume, were equally prevalent in that, I cannot but feel some anxiety for escaping a similar mortification.

I am prepared to offer an extensive selection from the pleadings of D'Aguesseau, which may be regarded as masterpieces of judicial eloquence, upon subjects of very great importance and very general interest, to the attention of the public, and should feel considerable pleasure in communicating to my readers a part of that gratification which I have myself experienced in the translation; but although I can justly disclaim an excessive regard for pecuniary considerations, I must not allow my attachment to the promotion of a favourite science entirely to supercede the ordinary claims of prudence and discretion.

After the greater part of the present work was printed I formed the resolution of subjoining to it two specimens of the productions which I have just referred to; the one, an entire pleading upon a subject in which the English law would clearly have acted upon similar principles; the other, an abridgment of a piece, the excellence of which has justly attached to it a peculiar celebrity; and from which I had previously inserted some extracts referable to the topics of my own discussion. The translation of these additions is preceded by a summary exposition of their contents.

The names of Pothier and D'Aguesseau are sufficiently connected to render such an addition admissible, for the importance of the objects which both are so admirably calculated to promote; and even those who may dispute the propriety of the introduction, will perhaps excuse it on becoming acquainted with the company.

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With respect to the mechanical execution of the present work, considerable pains and expense have been applied to obviate the defects which have occurred in my former productions, and the consequence of residing at a distance from the press. I am sorry to add that these pains do not, upon revision, appear to have been entirely successful, but I hope that most of the errors which have hitherto escaped observation will be sufficiently corrected by the context.

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A

TREATISE

ON

OBLIGATIONS.

[*The figures refer to the numbers in* Pothier.]

PRELIMINARY ARTICLE.

[1] THE term OBLIGATION has two significations: in its more extensive signification, it is synonymous to *Duty*, and comprises imperfect, as well as perfect Obligations.

Those Obligations are called imperfect, for which we are accountable to God alone; and of which no person has a right to require the performance. Such are the duties of charity and gratitude. The giving of alms, for instance, from our superfluities, is a real Obligation, and the neglect of it is a high offence; but it is an imperfect Obligation, as we are accountable for it to God only: when the Obligation is discharged, the person who is the object of it receives the alms, not as a debt, but as a benefit. It is the same with the duty of gratitude; he who has received a signal benefit is obliged to render his benefactor all the services in his power, when occasion offers for his doing so; and it is sinful and dishonourable to neglect it: but the benefactor has no right to claim such services; and when they are rendered, he receives them in his turn as a benefit. If my benefactor had a right to demand that I should render him upon the like occasion the same service which he has rendered me, the assistance I received would be no longer a benefit but a bargain; and the service which I render in return would no longer be entitled to the name of gratitude, *the essence of which* consists in its being voluntary.

The term *Obligation*, in a more proper and confined sense, comprises only perfect obligations, which are also called personal engagements, and which give the person, with whom they are contracted, a right to demand their performance; and it is this kind of Obligation which is the object of the present treatise.

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Jurists define these Obligations or personal engagements to be a legal tie which binds us to another, either to give him some thing, or to do or abstain from doing some act. *Vinculum juris quo necessitate abstringimur alicujus rei solvendæ; Instit. tit. De Obl. Obligationum substantia consistit ut alium nobis obstringat, ad dandum aliquid, vel faciendum, vel præstandum; L. 3. ff. de Obl.*

The term *legal tie, vinculum juris*, is only applicable to civil Obligations. Natural Obligation, which is only a tie of moral equity, is also, though in a less appropriate sense, a perfect Obligation; for it gives a right, though not in point of law, in point of conscience,(*a*) to the person in whose favour they are contracted, to demand their performance, which imperfect Obligations do not. *Vi. infra. No.* 197.

The present treatise on Obligations will be divided into four parts. In the first we shall examine what relates to the essence of Obligations, and what are their effects.

In the second, the several divisions and kinds of Obligations.

In the third, the several manners in which Obligations are extinguished or defeated.

We shall add a fourth part, respecting the proof as well of Obligations as of their discharge or payment.

PART I.

OF THE ESSENCE OF OBLIGATIONS AND THEIR EFFECTS.

CHAPTER I.

Of the Essence of Obligations.

[2] It is of the essence of Obligations that there should be, 1. A cause from which the Obligation proceeds. 2. Persons between whom it is contracted. 3. Something which is the object of it.

The cause of Obligations are, 1. Contracts.—2. Engagements in the nature of contracts [*quasi contracts*].—3. Injuries [*delits*].—4. Acts in the nature of injuries [*quasi delits*].—Sometimes the mere authority of the law, or the mere force of natural equity.

We shall treat; 1. Of Contracts, which are the most frequent source of Obligations.

2. Of the other causes of Obligations.

(*a*) *Si non dans le for exterieur au moins dans le for de la conscience*, these terms *for exterieur* and *for de conscience* continually occur in the writings of *Pothier;* and it is the professed object of the present treatise to consider the obligations of conscience, as well as those capable of being enforced by law; but as the former expression does not accord with the idiom of the *English* language, though the *Latin* phrase for the latter is naturalised by our judicial writers, I prefer avoiding the metaphorical expression.

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3. Of the persons between whom they are contracted.
4. Of the things which may be the object of them.

SECTION I.

Of Contracts.

We shall examine, 1. What a contract is, and wherein it differs from a pollicitation; and what things are principally to be distinguished in each kind of contract. 2. We shall state the several divisions of contracts. 3. We shall treat of the general defects or vices which may occur in contracts. 4. Of the persons who can or cannot contract. 5. Of what may be the object of contracts; and herein of the rule of the civil law, that it can only be something that concerns the interests of the contracting parties, and that a person can only stipulate or promise for himself. 6. Of the effects of contracts. 7. We shall state the rules for the interpretation of contracts. 8. We shall speak of the oath sometimes taken for the performance of agreements.

ARTICLE I.

What a Contract is, wherein it differs from a Pollicitation, (or Promise,) and what Things are principally to be distinguished in every Contract.

§ 1. *What a Contract is.*

[3] A contract is a particular kind of agreement; to understand the nature of a contract, we should therefore previously understand the nature of an agreement.

An agreement is the consent of two or more persons to form some engagement, or to rescind or modify an engagement already made. *Duorum vel plurium in idem placitum consensus, L.* I. § I. *ff. De Pact.*

That kind of agreement, the object of which is the formation of an agreement, is called a contract. The principles of the *Roman* laws respecting the different kinds of agreements, and the distinction between contracts and simple agreements, not being founded on the law of nature, and being indeed very remote from simplicity, are not admitted into our law.

Hence it follows, that in our law we should not define a contract as it was defined by the interpreters of the *Roman* law; *conventio nomen habens a jure civili vel causam;* but that it should be defined "An agreement by which two parties reciprocally promise and engage, or one of them singly promises and engages to the other to give some particular thing, or to do or abstain from doing some particular act."

The words *promise and engage* are used because those promises alone which are made with the intention of producing an engagement, and of giving the party to whom they are made a right of demanding their performance, can amount to a contract and agreement.

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There are other promises made with fairness and a real design of accomplishing them, but without any intention of giving the person to whom they are made a right of demanding their performance. This is the case where a person makes a promise, intimating, at the same time that he does not mean to engage himself; or when such a reservation can be implied from the circumstances of the case, or the relative characters of the person making the promise, and the person to whom it is made. As if a father promises his son at college, that if he is attentive to his studies there, he will give him money for a journey of pleasure in the vacation; it is evident that in making this promise, the father does not mean to contract what can properly be called an engagement. These promises produce, indeed, an imperfect obligation for their performance, if nothing unforeseen occurs which would have prevented their being made. But still they do not constitute any engagement, nor consequently any contract.

§ II. *Wherein a Contract differs from a Pollicitation.*

[4] It can no longer be a question whether pollicitations are obligatory by the law of France; the ordinance of one thousand seven hundred and thirty-one, Art. 3. having prohibited all gratuitous dispositions of property, except by actual donation in the life time of the donor, or by testament.

The *definition* already given of a contract explains the difference between that and a pollicitation. A contract includes a concurrence of intention in two parties, one of whom promises something to the other, who, on his part, accepts such promise. A pollicitation is a promise not yet accepted by the person to whom it is made. *Pollicitatio est solius offerentis promissum, L. 3. ff. De Pollicit.*

A pollicitation, according to the rules of mere natural law, does not produce what can be properly called an Obligation; and the person who has made the promise may retract it at any time before it is accepted; for there cannot be any obligation without a right being acquired by the person in whose favour it is contracted against the person bound. Now as I cannot, by the mere act of my own mind, transfer to another a right in my goods, without an intention on his part to accept them, neither can I by my promise confer a right against my person, until the person to whom the promise is made has, by his acceptance of it, concurred in the intention of acquiring such right. *Grotius*, lib. 2. c. 2.

But though a pollicitation is not obligatory by the mere force of natural law, the civil law, which comes in aid of the natural law, according to the Roman system of jurisprudence, rendered the pollicitations of a citizen to the place to which he belonged obligatory in two cases. 1. When there was a just cause for making it; as in consideration of holding some magistracy within the place, *ob honorem*. 2. When it had been begun to be carried into execution. *L. I. ff. de Poll.*

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§ III. *Of three Things, which are to be distinguished in every Contract.*

[5] With respect to contracts, *Cujas* makes no other distinctions than of those things which are of the essence of the contract and those which are accidental to it. The distinction made by many lawyers of the seventeenth century is much more accurate; they distinguish three different things in each contract—Things which are of the essence of the contract, things which are only of the nature of the contract, and things which are merely accidental to it.

[6] 1st. Things which are of the essence of a contract are those without which such contract cannot subsist, and for want of which there is either no contract, or a contract of a different kind.

For instance, it is of the essence of a contract of sale that there be a thing sold, and a price for which it is sold. Therefore if I sell you a thing which without the knowledge of either of us has ceased to exist, there will be no contract, *L.* 57. *ff. De Contr. Emp.* it being impossible that there can be a sale without a thing sold. Also, if I agree to sell you any thing for the price given for it by my relation from whom it has descended to me, and it appears that it had not been sold but given to him, there will be no contract for want of a price.

In these instances the want of any of the things which are of the essence of the contract prevents a contract of any kind from taking place. Sometimes the want of essential circumstances only changes the nature of the contract.

For instance, the essence of a contract of sale being a price which consist in a sum of money to be paid by the buyer to the seller, if there is an agreement that I shall sell you my horse for one of your books, this agreement does not constitute any sale, as there can be no sale without a price in money. But still the agreement is not null; for it forms a different kind of contract, namely, an exchange.

In the same manner it is of the essence of a contract of sale, not indeed that the seller shall precisely oblige himself to transfer to the buyer the property in the thing sold, if he is not the proprietor of it; but that he shall not retain it, if he is the proprietor: thus if it is agreed that I shall sell you an estate for a certain sum, and an annuity which you agree to pay, which estate I undertake that you shall enjoy, but with a reservation that the inheritance of it shall remain with me; this agreement forms not a sale, it being contrary to the essencé of a sale that the seller should retain the property; but becomes a lease. 80 *ff. De Contr. Emp. Nemo potest videri rem vendidisse de cujus domino id agitur, ne ad emptorem transeat; sed hoc aut locatio est, aut aliud genus contractus.*

In like manner it is of the essence of the contracts of loans for use [*pret d'usage, commodatum*], of mandates, and of deposit, that they shall be gratuitous. If I lend you any thing in consideration of your agreeing to pay me a certain sum for the use of it, that is not a contract of lending (*commodatum*), but of a different kind, viz, of hiring

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(*locatio*, *conductio*). For the same reason, if when I accept a commission from you, or a thing which you entrust to my care, I require a recompense, there is not any mandate or deposit, but a contract of hiring, in which I let out my trouble in transacting your business or taking care of your property.

[7]. 2d. Things which are only of the nature of the contract are those which, without being of the essence, form a part of it, though not expressly mentioned; it being of the nature of the contract that they shall be included and understood.

These things have an intermediate place between those which are of the essence of the contract, and those which are merely accidental to it, and differ from both of them.

They differ from those which are of the essence of the contract, inasmuch as the contract may subsist without them, and they may be excluded by the express agreement of the parties; and they differ from things which are merely accidental to it, inasmuch as they form a part of it without being particularly expressed, as may be illustrated by the following examples. In the contract of sale the obligation of warranty,(*a*) which the seller contracts with the purchaser, is of the nature of the contract of sale; therefore the seller, by the act of sale, contracts this obligation, though the parties do not express it, and there is not a word respecting it in the contract; but as the obligation is of the nature and not of the essence of the contract of sale, the contract of sale may subsist without it; and if it is agreed that the seller shall not be bound to warranty, such agreement will be valid, and the contract will continue a real contract of sale.

It is also of the nature of the contract of sale, that as soon as the contract is completed by the consent of the parties, although before delivery, the thing sold is at the risk of the purchaser; and that if it happens to perish without the fault of the seller, the loss falls upon the purchaser, who is notwithstanding the misfortune, liable for the price; but as that is only of the nature and not of the essence of the contract, the contrary may be agreed upon.

Where a thing is lent to be specifically returned [*commodatur*], it is of the nature of the contract that the borrower shall be answerable for the slightest negligence in respect of the article lent. He contracts this obligation to the lender by the very nature of the contract, and without any thing being said about it; but as this obligation is of the nature, and not of the essence of the contract, it may be excluded by an express agreement that the borrower shall only be bound to act with fidelity, and shall not be responsible for any accidents merely occasioned by his negligence.

It is also of the nature of this contract that the loss of the thing lent, when it arises from inevitable accident, falls upon the lender; but as that is of the nature and not of the essence of the contract, there may be an agreement to charge the borrower with every loss that may happen until the thing is restored.

(*a*) It is immaterial here to consider how far the illustration would accord with the decisions of the *English* law. The law may be assumed for the present purpose to be as stated.

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A great variety of other instances might be adduced from the different kinds of contracts.

[8] 3d. Those things which are accidental to a contract are such as, not being of the nature of the contract, are only included in it by express agreement. For instance, the allowance of a certain time for paying the money due; the liberty of paying it by instalments, that of paying another thing instead of it, of paying to some other person than the creditor, and the like, are accidental to the contract, because they are not included in it without being particularly expressed.(*a*)

ARTICLE II.

Division of Contracts.

[9] The division of contracts by the *Roman* law into nominate and innominate; contracts *bonæ fidei*, and contracts *stricti juris;* is not adopted in the law of *France.* The divisions recognised in *France*, are, 1, into reciprocal [*synallagmatiques*] and unilateral contracts.

Reciprocal contracts are those in which each of the parties enters into an engagement with the other, such as sale, hire, &c.

Unilateral contracts are those in which one of the parties contracts an engagement to the other, as the loan of money [*pret d'usage, mutuum.*]

Reciprocal contracts are subdivided into perfect and imperfect. In those that are perfectly reciprocal, the obligation of each of the parties is equally a principal obligation of the contract; such as sale, hiring, partnership, &c. For instance, in the contract of sale, the obligation of the seller to deliver the article sold, and of the purchaser to pay the price, are equally principal parts of the contract. The

(*a*) These several distinctions may be further illustrated from the *English* law by the case of a lease. It is essential to a lease that there shall be a reversion in the lessor. This induces several consequences, as a right of action founded upon privity of estate, a power to distrain, &c. If the person who makes a contract in the form of a lease does not retain a reversion, the essential character of that contract does not exist, and the incidental consequences do not attach; but still there is a valid contract of a different kind. It is of the nature of a lease for lives or years that it shall be impeachable for waste; but the contrary is every day specially provided for. A covenant that the tenant shall use a particular course of husbandry is accidental.

The following case, depending in a material degree on the distinction between things of the nature of, and those accidental to a contract, occurred respecting a contract of apprenticeship.

The stat. 8 *Ann.* c. 9, provides, That when any thing shall be contracted for the use or benefit of the master, a certain duty shall be paid, or the contract shall be void. It was long a disputed question, whether an agreement by the father of the apprentice to find his son with board and lodging was included in this provision, and many cases had been decided upon collateral grounds without meeting the general question; but when that question came for a direct decision, it was holden that no duty was payable. Lord *Kenyon*, in the course of his opinion, said, that it had occurred to him early in the argument, that in order to see what would or would not be considered as a benefit to the master, it was necessary to inquire what were the duties resulting from the bare relation of master and apprentice; and upon examining that question, he held that the duty of the master did not extend to finding sustenance for the apprentice. *The King* v. *Leighton*, 4 T. R. 732.

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contracts which are imperfectly reciprocal are those in which the obligation of one of the parties only is a principal obligation of the contract; such are the contracts of mandate, deposit, loans for use, and pledge. In these the obligation of the mandatary to give an account of his commission, and of the party receiving a thing by way of deposit, loan, or pledge, to restore it, are principal obligations of the contracts; those of the employer, the lender, or the person making the deposit or pledge, are only incidental obligations, on account of some expense incurred subsequent to the contract in the execution of the commission, or keeping the thing deposited, lent, or pledged.(a)

[10] 2. Contracts are divided into those, which are formed by the mere consent of the parties, and therefore called consensual, such as sale, hiring, mandate: and those in which it is necessary that there should be something more than mere consent, such as the loan of money, deposit, or pledge, which from their nature, require a delivery of the thing (*rei*); whence these contracts are called real.

[11] Although the mere consent of the parties is sufficient for the perfection of consensual contracts, nevertheless if, in agreeing upon a sale or any other bargain, they also agree that there shall be a formal act passed before a notary, with the intent that the bargain shall not be deemed perfect and conclusive until that is done, the contract is not perfect until the notarial act is so likewise, and the parties, though they have agreed upon the terms, may recede before the act is complete.

But if in this case the act is requisite for the perfection of the contract, this is not the nature of the contract itself, which requires nothing more for its completion than the consent of the parties; it is only because the parties have so agreed, and it was competent for them to make their obligation depend upon what conditions they pleased.

It must be observed that an agreement, that the act shall be executed before a notary, does not of itself make the perfection of the agreement depend upon that being done. In order to induce that consequence, it must appear that such was the intention of the parties. Therefore it was decided that a person could not avoid a contract of sale made under the private signature of the parties, though there was a clause that the act should be executed before a notary, and such act had not taken place; because it was not to be concluded from that clause alone, that the parties intended that the perfection of their agreement should depend upon the execution of it before a notary. The clause might only have been added for the purpose of more effectually securing the execution of the agreement, by the additional legal advantages attached to such a mode of authentication, and the danger of private writings being lost.

But when the agreement is verbal, it is more easy for the party

(a) These distinctions were more important in the *Roman* law, on account of the *actio directa* adapted to the principal obligation, and the *actio contraria* to the incidental, to which the *English* law has nothing analogous.

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called upon to execute it, to insist that the matter rested only in project, until the proposed signature before the notary was complete: because, as agreements, the consideration whereof exceeds the value of 100 livres, cannot, according to the law of France, be proved by witnesses, and consequently there being no other proof of the agreement than the verbal declaration, the whole ought to be construed together.

Where there is an instrument under private signatures, which has not received its entire perfection by the signature of all the parties, some of them having withdrawn without signing, those who have signed may recede, and are allowed to allege that, on entering into the agreement, they intended it should depend upon the entire completion of the instrument. Upon this principle the sale of an office made by a widow, as well in her own name as in the character of guardian to her son, who was a minor, was declared imperfect, and the person who had agreed for the purchase was discharged, because the instrument had not received its completion by the signature of the curator of the minor, who was named in it, as assenting on behalf of the minor, though that was unnecessary.

[12] The third division of contracts is into contracts of mutual interest, contracts of beneficence, and mixed contracts.

The first are those, which are entered into for the reciprocal interest and utility of each of the parties, such as sales, exchange, hiring, partnership, and an infinity of others.

Contracts of beneficence are those, by which only one of the contracting parties is benefited, such as loans, deposit, and mandate.

Contracts by which one of the parties confers a benefit on the other, receiving something of inferior value in return, are mixed, such as a donation subject to a charge.

[13] Contracts of mutual interest are divided into commutative and aleatory; commutative are those in which each of the contracting parties receives an equivalent for what he gives, as in the contract of sale, the seller ought to give the thing sold, and receive a price, which is the equivalent; the buyer ought to give the price, and receive the thing sold, which is the equivalent. These contracts are divided into four classes, *viz. Do ut des*, *facio ut facias*, *facio ut des*, *do ut facias*.

Aleatory (or hazardous) contracts are those by which one of the contracting parties, without contributing any thing on his part, receives something from the other, not by way of gift, but as a compensation for the risk which he runs. All games of chance, wagers, and contracts of this description.

[14] A fourth division is into principal and accessory contracts.—The first are those which take place principally and on their own account, the second those which are entered into for assuring the performance of another contract, such as pledging and the engagements of sureties.

[15] A fifth division of contracts is into those which are subjected by the civil law to certain rules or forms, and those which are regulated by mere natural justice.

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Those which in *France* are subjected to certain rules or forms are marriage,(*a*) donation, bills of exchange, and annuities. No other arguments are subjected to any forms or arbitrary rules prescribed by the civil law: and provided they contain nothing contrary to law or morality, and take place between persons able to contract, they are obligatory, and induce a right of action. If the laws ordain that those contracts, the consideration in which exceeds the sum of 100 livres, shall be reduced into writing, they have nothing more in view than to regulate the manner in which they shall be proved, in case the parties dispute the fact of their having taken place; but it is not intended that the writing shall be considered as the substance of the agreement, which is valid without; and if the parties do not deny it to have been made, that they may be compelled to execute it, and the decisory oath may even commonly be tendered to those who dispute it; the writing is only necessary for the proof and not for the substance of the agreement.(*b*)

ARTICLE III.

Of the different Defects which may occur in Contracts.

[16] The defects which may occur in contracts are, error, force, fraud, inequality, want of consideration, and want of obligation. These will each be considered separately.

The defects which result from the inability of some of the contracting parties, or from a defect in the object of the contract, will be considered in the succeeding articles.

(*a*) The relation of marriage is in *England* considered as a subject of so much higher a nature than ordinary contracts, that it is very seldom referred to as having any analogy with them. Annuities and bills of exchange are with us subject to special rules, as are some other particular contracts; for instance, the transfer of ships. The *French* law respecting the necessity that contracts of a certain value should be in writing, bears a very considerable analogy to our statute of frauds, as will appear when the provisions of that statute are particularly referred to.

(*b*) This passage was referred to in the argument of counsel in the case of *Cooth* v. *Jackson*, 6 Ves. 23. The question was, Whether a party admitting a parol agreement in answer to a bill in equity, but praying the benefit of the statute of frauds, lost the benefit of the statute? which Lord *Eldon*, who decided the case on another ground, thought that he did not. The passage referred to is in the argument for the plaintiff in support of the opposite proposition, and is as follows: "A very high authority, *Pothier* in his treatise upon obligations puts this case: By the *French* law an agreement was not binding for any sum exceeding 100 livres, unless it was in writing; *Pothier* says this does not apply where the party admits the agreement; and the other party has a right to make him give his oath whether he did enter into such agreement, this being a law of evidence. It is proper that the nature of the *serment decisoire*, which is here referred to, should be particularly understood. It is an oath tendered by one party to the other, upon which a denial of the person taking the oath is absolutely conclusive, and the fact cannot afterwards be controverted; a proceeding which has but a partial analogy to our answers in chancery, as those in general are not conclusive; although Lord *Eldon's* opinion in the case alluded to imports the contrary in respect to this particular subject, as to the nature of the *serment decisoire:* see Part 4, c. 3, Sec. 3, Art. I.

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§ 1. *Error.*

[17] Error is the greatest defect that can occur in a contract, for agreements can only be formed by the consent of the parties, and there can be no consent when the parties are in an error respecting the object of their agreement. *Non videntur qui errant consentire, L.* 116. § 2 *ff. De. Reg. Jur.* 57. *De Oblig. et Act.*

Therefore if a person intends to sell me any thing, and I intend to receive it by way of loan or gift, there is neither sale, nor loan, nor gift. If a person intends to sell me a thing, and I intend to buy or receive a donation of another, there is neither sale nor donation. If he intends to sell me a thing for a certain price, and I intend to buy for a less price, there is no sale, for in all these cases there is no consent. *Sive in ipsa emptione dissentiam, sive in pretio, sive in quo alio, emptio imperfecta est. Si ego me fundum emere Cornelianum, tu mihi te vendere Sempro nianum putâsti, quia in corpore dissensimus emptio nulla est. L.* 9. *ff. De Contra. Emp.*

[18] Error annuls the agreement, not only when it affects the identity of the subject, but also when it affects that quality of the subject, which the parties have principally in contemplation, and which makes the substance of it. Therefore if, with the intention of buying from you a pair of silver candlesticks, I buy a pair which are only plated, though you have no intention of deceiving me, being in equal error yourself, the agreement will be void, because my error destroys my consent; for my intention was to buy a pair of silver candlesticks. Those which you offer to sale being plated, it cannot be said that they are what I intended to buy. This is decided by *Julian* in a similar case *l.* 41. § i. *ff. d. t.* and *Ulpian, l.* 14, where he says, *Si æs pro auro veneat non valet.*

It is otherwise if the error only affects some accidental quality of the thing. For instance, if I buy a book on the supposition that it is a work of excellence, when in fact it is below mediocrity; this error does not destroy my consent, nor consequently vitiate the contract. What I intended to buy and had in view was in truth the book actually sold to me, and not any other thing. My error respecting the goodness of the book only applies to the motive in purchasing it, and does not interfere with its being the very book which I intended to buy. Now it will be seen presently that an error in the motive does not destroy the agreement. It is sufficient that the parties have not erred respecting the *object* of the agreement, *et in eam rem consenserint.*

[19] Here the question arises, Whether an error respecting the person with whom I contract annuls the agreement? This should be answered with a distinction: wherever the consideration of the person with whom I contract is an ingredient of the contract which I intend to make, an error respecting the person destroys my consent, and consequently annuls the agreement; for instance, if with the intention of giving or lending a thing to *Peter*, I give or lend it to *Paul* whom I mistake for *Peter*, the gift or loan is void for want of my consent; for I did not intend either to give or lend the thing to *Paul*,

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but only to *Peter;* a consideration of the Person of *Peter* was an ingredient in the contract that I intended to make.

So if intending to have a picture taken by a particular artist, I make a bargain for such picture with another person, whom I mistake for that artist, the bargain is void for want of my consent, for I did not intend to have the picture taken by that other. A consideration of the person and reputation of the artist whom I had in view was an ingredient in the bargain which I intended to make.

Nevertheless, if the person actually applied to, and who was ignorant of my mistake, had, in consequence of this erroneous agreement, completed the picture, I should be obliged to take it and pay him a proper compensation. But in this case I am obliged, not by the agreement, which was void, and therefore could not produce any obligation; the reason of my obligation is the principle of equity which obliges me to indemnify the person whom I have imprudently led into an error, and according to the Roman law, an action, different from that which would arise upon the agreement, was founded upon this obligation, called *actio in factum.*

We have seen that an error respecting the person annuls the agreement, wherever a consideration of the person forms an ingredient in the agreement.

On the contrary, when the consideration of the person with whom I suppose myself to contract, forms no ingredient in the contract, and I should equally have made the contract with any other person, the contract would be valid. For instance if I buy a book in boards from a bookseller, who engages to deliver it to me bound; although this bookseller, at the time of the sale, supposes me to be *Peter*, to whom I have a resemblance, and even calls me *Peter*, without my undeceiving him, this error on his part respecting the person to whom he makes the sale, does not annul the agreement; and he cannot refuse to deliver the book at the price agreed upon, in case the price has in the mean time advanced; for although he thought he was selling his book to *Peter*, nevertheless, as it was indifferent to him who purchased his goods, and it was not precisely and personally to *Peter* that he wanted to sell the book, but to any body who was willing to give the price of it, it may be truly affirmed of me, that I was the person to whom he intended to sell his book, and to whom he is obliged to deliver it. Such is the opinion of *Barbeyrac* on *Puffendorf*, L. 3. c. 6. n. 7. not. 2.

[20] As to the question, Whether an error in the motive annuls an agreement? *Puffendorf*, *l.* 3. c. 6, n. 7, thinks it does, provided I communicate to the person with whom I contract the erroneous motive by which I am influenced; because in this case the parties, according to his opinion, should be considered as intending to make their agreement depend upon that motive as a kind of condition. He adduces by way of example a case in which, upon receiving a false account of the death of one of my horses, I buy another, communicating at the same time to the seller the intelligence that I have received; and *Puffendorf* thinks that in this case I may rescind the bargain, provided it has not been executed on either side, subject to indemni-

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fying the seller if he has suffered any thing from the non-execution of it.

Barbeyrac points out very properly the inconsistency of this reason; for if it was true that we had made our agreement depend upon the truth of the intelligence, as soon as the intelligence proved false, the agreement would be void, *defectu conditionis*, and the seller consequently could have no claim to damages for the non-execution of it. *Barbeyrac* therefore consistently decides that this error in the motive does not produce any defect in the agreement. And, as in case of legacies, the circumstance of the motive by which the testator declares himself to be influenced being false, does not prevent the legacy being valid; for it is still true that the testator intended such a legacy, and it must not be concluded from what he has said of the motive that induced him to leave it, that he intended the legacy to depend upon the truth of that motive as a condition, unless such intention is otherwise sufficiently indicated; in the same manner, and for much stronger reasons, it should be decided with respect to agreements, that an error in the motive which induces a party to contract, does not affect the agreement and prevent its being valid; because there is much less reason to presume that the parties intended their agreement to depend upon that motive as upon a condition; conditions ought to be interpreted *prout sonant*, and conditions which can only be interposed by the consent of two parties should be implied with much more difficulty than in case of legacies.(*a*)

§ II. *Of Want of Liberty.*

[21] The consent by which agreements are formed ought to be free. If the consent of any of the contracting parties is extorted by violence, the contract is vicious, but as a consent, though extorted, is still a consent, *voluntas coacta est voluntas;* it cannot be said, as in case of error, that there is no contract. There is one, although it is vicious, and the person whose consent is extorted, or his heirs, may procure it to be annulled by letters of rescission.

If after the violence is at an end he approves the contract, whether expressly, or tacitly, by letting the time allowed for restitution, which is ten years, elapse, the vice is purged.(*b*)

[22] When the violence is committed by the person with whom I contract, or by his participation, the agreement is not binding either by the civil law, or even by the law of nature: for suppos-

(*a*) Some years ago a case occurred respecting an error in the subject of the contract. A painting was sold as an original of *Poussin*, but afterwards it appearing from the opinion of several artists to be the work of some other person, it was held that the sale was void, and the purchaser entitled to reclaim his money.

(*b*) In *England*, it is not necessary for the person whose consent is obtained by violence to institute any process analogous to the letters of rescission above mentioned; the force may be used as a defence in any suit founded on the contract. But the contract is not absolutely void, the party who has suffered the force may waive the exception by subsequent assent, and the party imposing the force can never allege it as a defence if the contract is insisted upon by the other side.

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ing that there resulted any obligation from me to you in consequence of my consent extorted by violence; the injustice committed by you in exercising that violence, obliges you to indemnify me for the injury which I suffer by it; and that indemnity consists in discharging me from the obligation which you have obliged me to contract. Hence it follows that my obligation, if there be one, cannot be binding by the principles of natural law. This is the reason given by *Grotius de Jur. bell.* lib. 2. c. 11. *n.* 7.

[23] When the violence is exercised against me by a third person, without the participation of him with whom the contract is made, the civil law does not on that account withhold that assistance from me; it rescinds all obligations contracted by violence, from whomsoever the violence may proceeds. This results from the 9th law *Ff. quod met. prætor generaliter et in rem loquitur:* but *Grotius* maintains that it is only by the authority of civil law that I in this case obtain the rescission of an obligation which, by the rules of natural law would be binding. According to him the civil law only regards my assent as imperfect on account of the agitation of mind suffered from the violence, nearly in the same manner as it presumes the consent of minors to be imperfect, and allows the rescission of their contracts, *propter infirmitatem judicii.* But according to this author my consent, although given under the agitation which this violence occasions, is still, according to the mere law of nature, a real consent sufficient to form an obligation; the same as that of a minor, though he has not that maturity of understanding which belongs to a more advanced age.

Puffendorf and *Barbeyrac* think, on the other hand, that even by the rules of natural law, when I am constrained by violence to enter into a contract, the contract is not obligatory upon me, though the other party was not at all concerned in the violence.

The reason adduced by *Barbeyrac* is as follows: it is true, says he, that a consent, though extorted, by violence, is still a consent; *coacta voluntas voluntas est;* and it is such as affects us with guilt, when we consent, even by constraint, to do what the laws of nature forbid, or to abstain from what they command: thus a Christian was guilty of a crime in sacrificing to idols, though constrained by the fear of tortures or death. But though a consent extorted by violence is a real consent; it is not sufficient to induce a valid obligation of giving or doing any thing we may promise; for as the law of nature has subjected every thing which it does not prohibit to our free and voluntary choice, it is only by such free and voluntary choice that we can contract an obligation of giving or doing any thing in respect to which we are left to our own choice by that law.

The agreement then is not the less defective, although the person with whom I have been forced to make it had no share in the violence imposed upon me. For notwithstanding this, my consent is imperfect; and it is that imperfection in the consent, which the law regards in releasing me from the obligation alleged to result from it. *Neque enim lex adhibenti vim irascitur, sed passo succurrit; et iniquum illi videtur id ratum esse, quod aliquis, non quia voluit pactus est, sed*

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quia coactus est; nihil autem refert per quem illi necesse fuit; iniquum enim quod rescinditur, facit persona ejus qui passus est, non persona facientis. Senec. Controv. iv. 26.

Puffendorf excepts one case in which an obligation though contracted under the impression of fear, arising from violence, is notwithstanding valid; that is, when I promise something to a person for coming to my assistance and delivering me from the violence which is exercised against me. For instance, if being attacked by robbers, I descry a person to whom I promise a sum of money for delivering me out of their hands. This obligation though contracted under an impression of the fear of death is valid. This is also the decision of the 9th law, *Ff. quod, met. caus. Eleganter Pomponius ait: Si quo magis te de vi hostium vel latronum tuerer, aliquid a te accepero, vel te obligavero, non debero me hoc edicto teneri; ego enim operæ potius meæ mercedem accepisse videor.*

Nevertheless, if the sum which is promised is excessive, my obligation may be reduced to making a just recompense for the service which has been rendered me.

[25] The violence which vitiates a contract for want of liberty ought, according to the principles of the Roman law, to be such as is capable of making an impression upon a person of courage. *Metus non vani hominis, sed qui in homine constantissimo cadat, l.* 6. *Ff. dict. tit.*

It is necessary that the party who insists upon his having been forced into a contract, should have been intimidated by the apprehension of some serious evil, *metu majoris mali, l.* 5. *Ff. dict. tit.* either in his own person or in that of some of his family, *nam nihil interest in se quis veritus, sit, an liberis suis. l.* 8. *Ff. d. t.;* and it should be an evil which is threatened to take place immediately if the thing is not done which is required, *metum præsentum non suspicionem inferendi ejus, l.* 9. *Ff. d. t.*

Where the menaces, which a person uses in order to make me contract an engagement, are only some vague menaces respecting something to happen in future, by which I am foolishly intimidated; although according to the principles of the *Roman* law the contract would not be esteemed invalid on account of the want of liberty of consent; it must not be concluded that such a manœuvre would be unpunished, and that the contract would subsist. The seventh law of the same title says, very justly, *Si quis meticulosus rem nullum frustra timuerit:* PER HOC EDICTUM *non restituitur;* but it does not say absolutely *non restituitur.* If the contract in this case is not defective for want of what the law deems requisite to freedom of assent; it is defective for want of that good faith which ought to prevail in every contract.

This manœuvre of the person to whom I have contracted is an injustice which obliges him to the reparation of the wrong, which reparation consists in the rescission of the contract.

If I foolishly suffer myself to be intimidated by a third person, and the person with whom I contract has no concern in it; the contract

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would be valid, and I should be left to my action *de dolo* against the person who intimidated me.

These principles of the *Roman* law are very just, and are founded on natural equity; except that which does not admit of any other fear being insufficient to invalidate the contract than such as is capable of making an impression upon a man of the greatest courage, is too rigid and not to be literally followed; but upon this subject, regard should be had to the age, sex, and condition of the parties; and a fear which would not be deemed sufficient to have influenced the mind of a man in the prime of life and of military character, nor consequently to rescind his contract, might be judged snfficient in respect of a woman, or a man in the decline of life.(*a*)

[26] The violence which leads to the rescission of a contract should be an unjust violence, *adversus bonos mores;* and the exercises of a legal right can never be allowed as a violence of this description; therefore a debtor can have no redress against a contract which he enters into with his creditor, upon the mere pretext that he was intimidated by the threats of being arrested, or even of his being actually under arrest, when he made the contract, provided the creditor had a right to arrest him. The 22nd *law ff. quod met. caus.* which says *Qui in carcerem quem detrusit, ut aliquid ei extorqueret, quicquid ob hanc causam factum est, nullius momenti est,* is to be understood of an unjust imprisonment.

[27] The fear of displeasing a father or mother or other person to whom we owe regard, is not such a fear as vitiates a contract made under the impression of it; but if a person who has another under his power uses ill-treatment or menaces to force him to contract, the contract may, according to the circumstances, be subject to rescission.(*b*)

§ III. *Of Fraud.*

[28] The term fraud (*dolus)* is applied to every artifice made use of by one person for the purpose of deceiving another. *Labeo definit dolem omnem calliditatem, fallaciam, machinationem ad circumveniendum fallendum, decipiendum alterum, adhibitam; L.* I. *ff. de dol.*

(*a*) I cannot but think it would be more reasonable to hold, that if a person actually contracted under the impression of fear induced by the misconduct of another, though by means in general inadequate to such an effect, it should be a sufficient ground to vitiate the contract, and that the infirmity of one man's mind should not be taken advantage of for the purpose of conferring a benefit on another, whether that other was or was not implicated in the misconduct, though the age, constitution, and occupation of the party might furnish very material *evidence* in deciding upon the fact; and such, I think it is probable would be the decision of the English law. But the same infirmity of disposition, which would be sufficient to prevent the validity of a contract, might afford an inadequate excuse for the commission of an offence, or the omission of a duty.

(*b*) A detrimental contract obtained by a father from a son, &c. is always in the English courts of equity regarded with very great jealousy; but the undue influence, which is usually exerted in obtaining such contracts, is rather referrable to the objection of fraud than of force.

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[29] When a party has been induced to contract by the fraud of another, the contract is not absolutely and essentially void, because a consent, though obtained by surprise is still a consent; but the contract is vicious, and the party surprised may institute a process for its rescission within ten years.(a)

[30] As a matter of conscience any deviation from the most exact and scrupulous sincerity is repugnant to the good faith that ought to prevail in contracts. Any dissimulation concerning the objects of the contract, and what the opposite party has an interest in knowing, is contrary to that good faith: for, since we are commanded to love our neighbour as ourselves, we are not permitted to conceal from him anything which we should be unwilling to have had concealed from ourselves under similar circumstances.

But in civil tribunals a person cannot be allowed to complain of trifling deviations from good faith in the party with whom he has contracted. Nothing but what is plainly injurious to good faith ought to be there considered as a fraud sufficient to impeach a contract, such as the criminal manœuvres and artifices employed by one party to induce the other to contract. And these should be fully substantiated by proof. *Dolum non nisi perspicuis indiciis probari convenit. L. 6. C. de dol. mal.*(b)

[31] It is only the fraud which induces the contract that can furnish ground for the impeachment of it; that is, the fraud by which one party induces another to contract who would not have contracted otherwise. Any other fraud only entitles the party to a reparation in damages for the injury sustained.(b)

[32] In order to impeach the contract, it is also necessary that the fraud should be committed by the opposite contracting party, or at least that he should participate in it. If it is committed without his participation, and I have not suffered any very serious

(a) Here the law of England essentially differs from the civil law; by the latter the fraud must have been necessarily made the object of an original suit, whereas by the former it may be shown as a matter of defence; but the observation, that fraud does not essentially vacate the contract, is true. It is an objection of which the person defrauded may take advantage, but if he assents to the contract, the opposite party cannot found any exception upon showing a fraud in himself, which if the contract was essentially void might be done. Also the person defrauded, having once dispensed with the objection after he is fully apprised of the fact is (except in particular cases) concluded by his assent, and the contract is equally valid as if no fraud had intervened. For instance, it is considered as a fraud to employ fictitious bidders, or as they are usually called, puffers at an auction. A purchaser may refuse to assent to a sale in which that fraud has taken place; but if he is fully apprised of the circumstance, and afterwards proceeds in the execution of the contract, he cannot resort to the objection of fraud in order to support a subsequent charge of inclination.

(b) This rule must not be undertood as excluding the inference of fraud from a combination of circumstances, which from the concealment that usually accompanies fraud, is all the evidence that the nature of the case will generally admit.

(c) I conceive that there are many cases in which this proposition would not be adopted by an English court, and that even as a general rule a party may except to the performance of a contract affected by fraud, though it might not appear that he would not have entered into the engagement if that fraud had not taken place. In fact, it would be very difficult to ascertain, in particular cases, what degree of influence the fraudulent act might have had upon the mind of the contracting party, and it is therefore preferable to allow it as a sufficient ground of objection, that the fraud had a tendency to produce such influence.

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injury; my engagement is valid, and I have only a right of action against the person guilty of the fraud, for the damages sustained in consequence of it.(a)

§ IV. *Of Inequality* (*Lesion*) *in Contracts*.(*d*.)

[33] Equity ought to preside in all agreements; hence it follows that in contracts of mutual interest, where one of the contracting parties gives or does something for the purpose of receiving something else as a price and compensation for it, an injury suffered by one of the contracting parties, even when the other has not had recourse to any artifice to deceive him, is alone sufficient to render such contracts vicious. For as equity in matters of commerce consists in equality when that equality is violated, when one of the pargives more than he receives, the contract is vicious for want of the equity which ought to preside in it.

Besides, there is an imperfection in the consent of the party injured, for he would not have given what he has given, except upon the false supposition that what he was receiving in return was of equal value; and he would not have had any disposition to give it if he had known that what he received was of inferior value.

It is to be observed, 1st, that the price of things does not ordinarily consist in an indivisible point; there is a certain latitude within which there is room for the contracting parties to contest; and there is no injury, nor consequently any want of equity in a contract, unless what one of the parties receives is above the highest or beneath the lowest value of what he gives.

[34] 2. Although any injury whatever renders contracts inequitable and consequently vicious, and the principle of moral duty (*le for interieur*) induces the obligation of supplying the just price; persons of full age are not allowed in point of law to object to their agreements as being injurious, unless the injury be excessive,

(*a*) This opinion would also, I conceive, be subject to several qualifications: for if the right of the party, with whom the contract is made, in any degree depends upon an adoption of the facts of the person committing the fraud, it would apparently be sufficient to vitiate the contract. It has been well said by Lord *Mansfield*, speaking on another subject, that although a third person shall not be punished for the fraud of another, he shall not avail himself of it. *Robson* v. *Calzee*, *Doug.* 228.

Still there are many cases in which the opinion expressed generally by Pothier would be certainly just; for instance, if one man proposes to contract with me for the purchase of goods, and another, without his collusion and for a fraudulent purpose of his own, falsely represents him as a person of fortune; this may induce an action against the last for damages; but will not defeat the contract with the first.

It may not be improper to observe, that the fraud which is at present under consideration is that which is practised upon one of the contracting parties, and not that where both parties concur in a fraud upon other persons, and which from a regard to the principles of general propriety is excluded from the assistance of the law even as between themselves.

(*b*) In the preceding parts of this article the law of *England* very nearly accords with the civil law in its exposition of the general principles of justice. Upon the present subject there is a considerable diversity; the Roman law and the law of *France* having interposed an objection on the ground of inequality, which would be only admitted in England in a very inferior degree. The following view of the subject by *Pothier* however, comprises several principles which will admit of an application beyond the limits of the positive institution to which they more particularly relate.

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a rule wisely established for the security and liberty of commerce, which require that a person shall not be easily permitted to defeat his agreements; otherwise we should not venture upon making any contract for fear that the other party, imagining himself to be injured by the terms of it, would oblige us to follow it by a lawsuit.

That injury is commonly deemed excessive which amounts to more than a moiety of the just price. And the person who has suffered such an injury may within ten years obtain letters of rescission for annulling the contract.

[35] But there are certain agreements in which equality is more particularly requisite, such as partitions between co-heirs or co-proprietors. With regard to these, if the injury exceeds a fourth of the just price, it is a sufficient ground for restitution.

[36] On the other hand there are certain agreements, in which persons of full age are not entitled to restitution, be the injury ever so considerable.

Such are compromises according to the edict of *Francis* II. *April* 1560. These are agreements respecting pretensions upon which there are impending or expected litigations.

The reason of this edict is deduced from the particular character of these agreements. In other contracts of interest each of the parties intends to receive as much as he gives, and not to admit of any relaxation in respect of what belongs to him. His consent then is not entirely perfect when he suffers an injury in the terms; for it is founded upon an error in supposing that he receives as much as he gives; and it is upon this ground of his consent being defective that he is admitted to restitution; on the contrary with respect to compromises; by the very nature of the agreement, the intention of the parties is the avoidance of litigation, even at the expense of what belongs to them.

On these principles the edict should not be understoood as applying to agreements which do not decide any contest, and which for instance, contain only a partition, although the notary may qualify them by using the word *compromise* (*transaction*); for the effect of the act ought not to be regulated by the name which the notary gives to it, but by the nature of the act itself.

[37] Restitution can hardly be admitted upon the ground of inequality, when the price of the thing which is the object of contract is so uncertain, that it is difficult or almost impossible to determine what the just price is, and consequently to judge whether the injury is above or below the half.

Such is a sale of the right succession, for the uncertainty of the debts with which it may be charged renders the value of it extremely uncertain.

Such are all aleatory contracts; for although the risk which is undertaken by one of the contracting parties may admit of appreciation, it must be admitted to be extremely difficult to determine what the just price is. And therefore restitution can hardly be allowed, on account of inequality, in the case of life-annuities (*constitutions des rentes viageres,*) insurances, &c.

[38] A purchaser who gives more than double the value of an

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estate is not admitted to restitution when the excess above the intrinsic value is the price of affection.

[39] Contracts which relate only to moveables are not subject to rescission, on the ground of inequality, however great it may be.

The reason of this may perhaps be that our ancestors deemed riches to consist in immoveable property, and made little account of moveables; hence it arises that, in most of the subjects of *French* jurisprudence moveable property is but slightly attended to. There is also another reason arising from the frequent commerce of articles that pass through several hands in a short space of time; which would be liable to interruption if restitution on account of inequality were allowed in respect of moveables.

Neither is restitution on account of inequality allowed in the case of leases of estates, for these leases only convey a disposition of the fruits, and are in the nature of moveables.

§ V. *Of Inequality in the case of Minors.*

[40] Every thing which has been said respecting inequality applies to persons of full age. Minors are admitted to restitution not only against any excessive inequality, but against any inequality whatever; and are even admitted to restitution in cases in which persons of full age have not that right; as in compromises.

The ordonnance of 1589, has limited the time within which they ought to demand this restitution; and does not allow them to be received after they have attained the age of thirty-five years.

Observe that the ordonnance does not say within ten years after their majority; because there are provinces in which persons become major at twenty; as in *Normandy*.—It was intended to place all the citizens in this respect upon a level, and that they should all be entitled to restitution until they had accomplished the age of thirty-five.

[41] There are certain agreements against which minors who are capable of contracting, that is to say who are emancipated are not entitled to restitution on the mere ground of inequality any more than majors; such are agreements for the alienation or acquisition of moveables; the custom of *Orleans* has a disposition to this effect in article 446.(*a*)

(*a*) The law of *England* has not in general admitted inequality as a primary and substantive objection, though it may often be very material evidence to taint a contract with fraud, oppression, or usury. The authorities upon the subject are collected by Mr. *Fonblanque*, in his notes to the *Treatise of Equity*, B. I. c. 2, s. 9, which I take the liberty to transcribe; "I have not been able to find a single case in which it has been held that mere inadequacy of price is a ground for the court to annul an agreement though executory, if the same appear to have been fairly entered into, and understood between the parties, and capable of being specifically performed; still less does it appear to have been considered as a ground for rescinding an agreement actually executed. In the case of *Kien* v. *Stukely*, *Gilb. Rep.* 155, the court expressly held that the exorbitancy of price was not sufficient to discharge the defendant from the performance of his contract; the decree for a specific performance was indeed afterwards reversed, but not upon the ground of inadequacy of consideration; but

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§ VI. *Of the Want of a good Consideration.*

[42] Every contract ought to have a just cause (or consideration.) In contracts of mutual interest the cause of the engagement by each of the parties, is in the thing given or done or engaged to be given or done, or the hazard incurred, by the other. In contracts of benificence, the liberality which one of the parties intends to exercise towards the other is a sufficient cause for the engagement contracted in his favour. But where an engagement has no cause, or, which is the same thing, where the cause for which it is contracted is false, the engagement is null, and so is the contract which includes it. For instance, if upon the false supposition that I owe you a thousand pounds, left you by the will of my father which has been revoked by a codicil, whereof I am not apprised, I engage to give you a certain estate in discharge of that legacy, the contract is null, because the cause of my engagement, which was the acquittance of a debt, is false; therefore the falseness of the cause being discovered, you are not only without any right of action to compel me to deliver the estate, but even if I have delivered it I am entitled to reclaim it, and my right of action according to the *Roman* law was called *condictio sine causa*, which is the subject of a title in the *Digest.*

[43] When the cause for which the engagement is contracted is repugnant to justice, good faith, or morals, the engagement and the contract containing it are null. This principle seems to decide a question which often occurs [in *France.*] An estate is seized under an hypothecate and adjudged to be sold; the owner makes an agreement with the purchaser to receive a certain sum for giving up the writings. The decision of the question whether, this agreement is valid depends upon whether the cause of the agreement is repug-

because the plaintiff had not made out his title by the time stipulated. 2 *Bro. P. C.* 396.* In *Willis* v. *Ternegan*, 2 *Atk.* 251, Lord *Hardwicke* held that it is not sufficient to set aside an agreement in equity to suggest weakness and indiscretion in one of the parties who has engaged in it; for supposing it to be in fact a very hard and unconscionable bargain, if a person will enter into it with his eyes open, equity will not relieve him upon this footing, unless he can show fraud. See also *Floyer* v. *Sherrard Ambl.* 18. In *Cwynne* v. *Heaton*, 1 *Bro. Ch.* 9, Lord *Thurlow* observes, that to set aside a conveyance there must be an inequality so strong, gross, and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it. And in *Spratley* v. *Griffith*, 2 *Bro. Ch.* 179, in a note to *Heathcote* v. *Paignon*, the Chief Baron assigned as a ground for the decree, that there was no case in which mere inadequacy of price, independent of other circumstances, had been held sufficient to set aside a contract. In addition to this concurrence of authority, a very strong argument in support of the rule may be drawn from those cases in which losing bargains have been actually established and decreed. *City of London* v. *Richmond & al.* 2 *Vern.* 423. *Wood* v. *Fenwick*, 1 *Eq. Ab.* 170. *Nichols* v. *Gould*, 2 *Ves.* 422, and the case referred to by Lord Chancellor *Thurlow* in *Mortimer* v. *Capper*, 1 *Bro. Ch.* 158.

"But though courts of equity will not relieve against agreements merely on the ground of the consideration being inadequate, yet if there be such inadequacy as to show that the person did not understand the bargain he made, or was so oppressed that he was glad to make it, knowing its inadequacy, it will show a command over him which may amount to fraud. *Heathcote* v. *Paignon*, 2 *Bro. Ch.* 175, *a.*"

The English law respecting minors is not referable to the question of inequality.

* [8vo. edit. i. 191, and see the note to the cases of *Fraud* in that edition, iv. 397.]

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nant to justice, which it certainly is; for the writings are accessory to the estate as much as the keys are accessory to a house; and it is the nature of such accessories to belong to the same person as the principal thing to which they relate. *Accessoria sequuntur jus ac dominium rei principalis.* The writings then belong to the purchaser as the adjudication, by giving him the property of the estate, gives him also the writings belonging to it; and the debtor when he hypothecated the estate,(*a*) consented that there should be a decree for the sale in default of payment, and therefore is obliged to give it up, together with the writings, as much as if he had sold it himself. He cannot retain them without injustice. The agreement by which he exacts a sum of money for delivering them up is therefore founded upon a cause repugnant to justice, which renders it null. Therefore not only is the debtor without any right of action for enforcing such an agreement, but even if the money is paid, he is subject to an action for the recovery of it.

[44] With respect to this action, it is very necessary to distinguish accurately, whether the cause for which a promise is made is repugnant to justice or morality on the part only of the person to whom it is made, or both on the one side and the other? An example of the first kind has just been stated. When the debtor insisted upon a sum of money for giving up the writings, it was on his part only that any thing was done repugnant to justice; the other party had done nothing repugnant to justice or morality by promising a sum of money for the writings which he had occasion for, and which the debtor would not give up without. It is in such a case as this, and others depending upon similar principles, that a party has a right of recovering what is given in pursuance of the agreement.

An example of the second kind is where an officer promises a sum of money to a soldier to fight with a soldier of another regiment. The cause of this arrangement is repugnant to morality on both sides; for the officer has no less acted in contravention of law and morals by making such a promise, than the soldier by receiving it. This second case agrees with the former so far as that the engagement is null, having a cause which is repugnant to morality; and consequently no action can result from it; and the soldier after having fought, cannot demand from the officer the sum which he has promised: but the cases differ, inasmuch as if the officer, in execution of the void engagement, pays the money agreed upon he is not entitled to recover it back; for, having no less than the soldier offended against law and morality, he is unworthy of the assistance of the law for such a purpose.

The two-fold decision is included in the very terms of the laws themselves. *Ubi dantis et accipientis turpitudo versatur non posse repeti dicimus. Quotiens autem solius accipientis turpitudo versatur, repeti potest; l.* 3 & 4. *Ff. de condic. ob. turp. caus.*(*b*)

(*a*) A solemn contract passed before a notary gave, without any special declaration, a right of hypothecation upon the estates of the debtor.

(*b*) This principle is fully adopted in the *English* law. In an Essay on the actions for money had and received I have considered it at length.

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[44] There is no doubt, according to these principles, that if I promise any thing to a person for committing a crime; for instance, beating another with whom I am at variance, I am not in point of law obliged to fulfil my promise. There is no difficulty in deciding the question as a matter of conscience. *Grotius* maintains that the promise is not obligatory so long as the crime is not committed, and that up to that time the party making the promise may retract and give a countermand to the other; but that as soon as the act is committed, the promise becomes obligatory by the rules of natural law and in point of conscience. The reason is, that the promise is vicious, inasmuch as it is an inducement to a crime; but that vice is at an end as soon as the crime is committed and consummated. As the vice of the promise no longer exists, there is nothing to prevent the promise having its effect, which consists in obliging the person making it to accomplish it. He states the instance of the patriarch *Judah* discharging the promise which he made to *Thamar*.

Puffendorf on the contrary thinks that a promise made to a person for committing a crime is no more obligatory after his committing it than before; because the recompense of a crime which is involved in the accomplishment of such a promise, is no less contrary to natural law and good morals than the invitation to the crime. And if after the commission of the crime the accomplishment of the promise is no longer an inducement to the commission of that crime, it is an inducement to the commission of others. Besides, every obligation supposes a right in the person in whose favour it is contracted. When I promise any thing to a person for committing a crime, the acceptance of the promise is not less criminal on his part, than the making it is on mine. Now can a crime ever be allowed to produce the acquisition of a right? Can it be thought that the law of nature is so favourable to villains as to assure them the reward of their offences? These reasons lead me to adopt the opinion of *Puffendorf*.

[45] I equally subscribe to the decision which he afterwards makes, that if I have voluntarily paid after the crime committed, what I promised for the commission of it, I have no more claim to recover it back in point of conscience than in point of law, although I have paid what was not due from me. It is true that both natural and civil law allow a right of action for what is paid without being due when the payment is made by error; it is supposed in this case that the payment was made under a kind of condition, that it should be refunded if found not to be due. Though such condition is not formally it is virtually interposed; it is conformable to the disposition of mind of the person paying; equity, which does not permit one man to enrich himself at the expense of another, implies this condition; but there can be no such implication in the case in question. The person who pays has a perfect knowledge of the cause of payment; he therefore cannot retain a right to the recovery of what he has parted with voluntarily, and with a perfect knowledge of the cause. It is true that it is contrary to natural law that any one should be rewarded for a crime; and that his repentance for the crime ought to make him renounce the reward he has

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received; but this only forms an imperfect obligation, such as was spoken of at the beginning of the treatise, without giving a right to any other person.

[46] Has a promise a licit cause when it is made to a person for his giving or doing something which he is obliged to give or do already? *Puffendorf* in respect of this question very properly marks the distinction between a perfect and an imperfect obligation; when there is only an imperfect obligation, the promise has a lawful cause, and is obligatory. For instance, if I promise something to a person for doing me a service; although gratitude for favours which he has received from me bind him to render me the service gratuitously, nevertheless my promise has a licit cause and is obligatory; for not having any right to demand that service from him he may lawfully, however unbecomingly, require something from me in order to afford me a right to the service which I did not otherwise possess.

On the contrary, when it is a perfect obligation the promise is a nullity, and has an illicit cause if it is exacted by him from me, as in the case before mentioned of the promise of a reward for giving up the writings; for being obliged to give them up, it is an exaction on his part to require any thing for doing so.

But even in the case of a perfect obligation, if a promise that I make my debtor, for something that he was already obliged to do, is a voluntary promise of mine, and not exacted by him, it is valid, and has a licit and honest cause; that cause being the liberality which I intend to exercise towards him.(*a*)

§ VII. *Of Want of Obligation (Lien) in the Person promising.*

[47] It is of the essence of agreements which consist in promising something that they should produce an obligation in the party making the promise to discharge it; hence it follows, that nothing can be more contradictory to such an obligation, than an entire liberty in the party making the promise to perform it or not as he may please. An agreement giving such entire liberty would be absolutely void for want of obligation. If, therefore, I agree with you to give you something in case I please, such an agreement is absolutely void.

The *Roman* lawyers thought it would be otherwise where a person promised to do a thing *when* he pleased, that these terms did not leave it to the choice of the party whether he would do what he had promised or not, but only left him at liberty as to the time when he would perform the promise; and that the agreement was valid and binding on his heirs if he died without having performed it. *L.* 46, § 2 & 3, *ff. de verb. obl.*(*b*) But there is reason to think that such a subtle distinction would not be admitted in the *French* jurispru-

(*a*) Vide Appendix, No. I.

(*b*) *Si ita stipulatus fuero cum volueris, quidam inutilem esse stipulationem aiunt: alii ita inutilem, si antequam, constituas, morieris, quod verum est. Illam autem stipulationem, si volueris dari? inutilem esse constat.*

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dence, and that this agreement would be no more binding than the other.

[48] There is a real obligation contracted if I promise to give you something in case I judge it reasonable; for it is not left to my choice to give it you or not, since I am obliged to do so in case it is reasonable. *l.* II. § 7, *leg.* 30.(*a*)

Lastly, though I promise something under a condition, which depends upon my will whether I will accomplish it or not (*condition protestative*) as, if I promise to give you ten pistoles in case I go to *Paris*, the agreement is valid; for it is not entirely in my power to give the money or not, since I can only refuse to do so in case I refrain from going to *Paris*. There is then on my part an obligation and a real engagement. *L.* 3. *ff. de legat.* 2.(*b*)

ARTICLE IV.

Of Persons capable or incapable of Contracting.

[49] The essence of a contract consisting in consent, it follows that a person must be capable of giving his consent, and consequently must have the use of his reason in order to be able to contract.

It is therefore evident that children, persons wholly destitute of reason, and such as are occasionally so during the continuance of their infirmity, cannot contract by themselves, but they may contract by the ministry of their tutors or curators.

It is evident that drunkenness, when it goes so far as absolutely to destroy the reason, renders a person in this state, so long as it continues, incapable of contracting, since it renders him incapable of consent.(*c*)

[49] Committees, or bodies corporate, which are not civil persons, cannot contract by themselves, but they may contract by the ministry of their syndics or administrators.(*d*)

[50] There are persons who, being by nature capable of contracting, are rendered incapable by law; such, in some provinces, are married women, unless they are authorised by their husbands, or by courts of justice, for it is an effect of the power of the husband, that the wife can only act as authorised by him; whence it follows, that she is incapable of making any agreement, and can neither oblige herself in favour of others, or others in favour of herself.

It is also the civil law only which renders persons under an inter-

(*a*) Quanquam autem fidei commissum ita relictum non debeatur *si volueris*, tamen si ita adscriptum fuerit, *si fueris arbitratas, si putaveris, si æstimaveris, si utile tibi fuerit visum, vel videbitur*, debebitur non enim plenum arbitrium voluntas heredi dedit, sed quasi viro bono commissum relictum.

(*b*) *Si ita legetur, Heres dare damnas esto, si in Capitolium non ascenderit; utile legatum est, quamvis in potestate ejus sit ascendere vel non ascendere.* Vide Appendix, No. I.

(*c*) Vide Appendix, No. II.

(*d*) According to the law of *England*, bodies corporate contract Obligations, and do other acts by means of a common seal.

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dict for prodigality incapable of contracting: for these persons know what they do; the consent which they give is a real consent, which is sufficient to form a contract.

[51] Hence arises a difference between these persons and those who are interdicted for insanity. All the contracts pretended to be made by the latter though before interdiction are null, provided it be shown that they were insane at the time of the contract, for their insanity alone and of itself, renders them incapable of contracting independently of the sentence of interdiction, which is merely a declaration of it: on the contrary, contracts made by a prodigal before his introduction are valid, although he was a prodigal at the time; for he is only rendered incapable by the sentence of interdiction; it is that alone therefore which renders him incapable of contracting.

Nevertheless, if I have contracted with a prodigal, though before his interdiction, by buying something from him, or lending him money, knowing that he was only selling or borrowing to raise money for his dissipations, the contract would be void in point of conscience, and I could neither conscientiously retain the thing that was sold, nor require to be repaid the money lent; for by knowingly supplying him with money to spend in dissipation, I have done him an injury, which I am obliged to repair, either by not exacting the money lent, or restoring the property sold; this is conformable to what is said at the end of law, 8, *ff. pro. empt.* that we ought not to regard a person as a *bona fide* purchaser who buys something of a libertine, knowing that he only sold it to carry the price to a brothel. *Nisi forte is qui a luxurioso, et protinus scorto daturo pecuniam, servos emit, non usu capiet.*

These decisions hold good in point of conscience, but in point of law, a person of full age, and not under interdiction, would not be admitted to relieve himself against a sale or loan, by alleging that the person with whom he contracted knew that his only motive in selling or borrowing, was to squander the money in dissipation.(*a*)

[52] It is likewise only civil law which invalidates the obligations that minors, under the power of a tutor, contract with the authority of their tutor, when at the time of the contract they are of sufficient age, and have sufficient use of their reason to comprehend the whole extent of the engagement they contract; wherefore minors may very well, even in point of conscience, take the benefit of letters of rescission against injurious contracts, as natural equity does not permit those who have contracted with them to take advantage of their want of experience, but they cannot conscientiously have re-

(*a*) Interdictions for prodigality are unknown to the law of *England*, but the courts of equity will watch very narrowly contracts made with young persons engaged in a course of dissipation, in order to obtain their property or expectations, at an inferior value; and, in some recent cases, persons have not been allowed to recover the debts incurred in promoting habits of dissipation; but these topics have only an incidental relation to the present subject; as they relate rather to the matter of the contract, than to the capacity of the person.

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course to the exception allowed them in point of law, against restoring the money which they have received and dissipated, if at the time of entering into the contract, they had sufficient use of their reason; and the person lending them the money did so, fairly, without knowing that it would be applied in foolish expenses. This is the sentiment cited by *Barbeyrac* in his notes on *Puffendorf.*

It remains to observe a difference between the incapacity of interdicts and minors, and that of women under the power of their husbands; the latter areinca pable of contracting without being authorised; they can no more oblige others towards them, than they can oblige themselves; they cannot even accept a donation which may be made to them.

On the contrary, interdicts for prodigality, and minors, who begin to have some use of their reason, are rather incapable of obliging themselves by a contract, than absolutely incapable of contracting; they may, by contracting without the authority of their tutor or curator, oblige others to them, although they cannot oblige themselves to others; *placuit meliorem conditionem licere eis facere etiam sine tutoris auctoritate, Instit. tit. de auctor. tut. Is cui bonis interdictum est, stipulando sibi acquirit, L.* 6, *ff. de verb. oblig.* The reason of this difference is, that the power of tutors and curators is only established in favour of minors and interdicts, and their assistance is only necessary for the interest of the persons under their charge, and from the apprehension of their being deceived, and consequently such assistance becomes superfluous, when in fact they make their condition better; on the contrary, the power of the husband being established, not in favour of the wife but of the husband, and the necessity of requiring his authority not being established for her interest, but on account of the deference which she owes, she cannot contract in any manner, whether for her advantage or detriment, without such authority.(*a*)

The ordonnance of 1731 does not by any means impeach the principle which we have laid down, that a minor may without the authority of his tutor render his condition better. *Furgolle* therefore is not correct in maintaining, that according to the 7th article of this ordonnance, minors cannot without the authority of their tutors, accept the donations which are made to them. This article only decides, that the father, mother, and other progenitors, without being tutors of their children, and consequently without having any quality to manage their affairs, may accept donations made to their infant children as effectually as a tutor, natural affection, supplying in this case a quality otherwise wanting; but it does not follow that because the ordonnance by this article permits such persons to accept

(*a*) No authority or concurrence of the husband can, according to the law of *England*, affect a married woman personally with the obligations arising from a contract, though there are cases in which her acts operating *in rem* have the effect of binding her property.

In *England* any gift to a married woman continues good until the husband dissents. His positive assent is not necessary to its validity.

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donations made to their children, minors are forbidden to accept them themselves, when they have the use of their reason.(a)

ARTICLE V.

Of what is capable of being the object of Contracts, and of the rule of the civil law, that it can only be something which concerns the contracting parties, according to the principle that a person cannot effectually promise or stipulate except for himself.

[53] Contracts have for their object either something which one of the contracting parties stipulates for being given to him, and which the other party promises to give, or something which one of the party stipulates to be done or not done, and the other promises to do or not to do.

What things may be so stipulated and promised will be mentioned hereafter, *Chap.* II. *art.* 2, to which at present we refer; contenting ourselves here with the development of a principle respecting what may be the object of contracts, to wit, that nothing but what one of the contracting parties stipulates for himself, and what the other promises for himself, can be the object of a contract. *Alteri stipulari nemo potest* INST. DE INCERT. STIP. *Nec paciscendo, nec legem dicendo, nec stipulando quisquam alteri cavere potest*, l. 73. *De reg. jur.* VICE VERSA. *Qui alium facturum promisit videtur in ea esse causa ut non teneatur nisi pœnam ipse promiserit. Inst. dic. tit. s.* 20. *Alius pro alio promittens daturum facturumve non obligatur, nam de se quemquem promittere oportere. L.* 83. *ff. de verb. obl.*

In order to develope this principle, we shall 1st, examine what are the reasons of it; 2d, we shall state several cases in which we stipulate and promise effectually for ourselves, though the agreement makes mention of other persons; 3d, we shall take notice, that what concerns other persons than the contracting parties, may be the mode or condition of an agreement, though it cannot be the object of it; 4th, we shall observe that we may stipulate or contract by the ministry of a third person, and that this is not to stipulate or promise for another.

§. I. *Reasons of the principle that a person cannot stipulate or promise for another.*

[54] When I stipulate with you for a third person the agreement is void: for by this agreement you do not contract any obligation in favour either of such third person or myself. It is evident that you do not contract any in favour of the third person: for it is a principle that agreements can have no effect except between the contracting parties, and consequently that they cannot acquire any right to a third person who is not a party to them, as we shall see here-

(a) *Vide* Appendix, No. III.

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after. By this agreement you do not contract any civil obligation in my favour; for, what I have stipulated in favour of the third person, not being any thing in which I have an interest capable of pecuniary appreciation, no damages can result to me from a failure in the performance of your promise, and therefore you may be guilty of such failure with impunity. Now nothing is more repugnant to the nature of a civil obligation than a power to contravene it with impunity. This is the meaning of *Ulpian* when he says, *Alteri stipulari nemo potest, inventæ sunt enim obligationes ad hoc ut unus quisque sibi acquirat quod sua interest, cæterum ut alii detur, nihil interest, L.* 38. *s.* 17. *ff. de verb. obl.*

[55] This first part of the principle, that nothing but what one of the parties stipulates on his own behalf can be the object of an obligation, only prevails when considered as a matter of law, (*dans le for exterieur*) and with respect to civil obligations; but in point of conscience, if I agree with you that you shall give something to, or do something for, a third person, the agreement is binding: although the interest which I have in the subject is not capable of pecuniary appreciation, still it is a real interest: *hominis enim interest alterum hominem beneficio affici*, and this interest arising from mere affection for a third person, gives me a sufficient right in point of conscience, to require the performance of your promise, and is sufficient to render you culpable in refusing to accomplish it, provided you have it in your power, and the other person is willing to accept of what was promised to be given. It is true that my interest not admitting of pecuniary appreciation, and consequently not being the object of a judicial sentence, I cannot call upon you for any satisfaction in damages if you fail in the performance of your promise, but your power of avoiding legal responsibility, though an obstacle to its being a civil obligation, does not prevent it from being a natural one. *Grotius L.* 2. *c.* 11. *n.* 18.

It must be observed that the natural obligation resulting from this agreement by which I stipulate for your giving something to a third person, is an obligation contracted in favour of me, and not of that person, when the agreement is made in my name and not in his, therefore I may release you from it without his consent, *Grotius, ibid. Puffendorf.*

But if the agreement were made in his name, and as having been entered into by a commission from him, the agreement would be made with him by my agency, and not with me.

[56] The second part of the principle, that a person can only promise for himself, is evident; for when I promise that another shall give you any thing, or do any thing, without undertaking that it shall be done, or promising any thing on my own part, the agreement can neither oblige the other nor myself. It will not oblige him, because it is not in my power to oblige another person without his own act; neither will it oblige me, for as it is part of the supposition that I promised for another and not for myself, I am not understood to be bound by it.

But a presumption will be readily admitted, that a person who pro-

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mises that another shall give or do something should not be understood *pure de alio promittere*, but to promise for himself, that is to say, to engage for the performance of the act by the third person, although it is not so expressed, and in this case he will be liable to answer in damages for the non-performance. *L.* 81. *ff. de verb. obl.*(a)

If in promising for the act of another, you submit to pay a certain penalty, or even merely to answer in damages for the non-performance, it is clear that you are not to be understood as promising simply for the act of another, *et de alia tantum promittere*, but as undertaking in assurance of that other *et de te promittere.* Therefore *Ulpian* says, *Si quis velit alienum factum promittere, pœnam vel quanti ea res est potest promittere. L.* 38. *s.* 2. *ff. dic. tit.*(b)

§ II. *Several Cases in which the Parties effectively stipulate or promise for themselves, although another person is mentioned.*

CASE I.

[57] To stipulate that any thing shall be delivered or paid to a third person designated by the agreement, is not to stipulate for another. For instance, if I contract to sell you an estate for a thousand pounds, which it is agreed shall be paid to *Peter*, it is not for him, but for myself, that I make this stipulation; *Peter* is only introduced into the agreement as a person to receive the money for me and in my name, and is what the *Roman* jurists call *adjectus solutionis gratia.*

The credit for that sum does not reside with him but with me: when he receives it, it is only on my behalf and in my name; and on his receiving it there arises between him and me either the contract mandate, if my intention was that he should render me an account; or a donation, if it were my intention to give it to him.

CASE II.

[58] It is not stipulating for another but for myself, when I stipulate that something shall be done for a third person; if I have a personal and appreciable interest it shall be done; suppose for instance I have contracted with him to do it. Thus if I have engaged to *James* to re-build his house in a certain time, and having other work to do, I contract with a mason that he shall rebuild the house, I stipulate for myself rather than for *James*, and the agreement is valid: for as I am under an obligation to him, and am answerable in damages if the work is not done, I have a real personal interest that it shall be

(a) Quotiens quis alium sisti promittit, nec adjicit pœnam (puta vel servum suum, vel hominem liberum) quæritur, an committatur stipulatio? Et Celsus ait, etsi non est huic stipulationi additum, nisi steterit, pœnam dari: [in] id quanti, interest sisti, contineri, et verum est quod Celsus ait; nam qui alium sisti promittit, hoc promittit, id se acturum, ut stet.

(b) *Vide* Appendix, No. IV.

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done. Wherefore, in stipulating that the mason shall rebuild the house of *James*, it is only *verbo tenus* that I stipulate for *James; re ipsa* and in truth I stipulate for myself and for my own benefit. *Si stipuler alii cum me interesset, ai Marcellus, stipulationem valere, L.* 38. § 20, 21, 22, *ff. de verb. obl.*

[59] Even if I have not entered into the engagement with *James* before I made the agreement with the mason, and consequently had no personal interest in the subject, yet as I undertake to conduct the business of *James*, and thereby render myself accountable to(*a*) him from the very time of the agreement, I begin thereby to have an interest in the reconstruction: from whence it follows, that I am deemed to stipulate rather for myself than for *James*, and the contract is valid, as I have a personal interest that the mason shall do in a proper manner the act which I stipulate to be done.

[60] But if I stipulate in my own name that a person shall do something for another, without having either before, or at the time of the agreement, any personal interest that it shall be done, this is really to stipulate for another, and such an agreement is not valid in point of law, (*dans le for exterieur*) for instance, if from mere regard for *James* I agree with a person who has a building opposite to his windows, that he shall whiten the walls in order to throw a greater light into the rooms of *James*, such an agreement will not give any right either to *James*, who is not a party to it, nor to myself, who, not having any personal and appreciable interest in the execution of this agreement, cannot claim any damages for the non-performance of it.

CASE III.

[61] It is stipulating or promising for ourselves and not for another, when we stipulate or promise for our heirs, since they are as it were the continuation of ourselves. *Hæres personam defuncti sustinet*, therefore there is no doubt we may stipulate for our heirs, *hæredi cavere concessum est. L.* 10. *ff. de pact. dot. L.* 38. *ss.* 14. *ff. de verb. obli.*

[62] Observe, that we stipulate effectually when we stipulate for our heirs in the character and capacity of our heirs; but if we stipulate for a particular person, who afterwards happens to become our heir, the stipulation is not thereby rendered valid, *L.* 17. *ss.* 4. *ff. de pact.*(*b*)

(*c*) *Julian* has carried the rigour of this principle so far as to decide, that when a debtor agreed with his creditor that he should not require the sum which was due to him either from himself or from his daughter,

(*a*) This is founded upon the *quasi* contract *negotiorum gestio*, which is where a person without previous authority or directions, takes upon himself to transact the business of another, and if that other afterwards assents, the same consequences ensue as if there had been a preceding authority.

(*b*) Si pactus sim *ne a me neve a Titio* petatur, non proderet Titio etiam si hæres extiterit, quia ex post facto id confirmari non potest.

(*c*) Hoc Julianus scribit in patre, qui pactus erat *ne a se neve a filia peteretur;* cum filia patri hæres extitisset.

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the stipulation would not be valid with respect to the daughter, although she should become the heir of the debtor. *Bruneman* is of opinion, and with reason, that this too literal decision ought not to be followed, for when I stipulate with my creditor, that he shall neither require from myself nor from my daughter the money which I owe him, it is manifest that I only stipulate for my daughter in the event of her becoming the debtor, now that can only be in the case of her becoming my heir, and consequently I am supposed to stipulate for my daughter in her future quality of my heir, although that is not expressed.

We shall be still further warranted in disallowing this decision of *Julian*, as it appears that the *Roman jurists* were not unanimous upon this question; *Celsus* appears to have thought differently in the law, 33 *ff. depact.*(a)

[63] We may not only make a valid stipulation for our heirs, but are commonly understood to have done so, although it is not expressed; *qui paciscitur sibi, hæredique suo pacisci intelligitur.*

This rule is subject to an exception: 1st, When the object of the agreement is a fact which is personal to him in whose favour it is contracted, as if I agree with a barber to come to shave me twice a week at my country-house during the vacation: 2d,(b) When it is clearly expressed by the agreement, that the party engaging obliges himself in favour of the other party to the contract, and not in favour of his heirs; but this must be clearly expressed, and although the person in whose favour I contract an engagement is named in the agreement, it does not follow that the intention was to confine to his person the right resulting therefrom. It may be understood on the contrary, that he is only named to indicate with whom the agreement was made, *plerumque persona pacto inseritur, non ut personale pactum fiat, sed ut demonstretur cum quo pactum fiat, L.* 7, § 8. *Wissembach, ad tit. ff. de pacto. no.* 7.

[64] We may also restrain our stipulation to one of our heirs, *non obstat uni tantum ex hæredibus provideri, si hæres factus fit, cæteris autem non consuli, L.* 33, *ff. de pact.* for instance, I agree with my creditor that he shall not demand his debt either from me or my daughter, and I leave that daughter and a son my heirs, the agreement will only take effect as to the daughter, as being alone comprised in it, and the creditor may demand the debt from my son, as to the part for which he is heir.

It must not, however, be always inferred from a person stipulating for a particular heir by name, that the intention of the contracting parties was to restrain the stipulation to that person; this may be very well inferred, if at the time of the agreement the person making

(a) Avus neptis nomine, quam ex filio habebat, dotem promisit, et pactus est, *ne a se, neve a filio* suo dos peteretur; si a coherede filii dos petatur, ipse quidem exceptione conventionis tuendos non erit, filius vero exceptione conventionis recte utetur; quippe heredi consuli concessum est, nec quicquam obstat, uni tantum ex heredibus providere, si heres factus sit, cæteris autem non consuli.

(b) There is an intermediate exception founded on the technical rules of the *French* law, the terms of which it is thought unnecessary to insert.

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such a stipulation knew that he would have other heirs, for in this case there does not appear any other reason for stipulating for one in particular, than to restrain the stipulation to that one; on the other hand, if the party stipulating for a particular heir, had at the time of the agreement reason to suppose that the person named would be his only heir, there is room to think that the name is only inserted in the agreement by way of mere enunciation, and not with a view to restrain the effect of the stipulation to his person. This is shown by *Papinian* in the following case:

Having married my daughter, to whom I promised a portion after my decease: under the supposition that I should not have any other children, and with the intention of instructing my brother as my heir, I stipulate in the agreement for the portion, that if my daughter should die without children, during the marriage, (in which case the whole of the portion, according to the Digest, would belong to the husband,) my brother might, as my heir, retain a moiety of the portion. Having afterwards other children, whom I leave as my heirs; and my daughter having died without children during the marriage, the question arises, whether my children may, as my heirs, retain a moiety of the portion? The reason of the doubt is, that the stipulation is made for my brother by name, from whence it might appear that it was restrained to his person, and to the case of his being my heir; but *Papinian* decides that my children are justified in retaining a moiety of the portion, by virtue of the agreement, because in stipulating for this retention on behalf of my brother, I am deemed, by using the term *my heir* to have stipulated for my heirs whoever they might be, and to have named my brother *enunciativé*, and, by way of indication, that I supposed that he would be my heir. *Pater qui dotem promisit pactus est ut post mortem suam in matrimonio sine liberis defuncta filia portio dotis apud heredem suum fratrem remaneret; ea conventio liberis a socero postea susceptis, et heredibus testamento relictis, per exceptionem doli proderit; cum inter contrahentes ita actum sit, ut heredibus consulatur, et illo tempore, quo pater alios (filios) non habuit in fratrem suum judicium supremum contulisse videatur. L.* 40, § *fin. ff. de Pact.* Therefore Cujas thinks that this decision should take place whatever heirs I might happen to leave, although they might not be my children.

It remains to observe, that when I stipulate with my creditor that he shall not demand what I owe him, the stipulation may very well be restrained to one of my heirs, so that he alone shall be discharged as to the part which will become due from him; but when I stipulate with a person that he shall give me a certain sum of money, or other divisible thing, I cannot restrain the agreement to one of my heirs so as to entitle him to the whole. *Sciendum est quod dari stipulemur, non posse per nos uni ex hæredibus adquiri, sed necesse est omnibus adquiri. L.* 137, § *fin. ff. de verb. Obl.*

[65] This is a consequence of the general principle that we cannot stipulate effectively for another, except inasmuch as he will be our heir, and in respect of his having that quality; whence it follows, that he cannot succeed to us as to the whole of the right

resulting from the agreement, but only as to the part for which he is heir; it is otherwise with respect to agreements, the object of which is indivisible, such for the most part are those which are *in faciendo*, for as in those agreements each of the heirs succeeds to the entire claim by the nature of the claim itself, which is not susceptible of parts, I may in stipulating by name for one of my heirs in particular, enable him alone to succeed to the whole of the claim, *at cum quid fieri stipulemur, unius personam recte comprehendi, D. L.* 137, § 3; for instance, if in selling an estate to a painter, there is a clause by which he obliges himself to me, and to one of my children and future heirs, to make us a picture of the circumcision of our Saviour, of such a size, and I should die before he had discharged the obligation, the child named in the agreement would succeed to the whole of the demand against the painter.

[66] In the same manner as we are deemed to stipulate for our heirs every thing which we stipulate for ourselves, we are also deemed to promise for our heirs, and to engage them to every thing which we promise, at least unless the object of our obligation is a personal act, or there is some clause to the contrary.

So, in case of divisible obligations, as we can only stipulate for a particular person, so far as he shall be our heir, we can only oblige any one of our heirs as to the part for which he is our heir; it is therefore immaterial for a debtor to comprise in an agreement a particular person, who may be one of his heirs, for he is no more bound for the debt than the other heirs not named in the agreement. *Te et Titium hæredem tuum decem daturum spondes? Titii persona supervacuè comprehensa est, sive enim solus hæres extiterit, in solidum tenebitur, sive pro parte, eodem modo quo cæteri cohæredes ejus. L.* 56. § *ff. de verb. obl.*(a)

(a) There is very little similitude between the heirs of the civil law and the representatives of deceased persons, according to the law of *England*, so far as relates to several of the subjects included in the preceding division. The divisibility or indivisibility of obligation s upon which several of the preceding distinctions are founded, and which is afterwards the immediate object of a very long discussion in *Pothier*, is a subject to which there is not in the law of *England* any thing very analogous; neither does our system supply anything to which the observations concerning a stipulation or promise for a particular heir can be directly applied; but in this as in many instances, the nature and course of the reasoning may afford instruction, which can be transferred to subjects very dissimilar to that which is the immediate object of inquiry.

In the *Roman* law, the heirs succeed to the obligations of the ancestors without any reference to the adequacy of the property. Where there were several heirs, and the nature of the subject admitted of division, there were so many distinct claims and distinct obligations; the difference between real and personal representatives, which in the law of *England* is a subject of much extent and importance, was from the nature of the system absolutely unknown.

In *England*, the term *heir* is confined to real estate, descending by operation of law to persons standing in a certain relation of consanguinity to the person deceased. The right of actions, which descends upon heirs, is confined to such covenants as have an immediate relation to the property so descended. The right of action against heirs is allowed upon all engagements by deed where the heirs are specially named to the extent of the property descended; but not upon any contract not by deed, or by which the heirs are not specially named, or beyond the extent before mentioned.

The deceased is, as to his personal property and obligations, represented by his executors or administrators. In general, the executor is a person appointed by the will

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CASE IV.

[67] With respect to any thing belonging to us, we may make a valid stipulation, not only as to ourselves and our heirs, but as to our successors in that property, under any particular title, who are comprised under the name of *ayant-cause*, which are used in contracts; and this not to stipulate for another. For instance, I may make a valid agreement that you shall never put in force either against me, or against my heirs or *ayant-cause*, the rights of substitution,(*a*) which may at some future period attach in your favour with respect to such an estate; and this agreement will be valid even with respect to those who may afterwards acquire the estate from me under a particular title.

This is indubitable with respect to those who acquire under an onerous title; for being under an obligation of warranty to them, I have an interest that you shall not give them any disturbance; which is sufficient to render what I stipulate for them a stipulation for myself: but the decision also holds good with regard to those claiming

of the deceased: the administrator, one appointed in case of intestacy by the spiritual court: but a person intermeddling without authority with the property is chargeable as executor, and is called executor of his own wrong. There are also administrators, though there is no intestacy, in several cases: as, an administration, with the will annexed, where no executor is named, or the executor declines; an administration of the goods not (*de bonis non*) administered by a deceased executor; an administration during the infancy or absence of the executor. In general, the executor or administrator succeeds to the rights acquired by contract in favour of the deceased, unless they are either incident to the real estate descended to the heir, or devised by will, or of a nature which is personal to the party himself, such as those above alluded to by *Pothier;* and to the extent of the property he receives, he is answerable for all the engagements entered into by the deceased, whether by deed or otherwise, and without being particularly named in the obligation, unless the undertaking is in its nature personal to the contracting party; but however personal a contract may be, if it is violated in the lifetime of the party personally entitled to or personally bound, I conceive it to be clear, that the right of action acquired or incurred by its violation devolves upon the representatives. Some illustrations may be stated from the *English* law, of contracts personal in their nature, and terminating with the death of the party. Such is a contract of apprenticeship, which is fiduciary, and to general purposes ceases with the death of the master, though for some particular purposes, principally arising from the law of settlement, it may be allowed to subsist so as to be productive of its effects, if in fact acted under, but not so as to induce any compulsory obligations. A bond was given for the fidelity of a clerk, with a condition to account for all money received for the obligee, his executors, &c. This was ruled to be confined to a service to the obligee, and not to accounting after his death to the executors for money received in his lifetime, and not to extend to a continuance in the service of the executor, after the death of the obligee. *Bacher* v. *Parker*, 1 *T. R.* 287. *Cooke* assigned some business in the vending of newspapers to *Calcraft*, and covenanted that he (*Cooke*) would not afterwards sell any newspapers; *Calcraft* engaged to pay to *Cooke*, and to his wife after his decease, 8*s.* a week. The wife having sued as administratrix for non-payment to her after her husband's death; *Calcraft* alleged as a defence, that she had sold newspapers contrary to the agreement. It was held, that the covenant by *Cooke* was only a restriction laid on himself, and must expire with his life. Suppose (said the Court) he had made a stranger his executor, who was a newsman, shall that executor be hindered from being a newsman? Certainly not. *Cooke* v. *Calcraft*, 3 Wils. 380.

(*a*) A right of substitution in civil law has a considerable analogy to a conditional limitation, and also a remainder in the law of *England.*

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under me by way of donation; *L.* 17. § 5. *ff. de pact.*;(a) although I am not under any warranty to them; for the interest which I have in preserving the free disposition of what belongs to me is sufficient to enable to make a valid agreement with you, that you shall give no disturbance to those to whom I think proper to dispose of it, by whatever title I may do so.

[68] In this agreement, and others of a similar nature which we make with reference to any thing which belongs to us, we may not only stipulate effectually for our successor (*ayant-cause*,) but we are even understood to do so although it is not expressed; whether the agreement be conceived in *in rem*, as when it is said, in a transaction(b) between us, that you will never put in force the pretensions which you may have to such an estate, without saying against whom; or whether it be conceived *in personam*, as if you were to say that you would never put your pretensions in force against me: in both the one case and the other I am deemed to have stipulated for my successors, even by particular title, even by donation. *Pactum conventum cum venditore sic in rem constituatur, secundum Proculi sententiam et emptori prodest. Secundum autem Sabini sententiam, etiamsi in personam conceptum est, et in emptorem valet, qui hoc esse existimat etsi per donationem successio facta sit, L.* 17. § 5. *ff. de pact.* The reason is, that in stipulating for myself I am understood to stipulate for all those who represent me. Now not only my heirs, but all those who succeed, either mediately or immediately, and by whatever title it may be, to the estate which is the object of the agreement, represent me so far as relates to that estate.

[69] If I stipulate *nominatim* for my heirs, I am not understood to stipulate for those who succeed to me under a particular title; in this case *inclusio unius fit exclusio alterius*, the expression of *my heirs*, excludes the other successors. For instance, if by a transaction with the lord of a seignory of whom I hold my estate by way of service, I agree that upon any descent of any estate, he shall not require from my heirs more than one pistole by way of relief; this agreement will not avail a third person who afterwards acquires the estate from me or my heirs under a particular title. It would be otherwise, if in the clause no mention was made of heirs, and it was said indefinitely that he should never require more than one pistole, or if after the term *heirs* there was an *et cetera.* In either of these cases, the clause would extend to all successors generally.(c)

(a) See the passage referred to in No. 68. *Pactum Conventum, &c.*

(b) Transaction in the civil law means a compromise.

(c) By the common law of *England* no action could be maintained by or against persons succeeding to any estate by grant or assignment: but by statute 38 *Hen.* 8, c. 34, the grantees of a reversion expectant on any lease are entitled to the same remedies, and subject to the same actions upon any covenants contained in such lease, as the grantors.

Several rules have been formed upon this subject, respecting covenants which do or do not run with the land; or in other words, which are transmissible to the person taking the estate, or are confined to the immediate party to the contract or his representatives; and also respecting cases where assigns are or are not expressly named in the covenant. But I conceive that there are many cases in which, though no action of covenant may be maintained for want of that privity which may be requisite, a

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§ III. *What concerns another Person than the Contracting Parties may be the Mode or Condition of an Agreement; although it cannot be the Object of it.*

[70] The giving any thing to a third person, and generally any thing which does not affect the personal interest of the party stipulating, cannot indeed be the object of the contract, but it may be *in conditione* or *in modo*.

Therefore, though I cannot in my own name make a valid stipulation that you shall make a present to *James* of *Meerman's Thesaurus*, for that is to stipulate for another; it is to stipulate a thing in which I have not any interest; I may effectually stipulate, that if in a particular time you do not make such a present, you shall pay a hundred additional pistoles(*a*) upon the purchase which you make from me: for in this case the present to *James* is only a condition: the object of the stipulation is that you shall give me a hundred pistoles, and this I stipulate for myself, and have an interest in. This agrees with what is said by *Justinian, tit. de inut. stip.* § 20. *Alteri stipulari nemo potest: plane, si quis velit hoc facere, pœnam stipulare convenit, ut nisi factum sit ut est comprehensum, committatur pœnæ stipulatio etiam ei cujus nihil interest.*

[71] What concerns the interest of a third person may also be *in modo:* that is to say, that although I cannot directly stipulate what concerns the interest of a third person, nevertheless I may alienate my own property with the charge, that the person to whom I give it shall do something which concerns the interest of a third person. For instance, though I cannot stipulate in my own name directly that you shall make a present to *James* of *Meerman's Thesaurus*, I may effectually give you a sum of money or other thing subject to the charge of making such a present.

According to the principles of the ancient *Roman* law, the effect of this condition was confined to my having a right, in default of your fulfilling the charge under which you had received the money or other thing from me, to reclaim what I had given; for, as I had only given it, and you had only received it with such a charge, there arises an implied agreement that you shall restore it unless you accomplish the charge, and I am entitled to an action for the repetition of it, called *condictio (seu repetitio) ob causam dati, causa non secuta.*

For the rest, according to the principles of this ancient law, the third person who was no party to this contract of donation, subject to the charge of your giving him something, had not any action

court of equity would interpose to restrain the infraction of an agreement respecting the property.

In the instance adduced by *Pothier* in the last sentence, I think the construction which he gives is contrary to the intent, and that if an obligation would extend to general successors, without any mention of heirs or successors (ayant cause) it would have been more suitable to apply the rule, *utile ab inutili non vitiatur*, than the rule adduced of *inclusio unius fit exclusio alterius.*

(*a*) The expression of *Pothier* in this and other instances is, "for the pot of wine of a bargain."

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against you for the recovery of it: and this was founded upon the principle that contracts have no effect except between the contracting parties: hence it follows, that no right can arise from a contract to a person who was not party to it; but according to the constitutions of the Emperors, the third person in whose favour the donor imposed a charge on his donation, has an action against the donatory to compel him to execute it. This we learn from *l.* 3. *Cod. de donat. quæ sub modo.*(a)

[72] This engagement which the donatory contracts in favour of the third person to accomplish the charge under which the donation was made, is an engagement which is not in fact properly formed by the contract of donation, as the contract cannot in itself and *propria virtute* produce an engagement in favour of a third person who was no party to it, and give him any right in the subject. The engagement is formed by natural equity, because the donatory cannot without violating such equity, and without perfidy, retain what was given to him and not accomplish the charge under which it was given, and to which he submitted in accepting the donation. Therefore, the action is called, in the law referred to, *actio utilis*, which is the name given by the *Roman* jurists to actions which have no other foundation than mere equity, *quæ contra subtilitatem juris, utilitate ita exigente, ex sola æquitate concedebantur.*

[73] Hence arises another question, whether after giving you any thing with the charge of restoring it to a third person in a certain time, or of giving him some other thing, I can release you from the charge without the intervention of such person, who was no party to the act, and who has not accepted the liberality which I exercised in his favour. Writers are divided upon this question. *Grotius de Jure Belli et Pacis*, II. IX. 19, decides it in the affirmative. This is also the opinion of *Bartolus*, of *Duaren* and many other doctors, and particularly of *Ricard*, *Traité de Substitut. p.* I. *ch.* 4. The reason upon which they ground their opinions is, that, the third person not having intervened in the donation, the engagement which the donatory contracts in his favour is contracted by a concurrence of intention in the donor and donatary only; and consequently may be dissolved by an opposite consent of the same parties, according to the principle that *nihil tam naturale est, quæque eodem modo dissolvi quo colligata sunt.* The right acquired to the third person is then according to these authors, not irrevocable, because, being formed by the sole consent of the donor and donatary without the intervention of the third person, it is subject to be destroyed by the destruction of this consent, produced by an opposite consent of the the same parties. The right only becomes irrevocable, when the death of the donor, rendering an opposite consent impossible the con-

(a) "Quoties donatio ita conficitur ut post tempus, id, quod donatum est, alii restituatur, veteris juris auctoritate rescriptum est, si is in quem liberalitatis compendium conferebatur, stipulatus non sit, placiti fide non impleta ei qui liberalitatis auctor fuit, vel hæredibus ejus condictitiæ actionis persecutionem competere. Sed cum postea benigna juris interpretatione divi principes ei, qui stipulatus non sit, utilem actionem juxta donatoris voluntatem competere admiserint."

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sent by which the right was formed is no longer susceptible of being destroyed.

The contrary opinion has also its defenders. It is that of *Fachinœus, contr.* VIII. 89., and the doctors cited by him. The reasons by which they support their opinion are, that the clause of the act of donation which contains the charge imposed upon the donatary, includes a second donation, or a fidei-commissary donation by the donor to the third person. The second donation, without the intervention of the person in whose favour it is made, receives its full perfection by the first donatary accepting the donation subject to the charge, since by that acceptance he contracts, in favour of the third person without the intervention of the latter in the act, an engagement to accomplish the charge. From this engagement arises a right, which is acquired by the third person, to demand that the charge shall be accomplished; this right is irrevocable, and it shall not be in the power of the donor to discharge the first donatary in prejudice of the right acquired by the third person; for the clause which includes the second or fidei-commissary donation, making part of an act of donation *inter vivos*, the fidei-commissary donation included therein is of the same nature, and consequently is a *donatio inter vivos*, and consequently irrevocable. It ought then to be no longer in the power of the donor to revoke it, by discharging the first donatory from the charge imposed upon him, and from the engagement which he has contracted in favour of the second. With regard to the rules of law relied upon in support of the opposite opinion, *Quæque eodem modo dissolvuntur quo colligata sunt. Quæ consensu contrahuntur consensu dissolvuntur;* these rules only apply as between the contracting parties; and not in prejudice of any right acquired by a third person. This results from the last law *ff. de pact.*, which decides that the surety who has acquired a legal exception (*un droit de fin de non recevoir*) by an agreement between the creditor and the principal debtor, cannot be deprived of that right by an opposite agreement of the same parties.(*a*)

This last sentiment is confirmed by the new ordinance of substitutions, *part* I. *art.* 11 and 12, but the question, being only decided by this ordinance in respect to future dispositions, remains entire as to every thing which had previously taken place.(*b*)

§ IV. *A Person may stipulate or promise by the Ministry of a third person; which is not stipulating or promising for another.*

[74] What has been hitherto said as to our only being able to

(*a*) Si reus postquam pactus sit *a se non peti pecuniam* (ideoque cœpit id pactum fidejussori quoque prodesse) pactus sit, *ut a se peti liceat,* an utilitas prioris pacti sublata sit fidejussori, quæsitum est. Sed verius est semel adquisitam fidejussori pacti exceptionem ulterius [ei] invito extorqueri non posse.

(*b*) I conceive it to be perfectly clear according to the law of England as a general proposition, that where a right is acquired to one person by the agreement of two others, such right cannot be afterwards defeated by the act of the parties originally contracting. In the particular case of the surety cited from the Digest, there can be no question, but that such would be the decision.

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stipulate or promise for ourselves and not for another, is to be understood as applying to contracts which we make in our own name; but we may lend our ministry to another person, for whom we may contract, stipulate, or promise; and in this case it is not we, properly speaking, who contract, but the other person who contracts by our ministry.

Thus, a tutor when he contracts in that quality, may stipulate and promise for his minor; for it is the minor who is deemed to contract, stipulate and promise for himself by the ministry of his tutor; the law giving a character to the tutor, which makes his acts be considered as those of his minor in all contracts relating to the administration of the tutelage.

It is the same with respect to a curator and every other legitimate administrator. It is the same with an attorney(a) (*procureur*) for the procuration (or power of attorney) which gives him the name of the person for whom he contracts, makes the person giving it be considered as contracting himself through the ministry of the attorney.

[75] If I contract myself in the name of a person who had not given me an authority, his ratification will in like manner make him be considered as having contracted himself by my ministry; for the ratification is equivalent to an authority, *rati habitio mandato comparatur.*

If he does not ratify the agreement it is void as to him, but if I undertake for him (*si je me suis fait fort pour lui,*) if I promise that he shall ratify it, this promise is an agreement which I make in my own name with the person with whom I contract, and by which I am in my own name obliged to obtain such ratification; and in default of my obtaining it, I am obliged to answer for his damages;(b) that is to say, for every thing which he loses or is disappointed of gaining for want of ratification.

[76] In order to consider a person as contracting by the ministry of his tutor, curator, administrator, &c., it is requisite that the contract should not exceed the power of these persons. For instance, if a tutor, in his quality of tutor had, without the decree of a judge, sold an estate of his minor, the minor would not be deemed to have contracted by his ministry, and no obligation would ensue against him; the sale of estates being an act which is beyond the authority of a tutor.

So for a person to be considered as contracting by the ministry of his agent, the agent must have acted within the limits of his commission. If he has exceeded them, the person in whose name he contracts is not considered as having been contracted by his ministry, unless he afterwards ratifies the contract.

[77] It is evident that a person exceeds the bounds of his authority, if the thing which he does differs from that which he is authorised to do, although it may be more advantageous. If I

(a) The word *Attorney* is here used in its most general sense, as a person acting in the place of another, and not in its more usual sense, of a professional person.

(b) The *French* writers always use the phrase of *damages* and *interests.*

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authorise a man to buy a particular piece of land at a limited price, and he purchases another more valuable at an inferior price, assuming to do so on my behalf; this, although more advantageous, will not be obligatory upon me, and I should not be considered as having made the purchase through his ministry, unless I was afterwards willing to ratify it. *L.* 5. § 2. *ff. mandat.*(a)

[78] An agent also exceeds the limits of his commission when he does the act appointed, but upon terms less advantageous; as if being authorised by me to purchase at ten pounds, he engages for twenty, I should not be deemed to have contracted by his ministry, nor obliged by the contract, because he had exceeded the limits of his authority.

Nevertheless, if he offered to put me in the same situation which I should have been in if he had kept within his authority, as by indemnifying me from the difference, I should be obliged to ratify it. *L.* 3. § 2. *& L.* 4. *ff. mandat.*(b) It is clear that a person does not exceed the limits of his commission, by contracting upon terms more advantageous than were prescribed. *L.* 5. *ff.* s. 5. *dict. tit.*(c)

[79] But the contract made by my agent in my name would be obligatory upon me if he did not exceed the power with which he was ostensibly invested; and I could not avail myself of having given him any secret instructions which he had not pursued. His deviation from these instructions might give me a right of action against himself, but could not exonerate me in respect of the third person with whom he had contracted conformably to his apparent authority; otherwise no one could be safe in contracting with the agent of an absent person.(d)

(a) Si mandavero tibi *ut domum Sejanam centum emeres*, tuque Titianam emeris longe majoris pretii, centum tamen, aut etiam minoris; non videris implesse mandatum.

(b) Quod si pretium statui tuque pluris emisti, quidam negaverunt, te mandati habere actionem, etiamsi paratus esses, id quod excedit remittere. Namque iniquum est, non esse mihi cum illo actionem, si nolit, illi vero si velit mecum esse, *l.* 4.. Sed Proculus recte eum, usque ad pretium statutum acturum existimat; quæ sententia sane benignior est.

(c) *Melior* autem *causa* mandantis fieri potest, si cum tibi mandassem *ut stichum decem emeres*, tu eum minoris emeris, vel tantidem ut aliud quicquam servo accederet: utroque enim casu aut non ultra pretium, aut intra pretium fecisti.

(d) This subject is accurately considered in the case of Fenn and Harrison, 3 *T. R.* 757. Where Mr. Justice Ashurst, adverting to the difference between general and particular agents, said, that if a person keeping a livery stable directs his servant not to warrant a horse, and the servant, notwithstanding, does warrant him, the master is liable, because the servant was acting within the general scope of his authority, and the public cannot be supposed cognisant of any private conversation between the master and the servant; but if the owner of a horse were to send a stranger to a fair, with express directions to the latter not to warrant him, and the latter acted contrary to the orders, the purchaser could only have recourse to the person who actually sold the horse; and the owner would not be liable on the warranty, because the servant was not acting within the scope of his employment. And Mr. Justice Buller said, that he agreed that there was a wide distinction between general and particular agents. If a person be appointed a general agent, as in the case of a factor for a merchant residing abroad, the principal is bound by his acts. But an agent constituted so for a particular purpose, and under a limited and circumscribed power, cannot bind the principal by any act in which he exceeds his authority; for that would be to say, that one man could bind another against his consent.

The question in the immediate case was, whether a person employed to get cash for a bill, bound his principal by saying that he would indemnify a third person if he en-

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[80] For the same reason, although the authority should be revoked, the person who had given it would be liable to another contracting with the agent without notice of the revocation.

[81] Likewise, although the commission terminates by the death of the person giving it, and there appears a repugnancy in supposing me to contract by the ministry of another, who after my death contracts in my name; yet if he contracts in my name after my death, but before it could be known at the place where the contract is made, such contract shall oblige my successor as if I had actually contracted by the ministry of this agent.(a)

For this and the preceding decision we may deduce an argument from its being legally established, that a payment made to an agent is valid though after death of a principal, or the revocation of the authority, if the death or revocation were not known. *L.* 12. § 2. and *L.* 32. *ff. de solut.*(b)

[82] We contract through the ministry of another, not only when a person merely lends us his ministry by contracting in our name and not in his own, as when we contract by the ministry of a tutor, curator, agent, &c., in their quality as such. We are also deemed to contract by the ministry of another, though he contracts himself in his own name, when he contracts in relation to the affairs which we have committed to his management; for we are supposed to have adopted and approved, before hand, of all the contracts which he may make respecting the affairs committed to him; as if we had contracted ourselves, and are held to have acceded to all the obligations resulting therefrom.

Upon this principle is founded the *actio exercitoria*, which those who have contracted with the master of a ship for matters relative to the conduct of such ship, have against the proprietor who has appointed the master.

Upon the same principle is founded the *actio institoria*, which those who have contracted with the manager of a commercial concern, or a manufactory, have against the employer (*le commettant;*) and the

dorsed the bill, whilst it appeared that the authority was accompanied with an express declaration that the persons giving it would not endorse the bill, the majority of the Court of King's Bench were of opinion that they were not bound; but when it was found, upon further inquiry, that that was not the fact, and the direction was only general to get the bill discounted, the same judges held, that as the defendants had authorised the party employed to get the bill discounted without restraining his authority as to the mode of doing it, they were bound by his acts. 4 *T. R.* 177.

(a) I do not think this decision would be admitted by the courts in *England.* If the contract is enforced, it must be either as the act of the party deceased, or of his executor. The first supposition is absurd, and the other imputes to the executor an assent which he has not given; and which if he does give, induces a personal obligation against himself.

(b) Sed et si quis mandaverit ut Titio solvam, deinde vetuerit cum accipere, solvam, liberabor; sed si sciero, non liberabor.

Si servus peculiari nomine crediderit, eique debitor cum ignoraret dominum mortuum esse ante aditam hereditatem solverit, liberabitur. Idem juris erit et si manumisso servo debitor pecuniam solverit, cum ignoraret ei peculium concessum non esse. Neque intererit vivo an mortuo domino numerata sit; nam hoc quoque casu debitor liberabitur; sicut is qui jussus est a creditore pecuniam Titio solvere quamvis creditor mortuus fuerit, nihilominus recte Titio solvit, si modo ignoraverit creditorem mortuum esse.

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actio utilis institoria, which relates to contracts made with a manager of any other kind. These actions will be treated of *infra, part* 2, *ch.* 6. § 8.(*a*)

Observe, there is a difference between these managers and tutors, curators, syndics, &c. When these managers contract, they contract themselves and enter into a personal obligation. Their employers are only regarded as accessory to their contracts, and to the obligations resulting from them; whereas the others do not contract themselves, but only afford their ministry in contracting, and therefore do not oblige themselves but only those who contract by their ministry.

[83] We are also deemed to contract by the ministry of our partners, when they contract or are regarded as contracting for the affairs of the partnership; for, by entering into the partnership with them, and permitting them to transact the business of it, we are deemed to have adopted and approved beforehand of all the contracts which they may make for the affairs of the partnership, as if we had contracted jointly with them, and we have acceded beforehand to all the consequent obligations.

A partner is deemed to contract for the affairs of the partnership whenever he adds to his signiture the words *and Company*, although afterwards the contract does not turn to the benefit of the partnership. For instance, if he borrow a sum of money, for which he gives a note with the words *and Company* added to his signature, although he has employed the money in his private affairs, or lost it at play; he is still deemed to have contracted for the affairs of the partnership, and consequently obliges his partners as having borrowed the money jointly with him, and as having contracted by his ministry. For his partners must take the consequence of having entered into their engagements with such a person: but those who contract with him ought not to be deceived and suffer by his want of fidelity.

The signature and company does not however oblige my partner, if it appears by the very nature of the contract that it does not concern the affairs of the partnership; as if I put that signature to the lease belonging to myself and not to the company.

When the partner does not sign *and Company*, he is deemed to have only contracted for his own private affairs, and does not bind his partners, unless the creditor shows by other proof that he contracted in the name of the partnership, and that the contract actually related to the partnership affairs. (*b*)

[84] Where a wife has a community of property with her husband, she is deemed, as to her share of the common property, to contract in conjunction with him, and by his ministry, in all the contracts made by him during the community. (*c*)

(*a*) In *England*, the contracts here referred to may be treated as the immediate acts of the parties really concerned; and the employment of the person making the engagement is, in such case, merely matter of proof. The rule *qui facit per alium facit per se* is carried through.

(*b*) The last of these alone is requisite according to the law of *England*.

(*c*) The community of property between husband and wife, to which the allusions in this treatise are very frequent, is not analogous to the course of the *English law*.

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ARTICLE VI.

Of the Effect of Contracts.

[85] Contracts produce obligations. The general effect of obligations will be considered infra, ch. 2. At present we shall only take notice of a principle peculiar to contracts and all other agreements. This principle is, that a contract has no effect except with regard to things which are the object of the agreement, and to the contracting parties. *Animadvertendum est ne conventio, in alia re facta aut cum aliâ personâ in alia re aliâve personâ noceat. L.* 27. § 4. *ff. de pact.*

[86] The reason of the first part of the principle is evident. The agreement, being formed by the intention of the contracting parties, can have no effect except with regard to what those parties intended and had in view.

We may adduce as an example of this first part of the principle, stipulations of separate property; when upon a marriage contract I bring a certain sum into the community, and stipulate that the remainder of my effects shall continue to be my own separate property; this agreement will not have the effect of excluding from the community the successions which may fall during marriage, because it had no other object than to exclude the residue of what belonged to me at the time of the marriage.(*a*) See other examples in l. 27. § 7, l. 47. § I. l. 56. *ff. de pact. et passim.*(*b*)

[87] The reason of the second part of the principle is not less evident; the obligation which arises from agreements and the rights which results from them, being formed by the consent and concurrence of intention of the parties, they cannot oblige or give a right to a third person, whose intention did not concur in forming the agreement.

The 25th law, code *de pact.* furnishes an instance of this second part

(*a*) It must be observed, that this illustration is independent of any question of construction, and supposes the intention to be ascertained. I think it is probable that upon the construction of an agreement, that a wife should have the separate disposal of her effects beyond a given portion, our courts would presume that the intention expressed in general terms was to comprise future effects.

(*b*) L. 27, § 7. Si generaliter mihi hominem debeas, et pasciscar *ne Stichum petam*, Stichum quidem pretendo, pacti exceptio mihi opponetur, alium autem hominem si petam, recte agam.

L. 47, § I. Lucius Titius Gaium Seium mensularium, cum quo rationem implicitam habebat propter accepta et data debitorem, sibi constituit, et ab eo epistolam accepit in hæc verba: *Ex ratione mensæ, quam mecum habuisti in hunc diem ex contractibus pluribus remanserunt apud me ad mensam meam trecenta octoginta sex et usuræ quæ competerint; summam aureorum quam apud me tacitam habes, refundam tibi si quod instrumentum ante emissum* (id est scriptum) *cujuscunque summæ ex quacunque causa apud me remansit, vacuum et pro cancellato habebitur.* Quæsitum est cum Lucius Titius ante hoc chirographum Seio nummulario mandaverat, uti patrono ejus trecenta redderet, an propter illa verba epistolæ, quibus *omnes cautiones ex quocunque contractu vacuæ et pro cancellato ut haberentur;* cautum est neque ipse neque filii ejus eo nomine conveniri possunt? Respondi si tantum ratio accepti atque impensi esset computata, cæteras obligationes manere in suâ causâ.

L. 56. Si convenerit *ne dominus à colono quid peteret* et justa causa conventionis fuit: nihilominus colonus à domino petere potest.

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of our principle. I agree with my co-heir that he shall take upon himself the whole of a certain debt due from the succession; this agreement shall not hinder the creditors from demanding the debt of me with respect to the part for which I am here; for the agreement can have no effect in relation to the creditor who was no party to it. *Debitorum pactionibus creditorum petitio nec tolli nec minui potest. Dict. loc.* We might adduce an infinity of other examples. It is no contradiction to this principle, that a partner may bind his associates; a factor his principal; a husband his wife; for, as we have seen in the preceding article these persons are considered as having themselves contracted by the ministry of the associate, the agent, or the husband.

[88] There might appear to be a stronger ground for opposing to our principle what is observed with respect to contracts *d'attermoiement*, by which a debtor, who declares himself incapable to satisfy his debts, makes an agreement with three-fourths of his creditors (the computation of which is made *non pronumero personarum, sed pro cumulo debiti.*) The agreement, which contains terms of composition and a remission to the debtor, may be opposed to the other creditors, although they are no parties to the contract; and the debtor by a regular process may obtain a declaration that the agreement shall extend to them, without prejudice to their hypothecations and privileges. Vide the ordinance of 1673, and l. 7. § 19. l. 8. l. 9. l. 10. *ff. de pact.*(*a*)

This is, however, not properly an exception to our principle, for it is not the agreement made with three-fourth of the creditors which *per se et propria virtute*, obliges the other creditors, who are not parties, to concur in the release. The agreement only serves to apprise the judge, that it is the common interest of the creditors, that it should be executed by all of them; the presumption being that so great a number would not concur in granting the release, unless it was for the common interest to do so, in order to obtain payment of the remainder;

(*a*) L. 7. § 19. Hodie tamen ita demum pactio hujusmodi creditoribus obest, si convenerint in unum, et communi consensu declaraverint, quota parte debiti contenti sint; si vero dissentiant, tunc prætoris partes necessariæ sunt, qui decreto suo sequetur majores partes voluntatem.

L. 8. Majorum esse partem, pro modo debiti, non pro numero personarum placuit. Quod si equales sint in cumulo debiti, tunc plurium numerus creditorem præferendus est. In numero autem pari creditorum, autoriatem ejus sequetur prætor qui dignitate inter eos præcellit; sin autem omnia undique in unam æqualitatem concurrant, humanior sententia a prætore eligenda est.

L. 9. Si plures sint qui eandem actionem habent, unius loco habenter. Ut puta plures sunt rei stipulandi, vel plures argentarii, quorum nomina simul facta sunt unius loco numerabuntur quia unum debitum est. Et cum tutores pupilli creditoris plures convenissent: unius loco numerantur: quia unius pupilli nomine convenerant. Necnon et unus tutor plurium pupillorum nomine unum debitum prætendentium, si convenerit, placuit unius loco esse; nam difficile est, *ut unos homo duorum vices sustineat;* nam neciis qui plures actiones habet adversus eum, qui (unam) actionem habet pulrium loco accipitur.

§ 1. Cumulum debiti et at plures summas referemus, si uni forte minutæ summæ centum aureorum bebeantur, alii vero una summa aureorum quinquaginta; nam in hunc casum spectabimus summas plures; quia illæ excedunt in unam summan coadunitæ.

L. 10. relates to the manner of summoning the creditors.

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and as it is not just that the rigour of some creditors should prejudice the common interest of the whole, the judge decrees them to accede to the agreement, and to grant the release and the terms which it contains. But it is not the agreement, to which they are no parties, that induces this obligation; they are only obliged in consequence of the principles of equity; it being repugnant to equity, that by rigour contrary to their own interest, they should prevent the general benefit of the creditors.(a)

[89] Our principle, that agreements have no effect, except as between the contracting parties, is in some degree subject to an exception in the case of sureties; for the agreements, which take place between the creditors and the principal debtor, enure to the benefit of the sureties, although no parties to them, and give them the same right against the creditor with the principal debtor. The reason whereof will be shown infra, part ii. ch. 6.

[90] It is also in some degree subject to another exception with regard to substitution contained in an act of donation inter vivos; for, upon the event on which they depend taking place, the praties called to the subtitution, although no parties to the act, may demand from the donatary charged with the substitution the property which is included in it, as we have shown in the preceding title, § 3.

ARTICLE VII.

Rules for the Interpretation of Agreements. (b)

[91] 1st Rule. We ought to examine what was the common intention of the contracting parties rather than the grammatical sense of the terms.

In conventionibus contrahentium voluntas potius quam verba spectari placuit, l. 219 *ff. de verb. signif.*

There is an example of this rule in the law cited.(c)

The following is another: You rent from me a small apartment in a house, the remainder of which is occupied by myself. I make you a

(a) There is perhaps more subtilty than solidity in the distinction here taken. The provision referred to is a matter of positive law; creating an exception from a general principle, and though founded upon motives of equity, not necessarily resulting from mere equity without the aid of positive institution.

In respect to its immediate effect, the provision is analogous to the *English* law of a bankrupt being discharged by a certificate assented to by four-fifths of his creditors, in number and value; but the analogy does not extend so far as to have any application to the general principle at present under discussion, for a certificate has not any similarity to an agreement.

(b) Upon this subject *Pothier* only gives the general rules and illustrations thereof, which are afterwards stated. I have considered the importance of it as demanding a much more extensive discussion. The chapter of *Vattel* on the interpretation of treaties contains a very valuable exposition, which is equally applicable to the case of contracts. The chapter on the interpretation of agreements in Mr. *Powell's* Treatise on Contracts, the 5th chapter of *Shepherd's* Touchstone, and the 6th chapter b. I. of the treatise of equity, with Mr. *Fonblanque's* notes, also contain much useful information upon this subject. See Appendix, No. V.

(c) Cum igitur ea lege fundum vectigalem municipes locaverint, ut *ad hæredam* ejus, qui suscepit pertineret; jus heredum ad legatarium quoque transferri potuit.

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new lease in these terms: "I let A. B. my house for so many years, at the same rent which is mentioned in the former lease. Will you be allowed to insist that I have let you the whole house? No; for although the terms *my house*, in their grammatical sense, signify the whole house, and not, a mere apartment, it is manifest that our intention was only to renew the lease of the apartment, which you held under me, and that intention, of which there can be no doubt, ought to prevail over the terms of the lease."(*a*)

[92] Rule 2. When a clause is capable of two significations, it should be understood in that which will have some operation rather than that in which it will have none. *Quoties in stipulationibus ambigua oratio est, commodissimum est id accipi quo res de qua agitur in tuto sit, l.* 80. *de verb. obl.*(*b*) As if in a partition between *Peter* and *Paul*, it is agreed that *Peter* shall have a way over *his land;* this in grammatical construction is applicable to his own land; but as in that sense it would be wholly nugatory, it must be construed to mean the land of *Paul.*(*c*)

(*a*) A case very similar to that supposed by Pothier occurred before the Court of King's Bench. A person demised amongst other premises a certain yard, under which there was a cellar, in the occupation of another tenant, and from the nature of the premises the cellar was ruled not to pass. *Doe* d. *Freedland* v. *Burt*, 1 *T. R.* 701.

Upon a life insurance, the person was warranted to be in good health, and it appeared that he was subject to the gout. Lord Mansfield upon this being stated as an objection to the policy, said, the imperfection of language is such that we have not words for every different idea, and the real intention of the parties must be found out by the subject matter. Such a warranty can never mean that a man has not the seeds of disorder. We are all born with the seeds of mortality in us. A man subject to the gout is a life capable of being insured, if he has no sickness to make it an unequal contract. *Park* 439.

A broker for a certain commission engaged to indemnify his principal from all loss occasioned by a resale of goods; the contract was held to be satisfied if the principal had a fair opportunity of disposing of them to a profit; and not to continue in force at all events till the goods should be resold, be the time when it might. *Curry* v. *Edson*, 3 *T. R.* 52. 5. It was agreed in a lease that the landlord's son should have an option of taking the premises when he came of age, it was decided that that option should be made in a reasonable time, not that one party should have an option to rescind the agreement at any time, whilst the other should be perpetually bound by it. *Doe* v. *Smith*, 2 *T. R.* 436.

But regard must be had to the observations, in Appendix, No. V. respecting the bounds within which the application of this rule ought to be confined.

(*b*) Verba aliquod operari debent. Verba cum effectu sunt interpretanda. *Bacon.*

(*c*) Lord *Mansfield*, in the construction of a lease containing an ambiguous expression, said, "the first sense of the words used makes every thing consistent and effectual, the second sense destroys one half of the lease as repugnant and contradictory to the other; there ought to be no doubt therefore in which sense the words should be understood; a strained construction should not be made to overturn the lawful intent of the parties." *Wright* v. *Cartwright*, 1 *Bur.* 282. The objection which these observations were intended to repel, is of a nature so merely technical that none but a professional lawyer would comprehend the drift of it; and, as his lordship observed, the lease was so intelligible to every unlearned eye, that nobody doubted of the title for 60 years.

In case one construction of an instrument is conformable to the power and interest of a party, and another repugnant to it, or an act of forfeiture, the former will be preferred. Thus where a person having a power to lease in possession, but not in reversion, made a lease for so many years, *from* the day of the date, the word *from* being construed inclusively would support the lease and be conformable to his power, and exclusively would make it void. Lord *Mansfield* observed, in the same spirit as the preceding case, "One construction is to support the deeds of parties, give effect to their intention, and protect property; the other is a subtilty to overturn property and

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[93] **3d Rule. Where the terms of a contract are capable of two significations we ought to understand them in the sense which is most agreeable to the nature of the contract. For instance, if it is said, that I let you an estate for nine years for the sum of 30*l.* *these***

defeat the intention of the parties, without answering any one good end or purpose whatsoever. *From* may in vulgar use, and even in the strictest propriety of language, mean either inclusive or exclusive; the parties necessarily understood it in the sense which made their deed effectual; the courts of justice are to construe the words of parties so as to make their deeds effectual, and not to destroy them, more especially where the words themselves abstractedly taken will admit of either meaning. *Pugh* v. *Duke of Leeds*, *Cowp.* 714.* And where the question was whether a writing amounted to a lease, or only to an agreement for a lease, it was ruled to be only an agreement; because if it was held to be a lease a forfeiture would be incurred, whereas that would be contrary to the intention of the parties, who cautiously guarded against it, by the insertion of a covenant that a license should be obtatned from the lord. 2 *T. R.* 744.

Lord *Coke* has laid it down as a general rule, that, "where words may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law; the intendment which standeth with law, shall be taken." *Co. Lit.* 42, *a.* 6, 183, *a.* Upon a question whether the expressions of an agreement did or did not amount to an usurious contract, Lord *Kenyon* said, "Without being inclined to strain the words either to involve the party in the crime of usury, or to exempt him from it, I am bound to read the whole, as any other person would do." His opinion was, that the contract was usurious. Mr. Justice *Buller*, without adverting to the general principle, drew an opposite conclusion, which was also the conclusion of the other judges. Mr. Justice *Ashhurst* said, if the court can by any reasonable construction consider this not to be usury they are bound to do so: and I think we are not necessarily to put the construction on this agreement that would make it usurious. Mr. Justice *Grose*, "If we can put a legal construction on this agreement we are bound to do so, then the question is, whether it will not fairly bear this construction. I think it will.

The following passage in the Treatise of Equity, with Mr. *Fonblanque's* note thereon, are materially applicable to the present subject.

"Where words, if taken literally, are likely to bear none or a very absurd signification, to avoid such an inconvenience we may deviate from the received sense of them: for the agreement of the parties is the only thing which the law regards in contracts: and it is a known rule, that a man's act shall not be void if it may be good to any intent; for every conveyance is made for some purpose, so that for necessity, *ne res pereat*, where there is no other way of satisfying the will and the intent, the words may be taken in the most extensive and improper sense, *B.* I. *c.* 6, § 18. If an absurdity would result from strictly pursuing the expression of the instrument, courts of law will, equally with courts of equity, set about to discover the means by which the real intent will receive effect, notwithstanding the untechnical language in which such intent is expressed. For though an interpretation or construction ought not to be admitted against the letter of a deed, yet in some cases a strained and secondary interpretation may be admitted; and if the letter will bear a second and less genuine interpretation, it may be admitted *ne detur absurdum;* but where the intention of the parties is not clear and plain, but in *equilibrio*, in such a case a secondary and strained construction shall not be made, but the words shall receive their more natural and proper construction." *Per Bridgman*, C. J., Earl of *Bath's* case, *Carter's Rep.* 108, 109. This distinction is agreeable to the rule, *benignæ faciendæ interpretationes cartarum propter simplicitatem laicorum ut res magis valeat quam pereat Co. Lit.* 36, 138, *a.*, which rule is allowed to control the application of every other rule of construction, *nam legis constructio non facit injuriam.* But though a deed may in some cases be expounded contrary to the strict import of its letter, yet this liberty of construction does not extend so as to make a deed, but merely to avoid some extremity which might ensue from a literal and strict construction of it. *Check* v. *Lisle*, *Rep. temp. Finch.* 101. The same general doctrines are stated by Lord Ch. *Willes* as follows: whenever it is necessary

* The particular application of these principles has been strongly combated, as being repugnant to a series of express authorities. That circumstance, however, cannot affect the propriety of the observations, as stating the nature and spirit of a general rule.

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terms, the sum of 30*l.* are not to be understood of one single sum, but of an annual rent to that amount, it being the nature of a lease that the price shall consist of an annual rent. It would be otherwise if it was evident that 30*l.* was the value of the farm, as if the former leases had been for two or three pounds a year. If it is said that I let you an estate for 30*l.* a year and repairs, these repairs are to be understood to be those which belong to the tenant according to the nature of the contract. (*a*)

[94] 4th Rule. Any thing, which may appear ambiguous in the terms of a contract, may be explained by the common use of those terms in the country where it is made. *Semper in stipulationibus & in cœteris contractibus id sequimur quod actum est, aut si non appareat quod actum ist, erit consequens, ut id sequimur quod in regione in qua actum est frequentatur, l.* 34. *ff. de reg. juris.*

According to this rule, if I agree with a person at a certain sum *per annum* to cultivate my vineyard, without expressing the quantity of labour to be employed, we are supposed to mean that there shall be such a quantity as agrees with the custom of the couutry. (*b*)

[95] 5th Rule. Usage is of so much authority in the interpretation of agreements, that a contract is understood to contain the customary clauses although they are not expressed; *in contractibus tacite veniunt ea quæ sunt moris et consuetudinis.*

For instance, in a contract for the lease of a house, though it is not expressed that the rent shall be paid half-yearly at the two usual feasts, and that the tenant shall do such repairs as are usually done by tenants; these clauses are understood.

to give an opinion upon the doubtful words of a deed, the first thing we ought to inquire into is, what was the intention of the parties. If the intent be as doubtful as the words, it will be of no assistance at all; but if the intent of the parties be plain and clear, we ought if possible to put such a construction on the doubtful words of a deed as will best answer the intention of the parties, and reject that construction which manifestly tends to overturn and destroy it. I admit, that though the intent of the parties be never so clear, it cannot take place contrary to the rules of law; nor can we put words in a deed which are not there, nor put a construction on the words of a deed directly contrary to the plain sense of them. But where the intent is plain and manifest, and the words doubtful and obscure; it is the duty of the judges to endeavour to find out such a meaning in the words as will best answer the intent of the parties. *Parkhurst* v. *Smith*, *Willes*, 332.

(*a*) There is an old case upon this point, where a lease of a manor in which there were divers copyholds, had a condition that the lessee should not *molest*, *vex*, or put out any copyholder upon pain of forfeiture, and the lessee entered into a cow-house, which was part of the premises, and beat a copyholder. It was held this was no breach of the condition, not being a molestation respecting his copyhold tenement. *Penn.* v. *Glover*, *Cro. Eliz.* 421. There is an authority still more ancient, that if I grant a man common out of *all* my manor, he may not by virtue of such a grant have common for any beasts but such as are commonable, or take it in my garden, but only in commonable places. 9 *H.* 6, 35. *Fitz. Common* 61. 12 *H.* 3, 2. If a vessel is warranted to depart with convoy, it implies convoy for the voyage according to the nature of the trade, and not such as might be designed to separate from the ship in a minute or two. *Lilly* v. *Ewer*, *Doug.* 72.

(*b*) A pack of wool in *Yorkshire* and in *Wiltshire* may perhaps differ in weight, and the word would be construed to apply to the one weight or to the other, according to the place where it was made. But if a particular measure is positively established by law, with a prohibition of using any other, as is the case with respect to corn, that measure will be understood notwithstanding any local usage to the contrary. Master, &c. of *St. Cross* v. Lord *Howard de Walden*, 6 *T. R.* 343.

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So in a contract of sale, although the clause that the seller shall be bound to warrant and defend the purchaser from evictions, is not expressed, it will be understood.(*a*)

[96] 6th Rule. We ought to interpret one clause by the others contained in the same act, whether they precede or follow it. (*b*)

The law 126, *ff. de verb. signif.*, furnishes an example of this rule. It was expressed in a contract of sale by one clause, that the estate should be sold *uti optimus maximus*, that is to say *free from incumbrances;* by a second clause it was said that the vendor should not be understood to warrant the estate except as to be his own acts; this second clause serves for the interpretation of the first, and restrains the generality of the terms to this sense, that the vendor by the first clause shall not be understood to promise and assure any thing more than that he had not himself incumbered the estate, but not to undertake that it was free from all incumbrances charged by his predecessor, and of which he had no knowledge. (*c*)

(*a*) Any thing, which is of the nature of the contract is of course understood without being expressed; and where there is a special local custom (as for a tenant who has left a farm to reap the crop which he sowed. *Wigglesworth* v. *Dullison*, Doug. 201,) that may be of the same effect as if it was included in the general nature of the contract. Also where a contract is merely preparatory to another, the insertion of customary clauses in such other will be implied as forming part of the first. But where a contract is perfect and complete, I do not conceive that any clauses not falling within the above principle, would be implied however usual they might be; but the usual mode would be a very proper ground for determining the sense of an ambiguous expression. Of which *vi.* an instance in n. to No. [96] post.

(*b*) Ex antecedentibus et consequentibus est optima interpretatio, nam turpis est pars quæ cum suo toto non convenit. *Plowd.* 160.

(*c*) Si cum fundum tibi darem, legam ita dixi uti optimus maximusque esset, et adjeci, *jus fundi deterius factum non esse per dominum, præstabitur*, amplius eo præstabitur nihil: etiam si prior pars qua scriptum est, *uti optimus maximus-que sit*, liberum esse significat, eoque si posterior pars adjecta non esset, liberum præstare deberem; tamen inferiore parte satis me liberatum puto, quod ad jura attinet ne quid aliud præstare debeam, quam jus fundi per dominum deterius factum non esse. A recent case before the Court of Common Pleas introduced a question very nearly similar to that in the preceding law, and involving the discussion of the same general question; but the instance was less strong, as the restrictive terms might admit a grammatical connection with the general covenant. The seller of an estate warranted it against himself and his heirs, and covenanted that he, *notwithstanding any thing by him done to the contrary*, was seized in fee, AND THAT he had good right to convey, that he would set out a way, that the purchaser should enjoy without interruption from the seller *or any person claiming under him*, that the seller and all persons claiming under him would make further assurances. It was contended that the covenant, that the *seller had a good right to convey* was general and not restrained to his own acts; but the contrary was decided. A considerable part of the judgment turned upon the general nature of the subject, (a very important ground of construction,) and the critical examination of the words. In the course of his opinion, and apparently as a principal ground of it, Lord Ch. Justice *Eldon* said, The intent of the parties to the covenant is to be collected from the warranty, from the other covenants, and from the *prima facie* nature of a purchase of a freehold estate.—Mr. Justice *Buller*. In the construction of agreements and covenants the intention of the parties is principally to be attended to. In a conveyance of this sort, the usage of the profession also deserves considerable attention. We do not do justice to the parties, unless we look to the whole deed, and infer from that their real intention.—Mr. Justice *Heath*. "The purchaser might have entertained suspicions of the title, and might therefore have required a general covenant. But in order to ascertain whether he did so, we must examine the other parts of the deed, and the other parts of the deed negative that idea. The second clause is consequential to the first." *Brownrig* v. *Wright*, 2 *B. & P.* 13.—This case is in several respects very instructive, and furnishes an illustration

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[97] 7th Rule. **In case of doubt, a clause ought to be interpreted against the person who stipulates any thing, and in discharge of the person who contracts the obligation.**

In stipulationibus cum quæritur qui actum sit, verba contra stipulatorem interpretanda sunt. L. 38. § 18. ff. de verb. obl.

Fere secundum promissorem interpretamur. L. 99. ff. dict tit.

For instance if it was said in a lease that the tenant should deliver to the landlord at a certain time a certain quantity of corn by way of yearly rent, without saying where the delivery should be made, it should be understood to be at the house of the tenant; for that sense is most in favour of the person who contracts the obligation. If the landlord intends that the corn shall be delivered at his own granary, he should take care to have it expressed, (*a*)

[98] 8th Rule. **However general the terms may be in which an**

of many of the other rules of interpretation which are considered in the text. In a prior case cited and relied upon in the preceding, two lessees of a colliery, "*jointly and severally covenanted in the manner following, that is to say.*" After some particular covenants there was a covenant on the part of the lessor, and a proviso admitting a particular mode accounting with the lessor, *it was agreed that certain moneys should be accounted for by the said G. E. and J. W.* It was ruled that this last was a joint and several covenant. Mr. Justice *Ashhurst* said, The first words must, according to the general rules of construction, extend to all the subsequent covenants on the part of the lessees throughout the deed, unless there was something in the nature of the subject to restrain them—Mr. Justice *Buller.* "It is immaterial in what part of a deed any covenant is inserted; for in construing a deed, we must take the whole deed into consideration, in order to discover the meaning of the parties. D. of *Northumberland* v. *Errington*, 5 *T. R.* 522. This principle also extends in some degree to several different instruments which are executed for one common purpose, and which are considered as the several parts of one assurance.

(*a*) The rule of the *English* law is directly the reverse, and the words of an engagement are to be construed most strongly against the person engaging.

These two opposite rules have probably both resulted from the same maxim, that *verba ambigua fortius accipiuntur contra proferentem.* By the *Roman* law, the words of the stipulation were necessarily those of the person to whom the promise was made; the person promising, only assented to the question proposed by the person stipulating. There is nothing similar to this in the covenants and engagements used in *England;* but an indenture is the deed of both parties and the words it contains are taken as the words of both, except as to those parts which are in their nature only applicable to one of them.

In the case of *Brownrig* v. *Wright*, cited in the last note, Lord *Eldon* said, it is certainly true that the words of a covenant are to be taken most strongly against the covenantor; but that must be qualified by the observation, that a due regard must be paid to the intention of the parties as collected from the whole context of the instrument.

Lord *Bacon*, in commenting upon the general maxim, says, "it is to be noted that this is the last rule to be resorted to, and is never to be relied upon but where all other rules of exposition of words fail, and if any other rule come in place, this giveth place;" and adds, "that it is a point worthy to be observed generally of the rules of law, that when they encounter and cross one another, that he understood which the law holds to be worthier and to be preferred; and it is in this particular very notable to consider, that this being a rule of some strictness and rigour, doth not as it were its office but in the absence of other rules which are of some equity and humanity."

In modern determinations, words, whether used in contracts or on other occasions, seem not so much to be construed upon the ground of an interpretation favourable or adverse as they formerly were. Rules of rigid and favourable construction, were formerly resorted to as a primary source of interpretation. The more reasonable practice is to give to language its true effect, according to the intention of the speaker or writer, as inferred from the whole expressions, and the nature of the occasion to which it is applied.

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agreement is conceived, it only comprises those things respecting which it appears, that the contracting parties proposed to contract and not others which they never thought of. *Iniquum est perimi pacto id de quo non cogitatum est. L.* 9 § *fin. ff. de trancac.*

According to this rule, if we had agreed upon a compromise concerning our respective pretensions, and had fixed upon a sum which you engaged to pay me, whereby we should be mutually discharged from the demand of each other; this compromise could not prejudice the rights which I had against you, and of which I could not have any knowledge at the time of making it. *His tantum transactio obest de quibus actum probatur; non porrigitur ad ea quorum actiones competere postea compertum est. d. l.* 9. § *fin.*

For instance, if a legatee compounds with the heir for all his rights arising from the testament of the deceased, he will not be excluded from his demand of another legacy given by a codicil, which does not appear till afterwards. *L.* 3. § 1. *l.* 12, *ff. de trans.*(*a*)

[99] 9th Rule. When the object of the agreement is universally to include every thing of a given nature (*une universalité des choses*) the general description will comprise all particular articles, although they may not have been in the knowledge of the parties. We may state as an example of this rule an engagement which I make with you to abandon my share in the succession for a certain sum. This agreement includes every thing which makes part of the succession whether known or not; our intention was to contract for the whole. Therefore it is decided that I cannot object to the agreement, under pretence that a considerable property has been found to belong to the succession of which we had not any knowledge. *Sub prætextu specierum post repertarum, generali transactione finita rescindi prohibent jura, l.* 29. *cod. de trans.*(*b*)

(*a*) Cum transactio propter fidei commissum facta esset et postea codieilli reperti sunt; quæro an quanto minus ex transactione consecuta mater defunctafuerit quam pro parte sua est, in ex fideis commissi causa consequi debeat? Respondit debere. *l.* 12. Non est ferendus qui generaliter in his quæ testamento sibi relicta sunt, transegeret; si postea causetur de eo solo cogitasse quod prima parte testamenti, ac non etiam quod posteriore legatum sit. Si tamen postea codicilli proferuntur; non improbe mihi dicturus videtur, de eo duntaxat se cogitasse, quo illarum tubularum, quas tunc noverat, scriptura continetur.

To this principle may be referred the decisions before adverted to, of disturbing a copyholder, and of granting a right of common; and the common covenants that a person shall enjoy an estate without the hinderance or interruption of any person whatever, which are held to comprise only hinderances and interruptions by persons bearing lawful titles, and not the mere trespasses of a stranger, or the public acts of the government.

Also where a person had a paternal estate which was under a settlement in *Limerick*, being entitled to dispose of the ultimate reversion on failure of issue, and had other estates in *Mayho* and *Roscommon*, and made a voluntary settlement of his estates in *Mayho* and *Roscommon*, and the deeds, after a very particular description of his lands in these countries, added, *and all his other estates in Ireland*, the limitations of the later sentiment being for the most part inapplicable to his paternal estate. It was said, "it is very common to put in a sweeping clause, and the use and object of it in general, is to guard against any accidental omission, but in such cases, it is meant to refer to estates or things of the same nature and description with those which have been already mentioned." *Moore* v. *Margreth*, Cowp. 9.

(*b*) Where it appeared to be the intention of a lady to settle all her property previous to marriage, and deeds were made settling her property in A. B. C., and else-

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It is however implied that the property has not been purposely concealed from me by my co-heir, for that is a fraud that gives me a right to invalidate the agreement; wherefore it is said in the same law, *Error circa proprietatem rei apud alium extra personas transigentium, tempore transactionis constitutæ nihil potest nocere.*(*a*)

The rule being only founded upon the presumption that the parties who treat upon the universality of a subject, intend to treat upon all the particulars which compose it, whether known to them or not, is subject to an exception. When it appears on the contrary, that the parties only intended to treat of that universality of which they had a knowledge, as if they treated with reference to an inventory; for instance, if by an instrument between my co-heir and myself it is said, that I give up to him, for a certain sum, my share of the moveables *comprised in the inventory*, or *according to the inventory*, it is clear in this case, that our intention was to treat of what was comprised in the inventory, and not of what was omitted and had not come to our knowledge.(*b*)

where, it was decided that a remote reversion was included, though not expressly mentioned or particularly thought of, as the general words were sufficient to include it, and the intention of the parties was to settle all. *Freeman* v. *Duke of Chandos*, *Cowp.* 360.

(*a*) In the case of *Corking* v. *Pratt*, 1 *Ves.* 400. An agreement by a daughter to receive from her mother a certain sum, in lieu of her share of the father's estate, was set aside, the value of the share appearing to be considerably more. The master of the Rolls said, "the question is what was in view on each side; the daughter clearly did not intend to take less than what by law she was entitled to; though what that was did not clearly appear to her, but then she thought what was stipulated for her was her full share. Though there is no very great evidence of undue influence, yet the Court will always look with a jealous eye upon a transaction between a parent and a child, and interpose if any undue advantage is taken. The mother plainly knew more than the daughter, and only says in general she believes, she conceals nothing from her. But there is another foundation to interpose; *viz.* that it appeared the personal estate amounted to more, and the party suffering will not be permitted here to avail himself of that want of knowledge, nor indeed in the case of a trifle, but some bounds must be set to it." I have thought it proper to insert this case here, although it has not any immediate relation to the rules of interpretation, there being no dispute about the construction of the agreement. It does not appear whether the Court proceeded upon each of the grounds of undue influence and inferior value as separately sufficient or merely upon their combination. In respect to the former there does not appear a sufficient foundation in fact, and in respect to the latter, it was evidently the intention of the parties to make an agreement in some degree aleatory, by which the gains or loss upon the specific account should be transferred from the daughter to the mother, the former having a certain definite compensation. The accidental benefit of the result (taking the case to be free from the imputation of fraud) ought not to vary the effect of the agreement, as it was a probable contingency in the contemplation of the parties. In case the succession had fallen short, would the agreement have been set aside in favour of the mother?

(*b*) The author of the treaties of equity observes *b.* I. c. vi. s. 16. That the matter which he is about is always supposed to be in the mind of the speaker, although his words seemed to be of a larger extent as general words in a release of all demands, or the like shall be restrained by the particular occasion, and shall be intended only of all demands concerning the thing released. Mr. *Fonblanque*, in his commentary on this passage says. "Where the purpose is distinctly recited in the instrument, inconvenience will rarely result from the general words of the contract, &c. receiving such construction will confine their operation to the declared purpose of the parties. Sensus verborum ex causa dicentis accipiendus est, et sermones accipendi sunt secundum subjectam materiem, 4 *Rep.* 136. But where the purpose or object of the instrument is not distinctly recited, but is to be collected from the substance of the instrument great caution is necessary in allowing the general expression to be controlled,

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[100] 10 Rule. When a case is expressed in a contract on account of any doubt which there may be whether the engagement resulting from the contract would extend to such case, the parties are not thereby understood to restrain the extent which the engagement has of right, in respect to all cases not expressed.

Quæ dubitationis tollendæ causa, contractibus inseruntur jus commune non lædunt, l. 81 *ff. de reg. juris l.* 56, *mandat.*

See an example of this rule in the said law 56, from which it is taken.(*a*)

The following is another. If it is said in a contract of marriage, that the intended husband and wife shall be in community of property, which community shall comprise the moveable property that may fall to either of them; this clause does not prevent all other things from forming a part of the community which would do so of common right; being only inserted on account of the doubt which the parties from want of legal information might entertain, whether moveables would form a part of the common property.(*b*)

upon the notion of its exceeding the particular purpose supposed to have been in the contemplation of the parties. In *Thorpe* v. *Thorpe*, 1 *Raym.* 235, the Court thus stated the distinction. "Where there are only general words in a release, they shall be taken most strongly against the releasor, as where a release is made to A. and B. of all actions; it releases all several actions which the releasor has against them as well as all joint actions, so if any executor releases all actions, it will extend to all actions that he hath in both rights, 2 *Roll. Abr.* 409, but where there is a particular recital in a deed, and the general words follow, the general words shall be qualified by the special words. See also Lord *Arlington* v. *Meyrick*, 2 *Sanders*, 414. But though this distinction may be generally true, yet there certainly are cases in which it has not been strictly regarded, exclusive of those cases in which, if the general words had been allowed to prevail in their whole extent, an absurdity or manifest injustice would have ensued. See *Porter* v. *Phillips*, *Palm.* 218, *Cro. Jac.* 623. *Tisdale* v. *Essex*, *Hob.* 34, *& Hoe's case*, 5 *Rep.* 70. *b.* in which case some material distinctions are stated. Several cases, in which the above distinction has not been allowed to take prevail, are cited by Lord *Bacon*, in his maxims as illustrative of the rule. "Verba generalia restringunter ad habilitatem vei vel personæ."

(*a*) Qui mutuum pecuniam dari mandavit, omisso reo promittendi, et pignoribus non distractis, eligi protest quod uti liceat si literis exprimatur *distractis quoque pignoribus* ad eum creditor redire potest.

(*b*) To add an illustration from the *English* law. A clause in a lease that the tenant shall not cut any oaks or elms, will not authorise his committing waste by cutting any other timber. In the annuity act, (and acts of parliament have in this respect the same construction with private instruments,) there is a declaration that it shall not extend to annuities given by will or marriage settlement. It was argued that this would be nugatory if the general expressions of the act were only to be confined to pecuniary transactions. But Lord *Kenyon* said, it seemed to him that the anxiety of some members induced them to insert the last clause, after the act was drawn, but he did not think that the first section could ever have been extended to cases mentioned in the last, if they had not been excepted. *Crespigny* v. *Winternoon*, 4 *T. R.* 790.

But it frequently becomes a material question, whether particular clauses or expressions are introduced from the abundance of caution, in order to obviate a particular doubt which might possibly arise, or are to be considered as a complete explanation of the intention of the parties respecting the subject, and it is not an unusual or unimportant argument, that if the whole of any class of objects was intended to be comprised, the mention of particular individuals was unnecessary and absurd. The fair principle appears to be, that, whatever is incidental to the nature of the transaction shall prevail, notwithstanding a particular stipulation of what that incident would generally comprise, but any arguments of mere general implication shall not prevail when the matter is defined by particular expressions. This principle is certainly open to some exceptions, and may be attended with some degree of difficulty in the appli-

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[101] 11th Rule. In contracts as well as in testaments, a clause conceived in the plural may be frequently distributed into several particular clauses.

For instance, if by a contract of donation which I make to *Peter* and *Paul* my domestics, of a certain estate, it is said, "*Subject to the charge that after their death without children, it shall be restored to the donor or his family.*" This clause conceived in the plural should be distributed into these two singular clauses. *Subject to the charge that upon the death of Peter without children his share* shall be restored, &c. and in like manner subject to the charge that upon the death of *Paul, &c. Arg. l.* 78. *l.* 7. *ff. ad. sen. Trebell.*(a)

[102] 12th Rule. What is at the end of a phrase commonly refers to the whole phrase, and not only to what immediately precedes it, provided it agrees in gender and number with the whole phrase.(b)

For instance, if in the contract for sale of a farm, it is said to be sold with all the corn, small grains, fruits and wine *that have* been got this year, the terms *that* HAVE *been got this year* refer to the whole phrase and not only to the wine, and consequently the old corn is not less excepted than the old wine; it would be otherwise if it had been said, all the wine that *has* been got this year, for the expression is in the singular and only refers to the wine and not to the rest of the phrase, with which it does not agree in number.

ARTICLE VIII.

Of the Oath which the Contracting Parties sometimes add to their Agreements.

[103] The contracting parties sometimes make use of an oath,

cation, but questions of construction depend very much upon the particular circumstances of the immediate case, and one case will furnish less immediate analogy for the exposition of another, than in almost any other department of the law. The several particular rules which have been mentioned are rather illustrations of the great and leading principle, that the intention of the parties as expressed or implied is the law of construction. They point out the reasonable grounds of inference and may be more properly considered as the aids and instruments of ratiocination than as the authorative rules of law.

(a) Gaio Seio ex semisse, Titia ex quadrante et aliis ex reliquis portionibus heredibus institutis, ita cavit *Fidei autem vestræ mando Gai Seie et Lucia Titia uti post obitum vestrum reddatis restituatis Titio et Sempronio semissem patrimonii et portionis ejus quam vobis dedi.* Quæsitum est cum utrique adierint hereditatem et postea Gaius Seius defunctus sit, Lucia Titia hærede institutâ an hæc Lucia Titia partem dimidiam semissis, quam rogatus erat Gaius Seius restituere protinus debeat; an vero post suam demum mortem, universum fidei-commissum tam ex suâ persona quem ex Gaii Seii datum restituere debeat? Respondit Luciam Titiam statim teneri, ut partem dimidam semissis ex persona Seii restituat.

(b) A rule nearly according with the above is laid down by Mr. Justice *Heath*, in the case of *Brownrig* v. *Wright*, referred to *supra*. No. 96. That where any sentence contains distinct covenants, and there are words of restriction either in the prefatory or concluding part, those words must be extended to every part of the sentence, unless the intention of the parties appears to require an opposite construction.

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for the further assurance of their accomplishing the engagements which they contract.

The oath in question is a religious act, by which a person declares that he submits to the vengeance of God; or, that, he renounces his mercy, if he does not accomplish his promise which results from these forms. "So may God preserve, or help me, I wish that God may punish me if I fail in my word, &c."

[104] The pretensions of the churchmen formerly rendered the use of an oath very common in all contracts; they pretended that the cognizance of all contests respecting the execution of contracts which were confirmed by an oath belonged to the ecclesiastical judge because an oath being an act of religion, and the refusal to execute an obligation confirmed by an oath, being a violation of the sanctity of the oath, the interests of religion were concerned in contests respecting the execution of these engagements; and therefore ought to bring these under the authority of the ecclesiastical judge.

On this account the notaries who are churchmen, in order to secure to the ecclesiastical judge the recognizance of the contracts which they passed, did not fail to insert in the contracts, that the parties had made oath not to contravene any clause of the contract, but would execute it faithfully.

The ecclesiastics have for a long time been obliged to abandon these pretensions to which ignorance gave rise, and the use of oaths in contracts of private individuals is discontinued; neverthelesss as it sometimes happens, that persons bind themselves by an oath for the accomplishment of their promises, it will not be improper cursorily to examine the effect of such an oath.

[105] An oath of this kind has little or no effect in point of law, (*dans le for exterieur*) for the obligation is valid in itself or it is not: if it is valid in itself the oath is superfluous, since without its intervention, the creditor in whose favour the obligation is contracted has an action against the debtor for the performance of it, the oath adds nothing to this action and gives no more right to the creditor than he would otherwise have had.

When the obligation is not valid in point of law, and is one to which it has been deemed proper to deny a right of action, the oath is likewise of no legal effect, for the right of action is notwithstanding still denied.

For instance, a tavern keeper is equally barred from enforcing against persons resident in the same town, a demand for expenses incurred at his tavern; a gamester is precluded from enforcing the payment of money lost at play, although in either case the debtor has entered into an obligation upon oath to pay. The reason is that the oath being an accessory of the engagement, the law which holds the engagement to be a nullity, must consequently hold the oath to be so likewise according to the rule, *quum principalis causa non consistit, nec ea quidem quæ sequntur locum habent. L.* 129. § 1. *ff. de reg. Juris.*

Besides, it ought not to depend upon private individuals by inter-

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posing an oath to render those engagements valid, which the law has deemed it proper to reprove, and thus to elude the authority of the law.

[106] According to the *Roman* law, an oath made by one of the parties to perform the agreement, had no effect when the agreement itself was void, on account of any illegality in the object of it, *l.* 7. § 16. *ff. de pact.*,(*a*) or on account of any violence. *Sacr. pub. cod. si adv. vend.*(*b*) But when the agreement was only subject to be impeached on account of the minority of one of the contracting parties, the oath of the minor precluded his impeaching it. This was decided by *Alexander Severus*, in the case of the sale of an estate made by a minor; who had engaged to the purchaser not to contravene the contract; *nec perfidæ*, answers the emperor, *nec perjurii me auctorem tibi futurum sperare debuisti*, *l.* 1. *Cod si. adv. vend.*"

Antonin in treating upon this law, teaches us that the decision of it is not adopted in *France*. The reason is that the laws for the succour of minors would be always eluded, it being easy for those who contract with them to interpose an oath. The custom of *Brittany* decides formally, art. 471, that the contracts of minors are not rendered valid by their oath.

It is principally in point of conscience, (*dans le for de la conscience*,) that an oath by which a person engages himself to the accomplishment of his promise can have any effect. It may render the obligation more strict, and the party contravening it more culpable; for a person who after having engaged with an oath voluntarily fails in the execution of his engagement, adds to the infidelity of every wilful contravention of an engagement, the crime of perjury.

[107] The oath is attended with this effect, at least *in foro conscientiæ*, when the engagement is valid in itself. But supposing the engagement to be void even *in foro conscientiæ*, is the oath for the performance of it void likewise? we shall examine this by running over the different vices by which engagements may be rendered null.

If the engagment is a nullity in respect of the object of it; for instance, if a person engages to give a thing which cannot be the object of a contract, (*qui est hors du commerce*), or to do something which is impossible, it is evident that the oath cannot be obligatory, or have any effect.

It is also universally agreed, that an oath to accomplish an illicit engagement is not obligatory; that it is sinful to take the oath, and doubly so to accomplish it. In this case *scelus est fides.*

This decision applies not only when the thing is illicit by the law of nature, but even when it is so by positive law, for we are obliged

(*a*) Quotiens pactum a jure communi remotum est, servari hoc non oportet: nec legari: nec jusjurandum de hoc adductum, ne quis agat, servandum, Marcellus lib. secundo Digestorum scribit.

(*b*) Sacramenta puberum sponte facta super contractibus rerum suarum non retractandis inviolabiliter custodiantur. Per vim autem, vel per justum metum extorta etiam a majoribus (maxime ne querimoniam maleficiorum commissorum faciant,) nullius esse momenti jubemus.

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in point of conscience to pay obedience to the law, and taking an oath cannot dispense with this obligation.

When an agreement is void on account of error, the oath which accompanies it is so likewise; for the agreement being absolutely void, there is no engagement which the oath can confirm.

[108] There is some difficulty with respect to an engagement void on account of force. *Grotius* agrees, that a promise extorted by unjust violence does not oblige the person making it to its performance, because even admitting such a promise might produce an obligation, which would give the person in whose favour it was made a right against me, he would be bound on his part to acquit me from it in reparation of his unjust violence, but when such promise is confirmed by an oath, although the oath is not less extorted than the promise, *Grotius* thinks that I am in conscience bound to perform it, because if, for the reasons already mentioned, I am not so bound to the person in whose favour it is made, I am obliged to God, to whom I am deemed to have made a promise by the oath which I have taken, and therefore if I do not accomplish this promise, having it in my power to do so, I am guilty of perjury. *Grot. lib.* 2 *A*. 3. *n*. 14.

The same author observes, that the heir of the person taking such an oath, is not subject to the obligation which results from it, because my heir who succeeds to my civil character, and represents me as a member of society, succeeds to my obligations contracted in favour of other persons in the commerce of civil society, but does not succeed to my obligations towards God. *Ibid.*

No. 17.

[109] St. *Thomas*, 11. 2. 989. *art*. 7, also thinks that a promise though accompanied by an oath, was not obligatory in regard to the person who had extorted it by an unjust violence, but that it was so in the eye of God and in point of conscience; that this obligation was not founded upon any vow or promise, but upon the respect due to the sacred name of God, which is violated when we do not accomplish what we promise thereby.

He however allows the qualification, that after I have satisfied my oath by paying what I had been forced to promise with an oath, I may proceed at law for the repetition of it, if I can prove the violence which has been offered to me.

This qualification is attended with difficulty; for can a mere form of payment (*dicis causa*), with the intention of reclaiming what is so paid, be called a payment and a satisfaction of an oath? Therefore *Grotius* refutes this sentiment, *probare non possum* (says he) *quod a quibusdam traditum est eum qui predoni quicquam pro miserit, momentanea solutione posse defungi; ita ut liceat quod solvit recuperare; verba enim juramenti quoad Deum simplicissime, et cum effectu sunt accipienda.* D. cap. 13. n. 15.

[110] The popes have also decided, that a promise, accompanied by an oath, although extorted by an unjust violence, was obligatory towards God: this is the decision of *Alexander* III. upon ch. 8 *extra de jurejur.* *Celestin.* III. ch. 15. *d. l.* says, that the Popes, when they give absolution for the violation of an oath, do not

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intend to encourage those who have taken such oaths to violate them, but only to show an indulgence for such violation, which ought to be treated with the tenderness due to venial transgressions, and not punished with the rigour which belongs to mortal sins. *Non eis dicatur ut juramenta non servent, sed si non ea attenderint non ob hoc tanquam pro mortali causa puniendi.*

[111] *Puffendorf* IV. 2. 8. thinks, on the contrary, that a promise extorted by violence, though confirmed by an oath, is not more obligatory before God than before man. His reasons are, 1st. That such an oath, when it is addressed to the person to whom I promise any thing, is only a solemn and religious confirmation of the promise made to that person; but it is no vow; it does not contain a particular promise made to God to accomplish the promise, nor consequently any obligation towards God. 2d. Even suppose the oath should be considered as a kind of vow made to God to accomplish the promise, the vow would not be obligatory before God: for upon the same principle that promises made to men are not obligatory, except inasmuch as they are accepted by those to whom they are made, so vows made to God are not obligatory before him, except so far as it may be supposed that he agrees to and accepts them. Now it cannot be supposed to be agreeable to God, and to be assented to by him, that an innocent person should strip himself of his property for the benefit of a ruffian, who has extorted his promise by an unjust violence.

With regard to the respect which is due to the sacred name of God, and upon which St. *Thomas* founds the obligation of fulfilling what is promised with an oath, it cannot indeed be disputed that it is a violation of the respect due to the sacred name of God, and a heinous offence to promise with an oath, even under the impression of force, what we have no intention to perform, and that this is to make his name subservient to a lie; and this *Puffendorf* admits. But after the oath is taken, whether the person had at the time a real intention of fulfilling his promise, in which case there would be nothing sinful, or whether he had not, in which case there would be a sin in taking the oath, the violation of this oath does not appear to *Puffendorf* to be criminal, or contrary to the duties of religion. Repentance, for having taken the oath, without an intention of performing it, may appear to require that we should give what we have promised: and in the case in which there was an intention of giving it, the fear of giving offence to weak minds might also be an inducement for the performance of the promise; but in this case, *Puffendorf* thinks it would be better to apply what was promised to charitable purposes, than to give it to the person who extorted the promise to whom it is not due, and who might be induced by our giving it to him to persist in his criminality.

[112] It remains to say a word concerning fraud. There is no doubt but that a promise, although attested by an oath, which has been surprised from me by the fraud of the person to whom I make it, is not obligatory in respect of him; for his fraud obliges him to release me from it, as much as in the case of violence. But does

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the oath oblige me in the sight of God to fulfil my promise? according to the system of *Puffendorf*, who thinks that no obligation arises from an oath extorted by violence: there should be none in this case. In adopting the sentiment of *Grotius*, and others, who think that the oath extorted by violence is obligatory, we must not always conclude, that that of a person surprised by the fraud of the party, to whom the promise is made, is so likewise; for when it is manifest that the oath had no other foundation, than the false supposition of some fact without which the promise would not have been made, *Grotius*, *ibid.* *n.* 4, agrees that the oath has no effect even before God, *ibid.* *n.* 4. The reason of the difference is, that a person who makes a promise, though under constraint, promises absolutely, and without making his promise depend upon any condition; whereas the other in some degree intends that his promise shall depend upon the truth of what he supposes to be the fact, and which supposition is the foundation of it.

SECTION II.

Of other Causes of Obligations.

§ I. *Of Quasi Contracts.*

[113] A Quasi contract is the act of a person permitted by the law which obliges him in favour of another, without any agreement intervening between them.(*a*)

For instance, the heir's acceptance of the succession is a quasi contract in favour of the legatees; for it is a fact permitted by the law, which obliges the heir to the payment of the legacies without the intervention of any agreement between him and the legatees.

Another instance of a quasi contract is, when a person pays by mistake what he does not owe. The payment is a fact which obliges the other party to restore what he has received, although there cannot be said to be any agreement for such restitution.

The undertaking the business of a person who is absent, without a previous direction, is also a quasi contract, which obliges us to render an account of it, and obliges the absent person in certain cases to indemnify us from the expenses.

There are many other instances of quasi contracts which we pass over in silence.(*b*)

[114] In contracts, it is the consent of the contracting par-

(*a*) *Vinnius* observes, that the particle *quasi* is a mark of similitude and impropriety; the impropriety is denoted when the obligation is said to be formed without agreement, the similitude, when it is shown to proceed from a lawful act, and which distinguishes it from offences or injuries.

(*b*) We have no term in the *English* law strictly corresponding with that of quasi contracts in the civil law: many of the cases falling within the definition of that term, may be ranked under the denomination of implied contracts, but that denomination is applicable rather to the evidence than to the nature or quality of the obligation, as in judgment of law an actual promise is deemed to have taken place, and the consequences are the same as if such promise had been declared by the most express and positive language.

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ties which produces the obligation; in quasi contracts there is not any consent. The law alone, or natural equity, produces the obligation, by rendering obligatory the fact from which it results. Therefore these facts are called quasi contracts; because without being contracts, and being in their nature still further from injuries, they produce obligations in the same manner as actual contracts.

[115] All persons, even infants, and persons destitute of reason, who are consequently incapable of consent, may be obliged by the quasi contract, which results from the act of another, and may also oblige others in their favour; for it is not consent which forms these obligations; they are contracted by the act of another, without any act on our part. The use of reason is indeed required in the person whose act forms a quasi contract, but it is not required in the person by whom, or in whose favour the obligations which result from it are contracted.(a)

For instance if a person undertakes the business of an infant, or a lunatic, this is a quasi contract, which obliges the infant or the lunatic to account to the person undertaking his affairs, for what he has beneficially expended, and reciprocally obliges that person to give an account of his transactions.

It is the same with respect to women who are under the power of their husbands; they may in this way be obliged towards others, or oblige others towards them, without being authorized by their husbands; for the law which prohibits their obliging themselves or doing any thing independently of their husbands, and without their authority, only annuls what is done without such authority, and not the obligations which are formed without any act on their part.(b)

(a) Infant is here meant in its popular sense, and not in the technical sense of the *English* law, as synonymous to minor.

(b) The cases in the *English* law, where a person is obliged by the act of another, without his own assent, are very few: wherever such assent forms a material ingredient, it induces all the consequences, and must have the requisites of a contract, and operates as such.

Minors are in general only obliged by contracts for necessaries, and I am not aware that any person supplying them with necessaries, without any act on their part, amounting in its nature to a contract, can induce a personal obligation against them; but the doctrine of the civil law upon this subject is highly reasonable, and probably would be in some degree adopted. For instance, it had been decided, that a person was liable to the expenses incurred by burying his wife in his absence. *Jenkins* v. *Tucker*, 1 *H. B.* 90, and such a liability ought in justice not less to attach upon a minor than upon an adult, it being an act which would be obligatory upon him if accompanied by an actual contract.

The case of infants so young as to be incapable not only of legal but of moral assent, and of persons wholly destitute of reason from infirmity, is one on which I am not prepared to offer any confident opinion, but I rather think that where the mind is incapable of assent, no obligation in the nature of a contract can be produced.

As to married women, it is perfectly clear, that they cannot be subject to any greater obligation from quasi contracts, than from actual contracts. The case of having any lien upon the property, in respect of which the obligation may be occasioned, is very different from an obligation attached to, and compulsory on the person.

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§ II. *Of Injuries and Negligencies.*

[116] Injuries (*delicta*) are the third cause which produces oblitions, and *quasi delicta* (or negligence) the fourth.

Injury (*delictum*) is when a person by fraud or malignity causes any damage or wrong to another.

Quasi delicta, are facts by which a person causes damages to another, without malignity, but by some inexcusable imprudence.

[117] These differ from quasi contracts, inasmuch as the fact, which is the subject of a quasi contract, is permitted by the law, whereas the fact which forms a *delictum* or quasi *delictum* is something reprehensible.

[118] It result from this definition of *delicta* and quasi *delicta*, that none but persons who have the use of reason are capable of them; for infants and persons destitute of reason are not capable of either malignity or imprudence.

Therefore if an infant or a madman does something which causes an injury, no obligation results therefrom against them, the fact is, neither a *delictum* or *quasi delictum*, as it does not include either malignity or imprudence.

We cannot precisely define the age at which persons have the use of reason and are consequently capable of malignity, some having it much sooner than others. The fact ought to be estimated by circumstances; but as soon as a person has the use of reason, and we can perceive reflection and malignity in the fact by which he has caused an injury to another, such fact is a *delictum*, and the person who commits it, although he has not attained the age of puberty, contracts an obligation to repair it; hence arises the maxim *neminem in delictis ætas excusat;* imprudence is more easily excused in young persons.(*a*)

[119] Although drunkenness causes a person to lose his reason, he is nevertheless liable for the reparation of the injury which he has caused when in that state; for it is his own fault voluntarily to become so, and herein a drunken person differs from infants and madmen, to whom no fault can be imputed.(*b*)

[120] There is no doubt but that a person interdicted for prodigality is obliged to repair the injury occasioned by his misconduct or negligence (*delicta* or *quasi delicta*,) although he cannot

(*a*) This distinction is in many respects similar to that between actions of trespass and actions on the case in the *English* law.

(*b*) In the *English* law, minority is no defence to actions founded upon torts, but the observations of *Pothier*, as to infants, are necessarily deduced from natural reason. The effect of those observations is not that malignity or imprudence is excused, but that it cannot exist.

There are some cases in the *English* law, where a party may elect to treat a case as a breach of contract or as an injury; but if the act is in its nature founded upon contract, and in that respect no obligation arises on account of minority, the stating it as an injury will not make any difference.

This was decided in an action brought by a person against a minor for riding a horse which had been lent in an improper manner; in consequence of which the horse was injured. *Jennings* v. *Randal*, 8 *T. R.* 335.

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incur any obligation by his contracts. The reason of the difference is evident; those with whom he contracts must impute the consequence to themselves; the interdiction being public ought consequently to be known. But nothing can be imputed to those who have sustained an injury; they ought not to suffer from the interdiction, neither ought it to procure an indemnity for injuries. This reason serves also to decide, that a person under an interdiction may be condemned to pecuniary damages, for the injuries which he commits, contrary to the doctrine of the gloss, *ad. l. si quis* 7 *cod. unde vi.;* of Bartolus *ad. l. is qui bonis*, 6. *ff. de verb obl.* and some other authors, who say, *potest quidem se obligare ad pœnam corporalem, sed non ad pœnam pecuniariam qui res suas alienare non potest:* for the interdiction is only established to prevent his contracting imprudently, and not to give him impunity for his injuries.

Every thing which has been said of persons under an interdiction is applicable to minors who have attained the age of puberty or approach towards it, except that faults of imprudence, which are called quasi *delicta*, are more easily excused in those persons than in those interdicted for prodigality.

[121] Not only is the person who has committed the injury, or been guilty of the negligence, obliged to repair the damages which he has occasioned; those who have any person under their authority such as fathers, mothers, tutors, preceptors, are subject to this obligation, in respect of the acts of those who are under them when committed in their presence, and generally when they could prevent such acts, and have not done so; but if they could not prevent it then they are not liable, *nullum crimen patitur is, qui non prohibet, quum prohibere non potest l.* 109. *ff. de reg. jur.;* even when the act is committed in their sight, and with their knowledge, *culpa curet qui scit sed prohibere non potest. l.* 20. *ff. d. l.*

Masters are also answerable for the injury occasioned by the wrongs and negligence of their servants; they are even so when they have no power to prevent them, provided such wrongs or injuries are committed in the exercise of the functions in which the servants are employed by their masters, although in the master's absence. This has been established, to render masters careful in the choice of whom they employ.

With regard to their wrongs, or neglect not committed in these functions the masters are not responsible.

[122] Observe, that those who are liable to the reparation of an injury committed by another person, in which they have not concurred, are obliged in a different manner from the authors of the injury; the latter are liable to be imprisoned in default of payment of the reparation awarded, when the injury is of a nature to warrant such imprisonment; the former can only be compelled to make satisfaction by the seizure of their effects, and not by the imprisonment of their persons.

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§ III. *Of the Law.*

[123] Natural law is at least the mediate cause of every obligation; for if contracts and injuries produce any obligation, it is because natural law requires every person to perform his promises, and to repair the injuries which he has wrongfully occasioned.

It is the same law which induces an obligation from those acts, which fall within the description of quasi contracts.

There are some obligations of which either natural or positive law is the immediate and only cause; for instance, it is not by virtue of any contract that a person whose circumstances will admit incurs an obligation to provide for his father, or mother, being in a state of indigence; the obligation is wholly the effect of the law.

The obligation which a woman contracts to restore the money that she has borrowed without the consent of her husband, when that money has turned out to her benefit, is not founded upon any contract, or quasi contract for the contract of loan which has been made by her without the authority of her husband, being a nullity, cannot in itself produce any obligation, *quod nullum est, nullum producit effectum.* Her obligation then is only founded upon the principle of natural law, which does not allow one person to enrich himself at the expense of another, *neminem æquum est cum alterius damno locupletari, L.* 206: *ff. de Reg. Jur.*

The obligation of the owner of a house in the city of *Orleans* to sell his neighbour a common interest in the wall which separates the two houses, when the neighbour wishes to build against it, has no other cause than the municipal law of the place, which makes such a disposition.(*a*)

And many other examples might be adduced, where natural and positive law is the only cause of obligation. These obligations produce an action called *condictio ex lege.*

SECTION III.

§ III. *Of the Persons between whom an Obligation may subsist.*

[124] To constitute an obligation, it is necessary that there should be at least two persons, the person who contracts the obligation, and the person in whose favour it is contracted. The latter is called the debtor, the former the creditor.(*b*)

[125] But though it is of the essence of an obligation that there should be two persons, the one a creditor, and the other a debtor, the obligation is not destroyed by the death of either; for the

(*a*) The obligation of the owner of a house in *London*, to join in the expense of a party wall, is an instance of the same kind.

(*b*) In *England*, these terms are not commonly applied to any other cases, than those in which there is a pecuniary debt.

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person is held to survive in his heirs, who succeed to all his rights and obligations.(*a*)

[126] Even where the creditor or debtor does not leave any heir, they are considered as having survived themselves on the vacant succession; for the vacant succession of a deceased person represents him, assumes the place of his person, and succeeds to all his rights and obligations, *hæreditas personæ defuncti vicem sustinet*, and this fictitious person, whether of the creditor or the debtor, is sufficient to sustain the obligation after their death.

An obligation may not only continue to subsist in the fictitious person of a vacant possession. There are even certain obligations which may be contracted by or in favour of such fictitious person.

For instance, when a curator, appointed for a vacant succession, administers the effects of such succession, he contracts in favour of the fictitious person of the vacant possession, an obligation to render an account, and *vice versa*, the vacant succession, contracts an obligation for reimbursing his expenses.

Many other instances might be stated of obligations contracted by a vacant succession; such as that contracted in favour of the minister who inters the deceased for the payment of funeral dues; *vice versa*, if any one steals effects belonging to the vacant succession, or commits any injury to it, there arises an obligation in favour of the succession.(*b*)

[127] Corporations and communities are a kind of civil persons, who may contract obligations, and in whose favour they may be contracted.

[128] It is clear that madmen, idiots, and infants, are not capable of contracting obligations, which result from injuries or neglects, nor contracting by themseves those obligations which result from contracts, since they are incapable of consent, without which there can be neither agreement, nor injury, nor negligence. But they are capable of contracting all those obligations which may be contracted, without the immediate act of the person obliged. For instance, if any person beneficially undertakes the conduct of their affairs, they contract an obligation to reimburse him his expenses, as has been already shown, *n.* 115. They also contract all the obligations which their trustees contract for them, and in their names, *n.* 74.

According to the *Roman* law no obligation could be contracted between a father and a child who was under his dominion, except *ex certis causis, puta, ex causa castrensis peculii*. The reason was, that the child so under dominion could not have any thing of his own, and whatever he acquired, he acquired to his father. The paternal authority not having that effect in the law of France. There is nothing

(*a*) The cases in which an obligation does or does not cease by the death of either party, will be referred to, *post p.* 3, *l.* 7.

(*b*) Though the *English* law does not recognize the fictitious persons of a vacant succession, it has recourse to another fiction for effecting similar purposes, by making letters of administration, when granted, relate to the time of the death, and by considering the administrator as invested with that character at a time when he was not so in point of fact.

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to prevent a father from contracting obligations in favour of his children, or children from contracting them in favour of their father.(*a*)

SECTION IV.

Of what may be the Object and Matter of Obligations.

[129] There cannot be an obligation without something being due, which is the object and matter of it.

§ I. *General Statement of what may be the Object of Obligations.*

[130] The object of an obligation may be either A THING (*res*), in the proper and confined signification of the word; which the debtor obliges himself to give, or an act (*factum*) which the debtor obliges himself to do or not to do. This results from the definition which has been given of the term *obligation*.

Not only things themselves (*res*) may be the object of an obligation, the mere use or possession of a thing may be so likewise. For instance, when a person hires any thing, it is the use of the thing, rather than the thing itself, which is the object of the obligation.

When a person engages to give me any thing by way of pledge, the object of the obligation is the possession of the thing, rather than the thing itself.

§ II. *What things may be the Object of an Obligation.*

[131] All things which are in commerce may be the object of obligations.

Not only a certain and determinate subject, as a particular horse, but also something indeterminate, may be the object of an obligation. It is necessary however that it should in its indetermination, a certain moral consideration, *oportet genus quod debetur habeat certam finitionem* as a promise of a horse, a cow, a hat in general; but if the indetermination is such as to reduce the thing to almost nothing, there will be no obligation, for want of something to form the object and matter of it, because, morally speaking, *almost nothing* is regarded as nothing. For instance, money, corn, wine, without the quantity being determined, or determinable cannot be the object of an obligation, because it may be reduced to almost nothing, as a farthing, a grain of corn, a drop of wine. For this reason, the 94. *l. ff. de verb obl.* decides that a stipulation *triticum dare oportere*, does not produce any obligation, because it is impossible to know what quantity the contracting parties had in view.(*b*)

(*a*) The parental power in *England* is much more circumscribed than even in *France*. Particular contracts by children in favour of their father are disallowed in courts of equity, for the prevention of undue influence; but there is nothing to impede the general power to contract.

(*b*) Triticum dare oportere stipulatus est aliquis; factio quæstio est non juris.

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It is not however necessary that the quantity which forms the object of the obligation, should be actually determined when the obligation is contracted, provided it be determinable. For instance, if a person obliges himself to indemnify me from the damages which I may suffer on such an occasion, the obligation is valid, although the sum of money to which they amount may not yet be determined, because it is determinable by the estimation which is to be made. So if a person obliges himself to supply me with corn, for the use of my family for a year, the obligation is valid, although the quantity is not determined, because it is determinable by an estimation of how much is necessary for that purpose.

Things which are not yet in existence, but which are expected to exist hereafter, may be the object of an obligation. The obligation must however depend upon the condition of their future existence.

As if I should oblige myself to deliver to a wine merchant all the wine that I shall grow the ensuing year, the obligation is valid, although the wine does not exist.

But if my vines are frozen, so that no wine can be got from them, the obligation fails for want of an object, and is as if it had never been contracted.

The rule, that things to arise in future may be the object of an obligation, was subject to an exception in the *Roman* law as to future successions. These laws proscribed as indecent, and contrary to general propriety, (*honnotè publique*) all agreements with respect to future successions, whether a person contracted and disposed of his own future succession in favour of another person to whom he promised to leave it, even when the agreement was made by a contract of marriage, *l.* 15. *cod. de pact.*(*a*) or those by which the parties contracted upon the future succession of a third person, which they or one of them expected to receive, *l. fin. cod. de pact.*(*b*) at least unless such

Igitur si de aliquo tritico cogitaverit, id est certi generis, certæ quantitatis; it habebitur pro expresso; alioquin si eum destinare genus et modum vellet, non fecit: nihil stipulatus videtur; igitur ne unum quidem modium.

(*a*) Pactum quod dotali instrumento comprehensum est, ut, *si pater vita fungeretur, ex æqua portione ea, quæ nubebat, cum fratre heres patris sui esset:* neque ullam obligationem contrahere, neque libertatem testamenti faciendi mulieris patri potuit auferre.

(*b*) De quæstione tali a Cæsariensi advocatione interrogati sumus: Duabus vel pluribus personis spes alienæ hereditatis fuerat ex cognatione forte ad eos devolvendæ; pactaque inter eos inita sunt pro adventura hereditate, quibus specialiter declarabitur, *si ille mortuus fuerit & hereditas ad eos pervenerit, certos modos in eadem hereditate observari,* VEL *si forte ad quasdam ex his hereditatis commodum pervenerit, certas pactiones evenire.* Et dubitabatur, si hujusmodi pacta servari oporteret. Faciebat autem eis quæstionem quia adhuc superstite eo de cojus hereditate sperabatur, hujusmodi pactio processit; et quia non sunt ita confecta, quasi omnimodo hereditate ad eos perventura, sed sub duabus conditionibus composita sunt, *si ille mortuus fuerit & si ad hereditatum vocentur hi quo hujusmodi pactionem fecerunt.* Sed nobis omnes eujusmodi pactiones odiosæ esse videntur, & plenæ tristissimi & periculosi eventus; Quare enim, quodam vivente & ignorante de rebus ejes quidam paciscentes, conveniunt? Secundum veteres itaque regulas, sancimus *omnimodo hujusmodi pacta, quæ contra bonos mores inita sunt repelli;* & nihil ex his pactionibus observari nisi ipse forte, de cujus hereditate pactum est, voluntatem suam eis accommodaverit, & in ea usque ad extremum vitæ suæ spatium perseveraverit: tunc etenim sublata acerbissima spe, licebit eis illo sciente & jubente, hujusmodi pactiones servare: Quod etiam anterioribus [legibus &] constitutionibus non est incognitum, licet nobis clarius est introductum. Jubemus etenim, neque do-

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third person intervened and gave his consent to the agreement. *d. l. ad. f.*

In the law of *France*, the favour of marriage contracts admits of agreements respecting future successions. A person by his marriage contract may engage to leave his wife his future succession in the whole or in part, or to leave it to the children of the marriage. They may also by marriage contracts, make such agreements for the interest of the two contracting families concerning future successions, from a third person as they think proper. With the exception of contracts of marriage, agreements concerning future successions are rejected by the *French* law in the same manner as by the *Roman*.

We must not confound with a future succession the substitution of *fidei-commission*(*a*) of the goods of a deceased person, who has left them to me, with the charge of restoring them to another person after my death. This substitution or *fidei-commission* is not a future succession; it makes no part in my future succession. It is a mere debt from me, payable after my death, to those entitled under the substitution, and who may treat respecting it in my life-time, either with me or amongst themselves. *l.* 1. 816. *cod. de Pact.*(*b*) *l.* 11. *cod. de Trans.*(*c*)

The rule, that future things may be the object of an obligation is subject to another exception by the laws of police, such as those which prohibit dealers from buying corn, or hay, before the harvest,(*d*) wool before the shearing, &c., and declare the contracts void.

[132] Even things which do not belong to the debtor but to another person may be the object of an obligation, as he is thereby obliged to purchase or otherwise procure them in order to

nationes talium rerum neque hypothecas penitus esse admittendas, neque alium quemquam contractum; cum in allenis rebus contra domini voluntatem aliquid fieri, vel pacisci secta temporum nostrorum non patiatur.

(*a*) These, so far as relates to the present subject, are equivalent to remainders and contingent limitations in the *English* law.

The *English* courts of equity very much discourage bargains respecting expectancies, but the principle upon which they proceed has no relation to that of the *Roman* law respecting future successions, but is, as Mr. *Fonblanque* observes, to restrain the anticipation of expectancies, which must from its very nature furnish to designing men an opportunity to practise upon the inexperience or passions of a dissipated man. *B.* I. *c.* 2, *s.* 12. Most of the cases reported upon the subject relate to vested reversionary interests, and are a kind of partial adoption of the objection of inequality of terms. I apprehend that, as a general rule, contracts respecting expectancies are not void. Certainly those which are entered into with respect to marriage are not so, being of frequent occurrence, and no objection having ever been made to them.

(*b*) Conditionis incertum inter fratres non iniquis rationibus conventione finitum est. Cum igitur verbis fideicommissi petitum a patre tuo profitaris, ut, si vita sine liberis decideret hereditatem. Licinio Frontoni restitueres; pactum eo tempore de sextante [Licinio] Frontoni dando cum liberos Philinus non sustulerit interpositum, non idcirco potest iniquum videri; quod, facta (sicut placuit) divisione diem suum, te filio ejus superstite, functus esset.

(*c*) Cum proponas, filios testamento scriptos heredes rogatos esse, ut qui primus rebus humanis eximeretur, alteri portionem hereditatis restitueret; quoniam precariam substitutionem fratrum consensu remissam adseris, fideicommissi persicutio cessat.

(*d*) Such contracts are also illegal by the law of *England*. How far that law is founded upon the principles of genuine policy is a question, which it would be foreign to the present purpose to discuss.

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fulfil his engagement; and if the real owner will not part with them, the debtor cannot insist that he is discharged from his obligation under the pretext that no man can be obliged to perform an impossibility. For this excuse is only valid in case of an absolute impossibility; but where the thing is possible in itself, the obligation subsists, notwithstanding it is beyond the means of the person obliged to accomplish it; and he is answerable for the damages occasioned by the non-performance of his engagement. The thing being possible in its nature, is sufficient to induce the creditor to rely upon the performance of the promise. The fault is imputable to the debtor, for not having duly examined whether it was in his power to accomplish what he promised or not.

[134] But though I may be obliged to give you what belongs to a third person, I cannot contract an obligation to give you what belongs to you already, *l.* 1. § 10. *ff. obl. et act.*(*a*) unless your right to it is imperfect, for then I may contract an obligation to render it imperfect.

[135] It is evident that things not subject to commerce cannot be the object of an obligation, as a church, the parliament house, a bishoprick.

Neither can an obligation be contracted for giving any right to a person incapable of enjoying it, as an easement in my land to a person who is not the owner of the land adjoining. But it is not necessary that the person who engages should be capable of having and possessing the thing promised, provided the person to whom the engagement is made is capable of receiving it, *l.* 81. *ff. de Verb. Obl.*(*b*)

The edict of 1734, having rendered persons in mortmain incapable of acquiring immoveable property, no obligation can be contracted for giving them such.

A saleable office may be due to a woman; for though she is incapable of holding it, she is not incapable of having the revenue derived from it (*le droit de finance de l'office.*) And it is that revenue, rather than the office, which is in commerce, and which is the object of the obligation.

§ III. *What Acts may be the Object of Obligations.*

[136] For an act to be the object of an obligation, it is necessary that it should be possible, for *impossibilium nulla obligatio est*, *l.* 85. *ff. de Reg. Jur.*

But it is sufficient that the fact to which a person obliges himself in my favour be possible in itself, though it may not be so with respect to him, because unless I am aware of that impossibility I have a

(*a*) Nec minus inutilis est stipulatio si quis rem suam, ignorans suam esse stipulatus fuerit.

(*b*) Multum interest utrum ego stipulor rem cujus commercium habere non possum, an quis promittat; si stipuler rem cujus commercium non habeo, inutilem esse stipulationem placet, si quis promittat, cujus non commercium habet; ipsi nocere, non mihi.

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right to rely upon the performance of it, and he is effectually obliged to me *in id quanti mea interest non decipi.* He must blame himself for not having measured the extent of his capacity, and for having rashly engaged to do an act to which he was not equal.

[137] An act contrary to law or good manners is regarded as impossible, and cannot be the object of an obligation.

For an act to be the object of an obligation it must be something determinate, therefore the 2d law, *ff.* § 5. (*a*) *de eo quod certo loco*, decides, that if a person promises another to build a house, without saying where, he does not contract any obligation.(*b*)

[138] Lastly the party in whose favour the obligation is contracted ought to have an appreciable interest in the act being done.

The reason is evident; an obligation being a legal tie, there cannot be any obligation if the person promising may violate his promise with impunity; and it is evident that he may do so when the other party has no appreciable interest in the performance or non-performance of it, for there cannot arise any damages to him for the non-performance, damages being nothing but the estimation of the interest which the creditor has in the performance of the obligation.

[139] But though an act in which the person to whom the promise is made, has no interest, cannot be the object of the obligation, it may be the condition of one. If you promise me that you will come to *Orleans* to study the law for a year, the promise would be void, and no obligation would result from it, because this fact, in which I have no interest cannot be the object of an obligation to me.

But if I agreed to give you a hundred pounds in case you did so, the agreement would be valid; for although I had no interest in the act, it might be made the condition of my obligation.

Upon this principle it was ruled, that a promise by a nephew to his uncle to desist from play, under the penalty of three hundred livres, was valid, and induced an obligation to pay the money in case he failed in his promise.

[140] But though it is essential to a civil obligation, that the person with whom it is contracted should, for the reasons abovementioned, have an interest capable of appreciation in the act to be done, it is otherwise with respect to a natural obligation. To

(*a*) Si qui si insulam fieri *stipuletur* & locum non adjiciat, non valet stipulatio.

(*b*) But I conceive that this general obligation may acquire certainty, from the relative situation of the contracting parties. That point is however rather referable to the principle of construction, than to an exception to the general proposition in the text, which supposes the intention to be wholly indeterminate.

In *Allen* v. *Harding*, 2 *Eq. ca. ab.* 17. The defendant being curate of *Newcastle*, had covenanted to build a house on the glebe-land, which he afterwards refusing to do, the plaintiff brought a bill for a specific performance. The defendant insisted on the uncertainty of the agreement, it specifying neither the time when the house was to be built, nor what sort of a house it should be; but the Lord Chancellor observed, that the covenant was for the benefit of the church, and therefore if it could be specifically performed, it ought, and decreed a convenient house to be built, directing certain persons to regulate the manner.

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constitute that, it is sufficient that there should be an interest arising from a just affection.

The person who makes the promise, and afterwards violates his engagement, having it in his power to accomplish it, is morally reprehensible, although he may not be accountable to any human tribunal.(a)

CHAPTER SECOND.

ARTICLE I.

Of the Effect of Obligations on the Part of the Debtor.

§ I. *Of the Obligation to give.*

[141] A person, who is obliged to give any thing to another, is bound to give it to the creditor, or some one authorised on his behalf, at a suitable time and place. See Part III. Ch. I. where we shall treat of the discharge or payment of obligations.

[142] When the object of the obligation is a specific thing, the obligation has the further effect of obliging the debtor to use a proper degree of diligence in the preservation of it until it is delivered; and if it is destroyed or injured for want of such diligence, he is answerable in damages. We shall treat of these damages infra, Art. III.

The degree of diligence which the debtor is bound to apply, is dif-

(a) In *England*, nothing is more common than for a person to enter into covenants with another, who has no personal interest, and is only a trustee either for other individuals or for some public purpose, and the person to whom such covenant is made is entitled to the same actions, as if he had an immediate interest. But this is only a mode and form of engagement; the substance of the obligation is contracted in favour of those who are really interested, and the principle referred to by *Pothier* is applicable to the inherent substance of the obligations, and not technical forms, deduced from the municipal constitutions of peculiar countries.

Upon the general principle, it is observed by Mr. *Powell*, referring to the authority of the *Year Book*, 21 *H.* 7, 20, that if the subject of a contract or agreement be self-evidently useless, as tending to no purpose when put in execution, this will render the contract or agreement void; and the motive to consider it so will be still stronger, if it be of such a nature as, if not performed, it brings no loss or prejudice to the party stipulating it, and if fulfilled will create trouble or damage to the prisoner. I am not aware however of its having ever been actually decided, that an engagement by deed, or upon a legal consideration, would produce no action on the ground of there being no appreciable interest: for the mere gratification of an innocent whim may be an adequate inducement for one person to make it worth the while of another to enter into such an engagement. That damages in such a case would be only nominal, is a consideration which affects the prudence, rather than the foundation of an action. There are many cases in which nominal damages are given for the non-performance of a duty, although from such non-performance no detriment has actually ensued.

But some of the judges of the Court of Common Pleas in a very recent case, (decided upon a different point) intimated an opinion that a covenant of daily occurrence, *viz.* a covenant between partners to appoint arbitrators to decide upon any dispute that might arise between them, was not obligatory; as it would be difficult to direct a jury upon what rule to proceed, in assessing damages on an action founded thereon; for *non constat* that the plaintiff would have succeeded in the arbitration. *Tattersall* v. *Groote*, 2 *Bos.* 131.

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ferent, according to the different nature of the engagements upon which the obligation depends. The 5th law, *F. commodat*,(a) supplies the following rule. When the contract solely regards the utility of the person to whom the property is to be given, or restored; the debtor is not bound beyond the application of fidelity in preserving it, and consequently is only answerable for that neglect which borders upon fraud, *tenetur duntaxat de latâ culpâ et dolo proximâ.*

For instance, a depository is answerable for nothing more than fidelity in keeping the article entrusted to his care; for the taking the deposit is merely for the benefit of the person by whom it was made, and to whom the depository is obliged to restore it. If the contract is for the common benefit of both parties, the debtor is bound to use that ordinary diligence which persons of prudence apply to their own affairs, and is therefore answerable for slight neglect. For instance, the seller is answerable for this neglect with respect to the article sold; and which he is obliged to deliver: the creditor is answerable for his neglect in the custody of a pledge, which he is under the obligation to restore; because the contracts of sale and pledging are for the benefit of both the parties. Where it is solely for the benefit of the debtor, such as a gratuitous loan of goods to be used, and specifically restored, he is obliged to apply more than ordinary diligence, and is consequently answerable for the slightest neglect.

But this rule is subject to several exceptions, as will be shown in the essays, where the different kinds of contracts are immediately under consideration.(b)

The debtor of specific things (*d'un corps certain*) is never answerable for accidents, and cases of inevitable necessity, (*cas fortuits et la force majeure, vis divina*) until he is guilty of improper delay: or (according to the law of *France*, is *en demeure de payer*,) at least unless he has subjected himself to the loss arising therefrom by particular agreement; or unless the accident is occasioned by some preceding fault of his own. For instance, if I lend you my horse to go to some particular place, and you are attacked by robbers, who take

(a) In contractibus interdum dolum solum, interdum & culpam præstamus: dolum, in deposito; nam quia nulla utilitas ejus versatur apud quem deponitur, merito dolus præstatur solus, nisi forte & merces accessit; tunc enim (ut est & constitutum) etiam culpa exhibetur: aut si hoc ab initio convenit, ut & culpam & periculum, præstet is, penes quem deponitur. Sed ubi utriusque utilitas vertitur, ut in empto [ut] in locato [ut] in dote [ut] in pignore [ut] in societate, & dolus & culpa præ statur.

(b) The translator has long since prepared essays upon all these different species of contracts, using the assistance of *Pothier*, but proceeding upon a much more limited scale, in the hopes of hereafter offering them to the profession. He has retained the passage which refers to the various treatises of his author. The degree of diligence which is to be applied in respect to the different classes of contracts, is the subject of Sir *Wm. Jones's* admirable Essay on the Law of Bailments, which consists in an amplification of the maxim in the text, and an historical view of the application of it in the various systems of jurisprudence. To the recommendation of that most celebrated performance, the *English* reader may principally ascribe an acquaintance with the writings of *Pothier*.

Vinnius, in his Commentary on the title of the institutes, *quibus modus contrahitur obligatio, & de commodato cui* has likewise a very valuable discussion of the same subject.

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away or kill the horse; although this violence is an accident for which a debtor is not ordinarily liable, nevertheless, if instead of taking the safe and usual road, you go by some cross way known to be infested by robbers, and are there attacked, you will be answerable for the accident, because it is occasioned by your imprudence.

[143] It is also an effect of the obligation to give, on the part of the debtor, that when he is guilty of any improper delay, (is *en demeure*) in satisfying his obligation, he is answerable for the damages of the creditor arising from such delay; and consequently ought to indemnify the creditor for every thing which he could have had, if the thing was delivered when demanded.

In consequence of this principle, if the thing due is deteriorated, or even totally destroyed, after such delay, by any inevitable accident, the debtor is answerable for the loss, unless the thing would have equally perished in the hands of the creditor.

Upon the same principle, the debtor is answerable not only for the fruits which have been actually received, but also for such as might have been received by the creditor, if a delivery had been made in proper time.

[144] Observe, that by the law of *France* a debtor is only considered as chargeable with delay, (placed *en demeure*) of giving the thing due from him, after a judicial interpellation regularly made, and from the time of such interpellation.

This decision takes place, although the thing be due to minors, or the church; the principles of the *Roman* law respecting demurrage, which was contracted *re ipsa* in favour of these claimants, not being followed.(a)

From this decision an exception must be made in the case of persons acquiring possession wrongfully (*les voleurs*) who are held to be *en demeure*, as to satisfying the obligation which they have contracted of restoring the thing taken, from the instant of their taking it, without any judicial interpellation being requisite. *L. de fin cond. furtiv.*(b)

The debtor ceases to be *en demeure*, by making a regular offer which places the creditor *en demeure*,(c) as to the receipt of the thing which is to be given.

[145] The obligation of giving a thing sometimes extends to the fruits thereof, if it procures any; and to interest when the debt is a sum of money: ordinarily the debtor is only answerable for the fruits which have been, or might have been got after a judicial interpellation; and in like manner interest runs from that time.

(a) In *England* we have no proceeding analogous to this judicial interpellation. I conceive that a neglect to deliver at a proper time, or upon demand, is in general attended with the same effects, as in *France* are consequent upon such proceeding.

(b) Licet fur paratus fuerit excipere condictionem, et per me steterit, dum in rebus humanis res fuerat, condicere eam, postea autem perempta est; tamen durare condictionem veteres voluerunt; quia videtur qui primo invito domino rem contractaverit, semper in restituenda ea quam nec debuit auferre, moram facere.

(c) This also is a judicial proceeding, which is referred to more at length. Part iii. c. i. Art. VIII.

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Although sometimes fruits and interest are due before the debtor is *en demeure*, as in contracts for the sale of a productive article. This depends upon the different nature of the contracts, and other causes producing the obligations, as is shown in treating of the different contracts, and quasi contracts.(*a*)

§ II. *Of the Obligation to do, or not to do any Act.*

[146] The effect of the obligation, which a person contracts to do any act, is that he ought to do what he has engaged, and that if he does not, after having been placed *en demeure* he ought to be condemned in damages to the person in whose favour he is obliged; that is to say, *in id quanti creditoris intersit factum fuisse id quod promissum est*, which ought to be estimated at a sum of money by *experts* agreed upon between the parties.

Ordinarily, the debtor is not placed *en demeure*, except by a judicial demand, instituted by the creditor against him; that he may be compelled to the performance of his promise, or in default thereof may be condemned in damages.

The judge upon this demand prescribed a certain time, within which the debtor shall be bound to do what he has promised, and in default of his doing so, he condemns him in damages and expenses.

If the debtor satisfies his obligation within the time prescribed, he avoids the damages, and is only answerable for the expenses, unless the judge awards some damages for the retardation.

[147] Sometimes the debtor is answerable for the damages of the creditor, on account of not performing what he was obliged to do; although there was no judicial demand. This is the case when what the debtor is obliged to do can only be done with any benefit, within a certain time which he has suffered to elapse. For instance, if I employ an attorney to oppose on my behalf a decree for sale, under an execution, of an estate hypothecated to me, and he suffers the decree to pass without making any opposition, he is answerable to me in damages, although I have not instituted any demand against him to oblige him to do what he has undertaken. The limited time, within which he ought to have known that the opposition should have been made is a sufficient interpellation.(*b*)

[148] The effect of an obligation which a person contracts of not doing any act is, that if he does such act, he is liable for the damages resulting from the prejudice which he has thereby caused to the person to whom he was under an obligation not to do it. When a person, who was obliged to do any act, is prevented by accident or force (*quelque cas fortuit et force majeure*) from doing

(*a*) See note to N 142.

(*b*) What was observed in the preceding section, of the law of *England* having nothing analogous to the judicial interpellation there mentioned, is equally applicable here. Except under particular circumstances, the liability to damages attaches without any demand after a proper time has elapsed. That time may be either limited, or collected from inference. Where there is no limitation of time, and no delay is implied from the nature of the subject, the obligation attaches immediately.

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it; and in like manner when a person has been forcibly constrained to do some act which he was obliged not to do, there is no ground for subjecting him to damages, *nemo præstat casus fortuitos.*

Observe, that I ought in this case to apprize you of the circumstance which prevents my doing what I had engaged, in order that you may take the necessary measures for having it done by another; otherwise I do not avoid the liability to damages, unless the same force prevents my apprizing you of the impediment, *L.* 27, § 2.(*a*)

ARTICLE II.

Of the effect of Obligations, with respect to a Creditor.

[150] The effects of an obligation with respect to a creditor are 1st. The right which it gives him of proceeding against the debtor in the course of justice for the payment of what is contained in the obligation.

2. Where the obligation is of a liquidated sum, it gives the creditor a right of opposing it to his debtor by way of compensation or set-off so far as it goes, against any money arising from him to his debtor. We shall treat of this right of compensation, *infra*, Part III. c. 4.

3d. The obligation serves the creditor as a foundation for other obligations, which persons may contract with him as sureties, on behalf of the party contracting as principal. We shall speak of these sureties, Part II. c. 6.

4th. It may serve as the subject of a novation, (or substituted contract) where any such intervenes; as to novations, *vide infra.* Part III. c. 2.

We are to treat at present only of the first and principal effect of an obligation; which is the right it gives to the creditor of proceeding in a course of justice for the payment of what is due to him. We must in this respect distinguish between the case of an obligation, for giving any thing, and that of doing or not doing any act.

§ I. *Of the Case where the Obligation consists in giving any thing.*

[151] The right which this obligation gives the creditor of proceeding to obtain the payment of the thing, which the debtor is obliged to give him, is not a right in the thing itself, *jus in re*, it is only a right against the person of the debtor for the purpose of compelling him to give it, *jus ad rem. Obligationum substantia non in eo consistit ut aliquod corpus nostrum, aut servitutem nostram faciat; sed, ut alium nobis adstringat ad dandum vel faciendum.*

(*a*) Qui mandatum suscepit, si potest id explere, deserere promissum officium non debet, alioquin, quanti mandatoris intersit, damnabitur; si vero intelligit explere se id officium non posse, id ipsum, cum primum poterit, debet mandatori nunciare, ut is, si velet, alterius opera utatur, quod si, cum possit nunciare, cessaverit, quanti mandatoris intersit, tenebitur; si aliqua ex causa non poterit nunciare, securus erit.

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L. 3. ff. de Oblig. & act. The thing which the debtor is obliged to give continues then to belong to him, and the creditor cannot become proprietor of it, except by the delivery, real or fictitious, which is made to him by the debtor in the performance of his obligation.

And till this delivery is made, the creditor has nothing more than a right of demanding the thing, and he has only that right against the person of the debtor who has contracted the obligation, or against his heirs and universal successors; because the heir succeeds to all the rights (*actifs et passifs*) of the deceased, and consequently to his obligations; and because the universal successor of the debtor, succeeding to his property, succeeds also to his debts, which are a charge thereon.

[152] Hence it follows, that if my debtor, after contracting an obligation to give a thing to me, transfers it upon a particular title to a third person, whether by sale or donation, I cannot demand it from the party who has so acquired it, but only from my debtor, who for want of the power of giving it to me, not having it himself, will be condemned to the payment of my damages resulting from the non-performance of his obligation. The reason is, as the obligation does not, according to our principle, give the creditor any right in the thing which is due to him, I have not any right in the thing which was due to me, that I can pursue against the person in whose hands it may be found; the right which the obligation gives, being only a right that the creditor has against the debtor and his universal successors, I cannot have any action against the third person who has acquired the thing in question; for, his acquisition being upon a particular title, he does not succeed to the obligation in my favour. *L. 15, cod. de rei vind.*(a)

For the same reason, if my debtor has given by will the thing which he was obliged to give to me, and dies, he will by his death have transferred the property therein to the legatee, according to the rule of law, that *dominium rei legatæ statim a morte testatoris transit a testatore in legatarium;* for, having according to our principles continued the proprietor, he was enabled to transfer the property: it ought then to be delivered to the legatee, and I shall in this case only have an action for damages, against the heirs of my debtor. *L. 32, ff. locat.*(b)

[153] Observe however, that if the debtor was not solvent at

(a) Quoties duobus in solidum prædium jure distrahitur, manifesti juris est eum, cui priori traditum est, in detinendo dominio esse potiorem. Si igitur antecedente tempore te possessionem emisse, ac pretium exsolvisse apud præsidem provinciæ probaveris; obtentu non datorum instrumentorum expelli te [a] possessione non patietur. Erit sane in arbitrio tuo pretium, quod dedisti, cum usuris recipere, ita tamen ut perceptorum fructuum ac sumptuum ratio habeatur; cum & si ex causa donationis utrique dominium rei vindicetis; eum cui priori possessio soli tradita est, haberi potiorem conveniat.

(b) Qui fundum colendum *in plures annos* locaverat, decessit, & eum fundum legavit, Cassius negavit posse cogi colonum ut eum fundum coleret, quia nihil heredis interesset: Quod si colonus vellet colere, & ab eo cui legatus esset fundus, prohiberetur cum herede actionem colonum habere, & hoc detrimentum ad heredum pertinere; sicuti si quis rem quam vendidisset, necdum tradidisset, alii legasset, heres ejus emptori & legatario esset obligatus.

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the time of his transferring to another the thing which he was obliged to give to me, I may proceed against the person who has so acquired it, to procure a rescission of the alienation that has been made to him in fraud of my claim, provided he was privy to the fraud, in case his acquisition was upon an onerous title: if it was upon a gratuitous title, his privity would not be necessary. *Tit. ff. de iis quæ in fraud. cred.*(a)

[*This is followed by a passage relating only to the peculiar laws of France, which it is not thought material to insert.*]

[154] Although a personal obligation does not in itself give the creditor in whose favour it is contracted any right in the thing which is the object of it; nevertheless, there are certain obligations to the execution of which the thing which is the object of it is specifically liable; and this liability gives the creditor a right in the thing, which enables him to enforce the execution of the obligation against third persons. Such is the obligation which results from the clause in a contract of sale, by which the buyer engages to let the seller re-purchase an estate upon re-imbursing him the price and all expenses. The estate, which is the object of this obligation of the purchase, is liable to the execution of this obligation, and the seller may enforce the performance of it against a third person; but it is not the obligation which produces this right; the obligation is not in itself capable of giving a right, except against the person who contracts it; the right results from the seller being considered as retaining a claim upon the estate to answer the obligation contracted by the purchaser in respect to it.

[*Here follow certain passages concerning the legal proceedings, whereby the performance of the obligation is to be enforced, which it is not thought material to insert.*]

§ II. *Of the Case in which the Obligation consists in doing or not doing any act.*

[157] When a person is obliged to do any act, this obligation does not give the creditor a right of compelling the debtor specifically to perform the act which he is obliged to do, but only a right to have him condemned in damages for not performing his obligation.

To this obligation of damages, all obligations of doing any act may be resolved, for *nemo potest præcise cogi ad factum.*(b)

(a) It is a general principle of the *English* courts of equity, that what is agreed to be done for a valuable consideration, is to be considered as done; and therefore any specific property is for most practical purposes effectually transferred from the time of an agreement for that purpose, without waiting for the formal completion of the act of transfer. Therefore any person acquiring with notice, or without a valuable consideration, property which is agreed to be transferred to another, acquires it subject to the obligation resulting from the agreement, without any regard to the question of solvency in the contracting party. Where the property is transferred upon a valuable consideration to a person not having notice of the agreement, the right acquired by such transfer must prevail, in consequence of another rule; that where equity is equal, the law must prevail.

(b) The real meaning of this is, that it is impossible in the nature of things for one

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[158] When a person is obliged not to do any act, the right which this obligation gives the creditor, is that of proceeding against the debtor, in case of his contravening the obligation to recover the damages, arising from such contravention.

If what he was obliged not to do, and has done contrary to his obligation, is something which may be destroyed, the creditor may also proceed against his debtor for the destruction thereof. For instance, if my neighbour engages with me to shut up his avenue, but to leave me a free passage through it, and in prejudice of this obligation builds a wall, or digs a trench, I may obtain a sentence that he shall take down the wall, or fill up the trench, and that in default of his doing so within a certain time, I may be allowed to do it at his expense.(*a*)

ARTICLE III.

Of the Damages and Interest arising from the Non-performance of Obligations, or the Delay in performing them.

[159] Damages and interests are the loss which a person has sustained, or the gain which he has missed; this is the definition of the law, 13. *ff. Rat. Rem. hab. quantum mea interfuit; id est quantum mihi abest, quantumque lucrari potui.* Therefore when it is said that the debtor is liable for the damages and interests(*b*)

man specifically to direct or constrain the actions of another; but by putting a restraint upon his person or property, he may be induced to do the act which is the object of his obligation, rather than submit to the continuance of such restraint. The doctrine of *Pothier*, derived from his own law, is, that the only mode of enforcing the performance of obligations to do an act, is by subjecting the party to the damages arising from its not being done. The *English* courts of equity, in exercising their jurisdiction of compelling the performance of acts agreed to be done, proceed by the imprisonment of the person in case of refusal, which is not a contradiction of the maxim of the *Roman* law above cited, but an application of it; such imprisonment not being any more a specific performance than a compensation in damages. It is always in the option of the creditor (except in some cases of technical impediments,) to proceed, not for the specific performance, but for a compensation in damages; but the converse does not hold good; and where pecuniary damages are, in the nature of the thing, a full and adequate compensation, the courts will not in general entertain a suit for the compelling a specific performance. See Treatise of Equity, *p.* I. *c.* I. *s.* 5. *c.* 3. *s.* I. and Mr. *Fonblanque's* Notes. See also *Errington* v. *Annesley*, 2 *Bro. Ch.* 343.

(*a*) I conceive that a court of equity would compel the party to replace the subject as if the act had not been done, in contravention to the agreement, but would not add the alternative of allowing the covenantee to do it at the expense of the covenantor. In the case of *Martin* and his wife v. *Natkin*, 2 *P. Wms.* 266, it appeared that the plaintiffs, who were infirm, were much disturbed by ringing the church bell at five o'clock in the morning, agreed with the parishioners to erect a new cupola, clock and bell, the parishioners agreeing on the other hand, that the five o'clock bell should not be rung during the lives of the plaintiffs, or the life of the survivor of them. After the agreement had been performed on the part of the plaintiffs, a new order of vestry was made for ringing the bell, and the Court of Chancery decreed an injunction to restrain it.

(*b*) In the *French* writers we always find these terms combined. I have retained them in the present article, but in the other parts of the Treatise have only used the word Damages. According to the *English* law the estimation of damages is peculiarly the province of the Jury, but is so far subject to the control of the courts, that in case of excess they may grant a new trial, referring the subject to the consideration of

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resulting from the non-performance of the obligation, it is to be understood that he ought to indemnify the creditor from the loss which the non-performance of the obligation has occasioned to him, and for the gain of which it has deprived him.

[160] The debtor however is not to be subjected to indemnify the creditor indiscriminately for all the loss which may have been occasioned by the non-performance of the obligation, and still less is he answerable for all the gain which the creditor might have acquired, if the obligation had been satisfied. A distinction must be made in this respect, between different cases, and different kinds of damages and interests, and a certain degree of moderation ought also to be applied, in estimating those for which the debtor is liable.

When the debtor cannot be charged with any fraud, and is merely in fault for not performing his obligation, either because he has incautiously engaged to perform something which it was not in his power to accomplish, or because he has afterwards imprudently disabled himself from performing his engagements; the debtor is only liable for the damages and interest which might have been contemplated at the time of the contract; for to such alone the debtor can be considered as having intended to submit.

[161] In general the parties are deemed to have contemplated only the damages and interest which the creditor might suffer from the non-performance of the obligation, in respect to the particular thing which is the object of it, and not such as may have been incidentally occasioned thereby in respect to his other affairs: the debtor is therefore not answerable for these, but only for such as are suffered with respect to the thing which is the object of the obligation, *damni et interesse ipsam rem non habitam*. For instance, suppose I sell a person a horse which I am obliged to deliver in a certain time, and I cannot deliver it accordingly: if in the mean time horses have increased in price, whatever the purchaser is obliged to pay more than he would have given for mine, in order to procure another of the like quality, is a damage for which I am obliged to indemnify him, because it is a damage *propter rem ipsam non habitam*, and

another jury. This discretion is exercised in a greater or less degree, according to the nature of the different causes of complaint. In cases particularly affecting the personal feelings, the conclusion of the jury is very seldom interfered with. In cases of injuries to property, a considerable latitude is allowed, and the damages often exceed the real measure of the injury, if there appears to be any act of wanton insult; but where the verdict indicates an intemperance of mind on the part of the jury, their decision is not unfrequently subject to revision. The term *vindictive damages* has been often applied to the cases of a compensation more than commensurate to the real injury, but this term has been lately discountenanced.

With respect to damages proceeding merely on the non-performance of agreements, the Courts have been much more active in their interference; and there are several cases in which they have decided upon the principle by which the measure of damages ought to be estimated. In *Flurean* v. *Thornhill*, 2 *Bl.* 1078, the seller of a house by auction could not make a title, and the jury gave the buyer, besides his deposit, a compensation in damages for the loss of his bargain, which was disallowed, and a new trial was granted. In *Shepherd* v. *Johnson*, 2 *East.* 211, the Court decided that the proper damages upon an agreement for the transfer of stock was the highest price which it had been at since the time when the agreement ought to have been performed. In reviewing the distinctions of *Pothier*, he seems to allow in many cases, a higher scale of compensation than would be probably admitted by the *English* courts.

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which only relates to the thing that was the object of the contract, and which I might have foreseen; the price of horses like that of all other things being subject to variation. But if this purchaser was a canon, who for want of having the horse that I had engaged to deliver to him, and not having been enabled to get another, was prevented from arriving at the place of his benefice in time to be entitled to his revenue; I should not be liable for the loss which he sustained thereby, although it was occasioned by the non-performance of my obligation; for this is a damage which is foreign to the obligation, which was not contemplated at the time of the contract, and to which it cannot be supposed that I had any intention to submit. So if I had made a lease for eighteen years of a house, which I fairly supposed to belong to me, and after eight or ten years my tenant is evicted by a superior title, I should be answerable for his damages and interest arising from the expense which he would be put to in removal; and also from his being obliged, in consequence of a general advance of rents, to take another house at a higher rent for the remainder of the term; for these damages and interests have an immediate relation to the enjoyment of the house, which is the object of my obligation, and are suffered by the tenant, *propter ipsam rem non habitam.*

But if the tenant has established a business in the house which I let to him, and his removal occasions a loss of custom, and an injury in his business, I shall not be answerable for this damage, which is foreign in its nature; and was not foreseen at the time of the contract.

Still less shall I be liable for the damage occasioned by any valuable furniture of the tenant being broken in the removal; for this is caused by the unskilfulness of the persons whom he employs, and not by the eviction, which is only the occasion of it.

[162] Sometimes the debtor is liable for the damages and interests of the creditor, although extrinsic; which is the case when it appears that they were contemplated in the contract, and that the debtor submitted to them either expressly or tacitly, in case of the non-performance of his obligation. For instance, I sell my horse to a canon, and there is an express clause in the agreement, by which I am obliged to deliver it to him, so that he may arrive at the place of his benefice in time to be entitled to his revenues. If in this case I make default, in discharging my obligation, though without any fraud, and the canon could not either get another horse or any other conveyance, I shall be answerable even for the extrinsic damages arising from the loss of his revenues; for by the clause of the agreement the risk of this damage was foreseen and expressed, and I am deemed to have taken it upon myself.

So if I have let my house to a person in his quality as a tradesman, or for the purpose of being used as an inn, and the tenant is evicted; the damages and interests, for which I am answerable to him, will not be confined to the expense of removal, and the advance of rents, as in the former instance. The loss of custom, if he cannot meet with any other suitable house in the neighbourhood, ought also

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in some degree to be taken in the account; for having let my house for the purpose of a shop, or an inn, this kind of damage is one whereof the risk is foreseen, and to which I am considered as having tacitly submitted.

[163] The following is another instance of this distinction; a person sells me some pieces of wood, which I have used to prop my building, and on account of the insufficiency of the props the building gives way; if the seller was not a person acting in the course of his business, and had fairly sold me these pieces of wood without knowing of their defect, the damages and interests would only consist in a reduction of the price on account of my having given him too much, by buying him the wood as good, which was defective; and will not extend to the loss arising from the failure of the building. For the seller who sold me the wood fairly, and who was not obliged to know any more of it than I, is not deemed to have undertaken this loss. *L.* 13. *ff. de act. empt.*(a)

But if the person who sold me these props acted in the course of his buisness, and was a carpenter, selling them for the purpose of supporting my building, he will be answerable for my damages and interest arising from the building giving way on account of the insufficiency of the props, and will not be permitted to allege that he thought they were good and sufficient; for admitting what he says to be true, this ignorance on his part would not be excusable in a person making a public profession of an art; for in this case *imperitia culpe annumeratur*, *l.* 132. *ff. de R. I.* In selling me these props, and selling them in his quality of a carpenter, he is held to render himself responsible for their sufficiency, and to have subjected himself to the risk of my building, if they were not so. *Molin. tract. de eo quod interest*, *n.* 51.

Observe however that he ought not to be liable beyond the risk which he undertook. Therefore if he sells me the props to support a certain building and I make use of them to support another, which is more considerable, the carpenter will not only not be liable for the ruin of this building, in case the props were sufficient for the smaller building, for which they were intended, because in this case he would not be in any fault at all; but even if he was in fault, his props being absolutely defective and insufficient even for the support of the smaller building for which they were intended, he will not be answerable for any damages and interest resulting from the ruin of the large building, beyond the value of the small one; for having only sold the props for the support of that, he is only understood to take upon himself the risk for the damages and interest which I should suffer to the extent of the value of the small building; he ought not therefore, according to our principles, to be answerable to a greater amount. Perhaps he would have been more cautious, if he had thought that he had been running a greater risk, and that he was selling the props for the support of a larger building. *Molin. tract. de eo quod interest*, *n.* 62.

For a similar reason, *Dumoulin* decides, that when a carpenter sells me props for the purpose of raising my building, which give way on

(a) Qui pecus morbosum aut lignum vitiosum vendidit, si quidem ignorans fecit, id tantum exempta actione præstaturum, quanto minoris essem empturus.

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account of their insufficiency, the damage and interests to which he is liable are confined to the ruin of the building, and do not extend to the loss which I sustain, in respect to the furniture which was then within it, and which is broken or destroyed in the ruin; for in selling me these props he only understood himself to be answerable in respect to the conservation of the building. He is therefore only charged with this risk, and not with the risk of the loss of the furniture, which he could not foresee that I should leave there, it being customary to remove the furniture from houses when they are raised by props. Therefore he ought not to be liable for the loss of the furniture unless he expressly took this risk upon himself. *Molin. ibid. n.* 63, *n.* 64.

It is otherwise with respect to a builder, with whom I make an agreement to build me a house, which some time after it had been finished, gives way from a defective construction; the damages and interests for which this unskilful builder is liable to me, for want of his having properly discharged his obligation, extend not only to the loss in respect to the house, but likewise to the furniture which was therein, and which could not be saved; for by undertaking to build me a house for the residence of myself or a tenant, he could not be ignorant that furniture would be taken there, and that it would be impossible to live there without furniture; and consequently he is chargeable with the risk of the furniture. *Molin. ibid. n.* 64

[164] It remains to observe, with respect to the damages and interest to which a debtor is liable for want of having fulfilled his obligation, where he is not subject to any imputation of fraud, that where the damages and interest are considerable, they ought not to be taxed and liquidated with rigour; but with a certain degree of moderation.

It is upon this principle that *Justinian*, in the single law of the *Code de sentent. quæ pro eo quod interest*,(*a*) ordains that the damages and interest in *casibus certis*, that is to say, as *Dumoulin* explains it, *ibid n.* 42, and *seq.* when they only relate to the thing which is the object of the obligation, cannot be taxed at more than double the value of the thing.

The decision of this law may be applied to the following case; I purchase for 500*l.* a vineyard in a distant province; at the time of my acquisition, the wine, which constitutes the whole revenue of this estate, is at a very low price in this province, because there is no com-

(*a*) Cum pro eo quod interest, dubitationes antiquæ in infinitum productæ sint, melius nobis visum est hujusmodi prolixitatem, prout possibile est, in augustum coarctare.

Sancimus itaque, in omnibus casibus, qui *certam* habent quantitatem vel naturam, veluti in venditionibus & locationibus & omnibus contractibus, hoc quod interest, dupli quantitatem minime excedere. In aliis autem casibus, qui *incerti* esse videntur, judices, qui causas dirimendas suscipiunt, per suam subtilitatem requirere, ut hoc, quod revera inducitur damnum, hoc reddatur, & non ex quibusdam machinationibus & immodicis perversionibus in circuitis inextricabiles redigatur, ne dum in infinitum computatio reducitur, pro sua impossibilitate cadat; cum sciamus esse naturæ congruum, eas tantummodo pœnas exigi, quæ vel cum competendi moderamine proferuntur, vel a legibus certo fine conclusæ statuuntur, et hoc non solum in damno, sed etiam in *lucro* nostra amplectitur Constitutio: quia & ex eo veteres id, quod interest, statuerunt, et sit omnibus secundum quod dictum est, finis antiquæ prolixitatis hujus Constitutionis recitatio,

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munication for exporting it; after my acquisiton the king makes a canal which gives me the opportunity of exportation, and which raises the price fourfold or more, and consequently raises the value of my estate to 2000*l*. or more; it is evident that if I am evicted from this estate, my damages and interest resulting from this eviction, which are nothing else than *id quanti mihi hodie interest hunc fundum habere licere*, amount in fact to more than 2000*l*. Nevertheless, according to this law, the person who *bona fide* sold me the estate, ought not to be condemned in more than 1000*l*. for all the damages and interests which are due to me, as well for the increased value of the estate as on any other account. The damages and interest which in this case are only due *propter ipsam rem non habitam & in casu certo*, ought never according to this law to amount to more than double the price of the thing, which is the object of the obligation.

The principle upon which this decision is founded, is that the obligations which arise from contracts can only be formed by the consent and intention of the parties. Now the debtor in subjecting himself to the damages and interest which might arise from the non performance of his obligation, is only understood as intending to oblige himself, as far as the sum to which he might reasonably expect that the damages and interests would amount at the highest; then when these damages and interests happen to amount to an excessive sum, of which the debtor could never have any expectation, they ought to be reduced and moderated to the sum to which it could reasonably be expected that they might amount at the highest, the debtor not being understood to have given any consent for binding himself further. *Molin. tract. de oe quod interest. n.* 60.

This law of *Justinian*, inasmuch as it limits the moderation of excessive damages and interests, precisely at double the value of the thing, is an arbitrary or positive law, which, as such, has not any authority in the provinces of *France*. But the principle on which it is founded, of not allowing a debtor who is free from the imputation of any fraud to be charged with damages and interest resulting from the non-performance of his obligation, beyond the sum to which at the utmost they might be expected to amount, being founded upon reason and natural equity, we ought to follow this principle, and moderate the damages and interest when they are excessive, agreeably thereto, leaving this moderation to the discretion of the judge.

[165] It is evident that the reduction of damages and interest to double the price of the thing, which is the object of the primary obligation, is only applicable to such as are merely due in respect of such thing considered in itself, and not to those which the creditor suffers extrinsically in his other property, when the debtor has expressly or tacitly submitted to them. For these damages and interests not being due in respect of the thing which is the object of the primary obligation cannot be regulated by the value thereof, and may sometime amount to ten-fold such value, or more. For instance, the damages and interest for which a cooper is liable to me for selling me bad casks, result from the loss of the wine which I put into them, and which may amount to more than ten-fold the value of the cask; for

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by selling them to me in the course of his trade he is responsible for their goodness, and tacitly charge himself with the risk of the wine that may be put into them; this kind of damage being suffered, not in respect to the casks, but of the wine which is put into them, ought not to be regulated by the price of the casks, *Molin, ibid. n.* 49. Nevertheless a certain moderation ought to be used even with respect to those extrinsic damages, when they are excessive, and the debtor ought not to be charged beyond the sum which he might have expected them to amount to at the highest. For instance, if I put in the casks foreign wine, or other liquor of an immense value, which is lost by the fault of the casks, the cooper who sold them to me ought not to be condemned to indemnify me for the whole of this loss, but only for the amount of a cask of the best wine of the country; for in selling me the cask he is not understood to have taken upon himself any further risk, nor to have foreseen that I should use it for a liquor of more considerable value. *Molin, Ibid.* N. 60.

For the same reason, though the builder of the house which gives way from the badness of the construction, is answerable to me, as has been already observed, for the loss of the furniture that is destroyed or broken by the ruins, yet if I had lost jewels, or manuscript of an immense value, he ought not to be charged for the whole of this loss; he is only answerable for the value to which the furniture of a person of my situation may commonly amount.

[166] The principles, which we have hitherto established, do not prevail when it is the fraud of my debtor, that gives me a claim for damages and interests; in this case the debtor is liable, indiscriminately, for all the damages and interest which I have suffered in consequence of his fraud; not only for those which I have suffered in respect of the thing which is the object of the contract, *propter rem ipsam*, but for all damages in respect of any other property, without regarding whether the debtor could be presumed to have intentionally subjected himself to them or not; for a person who commits a fraud obliges himself, *velit, nolit*, to the reparation of all the injury which it may occasion. *Molin, ibid.* N. 155.

For instance, if a person sells me a cow, which he knows to be infected with a contagious distemper, and conceals this vice from me, such a concealment is a fraud on his part, which renders him responsible for the damage that I suffer, not only in that particular cow, which is the object of his original obligation, but also in my other cattle, to which the distemper is communicated, *L.* 13, *ff de act. empt.(a)* for it is a fraud of the seller which occasions this damage.

[167] Will my debtor be answerable for other damages which I suffer, and which are only a more remote and indirect consequence of this fraud? For instance, if upon the supposition last

(*a*) *Julianus, lib*, 15. Inter eum, qui sciens quid aut ignorans vendidit, differentiam facit in condemnatione ex empto; ait enim qui pecus morbosum, aut lignum vitiosum vendidit, siquidem ignorans fecit, id tantum ex empto actione præstaturum, quanto minoris essem empturus, si id ita esse scissem; si vero sciens reticuit & emptorem decipit, omnia detrimenta, quæ ex ea emptione emptor traxerit, præstaturum ei, sive igitur, ædes vitio ligni corruerunt, ædium estimationem, sive pecora contagione morbosi pecoris perierunt, quod interfuit idoneé venisse erit præstandum.

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mentioned, the contagion which has been communicated to my other cattle, prevents me from cultivating my land; the damage which I suffer from my land being uncultivated appears also to be a consequence of the fraud of the person selling me the infected cow; but it is a more remote loss than that which I suffer in my cattle from the contagion; the question is, whether the seller is to be responsible for it? What if the loss of my cattle, and the damage which I sustain from my land being uncultivated prevents me paying debts, and my creditors seize upon my property, and dispose of it much below the value; will the seller also be liable to this damage? The rule, which appears proper to be followed in this case, is, that we ought not to include in the damages, for which the debtor is liable, by reason of his fraud, those which are not only a remote consequence, but are not even necessarily a consequence of it, and may arise from other causes. For instance, in the case supposed, the seller will not be liable for the damage which I suffer from the seizure of my effects; this damage is only a very remote and indirect consequence of his fraud, and has not any necessary relation to it; for, although the loss of my cattle occasioned by his fraud has had an influence in the derangement of my fortune, this derangement may have had other causes; this is comformable to the doctrine of *Dumoulin*, *ibid.* N. 179, where in speaking of the damage for which the tenant of a house is liable, for having maliciously set fire to it, he says, *Et adhuc in doloso intelligitur venire omne detrimentum tunc et proxime secutum non autem damnum postea succedens ex novo casu, etiam occasione dictæ combustionis sine qua non contigisset; quia istud est damnum remotum quod non est in consideratione.*

The loss, which I suffer for want of cultivating my lands, appears to be a less remote consequence of the fraud of the seller; nevertheless, I think that he ought not to be liable for the whole of it. This want of culture is not an absolutely necessary consequence of the loss of my cattle: for, notwithstanding such loss, I might have obviated the want of cultivation by buying, or if I had not the means of that, by hiring other cattle, or by farming out my lands, if I had not the means of turning them to account myself; nevertheless, in recurring to these expedients I should not derive so much profit by my land, as if I could have cultivated it myself, by the cattle that were lost in consequence of the fraud: this therefore may in some degree be taken into the account of the damages and interests for which he is liable.

[168] The damages and interests which result from the fraud of the debtor, differ also from ordinary damages and interests; inasmuch as the law of the *code* above cited, and the moderation which, according to the spirit of that law, is reserved with respect to common damages and interests, does not apply to those which result from fraud. The reason of the difference is evident; this moderation, which is practised with respect to ordinary damages and interests is founded upon the principle already developed, that a debtor cannot be presumed to have intended to subject himself to the obligation of

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damages and interest to a greater amount than he could suppose that the damages and interest to which he submitted, in default of performing his obligation would come to. Now this principle cannot have any application with respect to damages and interests arising from fraud; because whoever commits a fraud obliges himself indiscriminately, *velit, nolit*, to the reparation of the injury which it occasions: it ought nevertheless to be left to the prudence of the judge, even in cases of fraud to use a certain degree of indulgence in the estimate of damages and interest.

These decisions apply whether the fraud has been committed, *delinquendo* or *contrahendo*, *Molin*, *ibid*. *N.* 155.

[169] It remains to say a word concerning damages and interests resulting from the delay of the debtor, in the performance of his obligation.

A debtor is liable not only for the damages and interests of the creditor, resulting from the absolute non-performance of his obligation, but also for those which result from the delay of accomplishing it after having been judicially called upon to do so.(a)

These damages and interests consist in the loss which the creditor has suffered, and in the gain of which he has been deprived by the delay, provided such loss or deprivation of gain are the necessary consequences thereof. They are estimated rigorously and extended to every kind of damage, when the debtor delays the performance of his obligation by fraud, and an affected contumacy. But when he cannot be reproached with anything more than negligence they ought to be estimated with much more moderation, and should not be extended beyond what might have been foreseen at the time of the contract, and were therefore expressly or tacitly submitted to by the debtor. Such are the general rules; the following is a particular one, with respect to a delay in the performance of obligations which consists in giving a certain sum of money. As the different damages and interests which arise from the delay of satisfying this kind of obligation, are infinitely various; and as it is equally difficult to foresee and prove them, it has been necessary to regulate them by a kind of forfeit, by some fixed standard; this is done by fixing the interest of the sum due at the rates prescribed by the ordonnances, which begin to run against the debtor from the day of making a judicial demand, until the time of payment; these interests being the common price of the legitimate profit, which the creditor might have derived from the sum due to him if it had been paid. In consequence of this kind of forfeit, however great the damage may be which the creditor may have sustained from the delay of payment, whether such delay has proceeded from mere negligence or from fraud, and an affected contumacy; the creditor cannot demand any other recom-

(a) Here, as in former instances, it is to be observed that there is nothing in *England* analogous to this judicial interpellation. The obligation of the contract, if no time is limited, attaches immediately, on request, or at a reasonable time, according to the circumstances. The delay therefore is in itself an injury, and does not require any judicial proceeding to make it so.

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pense than these interests. But, on the other side he is not bound to prove any damage arising from the delay, in order to entitle himself to them.

[171] Our principle is subject to an exception with respect to bills of exchange. When a person upon whom a bill of exchange is drawn, refuses to pay the amount at the time of its becoming due, the holder, having protested it, may, by way of damage and interest for the delay which he suffers, demand from the drawer and indorsers the re-exchange, even where it exceeds the common interest of money. Re-exchange is the profit which is paid to a banker on the spot, for money to the amount of the bill of exchange in lieu of that which ought to be received. See the Treatise on Bills of Exchange, *N*. 64.

[172] Such are the rules that should prevail in point of law; but in point of conscience, if the creditor does not suffer any damage from the delay of payment, that is to say, if such delay does not cause him any loss or deprive him of any gain, he ought not to demand these interests; for they are allowed as an indemnity, and no indemnity can be due to a person who has not suffered any damage.

Vice versa, if the damage which the delay occasions to the creditor is greater than these interests; according to the principles of conscience, if the debtor by fraud and an affected contumacy delays the payment (*a etè en demeure de payer*,) of what he might easily pay, he ought entirely to indemnify the creditor for the damages which he knows to have been occasioned by his unjust delay; and it is not sufficient to pay the interest from the time of making the judicial demand.

It is otherwise when there is no fraud on the part of the debtor: the reason of the difference is, that, except in the case of fraud, a debtor is only liable for the damages and interests, to which it may be presumed that he intended to submit, which in this case are the interests accruing from the time of the delay. Another difference between the rules of law, and the rules of conscience, is, that in the latter it is not always necessary that there should be a judicial demand, in order to fix upon the debtor the imputation of delay, and to make the interests run against him: for, if my creditor advises me that he is in want of his money, and at my request, and from regard to me, and in order to save my credit, forbears having recourse to a judicial process, relying upon my good faith, and upon the promise which I make to indemnify him in the same manner as if he had instituted such proceedings; I am in this case and in point of conscience sufficiently chargeable with delay (*mis en demeure*,) by the notification, and I am liable for the interests which afterwards accrue. The author of the Conferences of *Paris*, concerning usury, improperly proscribes these interests as usurious: no interests are usurious but such as are demanded as the recompense for a loan which ought to be gratuitous; but these have a just cause, that is to say, the recompensing the injury which I occasion to my creditor by the delay in the performance of my obligation. This author proceeds upon

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the following reasoning. We only hold, says he, all the goods, and all the rights which belong to us, from the law. Now our laws only allow creditors a right of taking interest for the money due to them, when it is adjudged to them upon a judicial demand. Then, concludes this author, without a judicial demand, a creditor has no right to take any interest for the money due to him, and cannot conscientiously receive it.

The answer is, that if the creditor cannot in point of law demand interest without a judicial demand, it is because he cannot otherwise support the charge of a delay of payment, such a demand being the only proof of delay which the law allows; but if in truth his debtor does delay the payment after request, the creditor has a right to receive interest as a recompense for the injury arising from the delay. And he holds this right by the most respectable of all laws, the law of natural justice, which obliges debtors to fulfil their obligations, and to indemnify their creditor for the injury which he suffers in consequence of their delay. When a creditor, from regard for his debtor forbears having recourse to judicial proceedings, which might ruin the credit of the debtor, he renders him a good office, and ought not to suffer from doing so, *officium suum nemini debit esse damnosum.* It is an absurdity to suppose that the creditor, who spares his debtor, should thereby be placed in a worse condition that if he had proceeded with rigour against him.(*a*)

(*a*) This last reasoning shows the absurdity of the principle adopted in *France*, and in most *Roman Catholic* countries, of prohibiting all agreements for receiving a compensation on the loan of money. The present use of money is, in the intercourse of society, as beneficial as the use of any other commodity: and the transferring of that benefit from one person to another, is as naturally the object of a legitimate compensation as any other communication of property or service; but the misapplication of scriptural authority proscribes as oppressive and injurious a contract which in its nature is mutually beneficial.

It is taken for granted, that loans of money ought to be gratuitous acts of liberality; but in the general intercourse of society, it is much more advantageous to allow particular individuals a right to exercise their own judgment, as to what will be conducive to their interest, than by the semblance of protection to prevent their obtaining that assistance at all which they might have obtained upon a compensation, that they admit to be not more than adequate to the benefit which they derive from it. What is in its nature an act of commerce, is confined by law to an act of friendship, and if that motive does not operate, a man who might be saved from ruin by temporary assistance duly compensated for, is involved in that ruin by the very means injudiciously appointed for his protection.

Another part of the *French* system is founded upon much more rational principles, and such as it would not be injudicious to adopt elsewhere, viz: that a debtor shall be liable to interest from the time of instituting a judicial demand against him.

In *England*, it is generally in the discretion of a jury to allow interest for the detention of a debt, but it is a discretion very seldom exercised, except under circumstances of particular aggravation.

In the case of *Walker* v. *Constable*, 1 *Bos. & Pul.* 306, it was held that, in an action for money had and received, nothing more could be recovered than the original sum without interest; but this determination seems rather to be founded upon an implicit acquiescence in the doctrines incidently accompanying a former adjudication, than on an accurate examination of those principles of rational jurisprudence upon which the action so peculiarly depends.

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PART II.

OF THE DIFFERENT KINDS OF OBLIGATIONS.

CHAPTER I.

General Exposition of the different Kinds of Obligations.

§ I. *First Division.*

[173] The first division of Obligations is derived from the nature of the lien which they produce. Obligations considered in this respect are divided into Obligations, which are both natural and civil; Obligations merely civil, and obligations merely natural.

A civil Obligation is a legal tie, *vinculum juris*, which gives the person in whose favour it is contracted, a right of judicially enforcing the performance of it.

A natural Obligation is that which obliges the person contracting it in honour and conscience.

[174] Obligations are commonly both civil and natural: there are however some which are merely civil, and which the debtor may be judicially compelled to perform, without being under any Obligation to do so in point of conscience.

Such is the Obligation arising from a judgment founded on a mistake of law or fact, and from which there is no appeal: the person who is condemned is obliged to pay the amount of the condemnation, and may be judicially compelled to do so, although he does not owe it in truth and conscience; the Obligation merely results from the authority of the judgment.

[175] There are also Obligations which are merely natural, without being civil. These obligations oblige the person contracting them in point of honour and conscience, but the law does not allow any action to compel the execution of them.

These are only called obligations in an improper sense, for they are no legal tie, *vinculum juris;* they do not impose upon the person contracting them any real necessity to accomplish them, as he cannot be compelled to do so by the person in whose favour they are contracted; and it is this necessity which constitutes the character of Obligation: *vinculum juris, quo necessitate adstringimur;* they are only *pudoris et equitatis vinculum.*

We shall treat in particular of this kind of Obligation in the following chapter.

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§ II. *Second Division.*

[176] The second division of Obligations is derived from the manner in which they may be contracted; they are divided into such as are pure and simple, and such as are conditional.

Pure and simple Obligations are those, which are not suspended by any condition; whether they have been originally contracted without any condition, or whether the condition upon which they were contracted is accomplished.

Conditional obligations are those which are suspended by a condition under which they were contracted, and which is not yet accomplished.

[177] Pure and simple obligations, in a more confined sense, are those which are contracted without any modification; such as a resolutory condition, a limited time for the continuance of the obligation, time and place for payment, a liberty of paying to another person instead of the creditor; that of paying any other thing instead of that which is the object of the obligation, an alternative between several things which are the objects of the obligation.

All these modifications are so many different kinds of Obligations, of which we shall treat in the 3d Chapter.

§ III. *Third, Fourth and Fifth Divisions.*

[178] These divisions are derived from the quality of the different things, which are the object of the Obligation.

There are obligations to give, and obligations to do some act, *stipulationem quædam in dando, quædam in faciendo, l. 3. ff. de. v. obl.* The latter also include those by which a person is obliged not to do any thing.

There is this difference between obligations, for giving and for doing any thing; that the person who is obliged to give a particular thing, may, when it is in his possession, be precisely constrained to give it: the creditor may, in spite of the debtor, be put in possession of it by the authority of justice; whereas the person who is obliged to perform any act cannot be precisely constrained to do so, but in default of fulfilling the obligation it is converted into an obligation for paying the damages arising from the non-performance, and these damages consist in the sum of money at which they are liquidated, and estimated by experts named by the parties or the judge.

[179] Obligations or debts are further distinguished into liquidated and unliquidated; liquidated debts are those which consist in a certain thing, *obligatio rei certæ.* Gaius gives this definition of them, *certum est quod ex ipsa pronunciatione appareat, quid, quale, quantumque sit. l. 74. ff. de verb. Obl.* such are debts of a specific thing, or of a certain quantity of corn, wine, &c.

An unliquidated debt, is, when the thing or sum due is not yet ascertained, *ubi non apparet quid, quale, quantumque est in stipulatione, l. 75. ff. dict. tit.*

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Such are damages until they are liquidated, and consequently all such obligations as consist in doing or not doing any thing, *d. l.* 75. § 7,(*a*) since they are resolvable into obligations of damages, debts of an indeterminate thing, and alternative debts, until the debtor has made his choice, are also unliquidated debts, *d. l.* 75. § I.(*b*) § 8.(*c*)

There are several differences between liquidated debts, and those which are not so. The creditor of a liquidated debt, when he has an executory title, may proceed by commandment and seizure of the goods of his debtor; the creditor of an unliquidated debt cannot;(*d*) the credit of a liquidated sum may be opposed in compensation to another liquidated debt; a credit not yet liquidated cannot be opposed in compensation.

[180] Obligations are further divided into obligations of a specific thing, and obligations of an indeterminate thing, of a certain kind which is called *obligatio generis.*

We shall treat professedly of these obligations, in the first section of Chap. 4th.

[181] Lastly, obligations are divided into divisible and indivisible, according as the thing which is due is susceptible, or not susceptible, of at least intellectual parts: we shall treat professedly of this distinction, Chap. 4. § 2.

§ IV. *Sixth Division.*

[182] Obligations are divided into principal and accessory, this division is derived from the order of things which are the object of them.

The principal obligation is that, which forms the principal object of the engagement contracted between the parties.

Accessory obligations are those, which are in a manner the consequences and dependencies of the principal obligation.

For instance, in the contract for the sale of an estate the principal obligation which the seller contracts, is that, of delivering the estate to the purchaser, and of warranting it against all trouble and evictions, *obligatio præstandi emptori rem habere liceri*, the obligation of delivering the titles and instruments relating to the estate; that of using good faith in the contract, and a proper care in the preservation of the thing sold, are accessory obligations.

(*a*) Qui id quod in faciendo aut non faciendo stipulatur incertum stipulari videtur, in faciendo, veluti fossam fodiri, domum ædificari, vacuam possessionem tradi; in non faciendo, veluti per te non fieri quominus mihi per fundum tuum ire, agere, liceat, per te non fieri, quominus mihi hominem Erotem habere liceat.

(*b*) Ergo si qui fundum sine propria appellatione vel hominem generaliter sine proprio nomine aut vinum frumentumve sine qualitate dari sibi stipulatur, incertum deducit in obligationem.

(*c*) Qui illud aut illud stipulatur veluti *decem vel hominem Stichum*, utrum certum an incertum deducat in obligationem non immerito quæritur; nam & res certæ designantur: & utra earum potius præstanda sit in incerto est, sed utcunque is [qui] sibi electionem constituit adjectis his verbis, utrum ego velim, potest videri certum stipulatus cum ei liceat vel hominem tantum vel decem tantum *intendere* sibi dari oportere, qui vero sibi electionem *constituit*, incertum stipulatur.

(*d*) This is obviously a mere technical positive distinction.

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These terms of principal and accessory obligations, are also taken in another sense, as we shall see, *infra*, § 6.

§ V. *Seventh Division.*

[183] Obligations are distinguished into primary and secondary; and this division is derived from the order in which they are supposed to be contracted.

The primary obligation is that, which is contracted principally in the first place, and on its own account.

The secondary obligation is that, which is contracted in case of the non-performance of a primary obligation.

For instance, in the contract of sale, the obligation which the seller contracts to deliver and warrant the thing sold, is the primary obligation; that of paying the buyer damages, in case of inability to deliver or warrant the thing, is a secondary obligation.

[184] There are two kinds of secondary obligations.

The first consists of those which are only a natural consequence of the primary obligation; which, without the intervention of any particular agreement, naturally arise from the mere non-performance of the primary obligation, or from the delay in performing it.

We may state as an instance, the obligation of damages into which the primary obligation contracted by the seller to deliver or warrant the thing sold, is naturally and of right converted in case of non-performance, and likewise the obligation of interest which arises from a delay in performance of the obligation, to pay a certain sum of money.

The secondary obligations of the second kind are those, which arise from a particular clause, by which the party who enters into an engagement promises to give a certain sum, or other thing, in case he does not satisfy his engagement.

These clauses are called penal clauses, and the obligations which arise from them penal obligations, which are accessory to the primary obligation, and are contracted to assure the execution thereof.

We shall treat of them professedly in Chap. 5.

[185] Secondary obligations may be further subdivided into two kinds.

There is one kind of secondary obligations, into which the primary obligations are entirely converted when they are not executed; such is the obligation of damages already mentioned. When a seller does not satisfy his primary obligation, of delivering or warranting the thing sold, this primary obligation is entirely converted into the secondary obligation of paying damages; and the secondary obligation is substituted for the first, which no longer subsists.(*a*)

There is another kind of secondary obligations which only accede to the primary obligation without destroying it, as is the case when

(*a*) If the seller retains the property, and the delivery of it can be specifically enforced, this illustration will not be strictly applicable.

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the seller is guilty of delay in the performance; such is the obligation of interest, which arises from a default in payment of the principal sum.

§ VI. *Eighth Division.*

[186] Obligations, considered with reference to the persons who contract them, are divided into principal and accessory.

The principal obligation in this sense, is that of the person who obliges himself on his own account, and not for another.

Accessory obligations are those of the persons who oblige themselves for another, such as sureties, and all those, which belong to the obligation, of another. Of these we shall treat in Chap. 6.

[187] [188] [189] [190] There are other divisions noticed by *Pothier*, which are merely applicable to the course of judicial proceedings, according to the law of *France*.

CHAPTER II.

Of the first Division of Obligations into civil and natural.

[191] We have hitherto sufficiently seen the nature of civil obligations: it remains in this chapter to treat of natural obligations.

The principles of the law of *France* are in this respect, different from those of the *Roman* law.

In the *Roman* law, that was called a natural obligation which was destitute of an action; that is to say, which did not give the person in whose favour it was contracted, a right of judicially enforcing the payment of it.

Such were all those which arose from simple agreements, which were neither invested with the quality of a contract, nor the form of a stipulation.

These obligations were very favourable, *quid enim tam congruum fidei humanæ, quam ea, quæ inter eos placuerint servari? l. 2 ff. de pact.* If they were destitute of an action, it was only for a reason derived from the policy of the patricians; who for their own private interest thought proper to make the right of action depend upon certain forms, of which they alone had originally the cognizance, for the purpose of obliging the plebeians to have recourse to them in their affairs, and in order thereby to hold them in dependence. Therefore, although they were destitute of an action, they had all the other effects of a civil obligation; not only was the payment of what was due by a purely natural obligation valid, and not subject to repetition, but I might oppose by way of compensation or set-off, to the action

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of my creditor, what was due from him to me by an obligation purely natural, *l.* 6. *ff. de compens.*(*a*) According to the same principles sureties might contract a civil obligation, which was accessory to an obligation purely natural, *l.* 16. *ff.* § 3. *ff. de fidei.*(*b*) And an obligation purely natural, might serve as matter for a novation of a civil obligation, *l.* I. § I. *ff. de vovat.*(*c*)

According to the principles of the law of *France*, which does admit of the distinction in the *Roman* law between contracts and simple pacts, the natural obligations of the *Roman* law are real civil obligations.

The obligations which may be called purely natural, are those to which the law denies a right of action, on account of a disfavour of their consideration, such as a debt due to a tavern-keeper for expenses contracted in his tavern, by a person resident in the same place.

2. Those which arise from the contracts of persons, who having judgment and discretion sufficient to enable them to contract, are, notwithstanding, incapable of contracting by law; such is the obligation of a woman who being under the authority of her husband, has contracted without being authorised.

[193] These obligations, which arise from a cause discountenanced by the law, or which are contracted by persons who are not allowed by the law to contract, would not by the *Roman* law have even the name of natural obligations. Therefore I do not think they ought to have the same effect with us, which was given by the *Roman* law to obligations purely natural.

For instance, a tavern-keeper ought not to be allowed to oppose against the action of his creditor, what the creditor owes him for expenses incurred in his tavern. The debtor of a married woman cannot, in an action brought by her, oppose the compensation of what she owes to him, by a contract made without the authority of her husband.(*d*)

In like manner, sureties do not contract a valid obligation to a tavern-keeper; for the disfavour of the consideration, which causes a right of action to be withheld from the tavern-keeper, applies as strongly to the sureties as to the principal.(*e*)

When the law annuls the obligation merely on account of the qual-

(*a*) Etiam quod naturâ debetur, venit in compensationem.

(*b*) Fidejussor accipi potest, quotiens est aliqua obligatio civilis vel naturalis cui applicetur.

(*c*) Novatio,* est prioris debiti in aliam obligationem vel civilem vel naturalem transfusio atque translatio: hoc est, cum ex præcedenti causa ita nova constituatur, ut prior perimatur, novatio enim a novo nomen accepit & a nova obligatione, § I. Illud non interest qualis processit obligatio: utrum naturalis an civilis, an honoraria & utrum verbis an re an consensu; qualiscunque igitur obligatio sit, quæ precessit novari verbis potest: dummodo sequens obligatio aut civiliter teneat, aut naturaliter; ut puta, si pupillus sine tutoris auctoritate promiserit.

(*d*) It is very clear that according to the law of *England*, nothing can be the subject of a compensation, (or set-off) which cannot be the subject of an action.

(*e*) This principle would clearly be applied to analogous cases, by the laws of *England.*

* See Part III. c. 2.

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ity of the person, as when a married woman obliges herself without the authority of her husband, there would be more room to doubt whether an action ought to be denied against the sureties: for the reason, for which the law denies an action against her, is personal to herself; nevertheless it must be decided, that the obligation of the sureties is not more invalid than that of the wife: for as law renders the obligation of the wife valid, it does not subsist in any manner except in point of conscience; the civil law disallows it, and declares it to be void, and consequently it cannot be a sufficient subject for the other obligations to accede to. If according to the principles of the *Roman* law, sureties might accede to a natural obligation, it was because natural obligations were not disapproved by the law, but were merely destitute of a right of action. But the *Roman* laws decide, that sureties cannot contract a valid obligation on behalf of a woman, who should enter into an engagement against the prohibition of the *senatus consultum Valleianum,*(a) *qui a totam obligationem senatus improbat, l.* 16. § I. *ff. ad. sect. Vell. l.* 14. *cod. dict. tit.* For the same reason it ought to be decided that sureties cannot accede to the obligation which a married woman contracts without being authorised, nor to any other obligations which are only called purely natural, because they are disapproved by the civil law.(b)

[195] The only effect of purely natural obligations is, that when the debtor has made a voluntary payment, such payment is valid, and not subject to repetition, because the discharge of a conscientious duty was a just cause of paying; so that it cannot be said that it was made *sine causa;* whence it follows that in such case there can be no ground for the actions, which are called *condictio indebti* & *condictio sine causa.*

Observe, however, that a payment made by a woman of a debt, contracted without the authority of her husband, can only be valid if it is made after she becomes a widow, or else by the authority of her husband, if she still continues under his power; for she is no more capable of paying without the authority of her husband, than she is of contracting.

[196] We have hitherto spoken of obligations, which the disfavour of their cause, or the inability of the person contracting them, renders purely natural. A civil obligation, when the debtor has acquired some bar against the action resulting from it, such as the authority of a judgment, or the lapse of time requisite to form

(a) Velleiano senatus consulto plenissime comprehensum est. *Ne pro ullo fœminæ intercederent, ff.* 16. *tit.* 1.

(b) Here I apprehend that the law of *England* would certainly adopt a different determination. When the original contract is disallowed from a disapprobation of the cause, it is highly reasonable that an effect shall not be allowed to be produced circuitously, which cannot be produced directly; but where there is a mere inadequacy in an individual to make a valid engagement, and there is nothing reprehensible in the engagement itself; there is no reason for invalidating an undertaking by a person not affected by legal inability to assure the performance of an act constituting a natural obligation in another; as if goods should be sold to a person under age, and a person of full age should in his default engage to pay for them.

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a prescription, may be regarded as a purely natural obligation. See *infra. p.* 3, *c.* 8.

[197] We must not confound the natural obligations spoken of in this chapter, with the imperfect obligations mentioned in the beginning of this treatise. The latter gives no person any right against us even in point of conscience.

For instance, if I have failed to render my benefactor a service, which gratitude should oblige me to perform; what he suffers from a failure in this duty, does not therefore render him my creditor, even in point of conscience. Therefore, if he owed me a sum of money, for which I had no action against him in consequence of the lapse of time, he would still be obliged in point of conscience to pay me, without deducting any thing on account of what he had suffered from my ingratitude. On the contrary, the natural obligations of which we have treated in this chapter, give the person in whose favour they are contracted a right against us, not indeed in point of law, but in point of conscience. Therefore, if I have contracted a debt of five pounds at a tavern, in a place where I reside, the tavern-keeper is my creditor of that sum in point of conscience; and if I have on my side a credit against him, of the like sum, which is barred by length of time, he may conscientiously excuse himself from paying it, by placing it in compensation against the credit which he has against me.

CHAPTER III.

Of the different modifications under which Obligations may be contracted.

ARTICLE I.

Of suspensive Conditions,(a) *and Conditional Obligations.*

[198] A conditional obligation, is that which is suspended by the condition under which it was contracted, and which is not yet accomplished.

To understand what is a conditional obligation, we shall see, 1st. What is a suspensive condition, and what are the different kinds of conditions: 2d. What may make a suspensive condition: 3d. When a condition is accomplished, or considered as accomplished: 4th. We shall treat of the indivisibility of the accomplishment of conditions: 5th. Of the effect of conditions: 6th. We shall see whether it is necessary, when the obligation has been contracted upon several conditions, that they should all be accomplished in order to give effect to the obligation.

(a) These, in the law of *England*, are distinguished by the term conditions precedent.

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§ I. *What a Condition is, and its different Kinds.*

[199] A condition is the case of a future uncertain event, which may or may not happen, and upon which the obligation is made to depend.

[200] Conditions upon which an obligation may be suspended, are divided into positive and negative.

A positive condition consists in the case where a thing that may or may not happen, shall happen, as *if I marry.*

A negative condition is that, which consists in the case where something, that may or may not happen, shall not happen, as *if I do not marry.*

[201] Conditions are also distinguished into potestative, casual, and mixed.

A potestative condition is that, which is in the power of the person in whose favour the obligation is contracted;(a) as if I engage to give my neighbour a sum of money, in case he cuts down a tree which obstructs my prospect.(b)

A casual condition is that, which depends upon accident, and is no wise in the power of the creditor, as *if such a ship shall arrive safe.*

A mixed condition is that, which depends upon the concurrence of the will of the creditor, and of a third person; as *if you marry my cousin.*

§ II. *What may make a Condition which suspends an Obligation.*

[202] For a condition to have the effect of suspending an obligation, it is necessary, 1. That it should be a condition of something future; an obligation contracted under the condition of any thing that is past, or present, is not properly a conditional obligation. For instance, if after the lottery has begun to be drawn, and before an account of it is received, I promise a person to give him a certain sum in case I have the first drawn ticket; or if I promise a certain sum in case the Pope is now living, these obligations are not conditional, but they have at first their full perfection, if it appears that I really have the first drawn ticket, or that the Pope is living; or on the contrary no obligation is contracted if it appears that I have not the first drawn ticket, or that the Pope is dead.

This is decided by the law, 100. *ff. de verb. obl. Conditio in præteritum, non tantum in præsens tempus relata, statim aut perimit obligationem, aut omnino non differt, adde l.* 37, 38, 39, *ff. de. R. Cred.*(c) Nevertheless, although the thing be really due, the cre-

(a) As to a condition in the power of the debtor, see post, 205, 2.

(b) As to the conditional natural, of mutual agreements, see Appendix, No. VII.

(c) *L.* 37. Cum ad præsens tempus conditio confertur, stipulatio non suspenditur, & si conditio vera sit, stipulatio tenet: quamvis tenere contrahentes conditionem ignorent; veluti si rex Parthorum vivit centum [millia] dare spondes? Eadem sunt & cum in præteritum conditio confertur, 38. Respiciendum enim esse, an, quantum in natura hominum sit, possit scire eam debitum iri. 39. Itaque tunc potestatem conditionis obtinet, cum in futurum confertur.

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ditor cannot demand it until he has ascertained the fact, and notified it to the debtor.(*a*)

[203] It is necessary, 2d, that the condition be something, which may or may not happen. The condition of a thing, which certainly will happen, is not properly a condition, and does not suspend the obligation, but only defers the right of demanding the performance of it, and is merely equivalent to a term of payment.(*b*)

[*Pothier here makes a distinction between contracts and legacies, and shows that, according to the civil law a legacy given to take effect upon future events does not attach, unless the event happens in the life of the legatee.*]

[204] For a condition to be valid, and to suspend an obligation, it must be something possible, lawful, and not contrary to good manners.

The condition of any thing impossible, unlawful, or contrary to good manners, under which a promise is made, renders the act absolutely void, when it is in *faciendo*, and there is not any obligation *l.* § 11. *ff.*(*c*) *de Ob. & Act. l.* 31 *dict. tit.*(*d*) *l.* 7. *ff. de v. Obl.*(*e*) as if I promise you a sum of money upon the condition of your making a triangle without angles, or going naked in the streets.

It is otherwise in testaments; and legacies, given under such conditions would be valid, and the condition would be regarded as if it was not inserted.(*f*)

When the impossible condition is in *non faciendo*, as if I promise

(*a*) The civilians do not seem to have adverted to an obligation referable to an event, which may either be past or future, as a policy of insurance upon a ship lost or not lost, a promise to pay a sum of money if *John* survives *Thomas;* whereas at the time of the agreement the ship may be lost, or one of the persons may be dead, as was the case in the famous cause of the earl of *March* and *Pigott*, 5 *Bur.* 2802. Mr. *Codrington* and Mr. *Pigott*, being at *Newmarket*, engaged (in the phrase of the place) to run their fathers. The odds of the bet were computed according to their respective ages, and the plaintiff took the bet of Mr. *Codrington* off his hands. The defendant gave the plaintiff a note, as follows; I promise to pay 500*l.* if my father die before Sir *William Codrington*. Mr. *Pigott's* father had died that morning in *Shropshire*, and it was ruled that the plaintiff was entitled to recover. But in the notion under which the term is now considered, the obligation would not in these cases be conditional; the term *conditional* being only applied to the effect of *suspending* the obligation, it would be merely *uncertain* whether it were conditional or absolute.

Upon the necessity of notification, I think the *English* law would adopt the opposite rule to that which is here stated, and require the party obliged to apprise himself of the fact; and that an action commenced before the event was or could be known, might be sustained, provided it appeared at the trial the event had taken place at such commencement.

(*b*) Upon this principle it is held that although a bill of exchange upon a condition is void, a bill to pay on the death of any person is good.

(*c*) Item [sub] impossibili conditione factam stipulationem constat inutilem esse.

(*d*) Non solum stipulationes impossibili conditione applicatæ nullius momenti sunt; sed etiam cœteri quique contractus, veluti emptiones, locationes impossibili conditione interposita, æque nullius nomenti sunt, quia in ea re quæ ex duorum pluriumve consensu agitur; omnium voluntas spectetur; quorum procul dubio in hujusmodi actu talis cogitatio est, ut nihil agi existiment apposita ea conditione quam sciant esse impossibilem.

(*e*) In possibilis conditio, cum in faciendum concipitur, stipulationibus obstat; aliter atque si talis conditio inseratur stipulatione, si in cœlum non ascenderit, nam utilis & præsens est & pecuniam creditam continet.

(*f*) There is not any distinction of this kind in the law of *England*.

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you a sum of money if you do not stop the course of the sun, it does not render the obligation under which it is contracted void: the condition has no effect, and the obligation is pure and simple, *dict. l.* 7. *ff. de v. Obl.*(a) But the condition not to do a certain thing which is contrary to good manners, or to the law, may render the act void, because it is contrary to justice and good faith to stipulate for any thing to abstain from that which we are already obliged to abstain from.(b)

[205] For a condition to be valid, and suspend the obligation under which it is contracted, it is necessary that it should not destroy the nature of the obligation.(c) Such is the condition which should make the obligation depend upon the pure and simple will of the person who is engaged; as if I should promise to give a thing in case I please: for an obligation being *juris vinculum quo necessitate adstringimur*, and essentially including a necessity to give or to do something, nothing is more contrary to its nature than to make it depend upon the mere will of the person who is supposed to contract it; and consequently such a condition does not suspend, but destroy the obligation,(d) which is defective in this case for the want of lien, of which we have already spoken. No. 47, 48, *nulla promissio potest consistere quæ ex voluntate, promittentis statim capit, l.* 108. § I. *ff. de verb. Obl.*

It is contrary to the essence of an obligation, that it should depend

(a) This accords with the doctrine of *Co. Lit.* 266. That if the obligation of a bond be impossible at the time of making the condition, the obligation is single; as if a man be bound in an obligation, with condition, that if the obligor do go from *Westminster* to *Rome* within three hours, the obligation shall be void. Here the condition is void and impossible, and the obligation stands good. And the law is the same in case of a feoffment in fee, with condition subsequent (which is called by *Pothier* a resolutory condition,) the estate is absolute, and the condition impossible and void.

But in this respect there is a distinction between a condition of this kind that is precedent, (or in the language of *Pothier*, suspensive,) and such a condition subsequent; for in the former case no estate or interest will grow upon it; as if a man make a lease for life, upon condition that if the lessee go to *Rome* as aforesaid, then he shall have a fee; here the condition precedent is impossible and void, and therefore no fee simple can grow to the lessee.

The considerations of conditions originally possible, becoming afterwards impossible without the default of the party, is principally referable to resolutory or subsequent conditions and penal obligations; for it is clear that if a precedent (or suspensive) condition becomes impossible, the obligation attached to the performance of it can never arise, unless the impossibility is occasioned by the party obliged, in which case the effect is the same as if the condition had been accomplished.

(b) I conceive that such conditions may be valid, or otherwise, according to a variety of circumstances; if they in any degree partake of extortion, or are a cloak for illegality, there can be no doubt of their annulling the obligation. But there can be no objection to making a promise depend upon the continuance or renewal of good conduct, as to pay a relation a sum of money if he abstains from the gaming-table, to secure an annuity to a young woman if she does not renew an illicit connection.

(c) In the law of *England*, there are frequent references to the invalidity of a condition, repugnant to the nature of the act, as a gift in tail, with a condition not to suffer a recovery.

(d) But though an obligation cannot depend upon the pure and simple will of the debtor, it may depend upon his doing or not doing a particular act, which act depends upon his own unqualified will. As if a person engages to pay another 1000*l.* in case he practices as a surgeon within 20 miles of *Liverpool*. A case of this kind is referred to by *Pothier*, *supra*. No. 48.

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upon the pure and single will of the person who is supposed to have contracted it, but it may depend upon the pure and single will of a third person; therefore I may effectually contract an obligation to give or do some thing, if a third person consents to it, *l.* 43, *&* 44 *de verb Obl.*(a)

§ III. *When a Condition is accomplished, or considered as accomplished.*

[206] Positive conditions are accomplished, when the thing which is the subject of the condition arrives.

When a condition consists in giving or doing something, it is necessary for its accomplishment, that the person upon whom it is imposed should give or do the thing prescribed, in the manner which was probably intended by the parties. Therefore, if I had contracted some engagement with you in case of your giving a sum of money to such a one who is a minor, you do not accomplish the condition, if, instead of giving the money to his tutor, you give it to the minor himself, who has dissipated it. For it is evident that my intention in imposing this condition was, that you should give the money to the minor in such a manner that he should profit from it, by placing it in the hands of his tutor; and not that you should abandon it to his own discretion.(b)

Our principle, that conditions ought to be accomplished in the manner that was probably intended by the parties, serves to decide the question made by the doctors, whether conditions ought to be accomplished literally *in forma specificâ?* The answer is, that commonly they ought to be accomplished *in forma specificâ;* but they may nevertheless sometimes be accomplished *per æquipollens*, when from the subject matter it appears that such was probably the intention of the parties; and this intention is presumed, when the person, in whose favour the condition is made, has no interest in its being accomplished in one manner rather than in another

For instance, if I contract some obligation in your favour upon

(a) *L.* 43. Si quis arbitratu (puta) Lucii Titii restitui sibi stipulatus est, deinde ipse stipulator moram fecerit, quominus arbitretur Titius: promissor, quasi moram fecerit, non tenetur. Quid ergo, si ipse, qui arbitrari debuit, moram fecerit? magis probandum est, a persona non esse recedendum ejus, cujus arbitrium insertum est, *l.* 44. Et ideo si omnino non arbitretur, nihil valet stipulatio; adeo ut & si pœna adjecta sit, ne ipsa quidem committatur.

The case of *Worsley* v. *Wood*, in error, *T. R.* 750, is an instance of the application of the principle. It was a condition in a policy of Insurance of the Phœnix Fire Office, that the minister and churchwardens of the parish should certify that they were acquainted with the character, &c. of the assured, and it was determined that without such certificate the company were not liable. Mr. Justice *Lawrence* said, if the refusal by the minister and churchwardens were a wrongful act, the cases are uniform to show that if a person undertake for the act of another, that act must be done.

(b) If there is a covenant or condition, to leave all timber on the land, it is a breach in the tenant to cut down the trees, though he leave them. Sir *T. Raym.* 464. If a party after contracting for the sale of an estate falls the timber, he cannot maintain an action to compel the purchaser to perform the contract. Semble, Duke of St. *Alban's* v. *Shore.* 1 *H. Bl.* 270.

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this condition, that if within such a time you give me five guineas; you are held to accomplish this condition by giving me 105 shillings, it being indifferent to me whether I receive the amount in silver or gold; and the rather, because in respect of money the value ascribed to it by the state, and not the particular substances which are the signs of that value, is the object of consideration, *Arg. l.* I. *fin. ff. de Contr. Empt.*(a)

[207] As conditions ought to be accomplished in the manner which the contracting parties intended, it becomes a question when the condition consists of some act, whether of the creditor, of the debtor, or of a third person, whether it can only be accomplished by that particular person, or whether it may be done by his heirs, or by any other in the name, and on the behalf of the person imported by the condition. The decision of the question depends upon the nature of the fact, and upon the examination of the intention of the contracting parties. If the fact, which is the object of the condition, is personal, if it is the act of a particular person,(b) rather than the mere act itself, which the parties had in view, the condition can only be accomplished by that person. For instance, if I agree with my servant to give him a certain recompense in case he continues with me ten years, it is evident that his service is a personal act, which can only be accomplished by himself. So with respect to the obligation with a pupil of a celebrated painter, to give him a certain sum if his master paints a certain picture for me, this is also a personal act, and can only be accomplished by the painter himself.

(a) Quia non semper, nec facile concurrebat, ut cum tu haberes, quod ego desiderarem, invicem haberem, quod tu accipere velles, electa materia est, cujus publica ac perpetua estimatio difficultatibus permutationum, æqualitate quantitatis subveniret: ea [que] materia forma publica percussa usum dominiumque non tam ex substantia præbet, quam ex quantitate.

In the case of *Worsley* v. *Wood*, mentioned above, (note to 205,) Mr. Justice *Lawrence* observed, that there are some cases in the books respecting conditions precedent, where the thing agreed to be done was in effect performed; though not in the exact manner, it was deemed a substantial performance: as, where the condition was to enfeoff, a conveyance to lease and release has been deemed a compliance. So if the condition be to deliver the will of the testator, and he delivers letters testamentary. 1 *Rol. Abr.* 426. *fol.* 2. 4. But this (viz. the certificate of other persons instead of the minister and churchwardens,) instead of being a substantial performance of the condition is only a substitution of one thing for another.

In *Darrington* v. *East*, *Yelv.* 87, the plaintiff declared, that in consideration that he should procure the defendant six pound for a year, the defendant promised to make him a lease, and that on the 23d of *April*, he procured *J. S.* to lend three pound for a year, and on the 24th of *June* he procured *J. D.* to lend three pound for a year, which was holden insufficient, for it was the intent of the parties that the defendant should have the benefit of six pound for an entire year; and it was said that if the consideration had been to have lent the defendant 20*l.* *in gold*, and it appeared that 10*l.* of it had been lent in silver, although the substance of the matter was performed, it did not agree with the letter, which being specific and express, ought to direct the construction. And it is certain, that according to the principle of reason, one thing may be so specifically expressed as the condition of the agreement, as not to admit of an equivalent performance, even though such equivalent might, in case of a general expression, be allowed as sufficient.

(b) Such was the case in *Worsley* and *Wood*, mentioned in the notes to the two preceding numbers.

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But if the act, whether of the creditor or debtor, or a third person, which is interposed as a condition, is not a personal act; if it is considered by the contracting parties merely as an act in itself, and not as the act of a particular person, the condition may be accomplished not only by the person himself, but also by his heirs, or other successors. For instance, suppose I engage to pay you a sum of money, if you in the course of the year cut down a wood on your land, which keeps the sun from my vines; this condition may be accomplished by your heirs, for the act is not personal to yourself. It is evident, that in attaching this condition to my obligation, I consider the act alone, and in itself, having no other intention than that the wood shall be removed, and it being indifferent to me by whom it is done. So if I buy an estate from you upon condition that such a one shall give up an easement which he claims upon it, the condition is accomplished, if it is given up by his successor.(*a*)

[208] Conditions of contracts, by which we engage, as well for ourselves as for our heirs, may be accomplished as well after the death of the person, in whose favour they are contracted, as during his life. In this respect contracts differ from legacies, and other similar dispositions, which become void if the person in whose favour they are made dies before the condition upon which they depend is accomplished.

The reason of the difference is, that the party giving the legacy only regards the person of the legatee. Hence it follows, that the accomplishment of his condition, which only takes place after his death, cannot give a title to the legacy; for it cannot arise for the benefit of the legatee, who is no more, nor for the benefit of his heirs, who are not the persons that were intended by the testator as the object of his bounty; on the contrary, in contracts, the person who stipulates any thing is held to stipulate both for himself and his heirs; whence it follows, that the condition under which the obligation is contracted, although not accomplished till after his death gives a right to demand the performance of the obligation.(*b*)

(*a*) In *Fowler* v. *Samwell*, 1 *Str.* 653, the defendant signed an agreement in the following terms. Received from *Richard Nichols* and Co. 4500*l.* which I promise to pay on his transferring me 550*l.* South Sea Stock. On the action brought by the surviving partner of *Nichols*, it appeared that the tender of the stock was made after *Nichols's* death: And Lord *Raymond*, at *Nisi Prius*, was of opinion that it being tied up to a tender by *Nichols*, (who had time during life, if not hastened by request,) no tender after his death could make this an absolute debt recoverable upon an *indebitatus assumpsit.* This doctrine is in opposition to the text of *Pothier*. I cannot forbear adding, that it appears no less opposite to the plain reason and justice of the case.

(*b*) This distinction is not in general allowed in the *English* law.' If the conditional legatee survives the testator, the property vests in him subject to the condition, and is transmissible and disposeable. Where a legacy is charged upon a real estate, and the payment is postponed, the legacy fails by the death of the legatee in the mean time, unless it appears that the postponement of the payment was for the convenience of the estate, in which case it attaches. But such failure does not take place in case of the devise of the estate itself. There are several cases respecting the point, whether a testamentary disposition to take effect at a certain age does or does not become void, by the party dying before that age; but these are all referable to the question of intention, whether the attainment of the age should be a condition or denotation of time. The general view of that subject is very ably taken by Sir *William Grant*, Master of the Rolls, in the case of *Hanson* v. *Graham*, 6 *Ves.* 239.

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Cynus, *Bartholus*, and most of the ancient doctors, have maintained that our principle concerning the accomplishment of the conditions of contracts, is subject to exception in respect of potestative conditions, that is to say, of those which consist in some act which is in the power of the person in whose favour the obligation is contracted. These authors contend, that they cannot be accomplished after his death. If this decision were restrained to potestative conditions, which consist in some personal act of the creditor, it could not be attended with any difficulty. It is evident, from what has been already said, that such conditions cannot be accomplished after his death; but it is false, that all potestative conditions, indiscriminately, cannot be accomplished after the death of the creditor, and there is no solid reason upon which the opinion of these doctors can be established. They only found it upon some texts of the law, which are by no means decisive, and which it would be too tedious to mention and refute; it will be sufficient to answer the law, 48. *ff. de verb. Obl.*(a) which is the principal foundation of this opinion. It is there said, that in a stipulation, these terms CUM *petiero dabis;* are different from those SI *petiero*, and that they do not include a condition, *admonitionem magis quam conditionem habet hæc stipulatio, & ideo* adds Ulpian, *si decessero priusquam petiero, non videtur defecisse conditio.* From these last words our doctors argue thus: *Ulpian* says, that when the parties have used these terms, *cum petiero*, the death of the creditor before demand does not prevent the effect of the agreement, because these terms, *cum petiero*, do not include a condition: then say they, if the parties had made use of terms which do include a condition, such as *si petiero*, it would have been otherwise, and the death of the creditor, before demand, would have defeated the condition, and destroyed the obligation; then the condition *si petiero*, can only be accomplished with effect in the lifetime of the creditor; then potestative conditions can only be accomplished with effect in the life of the creditor. I answer, that the last consequence is ill drawn: these doctors, contrary to the rules of logic, argue from the particular to the general; I agree that the condition *si petiero*, cannot be accomplished after the death of the creditor, because it appears that in this condition it is the personal act of the creditor, it is the demand which he shall individually make, that is intended by the parties as a condition, otherwise the condition would have no meaning: but it does not follow that, because the condition *si petiero* cannot be accomplished after the death of the creditor, therefore other potestative conditions depending upon an act, which is not personal, cannot be accomplished with effect after the death of the creditor. This question is treated at great length by *Covaruvias*, *Quæst Pract.* 39.

[209] When the condition includes a specified time, within which it is to be accomplished; as if I am obliged to give you a

(a) *Si decem, cum petiero, dari* fuero stipulatus; admonitionem magis quandam quo celerius reddantur, & quasi sine mora, quam conditionem habet stipulatio, & ideo licet decessero prius, quam petiero, non videtur defecisse conditio.

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certain sum if a particular ship shall arrive in the course of this year, the thing must happen within the specified time, and when that is expired, without its happening, the condition fails, and the obligation contracted upon such condition is entirely at an end.

But if the condition does not include any specific time within which it is to be accomplished, it may be so at any time, and is not held to fail until it becomes certain that the thing will not take place.

There is an exception from this rule, where the condition consists in something which the person, in whose favour I am obliged, ought to do, and which I have an interest in having done; as if I promise my neighbour a certain sum if he will remove a tree which is injurious to me; for in this case I may assign him to appear, that the time may be prescribed within which he shall accomplish the condition, and that in default of his doing so, I may be discharged purely and simply from my obligation.(a)

[210] Negative conditions either have or have not a specified time: when they have such time, they exist as soon as the time is expired, without the thing taking place. For instance, if I promise you something, provided a ship does not return in the course of this year, the condition will exist as soon as the year is expired, without the ship having arrived. They may be accomplished before the expiration of the time, if it becomes certain that the thing will not take place.

If the negative condition has no time specified, it is not deemed accomplished until it is certain that the thing will not take place.(b) For instance, if I engage to give you something, provided a ship does not arrive in safety from the *West Indies*, the condition will not exist until it is certain that the ship will not return; as by certain intelligence being received of its loss.(c)

[211] If, however, the condition consists in something, which is in the power of the debtor, and which interests the person in whose favour the obligation is contracted; as if a person engages to give me a sum of money in case he does not remove a tree in his land which is injurious to mine, I think he who is obliged may be assigned, and that in default of doing such thing within the time appointed by the judge, he shall be condemned to pay what he had engaged to give,

(a) We have not in *England* any judicial proceeding prescribed for this purpose, though I conceive that a suit in equity might be allowable under the circumstances stated. But it seems to me, that without any suit whatever, if a person engages to pay a sum of money, or do any other act upon the performance of a condition for his interest, and no time is prescribed, the promise will be discharged in case the condition is not performed within a reasonable time after request. *Vid.* the distinctions upon this subject, *Co. Lit.* 208, 209. *Shep. Touch.* 134, 137. *Comyns*, *Condition*, *C.* 3.

(b) *Randal* v. *Payne*, 1 *Bro.* 55. A testator directed, that if either of certain persons should marry into the family of *Rivington*, and have a son, such son should have his estate; and if they should not marry into that family, it should belong to another. They all married, but not into the family mentioned; and it was held that the devise was suspended, as their husbands might die, and they might afterwards marry into the favoured family.

(c) This is only one medium of evidence. The not receiving any intelligence for a length of time which can only be accounted for by the supposition of a loss, is equivalent to an account of an actual loss, as is evident from constant experience in respect to policies of insurance.

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in case he did not do the act. And if he does not do it within the time appointed, this negative condition will be deemed to have existed, and he will in consequence be condemned to pay the sum which he has engaged to pay, under this condition.(a) This decision however has not appeared without difficulty to the *Roman* jurists; the two schools were divided upon the question, *l.* 115. § 2. *ff. de verb. Obl.*,(b) that of the *Sabinians*, which I have followed, appears more conformable to the spirit and simplicity of the *French* law.

[212] It is a rule common to all conditions of obligations, that they be taken to be accomplished when the debtor, who is obliged under such condition, has prevented its accomplishment,(c)

(a) I conceive that the same consequence, according to the *English* law, would attach, in case of neglecting to do the act within a reasonable time after request.

(b) Item si quis ita stipuletur, *si Pamphilum non dederis, centum dare spondes?* Pegasus respondit non ante committi stipulationem, quam desiisset posse Pamphilus dari. Sabinus autem existimabat ex sententia contrahentium postquam homo potuit dari, confestim agendum, & tamdiu ex stipulatione non posse agi, quamdiu per promissorem non stitit quominus hominem daret, atque defendebat exempto penus legatæ, [Mucius] etenim heredem, si dare potuisset pœnam, nec dedisset, confestim in pecuniam legatorum teneri scripsit: idque utilitatis causa receptum est ob defuncti voluntatem & ipsius rei natura.

Itaque potest Sabini sententia recipi, si stipulatio non a conditione cæpit; veluti, *Si Pamphilum non dederis, tantum dare spondes*, sed ita concepta sit [stipulatio], *Pamphilum dare spondes? si non dederis, tantum dari spondes?* quod sine dubio verum erit, cum id actum probatur, ut si homo datus non fueri, & homo & pecunia debeatur; sed & si ita cautum sit, *ut sola pecunia non soluto homine debeatur*, idem defendendum erit; quoniam fuisse voluntas probatur ut homo solvatur aut pecunia petatur.

(c) An instance of the accomplishment of a condition being prevented by the act of the debtor, arose in the case of *Hotham* v. the *East India* Company, 1 *T. R.* 638, upon a provision in a charter party, stating that nothing should be allowed for short tonnage, unless the same should be certified by the Company's agents, presidents, or chiefs in council, or supercargoes, from which the ship should receive her last dispatches; and it being found that the plaintiff had taken all proper steps to obtain the certificate, and that the Company's agents having, by their neglect and default, rendered it impossible that the condition could be performed, it was equal to a performance.

In the case of *Worsley* v. *Wood*, which has already been frequently referred to in the course of the present article, it was admitted, that if the obtaining the certificate had been prevented by the act of the Insurance Office, it would have been a dispensation from the condition.

If the person, who is under a conditional obligation, discharges the other from executing the condition, it has also been established by our courts to be a sufficient performance; and in the leading case upon the subject, it was held that if one party is ready, and the other stops him on the ground of intention not to perform his part; it is not necessary for the first to go further, and do a nugatory act. *Jones* v. *Barkeley*, *Doug.* 684.

But, without such a discharge or refusal, it seems that the party bound to perform the condition must do every thing towards it which can be done, without the concurrence of the other party. Some of the old cases upon the subject seem to carry this doctrine to an unreasonable extreme. The discussion which took place in the case last mentioned, will give the fullest information to those who are desirous of pursuing the subject further. With respect to the nature and effect of mutual agreements to be performed at the same time, see the Appendix to this article. (No. VII.)

In a former case, between Sir *Richard Hotham*, and the *East India* Company, it was held that a charter party having engaged for the payment of freight on a delivery at the port of *London*, and a delivery at *Margate* having been in the contemplation of the parties substituted for a delivery at the port of *London*, it was a good performance of the condition. *Doug.* 272.

But where a new agreement is substituted to the original agreement, the plaintiff must take care to frame his declaration according to the fact, and cannot maintain

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quicumque sub conditione obligatus, curaverit ne conditio existeret nihilominus obligatur, l. 85. § 7. *ff. de verb. Obl. Pro impletâ habetur conditio cum per eum fiat, qui, si impleta esset debiturus esset l.* 81, § 1. *ff. de Cond et Dem.* And this is a consequence of the rule of law, *in omnibus causis pro facto accipitur id in quo per alium mora fit, l.* 39. *ff. de R. I.* It may however be said, that it is by the act of the debtor that a condition is not accomplished, and that it ought to be considered as accomplished, when it is only indirectly, and without any intention of preventing its accomplishment, that he has placed an obstacle in the way of it. Therefore *Paulus* says, with respect to conditions attached to legacies: *Non omne ab hæredis persona interveniens impedimentum pro expletâ conditione cedit, l.* 38. *ff. de Statuliberis.*

For instance, if a testator to whom I succeed leaves you a house, provided that within a year after his decease, you give the creditor of *Peter* a certain sum for which he keeps him in prison, and I being your creditor on my own account for a considerable sum, seize upon your effects to satisfy my debt; although this seizure deprives you of the power of giving the money to the creditor of *Peter*, and of accomplishing the condition of your legacy, I should not hereby be properly held to have prevented the accomplishment, and it would not be taken as accomplished, for it is only indirectly that I have prevented it: this seizure which I have made, was not made with the design of preventing you from accomplishing the condition; I had no other object than to obtain in a lawful manner the money due to me from you.

Observe also in this respect a difference between conditions, the accomplishment of which is momentary, and those which are accomplished by a succession of time. The first are taken to be accomplished, as soon as the conditional creditor, having presented himself to accomplish the condition, is prevented by the debtor; it is not so with respect to the others. For instance, if I engage to do something in favour of a husbandman, upon condition he shall do me ten days' work, and having offered himself for the purpose, I send him away; the condition is only deemed to be accomplished in part, and as to one day's work; it would only be taken to be entirely accomplished, after he had offered himself on ten different days.(a)

With respect to the rule concerning potestative conditions, that they ought to be taken as accomplished, when the accomplishment o them was not in the power of the person, to whom a legacy had been left upon such condition, it is a rule which applies to last wills, and does not extend to contracts. For instance, if a person has left you a certain sum, provided within a year after his decease, you give your slave *James* his freedom, this condition is deemed to be accomplished, and the legacy is due, if the death of *James* takes place a short time

an action upon the first, by showing a performance of the last. See *Head* v. *Waithman*, 1 *East.* 619.

(a) This illustration takes it for granted, that the particular days are at the option of the person who is to do the work. Whether that would be the true construction of a condition expressed in general terms, is a question foreign to the object at present under consideration.

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after that of the testator, so that you are prevented from executing and accomplishing the condition, *l.* 54. § 2. *ff. de Leg.* I.(*a*) But if a person by an agreement with you, engages to give a sum of money upon the like condition, I think the money will not be due to you, if you are prevented by the death of *James* from accomplishing the condition.

The reason of this difference is, that last wills are susceptible of a more extensive interpretation ; on the contrary, contracts ought only to be construed *quantum sonant*, and the interpretation in case of doubt is always made against the person in whose favour the obligation is contracted, *ambiguitas contra stipulatorem est*, *l.* 26. *ff. de R. Dub.* because he ought to blame himself if the act is not explicit, as it was in his power, being present, to express it better, *l.* 39.(*b*) *ff. de Pact. l.* 99. *de verb. Obl.*(*c*) Therefore, according to this principle, when a person contracts an engagement with me, upon condition of my giving freedom to my slave, in case of doubt whether the obligation has been contracted, even where it was not in my power to liberate him, the interpretation ought to be against me, and I am not entitled to demand, what was promised me upon this condition, although the death of the slave having taken place before I could accomplish it, has prevented me from doing so. This decision holds good, even where I had already made some preparations, as if I had recalled the slave from a distant place, in order to liberate him before the judge of the place where I reside, and he had died on the road, I could not demand what was promised me on condition of his enfranchisement.

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It is the same with respect to the rule concerning mixed conditions. If a person promised me a certain sum in case I marry his cousin, I think that the sum would not be due if I was ready to marry her and she refused, although if a legacy was given me on such a condition it would be taken as accomplished, *l.* 31. *ff. de Cond.*(*d*)

(*a*) Sed et si sevi mors impedisset manumissionem, cum tibi legatum ; esset, si eum manumisses ; nihilominus debetur tibi legatum ; quia per te non stetit, quominus perveniat ad libertatem. The principle that a legacy given upon a condition precedent is due, if the performance of the condition becomes impossible, is not recognized in the law of *England.* See *Roundel* v. *Currer*, 2 *Bro. Ch. Rep.* 67.

(*b*) Veteribus placet, pactionem obscuram vel ambiguam venditori, et qui locavit, nocere; in quorum fuit potestate legem apertius conscribere.

(*c*) Quidquid adstringendæ obligationis est, id nisi palam verbis exprimitur, omissum intelligendum est, ac fere secundum promissorem interpretamur; quia stipulatori liberum fuit verba late concipere.

(*d*) In testamenta ita erat scriptum, *Stichus & Pamphila liberi sunto : & si in matrimonium coierint, heres meus his centum dare damnas esto :* Suchus ante apertas tabulas decessit: respondit partem Stichi defectam esse ; sed & Pamphillam defectam conditione videri, ideoque partem ejus apud heredem remansuran ; sed et si uterque viveret, & Stichus nollet eam uxorem ducere, cum mulier parata esset nubere, illi quidem legatum deberetur. Stichi autem portio inutilis fiebat. Nam cum uni ita legatum fit, *Titio si Seiam uxorem duxerit, heres meus centum dato ;* si quidem Seia moriatur, defectus conditione intelligitur: at si ipse decedat, nihil ad heredem suum eum transmittere, quia morte ejus conditio defecisse intelligitur ; utroque autem vivente, si quidem ipse nolit uxorem ducere, quia ipsius facto conditio defecit, nihil ex legato consequitur: muliere autem nolente nubere cum ipse paratus esset, legatum ei debetur.

A testator gave his estate in trust for his granddaughter, and the heirs of her body, remainder to *Comyns*, and his right heirs, upon condition that he should marry the

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§ IV. *Of Indivisibility in the Accomplishment of Conditions.*(a)

[215] The accomplishment of conditions is indivisible, even when the thing which is the object of the condition is something divisible. For instance if a person has left me an estate in case I give a sum of money to his heir, or if by an agreement of compromise a person engages to leave me an estate, which is in dispute between us in case I give him a certain sum within a given time: although the object of this condition is divisible, nothing being more so than a sum of money, yet the accomplishment of it is indivisible, so far as that the legacy which has been given, or the obligation which has been contracted under such condition will be in suspense until the accomplishment of the whole, without the accomplishment of a part giving any title to a proportionate part of the legacy, or to the performance of a proportionate part of the obligation, *l.* 23.(b) *l.* 56.(c) *ff. de Cond. et Demon.* Therefore if a person leaves an estate to *Peter*, on condition of his giving the heir 1000*l.* and *Peter* dies after having given 500*l.* the legacy becomes void for the whole, *d. l.* 56. and the heir of *Peter* can only reclaim the five hundred pounds, *condictione sine causa*, unless the heir of the testator prefers discharging the legacy in part. It is in favour of the heir, that the condition is regarded as indivisible.

It would be the same if the legacy had been given to *Peter*, or in default of him to his children, and *Peter* having died, one of the children had paid the heir his share of the one thousand pounds, the condition would not be deemed in any degree accomplished, and he could not demand any thing until the residue was paid, *d. l.* 56.

It would be otherwise, if the legacy was at first given to two lega-

granddaughter. *Comyns* filed a bill offering to marry the granddaughter, which she refused, and soon afterwards married another person, and suffered a recovery. Lord *Talbot* expressed himself inclined to think that the marriage was a condition subsequent, and that it was dispensed with, partly by the lady's death, and partly by her declaration that she would not marry him; but he decided that the estate was sufficiently barred by the recovery. *Robinson* v. *Comyns*, *Temp. Talb.* 164. It is to be observed, that the first part of this opinion, which was merely extrajudicial, is wholly referable to the construction of the condition, as being precedent or subsequent; and does not import any general rule analogous to that of the civil law, that *admitting it to be precedent*, the performance of it was dispensed with by the refusal to marry. It is very difficult to accede to the opinion, that this condition should be construed otherwise than as a conditian precedent.

(a) As to the doctrine of apportionment. See Appendix, No. VIII.

(b) Qui duobus heredibus decem dare jussus est [et] fundum sibi habere, verius est, ut conditionem scindere non possit ne etiam legatum scindatur; igitur quamquis alteri quinque dederit, nullam partem fundi vindicabit, nisi alteri quoque adeunti hereditatem reliqua quinque numeraverit, aut illo omittente hereditatem tota decem dederit.

(c) Cui fundus legatus est, *Si decem dederit*, partem fundi consequi non potest, nisi totam pecuniam numerasset; dissimilis est causa cum duobus eadem res sub conditione legata est. In hac enim quæstione statim a testamento, quo pluribus conditio apposita est, divisa quoque in singulas personas videri potest. Si ideo singuli cum sua parte et conditioni parere & legatum capere possunt; nam quamvis summa universæ conditionis sit adscripta, enumeratione personarum potest videri esse divisa; in eo vero, quod uni sub conditione legatum est, scindi ex accidenti conditio non debet: & omnis numerus eorum, qui in locum ejus substituuntur, pro singulari persona est **habendus.**

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tees under this condition. The testator having at the first imposed the condition upon two persons, is held to have divided it between them, *d. l.* 56.

[216] *Dumoulin* decides for the indivisibility of the condition in the following case. Four heirs of a debtor are condemned to pay a certain sum, with an allowance of two years for the purpose, provided they give security within a month. *Dumoulin* maintains, that three of the heirs who would have given security for their respective shares within the month, are not to be allowed the benefit of the term, if their co-heir does not in like manner give security for his part. His reason is, that the creditor is in this case the most favourable party, since he suffers from a term not agreed upon, being allowed to his debtor; whence it follows that the condition upon which the term is granted by the judge ought to be interpreted in his favour, and strictly against the debtor.

If the fourth heir, instead of giving security for his share, pays it, there is no doubt but that the three others giving security for their respective parts, ought to enjoy the time allowed by the judge, as the creditor has security for every thing that is due to him.

[217] A condition of a legacy is divisible, when the legacy only takes effect in part. For instance, if a person leaves me any thing upon condition of giving a certain sum, and the legacy is reduced one half, because the surplus did not belong to the testator, who nevertheless, believed himself to be the proprietor of the whole, I shall not only be bound to give more than one half, in order to accomplish the condition, but if I have actually given it, I shall be intitled to repetition, *l.* 43.(*a*) *l.* 44. § 9. *ff. de Cond. et Dem.*(*b*)

§ V. *Of the Effect of Conditions.*

[218] The effect of a condition is to suspend the obligation, until the condition is accomplished, or considered as accomplished; till then nothing is due: there is only in expectation that what is undertaken will be due; *pendente conditione nondum debetur, sed spes est debitum iri.* Therefore a payment made by mistake, before

(*a*) Plautius, Rogatus est heres a liberto testatore, *ut perceptis sibi decem, totam hereditatem revenderet;* postea patronus defuncti bonorum possessionem contra tabulus petierat, & partem hereditatis, quæ debebatur, abstulerat. Proculus, Cassius: fidei commissorum pro rata quod solvit repetere debere aiunt, Paulus; hoc jure utimur; nam quemadmodum præstatione fidei commissorum et legatorum heres exoneratur per prætorem, ita etiam ipse partem consequi debet. § 1. Diversum est, si falcidia,* interveniat et minuat legatum, nam his casibus nihil repetetur; gatum in solidum conditioni paretur. § 2. Item sanctitus jus dandi, si is cui lequia est, non potest partem hereditatis sibi relictam, totam capere; nam verius est, partem eum præstare debere, partem illos, qui auferunt ab eo, quod plus relictum est, quam a lege conceditur. § 3. Neratius libro primo responsorum scribit, ex duobus scriptis heredibus, si unus rogatus sit tibi hereditatem restituere, tu Titio certam summam dare, et beneficio legis falcidiæ in restituendo heres utatur; quanto minus tibi præstiterit, tanto minus te Titio præstare, non esse iniquum.

(*b*) *L.* 44. § 9. Si pars rei legatæ usucapta sit, an in solidum parendum sit, dubito: et potest dici, pro parte parendum ex sententia testatoris.

* A certain portion which could not be left from the heir.

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the accomplishment of the condition, is subject to repetition, *condictione indebiti, l.* 16. *ff. de cond. Indeb.*(a)

[219] If the thing, which is the object of the conditional obligation, entirely perishes before the accomplishment of the condition, it will be to no purpose that the condition is accomplished afterwards; for the accomplishment of the condition cannot confirm the obligation which no longer subsists; for there cannot be any obligation without something which is the subject of it; but if the thing exists at the time of the accomplishment of the condition, the accomplishment has this effect, that the thing is due in the state in which it is; if there is any augmentation, the creditor has the advantage of it; and if there is any deterioration he is subject to the loss arising from such deterioration, provided it has happened without the fault of the debtor, *l.* 8. *ff. de Peric. et Com. Rei. vend.*

[220] This accomplishment of the condition has a retrospective effect to the time when it was contracted, and the right which results from the engagement is deemed to be acquired from the time of the contract, *l.* 18. *l.* 144. § I. *ff. de Reg jur.*(b)

Hence it follows, that if the creditor dies before the existence of the condition, though he has not yet an absolute right, but only an expectation, nevertheless, if the condition is afterwards accomplished, he will be held to have transmitted to his heir the right to the credit resulting from the engagement contracted in his favour; because by the retrospective effect of the condition, the right will be held to have been acquired from the time of the contract, and consequently to be transmitted to his heir.

It is otherwise with respect to conditions attached to legacies. The reason of the difference is, that a legacy being only given to the person of the legatee, the condition can only be accomplished for his benefit; whereas a person who enters into a contract, is deemed to contract on behalf, as well of himelf, as of his heirs, and the condition may exist for the benefit of his heirs after his death, *supra, n.* 208. *Vi Cujas. ad. dict. l.* 18.(c)

[221] It is also a consequence of the retrospective effect of conditions, that if a conditional engagement is contracted by an act which gives a right of hypothecation, the hypothecation will be held to have been acquired from the time of the contract, although the condition may not be accomplished until long afterwards.

(a) Sub conditione debitum, per errorem solutum, pendente quidem conditione repetitur, conditione autem existente repeti non potest § 1. Quod autem sub incerto die debetur, die existente, non repetitur.

(b) *L.* 18. Quæ legata mortuis ad heredem nostrum transeunt eorum commodum per nos his, quorum in potestate sumus, eodem casu adquirimis: aliter atque quod stipulati sumus; nam et sub conditione stipulantes, omnimodo eis adquirimus, etiamsi liberatis nobis potestate domini conditio extat.

PAULUS.

Si filius familias sub conditione stipulatus emancipatus fuerit, deinde existiterit conditio, patri actio competit: quia in stipulationibus id tempus, spectatur, quo contrahimus.

L. 144. In stipulationibus id tempus spectatur, *quo contrahimus.*

(c) This distinction does not prevail in the *English* law, as is mentioned more particularly in a note to No. 208.

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[222] [*Here follows a paragraph respecting the right of opposing a sale of the lands hypothecated, which being merely technical is not included in the translation. The distinction between contracts, which do or do not give a right of hypothecation, is not analogous to any thing in the English law; it is a subject entirely different from the maritime contract of express hypothecation.*]

§ VI. *Whether it is necessary, when an Obligation is contracted upon several Conditions, that they should all be accomplished.*

[223] This question is to be answered with a distinction. Where several conditions are connected by a disjunctive particle as where I engage to do any thing in your favour, *if such a ship arrive safe*, OR *if I am appointed to such an employment*, it is sufficient to perfect the obligation if one of the conditions is accomplished. But where they are connected by a conjunctive particle, as when it is said, *if such a ship arrives*, AND *I am appointed to such an employment*, all the conditions must be accomplished, and if any one is not so, the obligation fails. *L.* 129. *ff. de verb. Obl.*(a)

Observe, however, that in testaments, and even in contracts, disjunctive particles are taken in a copulative sense, when it is evident that they were so intended by the testator, or the contracting parties, as where a person charges his son with a substitution,(b) if he dies without children, OR without having disposed of the estate, it is evident that in this substitution, whether it is contained in a testament or a grant, the disjunctive particle OR, is understood in a copulative sense, and that the substitution only takes place upon the accomplishment of both the conditions, *l.* 6. *Cod. inst. et subs.*(c)

(a) Si quis ita stipulatus, fuerit, *decem aureos dos* SI NAVIS VENIT ET TITIUS CONSUL FACTUS EST? non ailas dabitur quam si utrumque factum sit. Idem in centrarium DARE SPONDES, SI NEC NAVIS VENIT, NEC TITIUS CONSUL FACTUS SIT? exigendum erit ut neutrum factum sit. Huic similis scriptura est, SI NEQUE NAVIS VENIT, NEQUE TITIUS CONSUL FACTUS EST: aut si sic, DABIS SI NAVIS VENIT AUT TITIUS CONSUL FACTUS SIT? sufficit unum factum. Et contra, DABIS SI NAVIS NON VENIT AUT TITIUS CONSUL FACTUS NON EST? sufficit unum non factum.

(b) This is nearly the same as devising an estate to his son with a limitation over.

(c) Generalitur sancimus, si quis ita verba sua composuerit, ut edicat *si filius vel filia intestatus vel intestata vel sine liberis* (*aut sine testamento*) *vel sine nuptiis decesserit*, et ipse vel ipsa liberos sustulerit vel nuptias contraxerit, sive testamentum fecerit; firmiter res possideri et non esse locum substitutioni eorum vel restitutioni.

There are many cases in the *English* courts in which the word *or* is construed as *and* & *vice versa*, when from the context or subject or subject-matter such construction appears more consistent with the intention. *Vid. Richardson* v. *Spragg*, 1 *P. Wms.* 434. *Keilway* v. *Keilway*, 2 *P. Wms.* 346. *Haws* v. *Haws*, *Birch* v. *Dalway*, 1 *Ves.* 13. 19. *Jackson* v. *Jackson*, *id.* 217. *Read* v. *Snell*, 2 *Atk.* 645. *Walsh* v. *Peterson*, 3 *Atk.* 193, *& Snader's Notes*, *Mabersly* v. *Strode*, 3 *Ves.* 450. *Waddell* v. *Mundy*, 6 *Ves.* 341. In *Long* v. *Dennis*, 1 *Bur.* 2052, a testator directed that if his son should marry any woman not having a competent portion, *or* without the consent of his trustees, the estate after his death, should go over. He married a woman with a competent fortune but without consent; which was held a sufficient compliance with the condition, and the limitation over did not take place. Lord *Mansfield* said that he could never mean that both parts should at all events be fulfilled; that if the trustees consented, a question might afterwards arise concerning the competency of the portion.

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ARTICLE II.

Of Resolutory Conditions, and of Obligations determinable, on a certain condition, and of those which are limited to a certain Time.

[224] Resolutory conditions are those which are added, not to suspend the obligation until their accomplishment, but to make it cease when they are accomplished. An obligation contracted under a resolutory condition, then, is perfect from the instant of the contract, and the creditor may demand the payment of it. But if, before it is acquitted, or the debtor is put *en demeure*,(a) the condition, upon which it was agreed that it should be defeated, is accomplished, the obligation will cease.

This difference, between resolutory conditions, and the suspensive conditions spoken of in the preceding article, may be illustrated by the following example. You lend *Peter* by my orders the sum of 1000*l.* and I engage to return it if such a ship, on which he holds a bottomry interest, arrives safe. This is a suspensive condition, and I am not your debtor until the condition is accomplished by the arrival of the vessel; but if I engage for *Peter* until the arrival of the vessel, that is to say, upon condition that my obligation shall only continue until the arrival of the vessel, the condition in this case is only a resolutory condition, which does not prevent my engagement from being perfect immediately upon its being contracted, and consequently you may immediately demand the payment of the money. All the effect of this condition is, that if the vessel arrives before I have discharged or been called upon to discharge my obligation, the accomplishment of the condition puts an end to it.

[225] In the same manner, as an obligation may be limited until the occurrence of a certain condition, it may be also limited to a certain time. For instance, if I become surety to you for *Peter* for three years, I shall be discharged from my obligation as soon as that time is expired.

[226] Observe, however, that when the debtor before the expiration of the time, or before the accomplishment of the condition which is to dissolve the obligation, is put *en demeure* by a judicial interpellation, his obligation cannot afterwards be dissolved in this manner, *l.* 59. § 5. *ff. Mand.*(b) The reason is evident; the creditor ought not to suffer from the unjust delay of his debtor, in discharging his obligation whilst it subsisted, neither can the debtor take advantage of his own delay.

(a) *Vide ante*, No. 289.

(b) *Ille illi salutem. Mando tibi ut Blæsio Severo adfini meo octoginta credas, sub pignore illo [et illo] in quam pecuniam & quidquid usurarum nomine accesserit, indemnem rationem tuam me esse ex causa mandati, in eam diem quoad vixerit. Blæsius Severus præstaturum.* Postea sæpe conventus mandator, non respondit: Quæro an morte debitoris liberatus sit? *Paulus* respondit mandati obligationem perpetuam esse, licet in mandato adjectum videatur, indemnem rationem tuam esse ex causa, mandati, in cum diem, quoad vixerit Blæsius Severus præstaturum.

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See *infra* P. 3. Ch. 7. Art. 2. as to the extinction of obligations by a resolutory condition, or the expiration of a resolutory term.

ARTICLE III.

Of a Term of Payment.

[227] An obligation is either contracted with a term for discharging it, or not; when it is contracted without a term, the creditor may require it to be discharged immediately; when it includes a term he cannot require it until the term is expired.

§ 1. *What a Term of Payment is, and the different Kinds of it.*

[228] A term is a space of time granted to the debtor for discharging his obligation: there are express terms, resulting from the positive stipulations of the agreement; as where I undertake to pay a certain sum on a certain day; and also terms which tacitly result from the nature of the things which are the object of the engagement, or from the place where the act is agreed to be done. For instance, if a builder engages to construct a house for me, I must allow a reasonable time for his fulfilling his engagement. If a person at *Orleans* undertakes to deliver something to my correspondent at *Rome* the engagement tacitly includes the time necessary for taking the thing to *Rome*.

[229] A term, is either of right or of grace: when it makes part of the agreement, and is expressly or tacitly included in it, it is of right; when it is not part of the agreement, it is of grace; as if it is afterwards granted by the prince or the judge at the requisition of the debtor.(*a*)

§ II. *Of the Effect of a Term, and in what Respect it differs from a Condition.*

[230] A term differs from a condition, inasmuch as a condition sus-suspends the engagement formed by the agreement: whereas a term does not suspend the engagement, but merely postpones the execution of it.(*b*) A person who promises to pay upon a certain condition,

(*a*) The *English* law does not admit of any such term for general purposes. The courts of equity often prescribe certain times within which acts are to be done, as for instance, the redeeming of mortgages; but the exercise of this discretion, or more properly speaking, this mode of adjudication, has a very slight analogy to the term of grace referred to in the text. By the special jurisdiction of courts of conscience, for the recovery of small debts, a payment is often awarded to be made by instalments, to which the effects of a term of grace, as stated by *Pothier* may be fairly and naturally applied.

(*b*) This distinction is in *England* often very material with respect to cases affected by the bankrupt laws; a debt due at a future time (or according to the phrase applied to that subject, *debitum in præsenti solvendum in futuro*) being entitled to the benefit of the commission, which a conditional (more frequently termed a contingent debt) is not.

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is not a debtor until the condition has taken place; there is merely an expectation of his becoming so; therefore if he pays what is the object of the obligation, by mistake and before the condition is accomplished, it may be reclaimed, as we have seen in the preceding article; on the contrary, a person who owes anything subject to a term not yet expired, is a real debtor, and if he pays within the time he has no right of repetition, for he has only paid what was in effect due from him; but though he is a real debtor, he is not compellable to discharge his obligation until the expiration of the term.

Sometimes the word *owes*, (*devoir*, *debere*) is taken strictly for what may be actually demanded, and in this sense it is said that a person who has a term, does not owe any thing.

[231] A term defers the right of requiring payment until it is fully completed. Therefore if I promise to pay this year, no demand can be enforced on the last day; for that day is comprised within the term.

[232] This effect of a term, in postponing the right of requiring payment until it is expired, is common to a term of right, and to a term of grace.

A term of right has another effect which is peculiar to itself, viz. that it prevents the debt being opposed by way of compensation or set off, until it is expired.

For instance, on the first of *January* 1800, I lend you a thousand pounds, which you engage to pay on the first of *January*, following. Afterwards you become the heir(*a*) of my creditor for a like sum due without any term. You demand the payment of this sum in *July* 1800. I cannot set off against it the money due from you to me payable on the first of *January* 1801, for as compensation or set-off is a payment, I cannot oblige you to pay to me before the term, contrary to the agreement.

It is otherwise with respect to a term of grace. That stops the pursuits of the creditor, but it does not exclude the right of compensation. Therefore, if I lend you on the first of *January*, a thousand pounds payable on demand, and you obtain from the prince or judge a term until the first of *January* following; if on having become the heir of my creditor for a like sum, you demand the payment of it in *July*, the term of grace which is allowed to you, will not prevent my compensation of the money due to me. The term of grace has no effect, except to stop the rigour of prosecution; and does not suspend the right of compensation, *aliud est enim diem obligationis non venisse, aliud humanitatus gratia tempus indulgeri solutionis, l.* 16. § I. *ff. de Compens.*

[233] It remains to observe concerning the effect of the term, that being presumed to be inserted in favour of the debtor, *l.* 17.(*b*) *ff. de Reg. Jur.* the debtor may very well defend himself from

(*a*) The right of setting off a debt due from a person in his own right against another due to him as heir, is at this place only a matter of incidental illustration. The mutuality requisite in cases of set-off, will be a subject of particular attention in its proper place.

(*b*) Cum tempus in testamento adjicitur, credendum est pro herede adjectum; nisi

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payment before the expiration of the term, but the creditor cannot refuse receiving if the creditor is willing to pay, *l.* 70 *de Solut.*(*a*) *l.* 17. *de Reg. Jur.* at least unless it appears from the circumstances that the term was appointed in favour of the creditor, as well as of the debtor.

The time of payment specified in bills of exchange, is deemed to be appointed in favour of the creditor, who is the holder, as well as of the debtor: Declaration, 28th *November*, 1712.(*b*)

§ III. *Of a Case in which the Debt may be required within the Time.*

[234] The term granted by the creditor to his debtor is supposed to be founded on a confidence in his solvency; when that foundation fails, the effect of the term ceases.

[235] Hence it follows, that when the debtor fails, and the price of his effects is distributed among his creditors, the creditor may take his share although the term is not expired; this also is a difference between a term and a condition; for a conditional creditor has not in this case any right to take a share,(*c*) but only to oblige the other creditors to refund his proportion, if the condition afterwards, takes place. Observe, that if several persons are debtors jointly (*in solido,*) and some of these fail, the creditor may demand the debt within the term from these, but not from those who are solvent. The solvent party has a right to the enjoyment of his term, and is not even obliged to give security. This was adjudged by an *arrêt* of the 29th *Feb.* 1592. The reason is, that the debtor who continues solvent, ought not, without his own act, to be further obliged than he originally intended; he cannot then be compelled to give a security which he had not entered into any obligation to give: the failure of the other joint debtors being their act, and not his, it cannot prejudice him, according to the rule *nemo ex alterius facto prægravari debet.*

§ IV. *Of a Term joined in Conditions.*

[237] Agreements sometimes include both a condition and a term; in this case it is necessary to examine whether the

alia mens fuit testatoris, sicuti in stipulationibus promissoris gratia tempus adjicitur.

(*a*) Quod certo die promissum est, vel statim dari potest; totum enim medium tempus ad solvendum promissori liberum relinqui intelligitur.

(*b*) It is manifest, that if a husbandman engages to mow my meadow on the first of *June*, he does not discharge the obligation by mowing it on the first of *May*. Neither can a person derive any collateral advantage from an anticipated payment; as if he is bound to pay money with interest on the first of *June*, he cannot discharge himself from the intermediate interest by offering the principal on the first of *May* against the will of the creditor, who by express stipulation was to have interest to a subsequent period. If there be a condition to re-enter on payment of 100*l.* on the first of *May* though the grantor pays before, he cannot re-enter until the first of *May*.

(*c*) The difference, above referred to, is supported by the *English* bankrupt law, but it is there carried further; as it appears that, by the law of *France*, the occurrence of

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term is applied only to the condition or to the disposition also.(*a*) In the first case, as soon as the condition is accomplished, it is not necessary to wait for the expiration of the term, in order to demand the payment of the debt. For instance, if you agree to pay me a hundred pounds, provided I marry within three years, and I marry within six months, I may immediately demand payment of the hundred pounds, without waiting for the expiration of the three years. Likewise if you agree to give me a hundred pounds in case I do not go into *Italy* before the month of *May*, the sum may be demanded as soon as it becomes certain from my death that I cannot go into *Italy*, *l.* 10. *ff. de verb. Obl.*(*b*) without its being requisite to wait until the month of *May*, because the term was prefixed to the condition and not to the disposition. But on the contrary if it is said, if I marry before the first of *January* you shall then(*c*) (*pour lors*) give me one hundred pounds, the word *then* shows that the term is applied to the disposition as well as to the condition, and therefore though I accomplish the condition by marrying I cannot demand the sum promised, until after the expiration of the term,(*d*) *l.* 4. § I. *ff. de Cond. et Dem.*(*e*)

ARTICLE IV.

Of the Place agreed upon for Payment.

[238] When the agreement specifies a certain place where the payment is to be made, the place is supposed to be appointed for the advantage of the creditor as well as of the debtor, therefore the debtor cannot oblige the creditor to receive it elsewhere. *Is qui certo loco dare promittit, nullo alio loco quam in quo promisit solvere invito stipulatore potest*, . . 9. *ff. de eo quod certo loco, &c.*

the condition subsequent to the failure, entitles the creditor to a proportionate share, whereas no person is entitled to relief under the bankrupt laws, who is not an actual creditor at the time of the bankruptcy.

(*a*) In *Sidney* v. *Vaughan*, 2 *Bro. P. C.* 2 ed. 254, a person left a sum of money to her nephew, then being an apprentice to *A. B.* to be paid him in six months *after he should have fully served out his apprenticeship*. The nephew ran away before the end of his apprenticeship, and it was contended that the legacy was not payable at a certain time at all events, but only in case he fully served out his apprenticeship, which was in the nature of a condition. It was answered that the serving out the apprenticeship was not to be considered as a condition for the non-performance whereof the legacy would be forfeited, but was only an appointment of the time when the legacy would be paid; and so it was decided.

(*b*) Hoc jure utimur, ut ex hac stipulatione, *Si. Lucius Titius ante Calendas Maii in Italiam non veneri, decem dare spondes?* non ante peti quicquam possit, qaam exploratum sit ante eum diem in Italiam venire Titium non posse, neque venisse, sive vivo, sive mortuo id acciderit.

(*c*) *Then* in the *English* language is referable to *in that case*, as well as *at that time*, an ambiguity upon wnich some questions of construction are reported in our books.

(*d*) Si ita Scriptum sit, *si in quinquennio proximo Titio filias natus non erit, & TUM decem Scœi heres dato*, si Titius ante mortuus sit, non statim. Sciæ decem deberi, quia hic articulus *tum* extremi quinquennii tempus significat.

(*e*) See Appendix, No. IX.

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demand payment from the debtor at another place, making compensation to the debtor for any damage which he might suffer in con-
But according to the principle of the *Roman* law, the creditor may
sequence of the alteration; this was the subject of the action *de eo quod certo loco, &c.*

[239] This action is not in use in *France*, and the creditor can no more oblige the debtor to pay, than the debtor can oblige the creditor to receive elsewhere, than at the place agreed upon.(*a*)

Hence it follows, that when the creditor is not resident at the place where the payment ought to be made, he ought to appoint a domicil there for the purpose, otherwise he cannot put the debtor *en demeure.* This domicil ought to be notified to the debtor either by the agreement or by judicial signification. In default of the creditor having such a domicil, the debtor may assign him to appoint one; and if he does not, the debtor will not be allowed to appoint one himself.

[240] [*The next paragraph refers to the mode of execution in the French courts.*]

[241] It remains to observe, that if the agreement contains two different places for payment, and they are connected by a conjunctive particle, the payment ought to be made by a moiety in each place *l.* 2. § 4. *ff. de eo quod certo loco.*(*b*) If by a disjunctive, the payment ought to be made altogether in either of the places at the choice of the debtor, *generaliter definit Scævola petitorem habere electionem ubi petat, reum ubi solvat, scilicet ante petitionem, l.* 2. § 3. *ff. d. Vide* as to the place of payment, P. 3. C. 1. Art. 5.

ARTICLE V.

Of Obligations contracted, with a Power of paying to some Person who is indicated, or with the Power of paying some other thing in lieu of that which is due by the Obligation.

[242] Regularly, a payment cannot be made to any other person than the creditor, without his consent. Therefore it is a quality which is collateral and accidental to an obligation, when it is contracted with a liberty of paying to some other person specially indicated. See P. 3. Ch. 1. Art. 2. § 4.

[243] Neither can any other thing be regularly paid to the creditor without his consent, in lieu of that which is due to him, and which is the object of the obligation. Nevertheless, an obligation is sometimes contracted with liberty of paying something else, instead of what is regularly due; as, if I let a farm for a hundred a year, with liberty to the tenant to pay the amount in corn according to the current price of the country, though it is the money which is

(*a*) This is likewise the law of *England.*

(*b*) Si quis ita stipulatur Ephesi & Capuæ, hoc ait ut Ephesi partem et Capuæ partem petat.

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due to me from the tenant, he may notwithstanding give me corn in lieu of it.

So if any body leaves me a house by will, with liberty to the heir to pay me five hundred pounds in lieu of it; the heir by accepting the succession contracts an obligation in my favour, *ex quasi contractu*, to deliver me the house, but subject to the option of paying me the money.

[244] These obligations must not be confounded with the alternative obligations which will be next mentioned. In the latter all the things promised in the alternative are due; but where an obligation is contracted with power of substituting one thing in payment for another, the latter only is due; what the debtor has the special liberty of paying is not due, it is not *in obligatione*, but only in *facultate solutionis*, as in the instance of the legacy of the house.

Hence it follows, 1st. That the creditor can only demand the house and not the money, although the debtor may at his option pay the money. 2d. That if the house is swallowed up by an earthquake, the debtor is entirely liberated. 3d. That the right resulting from the legacy falls within the class of immoveable property, even where the debtor uses his election to pay the money; for the nature of the credit is regulated by the thing due, and not by any thing that may be substituted in lieu of it.(a)

ARTICLE VI.

Of Alternative Obligations.(b)

[245] An alternative obligation is contracted where a person engages to do, or to give several things in such a manner, that the payment of one will acquit him from all: as if I engage to give you a particular horse, or twenty guineas to build you a house, or pay you a hundred pounds.

Where a person is obliged in the disjunctive to pay one sum of money or another, he is only debtor to the amount of the least, *si ita stipulatus fuero decem aut quinque dari spondes, quinque debentur*, *l.* 12. *ff. de verb. Oblig.*

[246] In order to constitute an alternative obligation, it is necessary that two or more things should be promised disjunctively. Where they are promised conjunctively, there are as many obligations as the things which are enumerated, *l.* 29. *ff. de verb. Obl.*,(c) and the

(a) This is illustrated by a case unintelligible, without a technical knowledge of the law of *France;* the principle of it would be applied to the *English* law, by holding that if the devisee died before the election made by the heir, of paying the money: the money afterwards elected to be paid should belong to the heir, and not to the executor of the devisee.

(b) See Appendix, No. X.

(c) Scire debemus in stipulationibus tot esse stipulationes, quot summæ sunt, totque esse stipulationes, quot species [sunt]. Secundum quod evenit, ut mixtâ unâ summâ vel specie, quæ non fuit in præcedenti stipulatione, non fiat novatio: Sed efficit duas esse stipulationes, quamvis autem placuerit tot esse stipulationes, quot summæ, totque

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debtor cannot be wholly liberated without discharging them all; but where they are promised in the alternative, though they are all due, there is but one obligation which may be discharged by the payment of any of them, *alterius solutio totam obligationem interimit, l.* 27. *ff. de Legat.*

[247] The choice belongs to the debtor(a) *l.* 25. *ff. de Contr. Empt.* unless it is expressly agreed that it shall belong to the creditor. This is a consequence of the rule of interpretation stated *supra, n.* 97. But though the debtor may elect to pay which he pleases, he cannot pay part of the one and part of the other. Therefore if the obligation is to pay ten pounds or six measures of corn, or a hundred pounds or an acre of land; he cannot give fifty pounds and half the land, or five pounds and six measures of corn, he must either pay all the money or give the whole land, or the whole quantity of corn; so where the creditor has the choice he cannot require part of the one and part of the other, *l.* 8, § 2. *ff. de Leg.*(b) In case of rents, and annual sums, which are due in the alternative, as a rent of 40*s*. or a quarter of corn a year, the debtor may choose every year which he will pay, and though he has paid the money the first year, he may elect to pay the corn the rest, *et vice versa, l.* 21. § 6. *ff.*(c) *de Act Empt.*

[248] From the principle, that the things comprised in an alternative obligation are all due, without any of them however being due determinately, it follows. 1st. That the demand of the creditor, to be regular, must include all of them, not indeed conjointly, but according to the alternative in which they are due. If he only demanded one of them, his demand would be irregular; because neither is due determinately, but both alternately. Nevertheless, if by express agreement the option is given to the creditor, he may demand either separately.

[249] 2d. That an obligation is not alternative where one of the things is not susceptible of the obligation intended to be contracted, but in this case the obligation is a determinate obligation of

esse stipulationes, quot res: tamen si pecuniam quis quæ in conspectu est, stipulatus sit, vel acervum pecuniæ, non tot sint stipulationes, quot nummorum corpora, sed una stipulatio: nam per singulas denarios singulos esse stipulationes absurdum est. At si quis illud et illud stipulatus sit, tot stipulationes sunt, quot corpora. Stipulationem quoque legatorum constat unam esse, quamvis plura corpora sint, vel plura legata; sed et familiæ vel omnium servorum stipulatio una est. Itemque quadrigæ aut lecticæ rivorum stipulatio una est.

(a) Si ita distrahitur ILLA AUT ILLA utram eliget venditor, hæc erit empta.

(b) Si ita legatum sit *Lecticiarios octo, aut pro his in homines singulos certam pecuniam utrum legatarius volet:* non potest legatarius partem servorum vindicare, pro parte nummos petere; quia unum in alterutra causa legatum sit; quemadmodum si olei pondo quinquaginta aut in singulas libras certum æs legatum sit; ne aliter observantibus, etiam uno homine legato divisio concedatur; nec interest, divisa ea summa an juncta ponatur; [et] certe octo servis aut pro omnibus certa pecunia legata non posse invitum heredem partem pecuniæ, partem mancipiorum debere.

(c) Qui domum vendebat, *excepit sibi habitationem, donec viveret, aut in singulos annos decem;* emptor primo anno maluit decem præstare; secundo anno habiationem [præstare]. Trebatius ait, mutandæ voluntatis potestatem eum habere, singulisque annis altorutrum præstare posse; et quamdiu paratus sit alterutrum præstare, petitionem non esse.

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the other. Therefore it was decided in *l.* 72. § 4. *ff. de Solut.*,(*a*) that if a person promised me in the alternative two things, whereof one belonged to me already, that he had not a liberty of paying that in lieu of the other, although it might afterwards cease to belong to me; because, this not being at the time of the contract susceptible of the obligation contracted in my favour, the other only was due, *cum res sua nemini deberi possit.*

[250] 3d. It follows, that when several things are due in the alternative, the extinction of one does not extinguish the obligation: for, all being due, the obligation subsists with regard to such as remain, and they only cease to be due by the payment of one. For the same reason if the creditor by a beneficial title becomes owner of one of the things by another beneficial title, the obligation, which cannot subsist with respect to the thing whereof he is thus become the proprietor, nevertheless subsists as to the other, *l.* 16.(*b*) *de verb. Oblig.*

When one of two things, due under an alternative obligation, happens to perish, will the debtor be allowed to offer the price of that in order to avoid the payment of the other? no; for what is lost, thereby ceases to be due; and what remains is the only thing which continues due, and consequently the only thing which can be paid *l.* 2. § 3.(*c*) *ff. de eo quod certo loco. l.* 34. § 6. *ff. de Contr. Empt.* (*d*) *l.* 95. § 1. *ff. de Solut.*(*e*) The law 47. § 3. *ff de Leg.* 1.(*f*) seems contrary to

(*a*) Stichum aut Pamphilum stipulatus sum, cum esset meus Pamphilus; nec si meus esse desierit, liberabitur promissor Pamphilum dando; neutrum enim videtur in Pamphilo homine constitisse, nec obligatio, nec solutio, sed ei, qui hominem dari stipulatus est, unum etiam ex his, qui tunc stipulatori servierant, dando promissor liberatur, vi quidem ipsa et hic ex his dari stipulatus est, qui ejus non erat, fingamus ita stipulatum, *hominem ex his quos Sempronius reliquit dare spondes?* cum tres Sempronius reliquisset, eorumque aliquem stipulatoris fuisse, num mortuis duobus, qui alterius erant, supererit ulle obligatio, videamus? et magis est deficere stipulationem; nisi tean mortem duorum desierit esse reliquus servus stipulatoris.

(*b*) Si Stichum aut Pamphilum mihi debeas, et alter ex eis meus factus sit ex aliqua causa, reliquum debetur mihi a te.

(*c*) Scævola lib. 15. Quæstionem ait, non utique ea quæ tacite insunt stipulationibus, semper in rei esse potestate: sed quid debeat esse in ejus arbitrio, an debeat non esse; et ideo cum quis Stichum aut Pamphilum promittit eligiere posse quod solvat, quamdiu ambo vivunt; cæterum ubi alter decessit, extingui ejus electionem, ne sit in arbitrio ejus an debeat, dum non volt vivum præstare, quem solum debet.

(*d*) Si emptio ita facta fuerit, *est mihi emptus Stichus aut Pamphilus;* in potestate est venditoris, quem valit dare, sicut in stipulationibus: sed uno mortuo, qui superest dandus est, et ideo prioris periculum ad venditorem, posterioris ad emptorem, respicit; sed etsi pariter decesserunt, pretium debebitur: unus enim utique periculo emptoris fuit arbitrium, quem commissum sit, ut quem voluisset, emptum haberet non et illud et emptorem haberet.

(*e*) Quod si promissoris fuerit electio, defuncto altero, qui superest æque peti poteret: Enim vero si facto debitoris, alter sit mortuus, cum debitoris esset electio; quamvis interim non alius peti possit, quam qui solvi etiam potest; neque defuncti offeri æstimatio potest, si forte longe fuit vilior, quoniam id pro petitore in pœnam promissoris constitutum est: tamen si et alter servus postea sina culpa debitores moriatur, nullo modo ex stipulatu agi poterit cum illo in tempore quo moriebatur, non commisserit stipulationem.

(*f*) Sed si Stichus aut Pamphilus legetur, et alter ex his vel in fuga sit, vel apud hostes, dicendum erit præsentem præstari, aut absentis æstimationem, toties enim electio est heredi committenda quoties moram non est facturis legatario. Qua ratione placuit & si alter decesserit, alterum omnimodo præstandum, fortassis vel mortui pre-

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this decision: it is said, that two slaves having been left under an alternative obligation, and one of the two being dead, the heir was bound to give the one which remained; and it is added, or perhaps the price of that which was dead, *fortasse vel mortui pretium*, but this decision, as *Dumoulin* very well observes, ought to be restrained to the case where it appears from the circumstances that such was the intention of the testator, as is indicated by the term *fortasse, fortassis.*

[251] It is immaterial whether one of the things due in the alternative is lost, without any act or default, or delay on the part of the debtor, or by any default, or after delay.

In all these cases, what remains is the only thing which continues due, and the debtor is not required to offer the value of that which no longer subsists, *d. l.* 95. *ff. de Solut* neither is this repugnant to the maxim, that where a thing is lost by the fault of the person from whom it is due in respect of the value which becomes due in its stead, *l.* 82. § 1. *ff. de verb. Obl.*(*a*) For this maxim, being established in favour of the creditor, cannot be objected against him in the case of an alternative obligation, as neither the delay nor the fault of the debtor ought to prejudice the creditor: whereas they would prejudice him and alter his situation, if the debtor, having it in his power to accomplish his obligation by the things which remain, could offer the value in money of that which was lost, and which the creditor would not be bound to receive, if both had continued to subsist.

[252] Where two things are lost successively by the fault of the debtor, or after his delay, the debtor, though he had the choice which he would give, has not the same choice with respect to the payment of the value; for by the extinction of the first he became determinately debtor of the other, and therefore he is liable determinately for the value of that which last becomes extinct.

Where the first is lost through his default, and the other is also lost, but without his fault, and without any imputation of delay, although according to legal subtleties he may appear to be acquitted of both; it is just that he should be answerable for the value of that which has perished by his fault.

[253] If the choice is given to the creditor, he has his option to take the thing which remains, or the price of that which is lost by the fault of the debtor, otherwise he would suffer a detriment from such faults, if the thing lost were the more valuable.

[254] It also follows from the principle before stated, that so long as the things which are due in the alternative continue to subsist, the obligation continues indeterminate and uncertain, and can only be referred to one of them determinately, by payment being actually made; and of this it is the natural consequence, that where an immoveable and a moveable thing are due in the alternative, the nature of the credit is in suspense. If the debtor gives the immove-

tium. Sed si ambo sint in fuga, non ita cavendum, ut si in potestate ambo redirent, sed si vel alter, & vel ipsum, vel absentisæ stimationem præstandum.

(*a*) Si pust moram promissoris homo decesserit, tenetur nihilominus proinde ac si homo viveret: & hic moram videtur fecisse, qui litigare maluit, quam restituere

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able, the credit will be deemed of the nature of a real estate, and if he gives the moveable thing it will be deemed to be personal; and herein an alternative obligation differs from the determinate obligation of a certain thing, with the liberty of giving another in its place.

[255] A testator having given a certain piece of painting absolutely by his will, and by a codicil given the same painting, or a sum of money in the alternative; before the codicil was found, the painting was delivered by the heir, who supposed himself to owe it determinately. Afterwards the codicil having been found, and the heir having discovered that he only owed the painting in the alternative of paying the money, assigns the legatee for the repetition of the painting, offering to pay the money: the two schools of the *Roman* law were divided upon the question, whether he was well founded in his demand. *Celsus*, who was of the school of the *Proculeians*, decides in law 19. *ff. de Leg.* 2.(*a*) for the negative.

The reason of this decision is, that the things comprised in an alternative obligation, being all due, the payment of the painting is the payment of a thing actually due, and consequently a valid payment, and not subject to repetition.

On the contrary, *Julian*, who was of the school of the *Sabinians*, decided in the law 32. § 3. *ff de Cond. Indeb.*(*b*) that there is a right of repetition where a debtor paid a thing which he believed to be due determinately, being only debtor indeterminately of a thing of a certain kind, or even of the thing actually paid, but alternatively with another. The reason of this decision was that the innocent error of the debtor respecting the quality of his obligation ought not to operate to his prejudice, nor increase his obligation by depriving him of his choice of giving the money rather than the painting. And with respect to the reason alleged for the contrary opinion, the answer is, that there is a right of repetition not only where any thing is paid without being in any manner due, but also when more is paid than is due, which holds good now, *solum quantitate debiti et causa;* and therefore in the case supposed, a person who had given that as being determinately due, which in fact was only due with the alternative of another thing, has paid more than was due. And this payment ought to be subject to repetition upon offering what is due instead thereof. This latter opinion is more equitable than the former, as it gives each party what rightfully belongs to him.

[256] *Dumoulin* applies a qualification to this decision: where the debtor has led the creditor into the mistake, and the property has been fairly received, the repetition cannot take place, except it can be done without prejudice to the creditor, and he can be

(*a*) Si is cui legatus, sit Stichus, aut Pamphilus, cum Stichum sibi legatum putaret, vindicaverit; amplius mutandæ vindicationis jus non habet: tanquam si damnatus heres alterutrum dare, Stichum, dederit, cum ignoret sibi permissum vel Pamphilum dare, nihil repetere possit.

(*b*) Qui hominem generaliter promisit similis est ei qui hominem aut decem debet; & ideo, si, cum existimarit re Stichum promisisse, eum dederit, condicet: alium autem quemlibet dando, liberari poterit.

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placed in his original situation; for the right of repetition is wholly founded upon a reason of equity, *hæc condictio ex bono et æquo introducta, l.* 66. *ff. de Condictione Indeb.* It is only founded upon this rule of equity, which does not allow that one man shall enrich himself at the expense of another: therefore it can only prevail to the extent of the advantage actually acquired(*a*) *l.* 65. § 7, & 8. *ff. d. ff. dict. tit.* According to these principles, it must be decided on the case supposed, that if the legatee has fairly sold the thing delivered to him, he will only be answerable for the excess of price above the sum which there was an option to pay.

According to the same principles, if the money is paid which is supposed to be determinately due, although it is only due in the alternative, the debtor would not be easily admitted to sue for a repetition thereof, upon offering the alternative, if the creditor had spent the money, and there was not a great disproportion in the amount thereof and the value of the other thing.(*b*)

[257] Another question upon which the two ancient schools were divided, was where a person who owed two things in the alternative, being misled by an erroneous copy which contained the word *and* instead of *or*, paid them both at one time; and afterwards discovered that only one of them was due, and that at his election.

There was no doubt of his right to reclaim one; but the point in dispute was whether he had an option which to claim. *Celsus*, as cited by *Ulpian* in law, 26. § 13.(*c*) *in fin. ff. de Cond. Ind.* thought that the choice rested with the creditor, and that he had a right to retain what he pleased. *Julianus*, on the contrary, as cited by *Justinian* in *l. penult. cod. hujus tituli*,(*d*) thought that the debtor had

(*a*) Sic habitatione data, pecuniam condicam: non quidam quanti locari potui, sed quanti tu conducturus fuisses, § 8. Si servum indebitum tibi dedi, eumque manumisisti, si sciens hoc fecisti, teneberis ad pretium ejus: Si nesciens, non teneberis: sed propter operas ejus liberti, & ut hereditatem ejus restituas.

(*b*) I cannot think that the circumstance of having spent the money would in the *English* courts be allowed to effect the nature or extent of the obligation.

(*c*) Si decem aut Stichum stipulatus, solvam *quinque*, quæritur an possim condiciere? Quæstio ex hoc descendit, an liberer in quinque: nam si liberor, cessat condictio, si non liberor erit condictio? Placuit autem (ut Celus lib. 6. & Marcellus, lib. 20. Digestorum scripsit) non perimi partem dimidiam obligationis, ideoque eum qui quinque solvit, in pendenti habendum an liberaretur, petique ab eo posse reliqua quinque, aut Stichum; & si præstiterit residua quinque, videri eum & in priora debita solvisse. Si autum Stichum prætitisset, quinque eum posse condicere, quasi indebita; sic posterior solutio comprohabit priora quinque utrum debita & indebita solverentur; sed & si post soluta quinque & Stichus solvatur, & malim ego habere quinque & Stichum redere, an sim audiendus quærit Celsus? Et putat, natam esse quinque condictionem: *quamvis* utroque simul soluto, *nihi retinendi quod vellem arbitrium daretur.*

(*d*) Si quis servum certi nominis, aut quandam solidorum quantitatem, vel aliam rem promiserit, & cum licentia [ei] fuerat unum ex his solvendo liberari, untrumque per ignorantiam dependeri: dubitabatur, cujus rei daretur a legibus ei repetitio, utrumne servi an pecuniæ; & utram stipulator, an promissor habeat hujus rei facultatem? Et Ulpianus, quidem electionem ei præstat, qui utrumque accepit, ut hoc reddat, quod sibi placuerit; & tam Marcellum, quam Celsum sibi consonantes referet. Papinianus autem ipsi, qui utrumque persolvit, electionem donat; qui & antequam dependat, ipsam habet electionem, quod velit præstare; & hujus sententiæ sublimissimum testem adducit Salvium Julianum, summæ auctoritatis hominem, & prætorii edicti [perpetui] ordinatorem. Nobis hæc decidentibus, Juliani & Papiniani sententia placet, ut ipse [habeat] electionem recipiendi, qui & dandi habuit.

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the right of demanding which he pleased. The option of *Celsus* was apparently founded on the reasoning, that both the things due in the alternative being actually due, the debtor who had paid them both could not say of either determinately, that it was not due, and therefore he could not demand either determinately as paid without being due; he only had the right of repetition as to one of the two indeterminately, as having paid more than was due by paying both when he was only under an obligation for the payment of one. The creditor having in his turn become debtor in respect to the restitution of one of the things, he had a right in consequence of that character to make his election which should be restored.

But this reasoning is nothing more than mere subtlety. The opinion of *Julian* is founded upon equity. The action, called *Condictio Indebiti*, is an entire restitution which equity affords against an erroneous payment. Now it is the nature of all restitutions against any act, to place the parties in the same situation as they were before. Hence, it follows, that the debtor who had paid two things, being ignorant that he was only bound to pay one of them, and that at his own election, should be restored to the right which he had before, of only paying, and consequently to the right of reclaiming, which he pleases; this opinion, as being the most equitable, was embraced by *Pappinian*, and finally confirmed by the constitution of *Justinian*.

But the right of requiring such repetition can only apply in case both the things continue to subsist; if one of them had ceased to subsist after the payment, there could be no right of restitution, as *Julianus* decided in the(a) *l.* 32. *ff. dict. Tit.* The reason is evident; the right of repetion remits the parties to the same situation as if the payment had not been made, and were yet to make; now if the payment were yet to make, the debtor could not be excused from paying that which remained, and which alone was then due; that then ought to remain with the creditor as a valid payment, and without any right of repetition.

As to the indivisibility in payment of alternative obligations, see *infra* P. 3, Chap. 1, Art. 6, § 3.

ARTICLE VII.(b)

Of Obligations in Solido between several Creditors.

[258] Regularly, when a person contracts the obligation of one and the same thing in favour of several others, each of these is only a creditor for his own share, but he may contract with each of them for the whole when such is the intention of the parties, so that each of the persons in whose favour the obligation is contracted is creditor for the whole, but that a payment made to any one

(a) Cum is, qui Pamphilum aut Stichum debet, simul utrumque solverit, si posteaquam utrumque solverit, aut uterque, aut alter ex his desiit in rerum natura esse, nihil repetet, enim remanebit in soluto, quod superest.

(b) See Appendix, No. XI.

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liberates the debtor against them all. This is called Solidity of Obligation. The creditors are called *correi credendi*, *correi stipulandi*.

[259] An instance of this obligation in solido may be stated in the case of a testamentary disposition, made in these terms. My heir shall give to the *Carmelites* or the *Jacobins* a sum of one hundred livres; the heir in this case only owes a single sum, but he owes this entire sum to each of the two convents who are creditors of it in solido; but so that the payment of it to one will liberate him as against both, *l.* 16. *ff. de Legat.*(a) 2d. This solidity is very rare with us; it must not be confounded with indivisibility of obligation, which will be treated of *infra*.

[260] The effects of this solidity among creditors are, 1st. That each of the creditors being creditors for the whole, may consequently demand the whole, and if the obligation is executed, constrain the debtor for the whole.(b) The acknowledgment of the debt made to any one of the creditors, interrupts the prescription as to the whole of the debt, and consequently enures to the benefit of the other creditors, *l. fin. cod. de duobus reis.*(c) 3d. The payment made to any one of the creditors extinguishes the debt, for the creditor being such for the whole, the payment of the whole is effectually made to him, and this payment liberates the debtor as against all; for although there are several creditors, there is but one debt, which ought to be extinguished by the entire payment made to one of the creditors.

It is at the choice of the debtor to pay which of the creditors he will, as long as the matter is entire; but, if one of them has instituted a process against him, he cannot make an effectual payment, except to that one: *Ex duobus reis stipulandi, si semel unus egerit, alteri promissor offerendo pecuniam nihil agit. l.* 16. *ff. de duob. reis*, 4.

(a) Si Titio aut Scio utri *heres velit* legatum relictum est heres alteri dando ab utroque liberatur: si neutri dat, uterque perinde petere potest atque si ipsi soli legatum foret, nam, ut stipulando duo rei constitui possunt, ita et testamento potest id fieri.

(b) The meaning of the term executory, is here very different from that which is applied to it in the *English* law, as denoting a thing to be executed in future. It is foreign to the present purpose to enter into an inquiry respecting the kinds of obligations, for which the law of *France* allowed a remedy by seizure of the goods, and which is here denoted by the term before mentioned.

(c) Cum quidam rei stipulandi certos habebant reos promittendi, vel unus forte creditor duos, vel plures debitores habebat; vel è contrario multi creditores unum debitorem, & alii ex reis promittendi ad æris creditores debitorem & alii ex reis promittendi ad certos creditores debitum agnoverunt; vel per solutionem, vel per alios modos quos in anterioribus sectionibus, interruptionis invenimus positores: & nos ampliavimus, vel forte ad unum creditorem quodam ex debitoribus devotionem suam ostenderunt, vel cum plures essent creditores, debitor qui solus existerit, ad unum ex his vel quosdam debitum agnovit: & quæratur, si lis vel si daretur licentia adversus alios in devotionem suam exerceri, & quasi tempore emenso exactionem recusare, vel quibusdam ex debitoribus debitum agnoscentibus, vel in judicio pulsatis, deberent & alii ab omni contradictione repelli; nobis pietate suggerente videtur esse humanum, semel in uno eodemque contractu qualicumque interruptione, vel agnibione adhibita omnes simul compelli ad persolvendum debitum, sive plures sint rei, sive unus: sive plures sint creditores, sive non amplius quam unus; sancimusque in omnibus casibus quos noster sermo complexus est, aliorum devotionem vel agnitionem, vel ex libello admonitionem aliis debitoribus præjudicare & aliis prodesse creditoribus. Sit itaque generalis devotio & nemini liceat alienam in devotionem sequi cum ex una stripe unque fonte unus effluxit contractus, vel debiti causa ex eadem actione apparuit.

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Each of the creditors being such for the whole may, before a process instituted by any of the others, make a release to the debtor, and liberate him, as against them all.

For in the same manner as a payment of the whole, to any one of the creditors, liberates the debtor against all, a release by one, which is equivalent to a payment, ought to have the same effect. *Acceptilatione unius tollitur obligatio, l. 2 ff. de duob. reis.*

ARTICLE VIII.

Of Solidity on the Part of the Debtors.(*a*)

SECTION I.

Of the Nature of an Obligation in Solido, on the Part of the Debtors.

[261] An obligation is contracted in solido on the part of the debtors, when each of them is obliged for the whole, but so that a payment made by one liberates them all.

Those who oblige themselves in this manner, are called *correi debendi.*

As solidity on the part of the creditors consists in this, that the obligation of the same thing contracted in favour of several persons, is contracted in favour of each for the whole, as completely as if each of them was the sole creditor; but with the qualification that a payment made to one is a liberation against all the others; solidity on the part of the debtors in like manner consists in the obligation of the same thing being contracted by each for the whole, as completely as if each was the single debtor; but so that a payment made by one liberates the others.

[262] It is not always sufficient to constitute an obligation in solido, that each of the debtors is debtor of the whole thing; for this is the case, with respect to indivisible obligations, which are not susceptible of parts, though they are not contracted in solido: it is requisite that each of the debtors *totum & totaliter debeat*, that is to say, it is requisite that each should be as completely bound for the performance of the whole, as if he alone had contracted the obligation.

[263] It is most particularly requisite, that all the debtors should be obliged to the performance of the same thing. It is therefore not one obligation in solido, but two obligations, when two persons oblige themselves to another for different things.

But, provided they are each obliged totally for the same thing, though they are obliged differently, they are still debtors in solido, *correi debendi;* as if one is obliged purely and simply, and the other

(*a*) See Appendix, No. XI.

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subject to a condition or a term of payment; or if they are obliged to pay in different places, *l.* 7,(*a*) *l.* 9, § 2,(*b*) *ff. de duob. reis.*

It may perhaps be said to be repugnant, that one and the same obligation should have opposite qualities; that it should be pure and simple with respect to one of the debtors, and conditional with respect to the other. The answer is, that the obligation in solido, is one indeed with respect to the thing which is the object and subject matter of it, but it is composed of as many different liens as there are different persons who have contracted it; and those persons being different from each other, the liens which oblige them are so many different liens which consequently may have different qualities. This is the meaning of *Papinian*, when he says, *et si maxime parem causam suscipiunt, nihilominus in cujusque personâ propria singulorum consistit obligatio*, *d. l.* 9, § 2. The obligation is one with respect to its object, which is the thing due; but with respect to the persons who have contracted it, it may be said that there are as many obligations as there are persons obliged.

[264] When several persons contract a debt in solido, it is only in respect of the creditor that they are debtors of the whole; as between themselves the debt is divided, and each of them is only debtor *pro se*, as to that part of the debt which he was the cause. Suppose, for instance, that two persons borrow together a sum of money which they engage in solido to repay; or suppose they buy a thing, and engage in solido to pay for it to the seller: if they have equally divided the money borrowed, or the thing bought between themselves, each of them, although debtor for the whole with respect to the creditor, is only debtor for a moiety in respect to the other. If the division was unequal; as suppose, one had two-thirds of the money borrowed, or of the thing bought, and the other had only had one-third, he who had the two-thirds would, as between themselves, be debtor for two-thirds, and the other for only one-third of the amount. If one of them alone derived a benefit from the contract, and the other was only engaged on his behalf, (*pour lui faire plaisir*,) the person having the benefit is the only debtor; the other, although a principal debtor so far as concerns the creditor, is in respect of his co-debtor only a surety.

So, if the debt arises from an injury committed by four persons, each is debtor for the whole in respect of the person suffering the injury; but as between themselves, each is only debtor for his share in the injury, that is to say, for a fourth of the whole.

(*a*) Ex duobus reis promittendi, alius in diem, vel sub conditione obligari potest, nec enim impedimento erit dies, aut conditio, quo minus ab eo, qui purè obligatus est, petatur.

(*b*) Cum duos reos promitendi facerem (et) ex diversis locis Capuæ pecuniam dari stipulatus sim: ex persona cujuscunque ratio proprii temporis habebitur: nam et si maxime parem causam suscipiant; nihilominus in cujusque personâ propriâ singulorum consistit obligatio.

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§ II. *In what Case the Obligation of several Debtors is held to be contracted in Solido.*

[265] Solidity may be stipulated in all contracts of whatever kind, *l.* 9. *ff. de duob. reis.*(a) But regularly, it ought to be expressed; if it is not, when several persons have contracted an obligation in favour of another, each is presumed to have contracted as to his own part, *l.* 11, § 2, *ff. de duobus reis.*(b) And this is confirmed by *Justinian* in the *Novel* 99.(c) The reason is that the interpretation of obligation is made in cases of doubt in favour of debtors, as has been shown elsewhere.(d) According to this principle, where an estate belonged to four proprietors, and three of them sold it in solido, and promised to procure a ratification by the fourth proprietor, it was adjudged that the fourth, by ratifying the sale, was not to be considered as having sold in solido with the others: for, although the three had promised that he should accede to the contract of sale, it was not expressed that he should accede in solido.

[266] Nevertheless, there are certain cases in which solidity between several debtors of the same thing takes place, although it is not expressly stipulated.

The first case is when partners in commerce contract some obligation, in respect of their joint-concern.

This is the decision of the law of *France*, *Ordonnance du Commerce* of 1673, *t.* 4. *art.* 7.

Two merchants who buy together a lot of merchandise, although there is not any other partnership between them, are considered as being in partnership with respect to that purchase; and as such are obliged in solido, although it is not expressed. This was adjudged in the parliament of *Thoulouse*, and has become a general maxim.

[267] The second case in which several debtors of the same

(a) Cum ita cautum inveniretur TOT AUREOS RECTE DARI STIPULATUS EST JULIUS CARPUS: SPOPONDIMUS EGO ANTONINUS ACHILLEUS ET CORNELIUS DIUS, partes viriles deberi: quia non fuerat adjectum singulos in solidum spopondisse ita ut duo rei promittendi fierent.

(b) Eandem rem apud duos pariter deposui, utriusque fidem in solidum secutus; vel eandem rem duobus similiter commodavi; sicut duo rei promittendi quia non tantum verbis stipulationis, sed & cæteris contractibus, veluti emptione, venditione, locatione conductione, deposito, commodato, testamento; ut pote, si pluribus heredibus institutis testator dixit, *Titius & Mævius Sempronio decem dato* § 1. Sed si quis in deponendo penes duos, paciscatur ut ab altero culpa quoque præstaretur, verius est non esse duos reos, a quibus impar suscepta est obligatio. Non idem probandum est, cum duo quoque culpam promisissent, si aliteri postea pacto culpa remissa sit: quia posterior conventio, quæ in alterius persona intercessit, statum & naturam obligationis, quæ duos initio reos fecit, mutare non potest; quare si socii sint & communis culpa intercessit, etiam alteri pactum cum altero factum proderit § 2. Cum duos reos promittendi facerum, [&] ex diversis locis Capuæ pecuniam dari stipulatus sim: ex persona cujusque ratio proprii temporis habebitur; nam etsi maxime parem causam suscipiunt: nihilominus in cujusque persona propria singulorum consistit obligatio.

(c) Si quis alterna fidejussione sumat aliquos, si quidem non adjecerit, opporteret et unum horum in solidum teneri; omnes ex æquo conventionem sustinere. Si vero aliquid etiam tale adjiciatur, servari quidem pactum.

(d) In considering the rules of interpretation, the civil law and the law of *England* were shown to be at variance in respect to this principle.

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thing are bound in solido, without its being expressed, is, that of the obligation contracted by several tutors undertaking the same tutelage, or by several persons engaging in some public administration. These charges are undertaken in solido, according to the disposition of the laws which are followed by us in this respect, unless there is some usage to the contrary.

The *Roman* laws granted to tutors who have not acted, the benefit of order and discussion, which consisted in a right to refer the minor, whose tutelage was expired, to proceed at their risque against those who had acted; they also granted to tutors who had acted, the benefit of division(*a*) whilst they all continued solvent. But these exceptions are not in use with us: therefore when *Dumoulin* says, that tutors have the benefit of division for the payment of what remains due on account of their tutelage, except in the case where they are debtors *ex dolo*, he ought to be understood as speaking of the places which follow the disposition of the *Roman* law.

[268] The third case of obligations in solido is where several persons have concurred in an injury, and are each liable to the reparation of it.

They cannot oppose any exception of discussion or division, being unworthy of it.

[269] An obligation in solido may also result from testaments, when the testator declares, that he charges his heirs or other successors in that manner, with the performance of the legacy.

Even without its being expressed, those whom the testator charges with a legacy are bound in solido, when the testator makes use of a disjunctive expression; as if he were to say, my son *Peter*, or my son *John* shall give such an one ten pounds. This is decided in law 8. § 1. *st. de Legat.* I. *si ita, scriptum est*, TITIUS HERES MEUS AUT MAEVIUS HERES MEUS DECEM SEIO DATO: *cum utro velit, Seius agit, ut si cum uno actum sit et solutum, alter liberetur; quasi si duo rei promittendi in solidum obligati fuissent.* Nevertheless, *Dumoulin* insists that this is not perfectly an obligation in solido; that it is true that each of them is subject to the whole of the legacy, and in this respect they resemble debtors in solido; but they are not strictly such, and their obligation has not the other effects of obligations in solido. For instance, if two heirs were charged in this manner with the delivery of a specific thing, which had perished through the fault of one of them, he does not think that the other would be answerable for the loss, as a debtor in solido would. In this respect *Dumoulin* deviates from the common opinion maintained by *Bartholus* and the other doctors, who allow the case stated in this law to be that of a real obligation in solido. *Dumoulin* founds his opinion upon these terms, *quasi si duo rei*, which indicate, says he, that the two heirs are not really *correi*, the adverb quasi being *adverbium improprietatis*. I should rather incline in favour of the opinion of *Bartholus*; the heirs being in this case debtors of the whole, not

(*a*) A right of requiring the minor to proceed against each separately for their separate shares.

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on account of the quality of the thing due, but by the will of the testator, who chose that each should be charged with the entire performance of the legacy; their obligation appears to have all the character of a real obligation in solido, and I do not see anything to make a difference between them. The term *quasi* does not appear to have been used *pro adverbio improprietatis*, but as equivalent to *quemadmodum*; these two heirs are obliged in solido, in the same manner as they are obliged by a stipulation. For it is not only by stipulations that obligations may be contracted in solido, *non tantum verbis stipulationis, sed et cæteris contractibus duo rei promittendi fieri passunt. l. 9. ff. de duob. reis;* and testaments as well as contracts may form these obligations.

§ III. *Of the Effects of Solidity between several Debtors.*

[270] These effects are, 1st. That the creditor may recover from which of the debtors he pleases, by action, if the debt only lies in action: or by distress, if it lies in execution, the whole that is due; this is a necessary consequence of each of the debtors being such for the whole.

I do not think that the debtors would have even the benefit of division; that is to say, that any one from whom the creditor makes his demand may be allowed, upon offering his own part, to require that the creditor should proceed against the others for their respective parts, supposing them to be solvent. The acts of notaries commonly contain a clause renouncing this benefit, but even if there is no such clause, I do not think that it would be allowed.

[271] Observe, that the choice which the creditor makes of one of the debtors against whom he exercises his pursuits, does not liberate the others until he is paid; he may discontinue his pursuits against the first, and proceed against the others; or if he pleases he may proceed against them all at the same time. *l.* 28. *Cod. de Fidej.*(a)

[272] The judicial demand which is made against one of the debtors in solido, interrupts the course of prescription against all the others, *l. fin. cod. de duob. reis.*(b) It is also a consequence of each of the debtors being a debtor for the whole for the creditor, by instituting this proceeding, has instituted it for the whole of the

(a) Generalitur sancimus, quemadmodum in mandatoribus statutum est, ut contestatione contra unum ex his facta, alter non liberetur: ita & in fidejussoribus observari. Invenibus etenim, & in fidejussorum cautionibus plerumque ex pacto hujusmodi causæ esse prospectum, & ideo generali lege sancimus, nullo modo electione unius ex fidejussoribus, vel ipsius rei alterum liberari; vel ipsum reum fidejussoribus, vel uno ex his electo, liberationem mereri, nisi satisfiat creditori; sed manere jus integrum donec in solidum ei pecuniæ persolvantur, vel alio modo satis ei fiat. Idemque in duobus reis promittendi constituimus, ex unius rei electione præjudicium creditori adversus alium fieri non concedentes. Sed remanere et ipsi creditori actiones integras et personales et hypothecarias, donec per omnia ei satisfiat. Si enim pactis conventis hoc fieri conceditur, et in usu quotidiano semper hoc versari aspicimus, quare non ipsa legis auctoritate hoc permittatur, ut nec simplicitas suscipientiam contractus ex quacunque causa possit jus creditoris mutilare.

(b) See *supra*, *n.* 260. p. p. 144, 145.

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debt, even as against the other debtors who cannot oppose a prescription against the creditors, except upon the ground of his not having exercised his right to the debt for which they are bound; but this they cannot allege, for the debt for which they are bound, is that for the whole of which the creditor has instituted his demand.

[273] For the same reason, when the thing which is due has perished by the act or fault of one of the debtors in solido, or after his being put *en demeure*, the debt is perpetuated not only as against the debtor, but as against all the others. This is decided by the law *penult. ff. de duob. reis. Ex duobus reis ejusdem Stichi promittendi factis alterius factum alteri quoque nocet.* For instance if *Peter* and *Paul* have jointly (*solidairement*) sold me a certain horse, and before it is delivered it dies by the fault of *Peter*, *Paul* continues the debtor as well as *Peter*, and I may demand the value of the horse from him as well as from *Peter*, leaving him to his remedy against *Peter;* whereas if they had sold it without solidity, *Peter* alone would be answerable for his own fault, and *Paul* would by the death of the horse, though it was occasioned by the fault of *Peter*, be entirely liberated from his obligation, and would still be a creditor for a moiety of the price, for which the horse was sold, in the same manner, as if the death had been ocasioned by an accident merely fortuitous.

Observe, that the act, the neglect or the delay of one of the debtors in solido, affects in truth his co-debtors *ad conservandum et perpetuandam obligationem;* that is to say, so that they are not discharged from their obligation by the loss of the thing and are bound to pay the value of it. It is in this case that the law *penult. ff. de duob. reis*, says, *alterius factum alteri quoque nocet:* but the act, the neglect, or the delay of one of them does not affect the others *ad augendam ipsorum obligationem;* that is to say, that he only who has committed the fault, or has been put *en demeure* ought to be subject to damages resulting from the non-peformance of the obligation, beyond the value of the thing which is due. With respect to the other debtor, who has not committed any fault, and has not been put *en demeure*, he is only bound to pay the value of the thing which is lost by the fault, or after the *demeure* of his co-debtor. For the same reason the person alone who has been put *en demeure*, ought to be liable for the damages arising from the delay. It is in this sense that the law 32 *ff. de Usuris*, says, *si duo rei promittendi sint, alterius mora alteri non nocet.*

Dumoulin restrains the decision of this law to damages which have not been expressly stipulated; for if they had been so, the act or delay of one of them makes the condition, upon which they were all obliged, attach.

[274] The payment which is made by one of the debtors, liberates all the others; this is a consequence of the principle, that a debt in solido is only one debt of the same thing, of which there are several debtors.

Not only a real payment but every other kind of payment ought to have this effect; therefore if one of the debtors in solido, being

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sued by the creditor, opposes, in compensation of the debt demanded, a like sum owing to him from the creditor, the other debtors are liberated by this compensation, as well as by a real payment.

Peter and *Paul* are my debtors in solido of a sum of one thousand pounds; afterwards I become the debtor of *Peter* of the like sum; if I sue *Peter* for the payment of the thousand pounds due to me, and he opposes the compensation of the debt due to him, this compensation, as we have seen being equivalent to a payment, the debt due to me from *Peter* and *Paul* becomes extinct, as against them both. But if I do not sue *Peter*, and do sue *Paul*, for the payment of this money, can he oppose, by way of compensation, the debt which is owing from me to *Peter?* *Papinian* in law 10. *ff. de duobus reis*, decides in the negative, *si duo rei promittendi socii non sint, non proderit alteri, quod stipulator alteri reo pecuniam debet.*

Nevertheless, *Domat*, in his Civil Law, *p.* I. *l.* 3. *t.* 3. § I. *art.* 8. decides against this text, that *Paul* may oppose the compensation of what I owe to *Peter*, so far as *Peter* is debtor as between him and *Paul*, and no further. The reason is, that *Peter* no longer owing me that part of the debt for which he was bound, by reason of the compensation which he has a right to oppose; *Paul* ought not to be obliged to pay for *Peter*, that part of which *Peter* is discharged by the compensation. This reason is not entirely conclusive: for when a debtor in solido pays the whole of the debt, it is only in respect of the co-debtors, that he is considered as paying on their behalf their shares of the debt; but, such a debtor being in respect of the creditor a debtor of the whole, when he pays the whole it is not, so far as the creditor is concerned, a payment of the parts of the co-debtors: he pays what he owes himself; and consequently he can only oppose in compensation what is due to himself, and not what is due to his co-debtors; and upon this reason is founded the decision of *Papinian*. It may be said in favour of the opinion of *Domat*, that it prevents circuity; for when *Paul* has paid me the whole of the debt, which he owes in solido with *Peter*, he will have recourse against *Peter* for his share; and for this purpose he will attach, in my hands, what I owe to *Peter*, and will make me restore, so far as that extends, what I have received. This last reason ought to make the opinion of *Domat* be adopted in practice.

[275] The release of the creditor to one of the debtors, would also liberate the others, if it appeared that the creditor intended thereby to extinguish the debt as to the whole.

If it appeared that his intention was only to extinguish the debt, as to the part for which the person to whom he gave the release was liable to his co-debtors, and to discharge that one personally from the residue of the debt, the debt would still continue to subsist, as to the residue, in the co-debtors.

If the creditor, in the discharge which he gave to his co-debtor, expressly declared that he intended only to discharge the person of the particular debtor, and to retain his claim against the others; could he, by virtue of this declaration, require the whole from the other debtors, without deducting the part of him who was discharged?

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I think he could not; the several debtors would not have bound themselves in solido, but would only have engaged for their own respective parts, if they had not considered that on paying the whole, they should have recourse against the others, and that for this purpose they would be entitled to a cession of the actions of the creditor for the other parts. It is only under the tacit condition of having this cession of actions, that they are obliged in solido; and consequently the creditor has no right to demand from any of them the payment of the whole, without such cession. In this case, the creditor having put it out of his power to cede his action against the debtor whom he has discharged, and consequently having incapacitated himself from performing the condition upon which he has a right to demand the whole, it follows that he cannot demand the whole from each of them. See *infra*, P. III. c. I. Art. vi. § 2.

Where there are several debtors in solido, and the creditor discharges one of them, can he proceed against each of the others in solido, subject only to a deduction of the share of the one who is discharged, and of that proportion to which the one who is discharged would be liable as between themselves, for the share of any of the others who were insolvent? For instance, supposing that I had six debtors in solido, that I discharged one, that there remained five, of whom one is insolvent; can I only proceed against each of the others for their sixth part? Or may I proceed against each of those who are solvent for the whole, subject only to the deduction of the sixth, for which the person discharged was originally bound, and of his share in the portion of the one who had become insolvent? I think I should be well founded in doing so, for the debtor against whom I proceed cannot claim from me any other deduction, than the amount of what he loses by not having a cession of actions against the one whom I have discharged. Now the cession of actions against him would only give a right of repetition as to his portion, and a right of contribution, in respect to the share of the insolvent?

[276] When one of the debtors in solido becomes the only heir of the creditor, the debt is not thereby extinguished against the others; for the confusion or union of characters, *magis personam debitoris eximit ab obligatione, quam extinguit obligationem.* But this heir cannot demand the debt from the other debtors, without deducting the proportion for which he is liable in respect to them; and if any of them is insolvent; he ought besides to bear his proportion of the share of the insolvent. It is the same in the opposite case, where the creditor becomes the only heir of one of the debtors.

§ IV. *Of Release of Solidity.*

[277] The right of solidity which a creditor has against several debtors of the same debt, being a right established in his favour, it is clear that, according to the maxim, *cuique licet juri in suam favorem introducto renunciare*, a creditor of full age, who has the free disposition of his effects, may renounce the right of solidity, either in favour of all the debtors, by consenting that the debt

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shall be divided between them, or in favour of any one of them, whom he discharges from the solidity, retaining his right of solidity against the others; but so that the discharge of the one shall not operate to the prejudice of the rest, as has been observed, No. 275.

He may renounce it either by an express agreement, or tacitly.

He is presumed to have renounced it tacitly, when he has admitted any one of the debtors to pay *for his part* by name. This is the decision of law 18. *Cod. de post. Si creditores vestros ex* PARTE *debiti admisisse quemquam vestrum pro suâ personâ solventem probaveritis, aditus rector provinciæ pro sua gravitate, ne alter pro altero exigatur providebit.*

The reason is, that when the creditor gives an acquittance in these terms: *I have received from* ——— the *sum of* ——— *for his part*, he acknowledges him as his debtor *for a part*, and consequently he consents that he shall not be liable in solido, it being inconsistent that a person should be debtor for a part, and debtor in solido.

This decision does not apply if the acquittance declares the creditor to have received so much from the debtor for his part, reserving the right of solidity: for the formal terms, by which the creditor reserves the right of solidity, prevail over the inference that might be drawn from the terms *for his part*, as denoting a renunciation of the right; and even if it were allowed that the terms, *for his part*, were as formal in favour of the renunciation of solidity, as the express reservation is against it; it would only follow that the two expressions would mutually defeat each other, and the acquittance would be regarded as if it contained neither the one nor the other; in which case it would not prejudice the right of solidity. This is the reasoning of *Alciat* in *d. l.* 18.

It may perhaps be objected, that the terms, *without prejudice to the solidity*, ought to be understood of the right against the other debtors, and not against the one to whom he gives the acceptance, by which means the two expressions may be reconciled together. But this argument is not of any weight: when a person, in an acquittance, or any other act, reserves his rights, without saying against whom; it is natural to understand the rights of the person with whom he treats, to whom he gives the acquittance, and not those whom he has against other persons. The terms, *for his part*, are reconciled with the reservation of solidity, in a much more natural manner, by holding that the creditor meant, not a part for which the debtor would be answerable, in respect to him (the creditor,) but a part for which he would be answerable in respect to his co-debtors; which part the creditor consents to receive from him at present, saving the right to claim from him the residue, which he already has, and which he intends to reserve. This is one of the points adjudged by an arrêt of the 6th *September* 1712, reported in the 16th vol. of the Journal of Audiences.

When the acquittance is *without prejudice to my rights*, it is the same thing as if it had said *without prejudice to the solidity:* for the right of solidity is included in the general terms; and it is even the right which has the greatest relation to the acquittance that is given,

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and which serves to correct the terms, *for his part*, employed in the acquittance.

When the creditor has given one of his debtors in solido an acquittance purely and simply for a certain sum, which is precisely the amount for which he is liable with respect to his co-debtors, without expressing that it is *for his part*, is the creditor presumed to have released his right of solidity? I think it ought not to be so presumed, and that the decision of the law, *si creditores*, above cited, ought to be restrained to the particular case, which is where one of the debtors is expressly admitted to pay for his own particular share, *ex parte pro personâ suâ;* and that it is from the expression in the acquittance, *for his part*, that the presumption of renouncing the solidity arises.

But admitting it to be true, that the creditor intended to receive from one of his debtors a part of the debt amounting to the whole of that debtor's particular share, it is not from thence alone to be concluded that he intended to discharge him from the solidity: for there is no necessity for drawing that conclusion; and it ought not to be drawn without necessity, as no person is to be presumed to give up his rights, *nemo præsumitur donare.* This is decided in the law 8. § 1. *ff. de Legat.* 2, in the case of two heirs whom the testator had charged in solido with a legacy. *Pomponius* decides, that the legatee, who had demanded or even received from one of them, his proportion, is not presumed to have thereby discharged him from the solidity, but that he may still require the surplus. *Quid si ab altero partem petierit? Liberum erit ab alterutro reliquum petere; idem erit et si alter partem solvisset. Bacquet* in his Treatise *Des Droits de Justice*, and *Basnage tr. des Hypotheques*, are of this opinion.

Bartholus pretends, that there is in this respect a difference between debtors in solido, by testament, and those who are so by other transactions; but this distinction is not founded upon any solid reason.

Observe, that these terms of the law, *idem erit & si alter partem solvisset*, ought to be understood of the case in which the creditor, without having made any demand, voluntarily receives from one of the debtors the sum to which that debtor's proportion amounts, without expressing it to be received for his parts.

When a creditor proceeds by commandment against one of his debtors in solido, or when he assigns him to pay *his part of the debt*, is he deemed thereby to have divided the debt, and to have discharged the debtor from the solidity? The doctors are divided upon this question; *Baldus* is for the affirmative, *Bartholus* for the negative. For the affirmative it may be said, that there is the same reason for so deciding in this case, as in the case of the law *si creditores*, above referred to. In the case of that law, the creditor who has expressed in formal terms, in the acquittance given to one of the debtors, that he received so much *for his part*, has by these terms acknowledged and agreed, that he was only debtor for a part; and consequently that he was not a debtor in solido, as the being a debtor for a part is contradictory to being debtor in solido. Now, when a

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creditor has expressed, in his judicial demand against one of the debtors in solido, that he demands such a sum for his part, may it not be said in the same manner, that by these terms he consents that the debtor shall be no longer bound in solido? consequently there appears to be in this case the same reason for deciding, that the creditor discharged him from the solidity, as in the law *si creditores.* On the other side it is usual to allege the law, *Reos.* 23, *Cod. de Fid.*(a) and the law 8 § I. *ff. de Legat.* I.(b) above cited. The law *Reos* does not appear in any manner to decide the question; but the law 8 § I. formerly decides that a debtor is not discharged from solidity by the demand of the creditor, to pay his part; because it decides, that notwithstanding the demand made in this manner, the creditor is not precluded from demanding the surplus from one or other of the debtors, and consequently even from him of whom he had first demanded his part. *Quid si altero partem petierit? liberum erit ab alterutro relinquum petere.* The reason is, that debts being contracted by the concurrence of the intention of the debtor and creditor, a release can only take place by an opposite concurrence of the same parties. P. III. c. 3. Art. I. § 3. Hence it follows, that in supposing that a demand made upon one of the debtors in solido, to pay *his part*, would include an intention in the creditor to release him from the solidity; yet so long as the will of the debtor does not concur with that of the creditor, so long as the debtor does not acquiesce in the demand, and consequently offer to pay his part, this demand cannot acquire any right to the debtor, nor discharge him from the solidity, nor consequently prevent the creditor increasing his conclusions against him, and demanding the whole of the debt. Herein this case differs from that of the law *si creditores*, in which the will of the debtor paying his part of the debt to the creditor, who is willing to be satisfied with it, concurs with that of the creditor for the release of the residue.

When a debtor against whom a demand is instituted for the payment of his part, before the creditor has increased his conclusions against him, has paid his part, or only offered to pay it; it appears to me that in this case there is an entire parity of reason for deciding as in the law *si creditores* for the release of the solidity. Therefore I think that these last terms of the law 8 § I. *ff. de Legat. idemque erit & si alter partem solvisset*, which makes a separate division of the paragraph, ought to be restrained to the case of a voluntary payment made without the acquaintance expressing that the creditor receives it *for his part*, and ought not to be extended to a payment made in consequence of a pursuit made against the debtor for the payment *of his part.*

So, where upon a demand of a creditor against one of the debtors for the payment *of his part*, there is a sentence adjudging him to pay his part, the creditor can no longer demand the remainder; the sen-

(a) Reos principales, vel mandatores simplicitur acceptos eligere, vel pro parte convenire, vel satis non faciente contra quem egeras primo, post [illum] ad alium reverti (cum nullus de his electione liberetur) licet.

(b) See above, p. 119. n. 277.

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tence in this case, is equivalent to the will of the creditor in releasing the surplus, *cum in judiciis quasi contrahimus, et judicatum quamdam novationem inducat.*

[278] When there are more than two debtors in solido, does the acquittance given to one of them for a sum of money, with the expression, that it is for the payment of his part, discharge from the solidity all the debtors, or only the one to whom it is given? The doctors are also divided upon this question: the ancient doctors held the affirmative, and founded themselves upon the law, *si creditores*, above cited. *Pierre de Letoile*, a celebrated professor of the university of *Orleans*, was the first, according to *Alciat*, *ad d. Leg.* who held the negative; his sentiment appears to be the better, and more conformable to the principles of law. The law, *si creditores*, if well understood, does not prove the contrary; this law is founded upon an agreement which is presumed to have tacitly intervened for the discharge of the solidity between the creditor and the debtor to whom the acquittance is given. Now it is one of the clearest principles of law, that no right can be acquired by agreements, except between the parties between whom they intervene, *sup. n.* 85, *& seq.* Hence it follows, that such an acquittance cannot procure a discharge from the solidity, except to the debtor to whom it is given, who is the only one with whom the creditor has treated, and not to the others, with whom the creditor has not in this respect had any agreement; the favour of the creditor towards one of his debtors, by admitting him to pay the debt for his own part only, ought not to prejudice him in respect of the others: *bonitas creditoris*, says Alciat, *non debet esse ei captiosa.* The law, *si creditores*, relied upon by the ancient doctors, has no reference to this question, it even seems, that in the case of that law there were only two debtors; if there had been more, the Emperor would have said, *rector providebit ne unus pro cæteris exigatur.* These terms, *ne alter pro alterio exigatur*, designate two debtors only, and are to be understood in this sense, *ne alter qui solvit, pro alterio qui nondum solvit, exigatur.*

But this decision ought to be followed with the qualification, that if amongst the remaining debtors any one is insolvent, the others ought to be discharged from the share which the one who was released from the solidity, would have borne in the insolvency: for if they ought not to profit by this discharge, neither ought they to be prejudiced by it. Nevertheless it must be admitted that *Bacquet*, after having said that the opinion of *Letoile* appeared to him equitable, allowed that the contrary opinion, which is that of the ancient doctors, is followed at the Chatelet of *Paris*, but I think that this is an error which ought to be reformed, if it has not already been so.

When the creditor has obtained a judgment against the other debtor for the payment of his part of the debt, it ought to be decided according to the same principles, that the sentence shall not discharge the solidity of the other debtors, *cum res judicata aliis non prosit;* and they can only require that, if any of them is insolvent, the creditor shall allow a deduction of the share which the party discharged would have borne in the loss arising from the insolvency.

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[279] There remains another question, which is, whether when there are several debtors in solido of an annuity, the acquittance which the creditor gives to one of them of such a sum, for his part of the arrears that were then due, discharges him from the solidity for the future, or only for the arrears for which the acquittance has been given? It must be decided, that it only discharges him from the arrears, and not in respect to the future payments. This decision is founded upon the principle above established, that *Nemo facilè præsumitur donare.* Hence it follows that you cannot from such an acquittance, draw the inference that he intended to discharge the debtor from the solidity of the annuity for the future, unless there be a necessity for doing so. Now there is not any such necessity; for, from the creditor agreeing to let the debtor pay *for his part*, nothing more follows than that he intended to discharge him from the solidity as to such arrears; but it by no means follows, that he intended to discharge him from it for the future.

Nevertheless, if during the time requisite for forming a prescription, that is to say, for the space of thirty years, the debtor had always been admitted to pay the arrears *for his part*, he would acquire by the prescription a discharge from the solidity even for the future. But even in this case, the debtor would not acquire a right of redemption *for his part* of his annuity only; for it by no means follows, from the creditor intending to discharge him from the solidity in respect to the annual payments, that he also consented to a division in the redemption of his annuity.

§ V. *Of the Cession of the Actions of the Creditor, which a Debtor in Solido, who pays the whole, has a Right to demand.*

[280] The debtor in solido, who pays the whole, may avoid absolutely extinguishing the debt, except as to the part for which he is liable on his own account, without having any remedy over, *vi ante* No. 264. He has a right to the cession of the actions of the creditor against the other debtors; and by this cession of actions he is considered in some degree as purchasing the right of the creditor. *Creditor non in solutum accepit, sed quodam modo nomen creditoris vendidit. l. 36. ff. de Fidej.*

The creditor cannot refuse this subrogation or cession of actions, to the debtor who pays the whole; but if he has incapacitated himself from ceding them against any one, he has so far given up his right of solidity.

And further, when the debtor, by the *act* [or written instrument] of payment, requires a subrogation, though the creditor expressly refuses it, the debtor, according to our usage is, nevertheless, entitled to enjoy it without being under the necessity of instituting any process to compel the creditor to grant it: the law in this case supplies what the creditor ought to have done and gives the debtor who requires it, a subrogation to all the rights and actions of the creditor.

Suppose the debtor had paid without requiring a subrogation? He could not afterwards be subrogated to the actions of the creditor; for

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the pure and simple payment which he had made, having entirely extinguished the credit and all the rights and actions resulting from it, that credit cannot afterwards be ceded which does not any longer exist. *Si post solutum sine ullo pacto, omne quod ex causâ tutelæ debetur, actiones post aliquot intervallum cessæ sint, nihil ea cessione actum, cum nulla actio superfuit. l.* 76. *ff. de Solut.*

The doctors amongst other texts, commonly cite this law, to decide that subrogation is not made of full right, if it is not required at the time of the payment being made by a debtor in solido, or a surety, or any other person who pays what he owes for others or with others; and this text appears in effect to decide it in terms sufficiently formal. Nevertheless *Dumoulin* has maintained against the sentiment of all the doctors, that a debtor in solido, a surety, and generally, all those who pay what they owe, with, or for others, are thereby subrogated of full right, and without demanding a subrogation. His reason is, that they ought always to be presumed to have only paid, subject to this subrogation which they had a right to demand, nobody being presumed to neglect and renounce his rights; he contends, that this law is not, as has been thought by all others, referable to the case of a tutor who has paid the balance which he owed in solido with his co-tutors, without requiring a subrogation against them; but that it relates to the friend of a tutor who has paid for him, and who was not chargeable with the debt. *Dumoulin* maintains, that it is only in this case that there is no subrogation, if the acquittance does not mention any; because, as the creditor in this case is not obliged to cede his actions, such a cession cannot be presumed, unless it is expressly agreed upon. But wherever a payment is made by a person who has an interest in paying, and consequently a right to require a subrogation of the actions of the creditor against those for whom, or with whom he is debtor, he contends that he ought always to be considered as subrogated, although he has not required any subrogation; he founds his opinion principally upon law, I. § 13. *ff. de Tutelis & Rationibus*, which he understands in a sense entirely different from that which has been always ascribed to it. It is said, *Si forte quis ex facto alterius tutoris condemnatus præstiterit, vel ex communi gestu, nec ei mandatæ sunt actiones, constitutem est a Divo Pio & ab imperatore nostro & patre ejus utilem actionem adversus con-tutorem dandum.* This text is commonly understood of the *actio utilis negotiorum gestorum,* which these Constitutions grant, in this case, to the tutor against his cotutors; which action had created the difficulty, because the tutor in paying what he was condemned to pay in his own name, *non contutoris, sed magis proprium negotium gessisse videbatur. Dumoulin,* on the contrary, understands this text of the action of tutelage, which the minor had against the other tutor, which was called *utilis,* because the law *utiliate suadente,* in default of an express cession, subrogates the tutor who has paid.

This opinion of *Dumoulin* has not prevailed; and the instructions of the schools, and the practice of the bar, have continued to proceed upon the principle, that a debtor in solido, as well as sureties, and all those who pay with, or for others, are not subrogated to the actions

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of the creditor, unless they require such subrogation. The reason is, that according to a principle admitted by *Dumoulin* himself, there is no subrogation of full right, except where the law particularly so declares, *non transeunt actiones, nisi in casibus jure expressus.* Now *Dumoulin* cannot find any text of law which establishes a subrogation in this case; the law I. § 13. *de Tutel. & Rat.* which is the principal foundation of his opinion, does not establish it; there being no necessity to understand the text in the sense in which it is understood by *Dumoulin*, of an *actio utilis tutelæ*, to which the tutor who has paid is subrogated; as it may be understood much more naturally of the *actio utilis negotiorum gestorum.* The text is so far from establishing, that subrogation is made in this case in full-right, that it supposes the contrary, which is also supposed in the law 76, *ff. de Solut.* above cited, taken in its natural sense, which the sense ascribed to it by *Dumoulin* is not, by any means. The law 39. *ff. de Fidej.*,(*a*) and the law 11. *Cod. d. Tit.*,(*b*) admit of still less reply: these laws decide, that the surety, who at the time of payment has omitted to require a subrogation, has not an action against his co-sureties, which clearly, suppose that he is not subrogated of full right, without requiring a subrogation; as if he was so, it would have been useless to consult the Emperor *Alexander*, whether he had an action. In vain will it be said in support of the opinion of *Dumoulin*, that the debtor in solido, having a right to be subrogated to the action of the creditor against his co-debtors, he ought not to be presumed to have renounced this right, it being a principle, that no body is presumed to renounce the rights which belong to him. The answer is, that as this right consists in the mere power to require a subrogation, which power he may use or not, it is not sufficient to say that he shall not be presumed to have renounced his right; it must appear that he has used this power, which does not appear, unless he has declared himself to do so. The debtor, having another motive for his payment, than that of acquiring a subrogation, to wit, the avoiding the pursuits of his creditors, and the liberating his own person and effects, the payment which he makes without requiring a subrogation, does not establish any thing more than that he intended to liberate himself. Besides even if he were supposed to have intended to require a subrogation, this intention, kept to himself, would not be sufficient; as his right consists in the power to require it, the subrogation can only take place, if it is required. It is true, that the law allows it in case of the default of the creditor; but before it can be said that there is a default in the creditor, the creditor must have been put *en demeure* to grant it, by a requisition made to him for that purpose. For these

(*a*) Ut fidejussor adversus confidejussorem suum agat, danda actio non est: ideoque si ex duobus fidejussoribus ejusdem quantitatis, eum alter electus a creditore totum exsolvet, nec ei cessæ sint actiones: alter nec a creditore, nec a confidejussore convenietur.

(*b*) Cum alter ex fidejussoribus in solidum debito satisfaciat, actio ei adversus eum, qui una fidejussit, non competit. Potuisti sane, cum fisco solveres, desiderare, ut jus pignoris, quod fiscus habuit, in te transferretur: et si hoc ita factum est, cessis actionibus uti poteris. Quod et in privatis debitis observandum est.

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reasons the modern writers have continued to retain the common opinion.

Renusson in his *Traitè des Subrogations*, holds this opinion; it has also been followed by the jurisprudence of *arrêts;* there is one of the 26th of *August* 1706, reported in the 5th volume of the *Journal des Audiences*, which adjudged, that a surety, paying without requiring a subrogation, was not subrogated to the actions of the creditor; and that consequently he had no action against the wife of the debtor, who had engaged to the creditor to return her husband to prison, or to pay for him.

[281] The debtor in solido, who on paying the debt requires a subrogation, is, as to the surplus, beyond his own share subrogated not only against his co-debtors, but also against their sureties: *if they have given any to the creditor*, he is likewise subrogated, to all the privileges and rights of hypothecation attached to the actions of the creditors; and he may even exercise them against third persons, in the same manner as the creditor to whom he is procurator *in rem suam* might have done.

Where there are several co-debtors: as for example, when an obligation has been contracted in solido by four persons; it is a controverted question amongst the doctors, whether one of the four, who has paid the whole of the debt with subrogation, may proceed in solido against each of the others, subject only to the deduction of the fourth part, for which he was liable on his own account, or whether he can only proceed against each for his fourth? The question was anciently judged in favour of the first opinion. In fact, it seems at first, that the debtor being, by the subrogation, the procurator in *rem suam* of the creditor, he may exercise the actions of the creditor in solido, against each of the debtors in the same manner as the creditor might himself; nevertheless, the modern *arrêts* have decided in favour of the second opinion. The author of the *Journal du Palais*, *t.* I. *p.* 215, of the edition of 1701, reports one of the 22d of *Feb.* 1650, which was followed by another of the 5th *Sept.* 1674. The reason is, that otherwise there would be a circuity of actions; for either of my co-debtors, whom I had obliged to pay the whole of the debt, deducting my own share, would have a right in like manner to be subrogated to the actions of the creditor, subject to the deduction of the share for which he was liable; and by virtue of that subrogation he would have a right to demand from me, deducting his own share, what he had before paid me, since I am also bound by the solidity. I could not say, in order to avoid this circuity, that I am no longer a debtor, having paid the creditor: for, in consequence of the subrogation, the payment has only extinguished the debtor as to the part fór which I was liable on my own account, and not as to the residue. By means of the subrogation, I have rather acquired the claims of the creditor for the surplus, than discharged it; but being reimbursed by my co-debtor, who would also have required a subrogation, this claim for the surplus, and subject to the deduction of the part for which he was liable on his own account, would pass to him; the other would then become instead of me the proprietor in *rem suam* of the creditor,

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and he would have a right in that quality to exercise against me the actions of the creditor for the surplus, and to make me restore what he had paid.

If, after I had paid the whole with a subrogation, it appeared that one of my co-debtors was insolvent, and that I could not recover the part of the debt for which he was liable, this insolvency ought to fall equally upon the other solvent debtors and myself; as it is contrary to equity, that, in consequence of having alone discharged the common debt, I alone should bear the loss of the insolvency.

§ VI. *Of the Actions which a Debtor in Solido, who has paid without Subrogation, may have on his own account* (de son chef) *against his Co-debtors.*

[282] Although a debtor in soldido has omitted at the time of payment to require a subrogation, he is not therefore destitute of all redress; but has on his own account (*de son chef*) an action against each of his co-debtors, for the repetition of their several proportions.

This action is different, according to the different causes upon which the debt may be founded.

When the debt in solido is contracted by several persons for a common affair; as when several persons have made a joint purchase of an estate, for the payment of which they have bound themselves in solido; or when they have borrowed a sum of money which they have employed about their common affairs, or have divided amongst themselves, and bound themselves in solido for the payment of; in these, and similar cases, the debtor, who has paid the whole, has against each of the others the action *pro socio.*

He has this action against each of them, for the share which they respectively had in the common subject, which is the foundation of the debt.

If any one of them is insolvent, he who has paid the whole has likewise an action against each of those who are solvent, to pay the proportion which they ought respectively to bear of the loss arising from such insolvency; and to which each of them ought to contribute *pro ratâ*, according to the share which he has in the common subject: for the insolvency of any one is a loss to the body at large, which ought consequently to fall upon each of the members in proportion to his share.

This may be illustrated by an example. Suppose six persons, *Peter*, *Paul*, *James*, *Andrew*, *John* and *Thomas*, purchased a lot of merchandize together, for the sum of 1000*l.* for the payment whereof they oblige themselves in solido to the seller. By the division which is made between themselves, *Peter* takes one moiety for his share, and engages for the payment of a moiety of the price; the five others divide the other moiety in equal shares. *Thomas* pays the creditor the whole price without subrogation, *Andrew* is insolvent; *Thomas*, who in respect of his co-debtors only owed 100*l.* for his own tenth, and 12*l.* 10*s.* for his fourth of the moiety of the share of *Andrew*,

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will recover against *Peter*, 1st, 500*l.* for the moiety for which *Peter* was liable on his own account, 2d. 50*l.* for the moiety of *Peter* in the share of *Andrew*, and he will recover against each of the three others, *Paul*, *James* and *John*, 100*l.* on their own account, and 12*l.* 10*s.* for the share which each of them ought to bear in the portion of the insolvent.

When the affair, for which the debt has been contracted by several who are bound in solido, only concerns one of them, although they are all, in respect of the creditor, principal debtors; as between themselves, the only debtor is the one whom the affair concerns, and the others are only in effect his sureties. For instance, if *Peter*, *James*, and *John* borrow a sum of money, which they oblige themselves in solido to repay, and *Peter* has the whole of the money; *Peter* is, in respect of the others, the only principal debtor. If he discharges the debt, he has no recourse against them, they having only made themselves debtors on his behalf, (*pour lui faire plaisir.*) On the contrary, if either *James* or *John* discharges the debt, he will have an action *mandati* against *Peter* to recover the whole, in the same manner as a surety has the action *mandati* against the principal debtor when he has discharged the debt.(*a*)

But, in case of the insolvency of *Peter*, shall *James*, who was paid the whole, have an action against *John* for a moiety? That depends upon the decision of the question, whether a surety has an action against his co-sureties. As to which, see *infra*, ch. 6. § 7. Art. iv.

When the debt in solido is founded upon a donation, as when two or three, by a marriage-contract, engage in solido to give a certain sum by way of portion, and one of them pays the whole, he cannot have the action *pro socio* against the co-debtors; for partnership may be contracted in buying together, in selling together, but not in giving together; partnership being in its nature a contract which is made *lucri in commune quærendi causâ*. The action which in this case belongs to the one who pays the whole, is the *actio mandati;* for each of the donors and debtors is only donor and debtor for himself, to the amount of his own share, and for the remainder is only the surety and mandatory of the others; and consequently he has for that the *actio mandati*, in the same manner as a surety.

When the debt in solido proceeds from an injury as when several persons are condemned in solido, to pay another a sum of money for the injury which they have committed, he who pays the whole cannot have against the others either of the actions *pro socio* or *mandati: Non enim ulla societas maleficiorum*, *l.* I. § 14. *ff*. *Tut. & Rat.* *nec societas aut mandatum flagitiosæ rei ullas vires habet*, *l.* 35. § 2. *de Contrah. Emp. rei turpis nullum mandatum est. l.* 6. § 3. *ff*. *Mandat.* According to the scrupulous principles of the *Roman* jurists, the debtor, who has paid the whole has not any recourse against the others.

(*a*) In *England*, the terms, principal and surety, would be immediately applied to the case as here stated; and, in fact, the ordinary mode of a surety contracting is by a joint and several engagement with his principal. It seems that, according to the *Roman* and *French* law, some particular form was used for the engagements of sureties, (fidejussores) (cautions). For the system adopted respecting them, see post. chap. 6.

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The *French* practice is more indulgent in this respect, and gives the person who pays the whole, an action against each of the others for their respective parts. This action is not founded upon the injury which they have committed together, *nemo enim ex delicto consequi potest actionem.* It arises from the payment made by him of debt which was common to himself, and the others; and from the principle of equity, which does not allow his co-debtors to enjoy, at his expense, the liberation from a debt for which they were as much bound as he was. It is a kind of *actio utilis negotiorum gestorum,* founded upon the same reasons of equity as the action which in our jurisprudence is allowed to a surety against his co-sureties. As to which see *infra,* Part. II. ch. 6. § 7. Art. iv.

CHAPTER IV.

Of some particular Kinds of Obligations considered with Reference to the Objects of them.

In enumerating the divisions of Obligations, with reference to the the things which are the objects of them, we observed that there were Obligations of a specific thing, such as a particular horse; and Obligations of an uncertain and indeterminate thing of a particular kind, such as a horse generally.

We also adverted to Obligations as divisible and indivisible. In the first section of the present chapter, we shall treat of the Obligation of an indeterminate thing of a particular kind; in the second, of divisible and indivisible Obligations.

SECTION I.

Of the Obligation of an indeterminate Thing of a particular Kind.

[283] Any thing which is absolutely indeterminate, cannot be the object of an obligation, *supra, n.* 131. For instance, if I promise to give you *something,* without saying what, the promise does not induce any obligation; but an obligation may be contracted of an indeterminate thing of a certain kind: therefore, where a person promises to give another a horse, the furniture of a bed-chamber, a brace of pistols, without reference to any horse, furniture, or pistols in particular, the individual thing, which is the object of these obligations, is indeterminate; but the kind to which it belongs is certain and determinate; these obligations are indeterminate *quoad individuum,* though they have a determinate object, *quoad genus.*

These obligations are more or less indeterminate, according as the kind of things which form the object of them, is more or less general; therefore if a person engages to give me a horse from his stud, the

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obligation being confined to that stud is less indeterminate, than if it had been merely to give me a horse.

In these obligations, every individual comprised in the specified class, is *in facultate solutionis*, provided it is good, lawful, and merchandisable, but it is not *in obligatione;* for there is not any individual which the debtor may not pay: but there is not any one thing which can be properly and distinctly demanded from him.

There is indeed one thing of that kind due; for the obligation must have an object: but that thing is not any individual in the concrete, it is only a thing of that kind in the abstract, according to the transcendent idea which makes an abstraction from the individuals that compose the kind; the thing is uncertain and indeterminate, and can only become determinate by the actual payment of a particular individual.

It is true, that the thing so considered, until it is determined by payment, only subsists intellectually; but intellectual things may be the objects of obligations, obligations being in their nature intellectual.

This idea which *Dumoulin* gives us, *tr. de Div. and Indiv. p.* 2. *quest.* 5. of the object of an obligation of an indeterminate thing of a certain kind, is more natural and correct than that of those who think that such obligations have for their object all the individuals of the kind prescribed, so that each of them is due *non quidem determinate,* but in a kind of alternative, and upon the condition, *si alia res ejus generis non solvatur.*(*a*)

From the principles which have been stated, it follows, 1st. That where a thing of a certain kind, is due indeterminately, the creditor has no right to demand, determinately, any particular thing of that kind; but he may demand one of such things, generally and indeterminately.

2d. That the loss of any individual thing of that kind, subsequent to the obligation, does not fall upon the creditor: for the things which are lost are not such as were specifically due; the obligation subsists whilst there is any one thing remaining, by which it can be discharged.

But it must be observed, that if the debtor, in order to discharge his obligation, offers any thing of the proper kind, and of suitable quality, and has, by a judicial summons, put the creditor *en demeure* to receive it, the loss which may afterwards accrue to the thing so offered will fall upon the creditor, as the debtor ought not to suffer by the creditor's refusal or delay; the debt, however indeterminate before, becomes, by the offer, determinate; and is confined to the article offered, *l.* 84. § 3. *ff. de Leg.* I.(*b*)

[284] It is however essential to the validity of such an offer, that the thing should be good and sufficient in its kind. *l.*

(*a*) This metaphysical discussion, though not conformable to the taste of those who expect something practical in every juridical inquiry, will not be unacceptable to such as have no aversion to trace a subject to its original source, and to acquire an accurate knowledge of its fundamental principles.

(*b*) Si cui homo legatus fuisset, et per legatarium] stetisset, quo minus Stichum, cum heres tradere volebat, acciperet; mortuo Sticho, exceptio doli mali heredi proderit.

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33.(a) *in fine ff. de Solut.* that is, that it should not have any remarkable defect. Thus the debtor of a horse, generally will not be allowed to offer one which is blind, or broken winded, &c., or of an age unfit for service; with this exception, and on condition of transferring the absolute property, the choice of the particular thing belongs wholly to the debtor. *l.* 72. § 5. *ff. de Solut.*(b)

[285] Will he be allowed to give an article, of which a valid promise could not have been made, to the creditor in whose favour the obligation has been contracted? For instance, I engage to give you a horse indeterminately; may I acquit my obligation by giving you a horse, which belonged to you at the time of the contract, and having been sold by you, has become my property? *Dumoulin* decides in the affirmative; and in this the obligation differs from that by which I should have promised you the horse under the alternative of something else: for in this case, as my obligation could not subsist with respect to a thing which belonged to you, the other only was due; and consequently that alone is to be paid by me. But in the obligation of a horse indeterminately, no individual being due, and all horses being *in facultate solutionis* rather than *in obligatione*, the payment is sufficient if the horse then belongs, not to you but to me. *Marcellus* decides this in the law 72. § 4. *ff. de Solut. Ei qui hominem dari stipulatus est, unum etiam ex his qui tunc stipulatori servierum dando, promissor liberetur.*

It must be agreed however, that the law 66. § 3. *ff. de Leg.* 2. which is *Papinian's*, decides the contrary. *Quum duobus testamentis homo generatim legatur, qui solvente altero legatarius factus est quamvis postea sit alienatus, ab altero herede idem solvi non poterit, eademque ratio stipulationis est; hominis enim legatus, orationis compendio singulos homines continet; ut quæ ab initio non consistit in his qui legatarii fuerunt, ita frustra solvitur cujus dominium legatarius adeptus est, tametsi dominus esse desierit.*

Dumoulin, Tract. de Div. & Ind. p. 2, *n.* 102, according to his usual custom of making the laws subservient to his decisions, tortures this law; he says, that the decision of it ought to be restricted to its particular case of two legacies, made of a thing of a certain kind by two testators to the same person, or of two gratuitous promises of a thing of a specific kind, invested with the form of a stipulation, made by two donors to one person; that it is for a particular reason, that in this instance, the same thing which was paid to the legatee or to the donee, in performance of the first legacy, or of the first donation, can no longer be paid in performance of the other legacy or donation,

(a) Item, qui hominem dari promisit, & vulneratum a se offert, non liberatur. Judicio quoque accepto si hominem is, cum quo agetur, vulneratum a se offert, condemnari debebit. Sed et ab alio vulneratum, ci det condemnandus erit, cum possit alium dare.

(b) Qui hominem debebat, Stichum, cui libertas ex causa fideicommissi præstanda est, solvit: non videtur liberatus, nam vel minus hic servum dedit, quam ille, qui servum nondum noxa solutum, num ergo & si vespellionem, aut alias turpem dederit hominem idem sit? Et sane datum negare non possumus. Sed differt hæc species a prioribus; habet enim servum, qui ei auferri non possit § 6. Promissor servi cum debet hominem solvere, quem, si velit stipulator, possit ad libertatem perducere.

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ne scilicet videretur offendi juris regula, non possunt duæ causæ lucrativæ in eadem re et in eadem persona concurrere; but that it ought not to be deduced as a general principle from this law, that in all obligations of a thing of a certain kind, the things which, at the time of the contract or afterwards, belonged to the person in whose favour the contract is made, are excepted from the obligation, and consequently not capable of being paid to him, though no longer belonging to him. Lastly, he says; that in this law the terms, *hominis legatum, orationis compendio singulos homines continet*, do not signify that all the slaves in the world are *in obligatione legati*, under this condition, *si alius non solvatur;* but only, that all the slaves in the world are *facultate solutionis*, and that the legacy may be acquitted and executed *in singulis hominibus.* This interpretation does not appear agreeable to the natural sense of the text; I prefer with *Antoine Faber* and *Bachovius*, allowing a real antinomy between this law and law 72, abandoning the decision of *Papinian* as founded upon the false principle, that obligation of a thing of a certain kind includes *alternatè & orationis* the *compendio*, that of all the individuals which are susceptible of it, and admitting the decision of *Marcellus* in the law 72. § 4, above cited, for the reasons already mentioned. *Cujas*, in commenting upon this law, has taken a part diametrically opposite to that of *Dumoulin;* for to reconcile the laws together, and to make *Marcellus* in the law 72. *de Solut.* say the same thing, which *Papinian* says in the law 66. *ff. de Leg.* 1st, he changes the text of this law 66; but the end of the § shows the falsity of this innovation in the text, which, besides, is made without any authority.

Where a debtor, of the kind at present in consideration, pays a certain article under the erroneous belief, that it was specifically and determinately due from him, he has a right of repetition upon giving another; for, not having given the first by way of discharging a general obligation, but under the false persuasion of its being specifically due, he has paid what was not actually due, and therefore has a right to reclaim it. *l.* 32. 33. *ff. de Cond. Indeb.*

As to the indivisibility of payment of obligations of an indefinite thing of a certain kind, v. *infra*, P. III. ch. I. Art. IV. § 3.

[286] All that we have hitherto said holds good, whether the obligation be *generis generalissimi*, as of a horse in general, or *generis subalterni aut limitati*, as one of the stud belonging to the debtor, unless the choice is taken from the debtor by express agreement.

But where it is particularly stipulated, that the creditor shall have the choice, as if my debtor gives me the choice of any dog in his pack; in this case, although this agreement principally contains the pure and simple obligation of a dog indeterminately, it may also be said, that every dog in the pack is due to me under a kind of condition, provided I make choice of it; since there is not any of them which I have not a right by virtue of this clause to demand; therefore the debtor is obliged in this case to keep them all, until I have made the choice; and cannot dispose of any of them without contravention of his obligation. *Arg. l.* 3. *ff. qui. et a quib. man. si indis-*

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tinctè homo sit legatus, non potest heres quosdam manumittendo evertere jus electionis.

It cannot be said, in like manner, where the choice is with the debtor, that every individual is comprised in the obligation, subject to the debtor's right of fixing upon one rather than the other; because the obligation does not consist in the power of paying one rather than another, but in the right of demanding it.

Dumoulin, Tr. de Div. et Ind. p. 2. *n.* 112, 113, 114, establishes this difference between the case in which the choice is given to the creditor, and that in which it is given to the debtor.

SECTION II.

Of Divisible and Indivisible Obligations.(a)

ARTICLE I.

What Obligations are Divisible, and what are Indivisible.

§ I. *What is a Divisible Obligation, and what an Indivisible one.*

[287] A Divisible Obligation is that which may be divided. An Indivisible Obligation is that which cannot be divided. An obligation is not the less divisible, though it be actually undivided; for it is sufficient to render it divisible if it is capable of being divided. *Dumoulin, Tr. de Div. et Indiv. p.* 3. *n.* 7. *et seq.*

For instance, if I have singly contracted to pay you a thousand pounds, this obligation is undivided; but it is divisible, because it may be divided; and in fact will be divided among my heirs, if I leave several, and die before discharging it.

In like manner the obligation in solido, when several persons contract to pay to another the sum of ten pounds, is nevertheless a divisible obligation; the effect of the solidity is, that it is not actually divided among the debtors in solido: but their obligation is, notwithstanding, divisible, because it may be divided, and in fact will be so, among their heirs.

(a) By the *Roman* laws, when several persons contracted an obligation jointly, each was only liable for his own part, unless it was particularly stipulated that they should be bound in solido; and when a person died, leaving several heirs, each heir was only answerable for his own proportion. So, when an obligation was contracted in favour of several persons, or devolved upon several heirs of one person, each was creditor for his respective part; provided the obligation could, from its nature, be discharged in separate parts, and there was no particular reason to the contrary. Debts which might be so discharged in separate portions, by the several debtors to the several creditors, were called divisible; those which only admitted of an entire discharge were indivisible, and the nature and effects of this distinction are the subject of the present section, which manifests great ingenuity and distinctness, and is peculiarly distinguished for its perspicuous exposition of an intricate branch of law: and is therefore, as a specimen of judicial reasoning, of general value and utility; but it is evident from the above sketch of the general object of it, that it can have very little immediate application to the practice of the *English* law.

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[288] We are now to see what Obligations can be divided, and what cannot.

An obligation may be divided, and is divisible, when the thing which is the matter and object of it is susceptible of division and parts, by which it may be paid; and on the contrary, an obligation is indivisible, and cannot be divided, when the thing is not susceptible of division and parts, and can only be paid altogether.

The division in question is not a physical division, which consists in *solutione continuatis*, such as that of a plank, which may be divided in two, but a civil division.

There are two kinds of civil division, the one consisting in real and divided parts, the other intellectual, and undivided parts. When an acre of ground is divided into two parts by placing a fence in the middle, this is a division of the first kind: the parts of the acre, which are separated by this fence, are real and divided parts.

When a man who was proprietor of this acre of ground, or of any thing else, dies, and leaves two heirs, who continue proprietors of it, each having an undivided moiety, it is a division of the second kind; the parts which result from this division, and which belong to each of the heirs, are undivided parts, which are not real, and which subsist only *in jure et intellectu.*

Things which are not susceptible of the first kind of division, may be so of the second. For instance, a horse, a watch, are not susceptible of the first kind of division; for these things are not susceptible of real and divided parts, without the destruction of their substance; but they are susceptible of the second kind of division, because they may belong to several persons, in undivided parts.

If a thing may be susceptible of this kind of division, although it be not susceptible of the first; it is sufficient to make the obligation of giving the thing a divisible obligation. This results from law 9. § 1. *ff. de Solut.* where it is said, *qui Stichum debet, parte Stichi data, in reliquam partem tenetur.* According to this text, the obligation of giving the slave *Stichus* is divisible, since it may, at least by the consent of the creditor, be discharged in part, though the slave be not susceptible of the first division. *Dumoulin, ibid. p.* 1. *n.* 5, *p.* 2. *n.* 200 & 201.

Things are indivisible, when they are neither susceptible of real nor even of intellectual parts; such are for the most part, the rights of prædial servitudes,(*a*) *quæ pro parte acquiri non possunt.*

The obligation of giving a thing of this nature is indivisible. *Dumoulin p.* 2. 201.

[289] The same rule which we have just laid down for judging whether obligations *in dando* are divisible or indivisible, will serve also with regard to obligations *in faciendo vel in non faciendo.* Many doctors have supposed that these obligations were indivisible, indiscriminately, but *Dumoulin, ib. p.* 2. *n.* 203. & *seq.* has demonstrated that they are not less divisible than the obligation *in dando*, at least if the fact, which is the object of them, is not of such a nature

(*a*) Rights of way and other casements.

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that it cannot be acquitted for a part, as when I am obliged to build a house, &c. But if the fact, which is the object of the obligation, can be acquitted in parts, as if I am under an obligation to put you in possession of a thing which may be possessed in parts, the obligation will be divisible: this is the fifth of the clefs of *Dumoulin omnis obligatio etiam facti dividua est, nisi quatenus de contrario apparet. Dumoulin, ibid.* & *p.* 3. *n.* 112.

In like manner, an obligation *in non faciendo* will be divisible, when what I have obliged myself to do may be done as to one part, and not as to the other; such is the obligation *amphilus non agi ad aliquid dividuum;* as when I am engaged in your favour not to disturb the possessor of an estate which you are bound to warrent: this is an obligation *in non faciendo* which is divisible; for it may be satisfied in part. I may contravene it as to part, by claiming one part only of this estate, and satisfy it in part by abstaining from claiming the other part.

[290] Observe, that it is the thing or act itself which constitutes the object of the obligation, that ought to be considered, in order to decide whether the obligation be divisible or indivisible, and not the utility which results to the creditor from the obligation contracted in his favour, nor the detriment, *onus et diminutio patrimonii,* which result from it to the debtor, otherwise every obligation would be divisible; therefore, for instance, if two proprietors of a house are obliged in favour of two proprietors of the next house, to subject their house to a servitude in their favour, this obligation is indivisible because the right of servitude, which is the object of it, is indivisible, although the utility which results from it to each of them in whose favour it is contracted and the detriment suffered by those who have contracted it, is to be estimated by a sum of money which is divisible. This is what is laid down by *Dumoulin, ibid. p.* 2. *n.* 199. *cum hic effectus sit quid remotum et separatum a substantia obligationis et rei debitæ, non dicitur obligatio dividua vel individua penes effectum, sed secundum se, et secundum naturam rei immediate in eam deductæ.*

§ II. *Of the Different Kinds of Indivisibility.*

[291] *Dumoulin, ibid. p.* 3. *n.* 57. *& seq. &. n.* 75. properly distiuguishes three kinds of indivisibility, 1st, That which is absolute, and which he calls *individuum contractu.* 2d, That which he calls indivisibility of obligation, *individuum obligatione;* and 3d, That which he calls indivisibility of payment, *individuum solutione.*

The absolute indivisibility, which *Dumoulin* calls *individuum contractu,* is when a thing is in its nature not susceptible of parts, so that it could not be stipulated or promised in part: such are rights of servitudes, for example, a right of passage. It is imposible to conceive parts in a right of passage, and consequently these kind of things cannot be stipulated or promised in part.

[292] The second kind of indivisibility is that which *Dumoulin* calls *individuum obligatione:* every thing which is *individuum contractu,* is so likewise *obligatione;* but therea re certain things, which although they are capable of being positively stipulated or pro-

mised in part, and consequently are not *individuæ contractu*, are yet indivisible in the manner in which they have been considered by the contracting parties, and consequently cannot be due by parts.

We may adduce, as an example of this kind of indivisibility, the obligation of building a house. This obligation is not indivisible *contractu;* for it is not impossible for it to be contracted in part. I may agree with a man to build the house in part: for instance, that he shall raise the walls to the first story; but though the construction of a house be not indivisible *contractu*, it is generally indivisible *obligatione:* for where any one makes a bargain with an architect to build a house for hire, the construction of the house, which constitutes the object of the obligation, as it is considered by the contracting parties, an indivisible act, *et quod nullam recipit partium præstationem.* It is true that the building can only be made by parts, and successively. But it is not the transitory act of construction which constitutes the object of the obligation, it is the complete work itself, it is the *domus construenda;* as there can be no house then, until it is entirely constructed, since its form and quality as a house can only result from the completion of the work, and as there can be no parts of a thing which does not yet exist, it follows, that the obligation of building a house can only be accomplished by the entire construction, and consequently that this obligation is not susceptible of parts, and cannot be accomplished in part. This is what the jurist intends in the law 80. § 1. *ff. ad. Leg. Falcid*, in which to prove that the obligation of building or constructing a work, as a theatre or baths, is indivisible, he alleges this reason, *neque enim ulum balneum aut theatrum, aut stadium fecisse intelligitur, qui ei propriam formam, quæ ex consummatione contigit, non dederit.*

For the same reason, in law 85. § 2. *ff. de verb. Oblig.* it is said, that the obligation of constructing a house is indivisible, *singuli heredes in solidum tenentur, quia operis effectus in partes scindi non potest. Opus*, says Dumoulin, *fit pro parte realiter, et naturaliter; sed si illud opus fieri referas ad effectum et præstationem ejus quod debtur, tunc verum non erit per partes fieri, quia parte fabricæ factâ, non est debitor liberatus in ea parte; simplex enim fabricatio et operatio transiens non debetur, sed opus effectum, cujus pars non est fabricæ pars, cum nullæ sint partes domus quæ nondum est, nec sum stipulatus fabricam, sed fieri domum, id est tale opus sub tali formâ consummatum, quod ante perfectionem non subsistit, nec ullas actu partes habet. Dumoulin Tract. de Divid et Ind. p.* 3. *n.* 76. We *may* adduce here also the law 5. *ff. de vetb. Oblig.*, which says that *opere locato conducto significari non* εϱγον. *id est, operationem, sed'* αποτελεϛμα, *id est ex opere facto corpus aliquod factum.*

Certain circumstances with which the obligation of a thing is contraoted may likewise render the obligation indivisible, although the thing may in itself, and independent of those circumstances be very susceptible of division; such is the obligation which I might contract with any one, to furnish him a piece of ground to build a wine press, which he intends placing there: for, although the piece of ground that I have promised is divisible in itself, nevertheless being due, not

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as a piece of ground *simpliciter*, but as a piece of ground destined to have a wine press erected on it, it becomes in this view indivisible, for nothing can be retrenched from it, without its ceasing to be a place proper for a wine press, and consequently without its ceasing to be the thing which constitutes the object of the obligation.

[293] In short, an obligation divisible *natura et contractu*, is the obligation of a thing which in itself, by its nature, and under whatever aspect it is considered, it is not susceptible of parts: an obligation divisible *obligatione*, is the obligation of a thing, which is not susceptible of parts, in the respect in which it forms the object the obligation.

It is evident, that those obligations which are indivisible, either *contractu or obligatione*, are also indivisible *solutione;* for a thing cannot be paid by parts which is not susceptible of parts.

[294] This is a third kind of indivisibility, which is called *individuum solutione tantum.*

It is that which only concerns the payment of the obligation, and not the obligation itself, when the thing due is in itself divisible and susceptible of parts, and may be due in parts, whether to the different heirs of the creditor, or by the different heirs of the debtor, but cannot be paid in parts.

We shall adduce several examples of this kind of indivisibility in the following article, in which we shall treat of the nature and effects of divisible obligations, according to the class to which the obligations properly belong, in which this kind of indivisibility occurs, since it does not concern the obligation itself, although the law,(a) 2. § I. *ff. de verb. Obligationum* regards it as a third and middle kind, between obligations divisible and indivisible.

§ III. *Several particular Kinds of Obligations, with regard to which it may be a Question, whether they are Divisible or Indivisible.*

Of the Obligation to deliver a piece of Land.

[295] The obligation to deliver a piece of land, *fundum tradi* is a divisible obligation; for this delivery may be made in parts; a part of the land may be delivered: the act which forms the object of the obligation being therefore a divisible act, it cannot be doubted, according to the principles which we have established, but that this obligation is divisible; our decision is confirmed by the texts of law; for although the obligation of a borrower is the obligation of returning a specific thing, *obligatio rem tradi*, nevertheless the law 3.

(a) Stipulationum quædam in dando, quædam in fasciendo consistunt. Et harum omnium quædam partium præstationem recipiunt: veluti, cum decem dari stipulamur quædam non recipiunt, ut in his, quæ natura divisionem non admittunt: veluti, cum: viam, iter, actum stipulamur: quædam partis quidem dationem natura recipunt, sed nisi tota dantur, stipulationi satis non fit; veluti cum hominem generaliter stipulor, aut lancem, ant quodlibet vas: nam si Stichi pars soluta sit, nondum in ulla parte stipulationis liberatio nata est, sed aut statim repeti potest, aut in pendenti est, donec alius detur: Ejusdem conditionis est hæc stipulatio, Stichum aut Pamphilum dari.

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§ 3. *ff. Commod.* decides that the heirs are regularly bound for the part only of which they are heirs, which is the character of divisible obligations; *heredes ejus qui commodatum accepit, pro ea parte qua heres est convenitur.* It is true, that this obligation of the borrower, although divisible, *quoad obligationem*, is indivisible at least *quoad solutionem*, but we may easily state examples of obligations *tradi rem, tradi fundum*, which are divisible even *quoad solutionem;* such is that which *Dumoulin* gives, *p.* 2. *n.* 305. I make a compromise with my opponent respecting the claim of an estate which he demands from me, and I oblige myself by this compromise to leave the estate to him at my death, without any warranty on my part; this obligation, which is an obligation *fundum tradi*, is divisible, even *quoad solutionem:* and if I die, leaving four heirs, each of them acquits himself of this obligation, by renouncing the estate as to the part to which he has succeeded.

The law 72. *ff. de verb. Obl.*(a) appears, nevertheless, diametrically contrary to our decision: for the obligation, *fundrum tradi*, is there adduced in formal terms, as an example of an indivisible obligation, with the obligations *fossam fodiri, insulam fabricari, vel siquid simile*, which are indivisible, *tam obligatione, quam solutione. Dumoulin p.* 2. *n.* 278. *ad. n.* 359,(a) after having adduced seventeen different opinions of doctors to reconcile this law, states his own, to which we must accede; he thinks, and justly, that this example of the obligation *fundum tradi* ought not to be understood indiscriminately of every obligation, by which a person obliges himself to deliver a piece of ground, but only of the obligation by which a person is obliged to deliver a piece of ground, with circumstances which render the obligation of it indivisible; as for instance, if I wish to build a house, and have not a place to lay the materials necessary for that purpose, I agree with my neighbour, that he shall give me the use of a piece of ground near the scite of my intended house; this is an obligation *fundum tradi, non simpliciter, sed ad certum usum finemque principaliter consideratum in contrahendo.* And this purpose renders this obligation *fundum tradi* indivisible: for an obligation is indivisible, when the matter that constitutes the object of it is not susceptible of a partial performance, *cum id jus quod in obligationem deductum est, non nisi in solidum præstari potest*, which occurs in the instance proposed: for as this piece of ground ought to be furnished to me for the purpose of laying my materials, it can only be so furnished by my having it entire, since a part, which would not be large enough for laying my materials, could not serve the purpose for which it ought to be given me.

Of the Obligations of a Day's Work.

[296] The obligation of a day's work is indivisible, in the same

(a) Stipulationes non dividuntur earum rerum, quæ divisionem non recipiunt; veluti viæ, itineris, actus, aqduæctus, cæterorumque servitutium. Idem puto, et si quis faciendum aliquid stipulatus sit; ut puta, *fundum tradi*, vel *fossam fodiri*, vel *insulam fabricari, vel operas*, vel quid his simile; horum enim divisio corrumpit stipulationem.

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manner as the obligation of building a house; for though the service of a day's work is not in itself indivisible, nevertheless the obligation is contracted as if it were so, and cannot be acquitted in part; therefore *Ulpian* says, *nec promitti, nec solvi, nec deberi, nec peti pro parte poterit opera. l.* 15. *ff. de Oper. Libert.*

In like manner, *Pomponius*, in the law, 3. § 1. *ff. de Oper. Libert.* decides, that the service of a day's work cannot be acquitted in part, by the performance of a certain number of hours, and that, consequently, the debtor of a day's work, who has worked till noon, and gone away, has not in any degree acquitted his obligation, and remains debtor of the day's work; *non pars operæ per horas solvi potest, quia id est officii diurni, neque ei liberto, qui sex horis duntaxat meridianis præsto fuisset, liberatio ejus diei contigit;* but after he has acquitted the day's works, of which he remained the debtor, he may demand the price of his half day's work, which he did not owe.

For the rest, *Dumoulin* very properly remarks, *p.* 2. *n.* 355, *et seq.* that this indivisibility of the obligation of a day's work, is only an indivisibility *obligatione*, and not an absolute indivisibility, or indivisibility *contractu:* for there is nothing to hinder a person from contracting the obligation of part of a day's work; it is true, that the law 15, § I. *de Oper. Libert.* says, *nec promitti pro parte opera potest.* But this is a pure subtilty; the jurist takes *opera* for *officium diurnum*, according to the definition of the law 1, *ff. de Tit.* and according to this idea regards it as indivisible, because if you divide it, it is no longer *officium diurnum*, but *officium horarium.*

Of the Obligation of doing a Piece of Work.

[297] We understand here, by work, *affectio transiens in opus specificum permanens*, according to the expression of *Dumoulin, p.* 2. *n.* 361, and we have already seen, *n.* 192, that the obligation of doing a work taken in this sense, such as the obligation of building a house, making a statue, or a picture, was an indivisible obligation, not of that absolute indivisibility which we have called, with *Dumoulin*, indivisibility *contractu*, but of the mere indivisibility *obligatione.*

Of the Obligation of giving a certain Sum, left by Will, for the building of an Hospital, or some other Purpose.

[298] The obligation which results from such a legacy is divisible, since it is the obligation of giving a sum of money; the adding in the will, to build an hospital, only expresses the motive of the testator, which induced him to give this legacy; it is *ratio legandi;* but this motive not being attached to the disposition, *ratio legandi non cohæret legato, l.* 72. § 6. *ff. de Cond. et Dem.* consequently cannot have any influence upon the nature of the legacy, or upon the obligation which results from it.

But if the testator had charged his heirs to build an hospital in a

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certain town, and to employ therein a certain sum of money, the obligation (the object of which would be the building of the hospital,) would be indivisible; it is to this last case that the law 11. § 23.(a) *ff. de Leg.* 3. should be applied.

ARTICLE II.

Of the Nature and Effects of Divisible Obligations.

§ I. *General Principles.*

[299] An obligation is called divisible, as we have already observed, not because it is actually divided, but because it is capable of being divided; therefore, however divisible the thing due may be, the obligation, before it has been divided, is undivided, and cannot be acquitted in parts, as we shall see *infra*, P. III. ch. 1. Art. III. § 2.

Care must therefore be taken not to confound indivision with indivisibility: this is the first of the clefs of *Dumoulin, Tr. de Div. et Individ. p.* 3, *n.* 7. *et seq. n.* 112.

This division of obligations is made, either on the part of the debtor, or on that of the creditor, or sometimes of both, the obligation is divided on the part of the creditor, when he leaves several heirs; each of the heirs is creditor for his own part only; whence it follows, that he can only enforce this claim as to that part; that he can only give a discharge for this part; at least unless he has a procuration from his co-heirs to receive theirs; and it follows in like manner that the debtor may pay separately, to each of the heirs, the portion which is due to him.

The obligation is divided in like manner on the part of the debtor, when he leaves several heirs; each of the heirs is only bound for his part of the debt, and, in general, each of them may oblige the creditor to receive such part.

§ II. *Modifications of the first effect of the Division of an Obligation, on the Part of the Debtor.*

[300] The principle which we have established, that in divisible obligations each heir of the debtor is only liable in respect of the part of the debt, for which he is heir, is subject to several exceptions and modifications.

The first is with regard to hypothecatory debts; in this case, when the heirs of the debtor are possessors of the property hypothecated for the debt, although the debt is divided among them, and consequently they are only subject to a personal action, for the part

(a) Si in operæ civitas faciendo aliquid relictum sit, unumquemque heredum in solidum teneri. D. Marcus, et Lucius Verus, Proculæ rescripserunt.

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of which they are respectively heirs, they may be pursued hypothecatorily for the whole of this debt, as possessors of the goods hypothecated.

[301] The second is with regard to debts of a specific thing, which the deceased has left in his succession: when the deceased has left heirs of different kinds, some for his moveables and acquisitions, others for his patrimonial effects, they are not all subject to the debts of this specific thing, but the heirs of that portion of the property, of which it constitutes a part, are alone liable for it; the reason is, that the deceased could not be liable himself if he were still alive, except inasmuch as he still possessed it, or had ceased to do so by his own act or default. The heirs of the portion of which the thing does not constitute a part, who consequently have never either possessed it, or ceased to possess it, cannot then be liable for the debt, as they can only be liable in the same manner as the deceased, whom they represent, would be; it is only the heirs then of the portion of which the thing constitutes a part, who can be liable for it.

But if the division among the heirs of this portion, the thing due by the deceased has been comprised in the lot of one of them, the others are not therefore discharged from the debt, even although they may have charged the one to whose lot the thing has fallen, with discharging the debt when it shall become due: for, having been once liable for this debt, they could not, by their own act, in allotting the thing due, discharge themselves from the obligation of delivering it to the creditor.

[302] The third modification also relates to debts of a specific thing: although the debt of a divisible specific thing is divided among the heirs of the debtor, who succeed to that branch of the property, of which it constitutes a part, and even after the division by which thing is allotted to one of them, each of the heirs continues to be debtor for his part of it, as we have just seen; nevertheless, he to whose lot it falls, may be pursued for the payment of the whole to the creditor, provided his co-heirs are included in the judgment, if he has not been charged with this debt by the division.

The reason that *Dumoulin* gives for this, that although the action arising from this debt be divided against each of the heirs of the debtor, nevertheless, as the execution is to be levied for the whole upon him, who by the division is become the sole possessor of it, it follows that he may be condemned to the entire delivery of it: "*quai quamvis actio mere sit personalis, tamen executio judicati in rem scripta est, et divisio non debet impedire vim futuri judicii nec executionem in rem et in ejus possessorem, salvo contra heredes recursu.*" *Dumoulin, p.* 2. *n.* 48.

This decision takes place when it is in his quality of heir, and by reason of the partition of the succession that he has the entire possession of the thing which is due; it would be otherwise if he possessed it in his own right. In this case he would only be debtor, and could only be compelled to pay in respect of the part for which he was heir. This may be inferred from the law 86. § 3. *ff. de. Leg.* 1.

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Si fundus ab omnibus heredibus legatus sit, qui unius heredis esset, is cujus fundus esset, non amplius quam partem suam præstabit cæteri in relinquas partes tenebuntur.

We have seen, that when the heir on the part of the debtor of a specific thing, is, in his quality of heir possessor of the whole of that thing, he may be condemned to the entire delivery of it, provided his co-heirs are included in the judgment, according to what *Dumoulin* says, *ibid*, *n.* 84. This author goes further, *n. p.* 3. *n.* 242, *ibid.* for he decides, that the heir may be condemned, even when the co-heirs have not been made parties, when it is evident that they could not have any means of defence; if a person has sold a thing to be delivered in a month, and having received the price dies within the time, leaving several heirs, he decides that the sale and payment of the price being evident, the heir in whose possession the thing is, may after the expiration of the term be condemned to deliver it, without having a right to require that his co-heirs be included in the cause.

[303] The fourth modification, is when a debt consists in the simple restitution of a thing, of which the creditor is proprietor, and of which the debtor had only the mere detention, although the thing be divisible, and consequently the debt be so likewise; nevertheless, the particular heir of the debtor, who is in possession, is liable to the restitution of the whole. For instance, if any one has lent you, or given into your care a library, although this debt is divisible, such of your heirs as may have the possession of the library will be liable to the restitution of the whole of it: *Heres ejus qui commodatum accepit, pro ea parte qua heres est, convenitur, nisi forte habuit totius rei facultatem restituendæ, nec faciat: tunc enim condemnatur in solidum, quia hoc boni judicis arbitrio conveniat, l.* 3, § 5. *Commod.*

The reason is, that the heir who has entire possession of the thing, having it in his power to restore it, and not having any occasion to wait for the consent of his co-heirs, who have no right in the thing and to whom the restitution will be advantageous, by discharging them from the obligation which they themselves are under, good faith does not allow him to refuse this restitution; this is what the jurist intimates by the terms *quia hoc boni judicis arbitrio conveniat.* If this heir is only bound for his hereditary part, *ex prima et primitiva obligatione depositi aut commodati quæ dividua est*, he is bound for the whole restitution which is in his power, *ex obligatione accessoria præstandi bonam fidem*, the obligation of good faith being indivisible, *neque enim bona fides potest præstari pro parte.* This is also one of the clefs of *Dumoulin*, *lex Duodecim Tabularum*, says he, *non dividit obligationes etiam dividuas, quatenus respiciunt bonam fidem; unde obligatio etiam dividua ad officium bonæ fidei obligat, in solidum concurrente facultate præstandi, et quatenus concurrit, et quando cumque hoc contigerit. Dumoulin, p.* 3. *n.* 112.

[304] A fifth modification is, that any one of the heirs, by whose act or fault the thing has perished, is liable for the whole of the debt: the reason is deduced from the principle of *Dumoulin*,

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that the principal obligation, *rem dividuam dandi*, is indeed divisible, but the accessory obligation, *præstandi fidem bonam et diligentiam*, which is joined to it, is indivisible: each of the heirs is in this respect bound *in solidum, nec enim pro parte diligentia præstari potest;* whence it follows, that the heir, by whose act or fault the thing is lost, is answerable for the whole. According to these principles, if a person obliges himself in my favour to let me enjoy an estate, either by way of lease, or by sale of an usufruct, and leaves four heirs; if one of the heirs, without any right of his own, unjustly molests me in the enjoyment of the whole of this estate, he will be liable for the whole of my damages, and not for that part alone of which he is heir; for though the principal obligation, of giving me the enjoyment be divisible, the accessary obligation, *præstanti bonam fidem*, which includes the obligation, of not giving me any molestation, is indivisible; and consequently passes to each of the heirs for the whole; and the heir who contravenes it, ought to be liable for the whole of the damages arising therefrom.

Hence this maxim, that an heir can indeed only be proceeded against for a divisible debt, as to that part only for which he is heir, where he is pursued merely in his quality of heir, and for the act of the deceased, but that he may be proceeded against for the whole on account of his own personal act: "*Multum refert unum heredem debitoris teneri secundariâ obligatione ut heredem tantum, id est ex facto vel non facto defuncti tantum; an vero ut ipsum id est, ex suo facto proprio vel non facto. Dumoulin, p.* 3. *n.* 5.

[305] With regard to the other heirs, who have not concurred, by any act or fault on their part, to the loss of the thing due, they are liberated; for this heir is liable for the debt just as the deceased was; the deceased would have been liberated by the loss of the thing happening without his fault; the heir ought in like manner to be liberated by the loss happening without the fault, either of the deceased or of himself. The heir is liable for the acts of the deceased, since he succeeds to his obligations: but he is not liable for the act of his co-heirs: this is decided by the laws 9 & 10. *ff. Depos. In depositi actiones si de facto defuncti agatur, adversus unum ex pluribus heredibus, pro parte non ago; meritò quia æstimatio refertur ad dolum quem in solidum ipse admisit, nec adversus coheredes qui dolo carent actio competit. Paulus* decides the same with respect of things lent for use. *l.* 17,(*a*) § 2. *ff. Commod. Dumoulin, p.* 3. *n.* 439 & 440.

If a penalty were stipulated in case the thing should not be restored in this case, though it has perished by the fault of one of them, and without the act or fault of the others, they will still be liable for the penalty, each for his respective part; for the obligation of paying the sum agreed upon as a penalty, is a second obligation, which the deceased has contracted, which is conditional, upon the non-performance of the first; the heirs of the deceased have each, in respect of

(*a*) Si ex facto heredis agatur commodati, in solidum condemnatur, licet ex parte heres est.

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the part for which they are heirs, succeeded to this second obligation upon the same condition; they are then liable, each for his hereditary part, to pay this sum in case the condition exists, that is to say, in case the first obligation should not be executed, whether by the act or fault of the deceased, or by that of any of his heirs, saving their recourse against their co-heir, by whose act the thing has perished. This is what is meant by *Dumoulin* when he says, that the co-heirs of him by whose act the thing perished, are liable in this case to the penalty: *non immediatè ex facto & culpa dolosa, sed ejus occasione, et tanquam ex eventu conditionis, ex obligatione defuncti quæ in eos sub eâ conditione descendit. Dumoulin, d. n.* 440.

It is this case which is meant by *Paulus* in law 44. § 5. *ff. Fam. Erc.* where he says, *Si reliqui propter factum unius teneri cæperint, tanquam conditio stipulationis hereditariæ extiterit, habebunt familiæ erciscundæ judicium cum eo, propter quem commissa sit stipulatio.*

Observe, that to make the contravention of one of the heirs fall upon his co-heirs, there must have been a second express agreement, by which the deceased obliges himself to pay a penalty, in case of the non-performance of the principal obligation, or by which he obliges himself to damages in case of contravention by him or his heirs; but it is not sufficient for this purpose, that it be said at the end of the act, that all the parties oblige themselves to the contents of the act, on pain of all the expenses and damages; for this clause does not contain a second obligation: *Hæc clausula nihil novi addit, cum sit ex stylo communi ad confirmandum tantum, secundum materiam subjectam et ejus limites. ibid.* 442.

It may probably be urged in opposition to the distinction of *Dumoulin* that in all agreements which contain a principal obligation, a second tacit agreement, accessory to the first, should always be understood, by which the debtor engages himself for damages, in case of a contravention to the principal obligation by him or his heirs, and that this second tacit agreement ought to have the same effect, as if it were express. The answer is, that it is false, that this second obligation should be understood where it is not expressed; if the debtor who contravenes his principal obligation is liable to the damages resulting from his contravention, it is not by virtue of any second supposed agreement, by which he has obliged himself for these damages; it is only because this obligation of damages is included in the principal obligation, and that this principal obligation *ex propria natura*, is converted against the contravening party into an obligation of damages; but in this case, when it is one of the heirs who contravenes the obligation, the other heirs who have not contravened it, are not liable for any damages; these heirs being liable for the acts of the deceased whom they represent, and for their own acts, but not for the acts of their co-heir, as has already been observed.

[306] When the thing has perished by the fault, or fraud of several of the heirs, each of them is bound in solido: *nec*

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enim says *Dumoulin*, *qui, peccavit, ex eo relevari debet, quod peccati habet consortem.*

If, however, these heirs had, each by a particular act, lost different parts of the thing due, each would only be liable for the loss of that part: for in this case, *unusquisque non in solidum, sed in parte, duntaxat, dolum admisit;* this is what *Marcellus* decides in law 22. *ff. Depos.* *Si quo heredes rem apud defunctum depositam dolo intervenerint, quodam casu in partes duntaxat tenebuntur; nam si diviserunt decem millia, quæ apud defunctum fuerant, et quina millia singuli abstulerint, et uterque solvendo est; in partes adstricti erunt, quod si quæ species dolo eorum interversa fuerit, in solidum conveniri poterunt, nam certe verum est in solidum quemque dolo fecisse.*

Observe with regard to the first case of the above law that it is said, *si uterque in solvendo est;* for if one of the two heirs were insolvent, the one who was solvent would have been in fault, not only with respect of his own moiety, but even with respect of the other, as he ought not to have divided the sum deposited with the deceased with his insolvent co-heir. If the obligation of restoring the sum were a divisible obligation, the accessory obligation to keep and preserve it with good faith, to which each of them was bound for the whole, and which he has contravened, not only with respect of the moiety which he ought to pay, but also with respect of the other moiety, which he has left at the mercy of his insolvent co-heir was indivisible.

[307] A sixth exception is, that although an obligation be divisible, one of the heirs of the debtor may be liable for the whole of it, either by an agreement, or by the will of the deceased, charging him with it, or by the act of the judge who has made the division of the goods of the succession; in all these cases, one of the heirs is bound for the whole of the debt, without the others ceasing to be bound for their respective parts.

[308] It results from all these modifications, that *aliud est unum ex pluribus sive principalibus sive heredibus teneri in solidum, aliud obligationem esse individuam;* this is the third of the clefs of *Dumoulin, p.* 3, *n.* 112.

[309] Except in these cases, each of the heirs of the debtor is only subject to divisible debts, in respect of the parts of which he is heir; and is not even bound subsidiarily for the surplus in case of the insolvency of his co-heirs; the law 2 *Cod. de Hered. Act.*(a) which decides, that each heir is only subject to the debts of the deceased on his own part, does not distinguish whether all the heirs are solvent or not. This follows from the very idea of an heir; an heir is one who succeeds to the active and passive rights, that is to say, to the rights and obligations of the deceased; he who is only heir in part, only succeeds to that part, he is therefore only liable to that part, the insolvency of his co-heirs does not make him succeed

(a) Pro hereditariis partibus heredes onera hereditaria agnoscere etiam in fisci rationibus placuit; nisi intercedat pignus, vel hypotheca, tunc enim possessor obligatæ rei conveniendus est.

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to all the debts of the deceased; he is only successor for his part, and consequently ought only to be liable for his part of the debts.

It is said, in opposition to this, that the debts being a charge upon the effects, they should be discharged in full out of the goods, which are retained by this heir as his part. The answer is, that the total university of the goods is charged with the whole of the debts, but the portions of this universality, are only charged with a like portion of the debts. It is asserted, that if the debtor had dissipated the half of his goods, the remaining half would be charged with the whole of his debts; then, when one of the heirs of the debtor has dissipated his moiety, the other moiety, which belongs to the other heir, ought in like manner to be charged wtth the whole of the debts: I deny the consequence. When the debtor has dissipated the moiety of his goods, what remains is the whole of the goods of the person obliged for the whole of the debt, and consequently, the whole of the debts is a charge upon the remaining part of the goods. But when my co-heir has dissipated the moiety which devolves upon him, that which I have is only my own hereditary portion; this portion therefore ought only to be charged with a moiety of the debts. It is further insisted, that the creditor ought not to suffer from the multiplicity of heirs which the debtor leaves; therefore the dissipation of the moiety of these goods by one of the heirs of the debtor, ought not to make him loose the moiety of his debt; since if the debtor, or the single heir of the debtor, had lost this moiety of the goods, the creditor would loose no part of his debt: the answer is, that it is only *ex accidenti* that the creditor suffers in this case, from the multiplicity of heirs which the debtor has left; he might have avoided suffering any thing, by attaching the goods of the succession before the division took place, or by a proper vigilance to obtain payment.

This decision, that the heir in part is not bound for the debts of the portions of his co-heirs who are become insolvents, even although his portion would be more than sufficient to pay the whole, being deduced from the principles of natural reason, and from the very nature and quality of heir, it ought to prevail in point of conscience, as well as in point of law.

[310] This principle, that an heir is not answerable for the insolvency of his co-heir is subject to several exceptions. The first which does not admit of any difficulty, is when by the fraud and act of one heir, the creditor has not been able to obtain payment from the other heirs who have become insolvent, as for instance, if he had represented himself as the only heir. *Dumoulin, ibid. n.* 85. *in Fin.*

Dumoulin adduces as a second exception, the case of a father's leaving two children as his heirs, one of whom had beforehand dissipated what he would have received from the succession, and for which he is accountable in the distribution, so that he would on his part, receive a much smaller portion of the goods left by the father, than the portion of the debts for which he is liable as heir. The other child ought to be answerable in this case to the creditors of the succession for that part of the debts belonging to his insolvent brother, although the creditors have not had the precaution to attach the goods of the succes-

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sion, before the distribution; the reason is, that this child having taken almost all the goods left by the deceased, by reason that his brother was obliged to account for what he had received in the life of their common father, it is just that he should not, at the expense of the creditors of the succession, profit on account of his brother having improperly taken upon himself the character of heir. There is reason in this case to presume that there was a collusion between the two brothers, and that the solvent brother induced the other to act as heir: with the view of eluding a part of his debts, and defrauding his creditors. *Hoc est injustum*, says Dumoulin, *nec suspicione collusionis vacat. ibid. n.* 93 *in Fin.*

This author, *n.* 92. adduces, as a third exception, the case in which the creditor has made a loan to the deceased, which has been the cause of making his fortune; in this case as the solvent heir is in some measure indebted to the creditor for the part which he receives in an opulent succession, he ought not to let the creditor lose the part of the debt for which his insolvent co-heir is bound; this decision of *Dumoulin* is attended with some difficulty; I allow that gratitude demands such conduct: but gratitude only induces imperfect obligations, which are not obligatory in point of law.

§ III. *Of the second Effect of the Division of a Debt, which consists in its being capable of payment in Parts.*

[311] We have seen that the effects of the division of the debt, whether on the part of the creditor, or on that of the debtor, is that the payment may be made by parts: to wit, the parts due to each of the heirs of the creditor, and by each of the heirs of the debtor: this principle has likewise its exceptions and modifications, *non propter individuitatem obligationis, sed propter incongruitatem solutionis* says *Dumoulin*, that is to say, not because the partial payment of a divisible obligation be not always possible, absolutely speaking, for since the thing due has parts, it is a necessary consequence that it may be paid by parts; but if it sometimes happens that the payment of these obligations ought not to be made by parts, it is because a partial payment is not always equitable; *aliud quippe individuitas obligationis, aliud incongruitas solutionis*, this is the fourth of the clefs of *Dumoulin*, *p.* 3. *n.* 112.

[312] The first case in which the partial payment of a debt is not valid, although the debt is divisible, is that of alternative debts, or debts of indeterminate things; for instance if a person who is debtor of such a house, or of ten thousand pounds, leave two heirs, one of them will not be admitted to pay the half of one of these things, until the other likewise pays the remaining half of the same thing; for if after one has paid the half of the house, the other choose to pay the half of the money, a prejudice would result to the creditor, who ought to receive one of the two entire things, and not two halfs of two different things. For this reason, even if the creditor had voluntarily received the moiety of one of the two things, as the moiety of the money, the payment would not be perfect, even as to such moiety,

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until the other had paid the other moiety; and if in the sequel they gave him the house, a right would arise to the repetition of the money. *Infra. p.* 3. *n.* 525.

So in case of debts of indeterminate things; if the deceased owed an acre of ground indeterminately, one of his heirs is not entitled to offer to the creditor the moiety of a certain acre until the other heir gives also in payment the other moiety of the same acre; otherwise a prejudice would result to the creditor, to whom an entire acre is owing, and who has an interest in having an entire acre, rather than the moiety of two different acres: this appears by law(*a*) 85, § 4, and law(*b*) 2, § *ff. de verb. Oblig. Dumoulin, p.* 2. *n.* 125.

This indivisibility of payment ought to prevail, not only when a debt has been divided on the part of the debtor, but also in like manner, when it has been divided on the part of the creditor, who has left several heirs; for it is the interest of these heirs of the creditor to receive one whole thing which is due to them, and which is only in common between themselves, rather than portions of different things which they would have in common with strangers. *Dumoulin, ib. p.* 2. *n.* 130.

When one of the heirs of the debtor has been liberated from his part of the debt, either by the release of the creditor, or otherwise, then there is nothing to prevent the other heir from paying the moiety he owes, of whichever of the things he chooses, *d. l.* 2. § 3.(*c*) The reason which prevents the partial payment ceases; for there is no longer any reason to fear that the payment will be made in portions of different things.

Observe, that in the text cited, after these words, *si tamen hominem stipulatus, cum uno ex heredibus egero,* we must add by implication, *et victus fuero per judicium judicis. V. Cujas, ad L. Dumoulin, ibid. p.* 2. *n.* 188.

Observe also, that the non-division in the payment of an alternative debt ceases, when this debt, by the extinction of one of the things, ceases to be alternative, and becomes determinate in regard to the thing which remains; in this case there is no reason why the thing may not be paid by parts, either by the different heirs of the debtor, or to the different heirs of the creditor.

[313] The second case in which the payment of an obligation, although divisible, and divided among several heirs of the debtor, cannot be made by parts, is when it is so agreed in contracting the obligation, or afterwards: however, the validity of such an

(*a*) Pro parte (autem) peti, solvi autem nisi totum non potest; veluti cum stipulatus sum hominem incertum, non petitio ejus scinditur; solvi vero nisi solidus non potest; alioquin in diversis hominibus recte partes solventur; quod non potuit defunctus facere ne, quod stipulatus sum, consequar. Idem juris est, et si quis decem millia aut hominem, promiserit.

(*b*) For the first part of this law, *vide supra, n.* 294. § 2. Ex his igitur stipulationibus ne heredes quidem pro parte solvendo liberari possunt, quamdiu non eandem rem omnes dederint: non enim ex persona heredum conditio obligationis immutatur.

(*c*) Si tamen hominem stipulatus, cum uno ex heridibus promissoris egero, pars duntaxat cæterorum obligationi supererit, ut et sulvi potest. Idemque est si uni ex heredibus accepto latum sit.

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agreement may be doubted; because the law 56. § I. *de verb. Oblig.* decides, that a person cannot by his contract oblige one of his heirs for the payment of a greater part of the debt than his proportion as heir; "*Te et Titium heredem tuum decem daturum spondes. Titii personæ supervacuæ comprehensa est; sive enim solus heres extiterit, in solidum tenebitur; sive pro parte, eodem modo quo cæteri coheredes ejus.*" That is to say, that he will be bound notwithstanding this clause of the stipulation for that part only, of which he shall be heir; and the reason is, that being heir of the contracting party only for this part, and consequently a stranger with regard to the other parts, he could not be obliged for the others; according to the principle of law, that *nemo nisi de se promittere potest, non de extraneo.*

Notwithstanding this, *Dumoulin* decides, and rightly, that one may effectually agree that a debt shall not be capable of being acquitted by parts, by the different heirs of the debtor, and he remarks very justly, that this agreement is very different from the case of the law, above cited, which relates to the substance of the obligation itself; whereas this agreement only concerns the manner in which the payment is to be made, *non concernit substantium obligationis sed modum; unde quemadmodum potest in præjudicium heredum determinari locus et tempus solutionis, ita et modus. Dumoulin, ibid. p.* 2. *n.* 30 *&* 31. The effect of this agreement is, not that one of the heirs will be bound for more than his own part but that he can only make the payment of the entire thing, conjointly with his co-heirs, so that any offer from him to give his part would not be sufficient to satisfy even his part of the obligation, if his co-heirs did not likewise offer theirs. *Infra, vide n.* 316.

[314] This agreement, that the debt cannot be paid by parts, is sufficient to prevent the heirs of the debtor from being entitled to pay it in parts; but it does not prevent its being paid in parts to the different heirs of the creditor.

The debtor cannot even make a valid payment to any one of them, except for his own part; and if he paid the whole to one, he would not be liberated as to the others.

Nevertheless, it may also be agreed, that one of the heirs of the creditor may demand the whole, and that the whole may be paid to him; in which case, a payment to him, liberates the debtor against all the others; the one who has received the payment, is regarded as a person appointed on their behalf, or as *adjectus solutionis gratia. Dumoulin, ibid. n.* 33.

[315] The third case, in which the debt, although divided among the heirs of the debtor, is not to be acquitted by parts, is when, without any agreement having taken place, it appears from the nature of the engagement, or of the thing which is the object of it, or from the end which is proposed in the contract, that the intention of the contracting parties really was, that the debt should not be acquitted by parts; this may be easily presumed, when the thing which is the object of the agreement is susceptible indeed of intellectual parts, and is consequently divisible, but cannot be divided into real parts. *Dumoulin, p.* 3. *n.* 223.

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It may be presumed, with respect to things which may be divided into real parts, but not without prejudice to the creditor.

For instance, if I have bought, or taken to farm, a certain estate, though this estate be susceptible of parts, yet one of the heirs of the person who sold or leased it to me, would not be entitled to offer me his part of this estate, divided or undivided, in discharge of his obligation, if his co-heirs were not also ready to deliver me theirs, because the division of this estate would be a prejudice to me. I only bought or took it in order to possess the whole of it, or to enjoy it as the sole proprietor, and I should not have bought or taken a part of it only.

The end which the contracting parties proposed, may also prevent the partial payment, even of debts of a sum of money. For instance, if by a transaction you oblige yourself to pay me the sum of a thousand pounds, declaring that it is to liberate me from prison, where I was detained for the same sum by a creditor, and soon after you should die, leaving four heirs, one of these heirs will not be entitled to offer me separately the fourth of the said sum which cannot procure me the liberation of my person, which was the object of the contract, and which I might not be able to keep securely in prison, whilst I waited for the payment of the remainder. *Dumoulin, p.* 2. *n.* 40.

[316] In all the cases that have been adduced, in which an obligation though in itself divisible, cannot be discharged, in parts, the creditor cannot indeed put the heirs of the debtor *en demeure,* except by a demand against all; a demand against one of them, for the payment of the whole, would not be valid, and would not put him *en demeure,* since the obligation being divisible, he does not owe the whole. But although one of the heirs be not a debtor for more than the part of which he is heir, and cannot be sued for the whole; yet the non-division of payment prevents him from making a valid offer of the part of which he is debtor, if the remainder is not offered at the same time by his co-heirs. Therefore such partial offers, not only do not put the creditor *en demeure,* as to receiving the debt, or stop the course of interest, if the debt is of such a nature as to carry interest: but if the heir who made these offers had been previously put *en demeure,* by a demand given against all the heirs, these imperfect offers would not purge his delay, and would not prevent his being subject to all the consequences resulting of it, saving his recourse against his co-heirs. *Dumoulin, p.* 2. *n.* 243.

§ IV. *Of the Division of a Debt as well on the Part of the Creditor as on that of the Debtor.*

[317] When the debt is divided as well on the part of the creditor as on that of the debtor; as if the creditor has left four heirs, and the debtor has also left four; each of the heirs of the debtor, who, by the division is only bound for a fourth of the debt, may pay divisibly, and for the fourth only of which he is debtor, the fourth which is due to each of the heirs of the creditor, that is to say,

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that he may pay to each of them the fourth of the fourth, or a sixteenth of the whole.

§ V. *Whether the Re-union of the Portions, either of the heirs of the Creditor or of the Debtor, in a single Person, puts an end to the Power of paying the Debt by Parts.*

[318] The decision of this question depends upon the principle, that the division of the debt, which takes place by the death of the creditor, or of the debtor leaving several heirs, does not convert one debt into several, but only assigns to each of the heirs, whether of the creditor or of the debtor, certain portions of that debt which had no portions before, although it was susceptible of them; in this alone the division consists; there is still only one debt, *unum debitum;* as the law 9. *ff. de Pactis*,(a) lays down in formal terms. In fact, the different heirs of the creditor are only creditors of that which has been contracted in favour of the deceased: the different heirs of the debtor are only debtors for that which has been contracted by the deceased. Therefore there is only one debt; but, (and herein consists the division,) this debt, which was undivided, and did not contain any portions, as long as there was only one debtor, and only one creditor, comes eventually to have portions, and to be due by portions, either to each of the heirs of the creditor, or by each of the heirs of the debtor.

From this principle arises the decision of the question; the portions of the debt in which the division consists, being produced by the multiplicity of persons to whom the debt is due, when the creditor has left several heirs, or by the multiplicity of persons by whom the debt is due, when the debtor has left several; it follows that when this multiplicity of persons ceases, to be any parts in the debt; *cessante causa cessat effectus:* and consequently the division of the debt ceases, and the power of paying it in parts ceases also.

If then a debtor or a creditor has left several heirs, and the survivor of the heirs should be the only heir of all the others, the power of discharging the debt by parts, will cease; because as there is no longer any more than a single creditor, or a single debtor of the debt, there are no longer any portions in the debt.

It is to no purpose to say, that the debtor having once acquired the right of paying by portions, when the creditor has left several heirs, he cannot afterwards lose it; that the obligation which each of the heirs of the creditor was under, to receive his part separately, ought to pass to the survivor who has succeeded to all the obligations of those

(a) Si plures sint, qui eandem actionem habent, unius loco habentur. Ut puta, plures sunt rei stipulandi, vel plures argentarii, quorum nomina simul facta sunt, unius loco numerabuntur, quia unum debitum est. Et cum tutores pupilli creditoris plures convenissent, unius loco numerantur, quia unius pupilli nomine convenerant. Necnon et unus tutor plurium pupillorum nomine unum debitum prætendentiam, si convenerit, placuit unius loco esse; nam difficile est, ut unus homo duorum vicem sustineat: nam nec is, qui plures actiones habet adversus eum, qui [unam] actionem habet, plurium personarum loco accipitur.

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previously deceased; for this would be true, if this power of paying by portions was intrinsic in the obligation, and was not, on the contrary, merely dependent on the extrinsic circumstance of the multiplicity of the persons, to whom, or by whom the debt is due, which circumstance ceasing, its effect should cease likewise. See *Dumoulin*, *p*. 2. *n*. 18. *et seq.*

This decision does not take place when the last survivor of several heirs of the debtor has taken the successions of those previously deceased, with the benefit of an inventory: for this benefit by preventing a confusion of the property of the succession with that of the heir, prevents likewise the reunion of the portions of the debt: the survivor owes separately and differently, the portion of the debt for which he is bound on his own account, and that for which he is liable as heir of those previously deceased, since he is liable for the one out of his own property, and for the others only out of the goods arising from the succession; now, being bound separately and differently for these different portions of the debt, it is a natural consequence, that he has a right to discharge them separately: this is the opinion of *Dumoulin*, *p*. 2. *n*. 22.

[319] The reunion of the portions of the heirs of the creditor, in a single person, destroys the power of paying by portions, in whatever manner the reunion be made, not only when one of the heirs is become heir of all the others, but also when he has by cession acquired the rights of all the others.

Supposing there be no cession, could one of the heirs who had only a procuration from all the others to demand the debt, or even a third person who had a procuration from them all, refuse to accept the payment of a portion? It seems that he could not: for there is no reunion in this case; there are in fact several persons to whom the debt is due for their respective portions, and consequently it seems that it may be paid by portions; notwithstanding this reason, *Dumoulin*, *p*. 2. *n*. 20, decides, that this procurator of all the heirs may refuse to receive the payment of the debt by portions: the reason is, that as when the debt is divided amongst the heirs of the debtor, such division is made for the interest of these heirs, so that they may each be liable to the debt, only in respect of their hereditary portion, and may be liberated from it by paying this portion: so when the debt is divided among the heirs of the creditor, the division is only made in this case in favour of, and for the interest of the heirs of the creditor, so that each of them may demand and receive his portion without waiting for his co-heirs: these co-heirs of the creditor then may waive using the right arising from this division of the debt, which is only made in their favour according to the maxim of law, that *unicuique liberum est juri in favorem suum introducto renunciare;* and consequently the person who has the procuration of all the heirs, may refuse to receive the debt by portions.

[320] All that we have hitherto said holds good where the portions of several heirs of a single creditor or of a single debtor are united in the same person; it must be decided otherwise when a debt has at first been contracted in favour of two creditors, or by two

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debtors without solidity, and for their respective portions; in this case there are two debts truly distinct and separate, and they do not cease to be so, although one of the creditors or one of the debtors has succeeded to the other; therefore the payment may still be made separately. *Dumoulin, ibid. n.* 29.

§ VI. *Difference between the Debt of several Specific Things, and that of several indeterminate Things, with respect to the Manner in which they are divided.*

[321] When the debt is of several specific and determinate things, as of such an acre of ground, and of such another acre, and comes to be divided, as by the death of a creditor who has left two heirs, the division is made *in partes, rerum singularum:* the debtor does not owe one of the two acres of ground to one of the heirs, and the other acre to the other; but owes to each of the heirs the half both of the one acre and of the other, saving to these heirs the right of partition among themselves.

It is otherwise when the debt is of two indeterminate things: as if in the instance supposed, a debtor owed no acre in particular, but two acres indeterminately; in this case he would owe to each of the heirs of the creditor one acre, and not the moiety of two acres; the division is not made *in partes, rerum singularum,* but numerically, *numero dividitur obligatio.* This is the decision of the laws 54.(*a*) *ff. de verb. Obl. l.* 29.(*b*) *ff. de Solut.*

ARTICLE III.

Of the Nature and Effects of Indivisible Obligations.

§ I. *General Principles concerning the Nature of Indivisible Obligations.*

[322] An indivisible obligation, being the obligation of a thing, or act, which is not suceptible of parts, either real or intellectual, it is a necessary consequence, that when two or more persons have contracted a debt of this kind, although they have not contracted

(*a*) In stipulationibus aliàs species, aliàs genera deducuntur. Cum species stipulamur, necesse est inter dominos et inter heredem ita dividi stipulationem ut partes corporum cuique debebuntur. Quotiens autem genera stipulamur, numero sit inter eos divisio; veluti cum Stichum et Pamphilum quis stipulatus, duos heredes æquis partibus reliquit: necesse est utrique partem dimidiam Stichi & Pamphili deberi. Si item duos homines stipulatus fuisset: singuli homines heredibus ejus deberentur.

(*b*) Cum Stichus et Pamphilus communi servo promissi sunt, non alteri Stichus, alteri Pamphilus solvi potest, sed dimidiæ singulorum partes debentur. Idemque est si quis aut duos Stichos aut duos Pamphilos dari promisit: aut communi duorum servo homines decem dare promisit. Nam ambigua vox est decem homines, quemadmodum decem denarii, atque utriusque rei dimidium duobus modis intelligi potest; sed in nummis et oleo, ac frumento et similibus, quæ communi specie continentur, apparet hoc actum, ut numero dividatur obligatio: quatenus et commodius promissori stipulatoribusque est.

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it in solido, *et tanquam correi debendi*, nevertheless, each of the persons obliged is debtor for the whole of the thing, or act, that forms the object of the obligation; for he cannot be debtor for a part of it only, since it is supposed that the thing is not susceptible of parts.

For the same reason, when the person who has contracted a debt of this kind has left several heirs, each of the heirs is debtor for the whole of the thing, as there can be no debtor by parts for a thing, which is not susceptible of them, *ea quæ in partes dividi non possunt, solida a singulis heredibus debentur. l.* 122. *ff. de Reg. Jur.*

So, when the creditor of such a debt has left several heirs, the thing is due by the whole to each of the heirs, as it could not be due in parts, not being susceptible of them.

[323] So far indivisibility of obligation agrees with solidity: but it differs from it principally in this, that in regard to indivisibility of obligation, each of the debtors is so for the whole, on account of the quality of the thing due, which is not susceptible of parts; this indivisibility is a real quality of the obligation, which passes with this quality to the heirs, and makes each of the heirs of the debtor, debtor for the whole: the character of solidity, on the contrary, arises from the act of the persons who are each obliged for the whole, it is a personal quality, which does not prevent their obligation in solido, from being divided amongst the heirs of each of the debtors in solido, who have contracted it, and amongst the heirs of the creditor, in whose favour it has been contracted: this is what *Dumoulin* lays down, with his usual energy: *in correis credendi vel debendi qualitas distributiva seu multiplicativa solidi, personalis est, et non transit in heredes nec ad heredes, inter quos activè vel passive dividitur: sed qualitas solidi in individuis realis est quia non personis ut illa correorum, sed obligationi ipsi et rei debitæ adhæret, et transit ad herèdes et singulorum heredum heredes singulos in solidum, p.* 2. *n.* 222.

[324] Hence arises another difference between indivisibility and solidity; the latter not proceeding from the quality of the thing due, but from the personal act of the co-debtors, who have each contracted the entire obligation, they are debtors not only of the whole thing, but are so likewise *totaliter;* though the primary obligation, which they have contracted in solido, be converted by its non-execution into a secondary obligation, they are bound in solido for this secondary obligation, as they were for the primary. For instance, if two persons are obliged in solido, to build me a house in a certain time; in case of the non-performance of this primary obligation; they will each be liable in solido to the obligation of damages, into which the primary obligation is converted.

On the contrary, when the obligation is not in solido, but indivisible, as when several persons are obliged without solidity to something indivisible; in this case, the indivisibility only proceeding from the quality of the thing due which is not susceptible of parts, the debtors are indeed each of them debtors for the whole, as they cannot be debtors in part of a thing, which is not susceptible of parts, *singuli solidum debent;* but not being obliged in solido, *non debent totaliter;*

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aliud est, says Dumoulin, *p.* 3. *n.* 112. *quem teneri ad totum, aliud totaliter;* being debtors for the whole only on account of the quality of the thing due, which is not susceptible of parts, if the primary obligation be converted into the secondary obligation of a divisible thing, these debtors would only be bound each for his part. For instance, if two men have obliged themselves without solidity, to build me a house, although they be bound each for the whole, as to the primary obligation, because it has for its object an act which is not susceptible of parts; nevertheless, in case of the non-execution of this obligation, they will only be liable each for his own portion in the secondary obligation of damages, into which the primary one is converted, because these damages consist in a sum of money which is divisible: it follows, that *longe aliud est plures teneri ad idem in solidum, et aliud obligationem esse individuum;* this is also one of the clefs of *Dumoulin, ibid.*

The same observation applies with respect to several creditors, or the several heirs of one creditor, of an indivisible thing; they are creditors of the whole, *singulis solidum debetur*, but they are not so *totaliter*, as the creditors in solido are, who are called "*correi credendi, et aliud est pluribus deberi idem in solidum, aliud obligationem esse individuam,*" all this will be more clearly explained *in decursu*, in the following paragraphs.

[325] From this principle, that *aliud est debere totum, aliud est debere totaliter*, it follows, that an indivisible obligation may notwithstanding be susceptible of retrenchment. For instance, if my relation by his will, has charged me with a legacy of a right of servitude over my estate in favour of *Peter*, and there only remains in the succession, after all the debts are discharged, the sum of two hundred, and this right of servitude be worth three hundred pounds, though the legacy and the obligation which results from it be indivisible, the right of servitude, which is the object of it, being indivisible, nevertheless, as I am not subject to this obligation, *totaliter*, but only to the amount of the two hundred pounds, which I received as the net produce of the succession, this legacy and obligation, although indivisible, would be subject to retrenchment, not indeed with respect of the thing itself, which is bequeathed, and which is not susceptible of parts, but with respect to its value; therefore I should owe to the legatee an entire right of servitude, but so that he could not demand it without accounting to me for the sum that it is worth more than the two hundred pounds, to which amount alone, I am chargeable with the legacy. *Arg. l.* 76.(*a*) *ff. de Leg.* 2.

(*a*) Cum filius divisis tribunalibus actionem inofficiosi testamenti matiis per tul isset, atque ita variæ sententiæ judicum extitissent, heredem, qui filium vicerat, pro partibus, quas aliis coheredibus abstulit filius, non habiturum præceptiones sibi datas, non magis quam cæteros legatorios actiones, constitit. Sed libertates ex testamento competere placuit, cum pro parte filius de testamento matris litigasset: quod non erit trahendum ad servitutes, quæ pro parte minui non possunt. Planc petetur integra servitus ad eo, qui filium vicit: partis autem æestimatio restituitur; aut si paratus erit filius pretio servitutem præbere, doli summovebitur exceptione legatarius, si non offerat partis æstimationem, exemplo scilicet Legis Falcidiæ.

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§ II. *Of the Effect of the Indivisibility of Obligations,* in dando aut in faciendo, *with respect to the Heirs of the Creditor.*

[326] When the obligation is indivisible, each heir of the creditor being creditor of the whole thing, it follows that each of the heirs may demand the whole thing from the debtor.

For instance, if any one has engaged in my favour to grant, or procure me for the use of my estate, a right of passage over his or over any other neighbouring estate, this right being indivisible, each of my heirs may institute a demand for the whole against the debtor. *l.* 2. § 2. *ff. de verb. Oblig.*(*a*)

So, if any one engages to make me a picture, or to build me a house, each of my heirs may demand of him to make the whole picture, and to build the whole house.

But as each of my heirs, although creditor of the whole thing, is not creditor *totaliter*, if upon the demand of the whole by one of my heirs the debtor for want of executing his obligation, is condemned in damages, the condemnation in favour of this heir will only extend to that proportion of the damages for which he is heir; for although creditor of the whole, he is nevertheless only creditor as my heir for part; if he has a right to demand the whole thing, it is because the thing cannot be demanded in parts, not being susceptible of them: but the obligation of this indivisible thing being converted by the non-execution of it, into an obligation of damages, which is divisible, my heir in part can claim no greater share of the damages, than the part for which he is heir, *l.* 25. § 9. *ff. Fam. Ercisc.*

In this respect, the heirs of the creditor of an indivisible debt differ from the creditors in solido, who are called *corei credendi;* each of the latter being creditors not only of the whole thing due, but also *totaliter;* if upon the demand of the creditor, the debtor does not fulfil his obligation, he must be condemned to the creditor for the whole damages.

[327] From this principle, that the heir in part of an indivisible debt, though creditor of the whole thing, is not so *totaliter;* it follows also, that he cannot make an entire release of the debt, which a creditor in solido might. *l.* 13. § 12. *ff. de Accept.*(*b*)

Therefore, if the creditor of an indivisible debt has left two heirs, and one of them has made a release to the debtor so far as concerns himself, the debtor will not be liberated as against the others. Nevertheless, this release will have an effect. The other heir may indeed demand from the debtor the entire thing, but he can only do it by offering a moiety of the value of the thing: for the thing due, though indivisible in itself, has, nevertheless, a value which is divisi-

(*a*) Si divisionem res promissa non recipit, veluti via: heredes promissoris singuli in solidum tenentur, ex quo quidam accidere Pomponius ait ut et stipulatoris viæ, vel itineris heredes singuli in solidum habeant actionem.

(*b*) Ex pluribus reis stipulandi si unus acceptum fecerit, liberatio contingit in solidum.

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ble, and to which recourse may in this case be had; this is a modification which in such a case is made of the indivisibility of the debt.

It would not be sufficient for the debtor to offer to him who has not released his right, the half of the price of the thing due; for the heir is creditor for the thing itself, and one co-heir cannot, by releasing his own right, prejudice that of the other; this is what *Dumoulin* lays down *Tr. de divid. et individ. p.* 3. *n.* 189. *Stipulator servitutis reliquit duos heredes, quorum unus accepto fecit promissori. Debet alteri heredum totam servitutem sed non totaliter, ut pote deducenda æstimatione dimidæ partis, sed cujus est electio? breviter dico creditoris, videlicet alterius heredis, quia coheres etiam vendendo et precium recipiendo nocere non potuit, nisi in refusione pretii, si hic agres noluit jus suum vendere : igitur gratis remittendo non potest in plus nocere.*

[328] The same rule should apply when the debtor, as to one moiety, becomes heir of the creditor: the other may demand from him the entire thing, offering to account for the moiety of the value.

[329] Every thing which we have said of several heirs of the creditor of an indivisible debt may be applied with regard to several creditors not in solido, in whose favour a light debt has been contracted.

§ III. *Of the Effect of Indivisible Obligations,* in dando aut in faciendo, *with respect to the Heirs of the Debtor.*

[330] When the debt is indivisible, each of the heirs of the debtor being debtor of the whole thing, it follows that the creditor may institute a demand against each of the heirs for the whole; but as he is not debtor for *totaliter*, but only as heirs of the debtor in part, and jointly with his co-heirs, it also follows, that being assigned he may demand a stay of proceedings in order to have his co-heirs included in the cause, and ought not to be condemned alone except in default of requiring to have them included.

Dumoulin founds this decision on the law 2. § 23. *ff. de Leg.* 3. "*Si in opere civitatis faciendo relictum sit, unumquemque heredem in solidum teneri D. Marcus et Veres Proculæ rescripserunt tempus tamen coheredi Proculæ, quam Procula vocari desideravit ut secum curaret opus fieri prestiterunt, intra quod mittat ad opus faciendum, postquam solam Proculam voluerunt, facere, imputaturam sumptum coheredi.*" *Dumoulin, p.* 3. *n.* 90. *&* 104. *p.* 2. *n.* 469, *et seq.*

In this respect these co-heirs differ from persons obliged together in solido, who are called *correi debendi*, each of whom owes, *totam rem et totaliter ;* and are consequently not allowed to demand a stay of proceeding in order to have their co-debtors included in the cause, (except as a matter of favour, which is always allowed) but are obliged to pay as soon as they are judicially required, and can only demand from the creditor a cession of his actions against the others after discharging the debt. *Dumoulin* establishes this difference, *p.* 3. *n.* 107.

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[331] Further, when the heir, who is assigned by the creditor of an indivisible debt, is only heir for a small part, and there is an heir for a greater part, as, in the customary Provinces of *Anjou Touraine*, and some others, the creditor assigns a younger brother who is only heir for a small part; the elder brother of a noble family being the principal heir in this case, the heir assigned may not only demand a stay of proceeding, in order to assign his co-heirs, but he may also demand that the creditor himself shall proceed against this principal heir, the younger offering to contribute to the demand. *Dumoulin*, *ibid*, *n*. 105.

[332] For the rest, as to the effect of an indivisible obligation: *in dando vel in faciendo*, with respect of heirs of the debtor, we must distinguish with *Dumoulin* three cases: either the debt is of such a nature, that it can only be acquitted by the particular heir of the debtor who is assigned, or may be acquitted separately either by him who is assigned, or by each of his co-heirs, or it is such that it cannot be discharged but by the whole conjointly.

We may adduce, as an example of the first case, the debt of a right of prospect, or of passage which the deceased has promised to impose upon one of his estates that has fallen by the division to one of his heirs; it is only this heir, to whom the estate has fallen by the division, who can discharge this debt, because a servitude can only be imposed by the proprietor of the estate; in this case he alone will be condemned to afford the right of servitude, and he may be compelled to do so by a sentence, ordaining, that in his default to do so, the sentence itself shall avail as a sufficient title, *Dumoulin*, *p*. 3. *n*. 100, saving his recourse for indemnity against his co-heirs, if he has not been charged by the partition with the acquittance of the debt.

[333] We may adduce, as the first example of the second case, the debt of a like servitude, which the deceased had engaged to procure in the estate of a third person; the thing which is the object of this obligation is indivisible, and by its nature may be acquitted separately by each of the heirs of the debtor; for it is possible for each of them to agree with the proprietors of the estate, in which the deceased has promised his creditor to procure him a right of servitude; the creditor may then demand the right of servitude in the whole, from each of the heirs of the debtor, since this right being indivisible each of them is liable for the whole; but as this heir, though debtor for the right of servitude for the whole, is however not liable *totaliter*, and is liable for it conjointly with his co-heirs, he may demand a stay of proceeding, to have them included in the cause, so that he and the other heirs jointly may procure to the creditor the right of servitude, or in default of so doing, they may all be condemned in damages; and being so condemned, they will only be liable for their parts, because this obligation of damages is divisible.

But if he neglects to require that his co-heirs be included, he will be condemned alone to procure the right of servitude; and in default of this he will be singly condemned in damages, saving his recourse

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against his co-heirs. *Dumoulin, p.* 2. *n.* 175, for, having neglected to require that they should be included, he ought singly to be subject to the condemnation; he is liable in this case, *quasi et facto proprio et non tantum quasi heres.*

Observe, that this condemnation of damages should take place, even when the heirs of him who promised this servitude, are ready to purchase it from the proprietor of the estate, upon which the deceased promised to impose it, and the proprietor refused to grant it any price whatever; for, as we have seen elsewhere, it is sufficient to render the obligation valid, and to give a right to damages upon the non-performance of it, if the thing be in itself possible, although it be not in the power of the deceased who has promised it, or of his heirs; the person who has contracted the obligation must blame himself for having rashly engaged for the act of a third person.

A second example, is the obligation which I may have contracted with any one, to build a certain edifice upon his land; this obligation is indivisible; the creditors may conclude against each of my heirs, requiring him to be condemned to build the entire edifice; but as each of my heirs, although debtor for the entire construction of the edifice, is nevertheless not debtor in solido, he has a right to require that his co-heirs be included in the cause, that in default of their fulfilling this obligation, they may be condemned in damages, each only for his own hereditary part.

For the rest, those who were ready to concur in it, will not be less included in the judgment, than those who refused to do it, saving their recourse among themselves, because each of them is obliged to build the entire edifice, and it is a thing which each of them may do separately.

If one of my co-heirs assigned for the construction of the entire edifice, does not require his co-heirs to be included in the cause, he may be condemned alone in damages for the whole, in case of the non-execution of the obligation; as it is his own fault not to have assigned his co-heirs.

[334] It remains to speak of the third case, in which the indivisible debt can only be acquitted, jointly by all the persons obliged; we may adduce, as an instance, the case, in which a person by a transaction obliges himself in your favour to assign you a right of passage upon his estate, to go to yours in a part to be appointed by him: if he dies before the accomplishment of the obligation, and has left several heirs, amongst whom this estate is held in common, the obligation of imposing the right of passage to which they succeed, is an indivisible obligation, which can only be discharged jointly by them all; as a right of servitude cannot be imposed upon an estate, but by all those who are proprietors of it. *l.* 2.(*a*) *ff. de Serv. l.* 18. *ff. Comm. Præd.*

In the case of this kind of obligation, if one of the heirs declares that he is ready, as far as is in his power to accomplish the obligation and that the accomplishment of it only depends upon the other heir,

(*a*) Unus ex dominis communium, ædium servitutem imponere non potest.

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he only who refuses ought to be condemned in the damages resulting from the non-execution; for he that offers is not in default. *Dumoulin, ibid. p.* 3. *n.* 95.

But if a penalty had been stipulated in case of the non-execution of the obligation, the co-obliger, or co-heir, who was not in default, would nevertheless be subject to his part of the penalty, for the default of the other, *non immediaté, sed ejus occasione et tanquam ex conditionis eventu,* as in the case of divisible obligations, saving his recourse against his co-obligor.

[335] Observe, that the law 25. § 10. *ff. Fam. Ercisc.* does not contain anything contrary to the distinctions which we have made: for, as *Dumoulin* remarks, *p.* 3. *n.* 99, this text does not suppose, that one of the heirs of the debtor of an indivisible thing, should be always and indiscriminately bound to pay the value of the whole, in case of the non-execution; but only decides, that in the case in which he would be bound for it, as, if he had omitted to have his coheirs included in the cause, who were liable as well as himself, he has the action *familiæ erciscundæ,* against them to account to him for their proportion.

§ IV. *Of the Effects of Indivisible Obligations* in non faciendo.

[336] When any one is obliged, in favour of another, not to do any thing, if what he obliges himself to do, is any thing indivisible, as if he obliges himself to his neighbour, not to hinder him from passing through his estates, the contravention of any one of his heirs gives a right of action to the creditor against all the heirs, that they may be prohibited from such contravention, and that they may be condemned in damages, with this difference, that he who has contravened the obligation, ought to be condemned for the whole, *quia non tenetur tantum tanquam heres, sed tanquam ipse, et ex facto proprio,* and that the other heirs should be condemned for the part only for which they are heirs, and saving their recourse against him who has been guilty of the contravention, that he may be bound to pay in their discharge, or to indemnify them, if they have been already obliged to pay: they are not like the heir who has contravened the obligation liable in solido, but only for their hereditary part, *quia tenetur tantum ut heredes.* It is in this sense that *Dumoulin* teaches us to understand the law 2. § 5. *ff. de verb. Oblig.* "*Si stipulatus fureo per te non fieri, neque per heredem tuum quominus mihi ire agere liceat et unus ex pluribus heredibus prohibuerit, tenetur et coheredes ejus, sed familiæ erciscundæ repetent ab eo quod prestiterint. p.* 3. *n.* 168. *et seq.* For the rest so far as respects the creditor, those who have not contravened the engagement, are bound for their parts of the damages arising from the contravention of their coheir, and in this, obligations *in non faciendo* differ from those *in faciendo,* for when the obligation consists in doing something indivisible, which cannot be done separately by each of the heirs of the debtor, but which should be done by both together, and one of the two presents himself to do it, whilst the other refuses to concur, we

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have seen *n.* 334, that, according to the opinion of *Dumoulin*, the creditor had no action against him who was not in default, but only against him who had refused.

The reason of the difference is, that it is the default of the debtor, which is the cause of action in obligations *in faciendo:* whence it follows that it cannot be maintained against him who is ready, *quantum in se est*, to fulfil the obligation, and who consequently, is not in default; on the contrary, in obligations *in non faciendo*, it is the act itself from which the debtor has promised that he and his heirs would abstain; therefore the act of one of the heirs induces a right of action against all: it may be supposed that such was the intention of the contracting parties, because otherwise he, in whose favour the debtor obliges himself not to do any thing, would not have a sufficient security, and it would often happen that when one had done what it had been stipulated should not be done, he could not proceed against any one for want of knowing by whom it was done; as it is often difficult, when the thing has been done, to know who has done it, whereas in obligations which consist in doing any thing, it must be known who is in default on account of the judicial interpellation.

Dumoulin, p. 1. *n.* 27, allows the exception of discussion, to the heirs who have not contravened, by which they may oblige the creditor, in the first place, to proceed (*à discuter*) at their risks against the one who has contravened the obligation.

CHAPTER V.

Of Penal Obligations.(a)

[337] A penal obligation, as we have already seen, is that which arises from the clause in an agreement by which a person, in order to assure the execution of a primary engagement, obliges himself, by way of penalty, to some other thing in case of the non-performance of such engagement: thus, if you lend me a horse for a journey, and I engage to return him safe and sound, and to pay you fifty pistoles, if I do not do so; this obligation, which I contract to pay you fifty pistoles in case I do not return him, is a penal obligation.

To treat this matter with order, after having stated, in the first article, the general principles respecting the nature of penal obligations, we shall see in the second, in what cases the penalty is incurred; we shall examine, in the third, whether the debtor can, by partially discharging his obligation, avoid the penalty as to part: we shall consider, in the fourth, whether the penalty is incurred for the whole, and by all the heirs of the debtor by the contravention of one of

(a) See Appendix, No. XII.

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them; and, in the fifth, whether a contravention against one of the heirs of the creditor causes the penalty to be incurred for the whole, and in favour of all such heirs.

ARTICLE I.

Of the Nature of Penal Obligations.

First Principle.

[338] A penal obligation being in its nature accessory to a primary and principle obligation, the nullity of such principal obligation necessarily induces the nullity of the other; the reason is, that it is the nature of every accessory that it cannot subsist without its principal, *quum causa principalis non consistit, ne ea quidem quæ sequuntur locum obtinent*, law 129. § 1. *ff. de Regul. Jur.* Besides, the penal obligation being the obligation of a penalty stipulated, in case of the non-performance of the primary obligation, if the primary obligation is not valid, the penal obligation cannot take place, as there can be no penalty for the non-performance of an obligation, which not being valid, neither could nor ought to be executed.

The law 69. *ff. de. verb. Oblig.* affords an example of our decision: you promise to give me a certain slave, not knowing of his death, and to pay me a certain sum of money by way of penalty, in case you fail to do so; *Ulpian* decides that the obligation for the penalty is no more binding than the principal obligation which cannot be binding because it is impossible. *Si homo mortuus sisti non potest, nec pœna rei impossibilis committetur; quemadmodum si quis Stichum mortuum dare stipulatus, si datus non esset, pœnam stipuletur.*

[339] This principle, that the nullity of the primary obligation induces that of the penal obligation, is subject to an exception in the case of an obligation, in the accomplishment of which, the person with whom it is contracted has not any appreciable interest; as, *cum quis aliteri stipulatus est.* We have seen above *n.* 54, that such an obligation was null; nevertheless, the penal obligation, which is added to it, is valid: *alteri stipulari nemo potest; plane si quis velit hoc facere, pœnam stipulari conveniet; ut nisi ita factum sit ut est comprehensum, committatur pœnæ stipulatio etiam ei, cujus nihil interest, &c. Justit. Tit. de Inut. Stip.* § 19. The reason is, that the principal obligation is only null in this case, because the debtor may contravene it with impunity, the person with whom it was contracted not having any claim for damages in case of non-performance: the penal obligation purges this defect by taking away the impunity.

So, though one man cannot enter into a valid undertaking for the act of another, the penal obligation, added to an agreement by which any one has promised for the act of a third person, is valid, because the penal clause shows that the person promising, did not simply intend to promise for the act of another, but personally engaged to

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procure the act to be done: and consequently he promises *non dè alio sed dè se, n.* 56.

Frain, in his collection of the *arrêts* of the parliament of *Brittany*, adduces one of the 12th *January* 1621, which was decided upon this principle. The relation of a canon, who had given offence to the Bishop of *St. Maloes*, had promised the bishop that the canon should not appear in that city for four months, and in case of contravention engaged to pay the sum of 300 livres. The case having happened, it was judged that the contravention was valid, and that the penalty had been incurred.

Second Principle.

[340] The nullity of the penal obligation does not induce that of the primary. The reason is, that the accessory cannot indeed subsist without the principal, but the principal may subsist without the accessory, and is no wise dependant upon it, *l.* 97. *ff. de verb. Oblig. Si stiputatus sum te sisti, nis steteris hypocentaurum dari, perinde erit atque si te sisti solummodo stipulatus essem;* and as *Paulus* says in the law 126. § 3. *d. Tit. detractâ secundâ stipulatione, prior manet utilis.*

Third Principle.

[341] The object of the penal obligation is to assure the execution of the principal. Therefore it should not be presumed that the parties have intended either to make it extinguish the principal obligation, or to found the principal obligation upon it, *l.* 122.(*a*) § 2. *ff. de verb. Obligationibus.*

Therefore, where the penal obligation attaches from a default in executing the principal, the creditor may, instead of enforcing the penalty, proceed upon the principal obligation,(*b*) *l.* 28. *ff. de Act. Empt. l.* 122. § 2. *ff. de verb. Obl. & passim.*

When the parties who stipulate that a certain sum shall be paid, upon the non-performance of an anterior obligation, intend that, in

(*a*) Flavius Hermes hominem Stichum Manumissionis causa donavit, et ita de eo, stipulatus est: SI HOMINEM STICHUM DE QUO AGITUR, QUEM HAC DIE TIBI DONATIONIS CAUSA MANUMISSIONISQUE DEDI, A TE HEREDEQUE TUO MANUMISSUS VINDICTAQUE LIBERATUS NON ERIT: QUOD DOLO MALO MEO NON FIAT: POENAE NOMINE QUINQUAGINTA DARI, stipulatus est Flavius Hermes spopondit Claudius: quæro, an Flavius Hermes Claudium de libertate Stichi convenire potest? Respondit nihil proponi, cur non potest. Item quæro, an si Flavii Hermetis hæres á Claudii hærede pænam suprascriptam petere voluerit, Claudii hæres libertate Sticho præstare possit ut pœna liberetur? Item quæro, si Flavii Hermetis hæres cum Claudii hærede ex causa suprascripta nolit agere, an nihilominus Sticho libertas ex conventione, quæ fuit inter Hermetem et Claudium, ut stipulione suprascripta ostenditur, ab hærede Claudii præstari debeat? Respondit debere.

(*b*) Prædia mihi vendidisti; & convenit ut aliquid facerem; quod si non fecissem, pœnam promisi, Rospondit, venditur, antequam pœnam ex stipulatu petat, ex vendito agere potest: si consecutus fuerit, quantum pœnæ nomine stipulatus esset, agentem ex stipulatu doli mali exceptio summovebit, si ex stipulatu pœnam consecutus fuerit ipso jure ex vendito agere non poterit: nisi in id, quod pluris ejus interfuerint id fieri.

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case of default, nothing shall be paid but the sum so agreed upon, this is not a penal stipulation; the obligation which results from it is not a penal obligation, but as much a principal obligation as the first, of which the parties intended to make a novation; it is this kind of case which is mentioned in the law(a) 44. § *fin. ff. de Obl. & Act.*

Upon the question, whether the parties intended that there should be such a novation, see Part. 3. ch. 2. Art. 4. § 2.

Fourth Principle.

[342] This penalty is stipulated with the intention of indemnifying the creditor for the non-performance of the principal obligation; it is consequently compensatory of the damages which he suffers from such non-performance.

Hence it follows, that he ought in this case to elect, either to claim the execution of the principal obligation, or the penalty; that he ought to be satisfied with one of them, and that he cannot exact both.

However, as the penal obligation cannot invalidate the principal, if the penalty which the creditor has received for the non-performance of the principal obligation is not a sufficient indemnification, he may still demand damages resulting from the non-performance of the principal obligation, making an allowance and deduction for the penalty which he has already received: this is the decision of the laws, 28. *ff.*(b) *de Act. Empt.* 41.(c) & 42.(d) *ff. pro socio.*

But the judge ought not too readily to listen to the creditor, who pretends that the penalty he has received was not a sufficient indemnification for the non-performance of the agreement; for the parties having by fixing the penalty themselves, regulated the damages that may result from the non-performance of the agreement, the creditor, by demanding greater damages, seems to act in opposition to an estimation, which he himself has made, and this ought not to be allowed, at least unless he has proof at hand, that the damage sustained by him exceeds the penalty agreed upon; as in the following case, if a tradesman lends me his caravan upon condition that I shall return it by a certain day, when he will have occasion for it to carry his goods to a particular fair, under the penalty of 30 livres in case of my failing to do so; he may refuse taking 30 livres as a satisfaction, if he has proof at hand that he was obliged to hire another carriage for 50 livres, and that that was the common price at the time when I ought to have returned him his own.

[343] As a penal clause does not deprive the person who has stipulated the penalty of the action arising from the prin-

(a) Si navem fieri stipulatus sum, & si non feceris, centum: videndum utrum duæ stipulationes sint, pura & conditionalis & existens sequentis conditio non totlat priorem; an vero transferat in se, & quasi novatio prioris fit? quod magis verum est.

(b) See supra, No. 341.

(c) Si quis à socio pœnam stipulatus sit, pro socio non aget, si tantundem in pœnam sit quantum ejus interfuit.

(d) Quod si ex stipulatu eam consecutus sit, postea pro socio agendo, hoc minus accipiet, pœna ei in sortem imputata.

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cipal engagement, neither does it deprive him of his exceptions arising therefrom.

For instance, if I have agreed with a minor, who is now arrived at his majority, that he should not impugn the sale of an estate which he made to me during his minority, and I have stipulated with him by way of penalty a certain sum in case he contravenes the agreement; if he afterwards proceeds against me by letters of rescission to set aside the alienation, the penal clause inserted in our agreement will not hinder me from opposing against his demand the *fin de non-recevoir*, or estoppel, which results from the principal engagement contracted by our agreement, that he will do no act in opposition to this alienation. But as the person who has stipulated the penalty cannot take both the penalty and what is included in the principal engagement, if I take advantage of the *fin de non-recevoir*, and get the demand declared to be inadmissible, I can no longer demand from him the penalty which I stipulated for, and *vice versâ*, if I have exacted from him the penalty, I shall not be allowed to take advantage, the *fin de non recevoir*, as may be collected from the law,(a) 10. § 1. *ff. de part.*

The decision of this law has nothing contrary to that of the law(b) 122. § 6. *ff. de verb. Obli.* adduced *infra* in the following article, No. 348. when you have agreed with me after having attained your majority, that you would not impeach the sale of an estate made to me in your minority, under a certain penalty, the object of this agreement is to procure me the liberation from the rescisory action which you have against me; therefore, by opposing to you the *fin de non-recevoir* which results from this agreement, and by thus procuring a declaration that your action is inadmissible, I have procured a liberation from such action, and can no longer demand the penalty from you, otherwise I should at the same time have both the thing and the penalty, which cannot be; such is the law, 10. § 1. *ff. de pact.* which we have just adduced; that of the law 122, which is opposed to us, is very different. Upon a partition which is in itself valid and not subject to any rescisory action, but under the apprehension that a law-suit, although ill-founded, may possibly be instituted, we agree not to contravene the partition under a certain penalty; the object of this agreement is not, as in the preceding instance, to procure me a liberation from a rescisory action, for you are not entitled to any such; the only object is not to be involved in a law-suit; therefore, if you institute any action, although it is decided in my favour, the penalty will attach: for as the only object was the avoidance of a

(a) Si pacto subjecta sit pœnæ stipulatio, quæritur, utrum pacti exceptio locum habeat, an ex stipulatu actio? Sabinus putat, quod est verius, utraque via uti posse, prout elegerit qui stipulatus est; si tamen ex causa pacti exceptione utatur, æqunm erit accepto eum stipulationem ferre.

(b) Duo fratres hereditatem inter se diviserunt, and caverunt sibi, *nihil te contra eam divisionem facturos; & si contra quis fecisset pœnam alter alteri promisit:* post mortem alterius: qui supervixet, petit ab heredibus ejus hereditatem, quasi ex causa fidei commissi sibi à patre relicti debitam & adversus eum pronunciatum est quæsi de hoc quoque transactum fuisset: quæsitum est an pœna commissa esset? Respondit, pœnam secundum ea quæ proponontur, commissam.

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law-suit, and as you have engaged me in one, though ill-founded, you have deprived me of that object, and therefore the penalty will attach.

[344] Our rule that the creditor cannot, at the same time, have both the principal and penalty, is subject to an exception, not only when it is expressly said in the penal clause, that if the debtor does not accomplish his obligation, the penalty shall be incurred and due, without prejudice to the principal obligation, which is expressed in these terms, *rato manente pacto*, *l.* 16.(a) *ff. de trans.* but also, whenever it appears that the penalty is stipulated for the reparation of what the creditor may suffer, not from the absolute non-performance, but merely from the delay in the execution; for, in this case, the creditor who has suffered the delay, may take both the principal and the penalty.

Fifth Principle.

[345] The penalty stipulated in case of the non-performance of an obligation may, when excessive be reduced and moderated by the judge.

This principle is deducible from a decision of *Dumoulin* in his treatise *de eo quod interest*, n. 159 *& seq.* the foundation of it is, that the penalty is in its nature a substitution for the damages which may be claimed by the creditor, in case of the non-performance of the obligation; then, says he, as the judge should reduce the damages claimed by the creditor when they amount to an excessive sum, and the law *Cod. de sent. quæ pro eo quod interest prof.*(b) does not allow them to exceed double the value of the thing which was the object of the primary obligation: in the same manner, when the penalty stipulated in lieu of damages is excessive, it ought to be reduced: for although the penalty may in fact exceed the sum to which the damages amount, and may even be due in a case in which the creditor would not be subject to any damages at all, because it is stipulated to avoid any discussion of what damages the creditor has really suffered; but being stipulated in lieu of damages, it is contrary to its nature to be carried beyond the limits which the law respecting damages prescribes; if the law above cited restrains them, and does not permit their being claimed *ultrà duplum*, even when the non-performance of the contract, may in fact have occasioned a greater loss, so that the creditor *versatur in damno; à fortiori*, the judge ought to moderate the excessive penalty, to which the debtor has inconsiderably submitted, when the creditor has suffered no loss, or one much below, the penalty stipulated, and consequently *certat de lucro captando;* lastly, *Dumoulin* founds himself upon the text of the said law *cod. de sent, pro eo quod interest, &c.* which in the generality of its terms seems to include conventional, as well as all other kinds of damages.

(a) Qui fidem licitæ transactionis rupit, non exceptione tantum summovebitur sed et pœnam, quam si contra placitum fecerit, rato manente pacto stipulandi recte promiserat, præstare cogetur.

(b) This law is inserted in the note to n. 161, *supra.*

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Azon is of a contrary opinion to that of *Dumoulin*, and decides that a conventional penalty stipulated by way of damages is not subject to any moderation; it may be said in favour of his opinion, that there is a difference between conventional damages, and damages which are not regulated by the contract; in regard of the latter, it is very true, that the debtor in contracting a primary obligation is deemed to have contracted a secondary obligation of the damages which may result from the non-performance of it; but it may be presumed, that he did not intend to have obliged himself *in immensum*, but only *intra justum modum*, and so far as the sum to which it was probable the damages might amount; but the same cannot be said of conventional damages; *ubi est evidens voluntas, non relinquitur præsumptioni locus;* however excessive the sum stipulated by way of penalty, in case of the non-performance of the agreement, may be, the debtor cannot dispute his having intended to oblige himself to that extent, when the clause of the contract is express. Notwithstanding these reasons, the decision of *Dumoulin* seems more equitable; when a debtor submits to an excessive penalty, in case of the non-performance of his primary obligation, there is reason to presume that he was induced to do so under a false confidence, that he should not fail in the performance of the primary obligation, and supposed himself to engage for nothing by submitting to it, and that he would have submitted to it, if he had supposed that the penalty could have been incurred; and therefore that the consent which he gives to the obligation of so excessive a penalty, being founded upon error and illusion, is not valid. Therefore, these excessive penalties ought to be reduced to what the damages of the creditor, resulting from the non-performance of the primary obligation, may probably amount at the highest: this decision should take place in commutative contracts, because the equity which ought to prevail in these contracts does not permit one of the parties to profit and enrich himself at the expense of the other, and it would be contrary to this equity, that the creditor should enrich himself at the expense of the debtor, by acquiring from him a penalty too excessive, and manifestly beyond the damage which he has suffered from the non-performance of the primary obligation; the decision should likewise prevail with respect to donations, *cum nemini sua liberalitas debeat esse captiosa.*

Neither the text of the institutes *de inut. stip.* § 20,(*a*) nor the law 38. § 17. *ff. de verb. oblig.*(*b*) contains any thing contrary to the decision of *Dumoulin*, for when it is said, "*Pœnam cum quais stipulatur, non inspicitur, quod intersit ejus, sed quæ sit quantitas in conditione stipulationis*," it only follows that the penalty may be due, although the person who stipulated suffers nothing from the non-per-

(*a*) Si creditori suo [quis stipulatus sit] quod sua interest, ne forte vel pœna committatur, vel prædia distrahantur, quæ pignori data erant: valet stipulatio.

(*b*) Alteri stipulari nemo potest, præterquam si servus domino, filius patri stipuletur. Inventæ sunt enim hujusmodi obligationes ad hoc, ut unusquisque sibi adquirat, quo sua interest: cæterum, ut alii detur, nihil interest mea. Plane si velim hoc facere, pœnam stipulari conveniet: ut si ita factum non sit, ut comprehensum est, committetur stipulatio etiam ei, cujus nihil interest. Pœnam enim cum stipulatur quis, non illud inspicitur, quid intersir: sed quæ sit quantitas, quæque conditio stipulationis.

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formance of the primary obligation, or suffers less than the amount of the penalty; but by no means, that this penalty may be immense and out of all proportion to the object of the primary obligation.

With regard to the law(c) 56 *de Evict.* which supposes that a stipulation may be made in a contract of sale, for the restitution of triple or even four-fold the price, in case of eviction, a different answer may be given; *Noodt* pretends that the words *triplum aut quadruplum* are a bad gloss which is not in the text, and which ought to be taken from it. *Dumoulin*, *ibid*, *n.* 167. *et seq.* gives a better answer by saying that the question in this law does not relate to how much may be effectually stipulated in case of an eviction, and therefore it ought not to be concluded, that in contracts of sale a valid stipulation of the restitution of the triple or four-fold price of the eviction may be made in all cases without distinction; it is only to be concluded that such a stipulation may sometimes take place, and these cases are those in which a thing has been sold, not purely and simply but under circumstances of the purchaser running a risk of suffering a great loss in his other goods, in case of eviction of the thing sold, which risk was foreseen and known by the contracting parties; as in this instance; I sell a tradesman a room some little time before a fair, with a declaration in the contract that it is for the purpose of putting his goods there; the risk which the purchaser runs in case of eviction, of not being able at the time of the fair to get another place, and consequently not being able to show his goods, at the risk of a damage foreseen at the time of the contract, and which may far exceed the price of the room, and to which damage the seller submits; therefore, in this case, the damages not fixed by the contract, may be estimated at double, triple, or four-fold, the price of the thing sold; so a person may stipulate, in the same case, a penalty exceeding double the price, and the penalty in this case is not deemed excessive, on account of its not bearing a proportion to the price of the thing sold, provided it bear some proportion to the damage which the purchaser has suffered in not being able to show his goods, since it was stipulated in lieu of such damage.

[346] It remains to be observed, that if the penalty which is stipulated in lieu of ordinary damages, is reducible when excessive, *à fortiori* ought the penalties stipulated in default of payment of a sum of money, or other thing which is consumed by use, to be reduced to the legitimate rate of interest, or even entirely rejected, in cases where it is not allowed to stipulate for interest.

(c) Si dictum fuerit vendendo, *ut simple promittatur, vel triplum aut quadruplum* promitteretur, ex empto perpetua actione agi poterit.

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ARTICLE II.

In what Cases a Penal Obligation attaches.

§ I. *Of Cases where a Penal Clause is added to the Obligation of not doing any Thing.*

[347] It is evident in this case, that the penal obligation attaches, and that the penalty is due as soon as the person who has obliged himself under a penalty, not to do any thing, has done what he had obliged himself not to do.

[348] It is necessary that the fact upon which the penal obligation depends should have taken effect? This depends upon the intention of the parties.

Suppose at the end of an act of partition or transaction,(a) between you and me, we reciprocally promise not to contravene it, under a penalty to be paid by the party contravening to the other; afterwards you institute a suit against me to annul the act; this suit, although it has not had any effect, and has been dismissed, subjects you to the payment of the penalty, *arg. l.* 122,(b) § 6. *ff. de verb. oblig.* The reason is, that in stipulating under a certain penalty, that you shall not contravene the act, my intention was not precisely that you should not actually set it aside, which, as it was valid in itself, could not be done even without any such stipulation; what I intended to stipulate was rather, that you should not institute any process against me in opposition to it; it is sufficient then to subject you to the penalty, if you have instituted a process, though you have failed in it; it cannot be said in this case I have the benefit both of the principal obligation and the penalty, which is contrary to the fourth principle established in the preceding article; for the object of the principal obligation which you contracted of not contravening the act, and to which the penal obligation was attached, was that you should not institute any process against me, and this has not been satisfied, therefore I may demand the penalty.

On the contrary, if I stipulate with you under a penalty, that you shall not let your house, which is adjoining to mine, to a *pewterer*, and you make a lease which has never been carried into execution, you will not be liable to the penalty: for my object in the stipulation was, that I should not be incommoded by the noise which persons of this trade make; the lease not having been carried into execution, has not put me to any inconvenience, and therefore the penalty ought not to attach.

[348] For the same reason *Papinian* decided in the law 6 *ff. de serv. export.* that when a slave has been sold with the condition that the buyer should not give him his freedom under a cer-

(a) Transaction means a compromise.
(b) See n. 343, where this law is quoted.

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tain penalty, a void act of enfranchisement does not incur the penalty.(*a*)

§ II. *Of the case in which the Penal Clause is added to an Obligation to give, or to do any thing.*

[349] In this case the penalty attaches when the debtor is put *en demeure*, to give or to do what he has promised. The *Roman* laws make a distinction, whether the agreement contains a term, within which the debtor ought to give or do what has been agreed, or whether it does not; in the first case, they decide that the penalty is due of full right, as soon as the term has expired, without it being requisite to make any judicial interpellation of the debtor, and that he cannot be discharged from it by offering, after the expiration of the term, to satisfy the principal obligation, *l.* 23.(*b*) *ff. de Obl. & Act.*

The expiration of the term appeared to the *Roman* jurists, so completely sufficient, to induce the penalty without any proceeding against the debtor, that it even attached in the case of the debtor being dead, without leaving any heirs; and consequently though there was no person who could be placed *en demeure;* this is the decision of *l.* 77.(*c*) *de verb. Oblig.*

And further the *l.* 113.(*d*) *de verb. Oblig.* decides that when the obligation to which a penal clause is added, consists in doing within a certain term a piece of work which requires a certain time for its completion, the penalty is due even before the expiration of the term, as soon as it becomes certain that the work cannot be done within the term prescribed, so that the prorogation of the time which might be

(*a*) Incredibile est, de actu manumittentis, ac non potius de effectu beneficii cogitatum.

(*b*) Trajectitiæ pecuniæ nomine, si ad diem soluta non esset, pœna (uti absolet) ob operas ejus, qui eam pecuniam peteret, in stipulationem erat deducta; is qui eam pecuniam petebat, parte exacta petere desierat: deinde, interposito tempore, interpellare instituerat. Consultus respondit, ejus quoque temporis quo interpellatus non esset, pœnam peti posse; amplius etiam si omnino interpellatus non esset; nec aliter non committi stipulationem, quam si per debitorum non stetisset, quo minus solverat alioquin dicendum est, si is, qui interpellare cœpisset, valetudine impeditus interpellare desisset, pœnam noncommitti.

(*c*) Ad diem sub pœna pecunia promissa et ante diem mortuo promissore: committerut pœna, licet non sit hæreditas ejus adita.

(*d*) Cum stipulatus sum mihi Procule, *si opus arbitratu meo ante calendas Junias effectum non sit*, pœnam, & Protuli diem: putasne vere me posse dicere arbitratu meo opus effectum non esse ante calendas Junius, cum ipse arbitrio meo aliam opera laxiorem dederim? Proculus respondit: non sine causa distinguendum est, interesse, utrum per promissorem mora non fuisset, quominus opus ante calendas Junias ita, uti stipulatione comprehensum erat, perficeretur, an, cum jam opus effici non posset, ante calendas Junias, stipulator diem in Calendis Augustis protulisset? nam si tum diem stipulator protulit, cum jam opus ante calendas Junias effici non poterat, puto pœnam esse commissam: necad rem pertinere, quod aliquod tempus ante calendas Junias fuit quo stipulator non desideravit id ante calendas Junias effici, id est, quod non arbitratus ut fieret, quod fieri non poterat: aut si hoc falsum est, etiam si stipulatus pridie calendas Junias mortuus esset, pœna commissa non esset: quoniam mortuus arbitrari non potuisset, & aliquod tempus post mortem ejus operi perficiendo superfuisset: et propemodum, etiam si ante calendas Junias futurum esse cœpit opus ante eam diam effici non posse, pœna commissa est.

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afterwards allowed to the debtor, would not discharge him from the penalty previously incurred.

When the obligation does not contain any stipulation of the time, within which a thing is to be given or done, the law 122.(a) § 2. *de verb. Obl.* decides, that the right of the penalty only attaches by a judicial demand, on the part of the creditor.

According to our usages, whether the primary obligation does or does not contain a term, within which it is to be accomplished, a judicial interpellation is commonly necessary to put the debtor *en demeure*, and consequently to give the creditor a right to the penalty.

It remains to observe that the penalty cannot attach, when it is by the act of the creditor, that the debtor is prevented from discharging his obligation,(b) *l.* 122. § 3. *de verb. Oblig.*

ARTICLE III.

Whether a debtor may, by discharging Part of his Obligation, partially avoid the Penalty.

[350] A debtor cannot pay his creditor against his will, a part of what he owes him, so long as his obligation, although indivisible, continues undivided, as we shall see, *infra* P. III. c. I. Art. III. § 2. Therefore an offer to the creditor to pay part of what is owing to him, cannot avoid any part of the penalty stipulated in case of non-performance, if the creditor refuses to receive such partial payment.

But if the creditor voluntarily receives a part of his debt, shall he have a right to the whole of the penalty, in default of payment of the residue? *Ulpian*, in the law 9.(c) § 1. *ff. si quis cautioni in Jud.* decides, that although, according to the subtilty of law, it may appear that in this case the penalty is incurred for the whole, nevertheless, it is equitable that it should only be so in proportion to the part of the principal obligation which remains to be discharged: the true reason of this decision is that which is given by *Dumoulin*, and which we have above referred to, *viz.* that the debt being considered as a promise to compensate for the non-performance of the principal obligation, the creditor cannot have both the one and the other; then when he has been paid a part of what was due upon the principal

(a) See N. 339, where this is quoted.

(b) Coheredes, cum pradia hereditaria diviserant, unum prœdium commune reliquerunt sub hoc pacto: *ut si quis eorum partem suam alienare voluisset, eam vel coheredi suo, vel ejus successori venderet centum vigintiquinque:* quod si quis aliter fecisset, pœnam centum invicem stipulati sunt. Quæro, cum coheres mulier coheredis liberorum tutores sæpius testato convenerit, et desideravit, ut secundem conventionem aut emerent, aut venderet: an, si mulier extero pique nihil tale fecerint; vendiderit, pœna ab ea centum exigi possit. Respondit secundum ea quæ proponerentur, obstaturam doli mali exceptionem.

(c) Si plurium servorum nomine, judicio sistendi causa, una stipulatione promittatur; pœnam quidem integram committi, licet unus status non sit, Labeo ait: quia verum sit, omnes statos non esse: verum, si pro rata unius offeratur pœna, exceptione doli usurum eum, qui ex hac stipulatione convenitur.

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obligation, he can be no longer entitled to receive the penalty in respect of that part; otherwise he would receive both, which ought not to be; this is the 10th clef of *Dumoulin*, in his treatise *de Divid. & Individ. p.* 3. *n.* 112. *in omnibus sive individuis, sive dividuis pœna non committitur, nisi pro parte, contraventionis efficacis, nec potest exigi cum principali; sed creditor non tenetur partem principalis,* & *partem pœnæ accipere.*

This may be illustrated by an example: upon selling me a farm, without any beasts to cultivate it, you oblige yourself to furnish me with two pair of oxen, under the penalty of 500 livres, in case you fail to do so; you cannot in this case oblige me to receive one pair, and as I am not obliged to receive a part only of what is due to me, and consequently, the offer of one pair, if I refuse to receive them, does not prevent your being liable to me for the entire penalty; but if I voluntarily receive one pair, and you make default in furnishing me with the other, I cannot demand more than a moiety of the penalty; for having received a part of what formed the object of the principal obligation, I cannot have the whole penalty, as I am not entitled to both the one and the other.

[351] Our principle, that the penalty is only due proportionately, and in respect of the part for which the principal obligation is not executed, holds equally good whether you engage for a penalty in respect of your own act, or that of a third person: for instance if you undertake under the penalty of a hundred pounds, that *Peter* shall not claim from me a certain estate, the penalty will be due if *Peter* claims a moiety only of the estate, unless the contrary particularly appears to be the intention of the parties. *Dumoulin, ibid.* 3. *n.* 531.

[352] These decisions principally affect obligations of divisible things: it would seem that they could not be applied to obligations of indivisible things; they are however sometimes applied even to them.

Although the exercise of a predial servitude(*a*) is indivisible, and consequently the obligation contracted by the proprietor of the estate which is subject to it, to suffer the exercise of the servitude, is an indivisible obligation; nevertheless, if this servitude is limited to a certain purpose which terminates in something divisible, and the purpose has been fulfilled in part, the penalty will be divided and will only attach in respect to the part, for which the purpose has not been fulfilled; this may be illustrated as follows:

Your estate is subject to the servitude of the occupiers, being obliged at the time of the vintage, to suffer me, to carry my produce through such estate, under the penalty of a hundred crowns in case of disturbance; in this case, if after having permitted the half of my vintage to pass, you hindered the passage of the remainder, you only incur half the penalty; for although the right of passage be indivisible, and the obligation of following the exercise of this servitude is the obligation of an indivisible thing, nevertheless, as the servitude is

(*a*) An easement.

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limited to the carriage of my vintage, which is a particular purpose, and my vintage is divisible, it cannot be disputed but that I have enjoyed in part the purpose, for which the servitude was imposed, and that you have allowed me the enjoyment of it, by permitting me to carry the half; and therefore I can only demand half the penalty; for I cannot receive the whole of the penalty, and enjoy in part the benefit of my right of servitude; I cannot at the same time have the one and the other: this is laid down by *Dumoulin*, in the instance supposed, *quia* says he, *hæc servitus de se individua, dividuatur ex accidenti, et ex fine dividuo, et debet judicari, secundum regulam dividuorum, p.* 3. *n.* 363.

[353] Our principles may likewise be in some degree applied to indivisible obligations, in the following and similar cases; you engage under a certain penalty, to give me a right of passage upon an estate of which you have the usufruct;(*a*) undertaking for the ratification act of the proprietors, three of the proprietors ratify it; one only refuses to impose the servitude; the penalty is indeed due to me for the whole, for the refusal of any one proprietor to impose the servitude hinders its being imposed at all, notwithstanding the ratification of the other three; as a right of servitude cannot be imposed in part, and consequently cannot be imposed without the consent of all the proprietors; but as this ratification, although it is entirely useless for imposing a real right of servitude upon the estate, nevetheless has an effect, which consists in personally obliging those who have ratified to let me pass, I cannot, without giving up this obligation, demand the whole of the penalty, but only a part of it, as I could not receive the whole penalty, and at the same time retain a part of the right arising from the principal obligation. *Dumoulin, p.* 3. *n.* 473, *et* 474.

[354] Our principle, that the penalty is only due in proportion to the part, for which the principal obligation has not been executed, holds good even when the penalty consists in some thing indivisible. For instance, I have sold you an estate, and you have paid me the price, except fifty pistoles; which you engage to pay me in a year: and it is agreed between us, that in default of payment of this sum, you shall grant to me, instead of it, a right of prospect over an estate, belonging to you, and adjoining to mine; I have received from you twenty-five pistoles; in default of the payment of the remainder, I cannot require the payment of the whole penalty, but only the moiety for which the principal obligation has not been executed; and as the penalty consists in a right of servitude which is indivisible, and not susceptible of parts, I cannot demand it from you, without offering to pay you half the value of it, as only half the penalty is due. *Dumoulin, p.* 3. *n.* 523. *et seq.* v. *supra.*

(*a*) An usufruct is an estate for life, or other temporary interest.

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ARTICLE IV.

Whether the Penalty is incurred for the whole and by all the Heirs of the Debtor, by the Contravention of one of them.

It is necessary in this respect to distinguish between divisible and divisible obligations.

§ I. *Decision of the Question, with respect to Indivisible obligations.*

[355] When a primary obligation, contracted with a penal clause, is the obligation of an indivisible thing, the contravention of it by one of the heirs of the debtor, entitles the creditor to the whole penalty, not only against him who has caused it to attach by his contravention, but also against all his co-heirs, who are liable for the parts for which they are respectively heirs, saving their recourse against him who is guilty of the contravention.

For instance, if any one obliges himself to allow me a right of passage over his estate, under the penalty of 10 livres, in case of interruption; if any one of the heirs of the debtor shuts up the passage against me, although without the participation, and contrary to the will of his co-heirs, the entire penalty will be incurred, and that against each of the heirs of my debtor, who will be respectively liable for their hereditary parts; for the thing, which is the object of the primary obligations, being indivisible, as it is not susceptible of parts, the contravention of one of the heirs is a contravention to the whole obligation; and consequently, the whole of the penalty is incurred by all who are liable to it, as heirs of the debtor, who had obliged himself to such penalty in case of contravention. This is the decision of *Cato* in the law 4. § 1. *ff. de verb. Oblig.*

"Cato *scribit: pœnâ certæ pecuniæ promissâ: si quid aliter sit factum; mortuo promissore, si ex pluribus heredibus unus contrà quàm cautum sit, fecerit; aut ab omnibus heredibus pœnam committi pro portione heredetariâ, aut ab uno pro proportione suâ; ab omnibus, si id factum de quo cautum est individuum sit, voluti iter fieri quia quod in partes dividi non potest, ab omnibus quodam modo factum videretur.*" And a little lower, "*omnes commisisse videntur, quod nisi in solidum peccari poterit illam stipulationem per te non fieri quominus mihi ire agere liceat.*"

The jurist *Paulus*, decides the same thing in the law 85. § 3. *ff. Dic. tit.* "*quoniam licet ab uno prohibeor, non tamen in partem prohibeor.*" And he adds, "*sed cæteri familiæ erciscundæ judicio sarcient damnum.*"

As each of the heirs is only liable to the penalty; for the part for which he is heir, they are in this respect different from debtors in solido, who are debtors of the penalty for the whole, when it is incurred by one of them, as they are also for the principal obligation.

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[356] Can the creditor demand the whole of the penalty from the heir who made the contravention? The reason for doubting is, that the law does not say so, and that it says on the contrary, that the penalty is due by all the heirs, for their hereditary portion only. It may be added, that the contravention of the heir does not incur the penalty, except in as much as such contravention is in the nature of a condition, upon which the obligation of the penalty has been contracted by the deceased; and this debt of the penalty being a debt of the deceased, and divisible, the heir can only be bound for the portion for which he is heir, and for which he succeeds as such to the debts of the deceased.

It must be decided, nevertheless, that the heir, who contravenes the indivisible obligation contracted by the deceased, becomes debtor for the whole penalty: it cannot be doubted but that he is liable to it at least circuitously and indirectly; for, as he is liable to acquit his co-heirs of the parts for which they are bound, the creditor ought to be admitted, in order to avoid a circuity of actions, to demand from him not only for his own part of the penalty, but that of his co-heirs whom he is bound to indemnify, and consequently the whole.

Dumoulin, p. 3. *n.* 173 & 174, *et passim alibi*, goes further, and maintains that this heir owes the whole penalty, not only circuitously, but also directly; for, the primary obligation being supposed to be indivisible, he is debtor for the whole of it, and debtor under the penalty agreed upon; now, his contravention of an obligation for the whole of which he is bound, should make him incur the whole penalty. This is supported by an argument deduced from the law 9.(*a*) *ff. depos;* where it is decided, that a particular heir of the depositary who by his own act has caused the loss of the thing deposited with the deceased, is answerable to the person who deposited it, for the whole of the damages; because, although the principal obligation of restoring the thing deposited, is divisible, the accessory obligation of good faith in the preservation of the thing deposited is indivisible, to which each of the heirs of the dispository is liable for the whole, and which makes him debtor for the whole of the damages of the creditor, when he contravenes it; and if an heir for part, who by his own act contravenes an indivisible obligation of the deceased, is debtor for the whole of the damages, he should be so likewise for the whole of the penalty, since the penalty is in lieu of damages, and is only the liquidation of them agreed upon by the parties themselves: such is the reasoning of *Dumoulin.*

With regard to the first objection deduced from § *Cato*, the answer is, that when *Cato* decides that in indivisible obligations the contravention by one of the heirs causes the penalty to be incurred against each of them for their hereditary portions, he only means the heirs who have not participated in the contravention; with regard to the second objection, that the obligation of the penalty being a divisible obligation contracted by the deceased, each heir can only be bound

(*a*) In depositi actione, si ex facto defuncti agatur adversus unum ex pluribus heredibus, pro parte hereditaria agere debeo: si vero ex suo delicto, pro parte non ago; merito: quia æstimatio referetur ad dolum, quem in solidum ipse heredes admist.

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for the part for which he is heir, the answer of *Dumoulin* is, that this is true when the heir is only liable as heir, *tanquam hæres;* but when he is liable *ut ipse, et ex proprio facto,* he is answerable for the whole, and this is one of his clefs to decide questions upon this subject; *aliud est teneri heredem ut heredem, aliud teneri ut ipsum. Tr. de div. et indiv. p.* 3. *n.* 5 & 112.

[357] It being established, that the heir who has contravened an indivisible obligation, is personally liable for the whole of the penalty, we must for the same reason decide, that when the contravention is made by several heirs, each of them is liable to the penalty in solido; for the contravention of his co-heirs does not lessen his, *nec qui peccavit, ex eo relevari debet, quod peccati consortem habuit; multitudo peccantium non exonerat, sed potius aggravat, Dumoulin, ibid. p.* 3. *n.* 148.

[358] All that we have said in this paragraph with respect to the heirs of the debtor of an indivisible debt, applies to several principal debtors who have contracted together, without solidity, an indivisible obligation under a penalty; the contravention by one of the debtors obliges the others to the payment of the penalty, each for his respective part, saving their recourse, and it obliges the person contravening for the whole; and when the contravention has been made by several, it obliges them in solido.

§ II. *Decision of the Question with respect to Divisible Obligations.*

[359] When the primary obligation contracted under a penal clause is the obligation of a divisible act, *Cato*, in the passage above cited, seems to decide that the heir who contravenes the obligation, only incurs the penalty as to the part for which he is heir; *si de eo cautum sit quod divisionem recipiat, veluti ampliùs non agi eum heredum qui adversùs ea facit, pro portione sua solum pœnàm committere.*

The case mentioned in the law itself is an illustration of this subject: a person engages under the penalty of 300 livres, to acquiesce in the sentence of an arbitrator who had disallowed a demand, by which he alleged himself to be my creditor for ten measures of corn; one of his heirs, who is so for a fifth part, has, contrary to the faith of this agreement, renewed the contest, and demanded from me his fifth share of the ten measures, which the arbitrator decided I did not owe; he alone incurs the stipulated penalty, and he only incurs it for the fifth part for which he is heir; the reason is that the obligation is divisible, and as the heir could only contravene it in respect of the part for which he is bound, he can only be subject to the penalty to the extent of that part; his co-heirs, who not only have not contravened it, but have satisfied their part of the obligation, by acquiescing in the sentence, cannot be liable to the penalty; the creditor who is satisfied in regard to their parts of the principal obligation, cannot demand their parts of the penalty, as he cannot at the same time

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have the payment of the principal obligation and the penalty, as we have seen above *n.* 342 *et seq.*

The 4th paragraph, *si sortem* of the law 5, *d. tit.* appears contrary to this decision of *Cato;* it is there decided, that when one of the heirs of the debtor has satisfied the obligation in respect of the part for which he was bound, he notwithstanding incurs the penalty, if his co-heir does not satisfy it in like manner, saving his recourse against the co-heir who caused the penalty to be incurred in not satisfying his part of the obligation, *si sortem promiseris et si ea soluta non esset, pœnam, etiam si unus ex heredibus tuis portionem suam ex sorte solverit, nihilominus pœnam committet donec portio coheredis solvatur. Sed a coherede es satisfieri debet; nec enim aliud in his stipulationibus sine injuria stipulatoris constitui potest.*

Interpreters, both ancient and modern, have endeavoured to reconcile these two texts; *Dumoulin* adduces different conciliations of the ancient interpreters, all of which he refutes.

We adhere to those of *Cujas* and of *Dumoulin, tr. de divid. & individ. p.* 1. *n.* 62. *& seq.* which should be taken together, and according to which,—when the obligation is divisible, *tam solutione quam obligatione,* when the intention of the parties, in adding the penal clause, was simply to assure the performance of the obligation and not to prevent the payment from being made in parts by the different heirs of the debtor, particularly when the act, which constitutes the object of the primary obligation, is such that the different heirs of the debtor cannot accomplish it otherwise, than each for his own hereditary part,—in this case the decision of *Cato* ought to prevail; the heir of the debtor who contravenes the obligation, should alone incur the penalty, and that only for the part for which he is heir; the act adduced in the instance of § *Cato, amplius non agi,* is one of those which is divisible, *tam solutione quam obligatione,* and which in the nature of things cannot be accomplished by the different heirs of the person who contracted the engagement, except for the part of which each is heir: for, as each of the heirs only succeeds to his own part of the right and of the pretension which the deceased engages not to exercise, each of the heirs can only contravene or execute this engagement, by renewing, or not renewing this pretension with respect to the part which belongs to himself.

On the contrary, when the obligation is divisible indeed, *quoad obligationem,* but indivisible *quoad solutionem,* and the intention of the parties, in adding the penal clause, was, that the payment should only be made by the whole, and not by parts; in this case each of the heirs, by satisfying his part of the primary obligation, will not avoid incurring the penalty; and the § *si sortem* should be restricted to this case which reconciles it with the § *Cato.*

Dumoulin, p. 1. *n.* 72, gives as an example of the decision of § *si sortem,* the case of a merchant who has stipulated with his debtor a certain sum of money by way of penalty, in case the principal sum due to him be not remitted to him in a certain place at the time of a certain fair; the offers which one of the heirs should make to remit his part should not prevent the penalty from being due for the whole,

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in default of offering the whole; for as the merchant can only transact his business at the fair, with the whole of the sum which is due to him, the intention of the parties in stipulating the penalty was, that it should be incurred for the whole, in default of payment of the whole sum due, notwithstanding the partial payment might be made; for this partial payment cannot repair, even in part, the inquiry which the creditor suffers from the delay in paying the remainder, and it is for the reparation of this injury that the penalty was stipulated. Observe, also, that in the instance of § *si sortem*, the penalty is stipulated for the delay of the performance; therefore the creditor ought to receive both the principal and the penalty.

The law 85. § 6. *d. tit.* likewise relates to the case of an obligation divisible, *quoad obligationem*, but indivisible, *quoad solutionem;* it is said in the case of this stipulation, *si fundus Titianus datus non erit, centum dari; nisi totus deter, pœna committitur centum, nec prodest partes fundi dare cessante uno, quemadmodum nec prodest ad liberandum pignus, partes creditori solvere:* although the obligation of giving *fundum Titianum* be an obligation divisible *quoad obligationem*, nevertheless this obligation, whether it arises from a contract of sale, from a contract of exchange, a transaction, or from any other cause, is indivisible *quoad solutionem*, the creditor having an interest not to have the farm in part, and having intended only to have the whole of it; therefore, if one of the heirs of the debtor is *en demuere* with respect to giving his part of this estate, the offers of the others to give theirs, and even their cession of them to the creditor, who only accepted those parts but in the expectation of a cession of the remainder, would not prevent the creditor from demanding the whole of the penalty, offering, however, to give up all claim to the portions of the estate which he may have received, for he cannot have both the one and the other.

[360] In the case of § *si sortem*, when one of the heirs of the debtor, by not satisfying the primary obligation for the part for which he was liable, has caused the penalty to be incurred against the others, who were ready to satisfy their parts, does he himself incur the whole of the penalty? He does not incur it directly, except for the part for which he is heir; for as he is only subject to the primary obligation for this part, he could not himself have contravened it, except for this part; he can only then incur this part of the penalty, which ought to be proportionate to the contravention; in this respect divisible differ from indivisible obligations; but although he be not directly bound for more than his own part of the penalty, he is indirectly bound for the whole; for his co-heirs, who were ready to accomplish the obligation for their part, having incurred the penalty by the default of this heir in satisfying his, he is bound *judicio familiæ erciscundæ* to acquit them of it, *d.* § *si sortem*, and to avoid a useless circuity of actions, the creditor may demand the penalty from him not only for the part for which he is bound directly, but also for those of his co-heirs, from which he is bound to exonerate them, and consequently for the whole.

We have hitherto spoken of the case in which the heir in part has

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failed to satisfy a divisible obligation of the deceased, for the part to which he was liable; the instance of § *Cato* and that of § *si sortem*, although different from one another, as we have observed, are both referable to this case; we may suppose another ease, respecting which we have no text of law; it is a case in which one of the heirs of the person who has contracted a divisible obligation, with a penalty for its infraction, should contravene this obligation, of the deceased for the whole, and not for the part only for which he is heir.

For instance, a person has let his estate to another, and leaves four heirs, one of whom has evicted the tenant from the whole; two questions may be proposed in this case; the first, whether the penalty is incurred by this heir for the whole? the second, if it is incurred, not only against him, but against his co-heirs for their hereditary parts? The reason for doubting upon these two questions is, that as this heir is only bound as heir for the part for which he is heir, he should be looked upon as a stranger as to the other parts; his molestation of the tenant is only in his character of heir, so far as regards his own part, and it is the molestation of a stranger as to the rest; whence it is concluded, that as the molestation of a stranger without right to the enjoyment of the tenant, cannot induce the penalty either against such strangers who would be only liable to damages, nor against the heirs of the person granting the lease, who would only be bound to remit the rent to the tenant, in proportion as his enjoyment has been lessened, in case of the insolvency of the person who caused the molestation; so, in this case, the penalty ought not to be liable to damages for the remainder, and the penalty ought not to attach against his co-heirs; *Dumoulin*, however, who treats upon these questions, *p.* 3. *n.* 412, *& seq.* decides that in this instance the whole of the penalty is incurred by this heir; and that it is even incurred by his co-heirs, for the part for which each is heir. To establish his decision, and at the same time to refute the reasoning that we have just stated, he distinguishes in this obligation of the lease, and in all other divisible obligations, two kinds of obligations; the principal obligation, which in this case, is that of the lease, and which is divisible; and the accessory obligation, which is the obligation of good faith, and which is indivisible, and for which consequently each heir is bound to the whole. The particular heir of the lessor, who evicts the tenant, was not, in truth, subject to the principle obligation, except for his part; but he was liable for the whole and indivisibly, as to the preservation of good faith. This good faith obliged him not to molest the tenant, not only as to his own part, but even as to the others; in expelling the tenant from the whole of the enjoyment, he ought not then to be considered as having simply trespassed as a stranger, with respect to the other parts, but as having contravened the obligation of good faith, for which he was bound as heir, even with regard to the other parts; this contravention therefore, being a contravention even with regard to the other parts, and consequently to the whole, of an hereditary obligation contracted by the deceased under the penalty contained in the agreement, it ought to make the heir who contravened the obligation incur the whole of the penalty; such is the decision of *Dumoulin*

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upon the first question. He confirms the decision by the following reasoning: if it were true, says he, that this heir, in wholly evicting the tenant, ought only to be considered as having contravened the obligation as to his own part, and ought only to be considered as having trespassed as a stranger in respect to the other parts, it would follow, that the tenant would not have by reason of the contravention of these parts, an hypothecation upon the goods of the deceased, resulting from his lease; it would follow that though the lease had passed under an official seal, such as that of the Chatelet of *Orleans*, the tenant could not proceed against the heir who had evicted him, before the bailli of *Orleans*, except for the part for which he his heir; now, this is what nobody will contend; then this heir in part, by evicting the tenant, should be considered as having contravened an hereditary obligation, not only as to his own part, but also as to the other parts, and for the whole; and consequently he ought to incur the whole of the penalty agreed upon, in case of contravention.

With regard to the second question *Dumoulin*, for the same reason decides that the penalty is incurred, not only against this heir but against each of his co-heirs, for the part for which they are heirs; for by the penal clause the deceased obliges himself and all his heirs to the payment of the penalty, in case of the contravention of the primary obligation: if then there has been a contravention, it may be said, that the condition under which this obligation of the penalty was contracted has existed; and consequently that all the heirs of the deceased are liable to it.

If the deceased had given sureties *in omnem causam*, then the obligation of the sureties would extend as well to the primary obligation, as to the penal; the act of the heir, who has expelled the tenant, would have obliged the sureties to the performance of the penalty; *à multo fortiori*, it ought to oblige his co-heirs who succeed to this obligation as principal debtors.

[362] This decision of the second question applies even where the heir who has evicted the tenant was, alone, liable to the primary obligation of the lease; as in the following instance: I let an estate which has descended from my father to a tenant, under the penalty of 200 livres, in case I fail in giving him the enjoyment of it; I leave one heir of this paternal property and several heirs of another line to my other possessions; this paternal heir, by his own act, hinders the tenant from having the enjoyment; as by selling the estate without charging the purchaser with the lease; although he alone was bound for the primary obligation of the lease according to the principles above laid down, *n*. 301, it being the obligation of a specific thing, to which he alone has succeeded; nevertheless his contravention of this obligation will cause all the heirs to incur the penalty for the part for which each is heir; for the debt of the penalty is the debt of a sum of money contracted by the deceased, under the condition of the contravention, to which debt consequently all the heirs of the deceased succeed; but they have recourse against him who made the contravention. *Dumoulin*, *p*. 3. *n*. 430.

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[363] Another instance may be given; a person makes a lease of a farm of which he is only entitled to the usufruct, concealing the nature of his title, and giving himself out as the proprietor; there is a penalty of 200 livres stipulated in favour of the tenant, in case the lessor fails in securing him the enjoyment; the lessor leaves four heirs, one of whom is proprietor of the estate, who in his quality of proprietor evicts the tenant; the penalty is incurred by all the heirs; but the heir that evicted him is only liable for his own part, and is not obliged, as in the foregoing instance, to indemnify the other: for, having in his quality of proprietor the right of enjoying his estate, he has not transgressed against good faith, *dolo non facit, qui jure suo utitur;* he is only bound for the non-performance of the lease, and liable to the penalty in his quality of heir, and consequently only for his own hereditary part. *Dumoulin, ibid.* No. 432.

ARTICLE V.

Whether the whole of the Penalty is incurred in favour of all the Heirs of the Creditor, by a Contravention affecting only one of them.

[364] *Paulus* in the law 2. § *Fin. de verb. Oblig.* decides this question in the case of a penal stipulation, attached to a primary indivisible obligation: as for instance, you are obliged by a transaction in my favour to let me and my heirs pass through your park, either on foot or on horseback, and with beasts of burthen, under a penalty of twelve livres in case you contravene your obligation; I leave four heirs, you have prevented one of the four heirs from entering the park, and have allowed the three others to do so; *Paulus* decides that, in this case, as the contravention is of an obligation which is indivisible and not susceptible of parts, it cannot be a partial contravention: and that the penalty would also appear, according to the subtilty of the law, to be incurred to the whole extent, and for the advantage of all the heirs: nevertheless, that according to equity, which ought in these cases to prevail over subtilty, the penalty should only be incurred, in favour of the heir who has been refused admittance, and for his hereditary part only: *si stipulator decesserit, qui stipulatus erat, sibi heredique suo agere licere, et unus ex heredibus ejus prohibeatur: si pœna sit adjecta, in solidum committetur, sed qui non sunt prohibiti, doli [mali] exceptione summovebuntur. d.* §. The reason is, that equity does not permit that the three heirs, to whom the debtor has granted an entrance into his park, should at the same time receive the whole fruit of the performance of the obligation, and the penalty stipulated in case of the non-performance, nor allow them to complain of the contravention of the obligation, which the debtor has made against their co-heir, with regard to which contravention they have not any interest; *non debet aliquis habere simul implementum obligationis, et pœnam contraventionis; et pœna quæ subrogatar, loco ejus quod interest, non debet*

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committi his, qui non sunt prohibiti, et quorum nulla interest co-heredem ipsorum esse prohibitum." *Dumoulin, p.* 1. *n.* 32 *&* 35. The law 3. § 1. *d. tit.*(a) seems to be contrary; the answer is, that *Ulpian* only speaks according to the subtilty of law.

As the contravention of the obligation against one of the heirs only induces a right to the penalty in favour of such heir, and to the extent of his hereditary part, where the primary obligation is indivisible, the same ought to be decided *à fortiori*, when it is divisible.

CHAPTER VI.

Of the Accessory Obligations of Sureties,(b) *and others who accede the Obligations of a Principal Debtor.*

This chapter is divided into eight sections, the first seven concern the Obligations of Sureties. We shall treat in the first, of the Obligation of Sureties; we shall see in the second, what are the different kinds of Sureties; in the third, we shall treat of the Qualities which Sureties ought to have; we shall see in the fourth, for whom, in whose favour, for what kind of Obligation, and in what manner the engagements of Sureties are contracted; in the fifth, to what they extend; in the sixth, we shall treat of the manner in which such Obligations are extinguished, and of the different exceptions which the law allows to Sureties; in the seventh, of the actions which the Surety (*caution*) has, on his own account, (*de son chef*) against the principal debtor, and those engaging on his behalf (*ses fidejusseurs*); the eighth, and last section, treats of the other kinds of accessory Obligations.

SECTION I.

Of the nature of the Obligations of a Surety: Definition of Sureties (cautions *or* fidejusseurs), *and the Corollaries deduced from it.*

[365] The engagement of a surety is a contract, by which a person obliges himself on behalf of a debtor to a creditor, for the payment of the whole, or part of what is due from such debtor, and by way of accession(c) to his obligation.

(a) Ubi unus ex heredibus prohibetur, non potes coheres ex stipulatu agere, cujus nihil interest, nisi pœna subjecta sit, nam pœna subjecta efficit, ut omnibus committatur.

(b) There is in many respects a conformity between *Roman* law as adopted in *France*, and the law of *England* with respect to the obligations of societies; but the former was a more positive system, and included several distinctions and provisions to which we have nothing similar. The decisions in the *English* courts upon this subject, are, so far as it appeared necessary, included in the Appendix, on joint and several obligations.

(c) The term *caution* or *fidejussor*, appears from the whole of this discussion to import a secondary engagement, that another primary engagement shall be performed.

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The person who contracts such obligation, is called a surety, (*caution or fidejusseur.*)

The engagement, besides the contract which intervenes between the surety and the creditor, in whose favour the surety obliges himself, includes sometimes another contract which is supposed to intervene, at least tacitly, between the surety and the debtor for whom he is engaged, and this is the contract of Mandate, which is always supposed to intervene, when the surety engages with the knowledge and consent of the principal debtor; according to this rule of law, *semper qui non prohibet pro se intervenire, mandare creditur l.* 60. *ff. de R. J.* When the engagement is made without the knowledge of the debtor, it cannot be supposed to include any contract between the surety and the debtor, but there is supposed to intervene between them in this case, that kind of quasi contract which is called *negotiorum gestorum.* We shall treat of the obligations which arise from this contract of mandate, or from the quasi-contract *negotiorum gestorum,* in the seventh section of this chapter.

The contract which intervenes between the surety and the creditor, in whose favour the surety is obliged, is not of the class of contracts of beneficence, for the creditor by this contract receives nothing more than is due to him; he only procures a security for what is due to him, without which he would not have contracted with the principal debtor, or would not have allowed him time; but the engagement includes a benefit with regard to the debtor, for whom the surety is engaged.

Several Corollaries are deducible from the definition, which we have given of the obligation of a surety.

First Corollary.

[366] As the obligation of sureties is, according to our definition, an obligation accessory to that of a principal debtor, it follows that it is of the essence of this obligation, that there should be a valid obligation of a principal debtor; consequently, if the principal is not obliged, neither is the surety, as there can be no accessary without a principal obligation, according to the rule of law, *cum causa principalis non consistit, ne ea quidem quæ sequuntur, locum habent. l.* 178. *ff. de Reg. Jur.*

Second Corollary.

[367] A second consequence of our definition is, that the surety does not, by becoming such, discharge the obligation of the principal, but contracts another which is accessary to it; in this he

and many of the following corollaries seem to proceed upon an engagement made in a certain form, which, from its general character and effects, has the consequences stated; but I conceive it is not designed to state that several of the engagements which are mentioned, as not being susceptible of being contracted by sureties, cannot be substantially contracted by one person for another in a different form.

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differs from an ex-promissor, whose promise is accepted in lieu and exoneration of that of the person originally liable.

Third Corollary.

[368] It results from our definition, that the surety can only bind himself to the performance of the same thing, or a part of the same thing, with his principal; therefore, if a person became surety for one hundred quarters of corn, in favour of another who owed 100*l.* this would be void, *l.* 42. *ff. de Fidejus. Quia in aliam rem, quam quæ credita est fidejussor obligari non potest; quia, non ut æstimatio rerum, quæ mercis numero habentur, in pecuniâ numeratâ fieri potest; ita pecunia quoque merci æstimandi est.*

But a surety may, *vice versâ*, engage for a sum of money in lieu of another thing: for, money being the common measure of appreciation, the person who owes me one hundred measures of corn, of the value of one hundred pounds, owes me that sum effectively and really; and consequently the person who engages for him in my favour, to pay me 100*l.* does not engage himself to any thing different from what my principal debtor owes me.

[369] If a principal was obliged to give me an estate, and a surety engages for the usufruct, would this engagement be valid? Yes; for the usufruct being a right in this estate is, in a certain sense, a part of the estate owing to me; and consequently it cannot be said, that the surety, by so doing, would be obliged to any thing different from what is due from the principal: *Gaius* decides this in the law 70. § 2. *de Fidejuss.* "*In eo,* says he, *videtur dubitatio esse, usufructus pars rei si sit, an proprium quidam? sed cum usufructus fundi jus est, incivile est fidejussorem ex sua promissione non teneri.*"

Fourth Corollary.

[370] It results from this definition, that the surety cannot oblige himself to more than the principal; and that not only in respect of quantity, but also *die, loco, conditione, modo;* therefore the surety cannot oblige himself to harder conditions than the principal, but he may oblige himself to conditions less hard. The law 8. § 7. *ff. de Fidejuss,* decides this. "*Illud commune est in universis, qui pro aliis obligantur, quod si fuerint in duriorem causam adhibiti, placuit eos omnino non obligari; in leviorem plane causam accipi possunt.*"

From this principle it follows, that if a person becomes surety for a determinate sum, as 300*l.* on behalf a debtor whose debt is not yet liquidated, the mention of that sum should be considered as having been made in favour of the surety, and to the intent only, that if the debt should be liquidated at a greater sum, the surety should only be answerable for 300*l.* But if, by the liquidation, the sum was reduced to 250*l.* the surety would only be obliged for the sum actually due, and in case of paying more, would be entitled to repetition.

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Can the creditor in this case, before the liquidation of the debt, oblige the surety to the payment of 300*l.* provisionally, notwithstanding he requires a liquidation of the debt, which he maintains does not amount to so great a sum? The *Coutume* of *Brittany*, *art.* 189, decides in the affirmative; but this decision ought not to be followed out of this territory; for, according to the principle laid down, as the surety cannot be bound for more than the principal, he ought not to be compelled to the payment of the debt, sooner than the principal, who is not liable to it till after liquidation. *Ord. de* 1661, *tit.* 33. *art.* 2, the surety ought not to be compelled to pay before. *D'Argentré*, in his note upon the article of the *Coutume* above cited, agrees that its disposition is contrary to general law, *contra Jus Romanum;* and in his commentary upon *art.* 206, of the *Ancient Coutume* whence this is derived, he says: *Hic se auctores consuetudinis produnt non Jurisconsultos.*

[371] According to this principle, when the principal is obliged purely and simply, the surety may oblige himself to pay within a certain term, or under a certain condition; but on the contrary, if the principal debtor is only obliged under a certain condition which is yet in suspense, or within a certain term which is not yet expired, the surety cannot oblige himself to pay for him immediately, and upon the first requisition of the creditor. *Dict. Leg.* 8. § 7.

Observe, that if the engagement does not express any thing upon the subject, the term or condition expressed in the principal obligation, ought to be understood; as it is decided in the law 61.(*a*) *ff. d. tit.* that the place of payment, expressed in the principal obligation, is understood in the engagement of the surety.

[372] If the principal debtor is obliged to pay within a certain term, the surety may be obliged to pay within the same term, or a longer, but not within a shorter.

Hence it follows, that when the principal debtor is obliged to pay within a certain term, if the surety obliges himself under a certain condition, to pay as soon as the condition be accomplished, this engagement will not be valid, if the condition be accomplished before the term within which the principal debtor ought to pay, be expired, *l.* 16.(*b*) § 5. *ff. d. tit.* for if the engagement was valid, the surety would be obliged to pay before the debt could be demanded from the principal debtor, and consequently, *in duriorem causam*, which cannot be.

When the principal debtor is obliged under a condition, the surety may oblige himself under the same condition, and under another conjointly; for, in this case, the situation of the surety is better than that of the debtor, since he cannot be obliged, unless the two conditions are accomplished: if the surety obliges himself under the alternative of the condition, under which the principal debtor is obliged,

(*a*) Si (ut proponitur) cum pecunia mutua daretur, ita convenit, ui in Italia solveretur; intelligendum, mandatorem quoque simili modo contraxisse.

(*b*) Stipulatione in diem concepta, fidejussor, si sub conditione acceptus fuerit, jus ejus in pendenti erit, ut si ante diem conditio impleta fuerit, non obligetur: si concurrent dies et conditio, vel etiam diem conditio secuta fuerit, obligetur.

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and of another, or simply under a different condition, the engagement will be valid, if the condition under which the principal debtor is obliged, happens first, but if the other happens first, the engagement of the surety will not be valid, as the surety cannot be obliged before the principal debtor, *l.* 70(*a*) *pp. &* § 1.*ff. de Fidejuss.*

[373] The place of payment may also render the obligation burthensome; therefore if the surety promised to pay at a place more distant, than that in which the principal debtor ought to pay, the engagement would not be valid, as being made upon a condition more burthensome than the principal obligation, *d. l.* 16.(*b*) § 1 & 2.

[374] If a person in our colonies engaged to another to give him one or other of two negroes, say *James* or *John*, who were nearly of the same value, would the engagement by which the surety obliged himself for the debtor giving *John* determinately, be valid? The law 54.(*c*) *ff. de Fidejuss.* decides that it is valid, that the condition of the surety is in this case better than that of the principal debtor, since the surety may be liberated by the death of *John* alone, whereas the principal debtor can only be liberated by the death of both.

Contra, if the principal debtor was obliged to give *John* determinately, the engagement by which the surety should undertake to give *John* or *James*, would not be valid, not only for the reason which we have mentioned, that this alternative obligation is more extensive than the determinate obligation of *John*, but also for another reason, which is, that if the surety chose to give *James*, he would give a different thing from that due from the principal debtor, who is only debtor for *John;* which cannot be *supra*, *n.* 368. This is the decision of the law 8.(*d*) § 8. *ff. de tit.*

This is not to be apprehended in the preceding instance, in which the principal debtor promised *John* or *James*, and the surety *John* determinately; for in this case if the principal debtor offers *James* to the creditor, and by this choice reduces his obligation to the determi-

(*a*) Sub diversis quoque conditionibus si fuerint interrogati, interest utra eorem prior extiterit. Si reo injuncta, tenebitur etiam fidejussor, cum conditio ejus extiterit, tanquam si statim ab initio reus pure, fidejussor, sub conditione, acceptus esset. Ex diverso autem, si fidejussoris conditio prior extiterit, non tenentur; perinde ac si statim ab initio pure acceptus esset, reo sub conditione accepto.

(*b*) Qui certo loco dari promisit, aliquatenus duriori conditione obligatur, quam si pure interrogatus fuisset; nullo modo enim loco alio, quam in quem promisit, solvere invito stipulatore potest. Quare si reum pure interrogavero, et fidejussorem cum adjectione loci accepero, non obligatur fidejussor. Sed et si reus Romæ constitutus, Capuæ dari promiserit, fidejussor Ephesi: perinde non obligabitur fidejussor, ac si reus sub conditione promisisset, fidejussor autem in diem certam vel pure (promisisset.)

(*c*) This law does not relate to the subject, the translator has not been able to find the law intended to be referred to.

(*d*) Si quis Stichum stipulatus (fuerit) fidejussorem ita acceperit, *Stichum aut decem fide tua jubes?* Non obligari fidejussorum, Julianus ait, quia durior ejus fit conditio: utpote cum futuris sit, ut mortuo Sticho teneatur. Marcellus autem notat, non ideo tantum non obligari, quia in duriorum conditionem acceptus est, sed quia (&) in aliam potius obligationem acceptus est; denique pro eo qui decem promiserit, non poterit fidejussor ita accipi ut decem aut Stichum promittat, quamvis eo casu non fit ejus durior conditio.

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nate obligation of giving *James*, he liberates himself from the obligation of giving *John*, and consequently liberates his surety from it; *nam reo liberato, liberantur fidejussores.* The surety who had only acceded to the obligation of giving *John*, no longer owes any thing; if on the contrary, the principal had offered *John*, he would owe the same thing as his surety; it cannot then happen in this case, that the principal and the surety should owe different things.

If the principal was obliged to give the creditor the one of the negroes, *James* or *John*, at the choice of the creditor, the surety may effectually oblige himself to give one of the two at his own choice, *d. l.* 8.(*b*) § 10. for the creditor always preserving his choice against the principal, until payment, the debtor will always continue debtor of one of the two things, and, consequently, of that which the surety pleases.

[375] It is a question, whether the surety's engagement is entirely null, when he is obliged to more than the principal, or whether it is only null so far as it exceeds the principal obligation? It appears that the *Roman* jurists thought it entirely null, although *Dumoulin, ad. l.* 51. *si stipulanti*, § *sed si mihi, no.* 30. *& seq.* wished to make them say the contrary; this evidently results from the terms of the law 8. § 7. above cited, *placuit omnino non obligari.* It is true, that *Haloander*, in his edition, reads, *non omnino;* but it is by his own authority that he has changed the reading, contrary to the credit of the copies, and that of the *Grecian* interpreters, who have translated the terms *omnino non*, by οὐδενῶλως that is, *nullo modo:* this results in like manner from the other texts above cited. The reason which *Conanus* adduces, *Comment. Jur. n.* 68. for the opinion of the *Roman* jurists is, that a surety's engagement being essentially accessary to the obligation of the principal, and it being the essence of an accessory obligation, not to contain any thing more than the principal, an engagement by which the surety obliges himself for any thing more, fails in the essential form of such an engagement, and should consequently be absolutely void. This reasoning, upon which the *Roman* jurists seem to have founded their opinions, is more subtle than solid. From the proposition that a surety's engagement is accessary to the principal obligation, it only follows, that when the surety engages for more, his obligation is not valid as to the excess, but there is no reason why it should not be so to the extent of the obligation of the principal debtor; for, in consenting to oblige himself to a greater sum, he consents to oblige himself to the same sum with his principal; therefore, as the *Roman* laws are not followed in our provinces, except inasmuch as they are conformable to natural equity, I think that in this case we ought to deviate from them, and decide that a surety, who obliges himself to a greater sum than that included in the principal obligation, or who obliges himself to pay immediately what the principal only owes at the end of a certain term, or under a certain condition, is under a valid obligation to pay

(*b*) Contra autem, si is qui hominem aut decem, utrum ipse stipulator volet, stipulatus est; recte fidejussorem ita accipiet *decem aut hominem utrum tu voles?* fit enim (inquit) hoc modo fidejussorius conditio melior.

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the sum included in the principal obligation, at the term and under the conditions there mentioned. The *Coutume* of *Brittany*, *art.* 118, has followed this opinion, and *Wissembachad. t. de Fid. n.* 10. agrees that although contrary to the texts of law, it is followed in practice.

[376] The principle which we have established, that the surety cannot oblige himself to conditions harder than those of the principal debtor, *in duriorem causam*, ought to be understood with respect of the thing due, and of the object of the obligation; the surety cannot indeed, owe more than the debtor, *quantitate, die, loco, conditione, modo:* but, with respect of the quality of the lien, he may be more strictly obliged.

For instance, 1st, according to the principles of the *Roman Law*, the surety who accedes to an obligation purely natural, is more strictly obliged than the principal, since he may be forced to pay, though the principal cannot, as the creditor has no action against him.

2d. According to the same principles, when a surety has engaged with a debtor who has what is called *exceptionem competentiæ:* as when a person has engaged as surety for the father, in favour of the son who is his creditor, the surety is more strictly obliged than the principal, since the surety may be forced to the payment of the whole debt; whereas the principal cannot be so, except to the extent of what remains for him, after leaving him what would be necessary for his subsistence, *l.* 173.(*a*) *ff. de Reg. Jur.*

3d. The surety of a minor is often more strictly obliged than the principal, who may, if the contract is injurious, be relieved against his obligation, whereas the surety is obliged without the hopes of restitution, *l.* 13.(*b*) *de Minor. l.* I.(*c*) *Cod. de Fidej. Minor.*

4th. According to our usages, a judiciary surety may be subject to imprisonment, in some cases where the principal cannot, as where the latter is a priest, a minor, a woman, a person of the age of 70; and consequently more strictly, and, in respect of the quality of the lien, more extensively obliged.

(*a*) In condemnatione personarum, quæ in id, quod facere possunt, damnantur; non totum quod habent, extorquendum est, sed et ipsarum ratio habenda est, ne egeant.

(*b*) In causæ cognitione versabitur, utrum soli ei succurrendum sit, an etiam his, qui pro eo obligati sunt, utputa fidejussoribus. Itaque si cum scirem minorem, et ei fidem non haberem, tu fidejussoris pro eo; non est æquum, fidejussori in necem meam subveniri; sed potius ipsi deneganda erit mandati actio. In summa, perpendendum erit Prætori, cui potius subveniat, utrum creditori, an fidejussori; nam minor captus neutri tenebitur. Facilius in mandatore dicendum erit, non debere ei subvenire; hic enim velut adfirmator fuit & suasor ut cum minore contraheretur. Unde tractari potest; minor integrum restitutionem utrum adversus creditorem, an et adversus fidejussorem implorare debeat? Et puto tutius, adversus utrumque. Causa enim cognita, et presentibus adversariis, vel si per contumaciam desint, in integrum restitutiones perpendenæ sunt.

(*c*) Postquam in integrum ætatis beneficio restitus es, periculum evictionis emptori, cui prædium ex bonis paternis vendidisti, præstare non cogeris. Sed ea res fidejussore qui pro te intervenerunt, excusare non potest. Quare mandati judicio, si pecuniam solverint, aut condemnati fuerint, convenieris: modo si eo quoque nomine restitutionis auxilio non juvaberis.

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Fifth Corollary.

[377] It results from the definition of a surety's engagement, as being accessary to a principal obligation, that the extinction of the principal obligaticn necessarily induces that of the surety; it being of the nature of an accessary obligation, that it cannot exist without its principal; therefore, whenever the principal is discharged, in whatever manner it may be, not only by actual payment or a compensation, but also by a release, the surety is discharged likewise; for the essence of the obligation being that the surety is only obliged, on behalf of a principal debtor, he therefore is no longer obliged, when there is no longer any principal debtor for whom he is obliged.

[378] In like manner, the surety is discharged by the novation(a) of the debt; for he can no longer be bound for the first debt for which he was a surety, since it no longer subsists, having been extinguished by the novation; neither can he be bound for the new debt into which the first has been converted, since this new debt was not the debt to which he acceded; *novatione legitimè perfecta debiti in aliam speciem translati, prioris contractûs fidejussores vel mandatores liberatos esse non ambigitur, si modo in sequenti se non obligaverint, l. 4. Cod. de Fidej.*

[379] So when the principal becomes the sole heir, purely and simply, of the creditor, or *vice versâ*, when the creditor becomes sole heir, purely and simply, of the principal, or when the same person becomes successively heir of one and the other, the sureties are liberated, because there no longer remains a principal debtor, by reason of the confusion of the qualities of creditor and debtor, which, being united in the same person, destroy each other; as no one can be creditor or debtor of himself.

It would be otherwise if the debtor only became heir of the creditor, subject to the benefit of an inventory, or *vice versâ*, for one of the effects of a benefit of inventory, being to prevent the confusion of qualities, and to distinguish the person of the heir from the beneficiary succession, the debtor, who is beneficiary heir to the creditor, remaining always debtor to the beneficiary succession, his sureties are not liberated, for there is a principal debtor.

When the creditor succeeds to his debtor, not by the title of heir, but by the title of universal donatory, or universal legatee, as in all these cases he is not bound for debts indefinitely, but only so far as the value of the goods to which he succeeds, the confusion(b) only takes place to the extent of this concurrence; whence it follows, that the sureties are only discharged to the extent of such concurrence. and if there be not sufficient in the goods, which the debtor has left, wherewith to discharge the whole debt, the sureties are obliged to

(a) A novation is the acceptance of one obligation in satisfaction of another; for the nature of it, see P. III. ch. 2.

(b) As to the extinction of debts by confusion, see P. III. § 5.

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pay the remainder; but the creditor cannot sue for it, until he has accounted for the effects of the debtor to whom he has succeeded.

When the debtor becomes the heir of the creditor purely and simply indeed, but in part only, or *vice versâ*, as the confusion only takes place for the portion for which he is heir, the sureties are only liberated for this portion.

[380] When the principal debtor is not discharged *pleno jure*, but by some exception, or *fin de non reçevoir*, which he may oppose to the demand of the creditor, can the sureties oppose the same or *fin de non reçevoir* as the principal? With respect to this question, we must distinguish between exceptions, or *fins de non reçevoir*, which are called *exceptiones in personam*, and those that are called *exceptiones in rem. Exceptiones in personam*, are those founded upon some reason which is personal to the principal debtor; *exceptiones in rem* are so called, because they are not founded upon any reason personal to the principal debtor, but upon the thing itself, that is, upon the nature of the debt.

These exceptions *in rem* may be opposed by sureties, as well as by the principal; *rei autem cohærentes exceptiones etiam fidejussoribus competunt, l.* 7. § 1. *ff. de Except.* and it is of these exceptions that we must understand what is said in the law 19. *ff. d. tit. omnes exceptiones, quæ reo competunt, fidejussori quoque, etiam invitio reo, competunt.*

Such is the exception of fraud or violence: such are also the exceptions of a judgment, or of the decisory oath, (*a*) *d. l.* 7. § 1. for these exceptions being founded upon what was decided by the sentence or decisory oath, that the thing was not due, apply to the thing itself, and are not founded upon any reason personal to the principal debtor; and consequently, are exceptions not in *personam* but *in rem;* which may be opposed by the sureties, as well as by the principal with whom the question has been decided, or to whom the oath has been offered; *nec obstat regula juris*, that an adjudication or a decisory oath cannot give a right to a third person, who is not a party,(*b*) *l.* 2 *Cod. quib. res jud. non noc. l.* 3,(*c*) § 3. *ff. de Jurejur*, for this rule ought not to be understood of those whose right is essentially connected with that of the person who was a party concerned, such as that of sureties with their principal.

(*a*) For the nature of the decisory oath, see P. III. ch. 3. § 4. Art. I.

(*b*) *Res inter alios judicatæ, neque emolumentum afferre his, qui judicio non interfuerunt, neque præjudicium solent irrogare;* Ideo nepti tuæ prejudicare non potest, quod adversus *coheredes* ejus judicatum est, si nihil adversus ipsam statutum est.

(*c*) Unde Marcellus scribit, etiam de eo jurari posse, *an prægnans sit mulier vel non sit;* et jurijurando standum. Denique, ait, si possessione erat quæstio, servari oportere; si forte quasi prægnans ire in possessionem volebat, et cum ei contradiceretur, vel ipsa juravit *se prægnantem*, vel contra eam juratum est; nam si ipsa ibit in possessionem sine metu: si contra eam, non ibit, quamvis vere prægnans fuerit, proderitque, inquit Marcellus, mulieri juranti jusjurandum, ne conveniatur, quasi calumniæ causa ventris nomine fuerit in possessione, neve vim patiatur in possessione. Sed an jusjurandum eousque prosit, ut post editum non quæratur, ex eo editus, an non sit, cujus esse dicitur Marcellus tractat? Et ait, veritatem esse quærendam: quia *jusjurandum alteri neque prodest, necque nocet*, matris igitur jusjurandum partui non proficiet; nec nocebit, si mater detulerit, et juretur ex eo prægnans non esse.

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When the principal debtor, by a transaction with the creditor upon the legitimacy of the debt, has agreed to pay it, but with an allowance of three years, the exception which this agreement gives against the creditor, if he sues before the term, is likewise an exception *in rem*, for it is founded upon the thing itself: it is founded upon the doubt which was entertained of the legitimacy of the debt, upon which the transaction took place. This exception may consequently be proposed by the sureties, as well as by the principal, though they were not parties to the transaction; hence arises a question, whether the debtor, by a new agreement with the creditor, may, to the prejudice of the sureties, permit the creditor to demand what is due to him before the term specified by the former agreement! *Paulus* in the law 27,(*a*) § 2 *ff. de Pact.* decides formally that he may, (although some interpreters, to reconcile this text with the law *fin. ff. Dic. Tit.* which decides the contrary, have put the text to the torture to make it say something else.) The reason of the decision of *Paulus* is, that the right which results from the former agreement having been formed by the mere concurrence of the creditor and debtor, without the intervention of the sureties, it may be destroyed by a contrary agreement; *cum quæque eodem modo dissolvantur quo colligata sunt;* on the contrary *Furius Anthianus* decides, that the new agreement cannot deprive the sureties of the exception which they had acquired by the former, *l. fin.*(*b*) *ff. de Pact.* and I think that we must accede to this decision: the reason alleged for that of *Paulus* can only apply where there is no right acquired to a third person. Some interpreters, whose opinions I have elsewhere followed, to reconcile *Furius Anthianus* and *Paulus*, say, that the decision of *Furius* only takes place in the case where the sureties have ratified and accepted the former agreement; but this conciliation is imaginary. It is not said in this law, that the sureties had accepted the former agreement, it cannot even be supposed: for in so doing, *Furius* would have been putting a question upon what could never be made any question at all.

Let us now proceed to exceptions *in personam.*

Exceptions, founded upon the insolvency of the principal debtor, and upon the personal privilege of his property, being exempt from seizure, so far as it is necessary to his subsistence, cannot be taken advantage of by the sureties; as we learn from the law(*c*) 7. *ff. de Except.* which lays down that the exception which is granted to a debtor, who may be either the father, or mother, husband, or patron, or a partner of the creditor, to be exempt from the seizure of his neces-

(*a*) Paetus *ne peteret*, postea convenit, *ut peteret:* prius pactum per posterius elidetur: non quidem ipso jure, sicut tollitur stipulatio per stipulationem; si hoc actum est; quia in stipulationibus jus continetur; in pactis factum versatur: et ideo replicatione exceptio elidetur.

(*b*) Si reus qostquam pactus sit, *a se non peti pecuniam* (idebque cæpit id pactum fidejussori quoque prodesse) pactus sit, *ut a se peti liceat;* an utilitas prioris pacti sublata si fidejussori, quæsitum est? Sed verius est semel adquæsitam fidejussori pacti exceptionem, ulterius [ei] invito extorqueri non posse.

(*c*) Exceptiones, quæ personæ cujusque cohærent, non transeunt ad alios: veluti [ea] quam socius habet exceptionem, quod fecere possit: vel parens, patronusve, non competit fidejussori: sic mariti fidejussor post solutum matrimonium datus, in solidum dotis nomine condemantur.

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saries, cannot be opposed by the sureties. The reason is evident: the property of the principal debtor does not discharge him from his obligation; and if he afterwards is enabled to pay, he is compellable to do so; in the mean time, his obligation remains entire, and is a sufficient foundation for that of his sureties. His poverty does not destroy it, but only suspends the execution of it, by the exemption above mentioned; but this exception, being founded upon the quality of father or husband, which is personal to himself, cannot be taken advantage of by the sureties.

It is the same with respect to the exception which results from the *cessio bonorum*. Where the principal debtor has made a cession of his goods, and they are not sufficient to discharge him from his debt, he is not liberated from the remainder, *l.* I.(*a*) *Cod. qui. Bon. Ced.* and his obligation for the remainder is a sufficient foundation for the obligation of his sureties for such remainder. Nevertheless, until he has acquired new property beyond what is necessary for his subsistence, he may oppose, against the pursits of the creditor, a *fin de non-reçevoir*, resulting from the cession, *l.* 3.(*b*) *Cod. de Bon. Anthor jud. possid. l.* 4.(*c*) *de Cess. Bon.* it is evident that this *fin. de non-reçevoir* is founded upon a reason of favour, which is personal to the debtor, it is *exceptio in personam* which cannot be opposed by his sureties.

I think it is the same with the exception arising from a contract of *attermoiement*, to which the creditor would have been obliged to accede, by which a discharge is granted to the debtor of a part of his debt, and certain terms for the payment of the remainder; I think that the exception which this contract gives to the principal debtor, ought not to extend to the sureties, and that they may be sued immediately for the payment of the whole debt; for it is evident, that this is an exception *in personam*, which is only granted to the debtor in consideration of his poverty, which is personal to himself; the remission granted by the contract of *attermoiement* not having been granted *animo donandi*, but by necessity, this, as well as the preceding exception, only invalidates the civil obligation; the natural obligation for what remains unpaid continues entire, and serves as a sufficient foundation for the obligation of the sureties. This reason is an answer to that adduced in the first place in support of the contrary opinion, which is, that it is the essence of an engagement that the surety cannot be bound for more than the principal. With respect

(*a*) Qui bonis cesserint, nisi solidum creditor receperit, non sunt liberati.

(*b*) Ex contractu, qui cessionem rerum antecessit, debitorem contra juris rationem convenies, cum eum æquitas auxilio exceptionis muniat. At tunc demum iterato possis desiderare conventionem, cum tantum postea quæsivit, quod Præsidem ad ejus rei licentiam debeat promovere,

(*c*) Legis Juliæ de bonis cedendis beneficium, constitutionibus Divorum nostrorum Parentum ad provincias porrectum esse, ut cessio bonorum admittatur, notum est; non tamen creditoribus sua auctoritate dividere hæc bona, et jure dominii detinere; sed venditionis remedio quatenus substantia patitur, indemnitati suæ consulere permissum est. Cum itaque contra juris rationem res jude dominii teneas, ejus, qui bonis cessit, to creditorem dicens: longi temporis præscriptione petitorem submoveri non posse, manifestum est. Quad si non bonis enum cessisse, sed res suas in solutum tibi dedisse monstretur, Præses provinciæ poterit de proprietate tibi accomodare notionem.

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to the second argument adduced for the contrary opinion, which is, that if the surety does not profit by the contract of *attermoiement*, and may be obliged to pay the whole of the debt, it would happen indirectly that the principal debtor would not profit from it himself, on account of the recourse which the surety, who has paid the whole, would have against him; the answer is, that this will not happen, because the surety who has paid the whole, is, in his quality of creditor of this sum for his indemnity, obliged, as well as the other creditors, to accede to the contract of *attermoiement;* it must however be allowed that the contrary opinion is authorised by two ancient *arrêts*, cited by *Basnage*, one of the parliament of *Paris*, the other of the parliament of *Normandy;* but I do not think that the decision of these *arrêts* ought to be followed, for the reason above adduced. This decision even appears to be repugnant to the nature of a surety's engagement, which is an act to which a creditor has recourse for his security against the risk of insolvency of the principal debtor. Now what would become of this security, if the creditor had not the right of demanding from his surety what the insolvency of the principal debtor would oblige him to remit to such principal? Our opinion coincides with the article xiii. of the *Arrêts of M. de Lamoignon* upon this title.

When there has been an agreement between a creditor and the principal debtor, by which the creditor, in order to gratify the principal debtor, has agreed with him not to demand the payment of the debt; if the creditor afterwards demanded the payment of it from the sureties, they might indeed oppose the exception which results from the agreement; but, according to the ancient *Roman* law, the sureties had this right only because the demand against them would recur against the principal, who was obliged to discharge them from it, *actione contraria mandati aut negotiorum gestorum;* therefore in the case in which the demand against the sureties would not recur against the principal, as if the sureties had engaged *donandi animo*, with a declaration that they would not reclaim from the principal what they might be obliged to pay for him, the sureties could not, according to the principle of the ancient law, oppose the exception arising from the agreement between the creditor and the principal debtor, because this agreement, and the exception resulting from it, being founded upon the personal consideration of the creditor for the principal debtor, whom he wished to gratify, is an exception *in personam*, which does not belong to the sureties, as we learn from the law 32. *ff. de pact.* where it is said, "*Quod dictum est, si cum reo pactum sit ut non petatur, fidejussori quoque competere, exceptionem, propter rei personam placuit ne mandati judicio conveniatur; igitur si mandati actio nulla sit, forte si donandi animo fidejusserit, dicendum est non prodesse exceptionem fidejussori.*"

Even when the surety is an ordinary one, who has recourse against the principal debtor for what he is obliged to pay for him, he could not, according to the principles of the *Roman* law, oppose the exception arising from the agreement between the creditor and principal debtor, if by this agreement not to demand the payment of the debt

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from the principal debtor, the creditor had expressly reserved the power of demanding it from the surety. "*Debitoris conventio fidejussoribus proficiet, nisi hoc actum est, ut duntaxat, a reo non petatur, a fidejussore: tunc enim fidejussor exceptione non utetur.*" *L.* 21. § 5. *in fin.* 22. *ff. d. tit.*

Cujas, in his commentary upon the said § 5, properly observes, that in this respect sureties would differ from those who are called in law, *mandatores pecuniæ credendæ:* for, if at your request I had lent a person a sum of money, I could not afterwards, by agreeing with the debtor that I would not demand the payment of the debt from him, legally reserve to myself the power of demanding it from you; he gives us a reason for the difference; when at your request I had lent some one a sum of money, I am, by the nature of the contract of mandate, obliged to cede to you my action upon the loan; every person undertaking a commission being obliged *actione mandati directa*, to render an account to the person giving it of all that he has acquired in the execution of the mandate; therefore, when by my own act I have disabled myself from fulfilling my obligation to you, and from ceding to you the action upon the loan, whether by agreeing with him not to demand anything from him, or by letting him be discharged by my fault from the demand, or in any other manner, I ought not to be admitted to claim from you *actione mandati contrariâ*, the sum which I lent to him by your request,(a) *l.* 95. § *pen. ff. de Solut.* for it is a principle common to all reciprocal contracts, that the party who fails in the performance of his own obligation is not admissible to demand from the other party the performance of his.(b)

The case is different with respect to sureties. A creditor, according to the principles of the ancient *Roman* law, as *Cujas* observes, *ad. d.* §. does not contract any obligation in favour of the sureties, to preserve for them his actions against the principal, against whom they have an action in their own right; it is merely for a reason of equity that he cannot refuse the cession of it to the surety after payment: but he is only bound to cede them such as they are; therefore, the agreement with the debtor, by which he has rendered his actions against him inefficacious, does not preclude him from demanding the payment of the debt from the surety.

Such was the ancient law, as *Cujas* observes, *ad. d.* § 5, and which can scarcely prevail since the novel of *Justinian. Jure novo*, says *Cujas, haud facilè procedere potest:* for *Justinian* having by his *Novel* granted to the sureties the exception of discussion, *beneficium ordinis*, which consists in the right that he gives them, when they are sued by the creditor, to require them to proceed, in the first place, against the principal debtor, it is evident that the creditor can no longer, by agreeing with the debtor not to demand the debt from him, reserve the power of demanding it from the sureties; for he cannot

(a) Si creditor a debitore culpa sua causa ceciderit: prope est, ut actione mandati nihil a mandatore consequi debeat: cum ipsius vitio acciderit, ne mandatori possit actionibus cedere.

(b) See the observations upon this subject, Appendix, No. XII.

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by this act deprive them of the right and exception given to them by the law.

According to the principles of the *French* law, besides this reason deduced from the novel, that a creditor cannot, by agreeing with the debtor not to demand the payment of the debt from him, reserve the power of demanding it from the sureties, there is another not less decisive; it is derived from the difference between the principles of the *Roman* law and ours, with respect to simple pacts.

According to the principles of the *Roman* law, those obligations only which were formed by the mere consent of the parties, could be destroyed by a contrary consent; with respect to all others, when the creditor chose to make a release to the debtor, he could only do it by the formula of an acceptilation; without that, the agreement made with the debtor not to demand the debt from him, was only a simple pact, which could not destroy the obligation of the debtor: for as a simple pact cannot produce a civil obligation, so it cannot destroy one. It is true, that this agreement gave the debtor an exception to exclude the creditor from the demand which he might institute against him, contrary to the faith of the agreement; but the debtor only enjoyed this exception from the equity of the prætor and against the rigour of the law; the obligation which he had contracted continued to subsist *ipso jure* in his person, and was a sufficient foundation for preserving that of the sureties who had acceded to it.

It was the same with respect to an agreement by which the creditor, through liberality, granted a certain term to his debtor, who had at first contracted a pure and simple obligation without any term; this agreement was a simple pact, which only gave the debtor an exception, against the demand which the creditor, contrary to the faith of the agreement, had instituted against him before the expiration of the term; but if by the agreement the creditor declared, that he only meant to grant the term to the debtor and not to the sureties, this agreement, according to the principles of ancient law, would not prevent him from proceeding before the term against the sureties, who could not oppose the principle of law, that it is of the nature and essence of their engagement, that the surety should not be obliged to more than the principal, and that he should have the same terms of payment; for the agreement by which the term was granted to the principal, being only a simple pact, could not invalidate or diminish his obligation; it continued to subsist *ipso jure* such as it was when contracted, as a pure and simple obligation, and without any term, and leaves that of the sureties to subsist in like manner. If the debtor is enabled to enjoy the term granted to him by the agreement, it is only by virtue of an exception to which he is entitled, by the equity of the prætor against the rigour of the law, and which being founded only upon a consideration personal to the debtor, does not extend to his sureties.

The principles of the *Roman Law*, upon the effect of simple pacts, do not result from natural law, and are founded entirely upon subtilties, very opposite to the spirit and simplicity of the law of *France*. The solemnity of an acceptilation is with us unknown: and any kind

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of agreement may produce, extinguish, or modify civil obligations. When a creditor has agreed with a debtor not to demand the debt from him, this agreement, according to the simplicity of the *French* law, discharges the debtor *pleno jure:* therefore the creditor cannot legally reserve a power of demanding the payment from the sureties, the liberation of the debtor necessarily inducing that of the sureties.

So in our law, when after the contract a creditor through liberality grants a certain term of payment to his debtor, he cannot exclude the sureties from such term: for as the agreement has the effect of modifying *pleno jure* the obligation of the debtor, and converting a pure and simple obligation into an obligation with a term of payment, the obligation of the sureties necessarily receives the same modification; and they have the same term of payment as the principal debtor; it being the essence of their engagement that the surety should not be obliged to more than the principal.

If the sureties, in the case of a contract of *attermoiement* between the creditor and the debtor, do not enjoy the remission and terms granted to the debtor by the contract, as we have above decided, it is because these only affect the civil obligation; the natural obligation remains entire, and consequently the debtor himself, if he had wherewith to pay could not, in point of conscience, take advantage of either of them. This natural obligation, as we have before said, is a sufficient foundation for that of the sureties; but where a creditor of his own free will, and through liberality, has discharged his debtor, or granted him a term, the debtor is no longer obliged, either naturally or civilly, to pay the sum remitted, or to pay before the term; neither, consequently are the sureties.

[381] When the principal debtor obtains a restitution against his obligation by letters of rescision, does the recision of his obligation induce the recision of that of the sureties? We must make the same distinction here that we have done with regard to exceptions: if the restitution is founded upon any real defect of the obligation, as upon fraud, violence, mistake, gross inequality, the rescission of the principal obligation induces that of the sureties; but if, on the contrary, the restitution is founded upon reasons personal to the principal debtor, as for instance, upon his minority; the principal only acquires a personal defence against his obligation, which, notwithstanding the rescission, subsists *naturaliter*, and is a subject capable of being acceded to by the obligation of the sureties, as is decided by the law 13.(*a*) *ff. de Minor*, and very directly by the law 1.(*b*) *Cod. de Fidejusse Min.*

There is, however, a case in which the rescission of the principal obligation, although merely on account of minority, induces that of the sureties; this is when the principal debtor obliges himself in a quality which the rescission has destroyed, as if he had obliged himself in quality of heir, and obtains a restitution against his acceptance of succession: for, the principal debtor not being obliged on his own account, but in the quality of heir which he no longer has, and which

(*a*) *Vide supra, n.* 376. (*b*) *Vide supra, n.* 376.

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he lost by the rescission of his acceptance of the succession, he is no longer debtor at all, not even *naturaliter;* his obligation attached to the quality which is destroyed no longer subsists; as is decided in the law 89.(*c*) *ff. de Acquir. Hered.*

[382] The rule which we have established, that the extinction of the principal obligation extinguishes that of the surety, is subject to a kind of exception, in the case where the thing due has perished by the act or default of the surety; in this case, although the obligation of the principal debtor be extinguished by the extinction of the thing which constituted the object of it, the surety remains obliged, as is decided by the law 32. § 5. *de Usur.* "*si fidejussor solus moram fecerit, reus non tenetur, sicuti si Stichum promissum occiderit, sed utilis actio in hunc* (*fidejussorem*) *dabitur.*"

This has been established contrary to the principle, which does not permit the obligation of the surety to subsist, after the extinction of the principal obligation, as is indicated by the jurist in stating, that in this case the action against the surety is an *actio utilis*, that is to say, that it is given *contra tenorem juris, ita suadente utilitate et æquitate*, by way of damages, and as a punishment for the fault of the surety.

Sixth Corollary.

[383] From the principle that the surety, according to our definition, is one who obliges himself for and accedes to the obligation of another, the *Roman* jurists deduced this consequence, that whenever the two qualities of principal debtor and surety become united in the same person, which happens when the surety becomes heir to the principal; or *vice versâ*, when the principal becomes heir of the surety, or when a third person becomes heir to both the one and the other; in all these cases the quality of principal destroys that of surety; as a surety is essentially one who is obliged for another, and a man cannot be a surety for himself; whence they concluded that in all these cases, the obligation as surety was extinguished, and that the principal obligation remained only, *l.* 93.(*d*) § 2. *& Fin. de Solut. l.* 5.(*e*) *ff. d. fid. l.* 24.(*f*) *Cod. de Fidej.*

Hence they concluded, in these cases, that if the surety had himself given a surety who acceded to his obligation, the obligation of this last surety was extinguished by the extinction of that of the first,

(*c*) Si pupillus se hereditate abstineat, succurrendum est et fidejussoribus ab eo datis, si ex hereditario contractu convenirentur.

(*d*) Sed (et) si reus heredem fidejussorem scripserit, (non) confunditur obligatio; et quasi generale quid retinendum est ubi ei obligationi, quæ sequelæ locum obtinet, principalis accedit, confusa sit obligatio, quotiens duæ sint principales, altera alteri potius adjicitur ad actionem, quam confusionem parere. Quid ergo si fidejussor reum heredem scripserit? confunditur obligatio secundum Sabini sententiam, licet Proculus dissentiat.

(*e*) Julianus ait, eum, qui heres extitit ei, pro quo intervenerat, liberari ex causa accessionis et solummodo quasi heredem rei teneri.

(*f*) Fidejussoris quidem heres exemplo rei principalis tenetur, sed si idem utrisque succedat, intercessionis obligatione finita, velut principalis tantum debitorus heres conveniri potest.

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which, so far as regarded the second, was a principal obligation, *l.* 38.(a) § *fin. ff. de Solut.*

According to our usages no regard is paid to this subtilty, and a surety of a surety is not discharged on account of the surety, for whom he has engaged, having become heir of the principal debtor, or *vice versâ:* there is the more reason for this opinion, because the *Roman* jurists were divided upon this question, *d. l.* 93. § *fin.* Even if we were to decide according to the *Roman* law, that in this case there would be a confusion of the obligation of the surety, the hypothecations contracted by this surety would continue to subsist; for these are only extinguished by payment and this confusion, which according to the subtilty of law, discharges the surety as such, is not equivalent to a payment, as is decided by the said law 38. § *fin.*

When the surety becomes heir of his co-surety, it is clear that there will be no confusion, and that the two obligations subsist, although united in one and the same person. *L.* 21.(b) § 1. *ff. de Fidej.;* so where one of two principal debtors succeeds to his co-debtor, the two obligations subsist. *L.* 5.(c) *ff. de. tit.*

[384] It must not be concluded from the principle, that it is of the essence of the obligation of sureties to accede to the obligation of a principal debtor, that the obligation of the surety is extinguished, when the principal debtor dies without having left any heirs; the reason for doubting would be that there remains no principal debtor, to whose obligation the surety might appear to accede; the reason for deciding, which may at the same time serve as an answer to this objection, is that the succession of the principal debtor although vacant, represents him, and is in place of his person, according to the rule, *hereditas jacens personæ defuncti vicem sustinet,* and consequently there remains at least, *fictione juris,* a principal debtor to whose obligation that of the sureties is accessary.

Vice versâ, when the creditor, in whose favour the engagement has been entered into, dies and leaves his succession vacant, this succession represents him, and is a fictitious person in whose favour the engagement continues to subsist.

[385] When the engagement has been entered into in favour of the creditor in a certain quality, the engagement subsists in favour of the person succeeding to this quality. For instance, if I have engaged on behalf of the debtor of a succession in favour of the heir, in his quality of heir, and this heir has since restored the succession to a *fidei-commissary* heir, to whom the quality of heir and all

(a) Qui pro te apud Titium fidejusserat, pignus in suam obligationem dedit, post idem te heredem instituit quamvis ex fidejussoria causa non tenearis, nihilominus tamen pignus obligatum manebit; at si idem alium fidejussorum dederit, atque ita heredem te institueret; rectius existimari ait, sublata obligatione ejus, pro quo fidejussum sit, eum quoque, qui fidejusserit, liberari.

(b) Non est novum ut fidejussor duabus obligationibus ejusdem pecuniæ nomine teneatur; nam si in diem acceptus, mox pure accipiatur, ex utraque obligatur; et si fidejussor confidejussori heres extiterit, idem erit.

(c) Reum vero reo succedentem ex duabus causis esse obligatum.

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the hereditary rights have passed, the engagement subsists in favour of the *fidei-commissary* heir. *L.* 21.(*a*) *de Fid.*

SECTION II.

Of the different Kinds of Sureties.

[386] We have in the *French* law three different kinds of sureties; sureties (cautions) purely conventional; legal and judiciary.

Conventional sureties are such as intervene by the agreement of the parties in the different contracts, as in contracts of loan, of sale, of letting, and the like: for instance, if a person borrows money and has a surety who obliges himself to the lender to restore the loan, or buys something, or takes a lease, and has a surety who obliges himself for the payment of the price, or rent; these are conventional sureties, not required either by the law or the judge; and the only cause of their intervening is the agreement of the parties.

Legal sureties are those which the law commands to be given; such as those which a person is bound to give in order to obtain the enjoyment of the property, of which the usufruct has been given or left to him, &c.

Judiciary sureties are those which are ordered by the judge; as when the judge orders that a person shall provisionally receive a sum giving security to refund it, if he is ordered so to do.

SECTION III.

Of the Qualities which Sureties ought to have.

§ I. *Of the Qualities which a Person ought to have, in order to contract a valid Obligation as Surety.*

[387] It is necessary, in the first place, that the surety be capable of contracting and obliging himself as such.

All persons who are incapable of contracting, such as idiots, married women, religieux, cannot be sureties.

[388] By the *Roman* law, women could not oblige themselves as sureties for the affairs of others; the *Senatus consultum Vellei anum* destroyed their obligation.

Justinian, by his *Novel*, 134, *Cap.* 8 permitted women, obliging themselves, to renounce the exception which this *Senatus consultum* gave them.

(*a*) Heres a debitore hereditario fidejussorem accepit, deinde hereditatem ex Trebelliano restituit: fidejussoris obligationem in suo statu manere ait. Idemque in hac causa servandum, quod servaretur, cum heres, contra quem emancipatus filius bonorum possessionem accepit, fidejussorum accepit. Ideoque in utraque specie transeunt actiones.

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This law was formerly followed in *France:* but as the clause of renunciation to the *Senatusconsultum Velleianum*, which was become an expression of course in the acts of the notaries, rendered the effect of it useless, and as nothing but litigation could arise from it, it pleased the king, *Henry* IV., to abrogate entirely this law of the *Senatusconsultum Velleianum* by his edict of 1606, and consequently, it is no longer enforced within the limits of the parliament of *Paris*, where this edict was registered.

In *Normandy* where it has not been registered, the law of *Velleianum* is strictly observed, and the *Novel* which permitted women to renounce it, is not followed.

In this diversity of jurisprudence, the law of the woman's domicil, at the time of her contracting the engagement, is to be followed: for the laws that regulate the obligations of persons, such as the *Velleianum*, are personal statutes which extend to all persons who are subject to them by their domicil, in whatever place their property may be situated, and wherever the contract may be made;—therefore, if a woman, having her domicil in *Normandy*, should become surety for an other person, although the act of engagement was passed at *Paris*, where the *Velleianum* is abrogated, the engagement will be null.

But though a woman was married in *Normandy;* if her husband has transferred his domicil to *Paris*, the woman having ceased by this change of domicil to be subject to the laws of *Normandy*, the engagements which she may afterwards contract will be valid.

The personal obligation, that a *Norman* woman has contracted in being surety, being void, it follows that the hypothecation of her property will be also void, although the property may be situate at *Paris* as the hypothecation cannot subsist without the personal obligation to which it is accessary.

Vice versâ, if a woman resident in *Paris*, should become surety by an act before notaries, her goods, although situate in *Normandy*, will be hypothecated: this hypothecation being a consequence of the obligation, which she has contracted by an authentic act.

Perhaps this objection may be made: It is agreed, it will be said, that the *Velleianum* is a personal statute, in respect of its first part, by which it forbids women to oblige their persons for others; but it has a second part, by which it forbids them also to oblige their goods for the debt of another; and the object of this second part being things and not persons, it is with respect to this second part a real statute, and according to the nature of real statutes, it governs all things situate in the territory where it is in force, to whatever person they may belong; therefore it annuls the obligation which a woman, although not personally subject to its operation, makes of her goods situate in *Normandy* for the debt of another.

My answer is that this argument only proves, that if a *Parisian* woman without being surety, and without obliging herself personally, obliges her property, situate in *Normandy*, for the debt of another, this obligation would be null, because the *Velleianum* observed in *Normandy*, which governs the property there situated, prevents such

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property from being obliged for the debt of another; but when the obligation of the property is only a consequence of the personal obligation contracted by an act before notaries by a *Parisian* woman, the law of *Normandy* cannot invalidate it; for this law having no authority over the personal obligation of a *Parisian* cannot have any over what is only the accessary to it.

The *Velleianum* being only a personal statute in respect of the first part, and a real statute in respect of the second, it follows that a *Norman* woman in case she does not become a surety and does not contract any personal obligation, may oblige the goods which she has situate out of *Normandy*, in a Province where the *Velleianum* is abrogated, for the debt of another; for real statutes only extend to things situate in the immediate territory.

[389] Minors, though emancipated, cannot contract a valid obligation as sureties for the affairs of others: for the emancipation only gives them the power of administering their own goods; and it is evident that an engagement as surety for the affairs of another, makes no part of this administration.

This is the case even with respect to a minor merchant who has engaged as surety for another merchant, respecting a commercial transaction, in which he has no interest; for his quality of merchant does not give him the power of contracting without the hope of restitution, except for the affairs of his business; now, the business of another merchant, in which he has no interest, is not an affair of his commerce. *Basnage*, *Treatise de Hypot. p.* 2. *c.* 2. *Despeisses t.* of *Sureties*, *S. t.*

For the same reason, a minor who, by the dispensation of the prince, exercises a public office, is not thereby deprived of the right to restitution aginst an engagement which he has contracted as surety; for the dispensation of the prince only makes him be regarded as of full age, in respect of what concerns the public charge that he is permitted to enjoy; whence it follows, that those engagements only are contracted without right of restitution, which are relative to the administration of such charge: these principles are certain, notwithstanding a contrary *arrêt* cited by *Despeisses*. *Ibidem.*

There are some extremely favourable cases, in which the engagement of a minor as surety may be valid. For instance, it has been adjudged that a minor cannot obtain restitution against an engagement which he has entered into, for the purpose of liberating his father from prison.

The engagement of a minor made on this account, ought especially to be confirmed, when the father had not an opportunity of relieving himself from prison by the cession of his goods, and when the engagement would not occasion too serious a damage, and derangement to the fortune of the son; but if the father could have recourse to the cession of his goods, the minor son, who has had the facility to enter into a considerable engagement for his father, which was not necessary, ought to be relieved: the age of the minor may also be taken into consideration; a person of an age approaching to majority ought to be relieved against such an engagement with less facility, than one who was of a less advanced age. *Basnage* maintains, that to prevent

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the engagement of a minor on this account being subject to rescission, it is necessary, that at the time of entering into the engagement, he should be at least eighteen years of age, which is the age of complete puberty, and that at which by the *Novel*, 115. *c.* 3. § 13. children were obliged under penalty of disinherison, to ransom their fathers from captivity ; he cites an *arrêt* which annuls an engagement made for this purpose by a minor of sixteen. In all these cases regard ought to be paid to different circumstances: and hence arises the variety of *arrêts* reported by *Brodeau, sur Louet. L. A. ch.* 9.

§ II. *Of the Qualities requisite for a Person to be received as Surety.*

[390] When a debtor is obliged whether by the law, or by the judge, or by mere agreement, to find a surety to his creditor, the surety to be receivable must not only have this first quality, of being able to oblige himself as such; it is also necessary, 1st, That he be solvent, and have sufficient property to answer the obligation to which he accedes.

When the creditor to whom the surety is offered disputes his solvency, the surety ought to establish it, by producing the titles of immoveable property which he possesses; otherwise, he ought to be rejected.

In judging of the solvency of a surety, and the sufficiency of his property to answer for the debt, no regard is commonly paid to moveable propery, as that is easily alienated and is not followed by hypothecation; nevertheless, if the debt is moderate, and the engagement is not to continue long, merchants who have a well established business are admitted, although their fortune consists only in moveables. *Basnage. ibid.*

No regard is paid to property in litigation, or which is situate at too great a distance.

2d. The surety should have a domicil in the place where the engagement is required to be given, that is to say, within the limits of the bailliage, in order that the discussion may not be too difficult. *Fidejussor locuples videtur non tantum ex facultatibus, sed ex conveniendi facilitate. L.* 2. *ff. Qui satis, &c.* In this respect, however, more indulgence is shown to those who are obliged by the law, or by the judge to find sureties, than to those who have submitted to it voluntarily; the latter ought not to be admitted to allege, that they cannot find any within the district, as they have voluntarily submitted to find such sureties, *sibi imputare debent;* the other should be easily submitted, to offer as sureties persons of their own country, when they cannot procure any in the place where the engagement ought to be given. *Basnage, Despeisses.*

3d. For the same reason, if a powerful person is offered as surety, the creditor may refuse him; he may also refuse a person, who by his right of *committimus*, may transfer the suit of the creditor into another jurisdiction, or a soldier who would be in a condition to obtain letters *d'etat. V. Basnage, tr. de Hyp.* 2. *ch.* 2.

There is also another quality, requisite in persons offered as

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judiciary sureties; that they be subject to arrest; wherefore women, ecclesiastics who are in sacred orders, and persons above seventy years of age, may be refused as judiciary sureties; these persons not being subject to impisonment for debt

Concerning the form of the reception of sureties, see the ordinance of 1667, t. 28.

§ III. *Of Cases in which a Debtor is bound to find a new Surety in the place of one before received.*

[391] If the surety had the requisite qualities when received as such, but has ceased to have them, as, if he has become insolvent, will the debtor be obliged to find another? We must make a distinction upon this subject: he will be obliged to do so if it is a legal or judiciary surety, *si calamitas insignis fidejussoribus, vel magna inopia decidet, ex integro satisdandum erit. L.* 10. § 1. *Qui satisd. Cog.*

If it is a conventional surety, we must make a distinction. If I am obliged to find a surety indeterminately, and, in performance of this obligation I have found one, who has since become insolvent, I shall be bound to find another; but if I have contracted at first with a particular surety, or obliged myself to find a particular person as surety, and he afterwards becomes insolvent, I cannot be obliged to find another: because I only promised to procure the surety whom I actually have procured.

[392] It remains to examine the question, Whether the person who is bound to find a surety can be admitted instead thereof, to give sufficient pledges to answer the debt? For the negative, this maxim of law, *aliud pro alio, invito creditore, solvi non potest*, is adduced, which applies even when the thing offered should be better; whence it seems to follow, that the creditor who is entitled to have a surety is not obliged to receive pledges instead: notwithstanding these reasons, there should be some facility in allowing such pledges to be given, when the debtor cannot procure a surety; for the only interest of the creditor is to have security, and there is more security in a pledge than in a personal engagement; because, as the person to whom the surety is to be given, has no other interest but to have security, *cum plus cautionis sit in re quam in persona; et tutius sit pignoris incumbere quam in personam agere:* it would be mere ill-humour to refuse pledges in lieu of a surety, if the things which are offered are such as he may keep without any trouble or danger. *Basnage, id.*

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SECTION IV.

On whose Behalf, in favour of whom, for what Obligation, and in what manner the Obligation of a Surety may be contracted.

§ 1. *On whose Behalf, and in favour of whom.*

[393] A person may engage himself as a surety for any debtor whatever, even for a vacant succession, *cum personæ vicem substineat. l.* 22. *ff. de Fidejuss.* and in favour of any creditor. In like manner a person may engage as surety even for infant children, madmen, or interdicts, in cases where they may contract a valid obligation, without any act of their own: for instance, if I have conducted their affairs with advantage, they are obliged *ex quasi contractu*, to reimburse me what I have expended in doing so, and therefore a person may engage, as surety for the performance of this obligation. It is shown by *Cujas*, that it is in this sense that we are to understand the law 25. *ff. de Fidejuss.* which says, "*si quis pro pupillo sine tutoris auctoritate obligato, prodigove, vel furioso fidejusserit; magis esse ut ei non subveniatur.*"

This explanation removes the contrariety which *Basnage* discovers, between this law and law 6 *ff. de verb. Oblig.* which says, "*is cui bonis interdictum est non potest promittendo obligari, et ideo nec fidejussor pro eo intervenire potest;*" for in the first case the interdict must be supposed to be under a valid obligation; whereas in the latter, he is under no obligation, being incapable of contracting; and the obligation of the surety is void, for want of a principal obligation, *supra. n.* 366. *Gaius* clearly establishes our distinction, in law 70. § 4. *de Fidejuss.* "*Si a furioso,*" says he, "*stipulatus fueris, non posse te fidejussorem accipere, certum est; quod si pro furioso jure obligato, fidejussorem acciperis; teneter fidejussor.*"

It is evident that a person cannot become surety for or to himself. *L.* 21.(*a*) § 2. *ff. d. tit.*

[394] A person can only become surety to the creditor of the person on whose behalf the engagement is made; such an engagement to one, who had only the power of receiving the debt, would not be valid. *l.* 23.(*b*) *ff. d. tit.*

§ II. *For what Obligation.*

[395] A person may engage as surety for any obligation whatever; *fidejussor accipi potest, quoties est aliqua obligatio civilis vel naturalis, cui applicetur. L.* 16. § 3. *ff. d. tit.*

Observe that the natural obligations, for which it is said in this text that sureties may intervene, are those for which the civil law

(*a*) Ne pro se quis fidejubere possit.

(*b*) Si mihi aut Titio decem stipulatus fuerim. Titius fidejussorem accipere non potest: quia solutionis tantum causa adjectus est.

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did not allow any action, such as those which were formed by a simple pact, those contracted by slaves, and those which were not on other accounts reproved by the laws; but a surety cannot effectually intervene for obligations reproved by the laws, although they may be binding in point of conscience, and may in that sense be called natural obligations.

It is upon this ground that the laws decide, that a surety cannot make a valid accession to the obligation of a woman, who obliged herself contrary to the prohibition of the *Senatus consultum Velleianum, l.* 16.(*a*) § 1. *ff. ad Sen. Vell. l.* 14.(*b*) *Cod. d. tit.* for although the woman in point of conscience, is bound to acquit her obligation, yet as the obligation is contracted contrary to the prohibition of the law, it is, in point of law, regarded as null, and consequently cannot serve as a foundation to the obligation of a surety; the law, in annulling the obligation of the woman, annuls everything that depends upon it, and consequently, the engagements of sureties which are accessary to it; this is the meaning of the terms of the law 16. § 1. *quia totam obligationem senatus improbat.*

It appears to me that the same decision should take place, in regard to an engagement which may be entered into for a woman, under the power of her husband, who has contracted an obligation without being authorized; it ought even to be decided *a fortiori;* for the law only annulled, *per exceptionem,* the obligation of a woman who obliged herself contrary to the *Velleianum;* but it may be said, that according to our customary law, the engagement of a woman who has contracted without being authorized, though it may be valid in point of conscience, is void *ipso jure* in point of law, since our customs declare her absolutely incapable of contracting, and obliging herself, *Femme mariée ne se peut obliger, &c. Paris art.* 234: *ne peut aucunement contracter, Orleans, art.* 194. *Domat, tit. Des cautions,* § 1. *n.* 4. is against our opinion, and *Basnage* cites an *arrêt* of the parliament of *Bourgogne,* reported by *Bouvot,* which adjudged the engagement of a surety on behalf of a woman, who had contracted without being authorized, to be valid; but I do not think that the decision of this *arrêt* ought to be followed: The distinction upon which *Basnage* would found this decision whether the principal obligation is void, *ratione rei in obligationem deductæ,* or *ratione personæ,* does not appear to me to be solid; an obligation in whatever way it may be void, whether *ratione rei* or *ratione personæ,* is not a real obligation; and it is of the nature of the engagements of sureties, that they cannot subsist unless there is a principal obligation, *supra. n.* 366. We ought not to compare a woman under the power of her husband to a minor. The obligation of a minor is not void; the right of restitution which the laws allow him against his obligation, supposes an

(*a*) Si ab ea muliere, quæ contra senatusconsultum intercessisset, fidejussorem accepissem: Gaius Cassius respondit, ita demum fidejussori exceptionem dandam, si a muliere rogatus fuisset. Julianus autem recte putat, fidejussori exceptionem dandam, etiamsi mandati actionem adversus mulierum non habeat; qui totam obligationem senatus improbat.

(*b*) Mulierem contra senatusconsulti Velleiani auctoritatem non posse intercedere eademque exceptione fidejussorem ejus uti posse, juris auctoritas probat.

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obligation to exist; there is then an obligation to which the surety may accede; but the obligation of a woman under the power of her husband, who contracts without being authorized, is absolutely null; there is no obligation to which the surety can accede.

But if any one should oblige himself conjointly with a woman not authorised, not as surety for her, but as principal debtor, the nullity of the woman's obligation would not induce the nullity of his. For instance, if a sum of money is borrowed by me, and such a woman with an undertaking in solido for the re-payment, she received the money and expended it, she will not be under any obligation, but I shall be obliged as a borrower and principal debtor; for to render me such, it is not necessary that I should have received the money myself; it is sufficient that it has been delivered to her with my consent.

A surety cannot engage for the performance of obligations, *contra bonos mores*. For instance, if a person employed me to commit a crime and obliged himself to indemnify me from all the consequences of it, and to give me a certain recompense, another could not effectually engage as surety for such an obligation; it is in this sense that it is said *maleficorum fidejussorem accipi non posse;* but after the act is committed, a person may enter into a valid obligation as surety, for the reparation of the injury. *L.* 70.(*a*) § *fin. ff. de Fidejuss.*

[396] A person may be surety even for the obligation of a personal act, which can only be performed by the principal debtor, *l.* 8. § 1.(*b*) *ff. de op. lib.* for this obligation is converted by its non-execution, into an obligation of damages, which the surety may pay and this is sufficient for the validity of the engagement.

[397] The *Roman* law did not permit a woman to receive a surety from her husband, for the restitution of her dower; this distrust with regard to the person to whom she was trusting, and submitting her person, appeared to the emperors repugnant to propriety, *l.* 1 *&* 2. *Cod. de Fid. vel. Mand. dot.* These laws are not observed among us.

[398] A person may become surety not only for a principal obligation, but even for the engagement of a surety: *pro fidejussore fidejussorem accipi posse nequaquam dubium est*, *l.* 8. § 12.

Our certificators of sureties are a kind of sureties for sureties.

[399] Lastly, a person may become surety not only for an obligation already contracted, but for one to be contracted, in

(*a*) Id quod vulgo dictum est maleficiorum fidejussorum accipi non posse, non sic intelligi debet, ut in pœnam furti, is, cui furtum factum est, fidejussorum accipere non possit; nam pœnas ab maleficio solvi, magna ratio suadet; sed ita potius ut qui cum alio, cum quo furtum admisit, in partem, quam ex furto sibi restitui desiderat, fidejussorem obligare non possit; et qui alieno hortatu ad furtum faciendum provectus est ne in furti pœna ab eo, qui hortatus est, fidejussorem accipere possit, in quibus casibus illa ratio impedit fidejussorum obligari; quia scilicet, in nullam rationem adhibetur fidejussor; cum flagitosæ rei societas coita nullam vim habet.

(*b*) Pro liberto jurante fidejubere quemvis posse placet.

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future *adhiberi fidejussor tam futuræ quam præsenti obligationi potest, l.* 6. § *fin. dic. tit.* so that the obligation resulting from this engagement, shall only begin to arise from the time when the principal obligation is contracted; for it is the essence of such obligation, that it cannot subsist without a principal one. According to these principles, I may agree now to become surety to you for 1000*l.* which you propose to lend hereafter to *Peter;* but the obligation resulting from this engagement will only begin to have effect, from the time when you actually lend the money: as long as you have not yet lent it, and the thing is entire, I may change my intention, giving you notice not to lend the money to *Peter*, and that I no longer intend to be surety for him. *Basnage. tr. de Hyp. p.* 2 *ch.* 6.

§ III. *In what manner the engagements of Sureties are contracted.*

[400] According to the *Roman* law, an engagement as surety was only contracted by stipulation; stipulation is not in use amongst us; the engagement may be made by a simple agreement, either by an act before notaries, or under private signature, or even verbally; but if the object is more than a hundred livres, testimonial proof of a verbal agreement is not admitted.

[401] Although such an engagement may be made by letter, or even verbally, nevertheless, great attention must be paid not to regard what a person says or writes as such an engagement, unless the intention of becoming surety be clearly expressed; therefore if I have told you, or written to you by letter, that a man who wished to borrow money from you was solvent, that cannot be taken for an engagement as surety; for in this case I might have had no other intention than to intimate to you what I thought, and not to oblige myself. According to these principles, it was decided by an *arrêt* reported by *Papon* X. 4. 12, that these terms in a letter, *such a person wishes to place his son to board with you, he is a man of probity, and will pay you properly,* did not amount to any obligation: according to the same principle if I accompany a person to a tradesman's to buy some cloth, the tradesman should not conclude from that, that I have become surety for such person.

Although a person has entered into payment for another, even for his son, by paying a part of his debt for him, it is not to be concluded that he intended to become surety for the remainder of the debt. *L.* 4.(*a*) *Cod. ne Uxor pro Marito*, &c.

If it were stated in an obligation, that it was passed in my presence, and that I had subscribed it, it could not be concluded from that, that I had become surety; I should be considered in this case as having signed only as a witness. *L.* 6.(*b*) *Cod de Fidejuss.*

[402] When the debtor is obliged to give security, either by an

(*a*) Cum te ideo ex persona filii tui commemores conveniri, quod pro debitis ejus aliquid intulisse videaris; defensionibus tuis uti apud eum, cujus super ea re notio est, minime prohiberis ut is ad solutionem alieni debiti urgeri te non patiatur.

(*b*) Si pater tuus pro Cornelio cum pecuniam mutuam acceperit, se non obligavit, rustra ex eo quod tabulas obligationis, ut testis signarit, conveniris.

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agreement or by law, the creditor may demand that the surety shall oblige himself by an act before a notary.

[403] It is of no consequence, whether the engagement of a surety be contracted at the same time as the principal obligation, or at a different time, before or after.

It is not necessary that the person, on whose behalf the security is given, should assent to it. *L.* 30.(*a*) *ff. dic. tit.*

SECTION V.

Of the Extent of the Engagement of Sureties.

[404] In order to judge of the extent of the obligation of the surety, great attention must be paid to the terms of the engagement.

When the surety has expressed for what sum, or for what cause he engages, his obligation only extends to the sum, or to the cause which is expressed: for instance, if any one has engaged as surety to me for my tenant, for the payment of his rent, he will not be bound for the other obligations of the lease: such as those which result from the want of repairs, &c.

If a person engages as surety for a principal sum, he is not bound for the interest. *L.* 68.(*b*) § 1. *ff. dic. tit.*

On the contrary, when the terms of the engagement are general and indefinite, the surety is understood to be obliged for all the obligations of the principal debtor, resulting from the contract to which he has acceded; he is supposed to have engaged *in omnem causam.*

For instance, if the engagement, by which a person has become surety in my favour for my tenant, expresses in general terms, that he has become surety for the lease, he will be bound not only for the payment of the rent, but generally for all the obligations of the lease; as for instance, for the want of repairs, for the restitution of money advanced, or of the moveables which were left to the tenant for the cultivation of the estate, *dotes prædiorum.* *L.* 52.(*c*) § 2. *ff. dic. tit.*

A person who engages as surety in these general terms, is also bound not only for the principal due by him, on whose behalf he is obliged, but also for the whole of the interest which may be due. *L.*

(*a*) Fidejubere pro alio potest quisque, etiam is promissor ignoret.

(*b*) Pro Aurelio Romulo conductore vectigalis centum annua Petronius Thallus et alii fidejusserant; bona Romuli fiscus ut obligata sibi occupaverat, et conveniebat, fidejussores tam in sortem, quem in usuras, qui deprecabantur; lecta subscriptione fidejussionis, quoniam in sola centum annua se obligaverant, non in omnem conductionem: decrevit fidejussores in usuras non teneri; sed quidquid ex bonis fuisset redactum, prius in usuras cedere, reliquum in sortem; et ita in id quo defuisset, fidejussores conveniendos, exemplo pignorum a creditore distractorum.

(*c*) Fidejussores a colonis datos, etiam ob pecuniam dotis prœdiorum teneri convenit: cum ea quoque species locationis vinculum ad se trahat, nec mutat confestim, an interjecto tempore fidem suam adstrinxerunt.

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2.(*a*) § 11, & 12. *ff. de Adm. Rer. ad Civit. Pertin. l.* 54.(*b*) *ff. locat.*

He is bound not only for those which are due *ex rei naturâ*, but also for those arising from the delay of the principal debtor; *Paulus respondit, si in omnem causam conductionis, obligavit, eumquoque exemplo coloni, tardius illatarum per moram coloni pensionum præstare debere usuras d. l.* 54.

He ought also to be liable for the expenses incurred against the principal, for these are an accessary of the debt; but he ought only to be liable for them from the time of the suit being notified to him; this has been established to prevent a surety from being ruined in expenses, which are frequently incurred without his knowledge, and which he might avoid by paying, when applied to; therefore, until the suit is notified to him, he ought only to be liable for the first process.

[405] However extensive and general the engagement may be, it only extends to the obligations which arise from the contract itself, for which the surety is obliged, and not to those which might arise from an extrinsic cause.

As for instance, a creditor in our colonies has lent money to some one, and for a greater security, the debtor has given him as a pledge, a negro whom he knew to be a thief, without apprising him of it; the negro robs the creditor to whom he was given in pledge; the creditor may bring an action for damages *contraria pignoratitia actione* against the debtor; but the engagement of the surety does not extend to these damages, which arise from a cause foreign to the loan for which he has engaged; *ea actio fidejussorem onerare non poterit, cum non pro pignore, sed pro pecunia mutua fidem suam obliget. l.* 54. *ff. de Fidejuss.*

For the same reason, a person who becomes surety for an administrator of the public revenues, is only obliged for the restitution of the public money, and not for the penalties to which the administrator may be condemned for malversation. This was decided by the emperor *Severus: fidejussores magistratuum in pœnam vel mulctum non conveniri debere decrevit. L.* 68. *ff. dict. tit.* and in general, the engagement does not extend to the penalties to which the debtor has been condemned, *officio judicis, propter suam contumaciam;* for this

(*a*) Conductore perficiendi operis punito, fidejussor qui pro eo intervenerat idem opus extruendum alii locaverat, nec a secundo redemptore opere perfecto usurarum præstationem heres fidejusseris recusare non debet: cum et prior causa in bonæ fidei contractu in universum fidejussorem obligaverit; and posterior locatio, quia suum periculum agnovit, solidæ præstationi Reipublicæ eum substituerit. Qui fidejusserint pro conductore vectigalis in universam conductionem, in usuras quoque (in) jure conveniuntur, nisi proprie quid in persona eorum obligationis expressum est.

(*b*) Quæro, an fidejussor conductionis, etiam in usuras, non illatarum pensionum nomine teneatur: nec prosint ei constitutiones quibus cavetur, *eos qui pro aliis pecuniam exsolvunt, sortis solummodo damnum agnoscere opportere?* Paulus respondit, si in omnem causam conductionis etiam fidejussor se obligavit, eum quoque, exemplo coloni pensionum præstare debere usuras: usuræ enim in bonæ fidei judicis etsi non tam ex obligatione proficiscantur, quam ex officiis judicis applicentur, tamen cum fidejussor in omnem causam se applicuit, æquum videtur ipsum quoque agnoscere onus usurarum, ac si ita fidejussit. QUANTUM ILLUM CONDEMNARI EX BONA FIDE OPPORTEBIT TANTUM FIDE TUA ESSE JUBES? vel ita INDEMNEM ME PRÆSTATES.

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is a cause extrinsic to the contract; *non debet imputari fidejussoribus, quod ille reus propter suam pœnam præstitit. L.* 73. *ff. dic. tit.*(a)

SECTION VI.

In what Manner the Engagements of Sureties are extinguished, and of the different Exceptions which the Law allows them.

ARTICLE I.

In what manner the Engagements of Sureties are extinguished.

[406] The obligation of a surety is extinguished,

1st. In all the different manners in which all other obligations are extinguished. These will be stated, *infra*, Part III.

2d. It is the nature of such engagements, as well as of all accessary obligations, that the extinction of the principal obligation induces that of the accessary, and the liberation of the sureties, *supra, n.* 377. *& seq.*

3d. The surety is discharged when the creditor has disabled himself, by his own act, from ceding his actions against any of the principal debtors, to whom the surety had an interest to be subrogated, *infra*, Part, III. c. I. Art. VI. § 2.

4th. When the creditor has voluntarily received from the debtor an estate, in a payment of a sum of money which is due to him, the surety is discharged, although the creditor is afterwards evicted from the estate; the reason for doubting is, that the payment in this case is not valid, not having transferred to the person to whom it was made, the property of the thing, *infra*, Part. III. c. I. Art. III. § 3. consequently the principal obligation subsists; whence it seems to follow, that of the sureties should likewise subsist. *Basset* IV. 22. 5. adduces an *arrêt* of his parliament by which it is so decided; notwithstanding these reasons, and though it cannot be denied that in this case the payment is not valid, and that the principal obligation subsists, it was decided by some *arrêts* adduced by *Basnage, Trait. des Hyth. p.* 3. *c. fin.* that the creditor could not in this case proceed against the sureties, if the principal debtor had in the mean time become insolvent; the decision of these *arrêts* is founded upon this principle of equity, that *nemo ex alterius facto prægravari debet;* the surety ought not to suffer prejudice from the arrangement between the creditor and principal debtor; now, if in this case the creditor could proceed against the surety, he would suffer prejudice from the arrangement, by which the creditor has taken this estate in payment;

(a) In *Stratton* v. *Rustall*, 2 *T. R.* 366, the defendant engaged as surety with A., for the payment of an annuity, but A. received the purchase money, the annuity having been set aside for want of being duly registered; it was ruled that the defendant was not answerable in an action for the repetition of the purchase-money.

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the creditor having deprived the surety of the power which he had by paying the creditor whilst the debtor was solvent, of demanding from the debtor a restitution of the sum for which he had undertaken.

If the creditor had merely allowed the debtor a promulgation of the term of payment, and during this term the debtor became insolvent, would the surety be exempted from paying? *Vinnius Q. Illust.* 11. 42. holds the negative: This case is very different from the preceding; in the preceding case, the giving the estate in payment having made it appear till the time of the eviction as if the debt was acquitted, such an arrangement has deprived the surety of every means to provide for his indemnity, even if he perceived that the affairs of the debtor, for whom he became surety, were falling into derangement; for he could not demand that the debtor should discharge him from his engagement, which, as well as the principal debt, appeared to be acquitted; but the mere prolongation of a term, allowed by the creditor to the debtor, does not the debt appear to be acquitted, nor deprive the surety of the means of providing for his indemnity, and of proceeding against the principal debtor, if he perceives that his affairs are beginning to be deranged,(a) *si bona dilapidare cœperit l.* 10. *Cod. Mand.* he cannot then pretend that this prolongation of the term does him any injury, since on the contray he has himself the advantage of it.

The obligation of sureties was extinguished also, according to the principles of the *Roman* law, by the confusion of which we have spoken, *supra, n.* 383; which does not take place in *France.*

The pursuits of the creditor against the principal debtor, do not liberate the surety, who remains always obliged until payment, *L.* 28.(a) *Cod. de Fidejuss.* therefore the creditor may abandon his pursuits against the principal debtor, to sue the surety: but in general he may oppose to him the exception of discussion, of which we now proceed to trust.

(a) Si pro ea contra quam supplicas, fidejussor seu mandator intercessisti: & neque condemnatus es, neque bona [sua] eam dilapidare [postea] cœpisse comprobare possis, ut [tibi] justam metuendi causam præbeat, neque ab initio ita te obligationem suscepisse, ut eam possis & ante solutionem convenire: nulla juris ratione, antiquam satis creditori pro ea feceris, eam ad solutionem urgeri certum est: Fidejussorem vero, seu mandatorem exceptione munitum, et injuria Judicis damnatum, & appellatione contra bonam fidem minime usum, non posse mandati agere, manifestum est.

(a) Generaliter sancimus quemadmodum in mandatoribus statutum est, ut contestatione contra unum ex his facta, alter non liberetur, ita et in fidejussoribus observari. Ivenimus etenim et in fidejussorum cautionibus plerumque ex pacto hujusmodi causæ esse prospectum, et ideo generali lege sancimus nullo modo electione unius ex fidejussoribus, vel ipsius rei alterum liberari, vel ipsum reum fidejussoribus vel uno ex his electo, liberationem mereri, nisi satisfiat creditori; sed manere jus integrum, donec in solidum ei pecuniæ persolvantur; vel alio modo satis ei fiat. Idemque in duobus reis promittendi constituimus ex unius rei electione prejudicium creditori adversus alium non concedentes; sed remanere et ipsi creditori actiones integras, et personales et hypothecarias donec per omnia ei satisfiat. Si enim pactis conventis hoc fieri conceditur, et in usu quotidiano semper hoc versari perspicimus, quare non ipsa legis auctoritate hoc permittatur, ut nec simplicitas suscipientium contractus ex quacunque causa possit jus creditoris mutilare?

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ARTICLE II.

Of the Exception of Discussion.

SECTION I.

Origin of this Right.

[407] According to the law which was in use before the *Novel*, 4.(a) of *Justinian*, the creditor could demand of the surety the payment of what was due to him before applying to the principal debtor: *Jure nostro*, says *Antoninus Caracalla* in law 5. *Cod. de Fidejuss. est potestas, creditori, relicto reo, eligendi fidejussores, nisi inter contrahentes aliud placitum doceatur.* The Emperors *Dioclesian* and *Maximian* decide the same in the law 19.(b) *cod. d. tit. Justinian, Dic. Nov. cap.* 1. allowed to sureties the exception, which is called the exception of discussion, or of order, that is to say, by which they may refer the creditor who demands from them the payment of his debt, to discuss in the first place the goods of the principal debtor. This law of the *Novel* is followed in *France*, but not with respect to all sureties, nor in all cases.

§ II. *What Sureties may oppose the Exception of Discussion.*

[408] Judiciary sureties cannot oppose this exception. *Louet*, *l. f.* 23

(a) Si quis crediderit, & fidejussorum aut mandatorem, aut sponsorem, acceperit, is non primum adversus mandatorem, aut fidejussorum, aut sponsorem accedat, neque negligens, debitorus intercessoribus molestus sit; sed veniat primum ad eum quiaurum accepit, debitumque contraxit: et si quidem inde receperit, ab aliis abstineat; quid enim ei in extraneis erit, a debitore completo? Si vero non valuerit a debitore recipere aut in partem, aut in totum, secundum quod ab eo non potuerit recipere, secundum hoc ad fidejussorum, aut sponsorem, aut mandatorem, veniat; et ab eo quod reliquum est, sumat: et si quidem præsentes ei consistant ambo, et principalis & intercessor, & aut mandator aut sponsor: hoc amni servetur modo. Si vero intercessor aut mandator, aut qui sponsioni se subjecerit, adsit: principalem vero abesse contigerit, acerbum est, creditorum mittere alio, cum possit mox intercessorem, aut mandatorem, aut sponsorem exigere. Sed et hoc quidem curandum est a nobis possibili modo: non enim erat quoddam hic antiquæ legi datum pro sanatione remedium, quamvis Papinianus maximus fuerit, qui hoc primitus introduxit. Probet igitur intercessorem, aut sponsorem, aut mandatorem: & causæ præsidens judex det tempus intercessori (idem est dicere, sponsori et mandatori) volenti principalem deducere, quatenus ille prius sustineat conventionem: & sic ipse in ultimum subsidium servetur; sitque solatio intercessori (aut sponsori & mandatori) in hoc quoque judex: fidejussoribus enim & talibus prodesse sancitum est, ut illo deducto, interim conventione liberentur, qui pro eo in molestia fuerent. Si vero tempus in hoc indultum excesserat (convenit namque etiam tempus definire judicantem) tunc fidejussor, aut mandator aut sponsor exequatur litem, & debitum exigatur contra eum pro quo fidejussit, aut pro quo mandatum scripsit, aut sponsionem suscepit; a creditoribus actionis sibi cessis.

(b) Si alienam reo principaliter constituto obligationem suscepisti, vel fidejussorio, vel mandatorio, vel quocunque alio nomine pro debitore intercessisti, non posse creditorem ugeri, eum, qui mutuam accepit pecuniam (magis) quam te convenire, scire debueras; cum si hoc in initio contractus specialiter non placuit, habeat liberam electionem.

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Sureties for the farmers of the king's revenue, are not at this time received to oppose this exception, although the ordonnance of *Louis* XII. of the year 1513, allowed it to them. The practice now in use was introduced in the time of *M. Le Bret*, who gives this reason for it, that these sureties are supposed to be secretly the partners of the principal farmer, *Le Bret, Plaid.* 42. *in fin.*

Lastly, sureties who by their engagement have renounced this exception cannot oppose it, *unicuique enim licet juri in favorem suum introducto renunciare.*

Is the surety understood to have renounced this exception, when it is said by the engagement, that he obliges himself as principal debtor? Authors seem divided upon this question; some old *arrêts* of the parliament of *Paris* are adduced, which have decided that this was not sufficient, and that the renunciation of this exception ought to be express. *Basnage* in his *Treatise* of *Hypothecations*, says, that the jurisprudence of *Normandy* is, that these terms are sufficient to declare a renunciation of the exception of discussion, and that it should not be supposed that they were employed to signify nothing; this accords with the rules for the interpretation of agreements, *supra. n.* 92.

The renunciation of the exceptions of discussion and division should not be inferred from these terms which may occur at the end of the act of the engagement, *promising, obliging, and renouncing, &c.* This vague and indeterminate term, *renouncing*, without expressing what the parties renounce, can only be regarded as a mere formality, as a mere word of course, *ea quæ sunt styli non operantur.*

This decision holds when even in the engrossment the notary has extended this clause of renouncing, &c., and has therein expressed the renunciation of the exception of discussion and division. *Dumoulin, Tr. Usur. Quæst.* 7. *in fin.* states an *arrêt*, by which it was so decided: the reason is, that the notary cannot, by an addition of his own, increase the obligation of the parties, *infra, p.* 4. *Ch.* I. *Art. III.*

§ III. *In what case is the Creditor Subject to Discussion, and when ought the Exception of Discussion to be opposed.*

[409] The creditor is not subject to discussion in all cases, and in that respect we may establish it as a principle, that the creditor is not subject to a discussion which would be too difficult.

It is for this reason, that the *Novel*, in allowing the sureties the benefit of discussion, excepts the case in which the principal debtor is absent, unless the surety offers to produce him, within a short time allowed by the judge.

This exception is not allowed among us, as *Loyseau* justly remarks; the reasons on which it is founded arose from the difficulty which there was, according to the procedure of the *Romans*, in discussing a person who was absent. In *France* they have no application; the assignations and significations at the domicil, which have according to our procedure, the same effect as if they were made personally,

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render the discussion of the principal debtor, when he is absent, as easy as if he were present.

[410] The creditor is only obliged to discuss the principal debtor before he proceeds further against the surety, when the surety demands it, and opposes the exception of discussion; therefore, although the creditor has not discussed the principal debtor, his demand, and his pursuits, against the surety are regular, until the surety opposes the exception of discussion.

Agreeably to these principles it was decided by the *arrêt* of the first of *September*, 1705, cited by *Bretonnier sur Henrys*, that the judge could not, *ex officio*, ordain this discussion.

This exception of discussion is of the class of dilatory exceptions, since it only tends to put off the action of the creditor against the surety, until after the time of the discussion, and not to exclude it entirely; therefore, according to the rule common to dilatory exceptions, *L.* 12,(a) *Cod. de Except.* it ought to be opposed before the contestation of the cause. After the surety has contested the principal demand against him, without opposing it, he is not receivable, as by defending the substance of the charge he is held to have tacitly renounced these exceptions; *Guy Pape* and the DD. cited by him, *q.* 50. He might, nevertheless, be received in one case; that is, if the goods of which he demands the discussion, had only fallen to the principal debtor, after the contestation of the cause; for the rule, that dilatory exceptions ought to be opposed before the contestation of the cause, can only hold good with regard to the exceptions already existing, and not with regard to those which only arise afterwards, as the defendant cannot be supposed, in contesting the principal demand, to have renounced exceptions which did not exist till afterwards; *Guthieres*, and the DD. cited by him, *Tract. de Contr. Jurat.* xxii. 18.

§ IV. *What Goods is the Creditor obliged to discuss?*

[411] When the discussion is opposed, the creditor, if he has not an executory title against the principal debtor, should assign and obtain sentence of condemnation against him; by virtue of this sentence, or without assignation, by virtue of his executory title when he has one, he ought to proceed *par commandement* against the principal debtor, and seize and levy execution on the moveables in his house.

If there are not any upon which execution can be levied, the officer ought to state this deficiency by a *procès verbal* which operates as a mobiliary discussion.

With regard to the other effects, moveable and immoveable, which the principal debtor may have, the creditor, not being obliged to have any knowledge of them, is not obliged to discuss them, unless they

(a) Si quis advocatus inter exordia litis prætermissam dilatoriam præscriptionem postea voluerit exercere; et ab hujusmodi opitulatione submotus, nihilominus perseveret, atque præposteræ defensioni institerit, unius libræ auri condemnatione multetur.

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are pointed out by the surety. This indication ought to be made at one time; and it should comprise all the property of the debtor, which he wishes the creditor to discuss; he will not be allowed, after the discussion of those which have been indicated, to point out any other. See the *arrêts* of *Lamoignon*, *t.* of Discussions, *art.* 9. the *arrêts* of the twentieth of *January*, 1701, reported by *Bretonnier sur Henrys*, vol. iv. 34.

[412] As the discussion ought not to be too difficult, the creditor cannot be obliged to the discussion of the property of the debtor which is out of the kingdom. *M. de Lamoignon* held, that he could not even be compelled to the discussion of those which were within the jurisdiction of another parliament. *Arrêts* of *Lamoignon*, *ibid.*

Neither is the creditor obliged to the discussion of the property of the debtor, which is in litigation; for he is not obliged to maintain a process, nor to wait the event of it to be paid; this is also a consequence of the above principle, that the discussion ought neither to be too long, nor too difficult.

For the same reason, he is not obliged to discuss the property hypothecated by the principal debtor, when the principal debtor has alienated it, and it is possessed by third persons; but on the contrary, these third persons have a right of referring the creditor to the discussion of the principal debtor, and his sureties.

It is otherwise with respect to those who have succeeded by an universal title to the goods of the principal debtor, such as universal donatories and legatees; and even the public revenue, when it has succeeded to the principal debtor by escheat, or confiscation; these universal successors, *sunt loco heredis;* they are regarded as heir of the principal debtor, and represent him; they ought consequently to be discussed in the same manner as the principal debtor, so far as they are liable for his debts.

When several principal debtors have contracted an obligation in solido, and a third person has engaged as surety for one of them, the question arises, Whether such surety can oblige the creditor to discuss, not only that debtor for whom he is surety, but likewise all the other principal debtors? I think he may. To be convinced of it, it is sufficient to examine what the reason is upon which the exception of discussion is founded; it is not that it is presumed that the surety only intended to obligo himself in default, and in the case of the insolvency of the debtor, for whom he has undertaken; this intention ought to be expressed; when it is not so, it is not to be presumed, and the obligation is pure and simple; if this presumption holds good in ordinary engagements of sureties, the right which the surety would have of referring the creditor to the discussion of the principal debtor, would be a right which he would have in strict justice; the creditor would not have an action against the surety before the insolvency of the principal debtor had been manifested by the discussion; now, every body agrees that the exception of discussion, which the law allows to the surety, is only allowed him as a mere favour, and the demand of the creditor against the surety is well founded,

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although the principal debtor is solvent, and has not been discussed; we must then look for another reason for this exception of discussion: there is no other than this; that it is equitable, that in as far as it can be done, a debt shall be paid rather by those who are the real debtors and who have profited by the contract, than by those who are debtors for others; that it always goes against the grain to pay for another; therefore, it is only a reasonable indulgence that the creditor, when it makes very little difference to him, should spare the surety this mortification, and obtain payment rather from the real debtor than from him. This is the reason that *Quintilian Declam.* 273, assigns for the benefit of discussion; after having said that it is a painful thing for a surety to be obliged to pay for another, *miserabile est;* he concludes that a creditor cannot, without harshness give the surety this mortification, when he can be paid by the real debtor; "*non aliter salvo pudore, ad sponsorem venit creditor, quam si recipere a debitore non possit:*" now it is evident, that these reasons apply to obliging the creditor to the discussion, not only of the particular debtor for whom the surety has engaged, but also of all the other principal co-debtors; then the surety is well founded in demanding the discussion, not only of that debtor for whom he has become surety, but even of the other principal debtors; it may even be said, that the person who becomes surety for one of several debtors in solido, is also in some measure surety for the others; for the obligation of all these debtors being only one obligation, by acceding to the obligation of the one for whom he becomes surety, he accedes to that of all.

§ V. *At whose Expense the Discussion ought to be made.*

[413] The discussion is made at the risk of the surety who demands it; and, as the discussion of immoveable goods cannot be made without much expense, the creditor may demand that the surety should furnish him with money for the purpose. This is a general rule for all the cases in which the exception of discussion is opposed. *Journal des Audiences, V. I. l.* 5. *c.* 25. and is a consequence of our principle.

§ VI. *Whether the Creditor, who has failed to make the Discussion, is responsible for the Insolvency of the Debtor?*

[414] There remains one question more: the creditor to whom the surety has opposed the exception of discussion, has not thought proper to make it soon enough, and has let several years elapse, during which the debtor has become insolvent; can he, by a subsequent discussion, revive his claim against the surety? I think the creditor is well founded, and that the surety cannot oppose any *fin de non-reçevoir*, upon the pretext that he did not proceed soon enough to the discussion of the goods of the principal debtor to which he was referred; the reason is, that the right which allows the sureties the exception of discussion given them by the *Novel*, is confined

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to suspending the pursuits of the creditor against themselves, until he has proceeded against the principal debtor and has discussed his goods; the benefit given by this *Novel* is limited to this, as it is there expressed, *creditor non primum ad fidejussorem aut sponsorem accedat*, but provided the creditor does not proceed against the sureties; before he has proceeded against the principal debtor, and discussed his goods, he cannot be obliged to proceed against him until he thinks proper: the law having fixed the time in which a creditor may exercise his actions, the surety cannot impose a shorter term upon him than that which the law allows: *Nemo invitus agere compellitur, toto tit. Cod. ut nemo invitus, &c. creditor ad petitionem debiti augeri minime potest, l.* 20. *Cod. de Pign.* Then if the principal debtor, to the discussion of whom the creditor has been referred, has afterwards become insolvent, the surety ought not to blame the creditor for not having proceeded against him while he was solvent; the creditor was not obliged to do so, and the surety, if he apprehended the insolvency, might have obviated it by proceeding against the principal debtor himself, as he had a right to do so, as soon as he was assigned, *infra, n.* 450. *Henrys, v.* ii. *b.* iv. is of our opinion, he supports it by an *arrêt* pronounced in a case nearly similar: and testifies that it was in his time the common opinion of the bar of *Paris*. The custom of *Brittany, art.* 192. contains a contrary disposition: I think it ought to be confined to that province: *D'Argentré* upon this article, says, that this disposition, taken from the ancient custom, was retained at the reformation, contrary to his opinion.

We have only treated the question as it relates to ordinary sureties; but if the surety had only engaged to pay what the creditor could not recover from the principal debtor, *in id quod servari non poterit*, the creditor, who had the means for a considerable time of obtaining payment, would not be easily admitted to make a claim against the surety, after the debtor at the end of a considerable time had become insolvent, *L.* 41. *ff. de tit.*(*a*) because this surety, who had only engaged for what the creditor could not recover, might object that the creditor would have had no difficulty in recovering from the principal debtor what was due to him, and that consequently, he does not owe him anything.

(*a*) Si fidejussores in id accepti sunt, qnod a curatore servari non possit, & post impletam legitimam ætatem, tam ab ipso curatore, quam ab heredibus ejus solidum servari potuit, & cessante eo, qui pupillus fuit, solvendo esse desierit; non temere utilem in fidejussores actionem competere.

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ARTICLE III.

Of the Exception of Division.

SECTION I.

Origin of this Right.

[415] When several persons engage as sureties, of a principal debtor of the same debt, they are each of them held to oblige themselves for the whole debt, "*si plures sint fidejussores, quotquot erunt numero, singuli in solidum tenentur.*" *Instit. tit. de Fidej.* § 4.

In this respect, several sureties differ from several principal debtors, each of whom is understood to be only obliged for his own part of what is jointly promised, if the solidity of the obligation is not expressed; the reason of the difference is, that it is of the nature of the engagement of a surety to oblige himself to everything that is due from the principal debtor, and consequently each of those who undertake as sureties for him, is understood to contract this engagement, unless it be expressly declared, that he is only obliged for his own part. This is the reason given by *Vinnins, Select. Quest. lib.* ii. *c.* 40.

The emperor *Adrian* introduced a modification of this solidity, by the exception of division which he allowed to sureties; the surety from which the creditor demands the whole of the debt, obtains by this exception a right to demand, that the creditor shall be bound to divide, and apportion his demand between him and his co-sureties, provided they are solvent, and consequently, that he may be received to pay to the creditor his portion, saving the right of the creditor to proceed for the remainder against the others: this law has been adopted in *France.*

§ II. *Of the persons who can or cannot oppose the Exception of Division.*

[416] There are some sureties who cannot oppose this exception: such as sureties for the king's revenues. See *Le Bret. Plead.* 42. *in fin.*

Judiciary sureties are also excluded from it. According to the opinion of *Basnage*, sureties, who by their engagements have renounced this exception, are not entitled to it.

When it is expressed in the engagement that the sureties are obliged in solido, and as principal debtors, is this clause understood to include a renunciation of the exception of division? Those, who think that such a clause does not include a renunciation of the exception of discussion, would also think that it does not include a renunciation of the exception of division: but the reasons which in-

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duced us to think that it included a renunciation of the exception of discussion and which we stated *supra*, *n.* 408, induce us likewise to think that it imports the renunciation of that of division.

Lastly, the laws refuse the exception of division to sureties, who have begun their defence by *mala fide* denying the truth of their engagement. *Inficiantibus auxilium divisionis non est indulgendum. L.* 10. § 1. *n. ff. de Fidej.*

[417] Not only sureties themselves, but likewise their heirs may take advantage of this exception.

The certificate of a surety, who is *fidejussor fidejussoris*, may also oppose the same exceptions, as the surety whom he has certified, and consequently he may oppose this exception, and demand the division of the debt between himself and his co-sureties of the person whom he has certified.

§ III. *Between what Persons the Debt ought to be divided.*

[418] The surety may demand the division of the action between himself and the other sureties, who are equally principal sureties; but he cannot demand that it should be divided between him and his own certificator, in respect of whom he is himself a principal debtor. *L.* 27.(*a*) § 4. *ff. de Fid.*

[419] It is requisite also, that those with whom the surety demands that the action of the creditor shall be divided, be sureties of the same debtor; therefore, if two debtors in solido of the same debt had each given a surety, the surety of one of them could not demand that the action should be divided between himself and the surety of the other, for though they are sureties of the same debt, as they are not sureties of the same debtor, they are not properly co-sureties. This is the decision of the laws, 43.(*b*) 51.(*c*) *si* § 2. *ff. dic. tit.*

[420] Lastly, it is necessary that the co-sureties, with whom the surety demands that the action should be divided, be solvent; and they are understood to be so, if being otherwise themselves they are so by their certificators; this is decided by law 27. § 2. *si quæratur an solvendo sit principalis fidejussor, etiam vires, sequentis fidejussoris, ei aggregandæ sunt.*

But if my co-surety was solvent at the time of contesting the cause, and consequently the action of the creditor has been divided between him and me, although he afterwards becomes insolvent, the creditor

(*a*) Si fidejussor fuerit principalis, et fidejussor fidejussoris, non poterit desiderare fidejussor ut inter se et eum fidejussorem pro quo fidejussit dividatur obligatio; ille enim loco rei est: nec potest reus desiderare, ut inter se et fidejussorem dividatur obligatio.

(*b*) Si a Titio stipulatus, fidejussorem te acciperim, deinde eandem pecuniam ab alio stipulatus, alium fidejussorem accipiam, confidejussores non erunt, quia diversarum stipulationem fidejussores sunt.

(*c*) Duo rei promittendi separatim fidejussores dederunt, invitus creditor inter omnes fidejussores actiones dividere non cogitur; sed inter eos duntaxat, qui pro singulis intervenerunt, plane si velit actionem suam inter omnes dividere, non erit prohibendus; non magis quam si duos reos pro partibus conveniret.

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can no longer come against me for his part; this is the decision of *Papinian*, *L.* 51.(*a*) § 4 & *L.* 52.(*b*) § 1.

In this respect the exception of division differs from that of discussion; the reason of the difference arises from the different nature of these exceptions; that of discussion is only dilatory, it only defers the action of the creditor against the surety, till after the creditor has discussed the principal debtor; whereas, the exception of division is in the nature of a peremptory exception; when it attaches, it entirely destroys the action of the creditor against the surety who opposed it, for the part of his co-sureties with whom the division is allowed, and therefore the creditor can no longer come upon him, even if the co-sureties should afterwards become insolvent.

Further, even if my co-surety is insolvent before the demand of the creditor, if the creditor has voluntarily divided his action, by demanding from us separately our respective parts, he cannot afterwards demand from me the part of my insolvent co-surety; this is the decision of *Gordianus* in the law, 16.(*c*) *Cod. d. t.*

[421] Provided that my co-surety be solvent, although the term or the condition under which he is obliged, be not yet expired, I may nevertheless demand that the action be divided between him and me provisionally, saving the right of the creditor to come upon me for the part of the co-surety, if at the expiration of the term or condition he should not be solvent. *L.* 27. (*f*) *ff. de Fid.* and *à fortiori*, if the condition under which he is obliged happen to fail.

[422] As the demand of the creditor is only subject to be divided, when the co-sureties are solvent, if there is a dispute between the creditor and the surety, who demands the division, upon the fact whether the sureties are or are not solvent, the surety upon offering to pay his part, may demand that previous to deciding the point as to the residue, the creditor shall at the risk of the surety be bound to discuss the co-sureties. *L.* 10.(*a*) *ff. d. t.*

[423] I cannot oppose the exception of division, if any co-surety resides out of the kingdom; for this exception is a favour

(*a*) Cum inter fidejussores actione divisa quidam post litem contestatam solvendo esse desierunt, ea res ad onus ejus, qui solvendo est, non pertinet; nec auxilio defendetur ætatis actor; non enim deceptus videtur, jure communi usus.

(*b*) Inter fidejussores actione divisa, condemnatus si desierit esse solvendo; fraus vel segnitia tutoribus, qui judicatum persequi potuerunt, damnum dabit; quod si divisam actionem inter eos qui non erant solvendo, constabit; pupilli nomine restitutionis auxilium implorabitur.

(*c*) Liberum fuit antequam lis adversus omnes fidejussores contestaretur, unum eorem eligere creditori, si modo cæteros minus idoneos existimarit. At nunc post litis contestationem petitionem divisam redintegrari juris ratio non patitur.

(*d*) Si plures sint fidejussores, unus pure, alius in diem, vel sub conditionem acceptus, succurri opportet ei, qui pure acceptus est, dum existere conditio potest; scilicet ut interim in virilem conveniatur, sed si cum conditio extitit, non est solvendo, qui sub conditione acceptus, est, restituendam actionem in pure acceptam, Pomponius scribit.

(*e*) Si dubitet creditor, an fidejussores solvendo sint, et unas ab eo electus, paratus sit offerre cautionem, ut suo periculo confidejussores conveniantur in parte; dico audiendum eum esse; ita tamen et si satisdationes offerat, et omnes confidejussores, qui idonei esse dicuntur, præsto sint, nec enim semper facilis est nominis emptio, cum numeratio totius debiti non sit in expeditio.

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which the law only grants in as much as the creditor does not suffer too great inconvenience from it. *Papon*, x. 4. 25.

§ IV. *Whether a division can be required with a Surety whose Contract is not valid, and with a minor Surety?*

[424] When I oblige myself as a surety jointly with a person who was not capable of contracting such an obligation, as were all women by the *Roman* law, I can no more avoid paying the whole of the debt, than if I were the only surety; as the co-surety was not capable of contracting such an engagement, ought not to be regarded. In this case, there is no distinction whether I contract my engagement at the same time with the other person before or after.

It is otherwise according to the *Roman* law; when I have engaged as surety with a minor, who has afterwards obtained restitution against his obligation, I am only liable for the whole of the debt in case I had at first contracted the engagement alone and without reckoning upon the concurrence of the minor, who has only become surety subsequent to me; but if we engaged at the same time, his obtaining a restitution against his obligation ought not to subject me alone to the debt which I had expected him to have paid jointly with me. *L.* 48. *pp.* & § 1 *ff. de Fid.*(a)

Papinian gives this reason for the difference between a woman and a minor; a person who becomes surety jointly with a woman, ought not to rely upon her dividing the obligation with him, since he ought to know that she was incapable of it; *cum ignorare non debuerit mulierem frustrà intercedere;* but it is otherwise with respect to a person who becomes surety with a minor, *propter*, says *Papinian*, *incertum ætatis et restitutionis*, because he might not know that he was a minor, or might hope that he would not contravene his obligation by obtaining restitution against it; it was rather the business of the creditor to inform himself of it when he received the minor as a surety; and it is the creditor, rather than the other surety, who ought to suffer from the restitution. *D. L.* 48. *pp.* § 1.

Whatever respect I have for the decisions of the great *Papinian*, this decision appears to me to be subject to some difficulty; several sureties being, as we have already seen, debtors of the whole debt, the division which was granted by the constitution of *Adrian*, when they are all solvent, is only a favour which ought not to be granted to the prejudice of the creditor. This reason on account of which I am refused the division of the debt with my co-surety, when he has

(a) Si Titius et Seia pro Mævio fidejusserint, subducta muliere, dabimus in solidum adversus Titium actionem, cum scire potuerit, aut ignorare non debuerit, mulierem frustra intercedere. Huic similis et illa quæstio videri potest, ob ætatem si restituatur in integrum unus fidejussor, an alter onus obligationis integrum excipere debeat? Sed ita demum alteri totum irrogandum est, si postea minor intercessit, propter incertum ætatis ac restitutionis. Quod si dolo creditoris inductus sit minor ut fidejubeat, non magis creditori succurrendum erit adversus confidejussorum, quam si facta novatione circumvento minore desideraret in veterem debitorem utilem actionem sibi dari.

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become insolvent, equally extends to refusing it when the co-surety has obtained restitution against his engagement; there is no reason why it should be allowed in the one case rather than in the other; I ought not to have relied more upon the one than upon the other; if I could have foreseen the insolvency, I could still more easily have foreseen the restitution. It cannot be said that the creditor agreed to run this risk in accepting the engagement of a minor; for, not being satisfied with the engagement of the minor alone, and having required that another surety should be joined to him, it is on the contrary a proof, that he looked for a security against the restitution, and that he did not choose to subject himself to this risk.

These reasons appear to me sufficient to decide, without distinction, contrary to the authority of the *Roman* law, that the restitution obtained on account of minority, by my co-surety, ought, in the same manner as his insolvency, to subject me to the whole of the debt.

And further if, even before the minor had instituted a process to invalidate his engagement, I was proceeded against by the creditor, and opposed to him the exception of division, I think it would be equitable that he should not be obliged to divide his action, except with a reservation of coming upon me, provided the minor should obtain restitution.

But if the creditor had consented to the division of his action, without any reservation, there is reason to think that, in this case, he would have taken upon himself the risk of the restitution, and would not have any recourse against me.

§ V. *At what Time the Exception of Division may be opposed.*

[425] A question has been proposed, Whether the exception of division could only be opposed before the contestation of the cause? Some ancient doctors, as *Pierre de Belleperche*, *Cynus*, and others, were of this opinion; but the contrary opinion, which is followed by *Vinnius*, *sel. Quæst.* 11. 40. is more correct; it is founded upon the formal text of law 10. § 1. *Cod. n. tit. Ut. dividatur actio inter eos qui solvendo sunt, ante condemnationem ex ordine solet postulari.* It is sufficient, according to the terms of this law, to demand the division of the action before the sentence, and consequently, it may be done after the contestation of the cause; in fact, this is rather a peremptory than a dilatory exception, as it tends to exclude the action of the creditor entirely against the person who opposes it for the parts of his co-sureties. The text of the institutes, *tit.*(a) *de fid.* § 4, upon which those of the contrary opinion rely, does not prove

(a) Si plures sint fidejussores: quotquot erunt numero, singuli in solidum tenentur. Itaque liberum est creditori à quo velit, solidum petere. Sed ex epistola divi Hadriani compellitur creditor à singulis, qui modo solvendo sunt, litis contestatæ tempore, partes petere. Ideoque si quis ex fidejussoribus eo tempore solvendo non sit, hoc cæteros onerat. Sed si ab uno fidejussore creditor totum consequutus fuerit; hujus solius detrimentum erit, si is, pro quo fidejussit, solvendo non sit; et sibi imputare debet, cum potuerit juvari ex epistola divi Hadriani et desiderare, ut pro parte in se detur actio.

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anything; it says, indeed, that all the parties ought to be solvent, at the time of the contestation of the cause, to warrant a division of the action; but it does not follow from that, that this division may not be demanded afterwards.

The law(a) 10. § 1. *ff. de Fid.* where it is said, that the surety, who has denied his engagement, is not receivable to oppose the exception of division, is not contrary to our decision, for it is the denial made *malâ fide*, which renders him unworthy of this favour, and not receivable in this exception, and not the *litis-contestatio*. The *litis-contestatio* between the creditor and the surety, does not suppose that the surety has denied his engagement; it might have intervened upon any other point; for instance, upon the surety having alleged that the debt was discharged, or that there was some *fin de non reçevoir*, which excluded the creditor from his demand. Some doctors have gone into the opposite extreme, in deciding that the exception of division may be opposed even after the judgment of condemnation, according to the example of the exception *cedendarum actionum*, and of exceptions *Scti Macedoniani & Scti Velleiani*. This opinion is contradicted by the law(b) 10. § 1. *Cod. de Fid.* where it is said, that sureties may propose the exception of division before the judgment of condemnation, *ante condemnationem;* then they cannot do it afterwards. As to the instances adduced of exceptions, which may be opposed even after judgment, the answer is, that there is a great difference between the exception of division and the exception *cedendarum actionum;* the latter does not impugn the sentence, nor the right acquired by the creditor, who has no interest in refusing the cession of his actions to the surety, when he has paid the debt; on the contrary, the exceptions of division, if it were proposed after the judgment of condemnation, attacks this judgment and the right which the creditor acquires by it; since it tends to restrain to a part the right thus acquired by the creditor to the whole: with respect to what is decided concerning the exception of *Scti Macedoniani & Scti Velleiani*, it is a peculiar right founded upon the favour of these exceptions, and upon a kind of public interest, *ad coercendos fœneratores & ad subveniendum sexui muliebri;* this particular right cannot be drawn into consequence, and cannot be extended to the exception of division, nor to other peremptory exceptions. *Vin. ibid.*

When the judgment of condemnation is suspended by an appeal, it may be said, that there is no condemnation until there is a definitive sentence; whence it follows, that the surety may be admitted in a cause of appeal, to oppose the exception of division. This is the opinion of the doctors, cited by *Bruneman, ad L.* 10. *Cod. de Fid.;* it is also the opinion of *Vinnius.*

§ VI. *Of the Effect of the Exception of Division.*

[426] The effect of the exception of division is, that the judge

(a) Vide Supra, n. 416.
(b) Ut autem is, qui cum altero fidejussit, non solus conveniatur sed dividatur actio inter eos, qui solvendo sunt; ante condemnationem ex ordine postulari solet.

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will decree the division of the debt between the sureties who are solvent, and thereby restrict the demand against the surety who opposed the division to his part only.

Before this division of the debt is pronounced by the judge upon the exception of division, or has been voluntarily made by the creditor, by a demand against each of the sureties for his part, *L.* 10.(*a*) *Cod. de Fid.* each of the sureties is really debtor for the whole; therefore if one of them has paid the whole, he cannot have any repetition of the parts of his co-sureties against the creditor,(*b*) *L.* 49. § 1. *ff. de Fid.* for he actually owed the whole, by reason of his not using the exception of division which he might have done, *plenius fidem exsolvit.* But after the division of the debt is pronounced, the debt is so divided, that if one of the sureties, between whom the debt was divided, should become afterwards insolvent, the creditor cannot have recourse against the others for his part. *L.* 51.(*c*) *ff. de Fid.*

There remains a question, Whether if the surety who demands the division of the action of the creditor, between himself and his co-surety, had previously paid a part of the debt, he ought to pay the moiety of what remains due, without bringing into account what he has already paid? *Papinian* decided in the affirmative; *eam enim quantitatem inter eos convenit dividi, quam litis tempore debent.* This decision, although conformable to the rigour of the principle, has not been followed, and it has been deemed more equitable to allow the surety the right of placing what he has already paid, to the account of the part of the debt, for which he is bound, and not to oblige him to pay more than the remainder of his part of the whole debt, and to charge his co-surety with the whole of the residue, *sed humanius est,* says the annotator, *si et alter solvendo sit, per exceptionem ei, qui solvit, succurri, d. L.* 51.(*d*) § 1.

(*a*) Vide supra, n. 420.

(*b*) Ex duobus fidejussoris heredibus, si per errorem alter solidum exsolvat, quidam putant habers eum condictionem, et ideo manere obligatum coheredem; cessante quoque condictione, durare obligationem coheredis probant; propterea quod creditor, qui, dum se putat obligatum, partem ei, qui totum debit, exsolverit; nullam habebit condictionem. Qui si duo fidejussores accepti fuerint (verbi gratiâ) in viginti, & alter ex duobus heredibus alterius fidejussoris totum creditori exsolverit; habebit quidem decem, quæ ipso jure non debuit condictionem; an autem et alia quinque (millia) repetere possit, si fidejussor alter solvendo est, videndum est; ab initio enim heres fidejussoris, sive heredes, ut ipse fidejussor, audiendi sunt; ut scilicet pro parte singuli, fidejussores qui sunt, conveniantur.

(*c*) Vide supra, n. 420.

(*d*) Fidejussor, qui partem pecuniæ, suo nomine nil rei promittendi, solvit, quominus residui divisone facta portionis judicium accipiat, recusare non det; eam enim quantitatem inter eos, qui solvendo sunt, dividi convenit, quam litis tempore singuli debent; sed humanius est, si et alter solvendo sit, litis contestationis tempore, per exceptionem ei, qui solvit, succurri.

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ARTICLE IV.

Of the Cession of Actions, or Subrogation which the Creditor is obliged to make to the Surety who pays him.

[427] A third benefit which the laws allow to the surety, is, that when he pays, he may require of the creditor to subrogate him to all his rights, actions, and hypothecations, as well against the principal debtor for whom he has become surety, as against all the other persons who are liable for the debt: this results from the law 17.(a) *ff. de Fid. L.* 21.(b) *Cod. dic. tit.* and from a number of other texts. See *infra*, Part III. c. 1. Art. VI. § 2.

SECTION VII.

Of the rights which the Surety has against the Principal Debtor, and against his Co-sureties.

[428] The surety has recourse against the principal debtor after he has paid: we shall treat of this recourse in the first article; there are some cases, in which the surety has an action against the principal debtor, before he has paid; of which we shall speak in the second article; in the third we shall treat of the particular question. Whether the surety of an annuity (*rente constituée*) may, at the end of a certain time, oblige the debtor to redeem the annuity? we shall, in the fourth, treat of the right of the surety against his co-sureties.

ARTICLE I.

Of the Recourse of the Surety, against the principal Debtor after having paid.

§ I. *What Action the Surety has against the principal Debtor after having paid.*

[429] After the surety has paid, if he has procured a subrogation to the rights and actions of the creditor, he may exercise them against the debtor, as the creditor himself might have

(a) Fidejussoribus succurri solet, ut stipulatorcompellatur ei, qui solidum solvere paratus est, vendere cæterorum nomina,

(b) Sicut eligendi fidejussor creditor habet potestatem, ita intercessorem postulantem cedi sibi hypothecæ, sive pignoris obligata jure non prius ad solutionem (nisi mandata super hac re fuerit persecutio) convenit urgeri.

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done: if he has neglected to acquire this subrogation, he has still in his own right an action against the principal debtor, to reimburse him what he has paid.

This is the *actio mandati contraria*, if the engagement was made with the knowledge and approbation of the principal debtor: for the consent includes a tacit contract of mandate, according to the rule of law, *semper qui non prohibet pro se intervenire mandare creditur*, *L.* 60. *ff. de R. J.* If the surety is obliged for the principal debtor without his knowledge, he cannot have an action *mandati* against him, but an action *contraria negotiorum gestorem*, which was the same effect.

§ II. *What Payment gives a Right to these Actions.*

[430] It is of no importance, whether the surety has paid in consequence of a sentence of condemnation, or voluntarily and without a sentence; for in both cases *utiliter debitoris negotium gessit*, he has procured for him the liberation from his debt, and consequently he ought to reimburse him what it has cost to do so.

It matters not whether the payment was an actual payment or a compensation, or a novation; in all these cases, he has a right to demand that the principal debtor shall reimburse him, either the sum which he has paid, what he has allowed in compensation, or what he has obliged himself to pay, in order to extinguish the obligation of the principal debtor.

[431] But if the creditor, with regard to the surety, has made a gratuitous remission of the debt, the surety cannot demand any thing from the principal debtor who has profitted by this remittance, because it has cost the surety nothing; but if the remission was made for the recompense of services, which the surety has rendered the creditor, the surety may require to be reimbursed the amount of the debt by the principal debtor; for in this case it has cost the surety the recompense which he might have expected for his services. This is the disposition of the law 12.(*a*) *ff. Mandat.* and it is conformable to this maxim of the law 20. § 4. *ff. d. tit. sciendum est non plus fidejussorem consequi debere mandati judicio, quam quod solverit.*

§ III. *Three Conditions, upon which the Payment made by the Surety entitled him to an Action against the principal Debtor.*

[432] That the payment made by the surety should entitle him to these actions, it is requisite,

1st, That the surety shall not by his own fault have neglected any *fin de non reçevoir*, which he might have opposed to the creditor.

(*a*) Si vero non remunerandi causa, sed principaliter donando, fidejussori remisit actionem mandati eum non acturum.

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2d, That the payment shall have been valid, and liberated the principal debtor.

3d, That the principal debtor shall not have paid a second time through the fault of his surety.

First Condition.

[433] For the surety who has paid, to have recourse against the principal debtor, it is necessary that he should not by his fault have neglected to oppose *fins de non reçevoir*, if he had any, against the creditor; for instance, if any person has become my surety, for the price of an estate which I have purchased, and knowing that I have been evicted from the estate he notwithstanding pays the price to the person who sold it to me, he will have no recourse against me, because he could have avoided paying, by opposing to the seller the exception arising from the eviction which I have suffered; but if the surety were ignorant of the eviction, and consequently of the exception resulting from it, I shall be obliged to restore him what he has paid, saving any recourse against the seller; for he is in no fault for not having opposed an exception of which he was ignorant; and it is I, on the contrary, who am to blame for not having apprised him of it. The law 29.(*a*) *ff. Mandat.* establishes these principles in a similar instance; but it is only an ignorance of fact, which can in this case, excuse the surety; it would be otherwise with respect to an ignorance of the law; for instance, I have purchased a house which I supposed to subsist, but which had been entirely consumed by fire previous to the contract, and you are my surety for the price, although you should, after knowing of the accident, pay the price which from an error you believe to be due, you ought not to have any recourse against me. *d. l.*(*b*) 29. § 1.

[434] If the surety had a *fin de non reçevoir*, to oppose to the creditor, but it was such that he could not in honour oppose; in this case the surety is not indeed obliged to oppose it; but he ought not to deprive the debtor of the power of opposing it, therefore he ought to allow himself to be assigned for the payment, and have the principal debtor made a party to the cause, in order that he may oppose it, if he thinks proper; in default of doing so, the surety will have no recourse against the principal debtor for what he has paid, as appears by the law 48.(*c*) *ff. Mand. & l.* 10.(*d*) § 12. *dic. tit.*

(*a*) Si fidejussor conventus, cum ignoraret non fuisse debitori numeratam pecuniam solverit ex causa fidejussionis, an mandati judicio persequi possit, id, quod solverit, quæritur? Et si quidem sciens prætermiserit exceptionem vel doli, vel non numeratæ pecuniæ, videtur dolo versari; dissoluta enim negligentia prope dolum est. Ubi vergo ignoravit, nihil quod ei imputetur. Pari ratione et si aliqua exceptio debitori competebat, pacti forte conventi, vel cujus alterius rei, et ignarus hanc exceptionem non excerbit, dici oportet, ei mandati actionem competere; potuit enim atque debuit reus promittendi certiorare fidejussorem suum, ne forte ignarus solvat indebitum.

(*b*) Non mali tractabitur, si, cum ignoraret fidejussor inutiliter se obligatum solverit, an mandati actionem habeat? Et siquidem factum ignoravit, recipi ignorantia ejus potest: si vero, jus, aliud dici debet.

(*c*) Quint. Mucius Scævola ait, si quis sub usuris creditam pecuniam, fidejussis-

(*d*) See next page.

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We may adduce as an instance of these *fins de non reçevoir*, which cannot be honourably opposed, that which may be opposed to the creditor of an annuity, who has suffered more than five years to accumulate.

[435] The rule which we have established, that the surety, in order to have recourse against the principal debtor, ought not to have omitted by his default to oppose the *fins de non reçevoir*, which he had to oppose, is subject to an exception, when these *fins de non reçevoir* were personal to himself and could not be opposed by the principal debtor: for instance, if the surety who has engaged for me till a certain time, pay for me after this term; though he might have avoided paying, he will, notwithstanding, have recourse against me, because he has paid for me what I could not have avoided paying, which is the decision of the law 29. § 6. *ff. Mand quamquam enim jam liberatus solverit fidem implevit et debitorem liberavit.* That he has procured my liberation at his expense, is a sufficient reason why I should indemnify him; otherwise I should be enriched at his expense, which equity does not allow, *neminem, æquum est, cum alterius detrimento locupletari.*

Second Condition.

[436] For the surety to have recourse against the principal debtor, it is necessary that the payment which he has made be valid: therefore if a person owes me a horse indeterminately, and another engages as surety on his behalf, and this surety afterwards furnishes me with one, which turns out not to belong to him, the surety will not have recourse against the principal debtor; because the payment which he has made is not valid, and has not procured the liberation of the principal.

[437] This rule is subject to an exception, in the case where the surety being sued by the creditor should pay, through ignorance, what the principal debtor had already paid; for although the payment made by the surety, being the payment of a sum which had ceased being due, be not a valid payment, nevertheless the surety will still have recourse, *actione mandati contraria*, against the principal debtor, to be reimbursed the sum which he has paid, upon subrogating the principal debtor to his action of repetition against the creditor: this is the decision of the law 29.(*a*) § 2. *ff. Mandat.* The

set, et reus in judicio cenventus cum recusare vellet sub usuris creditam esse pecuniam, (&) fidejussor solvendo usuras potestatum recusandi eas reo sustulisset, eam pecuniam a reo non petiturum: sed si reus fidejussori, denunciâsset, *ut recuserat* sob usuris debitam esse, nec is propter suam existimationem recusare voluisset, quod ita solverit, a reo petiturum. Hoc bene censuit Sævola: parum enim fideliter facit fidejussor in superiore casu, quod potestatem eximere reo videtur, suo jure uti: cæterum in posteriore casu non oportet esse noxiæ fidejussori, si ipse pepercisset pudori suo.

(*d*) Generaliter Julianus ait, si fidejussor ex sua persona omiserit exceptionem, qua reus uti non petuit, si quidem minus honestam, habere eum mandati actionem: quod si eam, qua reus uti potuit, si sciens id fecit, non habiturum mandati actionem; si modo habuit facultatum rei conveniendi, desiderandique, ut ipse susciperet potius judicium vel suo vel procuratorio nomine.

(*a*) Si cum debitor solvisset, ignarus fidejussor solverit, puto eum mandati habere

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principal debtor is in default, for not having informed the surety that he had paid.

This decision does not apply when the surety has engaged as such for the principal debtor, without his knowledge: for in this case the principal is in no fault, for not having notified the payment to the surety, of whose undertaking he had not any knowledge.

Third Condition.

[438] A third case, in which the surety who has paid has no recourse against the principal debtor is, when the principal, in consequence of default of the surety in not apprising him of the payment, has paid the creditor a second time; but at least he may demand, that the principal should cede to him his action, to reclaim from the creditor what he received when it was no longer due to him: this is the decision of the law 29.(*a*) § 3. *ff. Mand.*

According to our usages, these cessions are supplied by operation of law, and it would be allowed to the surety to recover from the creditor *rectâ viâ*, what he has received a second time.

§ IV. *When the Surety who has paid, may exercise his Right of Recourse.*

[439] Regularly the surety who has paid, may have recourse against the principal debtor as soon as he has paid for him: but if he had paid before the expiration of the term, he can only have recourse against him after; for the surety ought not by his act to deprive the principal of the term, which he has a right to enjoy. *L.* 22.(*b*) § 1. *L.* 15.(*c*) *ff. Mandat.*

§ V. *When there are several principal Debtors, has the Surety an Action against each of them, and for how much?*

[440] The surety may by the *actio contraria mandati*, or by that of *contraria negotiorum gestorum*, proceed against each of

actionem: ignoscendum est enim ei, si non divinavit debitorem solvisse: debitor enim debuit notum facere fidejussori, jam se solvisse, ne forte creditor obrepat, et ignorantiam ejus circumveniat, et excutiat ei summam in quam fidejussit.

(*a*) Hoc idem tractari et in fidejussore potest: si cum solvisset, non certioravit reum, sic deinde reus solvit, quod solvere eum non oportebat, et credo, si cum possit (eum) certiorare, non fecit, oportere mandati agentem fidejussorem repelli: dolo enim proximum est, si post solutionem non nunciaverit debitori, cedere autem reus indebiti actionem fidejussori debet, ne duplum creditor consequatur.

(*b*) Si cum in diem deberem, mandatu meo in diem fidejusseris et ante diem solveris an statim habeas mandati actionem? Et quidam putant, præsentem quidem esse mandati actionem, sed tanti minorem, quanti mea intersit, superveniente die solutum fuisse: sed melius est dici, interim, nec hujus summæ mandati agi posse: quando nonnullum adhuc commodum meum sit, ut nec hoc ante diem solvam.

(*c*) Si mandassem tibi, *ut fundum emeres*, postea scripsissem *ne emeres*, tu antequam scias me vetuisse, emisses, mandati tibi obligatus ero: ne damno adficiatur is, qui suscepit mandatum.

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the principal debtors, for whom he has become surety for the repetition of the whole of what he has paid; for each of these principal debtors, being debtor of the whole of the debt in favour of the creditor, the surety by becoming such for each of them, and by paying, has liberated each of them from the whole, and consequently he has a right to conclude in solido against each of them, for the reimbursement of the whole of what he has paid, with interest from the day of his demand.

If the payment made by the surety included interest and arrears, such interest and arrears become principal, with regard to the surety who paid them, as against the debtor for whom he has paid, and the surety is entitled to interest upon the whole from the time of his demand; *arrêt* reported by *Papon* X. 4. 20.

Observe, however, that for the sum paid for interest and arrears, the surety who has obtained a subrogation to the rights of the creditor, will rank against the debtor in the same degree, as the creditor would have done if he had not been paid; but as he is only entitled to the interest upon that sum, in his own right, he will only be entitled to rank for such interest from the day of the act of indemnity passed before a notary, if the debtor has passed any; or if he has not, from the day of the condemnation which he has obtained against him.

The surety who demands from one of the principal debtors, for whom he had become surety, the whole of the debt which he has discharged, ought to cede to this debtor, not only his actions in his own right against the other debtors, but also the actions of the creditor to whom he may have procured a subrogation; if the surety in paying the creditor has neglected to acquire this subrogation, and has thereby incapacitated himself from assigning it to the principal debtor from whom he demands the whole of the debt, this debtor may, on offering to reimburse him for his own part, obtain *per oppositam actionem cedendarum actionum*, a liberation from the demand of the surety for the parts of the other principal debtors.

This takes place if the principal debtor had in fact an interest in having the subrogation; but if he has no such interest, if the subrogation to the actions, which the surety has in his own right, will give the same advantage against his co-debtors, as the subrogation to the actions of the creditor, he has no reason to complain that the surety did not, when he paid, require the subrogation of the actions of the creditor, and cannot procure it for him; and consequently he cannot avail himself of the exception of *cedendarum actionum*.

This will appear by the following example: several debtors have borrowed in solido, a sum of money from a creditor under my engagement as surety, and each of them has given me an act of indemnity before a notary, of the same date as the obligation which they have contracted in favour of the creditor. I have acquitted the debt without requiring a subrogation to the actions of the creditor, and demand a reimbursement of the whole from one of the debtors; it is evident that he cannot complain of my not being able to procure for him the subrogation of the actions of the creditor: for the action which I

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have against the co-debtors, and to which I am ready to subrogate him, having the benefit of a hypothecation, of the same date as the hypothecation of the creditor, the subrogation which I offer him, procures him the same advantages against the co-debtors, as the subrogation of the rights of the creditor could have done, and consequently he has no ground to complain that I have not procured it for him.

When the surety has only become such for one of the debtors in solido and not for the others, after he has discharged the debt, he has only a direct action against the one for whom he has become surety; and can only have the rights and actions against the others which would have belonged to his principal, in case of payment by him: see *supra, n.* 281.

ARTICLE II.

In what Cases the Surety has an Action against the Principal Debtor, even before he has paid.

[441] The law 10 *Cod. Mand.* only recognises three cases in which a surety may, before discharging the debt, proceed for an indemnity against the debtor for whom he has engaged. *Si pro ea contra quam supplicas, fidejussor seu mandator intercessisti, et neque condemnatus es neque bona [sua] eam dilapidare [postea] cæpisse comprobare possis, [ut] tibi justam metuendi causam præbeat; neque ab initio ita te obligationem suscepisse, ut eam possis et ante solutionem convenire; nulla juris ratione, antequam satis creditori pro ea feceris, eam ad solutionem urgeri certum est. d. l.* 10.

The first case stated in this law is, when the surety has been condemned to pay, *si neque condemnatus es.*

According to our *French* practice, the surety is not obliged to wait until there has been a judgment against him; as soon as he is proceeded against by the creditor, he may assign the principal debtor requiring him to discharge it, and he ought even to do so; in default of which the debtor is not liable to acquit the surety from the expenses incurred between the first demand and the assignment.

The debtor, whom the surety has not assigned, may even sometimes defend himself from the discharge of what the surety has been condemned to pay, when he had good grounds of defence against the demand of the creditor which he might have opposed, if he had been assigned. *Sup. n.* 432.

The second case is, when the principal debtor is in failing circumstances, *neque postea bona sua dilapidare comprobare possis;* in this case the surety, although he has not yet paid, may attach the goods of the principal debtor, to answer the engagement which he has entered into for him.

The third case expressed by this law is, when the debtor has obliged himself to procure the surety, the discharge of his engagement within a certain time; in this case, after the time has elapsed, the

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surety may proceed against the principal debtor requiring him to produce such discharge, or to advance money sufficient to pay the creditor.

The law says, *neque ab initio;* because, according to the principles of the *Roman* law, this agreement ought to have intervened at the time of the mandate: agreements which were not entered into till after the contract, being merely simple pacts, which, according to the subtilty of the *Roman* law, could not produce an action. As these subtilties have not been received into our law, it is of no consequence whether the agreement intervened at the time of the contract or afterwards.

The law(a) 38. *ff.* § 1. *Mand.* has a fourth case, *si diu reus in solutione cessabit:* according to this law, although there is no clause, by which the principal debtor has undertaken to discharge the surety from his engagement within a certain time, nevertheless, the surety whose obligation continues a considerable time, may assign the principal debtor to procure his discharge from it. The law, by the term *diu*, imports a considerable time, but it does not determine it precisely: *Bartholus* fixes it at two or three years; several suppose it to extend ten years from the date of the engagement; nothing can be decided in this respect, it must depend upon circumstances, and be left to the discretion of the judge. *Gl. ad. d. l.* 38.(b)

[442] When the obligation to which a surety has acceded, must from its nature exist a certain time, how long it may be, the surety cannot within that time demand that the principal debtor should discharge him from it; for as he knew, or ought to know the nature of the obligation to which he acceded, he should have reckoned upon continuing obliged during the whole of that time; therefore, the person who has become surety of a tutor for the due execution of his trust, cannot require the tutor, as long as such trust lasts, to discharge him from his engagement, because the obligation which results from the administration of his trust, cannot end before such trust; for the same reason, a person who has become surety for a husband in favour of his wife for the restitution of her portion, cannot, whilst the marriage continues, compel the surety to discharge him from his engagement, because the obligation from its nature is not to be acquitted until after the dissolution of the marriage.

(a) Fidejussor an et prius, quam solvat, agere possit, et liberetur? Nec tamen semper expectandum est, ut solvat, aut judicio accepto condemnetur, si DIU in solutione reus cessabit, aut certe bona sua dissipabit; præsertim si domi pecuniam fidejussor non habebit, qua numerata creditori, mandati actione conveniat.

(b) Lucius Titius Publio Mævio filio naturali domum communem permisset, non donationis causa, creditori filii obligare; postea Mævio defuncto, relicta pupilla, tutores ejus judicem adversus Titium acceperunt, et Titius de mutuis petitionibus: [Quæro, an domus pars, quam Titius] obligandam filio suo accommodavit, arbitratu judicis liberari debeat? Marcellus respondit, an et quando debeat liberari, ex persona debitaris, itemque ex eo, quod inter contrahentes actum esset, ac tempore, quo res, de qua quæreretur, obligata fuisset, judicem æstimaturum: est enim earum specierum judicialis quætio, per quam res expediatur.

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ARTICLE III.

Whether the Surety of an Annuity may oblige the Debtor to redeem it.

[443] Either there is an agreement between the surety and principal debtor, that the debtor should be obliged to discharge him from his engagement at the end of a certain term agreed upon between the parties, or there is not. The first case is less difficult, but still it is not without some apparent difficulty; it may be said, that such agreement is not valid, as it is contrary to the nature of these annuities, the essence of which is that the debtor should never be forced to redeem them; it is added, that if such agreements were permitted, they would open a door to the frauds of creditors, who, in order to secure a means of compelling the debtor of annuities to redeem them, would only purchase such annuity under the secret condition of having a surety in confidence with themselves, with whom the debtor should agree to redeem the annuity at the end of a certain term; and by this means creditors would indirectly procure usurious annuities without alienating their principal; notwithstanding these reasons, *Dumoulin, Tr. de Usur. Q.* 30. decides that this agreement is valid, that the surety may at the end of a certain term agreed upon, demand from the principal debtor a discharge from his engagement, and that to this effect he should be bound to redeem the annuity; if it be opposed to this argument that it is of the essence of such annuities, that the debtor cannot be forced to redeem them, the answer is, that it is true, that it is of the essence of these annuities that the debtor cannot be compelled by the creditor to redeem them, but there is nothing to prevent his being compelled by a third person; the essence of the contract is the entire alienation of the principal, which the creditor has paid for the purchase of the annuity; but it is sufficient to constitute this alienation, if the creditor does not retain the power of demanding the principal, and can never oblige the debtor to pay it; it is of no consequence that the debtor may be obliged to do so by a third person. With respect to the other objection founded upon fraud, the answer is, that fraud is not to be presumed; it is true, that the allowance of this agreement may sometimes give an opportunity of the kind of fraud above mentioned, which is an inconvenience; but if under the pretext of this inconvenience, such an agreement, which in itself is perfectly lawful, was prohibited, there would result a still greater, which is, that persons frequently would not find money of which they have need for their business, for want of finding sureties, who would contract an obligation, the duration of which was not limited.

The second case, in which there has been no agreement between the principal debtor and the surety, is attended with a greater difficulty. *Dumoulin, ibid.*, decides that in this case, the surety cannot, at the end of any time, however long it be, oblige the principal debtor to redeem the annuity, in order to discharge him from his en-

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gagement; for, the nature of an annuity being that it shall always continue until the debtor chooses to redeem it, the surety, who knew the nature of the debt, and has agreed to engage for it, has submitted to contract an obligation of as long a duration as the annuity. "*Non obstat* (says he) *quod diu vel perpetuo remanebit in obligatione, quia hoc est de natura obligationis, et sic prævisum fuit; et tamen fidejussit, et se perpetuo obligavit; simplex autem promissio indemnitatis intelligitur secundum naturam obligationis principalis.*" Thus, he adds, a person who becomes surety for another, who has taken a lease of an estate for the term of twenty-four years, contracts an engagement of a like duration; so the sureties for the administration of a tutelage, so the sureties of a husband for the restitution of the portion, contract engagements which are to last as long as the lease, or the marriage, and which cannot be discharged any sooner; this is the jurisprudence of the parliament of *Toulouse*, as attested by *Catellan*, *t.* 2. *l.* 5. ch. 21. Notwithstanding these reasons, it is holden at the Palace,(*a*) that even in the case in which there has been no agreement between the principal debtor and the surety, if the surety is obliged at the request of the debtor, and his engagement has lasted for a considerable time, as for ten years at least, he is entitled to demand that the principal debtor shall liberate him from his engagement, by redeeming the annuity within a certain time, to be limited by the judge; the reason is, that if the nature of an annuity is to last for ever, unless it be redeemed, it is also the nature of it to be always redeemable; if the surety of a person taking a farm for a long term of years, or of a tutor, or of a husband, for the restitution of the portion, can only be discharged after the expiration of the lease, or after the expiration of the tutelage, or of the marriage, it is because it is of the nature of these obligations not to terminate sooner; therefore, a person who becomes surety for these kinds of obligations, should have computed upon the obligation of his engagements not finishing sooner; but as annuities may be redeemed, and frequently are so, the person who has become surety for the debtor, may have reckoned that the debtor would redeem it, and that his engagement would not be perpetual; therefore, when it continues too long, he ought to be received in his demand against the debtor to discharge him by redeeming the annuity; this is the opinion of *Basnage*, *p.* 2. *ch.* 5. *Lacombe* cites an *arrêt*, by which it was so decided.

The right which results from the agreement, that the debtor shall be bound to redeem the annuity within a certain term agreed upon, in discharge of the surety, is not exercised rigorously; therefore, if the surety, after the expiration of the term agreed upon, proceeds against the debtor, to enforce such redemption, the judge ought to give the debtor a prolongation of the term to satisfy the obligation, when the debtor has not the means of doing it immediately. *Dumoulin*, *ibid.*

(*a*) The Palace is the place where the courts of justice at *Paris* are holden, and the expression of *Palace* is used figuratively in *France*, as familiarly as that of *Westminster Hall* is in *England*, the distinction referred to is a striking instance of the difference of jurisprudence in different provinces of the same country, respecting subjects which have nothing local in their nature.

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[444] When the surety, who has agreed with the principal debtor to redeem the annuity within a certain term, has become the sole heir of the creditor of the annuity, or when, being heir for a part, the annuity has fallen by the division to his share, it is plain that he can no longer require the principal debtor to redeem the annuity; for in this case, his engagement as surety is extinct, since he cannot be a surety to himself; he cannot, therefore, require that the debtor should discharge him from an engagement which no longer subsists, and from which he is liberated.

What if the annuity, for which he was a surety to the deceased, has fallen to the share of his co-heir, or the division has not yet been made? *Dumoulin, ibid.*, decides, that if the surety had only become heir of the creditor for a small portion, he may in either case exercise his right of obliging the debtor to procure him the discharge from his engagement, by redeeming the annuity; but that if he is become heir of the creditor for a considerable portion, as for a half or a third, he cannot demand such discharge; his reason is, that the surety, by becoming heir for a considerable portion of the annuity, has also become creditor for a considerable portion of this annuity; and that this quality which he has, or which he had before the division, is repugnant to the right of obliging the debtor to redeem it, in order to procure his discharge from the engagement; as he could have procured such discharge in a much more easy manner; by taking the annuity as a part of his own share.

I cannot perfectly agree with this decision of *Dumoulin*, especially where the whole of the annuity has been allotted to the co-heir of the surety; for, according to the principles of our jurisprudence, respecting the retrospective effects of partitions, which were not so well established in the time of *Dumoulin* as they are at present, an heir is not supposed to have succeeded to the deceased, except as to the part of the effects which has fallen to his share by the division; the surety then is not considered as having ever succeeded to the annuity which has entirely fallen to the share of his co-heir: he has not, therefore, nor is he supposed to have ever had, the quality of creditor of any portion of such annuity; there is nothing then to prevent him exercising the right which he has on his own account of requiring the debtor to redeem it, in order to procure him a discharge from his engagement: with regard to what *Dumoulin* adds, that it was easy for the surety to procure a discharge from his engagement in another manner, by taking the annuity as his own share, I answer, 1st, that this does not wholly depend upon the surety; his co-heir might have preferred this annuity to the other property, and have required the division to be made by lot; 2dly, even if it had depended upon the surety, I do not see that he would be obliged, for the sake of the debtor, to take this annuity, rather than the other effects of the succession which he might have preferred, and which would have been more advantageous to him.

Before partition, the case is more difficult: I should think that in this case, upon the demand of the surety against the debtor for the redemption of the annuity; it would be proper to wait till after the

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division; for it is not just that the surety should proceed against the debtor for the redemption, when he may have the expectation of being discharged from his engagement, by the partition upon which it may happen that the annuity may fall to his share.

What if the division had been made, and the annuity had remained in common between the surety and his co-heir? I agree that in this case, the quality of the surety, as heir of the creditor for a portion of the annuity, deprives him of the right to require from the debtor, that he shall re-purchase the whole of the annuity; but why may he not require the debtor to redeem the part belonging to his co-heir, declaring his consent that his own share shall continue? I see nothing to prevent his doing so.

The surety ceases to have the right of requiring the principal debtor to redeem the annuity, not only when he becomes proprietor and creditor of the annuity by the title of heir, but likewise when he becomes so by any title whatever, either universal or particular, as if he becomes universal donatary, or legatee of the creditor, or particular donatary, or legatee of the annuity: for he has only the right of demanding the redemption of it, in order to be discharged from his engagement; and he has no longer any occasion to be discharged from it, when he has become proprietor of the annuity by whatever title, since his engagement is then extinct, as no person can be a surety to himself.

If the right of property in the annuity, which the surety has acquired, were only a qualified right, as if he were donatary, or legatee of it, subject to a substitution, the obligation of his engagement would in this case be rather suspended than extinguished, it would revive when his right to the property had ceased, as by the vesting of the substitution: therefore the surety could not indeed require the redemption of the annuity, during the time that he was proprietor of it; but his right of property having ceased, and his obligation having consequently revived in favour of the person, to whom the property of the annuity has passed, the right of requiring the principal debtor to redeem the annuity, in order to discharge him from his engagement ought likewise to revive, and the time within which he has obliged himself to redeem the annuity, and which had discontinued running, whilst the surety was proprietor of the annuity, will recommence.

But if the surety, who has become proprietor of the annuity, ceases to be so by a voluntary alienation, and not by the dissolution of his right, the obligation of his engagement does not revive, neither consequently does the right of requiring the debtor to redeem the annuity. *Dumoulin, ibid. Quæst.* 29. *n.* 246.

If the surety has himself redeemed the annuity, although he has obtained a subrogation to the rights of the creditor, and is thereby enabled to revive it against the debtor, he may, nevertheless, waving the use of this subrogation, recover from the principal debtor, the sum which he paid for such redemption: the reason is that a mandatory may recover *actione mendati contrarir* every thing that the business in which he was engaged has obliged him to advance, *quidquid ex causa mandati ipsi inculpabilitea abest*, (*v. Pand. Justin, tit. Mand.* No 53.

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& seq.) Now, it is the engagement which the surety has entered into, at the request of the debtor, which obliges him to make the redemption, in order to put an end to his obligation; then this sum *ipsi abest ex causa mandati, et quidem inculpabiliter;* for the principal debtor cannot disapprove of this expense, since he was under an obligation to redeem the annuity, in order to put an end to the obligation of his mandatory, the surety; then the principal debtor cannot defend himself from the repetition of this sum. *Dumoulin, ibid. Quæst.* 30.

Whether the surety has given money for the redemption of the annuity, or whether by the consent of the creditor he has given him something equivalent to the sum at which it was subject to redemption, he has a right of repetition for this sum against the principal debtor; for, in both cases, *ipsi ex causa mandati abest.*

Observe, that if the surety had made the redemption of the annuity before the expiration of the time in which the principal debtor was obliged to redeem it, he could not have the repetition of it till after the expiration of such time: even after this time, the claim should not be exercised rigorously: and when it is made, the judge ought to allow the debtor a reasonable time to procure the money.

We have observed that the surety who has redeemed the annuity, could only have a repetition against the principal debtor, by waving the subrogation under which he is entitled to continue the annuity, Why? It should seem on the contrary, that the surety having two qualities, *duarum personarum vices sustinens*, he might exercise at once the different rights resulting from these two qualities, that of demanding the continuation of the annuity, as subrogated to the rights of the creditor, and that which he has of his own right to demand, that the principal debtor should reedem the annuity. It would seem that he might do so the rather, as the principal debtor would not appear to suffer any prejudice from it: since if the surety had not made the redemption, he might have required the debtor to do so; and notwithstanding this demand of the surety, he would be bound to pay the arrears to the creditor until he had redeemed. Now, it is a matter of indifference to him, whether he pays them to the surety who is subrogated to the rights of the creditor, or to the creditor himself. Notwithstanding these reasons *Dumoulin, Quæst.* 29. decides that the surety who wishes to use the right of subrogation, and to make use of the annuity, cannot also exercise his right of requiring a redemption, because these two rights are absolutely incompatible; the creditor of an annuity, and the person who chooses to exercise his rights is in that quality obliged to allow to the debtor the free enjoyment of the principle advanced as long as he pleases, which is directly repugnant to the right of demanding the principal.

Dumoulin, Quæst. 30. *n.* 249. gives this temperament to his decision, that if the surety, through an ignorance of law, and not knowing that he could not combine the right of reviving the annuity for his own benefit, with that of demanding the money paid for the redemption of it, had received one or two years' arrears, he would not loose the power of demanding the money paid, in case he offered to

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renounce the subrogation, and to apply the arrears which he had received to the account of the principal.

ARTICLE IV.

Of the action of the Surety against his Co-sureties.

[445] A surety may exercise the actions of the creditor against his co-sureties, when he has had the precaution to obtain a subrogation; but according to the *Roman* laws, he had not in his own right any action against them, even when he had paid the debt: this is the decision of the law 39.(*a*) *ff. de Fid. L.* 11.(*b*) *Cod. d. Tit.*

The principle which governed the *Roman* jurists, was that when several persons become sureties for one and the same debtor, they do not contract any obligation with one another; each of them has no other intention than that of obliging the principal debtor; each of them only proposes to undertake the concern of the principal debtor, and not that of his co-sureties, *solius rei principalis negotium gerit, non alter alterius negotium gerit.*

This principle is true, and it may even be said that it is self-evident; but the consequence which the *Roman* jurists deduced from it, that a surety can never, without a subrogation of actions, have recourse against his co-sureties, even if he has paid the whole of the debt for which they were all liable, is too harsh, and which we have not admitted into our jurisprudence; on the contrary our *French* jurists have held that the surety, who has paid the whole debt, may, without a subrogation of actions, recover a proportion of it from each of his co-sureties. This is the opinion of *Argentré* upon article 213, of the ancient custom of *Brittany;* and was retained in the reformation of the custom, *art.* 194.

This action does not arise from the engagement which the surety has entered into with his co-sureties, as by such engagement they have not contracted any obligation between themselves, according to the principle above established; it arises only in consequence of the payment which he has made of the whole debt, and from the principle of equity, which does not permit that his co-sureties, who were equally liable to this debt, should profit at his expense, by the payment which he has made. This action is not the real *actio negotiorum gestorum;* the surety who has paid the whole of the debt, having paid what he really owed, and being discharged from his own obligation, *proprium negotium gessit, magis quam confidejussorum;*

(*a*) Ut fidejussor adversus confidejussorem suum agat, danda actio non est: ideoque si ex duobus fidejussoribus ejusdem quantitatis, cum alter electus a creditore totum exsolvet, nec ei cessæ sint actiones; alter nec a creditore, nec a confidejussore, convenietur.

(*b*) Cum alter ex fidejussoribus in solidum debito satisfaciat, actio ei, adversus eum, qui una fidejussit, non competit: potuisti sane, cum fisco solveres, desiderare, ut jus pignoris, quod fiscus habuit, in te transferetur: et si hoc ita factum est, cessis actionibus uti poteris. Quod ei in privatis debitis observandum est.

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but it is the *actio utilis negotiorum gestorum, quæ non ex subtili juris ratione, sed ex sola utilitatis et æquitatis ratione, proficiscitur;* because, although the surety *ipsius inspecto proposito*, in paying the whole of the debt, was rather transacting his own affair than that of his co-sureties; nevertheless, *effectu inspecto*, having acted for the benefit of his co-sureties; at the same time that he was acting for himself, and having by his payment liberated them from a debt for which they were liable in common with him, it is equitable that they should bear their part of the payment, from which they have derived as much advantage as he has.

There are some authors who go much further, and maintain that in case of the insolvency of the principal debtor, a surety has an action in his own right against his co-sureties, not only after he has paid the creditor, to recover from their proportions, but that even before payment, each of the sureties has an action against his co-sureties, to contribute with him to the payment of the sum which they all owe to the creditor: they have even gone so far as to say, that in case of the insolvency of the debtor of an annuity, a surety, who has been such for a considerable time, has an action against his co-sureties, to make them contribute with him to the redemption: v. *Basnage, Tr. of Hypoth. p.* 2. *ch.* 6, who cites some *arrêts* of the Parliament of *Normandy*, which have so decided, and *Brodeau sur Louet lettres f. ch.* 27, who also cites an *arrêt* of the Parliament of *Paris;* but I think these authors have gone too far. I agree, that when one of the sureties is sued by the creditor, he has an action against his co-sureties, to furnish their part of the sum demanded; and that in default of so doing, they may each be bound for their part of the expenses incurred, after the suit has been notified to them. This action arises from the suit which has been instituted against the surety, and from the principle of equity which does not permit that of several, who are equally bound for one and the same debt, one should be proceeded against rather than the others. Upon this reason of equity is founded the benefit of division among sureties; the same reason of equity which allows a surety, when sued for payment, to require the creditor to divide his action between the sureties, should likewise enable him to require his co-sureties to contribute their respective parts to the payment of the debt; and in default of doing so, to pay the expenses incurred, after the notification of the suit to them. He ought to be admitted to make this demand, even where he has renounced the benefit of division, or is excluded from it by the nature of the debt for which he is surety, as this renunciation and exclusion are only in favour of the creditor.

But, as long as the surety is not sued for payment, he has not any action against his co-sureties to oblige them to contribute with him to the payment of the debt: for the co-sureties, according to the principle above established, not having intended to contract any obligation between themselves, the action that any one of them has against the others, when a suit is instituted against him, is only founded upon a reason of equity, arising from the suit itself; whence it follows, that until he is proceeded against, he has no such right of

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action; *à fortiori*, the surety of an annuity cannot, in case of the insolvency of the principal debtor, have an action against his co-sureties, to oblige them to contribute with him to the redemption of the annuity; for from what obligation could such a right arise? Where the surety has redeemed it, he can no longer demand anything else from his co-sureties than the continuation of the annuity, according to the amount of their respective parts: for, as the action which he has against them can only arise from the rule of equity, which does not permit that his co-sureties should have the benefit of this redemption at his expense, and as the co-sureties do not derive any other profit from such redemption than a liberation from the payment of the annuity, they can only be bound to continue the payment of their respective shares of an annuity equal to that from which they have been liberated by the redemption.

A surety who has paid a debt, or redeemed an annuity, has an action against the other principal sureties, and in case of the insolvency of any of them, against the certificators of such insolvent surety, who in this respect, represent him; but he has not an action against his own certificators, who have only engaged for himself; for the certificator is the surety of the surety, *est fidejussor fidejussoris;* the surety, in respect to his own certificator, is as a principal debtor, *est instar rei principalis.*

For the same reason, when the certificator has paid, he has recourse for the whole against the surety whom he has certified.

SECTION VIII.

Of several other kinds of accessory Obligations.

ARTICLE I.

Of the obligations of those who are called in law mandatores pecuniæ credendæ.

[446] A person by whose order I have lent money to another, is called in law, *mandator pecuniæ credendæ, toto. tit. ff. de Fid. & Mand.*

When you give me an order to lend *Peter* a certain sum of money, this order, which I undertake to execute, includes a contract of mandate between you and me.

According to the principles of a contract of mandate, the mandatory, being obliged, *actione mandati directâ*, to account to the person giving the mandate for every thing which he has *ex causâ mandati*, I am by this contract obliged, in quality of mandatory, *actione mandati directâ*, to cede to you the action which arises from the loan that I have made, in performance of your mandate, and which constantly I have *ex causâ mandati.*

On your part, you are obliged to me, *actione mandati contrariâ*, to reimburse and indemnify me for the sum which I have expended in the execution of your mandate, in lending it by your order to

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Peter. By this obligation, you become answerable for *Peter* to the amount of the debt which he has contracted, by my lending him the money.

In this respect, the *mandatores pecuniæ credendæ* agree with sureties.

They must not, however, be confounded; and there is an essential difference between them.

The obligation of a surety is nothing else than a simple accessary to the obligation of the principal debtor; the cause of which is, that of the obligation of the principal debtor. For instance, if you become surety to me for a sum of money which I have lent to *Peter*, or which *Peter* owes me for the price of any thing which I have sold him, the engagement which you contract is only a simple accession to the obligation of *Peter:* the cause of your obligation, as well as of that of *Peter*, to which you have acceded, is the sale or loan which I have made to him.

It is otherwise with regard to the obligation which you contract in my favour, by giving me an order to lend a certain sum to *Peter:* it is true, that it has the same object as that which *Peter* contracts by the loan. The sum of money which you ought to restore to me, *actione mandati contraria*, is not a like sum, but is precisely the same as that which is due to me by *Peter*, and I am not allowed to receive it both from you and from him, according to the rule *bona fides non patitur ut idem bis exigatur*, *L.* 57. *ff. de R. J.* But although your obligation has the same object with that of *Peter*, although the sum which is due to me by you and by him be one and the same thing, of which *Peter* is the more principal debtor, as he is the debtor of it for himself absolutely, and you are so rather for him than for yourself; nevertheless, your obligation is not a pure accession to that of *Peter*, it has a different cause from that of the obligation of *Peter*, viz. the contract of a mandate between you and me. This is not a simple accessary contract, such as the engagement of a surety, it is a principal contract; your obligation arising from this contract, which is an obligation *ex causa mandati*, has then a different cause from that of *Peter*, who is my debtor *ex causa mutui*.

From these principles, respecting the difference of the obligation of a *mandator pecuniæ credendæ*, from that of a mere surety, arises this distinction; that when a mere surety has discharged the debt for which he has engaged, without requiring, at the time of payment, a cession of the actions of the creditor against the principal debtor, he extinguishes by this payment the debt of the principal debtor, and cannot afterwards have a cession of the actions of the creditor against the principal debtor, which have been extinguished by the payment: for, as his debt is not only a debt of the same thing, but precisely the same debt with that of the principal, to which he has only acceded, the payment which he has made has extinguished the debt of the principal.

On the contrary, where a *mandator pecuniæ credendæ*, by whose order I have lent a certain sum to a third person, as to *Peter*, reimburses me this sum, although he has not required the cession of my

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actions against *Peter*, the payment which he makes to me only extinguishes his own obligation, and that of *Peter* is not extinguished; I remain, notwithstanding this payment a creditor of *Peter ex causa mutui;* not indeed so that I could recover for my own benefit the sum due to me, *ex causa mutui*, and which has already been paid *ex causa mandati*, but I remain creditor so far as to be enabled to cede my rights, as such, to the person giving me the mandate, when he shall require it, which I am obliged to do *obligatione mandati directa*, as we learn from the law 28 *ff. Mand. Papianus ait, mandatorem debitoris solventem ipso. jure reum non liberare; propter enim mandatum suum solvit, et suo nomine; ideoque mandatori actiones putat adversus reum cedi debere;* although he may not have required it at the time of payment.

With the exception of these distinctions, the *mandatores pecuniæ credendæ* nearly agree with sureties. Although the obligation *actione contraria mandati*, which they contract in favour of the person who has lent another a sum of money by their order, is not altogether like the engagement of a surety, a pure accession to the obligation of the debtor, to whom the money was lent, and has *propriam causam*, it is nevertheless, as well as that of sureties, accessary to the obligation of such debtor, and depends upon it; it is only valid inasmuch the obligation of such debtor is so. These mandatories, as well as sureties, may oppose all the exceptions *in rem*, which could be opposed by the debtor, to whom the thing has been lent by their order,(*a*) *L.* 32. *ff. de Fidej.* The extinction of the obligation of this debtor, in whatever manner it be made, whether by the real payment of the sum lent, or by compensation, novation, release, confusion,(*b*) extinguishes the obligation of these mandatories, in the same manner as that of sureties. The *Novel* 4. § 1. gives to them as well as to sureties, the exception of discussion. Every thing which we have said of this exception, *supra sect.* 6. *Art.* II. is equally applicable to mandatories as to sureties.

To render a person *mandator pecuniæ credendæ*, and consequently responsible to me for the sum of money which I have lent to a third person, by his order, it is necessary that what he says or writes to me should include a real mandate, by which he has charged me to lend this sum, with an intention of indemnifying me for it: but if, having told you in a conversation that I had a thousand crowns to invest in the purchase of an annuity, you should tell me that *Peter* wanted to take up money upon an annuity, and that you thought it would be a beneficial employment of what I have to put out, these terms do not express a mandate, but a mere advice, which does not subject you to any obligation in my favour, according to the rule of law, *consilii non fraudulenti nulla est obligatio, nisi dolus intervenerit. L.* 47. *ff. de Rig. Juv.*(*c*) .

(*a*) Ex persona rei, et quidem invitio reo, exceptio et cætera rei commoda fidejussori, *cœterisque accessionibus competere potest.*

(*b*) For the nature of these different modes of discharging obligations, see the several chapters in Part III. where they are particularly considered.

(*c*) The terms of the law are, *Consilii non fraudulenti nulla obligatio est, cœterum si*

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Observe, however, that the rule by which an act of counsel or advice does not oblige the person giving it, only applies if it has been given *bona fide;* therefore, the law adds, *nisi dolus intervenerit;* for if *dolus & calliditas intercessit, de dolo actio competit.* The two propositions included in this rule, manifestly accord with the dictates of natural justice, and have been, by recent determinations, incorporated into the *English* law: but though the subject underwent very considerable discussion, the direct authority of the civil law was not adverted to, either by the bar or the bench; although such an authority, in respect to a subject not depending upon local institution, would certainly be very far from immaterial.

In the first case upon the subject (*Pasley* v. *Freemen*, 3 *T. R.* 51.) the allegation that the defendants did encourage the plaintiff to sell certain goods to a third person upon credit, and for that purpose did falsely, fraudulently, and deceitfully, assert, that he was a person of credit, knowing at the same time that he was not so, was holden sufficient to maintain the action. A very correct view of the subject was taken by Mr. Justice *Buller*, who fully investigated the nature and principles of the action, stating, that the foundation of the action was fraud and deceit in the defendant, and damage to the plaintiff. Fraud without damage, or damage without fraud, gives no cause of action; but where these two concur, an action lies. This opinion was supported by Lord *Kenyon* and Mr. Justice *Ashurst;* but opposed by Mr. Justice *Grose*. In the subsequent case of *Haycraft* and *Creasy*, 2 *East.* 92. the defendant said to the plaintiff, "I can positively assert, *of my own knowledge*, that you may safely credit Miss *Robertson*." There was every reason to believe that this declaration was made with sincerity, and with a perfect assurance of the truth of it, the defendant speaking from a knowledge of circumstances, which had given him that persuasion. Lord *Kenyon* held that he was answerable, as for a fraud, inasmuch as he did not say, that he believed the matter to be true, or that he had reason so to believe, but, in asserting positively, his knowledge of that which he did not know. But the other judges were of an opposite opinion: and Mr. Justice *Lawrence* said, that in order to support the action, the representation must be made *malo animo.*—This last opinion has certainly received the general assent of the profession, and is founded upon the true principles of legal reasoning. An actual intention to deceive was the ground and foundation of the action in the first case; the absence of such intention was consistently held to be an adequate defence in the second.

In the discussion of the last case, some apprehension was expressed of trenching upon the statute of frauds; but that opinion seems to be wholly without foundation. The object of the statute is merely to require that certain engagements and promises shall be evidenced by writing. A promise and engagement is the only subject of the provision; but in the case in question, no promise or engagement is intended; the responsibility arises wholly *ex delicto:* the intention to engage in the one case is manifestly supposed, the absence of such intention is equally manifest on the other; and it would be by no means wise to extend the operations of the statute further than its regular limits, from the apprehension that courts would be unable to distinguish between a defective engagement with intention to contract, and a false representation with the intention to deceive. The objection to the plaintiff's right of recovery, in the case of *Haycraft* and *Creasy*, would be equally strong, so far as the true principles of the decision are concerned, whether the representation had been written or verbal.

Lord *Eldon*, in *Evans* v. *Bicknell*, 6 *Ves.* 186, was of opinion, that the doctrine laid down in *Pasley* v. *Freeman*, was in practice and experience the most dangerous. He seemed to think the action was allowed upon the principle of its following the practice of courts of equity: but considered it as outstripping equity, inasmuch as in those courts relief could not be had against the answer of the defendant, upon the oath of a single witness. This argument, however, seems to be entirely beside the question: for the court of King's Bench, in deciding upon *Pasley* and *Freeman*, did not at all profess to act in imitation of anything previously established in courts of equity; but wholly founded their opinions upon legal reasons and legal authorities. If the abstract proposition is established, that a man who wilfully injures another, by a deceitful and fraudulent representation of the circumstances of a third, shall be answerable for the damage which ensues, few lawyers will entertain the opinion that for ascertaining the fact of a fraudulent intention, and the amount of the consequent damages; the trial by jury is a less judicions and constitutional proceeding than the course of investigation which would be adopted for similar purposes in a court of equity. The reason assigned for the contrary doctrine would apply with equal force to the investigation of any other question of fact.

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you had any knowledge of the bad situation of *Peter's* affairs, when you advised me to give him my money, this would be a fraud on your part, which would oblige you, at least in point of conscience, to indemnify me for the loss I might sustain, by the insolvency of *Peter*.

You might even be liable for it in point of law, if I had any manifest proof of your knowledge of it. In like manner we must not regard as a *mandatum pecuniæ credendæ*, that which is no more than a simple recommendation. For instance if you said to me, *Peter*, our common friend, has occasion for the loan of ten pistoles, I recommend it to yon to lend it to him; this would not be a mandate, but a simple recommendation, which is not obligatory. *L.* 12.(*a*) § 12. *ff. Mandat.*

It would be otherwise, were I to say to you, *Peter* wants ten pistoles, I cannot at present conveniently lend them to him, I will thank you to lend him this sum for me: this is a real mandate.

For a *mandator pecuniæ credendæ* to be obliged to indemnify you for the money which you have lent to a third person by his order, it is necessary that you should confine yourself exactly to the terms of his mandate *diligenter enim fines mandati custodiendi sunt. L.* 5. *ff. Mand.* If then you have done any thing else than what is imported by my mandate; as if when I have given you an order to lend a certain sum of money to *Peter*, you have given it to him in purchase of an annuity, or *vice versâ*, if having ordered you to give it to him in the purchase of an annuity, you have given it to him by way of loan, I shall not be obliged in your favour; for the grant of an annuity and a loan being different things, it cannot be said that you have done what was directed by my mandate.

If I had given you an order to lend *Peter* a certain sum of money, as 500*l.* and you have lent him 600*l.* the sum of 500*l.* directed by my mandate, being contained in that of 600*l.* which you have lent him, according to this rule of law *in eo quod plus sit, semper inest et minus, L.* 110. *ff. de R. J.* you in fact have done what was directed by my mandate, and, consequently, I am obliged in your favour, *obligatione mandati contraria*, to the extent of the 500*l.* With regard to the other 100*l.* as you have exceeded the limits of my mandate, I am not obliged for the excess.

Vice versâ, if you have lent *Peter* a less sum than that directed by my mandate, I am obliged, for you have executed my mandate in part.

If you did what was in truth directed by my mandate, but have not done it in the manner therein prescribed, I shall not be obliged.

For instance, if the order which I have given you to lend *Peter* a certain sum, directed that you should take from him goods by way of pledge for this sum, and you have not done so; or, if it directed that you should make him pass an obligation before a notary, in order to acquire an hypothecation upon his goods, and you have been satis-

(*a*) Cum quidam talem epistolam scripsisset amico suo, *rogo te, commendatum habeas Septilium Crescentem amicum meum*, non obligatibur mandato: quia commendandi magis hominis quam mandandi causa scripta est.

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fied with his note; in all these and other similar cases, I shall not be obliged, because you have not followed my order. *L.* 7.(*a*) *Cod. de Fidej.*

Contra vice versâ, if I had ordered you to lend *Peter* a certain sum upon his note, without requiring from him either pledges or securities, and you have made him pass an obligation before a notary, for the sum which you have lent him by my order, and have even demanded some pledge or security from him I cannot complain that you have not confined yourself to the terms of my mandate, for you have done what was included in it, by lending *Peter* the sum I ordered, and as what you have done further cannot be otherwise than advantageous to me, I cannot object to it.

If I had ordered you to lend *Peter* a certain sum, purely and simply, and in lending it to him, you have allowed him a certain term for payment, or given him the power of paying anything else in its place, I shall not be under any obligation to you; for by giving him this alternative, you have exceeded the limits of my mandate; I am not obliged, *obligatione mandati contrariâ* to reimburse you the sum which I ordered you to lend him, except inasmuch as you would be in a condition, after I had done so, to cede to me actions against *Peter*, by which I might have been able, as soon as I pleased to demand this sum from him, without his being entitled to give me anything else in its place; and as you have disabled yourself by the term and power which you have granted to *Peter*, from ceding these actions to me, I am not answerable for the loan.

On the contrary, if I had ordered you to lend *Peter* a certain sum, and to allow him a certain term, and you have lent it to him without allowing him such term, I shall be liable to you for this sum, but so that you could not demand it from me, till after the expiration of the term imported by my mandate. I cannot complain of your not allowing the term directed by my mandate to *Peter;* for provided you cannot demand the sum from me till after the expiration of the term, it is indifferent to me whether you might be entitled to demand it sooner from the principal debtor, or not.

ARTICLE II.

Of the Obligations of Employers.

Upon this subject, we shall see, 1st, in what sense employers accede to the obligations arising from the contracts of their managers, and in what respect they differ from other accessary debtors; 2d, in what cases this obligation of employers takes place; 3d, the effect of this obligation; 4th, the accessary obligations of employers, arising from the faults of their managers.(*b*)

(*a*) Si creditor conditioni mandato adscriptæ, cum pecuniam mutuam daret, in accipiendis hypothecis non paruit; frustra te judicio mandati convenit quando non aliter te, obligasse intelligaris, quam si pignoribus contraheretur obligatio.

(*b*) The nature and extent of the responsibility in the cases referred to in this arti-

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§ I. *In what Sense Employers accede to the Obligations of the Contracts of their Managers, and in what Respect they differ from other accessary Debtors.*

[447] When a merchant has appointed any person to the management of a commercial concern, or to the command of a vessel, and in like manner when the farmers of the king's revenue have appointed any person to the direction of a particular department; in all the engagements which such manager contracts for the affairs committed to his charge, although he contracts in his own name, he obliges himself as principal, and at the same time he obliges his emplower as an accessary debtor; for the employer is considered as having consented beforehand, by the commission which he has given, to all the engagements which the manager might contract for the business to which he was appointed, and to have rendered himself answerable for them.

These employers are a kind of accessary debtors different from sureties, and from *mandatores pecuniæ credendæ;* the latter in acceding to the obligation of the principal debtor, commonly oblige themselves for the business of the principal debtor, and not for their own; on the contrary, the employer, in acceding to the contracts of his managers, does so on account of his own business rather than of theirs. If the manager is, with respect to the engagements which he contracts, regarded as the principal debtor, and the employer as accessary, it is only because the contract was made with the manager; the employer, who frequently knows nothing of the contract, accedes to it, by a general accession which he is supposed to have previously made to the contracts of his manager; but the contracts which the manager makes are rather the business of the employer than his own; and whereas sureties and *mandatores pecuniæ credendæ*, are to be

cle is almost the same in the law of *England* as in the law of *France* and *Rome;* and the distinction in the different systems, between considering the obligations as principal or as accessary, refers rather to the name ascribed to the subject, and to the course of judicial proceeding, than to any material difference in the obligation itself. The subject under discussion is the acts of agents, contracting not in the avowed character of agents on behalf of a principal named and recognised as the only responsible person, but themselves contracting, and acting so as be subject to a personal responsibility, in the business of others generally not named or avowed; the persons on whose behalf the engagement is made are, as well as the agents immediately acting, subject to all the legal consequences of it; but in *England* the obligation is enforced, as arising from the direct and immediate act of the party intended to be charged, whether principal or agent; and in the former case, the character of agent is only a medium of evidence, to show that the act is imputable to the principal. This was likewise the case with regard to an avowed agent in the law of *France* and *Rome;* but the nominal distinction adverted to in this article, was applied to the obligation of the principal, where the agent acted as on his own account, and thereby incurred a personal obligation.

The extent of the obligation contracted by the principal depends upon the nature of the authority committed to the agent, either by the general nature, or the particular terms, of his appointment. As to the nature of such obligation, see *ante*, No. 79, and the notes. See also the case of *Yates* v. *Hall*, 1 *T. R.* 73, in which there is a very elaborate disc ussion, respecting the right of the master of a ship to bind his owners, by an undertaking, to pay the wages of a seaman agreeing to become a hostage upon the ransom of a vessel; and *Abbott on Shipping*, P. II. c. 6. P. III. c. 5.

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indemnified by the principal debtor for the obligations which they contract, it is the employer, on the contrary, who is to indemnify his agent.

§ II. *In what case the accessary Obligation of Employers takes place.*

[448] In order to raise the accessary obligation of employers, the manager must have contracted in his own name, although he was acting for the employer; but when he contracts in his quality of agent he does not enter into any contract himself, it is his employer who contracts by his ministry; *supra*, *n.* 74. in this case the manager does not oblige himself; it is the employer alone who contracts a principal obligation by the ministry of his manager.

When the manager contracts in his own name, the contract to oblige his employer must concern the affair to which he is appointed, and the manager must have exceeded the limits of his commission. *L.* 1.(*a*) § 7. & 12. *de Exerc. Act.*

Such are the contracts of sale and purchase of goods, which are made by a manager of a commercial concern; the purchases made by the captain of a ship to equip or refit his vessel, &c.

The borrowing of money by a manager is likewise deemed to be made on account of the business to which he is appointed, and consequently obliges the employer, when the contract of borrowing contains a declaration of the cause of making it, and when such cause does really relate to the affairs in which the borrower is employed.

For instance, if the master of a vessel after a storm, or an engagement, which has greatly damaged his vessel, puts into a port, and there borrows a sum of money with a declaration that it is to refit his vessel, the merchant who appointed him will be answerable for the money.

It is even decided that the employer is obliged in this case although the master has misapplied the money, provided the declaration made by the contract was probable, and that the sum borrowed was not much more than was necessary for the business for which it was de-

(*a*) Non autem ex omni causa Prætor dat in exercitorem actionem, sed *ejus rei nomine, cujus ibi præpositus fuerit;* id est, (si) in eam rem præpositus sit, ut puta, si (ad) onus vehemendum locatum sit; aut aliquas res emerit utiles naviganti, vel si quid reficiendæ navis causâ contractum vel impensum est, vel si quid nautæ, operarum nomine, petent.

Igitur præpositio certam legem dat contrahentibus. Quare si eum præposuit navi ad hoc solum, ut vecturas exigat, non ut locet, quod forte ipse locaverat, non tenebitur exercitor, si magister locaverit; vel si ad locandum tantum, non ad exigendum, idem erit dicendum; aut si ad hoc, ut vectoribus locet, non ut mercibus navem præstet, vel contra, modum egressus, non obligabit exercitorem. Sed et, si, ut certis mercibus eam locet, præpositus est, puta legumini, cannabæ, ille marmoribus, vel alia materia locavit; dicendum erit, non teneri, quædam enim naves onerariæ, quædam, (ut ipsi dicunt) επιβατηγοί, id est, *vectorum ductrices* sunt, et plerosque mandare scio, *ne vectores recipiant;* et sic *ut certa regione, et certo mari negotietur;* ut ecce sunt naves, quæ Brundusium a Cassiopa, vel a Dyrrachio vectores trajiciunt, ad onera inhabiles : item, quædam fluvii capaces, ad mare non sufficientes.

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clared to be intended. *L.* 1.(*a*) § 8 & 9. *L.* 7. *Princip.* § 1.(*b*) *ff. de Exerc. Act.*

Managers oblige their employers as long as their commission lasts, and it is understood to continue until it is revoked, and the revocation is publicly known.

Although regularly every mandate ends with the death of the person giving it, it has for the benefit of commerce been established, that the commission of those mandatories shall last even after the death of the merchant who appointed them, until it is revoked by the heir or other successor: and in contracting for the business in which they are appointed, they oblige the heir of the merchant who appointed them, or the vacant succession, if he has left no heir. *L.* 17.(*c*) § 2 *&* 3. *L.* 11.(*d*) *ff. Instit. Act.*

For the same reason the person appointed to the superintendance of a department of finance, obliges the successors of the farmer who appointed him, until his appointment is revoked.

§ III. *Of the Effect of the accessary Obligations of Employers.*

[449] This obligation extends to every thing that is included in the obligation of the manager; it depends upon it the same as all accessary obligations depend upon the principal obligation to which they accede: therefore this obligation of employers is extinguished when that of the manager is so, whether by payment or novation, *L.* 13.(*e*) § 1. *ff. Inst. Act.* or any other manner; the employer may oppose all the exceptions *in rem, et fins de non reçevoir* which may be opposed by the manager; he cannot oppose any defect in the obligation of his manager arising from any personal incapacity; for the employer who appointed him cannot impugn his own act and the

(*a*) Quid, si mutuam pecuniam sumpserit? an ejus rei nomine videatur gestum? Et Pegasus existimat, si ad usum ejus rei, in quam præpositus est, fuerit mutuatus, dandam actionem; quam sententiam puto ueram. Quid enim si ad armandam, instruendamve navem, vel nautas exhibendos, mutuatus est? Unde quærit Ofilius, si ad reficiendam navem mutuatus, nummos in suos usus converterit, an in exercitorem detur actio? Et ait, si hac lege accepit, quasi in navem impensurus, mox mutavit voluntatem, teneri exercitorem, imputaturum sibi, cur talem præposuerit: quod si ab initio consilium cepit fraudandi creditoris, et hoc specialiter non expresserit *quod ad navis causam accipit*, contra esse. Quam distinctionem Pedius probat.

(*b*) Interdum etiam illud æstimandum, an in eo loco pecunia credita sit, in quo id propter quid credebatur, comparari potuerit. Quid enim (inquit) si ad velum emendum in ejusmodi, insula pecuniam quis crediderit, in qua omnino velum comparari non potest? Et in summa aliquam diligentiam in ea creditorem debere præstare.

(*c*) Si impubes patri habenti institores heres extiterit, deinde cum his contractum fuerit, dicendum est, in pupillum dari actionem propter utilitatem promiscui usus; quemadmodum ubi post mortem tutoris, cujus autoritate institor præpositus est, cum eo contrahitur. Ejus contractus certe nomine, qui ante aditam hereditatem intercessit, etiam si furiosus heres existat, dandam (esse) actionem etiam Pomponius scripsit: non enim imputandum est ei, qui sciens dominum decessisse, cum institore exercente mercem contrahat.

(*d*) Sed si pupillus heres extiterit ei, qui præposuerat, æquissimum erit, pupillum teneri, quamdiu præpositus manet; removendus enim fuit a tutoribus, si nollent opera ejus uti.

(*e*) Meminisse autem oportebit, institoria dominum ita demum teneri, si non novaveritquis eam obligationem, vel ab institore, vel ab alio, novandi animo, stipulando.

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choice which he has made; therefore, although a person under the age of puberty does not, in contracting, oblige himself, *ne quidem naturaliter*, except so far as *locupletior factus est*, and consequently sureties cannot intervene for him, yet, if a merchant has given the management of his business to such a person, he is liable *institoria actione* to the obligations arising from the contracts made by him, without having any right to oppose his want of age: *pupillus institor obligat cum qui eum præposuit institoria actione, quoniam sibi imputare debet qui eum præposuit. L.* 7. § *fin. ff. de Inst. Act.*

[450] With regard to the execution of the *actio institoria*, which arises from the accessary obligation of the employers, there is some difference to be observed between them and sureties.

When several merchants or farmers of the revenue, have appointed any person to the management of their business, to the conduct of their vessel, or to the direction of a department, *L.* 1 §. *fin. & L.* 2.(*a*) *ff. de Exerc. Act.* they have not the benefit of division which is allowed to sureties; this rule should more particularly prevail with us, as, according to our jurisprudence, partners are bound in solido for all engagements relative to their joint concern.

[451] Sureties, and even *mandatores pecuniæ credendæ*, have the benefit of discussion allowed them by the *Novel* of *Justinian*, of which we have treated, *supra*, § 6. *Art.* II. because they have contracted their obligations rather for the interest of the principal debtor than of themselves; but the obligation which an employer contracts *ex contractu*, being an obligation which he contracts for his own account, he has not this benefit of discussion, even if he has already indemnified his agent and remitted him funds to pay; but in this case the creditor ought to grant him a cession of his actions, if required so to do, at the time of payment.

The *Ordonnance* of the *Marine*, *tit.* 8. *art.* 2. allows a particular benefit to the owners of ships, by discharging them from engagements contracted by the captain, upon abandoning to the creditors the ship and freight.

§ IV. *Of the accessary Obligation of Employers, arising from the Faults of their Managers.*

[453] It is not only by contracting that managers oblige their employers; whoever appoints a person to any function, is answerable for the wrongs and neglects which his agent may commit in the exercise of the functions to which he is appointed, *L.* 5. § 8. *ff. de Inst. Act.*(*b*); and if there are several who have appointed him; they are all bound in solido without any exception of division or discussion: for instance, if an inferior collector of the revenue, in exercising his functions in the house of a trader, abuses such trader,

(*a*) Si plures navem exerceant, cum quolibet eorum in solidum agi potest. Ne in plures adversarios distringatur quicum uno contraxerit.

(*b*) Idem (sc. Labeo) ait, si libitinarius, quos Græcé νεκροθαπτας, id est. *mortuorum sepultores* vocant, servum pollinctorem habuerit, isque mortuum spoliaverit, dandam in eum quasi institoriam actionem, quamvis & furti & injuriarum actio competeret.

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or damages his goods, the farmers of the revenue who have appointed him are answerable for such injury, and obliged to pay the damages to which their agent is condemned, saving their recourse against him; because the agent has committed the injury in the discharge of his functions. But if the agent had ill-treated, or robbed any person in a matter not connected with his functions, they would not be answerable.

This obligation of the employer is accessary to the principal obligation of the agent, who committed the injury.

It is co-extensive with the principal obligation, in respect of the damages due to the person who has suffered the injury; but the employer is only bound civilly, although the person committing the injury may be subject to personal correction; the employers cannot oppose against the action which arises from such injury, either the exception of division, or of discussion; they can only require, upon paying the damages, a cession of the actions of the creditor.

§ V. *Of Heads of Families and Masters.*

[454] Another kind of accessary obligations is that of heads of families, who are responsible for the injuries committed by their minor children and their wives, if they did not prevent them, having it in their power to do so.

They are supposed to have had it in their power to prevent the injury, when it was committed in their presence; if it were committed in their absence, we must judge by circumstances whether the father could have prevented it: for instance, if a child has had a quarrel with his companion, and has wounded him with a sword, although not in the presence of his father, the father may be answerable for the injury, as having had it in his power to prevent it, by not allowing his son to wear a sword, especially if he was naturally quarrelsome.

[455] What we have said of fathers is equally applicable to mothers, when, after the death of their husbands, they have their children under their power; and also to masters, tutors, and to all those who have children under their care.

[456] Masters are likewise answerable for the faults of their servants, when they have not prevented them, having it in their power to do so.

They are even responsible for those which they could not prevent, if the servants committed them in the functions to which they were appointed; for instance, if your coachman in driving your carriage has, through brutality or unskilfulness, caused any damage, you are civilly responsible for it, saving your recourse against him who is the principal debtor.

Fathers and masters are not answerable for the contracts of their children, or servants, unless it can be proved that they had intrusted them with the conduct of some business to which these contracts relate.(*a*)

(*a*) See 74. *ante*, and notes.

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For instance, if it was proved that I was in the habit of paying tradesmen for the articles of dress, with which they furnished my daughter, or for the provisions of my house supplied to my cook, a tradesman would be entitled to demand payment from me, for what they might purchase in my name, unless I could prove that I had given him notice not to supply them, or at least, unless what he supplied greatly exceeded what was requisite for the provision of my family; in default of his proving such habit, I should be discharged from the demand by affirming that when I sent my daughter, or my cook to purchase the provisions, I gave them money to pay for them. *Arrêt du Journal des Audiences, Tom.* 5.

SECTION IX.(*a*)

Of the pactum constitutæ pecuniæ.(*b*)

In the first edition of this work, we omitted to speak of the *pactum constitutæ pecuniæ*, and the engagement resulting from it; which is in some degree a kind of accessary obligation, since it is added to a primary obligation, and only contracted in order to confirm it.

[1] The *pactum constitutæ pecuniæ*, with the *Romans*, was

(*a*) This section not having been included in the first edition of the original, is numbered separately.

(*b*) There appears to me to be a striking conformity between the *pactum constitutæ pecuniæ*, as defined in this section, and the *indebitatus assumpsit* of the *English* law. The *pactum constitutæ pecuniæ*, was a promise to pay a subsisting debt whether natural or civil; made in such a manner as not to extinguish the preceding debt, and introduced by the prætor to obviate some formal difficulties. The action of *indebitatus assumpsit* was brought upon a promise for the payment of a debt; it was not subject to the wager of law and other technical difficulties of the regular action of debt; but by such promise the right to the action of debt was not extinguished or varied. In *Slade's* case, 4 *Rep.* 4. the declaration stated, that in consideration that the plaintiff sold the defendant certain corn, the defendant promised to pay. The jury, by a special verdict, found that there was no other promise except the bargain for the sale. From the discussion which this case received, it is evident that it could not have been before that time usual to proceed in *assumpsit* without a distinct express promise, but the right of action was established; and the case is in a great degree the support of the most ordinary action in modern practice. It will be recollected that the jealousy of the civil law, formerly entered by the common lawyers of this country, did not extend to the Chancellors by whom writs were framed, that this form of action is of considerable antiquity, though the more extended application of it is to be dated from the case that has been mentioned, and when it is added that the term *nudum pactum*, which we use to import a promise void for want of consideration, is immediately borrowed from the *Roman* law; the resemblance between the two systems, with regard to this subject, appears to be too strong to be merely accidental.

The preceding observations were made as forming part of a discussion respecting the question whether an indorser of a bill of exchange, making a promise to pay, after he is legally exonerated, under the apprehension through ignorance of law that he is still liable, is bound by the promise. The conclusion which I have found upon that subject is, that the supposition of such a responsibility is contrary to the true principles of juridical reasoning, however, the opposite doctrine may have been established by authority. The authority of the law mentioned, *n.* 6. *infra*, was considered as an argument in support of my general conclusion. It is probable that that discussion accompanied by a translation of *D'Aguesseau's Dissertation on Mistakes of Law*, may, unless prudential considerations intervene, appear before the public at an earlier period than the present volume.

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an agreement by which a person appointed to his creditor a certain day, or a certain time, at which he promised to pay. *Diem solvenda pecuniæ constituebat:* this results from the terms of the edict *de constituta pecunia.*

The word *pecunia* in this edict, as well as in the law of the *Twelve Tables*, and the other edicts of the *prætors*, is used for all kinds of things, as well corporeal as incorporeal, which compose the property of individuals, and which may be the object of obligations. "*Pecuniæ nomine non solum numerata pecunia, sed omens res tam soli quam mobiles, & tam corpora quam jura continentur, l.* 222, *ff. de verb. sig. Pecuniæ appellatione rem significari Proculus ait. L.* 4. *ff. d. tit.*

According to our usages, a *pactuæ constitutæ pecuniæ* may be defined simply, an agreement by which a person promises a creditor to pay him.

[2] A person may make this promise to his own creditor, or to the creditor of another.

When a person by this pact, promises his own creditor to pay him, there arises a new obligation, which does not destroy the former by which he was already bound, but which is accessary to it; and by this multiplicity of obligations the right of the creditor is strengthened.

In this respect the right founded upon a personal credit differs from the right of dominion and property; when I have by virtue of my title, the dominion and full property of a thing, I cannot further acquire this dominion by virtue of any other title; *dominium non potest nisi ex una causa contingere. L.* 3. § 4. *de acq. poss.*

On the contrary, though I am already creditor of a thing by virtue of one title, I may afterwards become creditor of the same thing, either of the same debtor who obliges himself anew to give it me, or of other debtors.

Paulus, in the law 159. *ff. de. reg. Jur.* takes notice of this difference between the right of dominion and the right of personal credit, "*non ut ex pluribus causis idem nobis deberi potest, ita ex pluribus causis idem potest nostrum esse.*"

[3] What, it may be asked, is the creditor the better for the new obligation which the debtor contracts in his favour, by the *pactum constitutæ pecuniæ?* It is of use both in point of law, and in point of conscience, (*dans l'un & l'autre for.*) In point of conscience (*en ce qui concerne le for interieur,*) the more the obligation of the debtor is multiplied, the greater is the violation of good faith in not performing them, and consequently the right of the creditor to expect the execution of them, becomes so much the more strong. In point of law; when the obligation of the debtor, who by this pact promised the creditor to pay, was an obligation purely natural, as with the *Romans* were all those which were only formed by simple pacts, and not accompanied by a stipulation, it is evident that the obligation which the debtor contracted by the *pactum constitutæ pecuniæ*, was very useful to the creditor, as it gave him an action which the former did not. The degree of infidelity which attended the violation of reiterated obligations, induced the prætor to give this action against the debtor, to compel him to accomplish

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the obligation arising from the pact, *quoniam grave est fidem falli. L. 1. ff. de pec. const.*

When the obligation of the debtor, who by his pact promised the creditor to pay him, was a civil obligation, giving a right of action, the obligation and the action arising from this part were not indeed necessary; nevertheless the pact was not entirely useless, and it appears, that it was interposed with respect to civil, as well as with respect to natural obligations. *Debitum ex quacunque causa constitutui potest ex quocumque contractu, &c. L.* 1. § 6. *& seq. de. const. pec.* This pact served particularly to determine the time when the payment was to be made, if it was not expressed by the contract; and this determination according to the principles of the *Roman* law, served, *pleno jure*, by the mere lapse of time, to put the debtor *in mora*, when he had not satisfied his obligation; whereas, when no time was fixed, the debtor could only be put *in mora per litis contestationem.*

[4] Even in cases where the creditor would have no need of the pact *constitutæ pecunia*, in order to fix the time of payment, on account of its being already fixed and determined by the contract, *Ulpian* decides that the pact may still be of some utility: *Si is qui et jure civili et prætorio debebat in diem sit obligatus, an constituendo teneatur; habet utilitatem, ut ex die obligatus constituendo se eadem die soluturum teneatur. L.* 3. § 2. *ff. d. tit.*

In order to understand in what this utility could consist, it must be remembered that according to the principles of the ancient *Roman* law, actions depended upon embarrassing fórmulæ, the least inattention to which occasioned a failure of the action: it was consequently useful to have several actions for one and the same thing, so that if one failed for want of form, recourse might be had to the other: therefore although the obligation was a civil obligation which gave an action to the creditor, the pact *constitutæ pecuniæ*, which gave a new action, was not altogether useless.

[5] Pacts *constitutæ pecuniæ*, the object of which was the determination of a certain day or term, in which a person obliged himself to the creditor to pay him what was due to him, are scarcely in use among us; for the determination of the time in which the payment is to be made, which according to the *Roman* law, was useful to the creditor, as thereby the debtor might more easily be placed *in mora*, is not generally, according to the principles of our *French* law, of any utility to the creditor: since with us, whether there be a certain term of payment or not, the debtor can in general only be placed *en demeure*, by a judicial interpellation.

We have, however, among us agreements which likewise may be called pacts *constitutæ pecuniæ*, by which a promise is made to the creditor to pay him what is owing to him; such are those by which the heirs of a debtor pass a new title to the creditor, and oblige themselves to pay him what they owe him in their quality of heirs, the new obligation which results from this act, and which is cumulative to that contracted by the deceased, and is useful to the creditor, as it

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gives him the right of execution to which he was no longer entitled, by virtue of the original obligation.

With respect to this pact we shall see, 1st, What is necessary to its validity; 2d, Whether it necessarily includes a term within which the payment is to be made; 3d, Whether, by this pact, a person may oblige himself for more than by the former obligation, or for another thing, or in a different manner; 4th, What is the nature of the obligation, which arises from this pact; we shall say something in a 5th § of the pact, by which a promise is made to a creditor to give him a certain security.

§ I. *Of what is requisite to a* pactum constitutæ pecuniæ.

[6] It results from the definition which we have given of the *pactum constitutæ pecuniæ*, that it supposes the pre-existence of a debt, which is promised to be paid to the creditor; therefore, if through mistake I have agreed with you to pay a certain sum, which I thought was due to you from me or from another, the mistake being afterwards discoverd, you cannot demand the payment of it, the pact being void for want of a debt, which was the foundation of it; "*Hactenus constitutum valebit, si quod constituitur debitum sit.*" *L.* 11. *ff. de Const. Pec.*

What if I have promised you to pay a certain sum, which I have declared was owing to you, although at the time I knew that I did not owe it to you? this agreement cannot be valid as a *pactum constitutæ pecuniæ*, for want of a debt which ought to be the foundation of it; it is in this case a donation which I intend to make you, and it cannot be valid unless it be accompanied by the forms which the civil law requires for the validity of donations.

[7] When the debt which was promised to be paid by the pact *constitutæ pecuniæ*, was suspended by a condition under which it had been contracted, and which was not yet accomplished; although there is not as yet any debt, yet if, in the sequel the condition is accomplished, the pact will be valid: for, as conditions, when they are accomplished, have an effect which is retrospective to the time of the contract, the debt will be deemed to have existed from the time that it was contracted, and consequently at the time of the *pactum constitutæ pecuniæ*, which did not intervene till after. *L.* 19. (*a*) *ff. d. tit.*

But if the condition happens to fail, the pact will not be valid; it necessarily includes the condition under which the debt was due, although not expressed.

What if I had expressly promised to pay, even in case the condition should happen to fail? The promise to pay in this case cannot be valid, as a pact *constitutæ pecuniæ* for want of a debt which may serve as a foundation for it; it amounts in case of a failure of the condition, to a donation which cannot be valid unless the act is accompanied with the regular forms.

(*a*) Id quod sub conditione debetur, sive pure, sive certo die constituatur, eadem conditione suspenditur; ut existente conditione teneatur, deficiente, utraque actio depereat.

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[8] It does not matter in what manner the thing promised to be paid by the pact *constitutæ pecuniæ* is due: for in whatever manner the thing which I promise to pay you is due, it is by merely a natural obligation, it is not a donation, it is a payment which I promise to make to you, and consequently it is a real *pactum constitutæ pecuniæ*.

What if the debt was of a nature expressly disallowed by the civil law? would the pact *constitutæ pecuniæ*, by which a person obliged himself to pay it be valid? I think, that if this debt were disallowed by the civil law, not from any defect in its consideration, but from an incapacity of the person who contracted it, and if this incapacity did not subsist at the time of the pact, the pact would be valid.

For instance, if a woman under the power of her husband has borrowed a sum of money, which has not turned out to her benefit, I think that if she becomes a widow, she may legally oblige herself by this pact to pay it; for although this debt is disallowed by the civil law which declares it void, its being due in point of conscience, is sufficient to render the payment of it a real payment, and not a donation; whence it follows, that the agreement by which she promises to pay it, is not a donation but a promise to pay, and consequently a real *pactum constitutæ pecuniæ*, which she may lawfully make, as she was then free and capable of entering into an obligation; what we have decided *supra*, *n*. 395 that this obligation cannot serve as a foundation for that of a surety, may be here offered as an objection to its serving as a foundation for the *pactum constitutæ pecuniæ*.

I answer that there is a great difference between one and the other; the engagement of a surety is only a simple adhesion to the obligation of the principal debtor; such engagement cannot subsist by itself alone; there must be a principal obligation to which it is accessary; now an obligation which the civil law disallows, and which it declares absolutely void, is not susceptible of accession, and consequently cannot serve as a foundation for the engagement of a surety. The right which I acquire against you, when you become surety for any one in my favour, being only an extension of the right which I have against the person on whose behalf you engage; if I have none against him, (the law declaring his obligation absolutely void,) I can have none against you. The case is not the same with respect to the *pactum constitutæ pecuniæ*. If it is said that the obligation which arises from it is accessary to the principal obligation which a person obliges himself by this pact to discharge, it is only said to denote its being added to the principal obligation; and not in the same sense as when it is said of the engagement of a surety, that it is only a simple adhesion to the principal obligation; it is an obligation which subsists by itself, *propriis viribus* and even sometimes after the principal obligation has ceased to exist; as we shall see *infra*, by the law, 18.(*a*) § 1. *ff. d. tit.*

(*a*) Quod adjicitur EAMQUE PECUNIAM, CUM CONSTITUEBATUR, DEBITAM FUISSE, interpretationem pleniorem exigit. Nam primum illud efficit, ut, si quid tunc debitum fuit, cum constitueretur, nunc non sit nihilominus teneat constitutum: quia retrorsum se actio

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If it is the essence of the *pactum constitutæ pecuniæ*, that there shall be a pre-existing debt, it is only because it must have for its object a payment, without which it will amount to a donation: now in order that this pact should not be regarded as a donation, and that its object should be a payment, it is sufficient that the debt promised to be paid should be due in point of conscience, and consequently that there should be a just cause of payment, although it could not be enforced in point of law.

[9] Observe, however, that for the pact *constitutæ pecuniæ*, by which a promise has been made to pay a debt, which the civil law disallows and annuls, to be valid, it is necessary that this debt be not reproved for any vice in its consideration, but only for a civil incapacity in the person contracting, and that this incapacity should not continue to subsist at the time of the pact, as in the instance just given; but if the debt promised to be paid by the *pactum constitutæ pecuniæ*, were reproved by the civil law on account of its consideration, as a debt incurred for expenses at a tavern, by a person residing in the same town, although it be due in point of conscience, and although the payment of it would be valid, nevertheless, the pact by which it was promised to be paid would not, because the badness of the consideration would always subsist; whether the demand is by virtue of the original obligation, or by virtue of the pact, it is still the demand of a tavern debt, which cannot be admitted in a court of justice.

[10] When a debt is only such according to the subtility of law, such as that resulting from a promise which you have extorted from me by force and violence, and which I am not bound to perform either in point of law, as I can defend myself by an exception, or in point of conscience, it cannot serve as the foundation of a *pactum constitutæ pecuniæ*, "*Si quis constituerit quod jure civili debebat, jure prætorio non debebat, id est per exceptionem: an constituendo teneatur? Et est verum non teneri, quia debita juribus*(a) *non est pecunia quæ constituta est. L.* 3. § 1. *ff. de pec. const.* The reason is, that as it is of the essence of the *pactum constitutæ pecuniæ*, to have for its object the payment of a debt, and a debt of which a valid payment cannot be made, cannot be the object of such a pact; for either the payment is made by error and is not valid, as there is a right of repetition, *L.* 26. § 3. *ff. de cond. indeb.*(b) or it is made with the knowledge of the badness of the debt, and in this case it is rather a donation than a payment; according to the rule, "*Cujus per errorem dati repetitio est, ejus consulto dati donatio est.*" *L.* 53. *de R. Jur.* Now a donation cannot be the object of a *pactum constitutæ pecuniæ*, this can only be the payment of a debt.

refert. Proinde temporali actione obligatum constituendo, Celsus et Julianus scribunt teneri debere: licet post constitutum dies temporalis actionis exierit. Quare et si post tempus obligationis se soluturum constituerit, adhuc idem Julianus putat; quoniam eo tempore constituit, quo erat obligatio, licet in id tempus, quo non tenebatur.

(a) Id est nec jure naturali, nec quoad effectum jure civili, propter exceptionem.

(b) *Indebitum* autem *solutum* accipimus, non solum si omnino non debeatur, sed & si per aliquam exceptionem perpetuam peti non poterat: nisi sciens se tutum exceptione solvit.

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[11] It is indeed necessary, as we have hitherto seen, to the validity of a *pactum constitutæ pecuniæ*, that at the time of the pact there should be a debt, which by this pact is promised to be paid: but it is not always necessary that the thing which is the object of the pact should exist, for if it had perished by the fault of the debtor, it would continue to be due, as we shall see *infra*, *p.* 3. *c.* 6. *art.* 3. which is sufficient to render valid the pact, by which he promises to pay the thing that no longer exists, and obliges him to pay the value of it. This is the decision of *Julian: "Promissor hominis, homine mortuo quum per eum staret quominus traderetur, si hominem daturum se constituerit, de constituta pecunia tenebitur ut pretium ejus solvat. L.* 23. *ff. d. tit.*

[12] Provided at the time of the pact, there exists a debt, the payment of which is the object of it, it is immaterial to the validity of the pact, whether the promise of payment be made by the debtor, or any other person for him. *Et quod ego debeo tu constituendo teneberis. L.* 5. § 2. *d. tit.*

It is not even necessary, that the consent of the debtor should intervene, when another obliges himself on his behalf to pay what he owes. The engagement may be even made against his consent; for in the same manner as one person may pay for another, without or against his consent, *L.* 53. *ff. de solut.*(a) he may enter into an obligation for such payment. This is laid down by *Ulpian*, " *Utrum præsente debitore, an absente constituat quis parvi refert; Hoc amplius etiam invito: unde falsam putat opinionem Labeonis existimantis si postquam quis constituit pro alio, dominus ei denuntiet ne solvat, exceptionem dandam: nec immerito, nam cum semel si obligatus qui constituit factum debitoris, non debet cum excusare. L.* 27. *ff. d. tit.*

I may indeed by the *pactum constitutæ pecuniæ*, promise to pay what is due from another person; but it is requisite, to the validity of the pact, that I should promise to pay it as due from the person who was really the debtor; if I promise to pay as supposing myself to be the debtor, when, in fact, I am not so, the pact is not valid. *L.* 11. *ff. dic. tit.*(b)

[13] In like manner, as a payment is valid, not only when it is made to a creditor, but also when it is made to another by his order, or with his consent; so a pact is valid, whether the promise be made to the creditor, or to any other, provided it be made with his consent. It is in this manner that we are to understand what is said by *Ulpian*, *Quod constituitur in rem exactum est, nam utique ut is cui constituitur creditor sit; non quod tibi debetur, si mihi constituatur debetur. L.* 5. § 2. Provided as we have said, it be by the consent of the creditor: but if a promise was made to pay any

(a) Solvere pro ignorante & invito cuique licet, cum sit jure civili constitutum, licere etiam ignorantis invitique meliorem conditionem facere.

(b) Hactenus igitur constitutum valebit, si, quod constituitur, debitum sit, etiam si nullas apparet, qui interim debeat: ut puta, si ante aditam hereditatem debitoris, vel capto eo ab hostibus, constituat quis se soluturum: nam & Pomponius scribit valere constitutum, quoniam debita pecunia constituta est.

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other than the creditor without his consent, the pact would not be valid, even though made to a person to whom a payment would be sufficient. *Si mihi aut Titio stipuler; Titio constitui suo nomine,* says *Ulpian, non posse, Julianus ait; quod non habet petitionem, tametsi ei solvi possit. L. 7. ff. d. tit.*

§ II. *Whether the* pactum constitutæ pecuniæ *necessarily includes a Term, within which there is a promise to pay.*

[14] According to the *Roman* law, as we have already observed, the *pactum constitutæ pecuniæ* generally included a certain day or term, in which a promise was made to pay. This word *constitutum* appeared so manifestly to include the idea of a term of payment, that it was doubtful whether the *pactum constitutæ pecuniæ* could be valid, if no term was expressed; this we learn from *Ulpian,* who thinks, however, that the pacts would be valid, but that a term of at least ten days should be implied. *L.* 21.(*a*) § 1. *ff. de tit.*

This decision, in my opinion, ought only to apply where the original contract was also without any term of payment; but if the contract imported a term in which the debt was to be paid, I think that the parties should be presumed in the *pactum constitutæ pecuniæ,* to have agreed upon the time imported by the contract.

This principle of the *Roman* law, that the *pactum constitutæ pecuniæ* ought always to contain a certain term, expressed or understood, in which the payment promised by this pact should be made, does not prevail with us, as we have observed at the beginning of this section.

§ III. *Whether a person may by the* pactum constitutæ pecuniæ *oblige himself for more than is due, or for any other Thing or in a different Manner.*

[15] It is not necessary to the validity of the *pactum constitutæ pecuniæ,* that what is promised to be paid should be precisely the same sum which is due; it may be a less sum: "*Si quis viginti debens, decem constituit se soluturum, tenebitur.*" *L.* 13. *ff. de pic. const.* Observe, that in this case, although the debtor is only bound *ex pacto constitutæ pecuniæ in decem,* he is still debtor of the whole sum: "*ex pristina obligatione,*" the *pactum* (*constitutæ pecuniæ*) not destroying the former obligation, and only acceding to it.

[16] A valid promise may be made by the *pactum constitutæ pecuniæ,* for a less sum than is due, but not for a greater; and if the pact would only be valid to the amount of the sum due, *v. g. si quis centum aureos debens, ducentos constituit, in centum tantummodo tenetur. L.* 11. § 1. *ff. de t.*

The reason is, that if what was given were more than the sum due,

(*a*) Si sine die constituas, potest quidem dici, te non teneri, licet verba edicti late pateant alioquin et confestim agi tecum peterit, si statim, ut constituisti, non solvas; sed modicum tempus statuendum est, non minus decem dierum, et exactio celebretur.

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it would not be a payment, but a donation; now as we have often said already, the *pactum constitutæ pecuniæ* can only be valid as a promise to pay, and not as a donation.

For the same reason, if a person had promised by this pact to pay something else, besides the sum which he owes, the pact would only be valid for the sum; *si decem debeantur, et decem et Stichum constituat, potest dici decem tantummodo nomine teneri.* *L.* 12.

[16] It is not, however, necessary to the validity of the *pactum constitutæ pecuniæ*, that the person should oblige himself to pay precisely the same thing which is due: he may effectually promise to pay something else, not beyond that which is due, but in the stead of it; for the payment of another thing in place of that which is due, being valid when the creditor consents to it, as we shall see *infra, post* 3. *n.* 495. the agreement to pay a different thing ought in like manner to be valid. This is laid down by *Ulpian: An potest constitui aliud quam quod debetur, quæsitum est, sed cum jam placet rem pro re solvi, posse nihil prohibet et aliud pro debito constitui. L.* 1. § 5. *d. tit.*

[17] This pact of paying something else instead of the thing due, may be made not only by the debtor, but by a third person who promises to pay such other thing for the debtor; for as a third person may make a valid payment on behalf of the debtor, of a thing different from that which is due, when the creditor consents to it, he may also make a valid promise by this kind of pact.

In this respect the pact differs from the engagement as surety; for as we have seen *supra*, 368, that a surety cannot legally oblige himself for any other thing than that which is due by the principal debtor, *in aliam rem quam quæ credita est, fidejussor obligari non potest. L.* 42. *ff. de Fidej.* The reason of this difference is, that an engagement as surety is only a mere adhesion of the surety to the obligation of the principal debtor; it cannot therefore have a different object; on the contrary, the pact *constitutæ pecuniacæ* supposes indeed the pre-existence of a debt, since it has for its object the payment of such debt; but it is not on that account, a simple adhesion to the principal obligation; it may have a different object from that of the principal obligation; for as the payment of the principal debt, which is the object of the pact, may be made with the consent of the creditor, in something else than the thing due, a promise may be also made by this pact to pay another thing in place of the thing due; in which case, the pact has another object, different from the principal obligation. Another proof that the pact *constitutæ pecuniæ* is not a mere adhesion to the principal obligation is, that the obligation arising from this pact sometimes subsists after the principal obligation is extinguished, as we shall see in the following paragraph.

[18] A person may oblige himself by this pact in a different manner from the principal obligation: for instance he may oblige himself to pay in a different place from that imported by the principal obligation: *nem qui Ephesi promisit se soluturum, si constituit alio loco se soluturum, teneri constat. L.* 5 *ff. de pec. const.*

A person may even oblige himself by this pact to pay in a shorter

time than that imported by the principal obligation: *sed et si citeriore die constituat se soluturum similiter tenetur. L.* 4. *ff. d. tit.*

This pact, by which a promise is made to pay in a shorter time, is valid, whether it be made by the debtor, or by a third person who promises to pay for him, as has been justly observed by *Accursius*, in his gloss upon this law.

This is not contrary to the principle of law which we have adduced *supra, n.* 370. *Illud commune est in universis qui pro aliis obligantur, quod si fuerint in duriorem causam adhibiti placuit eos omnino non obligari. L. D.* § 7. *pp. de Fidej.;* for this principle only applies to persons whose obligation is a mere adhesion to that of the principal debtor, such as sureties; but the obligation contracted by the *pactum constitutæ pecuniæ*, although his object ought to be the discharge of a pre-existing obligation, is not, as we have already remarked, a simple adhesion to such obligation; since, as we have seen, it may be contracted to give any other thing instead of what is due, provided it be in discharge, and in the place of the thing due; so, provided the pact has no other object than the payment of the debt, a person may oblige himself thereby more strictly than the debtor was obliged by the principal obligation; and consequently, to make the payment in a shorter time. *Accursius* justly observes upon this law, that one who obliges himself by this pact, and whom he calls *reus constitutæ pecuniæ* is in this respect different from a surety.

I cannot approve of the opinion of *Cujas*, who, in his commentary upon *Paulus ad Ed.* upon this law, censures *Accursius* for having distinguished the *reus constitutæ pecuniæ* from a surety and maintains that the surety may, as well as the *reus constitutiæ pecuniæ*, oblige himself to pay in a shorter time than the principal debtor, and that there is no passage in the law to the contrary. I answer, that the conclusion that sureties cannot oblige themselves to pay in a shorter time than the principal debtor, is sufficiently warranted by the laws saying in general that they cannot oblige themselves *in duriorem causam*, for it is evident, that the condition of the person who obliges himself to pay, *hic et nunc*, and without a term, is harder than that of him who is allowed a term: and it is true, that he is obliged for more, since the magnitude of the obligation is estimated not only *quantitate*, but *die, conditione, loco, &c.* Further, the law 16,(*a*) § 5. *ff. de Fid.* expressly decides, that if a person has become surety, under a certain condition, for a principal debtor, who was obliged to pay at the end of a certain time, and the condition is accomplished before such time, the surety will not be obliged; is not this expressly declaring, that a surety cannot be obliged to pay without a term, when the principal debtor has a term?

[19] The law 8,(*b*) *ff. de pec. const.* furnishes us with another example of the principle that a person may oblige himself in

(*a*) Stipulatione in diem concepta, fidejussor si sub conditione acceptus fuerit: jus ejus in pendenti erit; ut si ante diem conditio impleta fuerit, non obligetur; si concurreret dies et conditio, vel etiam diem conditio secuta fuerit, obligetur.

(*b*) Si vero mihi aut Titio constitueris te soluturum, mihi competit actio. Quod si postea quam soli mihi te soluturum constituisti, solveris Titio, nihilominus mihi teneberis.

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a different manner, and more strictly, by the *pactum constitutæ pecuniæ*, than by the principal obligation: it decides, that I may stipulate by this pact, that a person may pay to me alone what was, by the principal obligation, payable either to myself, or into the hands of another person, which could not be done by the engagement of a surety; the condition of a surety, who is deprived of the power which the debtor has of paying into the hands of another, being more strict than that of the principal debtor.(c) *L.* 34. *ff. de Fid.*

Cujas, in the same work, *ad Leg.* 10. & 13. says, that this law ought to be restrained to its particular instance, that is, when it is the debtor himself who promises by this pact to pay to me alone what what might have been paid either to me, or into the hands of another, and that a third person could not make this pact, because he cannot any more than a surety oblige himself *in duriorem causam;* I think, on the contrary, that as this pact is not a simple adhesion to the principal obligation, a third person may thereby oblige himself *in duriorem causam*, as we have already seen.

It remains to observe, that in new titles passed by heirs, by which they oblige themselves to the payment of what was due by the deceased, they may legally, indeed, according to the principles which we have just established, engage for such payment by clauses different from those which are imported by the original title; but, for this purpose, it is requisite that they should intend to make a novation, otherwise, every thing that occurs in the acts different from what was imported by the original title, is supposed to have slipped in by mistake, and it is not valid: the presumption being, that the intention of those who pass these acts is to recognise and confirm what was imported by the original title, and not to introduce any new engagement into it. *V. infra, n.* 744.

§ IV. *Of the effect of the* pactum constitutæ pecuniæ *and of the Obligation arising therefrom.*

First Principle.

[21] The *pactum constitutæ pecuniæ*, which has for its object the discharge of a pre-existing obligation, does not include any novation; it produces a new obligation, which does not extinguish the former, but accedes to it.

Second Principle.

Although the *pactum constitutæ pecuniæ* does not extinguish the

(c) Hi, qui accessionis loco promittunt, in leviorem causam accipi possunt, in deteriorem non possunt. Ideo si a reo mihi stipulatus sim, a fidejussore mihi aut Titio, meliorem causam esse fidejussoris Julianus putat, quia potest, vel Titio solvere. Quod si *a reo mihi aut Titio* stipulatus, a fidejussore mihi tantum interrogem: in deteriorem causam acceptum fidejussorem Julianus ait. Quid ergo si a reo Stichum aut Phamphilum, a fidejussore Stichum interrogem? Utrum in deteriorem causam acceptus est sublata electione, an in meliorem? Quod et verum est: quia mortuo eo liberari potest.

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former obligation, it sometimes introduces some changes or modifications; which, however, according to the subtility of the *Roman* law, was not done *ipso jure*, but *per exceptionem*.

Third Principle.

Athough the obligation arising from the *pactum constitutæ pecuniæ* accedes to the former obligation, it is not therefore a pure adhesion to it: it subsists by itself, and sometimes continues to subsist even after the extinction of the former.

Fourth Principle.

The discharge of one of these obligations extinguishes and acquits both.

[22] The first of our Principles has no need of explanation. The second will be illustrated by the following examples:

First Example.

We have seen in the preceding article, that by the *pactum constitutæ pecuniæ*, a person might promise to pay another thing in place of the sum or of the thing which is due. Suppose a person who owes me thirty pistoles, has promised to give me six gallons of wine of his own vintage in payment, this pact does not destroy the former obligation: I may, by virtue of that, demand from my debtor the thirty pistoles, and my demand may *ipso jure* be supported; but as I have agreed by the pact that he may pay me, instead of this sum, six gallons of his wine, he may, *per acceptionem pacti* on offering such wine, require to be liberated from my demand of thirty pistoles: his former obligation, which was a pure and simple obligation, to pay me precisely the sum of thirty pistoles, receives by the pact a modification, and becomes an obligation of thirty pistoles, with the power of paying the six gallons of wine in its stead.

The creditor being a creditor of the thirty pistoles, by virtue of the former obligation; and creditor of the six gallons of wine, by virtue of the *pactum constitutæ pecuniæ*, he may, if he thinks proper, proceed in the action arising from the pact, and demand the wine; but if the debtor chooses rather to pay the money, he may, on offering it, stop the demand of the wine, because, according to the fourth of our principles, the payment of the money which discharges the former obligation, discharges both.

Second Example.

[23] If being your debtor in a sum which was payable to you only at your domicil, I have promised you, by the *pactum constitutæ pecuniæ*, to pay it either into your own hands, or into those of your correspondent, in a place less distant, this pact pro-

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duces in my favour a modification to my obligation; for, instead of being obliged to pay precisely into your hands; and at the place of your domicil, I acquire by this pact the option of paying into the hands of your correspondent, and at a place more convenient for me; which, however could only be done according to the subtility of the *Roman* law *per exceptionem; si quis pecuniam constituerit tibi aut Titio: etsi stricto jure, priori actione, pecuniæ constitutæ manet obligatus etiamsi Titio solverit, tamen per exceptionem adjuvatur. L.* 30. *ff. de pec. const.*

Third Example.

[24] If, by the *pactum constitutæ pecuniæ*, my debtor has promised to pay me, within a certain time, the sum which he owed me, payable at a shorter term, or without any term, this pact gives a modification to his former obligation; for I am to be understood, as allowing him the term within which he promised to pay me, which ought to preclude me from demanding it sooner, even by the action arising from the former obligation.

It would be otherwise, if a third person promised to pay for you, within a certain term, what you owe me, without a term, or within a shorter one; this pact makes no change in your obligation and does not prevent my demanding from you before the term specified by this pact, what you owe me; for it is not you to whom I have granted the term specified by the pact, in which you were not a party.

[25] There are, however, cases in which you may indirectly take advantage of a pact by which a third person has promised to pay for you; as if the third person has promised to pay a certain sum for you instead of the thing which you owe; by this pact although you are not a party to it, you indirectly acquire the power of liberating yourself from your obligation, by the discharge of this sum; for as it is allowed to all persons to pay what is due by another, in the name of the debtor, when they have an interest in making such payment; your having an interest in the payment of the sum, which the third person has by the *pactum constitutæ pecuniæ* obliged himself to pay, instead of the thing which you owe, is sufficient to entitle you to make the payment of that sum in the name of the third person; and by paying for him, and discharging him from his obligation, you discharge yourself likewise from your own; for, according to the fourth of our principles, the discharge of one of the obligations extinguishes both.

For the same reason, if a third person has by such a pact promised to pay in a different place from where the debtor was obliged to pay, or if he has promised to pay to the creditor, or into the hands of another person, what the debtor could only pay into the hands of the creditor, the debtor may profit indirectly by this pact, by paying in the manner, allowed to the third person, and in his name; and in so doing, you acquit yourself from your obligation, by which you were bound to pay precisely into the hands of the creditor or in another place; for according to our fourth principle, the discharge of the

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obligation arising from the *pactum constitutæ pecuniæ*, extinguishes the former, and *vice versa*.

[26] We have given examples of the changes and modifications, which the former obligation may receive by the *pactum constitutæ pecuniæ*, for the advantage of the debtor; it may also receive some for the advantage of the creditor.

For instance, when a person who owed me a sum payable to myself or into the hands of another, promises by the *pactum constitutæ pecuniæ*, to pay it to me, the former obligation receives by this *pactum* a change for the benefit of the creditor: for instead of its being an obligation with the power of paying into the hands of another person, it becomes by this pact an obligation which is only payable to myself. *Si mihi aut Titio dare obligatus, postea quam soli mihi te soluturum constituisti, solveris Titio, nihilominus mihi teneris. L. 8. ff. de Const. Pec.* for by this pact you are held to have renounced the power which you reserved by your former obligation, to pay into the hands of *Titius;* therefore the payment which you have made to him is not valid.

It would be otherwise if it was a third person who promised me to make payment for you; for this pact to which you were not a party, cannot deprive you of the power which you had of paying into the hands of *Titius*.

[27] The following is a case in which the *pactum constitutæ pecuniæ* introduces some changes in the former obligation, as well on the part of the creditor as on that of the debtor; if the person who was my debtor of two things under an alternative has promised to pay me one of them determinately: this pact introduces, with respect to the creditor, a change in the former obligation, inasmuch as by determining to the thing which he promises to pay, what was before alternative, it gives the creditor the right of requiring this thing determinately, without the debtor's having it any longer in his choice to pay the other. This is laid down by *Papinian; Illud aut illud debuit, et constituit alterum, an vel alterum quod non constituit solvere possit, quæsttum est? Dixi non esse audiendum, si velit hodie fidem constitutæ rei frangere. L. 24. ff. de tit.*

The first obligation receives also in this case a change with respect to the debtor; for, being by this pact confined to the determinate thing which the debtor has promised to pay, the debtor may acquire a liberation from his obligation, by the extinction of the thing happening without his fault; whereas previous to the pact, his obligation could only be extinguished by the extinction of the two.

[28] Our third principle, that the obligation arising from the *pactum constitutæ pecuniæ* is not a pure adhesion to the former is sufficiently evident from what we have said in the preceding articles, that it may have a different object; as when a person promises to pay another thing, in place of that which is due by the former obligation.

This also appears from the decision, that it may be contracted under a stricter condition; as when a person promises to pay within a

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shorter term than that imported by the former obligation, *supra n.* 18.

What proves still more evidently that the obligation, arising from the pact, is not a simple adhesion to the former obligation, which the party by this pact obliges himself to discharge, and that it subsists by itself, is, that it may continue after the former obligation is extinct.

This is laid down by *Ulpian*, "*Si quid tunc debitum fuit cum constitueretur, nunc non sit, nihilominus teneat constitutum; quia retrorsum se actio refert: proinde temporali actione obligatum, constituendo, Celsus et Julianus scribunt teneri debere, licet post constitutum dies temporalis actionis exierit. Quare etsi post tempus obligationis se soluturum constituerit, adhuc idem Julianus putat, quoniam eo tempore constituit quo erat obligatio, licet in id tempus, quo non tenebatur.*" *L.* 18. § 1. *ff. de Pec. Const.*

The *Gloss* gives an instance of this decision, the case in which a seller has, by the *pactum constitutæ pecuniæ* promised the purchaser to pay him a certain sum, in reparation of a fault of the article sold, for which he was liable *actione æstimatoria;* according to the decision of this law, the obligation which arises from the pact to pay the sum, continues even after the term of six months, limited for the *actio æstimatoria;* and a person might by the pact, have appointed a day of payment, which would not arrive till after the expiration of that time.

In the example which is stated in the *Gloss*, it may be said that although the *actio æstimatoria* be extinguished by the expiration of the term of six months, there remains nevertheless a natural obligation to indemnify the purchaser, which may be the subject of the payment that the seller has promised to make by the *pactum constitutæ pecuniæ.*

What if the debt, for the discharge of which the *pactum constitutæ pecuniæ* has intervened, and which subsisted at the time of such pact, has since been extinguished in some other way than the real or fictitious payment, so that there no longer subsists any obligation either natural or civil; will the obligation contracted for the discharge of this debt by the *pactum constitutæ pecuniæ*, continue to subsist? The affirmative is decided by *Paulus* in the law 19.(*a*) § 2. *ff. de Pec. Const.* where he says that if a father being debtor of a sum which formed a part of the peculium(*b*) of his son, has promised the creditor to pay him this sum, he continues to owe it by virtue of the pact although it no longer continue to form part of the son's peculium, and although the obligation *de peculio*, for which he was bound, and in discharge of which he has promised to pay this sum, be extinguished, *licet interierit peculium non tamen liberatur.*

The following examples are more conformable to our usages:

(*a*) Si peter vel dominus constituerit se soluturum, quod fuit in peculio, non minueretur, peculium, eo quod ex ea causa obstrictus esse cœperit; et licet interierit peculium, non tamen liberatur.

(*b*) A person was not in general susceptible of property during the life of his father; the peculium was certain property excepted from the general rule.

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I have become surety for *Peter* to you, for a sum of a thousand pounds, upon condition that the obligation of my engagement as surety should only continue for two years, at the end of which I should be discharged: before the expiration of two years, and consequently while my obligation subsisted, *James* has promised to pay you this sum for me; he has even assigned for such payment a time which falls after the expiration of the two years; will *James*, after the expiration of the two years, be obliged by the *pactum constitutæ pecuniæ* to pay you? The reason for doubting is, that as I am only obliged upon condition that my obligation shall not continue longer than two years, and that I should be discharged from it after that time, there no longer subsists in my person any debt, either civil or natural, which could serve as the subject of the payment which he has promised to make for me. The reason of deciding that although my debt be extinct, the obligation of *James* continues to subsist, is, that the time when the *pactum constitutæ pecuniæ* is interposed is that at which it is requisite that the debt for which it is interposed should exist. If at that time I actually owed you the sum of a thousand pounds, in discharge of which *James* has promised to pay you a thousand pounds, the pact is valid, and *James* has contracted a binding obligation to you for such sum. It is of no consequence that my debt has since become extinct; that which he contracted subsists: *si quid tunc debitum fuit, quum constitueretur nunc non sit tenere constitutum; quia retrorsum se actio refert.* It may be objected,—he is obliged to pay my debt; he cannot pay it when it is extinct; therefore his obligation cannot subsist; it is reduced to an impossibility. I answer, that it is in fact in payment of my debt that he is obliged to pay you a thousand pounds, and it was necessary for that purpose that I should owe it to you at the time of making the promise; but after he has contracted the obligation, the payment which he ought to make, and which he does make, is of his own debt; it is only indirectly that it would also amount to the payment of mine, if it still subsisted.

Another instance: a third person engages to pay you thirty pistoles, instead of a certain horse which I owe you; although afterwards my obligation is extinguished by the death of the horse, that of the third person would subsist.

This case is very different from that of a person who was debtor of a certain horse, if he did not choose to give thirty pistoles in his stead. In this case the death of the horse liberates him entirely from his obligation, because the horse constitutes the only debt, the thirty pistoles are only *in facultate solutions.* But in our case the third person was really debtor of thirty pistoles; it was not even of the horse, but of the money that he was debtor, therefore the death of the horse which extinguishes my obligation does not extinguish his.

[29] The obligation arising from the *pactum constitutæ pecuniæ*, may indeed continue after the extinction of the principal obligation, for the discharge of which the pact was interposed; but it is necessary for that purpose, as we have already observed, that the

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extinction should have taken place by some other means than by a real or fictitious payment; for, according to the fourth of our principles, the payment of either of the obligations extinguishes both.

[30] The reason of this fourth principle is evident: what is promised by the pact *constitutœ pecuniœ*, being promised in payment of the principal obligation, this promise, when it is accomplished, includes a payment of the principal obligation; the payment of what has been promised by the pact is therefore a payment of the two obligations, and consequently extinguishes both the one and the other.

Vice versa, the payment of the principal obligation extinguishes that of the pact, by rendering the creditor incapable of requiring the discharge of it; for, what has been promised to him by this pact having only been promised, and being due to him for the payment of the principal obligation, if, after having been otherwise satisfied what is due to him by the principal obligation, he should also get paid what was promised him by *the pactum constitiœ pecuniæ*, he would obtain two payments of the principal obligation, which is contrary to good faith: *bona fides non patitur ut bis idem exigatur. L.* 57. *ff. de R. I.* a person cannot receive two payments of the same debt.

[31] This principle, that the payment of one of the obligations extinguishes both is true, not only with respect to a real payment; it is likewise so with respect to fictitious payments, such as compensation, novation, and even a release. The creditor acquiring by the compensation of a like sum which he owed, the liberation from this sum, is by such liberation paid what was due to him; the creditor in the case of novation is paid the debt of which novation is made, by the new debt contracted in his favour; he cannot then, in these cases, require to be paid what has been promised him by the *pactum constitutæ pecuniæ*, as this would be requiring to be paid twice over.

It is the same in the case of a release; for although in this case he has not received any thing, his having treated the principal obligation, as if paid, is sufficient to render him incapable of demanding the payment of it a second time.

[32] Our principle, that the discharge of one of the two obligations extinguishes both, holds good, when the thing promised by the *pactum constitutæ pecuniæ* is promised for the payment of all that was due by the principal obligation: when a promise has been made to pay only a part of it, the payment of what was promised by the pact only extinguishes the principal obligation, to the amount of such part; for instance, if being your debtor in twenty pistoles, I have promised, or another has promised to pay fifteen of them within a certain time, the payment of the fifteen pistoles, promised by the pact, will only extinguish the principal obligation to that amount.

[33] It remains to observe with respect to the obligation *constitutœ pecuniæ*, that according to the law 16. *ff. de Pec. Const.*(*a*) when two persons have promised to pay what is due by a

(*a*) Si duo, quasi rei duo, constituerimus, vel cum altero agi poterit in solidum.

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third, they are each liable in solido, in which respect they resemble sureties, *supra n.* 515, but they have the same exception of division as sureties, when they are solvent. *L. fin. Cod. de Pec. Const.*(a)

Haloander is of opinion that those, who have promised by the *pactum constitutæ pecuniæ* to pay what is due by a third person, have also, like sureties, the exception of discussion, when they are proceeded against for having availed to pay on the day specified, and that they are included in the disposition of the *Novel*, 4, *Ch.* I. under the term ἀντιφωνητής, which he renders *constitutæ pecuniæ reus.*

§ V. *Of the Kind of Pact, by which a Person promises to the Creditor to give him certain Securities.*

[34] There is a kind of *pactum constitutæ pecuniæ*, by which a person promises the creditor not to pay him, but to give him certain securities within a specified term, as a pledge, hypothecation, or surety: *Si quis constituerit se pignus daturum, debet hoc constitutum admitti. L.* 14. § 1. *ff. de Pec. Const.*

The effect of this pact is that the person who has promised to give certain securities may, in default of doing so, be constrained to the payment of the debt, even before the term in which it is payable; and if it is an annuity, he may be obliged to repay the principal.

[35] A person who has promised by this pact to find a certain other person as surety, is discharged from this obligation, if before he has satisfied it, or is placed *en demeure* so to do, the person whom he promised to find as surety happens to die, *d. L.* 14.(b) § 2. the reason is, that his obligation becomes impossible; by the death of this person who can no longer become surety.

It would be otherwise if the person whom he promised to procure as his surety refused to enter into an agreement as such, *si nolit fidejubere, puto teneri eum, qui constituit, nisi aluid actum est d.* §. The reason is, that it is sufficient to render my obligation valid, if the engagement of the person whom I have promised to procure as surety be a thing possible in itself, although it is by his refusal impossible with respect to me; it is my fault to promise what I could not accomplish. This is conformable to the principles established in *n.* 136.

(a) Divi Hadriani epistolam, quæ de peculio dividendo inter mandatores et fidejussores loquitur, locum habere, in his etiam qui pecunias pro aliis simul constituunt, necessarium est: æquitatis enim ratio diversas species actionis excludere nullo modo debet.

(b) Sed et si qus certam personam fidejussorem pro se constituerit, nihilominus tenetur, ut Pomponius scribit. Quid tamen, si ea persona nolit fidejubere? puto teneri eum, qui constituit, nisi aliud actum est. Quid, si ante decessit? Si mora interveniente, aquum est tenerii eum, qui constituit, vel in id, quod interest, vel ut aliam personam, non minus idoneam fidejubentem præstet: si nulla mora interveniente, magis puto non teneri.

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PART III.

Of the different Manners in which Obligations are extinguished, and of the different Fins de non reçevoir *or prescriptions against, Debts.*

[457] OBLIGATIONS may be extinguished in different ways, either by real payment, by consignation, by compensation, (or set off;) by confusion, by novation, (or the acceptance of a new engagement) by a release of the debt, or by the extinction of the thing which is due.

Those which have been contracted under a resolutory condition are extinguished by the concurrence of that condition, some by the death of the debtor or of the creditor.

We shall treat of these several modes of extinction, in seven chapters; we shall add an eighth, in which we propose to treat of *fins de non reçevoir*, or prescriptions.

CHAPTER I.

Of real Payment and of Consignation.

[458] Real payment is the actual accomplishment of a thing which a person obliges himself to give or to do.(*a*)

When the obligation is to do something, the real payment of this obligation consists in the performance of what the person has obliged himself to do.

(*a*) No accident rendering a covenant extremely prejudicial will excuse the performance of it. If a person engage to sustain a bridge for seven years, it is no excuse that the bridge was washed away by an extraordinary flood. *Brecknock* Canal Company versus *Pritchard*, 6 *T. R.* 750. If the tenant of a house engage to repair and pay rent, he must do both though the house is detroyed by fire, *Bullock* v. *Dommitt*, *id.* 650. The owner of a ship engaged to take a cargo from *Liverpool* to *Leghorn*, and was detained two years by an embargo, and it was held that he was not discharged from his contract, *Hadly* v. *Clarke*, 8 *T. R.* 259. The rule laid down in *Dyer*, 33, *Allen*, 26, and referred to in some of the preceding cases is, that when the law creates a duty, and the party is disabled to perform it, without any default in him, and he has no remedy over, the law will excuse him; but when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good if he may notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.

The case of fire often appears to be a hardship, but wherever there is a loss by inevitable accident, an apparent hardship must fall somewhere. Upon an attentive and frequent consideration of the subject, I am perfectly satisfied that the law in this respect is founded upon the principles of natural justice. The grounds of that opinion are contained in Mr. *Fonblanque's* valuable notes to his *Treatise* on *Equity*, *B. I. Ch.* 5. § 8.

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When the obligation is to give something, the payment is the donation and transferring the property of that thing.

It is clear that he who has accomplished his obligation is acquitted and liberated from it; whence it follows, that real payment, which is nothing else than the accomplishment of the obligation, is the most natural manner in which obligations can be extinguished.

We shall see in the two first articles of this chapter, by whom and to whom the payment ought to be made. In the third, what thing ought to be paid, how, and in what state. In the fourth, and fifth, when the payment is to be made, where, and at whose expense. We shall treat in the sixth of the effect of payment. The seventh will contain rules for the application of payment. Lastly in the eighth we shall treat of consignation and offers of payment.

ARTICLE I.

By whom ought the Payment to be made.

[459] When the obligation is to give any thing, the payment consists, as we have said, in an absolute transfer of the property; it follows, that it is essential to the validity of a payment, that it is made by a person who is able to make such transfer.

Whence it also follows, that the payment cannot be valid unless made by the proprietor of the thing, or with his consent; for otherwise, the person who makes the payment cannot transfer the property to the creditor; *nemo plus juris in alium transferre potest quam ipse habet. L.* 54. *ff. de Reg. Jur.*

Upon this principle, although a certain thing determinately were due from a person deceased, one of several heirs would not by paying it without the consent of the others, according to the subtlety of law, making a valid payment, except for his own proportion; not being the proprietor of those parts which belonged to the others, but as to the effect, the payment would be valid, at least, unless the thing were due under an alternative, or with the liberty of paying something else in lieu of it: because, in any other case, the co-heirs would be bound to ratify the payment which they would have been bound to make; *quod utiliter gestum est, necesse est apud judicem pro rato haberi. L.* 9. *ff. de Neg. Gest. Dumoulin, Tract. de Div. & Indiv. p.* 2. *n.* 166 & 169.

If the obligation did not consist *in dando*, but merely in the restitution of something which was detained by the deceased, as if something was lent to him or deposited with him; a restitution by any one of the heirs, in whose possession it might happen to be, would be a valid payment, even *ipso jure*, without the consent of the others: for the co-heirs, not having any right in the thing, would have no interest in preventing the restitution of it, their consent would therefore be superfluous. *Dumoulin, ibid.*

[460] For the same reason that a payment would not be valid, if the person making it were not the proprietor, a payment by

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the very proprietor would be inefficacious, if, through any personal defect, he was incapable of aliening it.

For this reason the payment is not valid, if it is made by a woman under the power of her husband without authority, by a minor under the power of his tutor, or by an interdict. *L.* 14, § *fin.*(a) *ff. de Solut.*

[461] Where the payment made by a person who is not proprietor, or who is incapable of alienation, is of a sum of money, or other consumeable property, and such property is *bona fide* consumed by the creditor, the payment becomes valid, *d.* §. The reason is, that such a consumption of a sum of money, or any thing similar, is equivalent to a transfer of the property. In effect the actual transfer could not have given the creditor any further advantage: he has used and consumed the thing, as if the entire property had been transferred to him; he is no longer subject to any repetition, either of the sum of money, or any thing else which he has *bona fide* consumed, than if he had become the true proprietor; since the thing which is no longer in his possession, and that without any fraud on his part, cannot be claimed from him; as such a claim could only be maintained against the actual possessor, or a person who had fraudulently ceased to be so.(b)

[462] Although the payment would not be valid, where the property was not transferred, the creditor, while he retains the possession, cannot claim any other payment; he must suffer an eviction, or offer to restore what he has received to the debtor.(c) *L.* 94.(d) *ff. de Solut.*

[463] It is not essential to the validity of the payment, that it be made by the debtor, or any person authorised by him; it may be made by any person without such authority, or even in opposition to his orders, provided it is made in his name, and in his discharge, and the property is effectually transferred; it is a valid payment, it induces the extinction of the obligation, and the debtor is discharged even against his will. This is what *Gaius* decides in the law 53. *ff. de Solut. Solvere pro ignorante & invito cuique licet, cum sit jure civili constitutum licere etiam ignorantis invitique meliorem conditionem facere.* The law 23.(e) contains the same decision,

(a) Pupillum sine tutoris auctoritate nec solvere posse palam est, sed si dederit nummos, non fient accipientis vindicarique poterunt, plane si fuerint consumpti liberabitur.

(b) The distinctions in the above paragraph would not be applicable, according to the law of *England;* the payment of money, or the transfer of bank notes, or negotiable instruments, would, on account of their currency, give a valid indisputable property to the person receiving the payment, (except in some particular cases resulting from the illegality of the contract.) The delivery of articles of any other kind would not give any absolute right, and the person who had received them would be responsible for the value; the act of consumption would not in either case have any effect upon the nature of the right.

(c) It may be reasonably added, or an action must have been instituted against him by the original proprietor, and the debtor have refused to indemnify him.

(d) Si is, cui nummos debitor solvit alienos, nummis integris pergat petere quod sibi debeatur, nec offerat quod accepit exceptione doli summovebitur.

(e) Solutione, vel judicium pro nobis accipiendo, et inviti et ignorantis liberari possumus.

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and the laws 40.(a) *ff. d. tit. & 39.(b) ff. de Neg. Gest.* likewise decide the same thing.

But if the payment was not made in the name of the real debtor, it would not be valid: if a man paid me in his own name a sum of money, believing that he was the debtor, when in fact it was not due from him, but from some other person; this payment would not extinguish the obligation of the real debtor, and I should be obliged to refund what had been paid me by mistake.

This decision holds good according to the subtlety of law, even when you have, in your own name, paid me a sum, which you did not owe me, out of the money and by the orders of the person who really owed it to me. But if I demanded the payment of this sum from my real debtor, he could defend himself by making you a party to the cause, and obtaining a declaration that this sum which you had unduly paid in your own name out of his money, should remain as a payment of what was owing from him to me, and consequently that he should be discharged and acquitted of my demand; but if you instituted the demand against me, in repetition of the sum which you have paid, as having paid it to me without owing it, I may be discharged from your demand, by making my debtor an intervening party, and obtaining a judgment that this sum, having been furnished to you by him, to pay me in his name, should be retained by me in acquittance of his debt.

Although the payment of a sum or any thing which was due to me, would not be valid, when the person who did not owe it to me, has paid it in his own name, yet if he has afterwards himself become debtor of it, the payment is by that circumstance rendered valid, if not *ipso jure*, at least *per exceptionem doli. L.* 25.(c) *ff. de Solut.*

[464] The principle which we have established, that a payment is valid, by whatever person it may be made, provided it is in the name of the debtor, is not attended with any difficulty, where it has been effectively made, and the creditor has agreed to receive it.

The question, whether a stranger who has no authority for the purpose, either specially or by reason of his situation, nor any interest in discharging the debt, can oblige the creditor to receive the payment, which he offers in the name of the debtor, is attended with more difficulty: the laws above cited do not decide this question; they say indeed that the payment made by any person whatever, in the name of the debtor, liberates the debtor, but they do not decide whether the creditor can or cannot be obliged to receive the payment; we

(a) Si pro me solverit quis creditori meo, licet ignorante me, adquiritur mihi actio pignoratitia.

(b) Solvendo quisque pro alio, licet invito et ignorante, liberat eum; quod autem alicui debetur, alius sine voluntate ejus non potes jure exigere, naturalis enim simul et civilis ratio suasit alienam conditionem, meliorem quidem [etiam] ignorantis & inviti nos facere posse; deteriorem non posse.

(c) Ex parte hæres constitutus, si decem, quæ defunctus promiserat, tota solvit; pro parte quidem, qua hæres est, liberabitur; pro parte autem reliqua ea condicet; sed si antequam condicat, ei adcreverit reliqua pars hæreditatis, etiam, pro ea parte erit obligatus: et ideo condicentem indebitum doli mali exceptionem obstare existimo.

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must look for the decision of this question in the law 72.(a) § 2. *ff. de Solut.* it decides that the offers made to the creditor by any person whatever, in the name and without the knowledge of the debtor, for the payment of his debt, place the creditor *en demeure.* The ordonnance of 1673. *t.* 5. *art.* 3. also directs that in case of protest, bills of exchange may be acquitted by any person. From these texts the rule may be inferred, that any tender made to the creditor by any person whatever, in the name of the debtor, will be valid, and place creditor *en demeure*, when the debtor has an interest in the payment, so as to put an end to any action which the creditor may have commenced, or to stop, the accumulation of interest, or to extinguish a right of hypothecation. But if the payment offered would not procure any advantage to the debtor, and would have no other effect than to change his creditor, the offer ought not to be regarded. *V. Dumoulin, tr. de Usum.* 9. 45.

The principle, that the payment may be made by any other person as well as the debtor, is true with respect to obligations, for giving any thing; for it is immaterial to the creditor by whom the thing is given, provided it be given effectually.

With respect to obligations of doing any thing, our rule is not universally applicable; it takes place where the act which is the object of the obligation is of such a nature that it can be of no importance to the creditor, by whom the thing is done. If I contract with a husbandman to plough my land, another husbandman may discharge the obligation by ploughing it for him.

It is otherwise where the personal skill and talents of the party contracting the obligation are objects of consideration; there the obligation can only be discharged by the debtor himself, *L.* 31, (b) *ff. de Solut.* For instance, if I agree with a painter to take a likeness he cannot discharge his obligation by causing it to be taken by any other painter, at least without my consent.

ARTICLE II.

To whom ought Payment to be made?

[465] The payment in order to be valid should be made to the creditor, or to some person deriving a power from him, or having a quality to receive it.

(a) Sed quid, si ignorante debitore ab alio creditor eum stipulatus est? Hic quoque existimandus est periculo debitor liberatus: quemadmodum si quolibet nomine ejus servum offerente, stipulator accipere noluisset.

(b) Inter artifices longa differentia est et ingenii, et naturæ, et doctrinæ, et institutionis. Ideo si navem a se fabricandam, quis promiserit, vel insulam ædificandam, fossamve, faciendam, et hoc specialiter actum est, ut suis operis id perficiat, fidejussor ipse ædificans, vel fossam fodiens, non consentiente stipulatore non liberabit reum.

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§ 1. *Of Payment made to the Creditor.*

[466] The term creditor is here understood to mean, not only the immediate person with whom the debtor has contracted, but his heirs and all those succeeding to his interest, even under a particular title.

When the creditor has left several heirs, as each of them becomes creditor merely of that particular part for which he is heir, a valid payment cannot be made to any of the heirs of more than his own portion, unless he has been authorised by his co-heirs to receive the whole.

Any person to whom the creditor has transferred his rights, whether by sale, donation, legacy, (*a*) or any other title whatever, becomes the creditor upon notice of the transfer being given to the debtor, or by the debtor assenting to such transfer; and consequently the payment to any such person is valid.

On the contrary the original creditor ceases to have that character upon such notice or assent, and any subsequent payment to him would be nugatory. (*b*)

So, where a person, in whose hands a debt is attached, is condemned to pay the amount to the person suing forth the attachment, that person becomes the creditor, and a payment to him is valid.

[467] A person may sometimes be deemed the creditor, where there was just reason to consider him as such, although another person may in truth be the actual creditor; and a payment made to such ostensible person is as valid, as if it had been made to the real creditor,

For instance, you are in possession of an estate which does not belong to you, to which certain feodal dues and services are attached, the payment to you of such dues, while you are in possession, is valid, although not being the proprietor, you are not properly the creditor; and, when the real proprietor appears and gets possession of the estate, although he was the real creditor of these dues, which have been paid to you he cannot demand them from the person who paid you; the payment which they have made to you liberates them. The reason is, that every person being in law reputed and esteemed the owner of property which he possesses, provided the real proprietor does not appear, these debtors have reason to believe, from seeing you in possession of the seignory, that you were the proprietor of it, and consequently creditor of the dues which they have paid; their good faith ought to render the payment which they made valid, it is the fault of the real proprietor not to have made himself known as such sooner.

For the same reason, the payments made to the person who is in good and lawful possession of a succession, by the debtors of such succession, are valid, although the succession does not belong to him, sav-

(*a*) But according to the law of *England*, a payment cannot be effectually made to a legatee, without the assent of the executor.

(*b*) See Appendix (No. IV.) to Part 1. Chap. 1. § 1. Art. 5. In *Legh* v. *Legh*, 1 *B. & P.* 417, it was held that the court would not permit the obligor of a bond to plead payment to the original obligee, after notice of an assignment.

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ing to the real heir, when he shall appear, the right of demanding an account from the possesor of the succession of what he has received. (a)

A fortiori, the payments, made by the debtors of a succession to a beneficiary(b) heir, are valid, although he may be afterwards excluded from the succession by a relation who insists upon being the pure and simple heir: for, if he was not heir, he was at least the administrator of the succession, which gave him a quality to receive.

And *a fortiori*, the payment made to an heir, who is afterwards discharged from his acceptance of the succession, continues valid.

[468] In order to render the payment valid, whether made to the creditor or those succeeding to his rights, the person receiving must have a legal capacity to manage his affairs.

Therefore, if the creditor were a minor, a person under an interdict, or a woman under the control of her husband, (c) a payment to them would be insufficient, and would not liberate the debtor.

But if the creditor, or his tutor, under pretence of the nullity of such payment required to be paid a second time, and the debtor could show that the creditor had derived an advantage from the money that had been paid, and that the advantage subsisted at the time of the demand; as, by the discharge of debts, or the repair of buildings, the demand should be disallowed, as repugnant to that principle of integrity which will not permit one man to enrich himself at the expense of another, *neminem æquum est cum alterius damno locupletari.*

Observe, that if the money was employed in purchasing any thing necessary at the time, though it might afterwards be accidentally destroyed, the creditor would still be deemed to retain the advantage at the time of the demand. For if that money had not been so applied, other money must, which has thereby been saved. *Hoc ipso, quo non est pauperior factus, locupletior est. L.* 47. § 1. *ff. de Solut.*

But if the money had been applied in purchasing things which were not necessary, the demand will be allowed if those things do not subsist; and in case of their subsistence, upon abandoning them to the debtor. *d. L.* 47. *prin. L.* 4. (d) *ff. de Except.*

[469] A payment made by a debtor to his creditor, in prejudice of the rights of persons by whom the debt has been attached, is valid, so far as respects the creditor, but not as against the persons claiming under the attachment, who may compel the debtor to pay a second time, provided their suit can in other respects be maintained; leaving the debtor to his right of repetition against the creditor.

(a) See *Allen* v. *Dundas*, 3 *T. R.* 125. in which it was held that a payment to an executor, having probate of a forged will, was good against the rightful administrator.

(b) A beneficiary heir was a person appointed to the succession in such a manner as to be only accountable for his actual receipts; whereas in general, an heir accepting a succession was liable indiscriminately to the obligations of the deceased.

(c) If a legacy be bequeathed to a feme covert, payment of it to her alone is not good, and the executor shall pay it over again to the husband, *Palmer* v. *Trower*, 1 *Ver.* 261.

(d) In pupillo, cui soluta est debita pecunia sine tutoris auctoritate, si quæratur, an doli exceptione summoveri debeat: illud tempus inspicitur, an pecuniam, vel ex ea aliquid habeat, quo petit.

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Although a person be under arrest, his debtors may make valid payments to him as long as there is no attachment against the debts. *L.* 46.(*a*) § 6. *ff. de Jur. Fisc. L.* 41.(*b*) *ff. de Solut.*

§ II. *Of those who have Power from the Creditor to receive.*

[470] A payment to any person authorised by the creditor, and on his behalf is considered as a payment to the creditor himself, and consequently is as valid as if it had been made to him. This is laid down by the law 180. *ff. de Reg. Jur. Quod jussu alterius solvitur, pro eo est quasi ipsi solutem esset.*

[471] From this rule it follows:

1st. That the quality or situation of the person authorized to receive is immaterial; notwithstanding he may be either a minor or a monk, the payment is valid. The reason is, that it is regarded as a payment to the person giving the authority, and it is his person, and not the person to whom the power is given, that ought to be considered, and he should impute to himself the consequences of his choice. *L.* 4. *Cod. de Solut.*(*c*)

[472] 2dly. That a payment may be made to a person authorized not only by the creditor, but also by any person having the quality of receiving on his account. For instance, if the creditor is a minor or a married woman, a payment to any person authorised by the tutor or husband is valid. *L.* 96(*d*) *ff. de Solut.*

[473] 3dly. A payment made to a person authorized by the very creditor, is no further valid than if it had been made to the creditor himself. Such is a payment made to a person authorized by a minor, or an interdict.

[474] A payment to a person under an authority to receive is only valid if made during the continuance of his authority. Therefore, if a creditor had given such an authority for a certain time, or during his absence, a payment after that time or after his return would be ineffectual, because the authority no longer subsists.

So, if the creditor has revoked the authority, a subsequent payment would be invalid: but then the debtor must be apprised of the revocation, or such a notification must have been given that he might have been apprised of it; otherwise the payment is sufficient. *L.* 12.(*e*) § 2. *L.* 34.(*f*) § 3. *L.* 51.(*g*) *ff. de Solut.*

(*a*) In reatu constitutus, bona sua administrare potest; eique debitor recte bona fide solvit.

(*b*) Reo criminis postulato, interim nihil prohibet recte pecuniam a debitoribus solvi; alioquin plerique innocentium necessario sumptu egebunt.

(*c*) Nihil interest utrum creditori mutuam pecuniam solveris, an ex ejus voluntate servo numeravis. Nec enim ex eo quod creditor concessit in fatum, priusquam instrumenta redderet, evacuatæ obligationis vires reparari quent.

(*d*) Pupilli debitor tutore delegante pecuniam creditori tutoris solvit: liberatio contigit, si non malo consilio cum tutore habito factum esse probetur. Sed et interdictio fraudatorio tutoris creditor pupille tenetur, si cum consilium fraudis participasse constabit.

(*e*) Sed et si quis mandaverit, ut Titio solvam, deinde vetuerit eum accipere: si ignorans prohibitum eum accipere, solvam liberabor: sed si sciero, non liberabor.

(*f*) Si Titium omnibus negotiis meis præposuero, deinde vetuero eum ignorantibus

(*g*) See next page, note (*g*.)

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The reason is, that the mistake of the debtor, who pays after the revocation of the procuration, arises rather from the fault of the creditor, who ought to apprise him of the revocation, than of the debtor himself, who seeing an authority to receive, and having no reason to suppose that it had been revoked, has a sufficient ground for making the payment accordingly. Therefore, it is not just that he should suffer from this mistake, and be liable to a second payment; the creditor, who alone is in fault, is the only person who should suffer.

This is very different from the case of paying to a person who produces a forged authority;(a) for here, the fault is not in the creditor, it is in the debtor, who has not taken sufficient precaution in examining the authenticity of what purports to be an authority, such a payment is null, and does not liberate the debtor. *L.* 34.(b) § 4 *ff. de Solut.*

[475] An authority ceases by the death of the creditor, or by a change of condition; as, if the creditor is a woman who afterwards marries, consequently a payment to the person having such authority, after it is revoked by death or a change of condition, would be void. *L.* 108.(c) *ff. de Solut Arg. L.* 58.(d) § 1.

But if the death or change of situation were unknown to the debtor at the time of payment, his making such a payment *bona fide* would be valid. *L.* 32.(e) *ff. d. tit.*

[476] A power given by a person having a quality to receive for the creditor, expires when such quality ceases. Thus, if the tutor of a minor gives a power to receive, the debtor cannot safely pay on the ground of this power, after the minority has expired; be-

debitoribus administrare negotia mea: debitores ei solvendo, liberabuntur, nam is qui omnibus negotiis suis aliquem proponit, intelligitur etiam debitoribus mandare, ut procuratori solvant.

(g) Dispensatori, qui ignorante debitore remotus est ab actu recte solvitur; ex voluntate enim domini si solvitur: quam si nescit mutatum, qui solvit, liberatur.

(a) In *Robson* v. *Eaton*, 1 *T. R.* 62. *Davis* having a forged power of attorney, to receive a debt due from the defendant to the plaintiff, employed an attorney to sue for it whereupon the defendant paid the money into court, and it was taken out by the attorney. It was ruled that the defendant was not discharged. *Cheap* v. *Harley*, *N. P.* cited 3 *T. R.* 127. The defendants drew two bills of exchange, a first and second payable to the order of the plaintiffs; one of them being lost came to the hands of a third person, who forged an indorsement of the plaintiff's and received the amount; afterwards the real payees brought their actions on the other bill and recovered.

(b) Si nullo mandato intercedente, debitor falso existimaverit voluntate mea pecuniam se numerare, non liberabitur et ideo procuratori, qui se ultro alienis negotiis offert, solvendo nemo liberabitur.

(c) Ei qui mandatu meo post mortem meam stipulatus est, recte solvitur; quia talis est lex obligationis, ideoque etiam invito me recte ei solvitur. Ei autem cui jussi debitorem meum post mortem meam solvere non recté solvitur: [quia mandatum morte dissolvitur.]

(d) Si creditor, cujus ignorantis procuratori solutum est, adrogandum se dederit sive ratum habuit pater, [rata] solutio est; sive non habuit, repetere debitor potest.

(e) Si servus peculiari nomine crediderit, eique debitor, cum ignoraret, dominum mortuum esse, ante aditam hereditatem solverit: liberabitur. Idem juris erit & si manumisso servo debito pecuniam selverit, cum ignoraret ei peculium concessum non esse. Neque intererit, vivo an mortuo domino, pecunia numerata sit: nam hoc quoque casu debitor liberatur, sicut is, qui jussus est a creditore pecuniam Titio solvere, quamvis creditor mortuus fuerit, nihilominus recte Titio solvit: si modo ignoraverit creditorem mortuum esse.

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cause the quality of the tutor who gave the authority having ceased, a payment to himself would be ineffectual. This is also a consequence of law 180.(a) *ff. de Reg. Jur.*

[477] It remains to observe, that it is immaterial to the validity of the payment, whether the authority(b) be special or a general authority, *omnium negotiorum. L.* 12.(c) *de solution.*

The process of execution which is held by the officer, who is employed by the creditor to execute it, is equivalent to a power to receive the debt; and the discharge which he gives to the debtor is as valid, as if it had been given by the creditor himself.

It is otherwise with respect to a procurator *ad lites*, whom I have authorized to institute a suit against my debtor; the procuration is not supposed to include a power to receive the debt. *L.* 86.(d) *ff. de Solut.*(e)

It is a noted question, whether an authority to contract, as to sell or let, includes an authority to receive the price or hire? *Bartolus* maintains the affirmative, and is followed by *Fachin* II. *contr.* 94. The opinion of *Wissembach, ad. tit. ff. de Solut. n.* 14. who thinks that a power to sell does not include a power to receive the price, at least without circumstances in support of such a presumption appears more plausible. The law 1. § 12.(f) *ff. de Exerc. Act.* appears decisive in favour of this opinion; it is there said that a person who is only appointed to contract for freighting a vessel, has no power to receive the freight. It cannot be more formally stated, that a power to sell or let does not extend to a receipt of the price.

But there are circumstances under which a person authorized to sell, may be presumed to be authorized to receive the price. For instance, if there happened to be in a town certain public brokers; (*revendeurs*) who were in the habit of taking in goods for sale; and

(a) Quod jussu alterius solvitur, pro eo est, quasi ipsi solutum esset.

(b) In *Whitlock* v. *Waltham*, 1 *Salk.* 157, it was laid down that if a scrivener be intrusted with a bond, he may receive the principal and interest; but that if he is intrusted with the mortgage but not the bond, he has not such power, for giving up the deed does not restore the estate, but giving up the bond extinguishes the debt; that though he has neither, yet if the mortgagee, or his executor assents to the payment being made to him, such payment is valid. In *Martin* v. *Kingsly*, *Prec. Ch.* 209, it was said that if the scrivener intrusted with the bond receives the money, and delivers up the bond, it binds the obligee, but it is not so in case of a mortgage, because the estate cannot be divested without assignment; but in *Sharp* v. *Thomas* mentioned in Lord *Harcourt's Index* to parliamentary cases. *Index* to 2d edition, *B. P. C.* tit. Payment it is said that payment to the scrivener of the mortgagee is good payment.

(c) Vero procuratori recte solvitur. Verum autem accipere debemus eum, cui mandatum est vel specialiter, vel cui omnium negotiorum administratio mandata est.

(d) Hoc jure utimur, ut litis procuratori non recte solvatur; nam et absurdum est, cui judicati actio non datur, ei ante rem judicatam solvi posse, si tamen ad hoc datus sit ut et solvi possit: solvendo eo liberabitur.

(e) In *England*, payment to an attorney employed to bring an action is sufficient, *Powell* v. *Sittle*, 1 *Bl.* 8, but it has been held that a payment to the attorney's agent in *London* is not, *Yates* v. *Freckleton*, *Doug.* 623; but where money was paid into the court, though irregularly, and taken out by the agent, it was ruled that the plaintiff was concluded. *Griffiths* v. *Williams*, 1 *T. R.* 710.

(f) Præpositio certam legem dat contrahentibus. Quare si cum præposuit nave ad hoc solum ut vecturas exigat, non ut locet, quod forte ipse locaverat, non tenebitur exorcitor, si magister locaverit; vel si ad locandum tantum, non ad exigendum, idem erit dicendum.

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receiving the price from the purchasers, the putting goods into the hands of such persons to be sold, imports an authority to receive the money arising from the sale.(*a*)

§ III. *Of Persons to whom the Law gives a Quality to receive.*

[478] A payment to those whom the law invests with a quality to receive, on behalf of the creditor, is valid.

The law gives such authority to tutors to receive for their minors; to the curators of interdicts, to receive what is due to those interdicts; to husbands with respect of the property of their wives, cohabiting with them; to the receivers of hospitals, and other public institutions.

These persons have authority to receive, not only the profits of the estates of those who are subject to their administration, but even the principals of their annuities,(*b*) (when the debtors think proper to redeem them,) without the intervention of any ordonnance of the judge being requisite for that purpose; and the debtors who have paid into the hands of these persons, are altogether liberated and have nothing to apprehend, even if the persons to whom they have paid should become insolvent. The law 25.(*c*) *Cod. de Adm. Tut.* which required a decree of the judge to protect the debtor, in case of the insolvency of the tutor whom he had paid, is not followed with us.

[479] The mere circumstance of consanguinity, however near, is not a sufficient quality to receive.(*d*)

Therefore, a father has not the quality of receiving what is due to his son, who is not under his power: nor the son what is due to the father; the husband for the wife who is separated from him; and

(*a*) According to our usages, this presumption would be applied to almost all transactions in the way of trade; and by *Holt, Ch. J. Anon.* 12 *Mod.* 230. he that has power to sell, has power to receive the money; for if a man give power to his servant to sell his horse, he implicitly gives him power to receive the money, and payment to such servant is payment to the owner.

(*b*) The debtor of an annuity was *de jure* entitled to redeem it upon paying the original purchase money, which is here meant by the principal.

(*c*) Sancimus: creatione tutorum & curatorum cum omnis precedente cautela licere debitoribus pupillorum vel adultorum ad eos solutionem facere: ita tamen ut prius sententia judicialis sine omni damno celebrata hoc permiserit: quo subsecuto, si et judex [hoc] pronuntiaverit, & debitor persolverit: sequitur hujusmodi causam plenissima securitas, ut nemo in posterum inquietetur; non eneim debet quod rite, & secundum leges ab initio actum est, ex alio eventu resuscitari. Non autem hanc legem extendimus etiam in his solutionibus, quæ vel ex reditibus, vel ex pensionibus, vel aliis hujusmodi causis pupillo, vel adulte accedunt: sed si extraneus debitor ex fœneratitia forsitan cautione, vel aliis similibus causis solutionem, facere & se liberare desiderat: tunc enim eam subtilitatem observari censemus.

(*d*) In *Dagley* v. *Talferry*, 1 *P. Wms.* 285. 1 *Eq. Abr.* 300, it was ruled that payment to a father of a legacy left to his son was no discharge, although there were strong circumstances of acquiescence, after the son's coming of age; but where a legacy was given to a father to be divided between himself and his family, this was held to authorise a payment to the father. *Cooper* v. *Thornton*, 3 *Bro. Ch.* 96.

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still less the wife for the husband. *L.* 22.(*a*) *ff. h. t. l.* 11.(*b*) *cod. id.*

§ IV. *Of those to whom the Agreement gives a quality to receive.*

[480] Sometimes in contracts, whereby one man enters into an obligation to pay something to another, a third person is indicated, a payment to whom shall be considered as made to the creditor; such a person has a capacity to receive for the creditor by the agreement itself; and consequently, a payment to him is as effectual as one to the creditor. Such third person, to whom it is agreed that the debtor shall pay, are called by the *Roman* jurists *adjecti solutionis gratia.*

The persons so indicted are usually creditors of the creditor indicating them. For instance, you sell me an estate for 10,000*l.* and it is stipulated by the contract that I shall pay the money in your discharge to a third person, who is your creditor to that amount.

Sometimes a person to whom I direct a payment to be made is not my creditor, but is to receive the money for me as my mandatary, or as my donatary if I intend to give it to him. It is such who are properly designated by the *Roman* jurists *adjecti solutionis gratia.*

[481] The indication may be even made for a different thing, to be paid to the person indicated from that due to the creditor; as if I give you a right to feed your sheep in my field, provided you pay the sum of thirty livres to me in my domicil; or a load of wood of the same value to my tenant, at such a place. In this case, the payment of the wood to my tenant liberates you from the thirty livres which you owed to me. *L.* 34.(*c*) § 2. *ff. de Solut. L.* 141(*d*) § 5. *ff. de Verb. Oblig.*

[482] The sum appointed to be paid by the contract to a third person may be less than the debtor is obliged to pay to the creditor.

Hence arises the question agitated in law 98(*e*) § 5 *ff. de Solut.*

(*a*) Filius familias patre invito debitorem ejus liberare non potest.

(*b*) Cum maritum tuum a debitoribus tuis minoris viginti quinque annis constitutæ; velut ex causa tibi debiti aliqus accepisse quantitates, nec tamen te consensum accomodasse, significes nullum tibi præjudicium potuit fieri nisi factans solutionem post majorem ætatem ratam feceris.

(*c*) Stipulatas sum *decem mihi aut hominem Titio dari;* si homo Titio datus fuisset, promissor a me liberatur; et antequam homo daretur, ego decem petere possum.

(*d*) Cum *mihi aut Titio* stipulor, dicitur aliam quidem rem in personam meam, aliam in Titii designari non posse; veluti mihi decem aut Titio hominem, si vero Titio ea res soluta sit, quæ in ejus persona designata fuerit; licet ipso jure non liberetur promissor per exceptionem tamen defendi possit.

(*e*) Qui stipulatus *sibi aut Titio*, si hoc dicit, si Titio non solveris, dari sibi: videtur conditionaliter stipulari. Et ideo etiam sic facta stipulatione, MIHI DECEM, AUT QUINQUE TITIO DARI? Quinque Titio solutis, liberabitur reus a stipulatore. Quod ita potest admitti, si hoc ipsum expressim agebatur, ut quasi pœna adjecta sit in persona stipulantis, si Titio solutum non esset. At ubi simpliciter *sibi aut Titio* stipulatur, solutionis tantum causa adhibetur Titius: et ideo quinque ei solutis, remanebunt reliqua quinque in obligatione. Contra si mihi quinque, illi decem stipulatus sim; quinque Titio solutis, non facit conceptio stipulationis, ut a me liberetur, porro si decem solverit, non quinque repetet, sed mihi per mandati actionem decem debebuntur.

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Whether the payment of such a smaller sum to the third person liberates the debtor entirely, or only to that extent? The intention of the parties must be inferred from circumstances; but unless the contrary evidently appears, the presumption is that the intention of the parties was, that the payment of this less sum to the person indicated should only liberate the debtor to the extent of that sum.

[483] An appointment may be made to pay a third person at a different time and place from those agreed upon for payment to the creditor.

For instance, I may agree that you pay me a sum in my domicil at *Orleans*, or to my banker at *Paris;* so I may agree that you shall pay me such a sum either to myself at the time of a certain fair, or to such a person after the fair; *vice versa*, may agree that you shall pay me such a sum either to myself at the time of the fair, or to another person before that time. *L.* 98.(*a*) § 4. *&* 6. *ff. de Solut. L.* 141.(*b*) § 6 *de Verb. Oblig.*

[484] The indication of paying to a third person may depend upon a condition, although the obligation itself is pure and simple; but if the obligation itself depended upon a condition, the indication though it were made purely and simply, or upon a different condition, would necessarily depend upon the same condition as the obligation; for a payment can only be made to the person indicated, where something is due, and nothing can be due if the obligation is contracted upon a condition which does not subsist. *L.* 141.(*c*) § 7. *&* 8. *ff. de Verb. Oblig.*

It is otherwise with respect to a term for payment; as the payment may be effectively made within the term, an indication to pay to a a third person is not necessarily subject to the term allowed for pay-

(*a*) *Mihi dare decem pure*, aut *Titeo calindis, vel sub conditione*, aut *mihi calendis Januariis*, Titio Februariis, utiliter stipulor. Quod si *mihi calendis Februariis*, *Titio calendis Januariis;* potest dubitari. Sed rectius dicitur utiliter stipulatum; nam cum in diem sit ea quoque obligatio, etiam mihi solvi potest ante Februarias; igitur et illi solvi poterit.

Mihi Romæ, aut Ephesi Titio, dari stipulor, an solvendo Titio Ephesi a me libaretur, videamus? Nam si diversa facta sunt ut Julianus putat, diversa res est, sed cum prævalet causa dandi liberatur: liberaretur enim et si *mihi Stichum illi Pamphilum dari* stipulatus essem et Titio Pamphilum solvissit. At ubi merum factum stipulor, puta *insulam in meo solo ædificari aut in Titii loco;* nunquid si in Titii loco ædificet, non contingat liberatio; nemo enim dixit facto pro facto soluto liberationem contingere? Sed verius est liberationem contingere: quia non factum pro facto solvere videtur, sed electio promissoris completur.

(*b*) Tempora vero diversa designari posse, veluti: MIHI KALENDIS JANUARIIS AUT TITIO KALENDIS FEBRUARIIS? Imo etiam citeriorem diem in Titii personam conferri posse; veluti MIHI KALENDIS FEBRUARIIS, TITIO KALENDIS JANUARIIS? Quo casu talem esse stipulationem intelligemus, SI TITIO KALENDIS JANUARIIS NON DEDERIS, MIHI KALENDIS FEBRUARIIS DARI SPONDES?

(*c*) Sed rursus mihi quidem pure, aut Titio sub conditione stipulari possum. Contra vero, si mihi sub conditione, aut Titio pure: inutiles erit tota stipulatio, nisi in meam personam conditio extiterit, scilicet [quia] nisi, quod ad me, rem acceperit obligatio, adjectio nihil potest valere. Hoc tamen ita demum tractari potest, si evidenter apparet pure titii persona adjecta.. Alioquin cum stipulor SI NAVIS EX AFRICA VENERIT, MIHI AUT TITIO DARI SPONDES? Titii quoque persona sub eadem conditione adjici videtur.

Ex hoc apparet si diversa conditio in meam personam, diversa in Titii, posita sit, nec in meam personam extiterit conditio, totam stipulationem nullius momenti futuram: extante vero mea conditione, si quidem Titii quoque conditio extiterit, poterit vel Titio solvi: si vero in illus persona defecerit, quasi non adjectus habebitur.

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ment to myself; therefore, I may agree to permit my debtor to pay a third person, provided it is paid within a month; although I give him two months for payment to myself. *d. L.* 98. § 4.

[485] The payment is effectively made to the person indicated not only by the debtor himself, but by any other on his behalf. *L.* 59.(*a*) *vers. & si a filio ff. de Solut.*

[486] The right which the debtor has to make as valid a payment to the person indicated as to the creditor, is transmissible to the heirs of the debtor, they have this right, even if mention of it had not been made in the new title which they have passed; for it is never presumed that a new title was intended to vary from the original title.

[487] Regularly the payment can only be made to the person actually indicated by the contract, and not to his heirs, or other representatives. *L.* 55.(*b*) *ff. de Verb. Oblig. l.* 81.(*c*) *ff. de Solut.*

Nevertheless, where the seller appoints a purchaser by the contract of sale to pay the price to one of his creditors, the payment may be effectively made, not only to the creditor himself, but to his heirs, and others succeeding to his rights. The reason is, that in such indication, it is not so much the person indicated, as his quality of creditor that is considered, in consequence of the interest which the seller has in the credit being discharged, and of that which the purchaser has to be subrogated to the rights and hypothecations of the creditor.

[488] A payment of the person indicated ceases to be valid, when he has changed his state. Therefore, if the person indicated by the contract has afterwards ceased to have a civil existence, I cannot make a valid payment to him. *L.* 38. (*d*) *de Solut.* although the creditor could have indicated to me a person who at the time of the contract was civilly dead; and it is in this sense that the law 95. (*e*) § 6. *d. t.* which appears to decide the contrary, ought to be taken. (*v. Cujas. in Comment. ad Padin. ad h. L.*) The reason of this difference is, that it may be presumed that the creditor would not have chosen the payment to be made to such person, if he had foreseen that he was to lose his civil existence. But if, at the time of the con-

(*a*) Et si a filio familias mihi aut Titio stipulatus sim: patrem posse Titio solvere quod in peculio est: scilicet si suo non filii nomine solvere velit dum enim adjecto solvitur, mihi solvi videtur. Et ideo si indebitum adjecto solutum sit, stipulatori posse condici Julianus putat; ut nihil intersit jubeam [te] Titio solvere, an ab initio stipulatio ita concepta sit.

(*b*) Cum quis SIBI AUT TITIO DARI stipulatus est, soli Titio, non etiam successoribus ejus recti solvitur.

(*c*) Si stipulatus sim MIHI AUT TITIO DARI, si Titius decesserit, heredi ejus solvere non poteris.

(*d*) Cum quis sibi aut Titio dari stipulatus sit: magis esse ait, ut ita demum recte Titio solvi dicendum sit, si in eodem statu maneat, quo fuit cum stipulatio interponeretur: cæterum sive in adoptionem sive in exilium ierit, vel aqua & igni ei interdictum, vel servus factus sit; non recte ei solvi dicendum, tacite enim inesse hæc conventio stipulationi videtur, si in eadem causa maneat,

(*e*) Usumfructum *mihi aut Titio dari* stipulatus sum: Titio capite dimmuto, facultas solvendi Titio non intercedit: quia & sic stipulari possumus, MIHI AUT TITIO, CUM CAPITE MINUTIS ERIT, DARI?

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tract, he had lost it, and the creditor knew that he had done so, the assent of the creditor, that the payment shall be made into his hands, notwithstanding he does not enjoy a civil state, cannot admit of any doubt.

The same may be said of a person of whom an indication has been made, and who afterwards becomes an interdict, or subject to the power of a husband, or a bankrupt. In all these cases, the creditor cannot make a valid payment, the presumption being, that if these accidents were foreseen, such person would not have been indicated.

[489] A person to whom the creditor has indicated the payment to be made by the agreement itself, is very different from one who has merely an authority from the creditor to receive. The power of paying to a person having a simple authority ceases by a revocation of the authority notified to the debtor, which the creditor may make at pleasure. The reason is, that such a right of payment being founded merely upon the procuration of the creditor, which, like every other procuration, is revocable, it follows, that at the procuration is determined by the revocation, the right founded upon it must determine also.

On the contrary, the right of paying to the person indicated by the agreement being founded upon the agreement itself, of which it constitutes a part, and which cannot be derogated from, but by mutual consent, the creditor cannot deprive the debtor of it, and the debtor, notwithstanding any prohibition of the creditor, may according to the law of the agreement, pay to the person indicated; this is laid down by the law 12. (*a*) § 3. and law 106. (*b*) *ff. de Solut.*

Nevertheless, if the creditor alleges that he has reasons for objecting to the payment being made to this person indicated by the contract, and the debtor has no interest in paying to that person, rather than to the creditor himself, or any other indicated by him, in lieu of the person indicated by the contract; to insist upon paying to the person indicated would be a degree of ill-humour and unreasonable obstinacy on the part of the debtor, which justice must disapprove.

[490] By the *Roman* law, the power of paying to the person indicated by the agreement, ceased, when upon the demand of the creditor, there intervened a *litis contestatio*. *L.* 57. (*c*) § 1. This being only founded upon a subtility, I do not think it ought to be followed in our law.

[491] There is no doubt but that a payment of part of the debt

(*a*) Alia causa est, si mihi proponas stipulatum aliquem sibi, aut Titio, hic enim etsi prohibeat me Titio solvere, solvendo tamen liberabor; quia certam conditionem habuit stipulatio, quam immutare non potuit stipulator.

(*b*) Aliud est, jure stipulationis Titio solvi posse; aliud postea permissu meo id contingere. Nam cui jure stipulationis recte solvitur, ei etiam prohibente me recte solvi potest: cui vero alias permisero solvi, ei non recte solvitur, si priusquam solveretur, denunciaverim promissori, ne ei solveretur.

(*c*) Item si MIHI AUT TITIO stipulatus fuero dari, deinde petam, amplius Titio solvi non potest, quamvis ante litem contestatam possit.

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to the creditor himself does not destroy the power of paying the remainder to the person indicated. *L.* 71. (*a*) *de Solut.*

§ V. *In what Manner may a Payment to a Person, who has neither Power nor Quality to receive, be rendered valid?*

[492] A payment to a person who has neither quality nor power to receive, becomes valid,

1st. By a subsequent ratification and approbation by the creditor. *L.* 12. (*b*) § 4. *ff. de Solut.* *L.* 12. (*c*) *cod. d. t.* *L.* 24. (*d*) *ff. de Neg. Gest.*

Ratifications, having retrospective effect, according to the rule *ratihabitio mandato comparatur, d. L.* 12. § 4. the payment is regarded as valid from the time of making it. Therefore, if a person engages as surety for my debtor, with a condition that his engagement shall continue no longer than the first of *January*, 1750, at the end of which time he shall be, *pleno jure*, discharged and acquitted; the payment by him in the course of the year 1749, to a person who had no power from me, will be valid, and he will have no right to demand a repetition, although I did not ratify the payment till 1750, the time in which he would have ceased being my debtor, if he had not paid; for by the retrospective effect of my ratification, the payment becomes valid, from the day on which it was made; and it was made at a time when his obligation subsisted. *L.* 71. (*e*) § 1. *ff. de Solut.*

Upon the same principle, if I owe a hundred pounds to *Peter* and *Paul*, as creditors in solido,(*f*) and I pay that sum in the first place to a person who receives it for *Peter*, without any power from him, and afterwards pay it a second time to *Paul*, the validity of the payment made to *Paul* will depend upon *Peter's* ratification; the first payment will be valid, if ratified by *Peter;* the second void, as being the payment of a debt already discharged; if *Peter* does not ratify the first, it will be void, and the second good. *L.* 58.(*g*) § 2. *ff. d. t.*

(*a*) Cum decem mihi aut Titio dari stipulatus, quinque accipiam! reliquum promissor recte Titio dabit.

(*b*) Sed etsi non vero procuratori solvam, ratum autem habeat dominus, quod solutum est: liberatio contingit, rati enim habitio mandato comparatur.

(*c*) Invito vel ignorante creditore qui solvit alii, se non liberat obligatione. Quod si hoc, vel mandante, vel ratum habente eo fecerit, non minus liberationem consequitur, quam si eidem creditori solvisset.

(*d*) Si [ego] hac mente pecuniam procuratori dem, ut ea ipsa creditoris fieret; proprietas quidem per procuratorem non adquiritur, potest tamen creditor, etiam invito me, ratum habendo, pecuniam suam fecere; quia procurator in recipiendo creditoris duntaxat negotium gessit; & ideo creditorus ratihabitione liberor.

(*e*) Si fidejussor procuratori creditoris solvit & creditor post tempus, quo liberari fidejussor poterit, ratum habuit: tamen quia fidejussor, cum adhuc ex causa fidejussionis teneretur, solvit, nec repetere potest, nec minus agere adversus reum mandati potest, quam si tum præsenti dedisset.

(*f*) As to the nature of obligations in solido among several creditors, *v. ante*, n. 258.

(*g*) Et si duo rei stipulandi sunt, quorum alterius absentis procuratori datum antequam is ratum haberet, interim alteri solutum est, in pendenti est posterior solutio, ac prior. Quippe inceptum est, debitm an indebitum exegerit.

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[493] The second case in which a payment to a person who had not a quality to receive becomes good, is, when the payment has eventually turned to the profit of the creditor, *L.* 28.(*a*) *L.* 34.(*b*) § 9 *de Solut.* As if it had served to liberate him from a debt,(*c*) *L.* 66.(*d*) *v. sed exceptione, ff. d. t.*

The third case is, if the person to whom payment has been made, becomes heir, or has succeeded to any other title of the creditor. *L.* 96.(*e*) § 4. *d. t.*

ARTICLE III.

What ought to be paid, how and in what State.

§ I. *Can one Thing be paid for another?*

[494] Regularly, a payment can only be made of the thing due; and a debtor cannot oblige his creditor to accept of any other thing, in lieu of what he owes him. *L.* 16.(*f*) *Cod. de Solut.*

By the *Novel* 4. *ch.* 3, a debtor, who has neither money, nor goods by which money may be raised, may oblige his creditor to receive estates upon a valuation to be made, unless the creditor prefers finding a purchaser.(*g*)

[495] The debtor is not only without any right of obliging his creditor to receive anything different from what is due, as a payment, but even if the creditor, by mistake, receives some other thing, upon a supposition of that being the thing which is actually due, the payment would not be valid, and the creditor may, upon offering to return what he has so received, demand what is really due. This is decided by *Paulus*, in *l.* 50. *ff. si quum aurum tibi promisisem tibi ignoranti quasi aurum æs solverem non liberabor.*

If the creditor consents to receive any other thing in discharge of

(*a*) Debitores solvendo ei, qui, pro tutore negotia gerit, liberantur si pecunia in rem pupilli pervenit.

(*b*) Si prædo id, quod a debitoribus hereditariis exigerat, petenti hereditatem restituerit; debitores liberabuntur.

(*c*) In England, this decision would not be allowed. Under many circumstances, a ratification would be presumed, which would bring the case to the preceding point; but my debtor has not a right against my will to discharge himself by a payment to my creditor.

(*d*) Si pupilli debitor, jubente eo sine tutoris auctoritate pecuniam creditori ejus numeravit: pupillum quidem a creditore liberat, sed ipse manet obligatus; sed exceptione se tueri potest. Si autem debitor pupilli non fuerat, nec pupillo condicere potest, qui sine tutoris auctoritate non obligatur nec creditore, cum quo alterius jussu contraxit: sed pupillus in quantum locupletior factus est, utpote debito liberatur, utili actione tenebitur.

(*e*) Cum institutus deliberaret, substituto pecunia per errorem soluta est; ad eum hereditate postea devoluta, causa condictionis evanescit; quæ ratio facit ut obligatio debiti solvatur.

(*f*) Eum, a quo mutuam sumpsisti pecuniam, in solutum nolentem suscipere nomen debitoris tui, compelli juris ratio non permittit.

(*g*) But this is not observed in *France.*

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what was due to him, it is doubtless a valid payment,(a) *L.* 17.(b) *cod. de Solut.* unless there was a right of restitution against this payment, in the case of insufficiency in value (*lesion*) on account or the minority of the creditor, who may have imprudently given his consent, or on account of fraud, &c. *L.* 26.(c) *ff. de lib. leg.*

[496] The debtor may oblige the creditor to receive some other thing, when there is an express power for the purpose, whether by the original contract, or by a subsequent agreement entered into with the creditor. *L.* 57.(d) *L.* 96.(e) § 2. *ff. de Solut.*

By the *Roman* law, this power ceased, when upon the demand of the creditor there intervened a *litis contestis, d. l.* 57. This I think should not be followed in our laws.

[497] These agreements for paying anything else in the lieu of what is due, are always presumed to be in favour of the debtor; therefore the debtor has always a right to pay the thing which is actually due, and the creditor cannot demand anything else.

Therefore, if by a contract of marriage a husband receives a certain portion for security of which he obliges particular lands, and it is said that after the dissolution of the marriage, the wife shall re-

(a) In *Pinnel's* case, 5 *Co.* 117. an action of debt was brought upon an obligation of 16*l.* with condition to pay 8*l.* 10*s.* on the 11th of *November*, 1600. The defendant pleaded that he, at the instance of the plaintiff before the day, viz. 1st *October*, paid the plaintiff 5*l.* 2*s.* which he accepted in full satisfaction of the 8*l.* 10*s.* And *per totam curiam*, the payment of a less sum at the day in satisfaction of a greater cannot be a satisfaction for the whole; for by no possibility can a smaller sum be a satisfaction for a larger; but the gift of a horse or a robe, &c. in satisfaction, is good; for it shall be intended that the horse, &c. was more beneficial to the plaintiff, otherwise he would not accept it in satisfaction: but when an entire sum is due, the acceptance of part of it cannot by any intendment be a satisfaction. But in the case at bar, it was resolved, that the payment and acceptance of part before the day, in satisfaction of the whole, will be a good satisfaction, in respect of the circumstance of time, for perhaps a part before the day may be more beneficial than the whole at the day, and the value of the satisfaction is not material. So if I am bound in 20*l.* to pay you 10*l.* at *Westminster*, and you request me at the day to pay 5*l.* at *York*, and are willing to receive it in full satisfaction, it is a good satisfaction for the whole, for the expense of paying at *York* is sufficient. But the plaintiff had judgment, because the defendant did not plead that he had paid in satisfaction, but only that the plaintiff had received in satisfaction; and the payment is always to be directed by him who makes it, and not by him who accepts it.

(b) Manifesti juris est, tam alio pro debitore solventi, quam rebus pro numerata pecunia consentiente creditore datis, tolli obligationem.

(c) Tutor decedens aliis heredibus scriptis, pupillo suo cujus tutelam gessit, tertiam partem bonorum dari voluit, *si heredibus suis tutelæ causa controversiam non fecerit, sed eo nomine omnes liberaverit:* pupillus legatum prætulit & posteo nihilominus petit quicquid ex distractione aliave causa ad tutorem suum ex tutela pervenerit. Quæro an verbis testamenti ab his exactionibus excludatur? Respondit, si, priusquam conditioni pareret, fidei commissum percipisset, & pergeret petere id in quo contra conditionem faceret, doli mali exceptionem obstaturum; nisi paratus esset, quod ex causa fideicommissi percepisset, reddere; quod ei ætatis beneficio indulgendum est.

(d) Si quis stipulatus fuerit *decem in melle;* solvi quidem mel potest, antequam ex stipulatu agatur: sed si mel actum sit, et petita decem fuerint, amplius mel solvi non potest.

(e) Soror cui legatum ab herede fratre debebatur, post motam legati questionem transegit, ut nomine debitoris contenta legatum non peteret: placuit, quamvis nulla delegatio facta, neque liberatio secuta esset, tamen nominis periculum ad eam pertinere. Itaque si legatum contra placitum peteret, exceptionem pacti non inutiliter opponi.

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ceive them in discharge of her portion, this agreement does not prevent the husband or his heirs retaining the lands, upon offering the amount of the portion. *L.* 45.(*a*) *ff. de Solut.*

For the same reason, if I have let a vineyard for the yearly sum of 500*l.* payable in the wines of the vintage, the liberty of paying in wines is deemed to be allowed in favour of the tenant; and I could not oblige him to give me wines, if he offers to pay me his rent in money.

But if a different thing had been paid in lieu of what was due, and actually consumed, the debtor could have no right of repetition upon offering to pay the sum which was due. *L.* 10.(*b*) *L.* 24.(*c*) *cod. de Solut.*

§ II. *Is the creditor bound to receive what is due in parcels?*

[498] Although the debt be divisible, if it is not actually divided, the creditor is not obliged to receive what is due to him in parts.

It is upon this principle that *Modestinus*, in the law 41.(*d*) § 1. *ff. de Usur.* decides, that unless there is a clause in the contract, that the debtor may pay by parcels, a tender of the part does not prevent the course of interest even as to that part. This decision clearly supposes the principle that a creditor is not obliged to receive what is due to him by parcels; if he were so obliged, and the consignation were valid, the interest would cease from that time; for when a debt is acquitted in part, the interest only runs upon the remainder. This is decided by law 4.(*e*) *Cod. de Comp.* and good sense alone is sufficient to establish it.

It may be said what interest can a creditor have in refusing his debtor the convenience of discharging his debt by parcels? The answer is, that a person has an interest in receiving at once a gross sum for the purposes of his business, rather than several small sums at different times, which are imperceptibly consumed as they come in.

(*a*) Callippo respondit, Quamvis stipulanti uxori vir spoponderit, *dirempto matrimonio prædia, quæ doti erant obligata, in solidum dare:* tamen satis esse, offeri dotis quantitatem.

(*b*) Successores ejus, qui major vigintiquinque annis in solutum pro debito jure mancipia debit, hæc revocare non posse, constat.

(*c*) Cum pro pecunia quam [mutuo] acceperas, secundum placitum Evandro te fundum dedisse profitearis; ejus industriam, vel eventum meliorem tibi non ipsi prodesse, contrarium non postulaturus, si minoris distraxissit, non juste petis.

(*d*) Tutor condemnatus per appellationem traxerat exsecutionem sententiæ: Herenius Modestinus respondit, eum qui de appellatione cognovit, potuisse, si frustratoriam morandi causa appellationem interpositam animadverteret, etiam de usuris medii temporis eum condemnare. Lucius Titius, cum centum & usuras aliquanti temporis deberet, minorem pecuniam, quam debebat, obsignavit. Quæro, an Titius pecuniæ, quam obsignavit, usurus non debeat. Modestinus respondit, si non hac lege mutua pecunia data est, *uti licerit & particulatim* [*quod acceptum est*] *exsolvere;* non retar dari totius debiti usurarum præstationem, si cum creditor paratus esset totum suscipere, debitor qui in exsolutione totius cessabat, solam partem deposuit.

(*e*) Si constat pecuniam invicem deberi; ipso jure pro soluto compensationem haberi oportet ex eo tempore, ex quo ab utraque parte debetur, utique quoad concurrentes quantitates, ejusque solius quod amplius apud alterum est usuræ debentur, si modo petitio earum subsistit.

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Besides, it is inconvenient for the creditor to keep an account of these small sums and make a calculation of them. *Dumoulin, tr. de div. & indiv. P.* 2. *n.* 14.

It is even not sufficient to offer the whole principal, when it carries interest, the creditor is not obliged to receive it, without having at the same time all the interest which is due upon it.

[499] When several persons have become sureties for a debtor, although they have among themselves the benefit of division,(*a*) yet if the creditor does not proceed against them for the payment, they cannot separately oblige him to receive the payment in part.

The reason is, that the debt, to which several sureties have acceded, is not *pleno jure* divided among them, they have only an exception, by which they are entitled to a decree for the division of the debt; it is when they are proceeded against for payment, and are all solvent, that this exception may be proposed; the debt, until that time, being undivided, it follows that the creditor cannot be obliged to receive it in part.

A judicial demand for the creditor to receive his part, by a surety against whom no process has been instituted, or to discharge him from the obligation, cannot be supported, however long a time may have elapsed since entering into his obligation; for the surety is only entitled to the *actio mandati*, to be discharged from his undertaking, and this against the principal debtor, for whom he has engaged, and not against the creditor.

Such a demand cannot be sustained, even if the surety should allege that the principal debtor and the co-sureties, although yet solvent, began to be in precarious circumstances, and that he ought not to suffer from the creditor's neglecting to proceed against them; the only recourse which the surety has is to pay the whole debt, and to procure subrogation of the rights and actions of the creditor. *Dumoulin, tr. d. div. & indiv. P.* 2. *n.* 54, 55, 56.

Dumoulin, n. 57. goes farther: "Although the obligation of the sureties should be *pleno jure* divided amongst them, as, if three persons became sureties for a debtor, each for a third part, he thinks that even in this case, the surety who is not proceeded against for payment, cannot oblige the creditor to receive the payment of his third part, because, says he, the obligation of sureties ought not indirectly to impair the principal obligation, and render it payable in parcels before it was actually divided."

I think *Dumoulin* goes too far; for as this surety is only obliged for a third part, he ought to have the power of liberating himself, by paying that third part, which is all that he owes, it being permitted to every debtor to liberate himself, upon offering everything that he owes. I even think that the principal debtor, who cannot in his own name pay in parcels, may pay for one of the sureties the third which that surety owes. The debtor having an interest in paying for this surety, to discharge himself from the indemnity which he is bound to

(*a*) Vide supra, n 415.

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give, the creditor can refuse such payment. *Dumoulin*, *ibid. n.* 50, agrees that this is the general opinion of the doctors, though he is of a different one himself.

[500] The rule that a creditor cannot be obliged to receive his debt by parcels, provided the debt is yet undivided, is subject to exceptions; first, when there is a clause in the contract, that the debt shall be divided into a certain number of payments; as, into two or three payments, or when in consideration of the poverty of the debtor, the judge directs it by a sentence of condemnation; the creditor is in all these cases bound to conform to what is prescribed by the agreement, or by the sentence.

When it is not expressed what shall be the amount of each payment, it should be understood that all the payments should be equal. For instance, if I am bound to pay a thousand pounds in four payments, each payment must be a fourth of that sum, neither more nor less; except that I may make several payments at once, by paying the half or three-fourths of the sum.

When the agreement imports, that the payment shall be made in two different places conjunctly, as at my house at *Orleans* AND my Banker's at *Paris*, this clause means that a moiety shall be paid in each place; if the particle is disjunctive, as at *Paris* OR *Orleans*, the creditor is only bound to receive the money in one payment, at which of the places the debtor thinks proper.

[501] Our rule is subject to a second exception, when there is a dispute concerning the quantity that is due; as, if I state an account by which I make myself debtor of a certain sum, and the creditor insists that the balance amounts to a greater sum, the law 31.(a) *ff. de Reb. Cred.* directs that in this case the creditor shall be obliged to receive the admitted balance without prejudice to the remainder, which shall be subject to the decision of the contest. This decision being very equitable, is in the discretion of the judge to admit such provisional payment, when the debtor requires it.

[502] The rule is subject to a third exception, in the case of compensation, (set off,) for a creditor is obliged to admit a compensation of what is due from him to his debtor as far as it goes, although it be less than what is due to himself.

[503] A person who is creditor of another for different debts, is obliged to receive a payment offered by the debtor of any one, although he does not offer the payment of the others at the same time.(b)

For the same reason, a debtor of several years rent may oblige the creditor to receive the payment for one year, although he does not

(a) Cum fundus vel homo per condictionem petitus esset, puto, hoc nos jure, ut post judicium acceptum causa omnis restituenda sit: id est, omne, quod habiturus esset actor, si litis contestandæ tempore solutus fuisset.

(b) I conceive that this point would, according to the law of *England*, admit of distinctions; where goods had been purchased at several times, the consolidated amount would constitute an entire debt; but if a tenant tender his rent, or a debtor the money due on the condition of a bond, the tender could not be refused, and a distress made for the rent, or an action sustained on the bond on account of any unconnected debt, not being included in the tender.

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offer him the payment of the others at the same time; for all the arrears are so many different debts; the creditor however cannot be obliged to receive the last year's payment before the first, *ne rationes ejus conturbentur. Dumoulin, ibid. n.* 44.

According to this principle, *Dumoulin, ibid.* decides, that the holder of an estate, who is subject to lose his right in it, by non-payment of a rent charge for three years, may avoid such penalty, on offering the payment of one year, before the expiration of the third.

§ III. *In what manner may the Thing, which is due, be paid?*

[504] The payment of a thing can only be made by transferring to the creditor the irrevocable property of it, *non videntur data quæ eo tempore quo dantur, accipientis non fiunt. L.* 167. *ff. de Reg. Jur.*

Hence it follows, as has already been observed in Art. I. that the payment of a thing is not valid, when it does not belong to the person who gives it in payment without the consent of the real proprietor.

Nevertheless, such payment may afterwards become valid, if the creditor who receives it becomes proprietor, by enjoying the thing so as to acquire a prescriptive title, or when he can no longer apprehend an eviction; as where the person giving it has become sole heir of the proprietor, or where the thing is no longer in existence, or has been *bona fide* consumed by the creditor who received it. *L.* 60.(*a*) *L.* 78.(*b*) *L.* 94.(*c*) § 2. *ff. de Solut.*

The reason is, that in these cases, the subsequent occurrences supply what was originally wanting to complete the payment, as the creditor thereby acquires either the property of the thing which he has received in payment, or something equivalent to it.

[505] But where the creditor receives his own property by mistake, the payment made to him is so null, that it can never become valid; for he can never be supposed to have acquired either really, or by way of equivalent, what already belonged to him; *quod meum est, amplius meum esse non potest.*

[506] When the payment is made to a third person, by the order of the creditor, it is likewise necessary that the property which is paid, should be transferred either to the creditor, when such third person receives it in his name, and for the purpose of acquiring it for him; or to the third person himself, if such was the intention of the creditor.

Hence it follows, that if I have given an order to a person who has sold me an estate, to deliver it to my wife, to whom I intended to give it; as the payment or delivery of it to my wife is not sufficient to

(*a*) Is, qui alienum hominem in solutum dedit, usupacto homine liberatur.

(*b*) Si alieni nummi inscio vel invito domino soluti sunt, manent ejus, cujus fuerunt, si mixti essent, ita ut discerni non possent: ejus fieri, qui accepti, in libris Gaii scriptum est: ita ut actio domino cum eo, qui dedisset, furti competeret.

(*c*) Sed et si fidejussor alienos nummos in causam fidejussionis dedit; consumpsit his, mandati agere potest: et ideo si tam pecuniam solvat, quam subripuerat, mandati aget, postquam furti, vel ex causa conditionis præstiterit.

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transfer the property to her, (as donations between husband and wife are forbidden by law,) nor to myself, (as my wife did not receive it for me); and as my debtor consequently remains the proprietor of the estate, such payment, considering only the subtility of law, is not valid, and does not liberate my debtor; but if he is not in this case liberated *ipso jure*, and according to the subtility of the law, he is liberated *per exceptionem doli*, as good faith does not permit that I should demand from him an estate, which by my act he is rendered incapable of delivering to me, having delivered it by my order, to my wife; therefore he is only bound to cede to me his right of revindication to be exercised at my risk. This results from *L.* 26.(*a*) *ff. de Donat. inter vir. & uxor.* and law 38.(*b*) § 1. *ff. de Solut.*

According to our usages, it is not even necessary that my debtor should subrogate me to his right of revindication; the law subrogates me *pleno jure*.

[507] It is not sufficient to constitute a valid payment, that the property be transferred to the creditor; it is requisite, as we have already said, that it be done irrevocably, for it is not really transferring it, if it is transferred in such a manner that he cannot always retain it; according to the rule of law, *quod evincitur, in bonis non est. L.* 190. *ff. de R. J.*

For instance if the thing given in payment were subject to hypothecations, whether it were the very thing which is due, or whether it were given in payment of a sum of money, the debtor would not by such payment be acquitted of his debt, unless he discharged the hypothecations, *L.* 20.(*c*) *L.* 69.(*d*) *L.* 98.(*e*) *ff. de Solut.* for such a payment not having transferred to the creditor, to whom it was made, a property of the thing, which he can always retain, is not a valid payment, and consequently does not extinguish the debt.

If by a clause of the contract, the debtor, who is obliged to give a

(*a*) Si cum, qui mihi vendiderit, jusserim *eum rem uxori meæ donationis causa dare*, et is possessionem jussu meo tradiderit, liberatus erit: quia licet illa jure civili possidere non intelligatur, certe tamen venditor nihil habet quod tradet.

(*b*) Si debitorem meum jusserim *Titio solvere*, deinde Titium vetuerim accipere, et debitor ignorans solverit: ita cum liberari existimavit, si non ea mente Titius nummos acceperit, ut eos lucretur: alioquin, quoniam furtum eorum sit facturus, mansuros eos debitores: et ideo liberationem quidem ipso jure non posse contingere debitori: exceptione tamen ei succurri æquum esse, si paratus sit condictionem furtivam quam adversus Titium habet mihi præstare; sicuti servatur, cum maritus uxori donaturus, debitorem suum jubeat solvere: nam ibi quoque, quia nummi mulieris non fiunt, debitorem non liberari: sed exceptione eum adversus maritum tuendum esse, si condictionem, quam adversus mulierem habet, præstet: furti tamen actionem in proposito mihi post divortium competituram quando mea intersit interceptos nummos non esse.

(*c*) Si rem meam, quæ pignoris nomine alii esset obligata, debitam tibi solvero, non liberador: quia avocari tibi res possit ab eo, qui pignori accepisset.

(*d*) Si hominem, in quo usufructus alienus est, vel qui erat pignori Titio obligatus, noxæ dedisti: poterit is, cui condemnatus es, tecum agere judicati: nec expectabimus, ut creditor evincat, sed si ususfructus interierit, vel dissoluta fuerit pignoris obligatio: existimo processuram liberationem.

(*e*) Qui res suas obligavit, postea aliquam possessionem ex his pro filia sua dotem promittendo obligavit, et solvit: si ea res a creditore evicta est, dicendum est maritum ex dotis promissione agere posse, ac si statu liberum, remve sub conditione legatam, dotis nomine pro filla pater solvisset, harum enim rerum solutio non potest nisi ex eventu liberari; scilicet, quo casu certum erit remanere eas.

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certain thing, had charged the creditor with the risk of such thing, or if the thing was declared by the contract to be subject to a particular kind of eviction; his being subject to such eviction, provided he has no ground to apprehend any others, will not prevent the payment from being valid.

§ IV. *In what State ought a Thing to be given in Payment?*

[508] When a debt is of a certain and determinate thing, that thing may be effectually given in payment, in whatever state it may happen to be, provided the deteriorations subsequent to the contract have not arisen from the fault of the debtor, or of persons for whom he is responsible, such as his workmen, or servants.(*a*)

If the deterioration arises by accident, or by the act of a stranger, the debtor may make a valid payment of it, according to the state in which it is; he is no further obliged than to cede to the creditor the actions which he might institute against the person who caused the damage; and if he does not cede them, the judge would subrogate the creditor, who is the person that has really sustained the damage.

[509] It is otherwise, when the debt is of an indeterminate thing; as if a horse-dealer has promised, by a contract of marriage, to give his son-in-law a horse, as part of his daughter's portion, without specifying what horse; if one of his horses becomes lame, or broken-winded, he could not give this horse in discharge of his debt, he ought to give one which had no material defect. *L.* 33.(*b*) *in fin. ff. de Solut.* Whereas if he obliged himself to give to his son-in-law such a horse determinately, he would be discharged from his obligation in giving him that horse, in whatever state it might happen to be.

(*a*) *Fitzherbert* v. *Shaw*, 1 *H. B.* 258. The landlord of an estate having brought an action of ejectment against the tenant, the parties entered into an agreement, that judgment should be signed for the plaintiff, with a stay of execution until, &c., and that the defendant should continue in possession until that time. In the meantime the defendant removed a stable fixed on blocks or rollers. The court held it unnecessary to go into the general question of the right of the tenant to remove a building of that description, since the fair interpretation of the agreement was, that as the defendant was to remain in possession for a certain time after that agreement was entered into, he should do no act in the meantime to alter the premises, but should deliver them up in the same situation as they were in when the agreement was made.

I cannot but think that the Court here ascribed an intention to the parties different from that which most probably existed in point of fact, and that the only thing in contemplation of the parties was, that they should at a certain time be placed in the same situation, as if the cause had gone on to trial, without any design on the part of the tenant to abandon any right which he in that case would have enjoyed.

(*b*) Qui *hominem dari* promisit, et vulneratum a se offert, non liberatur. Judicio quoque accepto, si hominem is cum quo agetur, vulneratum a se offert, condemnari debebit. Sed et ab alio vulneratum si det, condemnandus erit, cum possit alium dare.

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ARTICLE IV.

When ought the Payment to be made?

[510] It is evident that a payment cannot be made of anything before it is an actual debt, for where there is no debt there can be no payment. Hence it follows, that if a debt is suspended by the condition under which it was contracted, and which is not yet accomplished, no payment can be made of it.

Not only is the debtor exempt from any obligation of paying, or the creditor of receiving, before the condition is accomplished; but if the debtor, being ignorant of the condition, pays by mistake, he has a right of repetition *per condictionem indebiti;* for, in this case he would pay what he did not yet owe. But this payment which was not valid at first, is confirmed and becomes valid by the accomplishment of the condition; for such accomplishment has a retrospective effect to the time of the contract; and the debt is considered as due from the time of the contract being made, (*supra, n.* 220,) and by a necessary consequence, the payment made before the accomplishment of the condition is considered as valid. *L.* 16. *ff. de Cond.*(*a*) *Indeb.*

[511] A term of payment differs from a condition, as such term has not the effect of suspending the debt, but merely of postponing the right of demanding it, (*supra, n.* 230.) A payment before the term is valid. *L.* 1.(*b*) § 1. *ff. de Cond. & Demost.*

This rule however is subject to some exceptions: for instance, if a testator having bequeathed a sum of money to a minor, to prevent its being consumed by the tutor, had ordered that it should be paid at the majority of the legatee, the heir who should pay the legacy before, would not be liberated in case of the insolvency of the tutor. *V. l.* 15.(*c*) *ff. de Ann. Leg.*

See as to the term of payment, Part II. Chap. 3. Art. III.

(*a*) Sub conditione debitum, per errorem solutum, pendente quidem conditione repetitur; conditione antem existente repeti non potest.

(*b*) Cum dies certus adscriptus est, quamvis dies nondum venerit, solui tamen possunt quia certum est ea debita iri.

(*c*) [Javolenus] Eum, qui rogatus *post decem annos restituere pecuniam*, ante diem restituerat, respondit: si propter capientis personam, quod rem familiarem tueri non posset, in diem fideicommissum relictum probetur, et perdituro ei id heres ante diem restituisset, nullo modo liberatum esse; quod si tempus heredis causa prorogatum esset, ut commodum medii temporis ipse sentiret, liberatum eum intelligi: nam et plus eum præstitisse, quam debuisset.

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ARTICLE V.

Where and at whose expense ought the payment to be made?

§ I. *Where ought the payment to be made?*

[512] When there is a place appointed by the agreement for the payment, it ought to be made there. If no place is appointed and the debt is of a specific thing, the payment should be made where the thing is. For instance, if I have sold the wine of my vineyard to a merchant, the delivery ought to be made in my repository where the wine is: he should send there for it, and load at his own expense; my obligation is to deliver it to him where it is, and I am not obliged to take it up, but merely to give him the key, and permit him so to do. This is conformable to the law 47. § 1. *ff. de Leg.* 1. *Si quidem certum corpus legatum est, ibi præstabitur ubi relictum est.*

If the debtor, after the sale, has transferred the thing from the place where it was, to another place, from which the carriage would be more expensive to the creditor, he may demand by way of damages, what the carriage cost, more than it would have cost if it had remained in the place where it was before the sale; as the debtor ought not by his act to prejudice the creditor.

[513] If the debt is not of a specific thing, but of any thing indeterminate, as a pair of gloves, a sum of money, a certain quantity of corn, wine, &c. the payment in this case cannot be where the thing is, because the generality of the engagement prevents there being any such place; where must it be then? The law above cited decides, that in this case payment should be made at the place where it is demanded, *ubi petitur;* that is to say, at the domicil of the debtor. *Dumoulin, Tr. de Usur. q. q.*

The reason is, that as agreements ought, in respect to the things which are not expressed by the parties, to be interpreted rather in favour of the debtor, than of the creditor *in cujus potestate fuit legem opertius dicere*, (*supra, n.* 97). from these principles it follows, that when they have not assigned a place for payment, the agreement ought to be interpreted in a manner the least burthensome and expensive to the debtor.

Our principle, that such things are payable at the domicil of the debtor, when no other place has been appointed for payment by the agreement, is subject to an exception when two things occur; when the debtor and creditor reside near each other; as if they live in the same town, and the thing due consists in a sum of money, or any thing else, that may be carried, or sent to the creditor's without expense; where these two things concur, payment should be made at the house of the creditor. *Dumoulin, ibid.* In this case, the debtor owes his creditor this compliment which costs him nothing; in default of paying at the house of the creditor, the creditor may send a process of commandment to the house of the debtor who will be liable

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for the expenses of it, and the debtor may pay the officer who serves the process.

Although it is said expressly by the act, that the payment shall be at the house of the creditor, who at the time of the act resided in the same town with the debtor, and *a fortiori* if no place has been appointed for payment; if the creditor subsequent to the contract has changed his domicil to a town, at a distance from that of the debtor, the debtor may demand that the creditor should choose a domicil in the place where he resided when the contract was made; as this transfer of domicil to a place where the debtor did not reside ought not to be burthensome to the debtor, and alter his condition to his detriment according to the rule, that *nemo alterius facto prægravari debet.*

See Part II. Ch. 3 Art. IV.

§ II. *At whose Expense is the Payment to be made?*

[514] Payment is made at the expense of the debtor; therefore, if he desires an acquittance before a notary, the acquittance should be passed at his expense.

Therefore a person who sells wine, ought to pay the expense of a permit, for the delivery of it.

ARTICLE VI.

Of the Effect of Payment.

[515] The effect of a payment is to extinguish the obligation and every thing accessary to it, and to liberate all the debtors of it. *L.* 43.(*a*) *ff. de Solut.*

§ I. *Whether a single Payment may extinguish several Obligations.*

[516] Sometimes a single payment may extinguish several obligations; this happens when the thing given in discharge of an obligation is the very thing which is the object of another obligation.

For instance, if I have agreed to sell you the thing which I have given you in pledge, in payment of a sum which you have lent me, my payment of this thing extinguishes at once the obligation resulting from your loan to me, and from my sale to you, *L.* 44.(*b*) *ff. de Solut.* for the thing which I have paid you, in discharge of the obli-

(*a*) In omnibus speciebus liberationum etiam accessiones liberantur, puta adpromissores, hypothecæ, pignora; praterquam quod inter creditorem et adpromissores confusione facta reus non liberatur.

(*b*) In numerationibus aliquando evenit, ut una numeratione duæ obligationes tollantur uno momento; veluti si quis pignus pro debito vendiderit creditori, evenit enim, ut [&] ex vendito tollatur obligatio, et debiti. Item si pupillo, qui sine tutoris auctoritate mutuam pecuniam accepit, legatum a creditore fuerit sub ea conditione *si eam pecuniam numeraverit,* in duas causas videri eum numerasse; et in debitum suum, ut in Falcidiam heredi imputetur; et in conditionis gratia ut legatum consequatur. Item

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gation resulting from the loan, is the same thing which constitutes the object of my obligation resulting from the sale.

[517] This rule holds good even with regard to the different creditors: for instance, if I have by your order paid ten thousand livres, which I owe you, to your creditor to whom you owe the same sum, this payment extinguishes at once both my obligation and yours, *L.* 64.(*a*) *ff. d. t.* it amounts to two payments, *juris effectu;* for it is as if I had paid you the money, and you had paid it afterwards to your creditor, *celeritate conjungendarum inter se actionum, unam actionem occultari, L.* 3. § 12. *ff. de Don. int. Vir. & Exor.*

[518] This rule that a payment made in discharge of one obligation, extinguishes others which have the same object, applies likewise with respect to several debtors.

For instance, if by your orders I have lent a sum of money to *Peter*, the payment by *Peter* extinguishes at once both your obligation and his own.

This observation, that when there are obligations, which, although proceeding from different causes have nevertheless one and the same object, the payment of one extinguishes both, only holds good where the debtor who has paid, has not a right of requiring a cession of the actions of the creditor, against the debtor of the other obligation; but in the opposite case, where the debtor who has paid has a right to require such cession of the other obligation, that obligation subsists, not indeed so that the creditor can be paid a second time, but so that he may cede his action to the person entitled.

For instance, retaining the same example, if by your direction I have lent a sum of money to *Peter*, we have seen that a payment by *Peter* extinguishes both his obligation and yours; but if before *Peter* pays me, you pay me to liberate yourself, this payment only extinguishes your obligation, and not that of *Peter;* because upon paying me you have a right to require the cession of my action against *Peter*, who remains obliged not to me, who cannot demand the same thing twice over, but to you in consequence of the cession of my actions, which I ought to make. *L.* 95.(*b*) 10. *ff. de Solut. L.* 28.(*c*) *ff. Mand.*

si usufructus pecuniæ numeratæ legatus fuerit; evenit, ut unan numeratione [&] liberetur heres extestamento, et obliget sibi legatarium.

Tatundem est, et si damnatus fuerit alicui vendere vel locare; nam vendendo, vel locando, et liberatur ex testamento heres, et obligat sibi legatarium.

(*a*) Cum jussu meo id, quod mihi debes, solvis creditori meo; et tu a me, et ego a creditore meo liberor.

(*b*) Si mandantu meo Titio pecuniam credidisses, ejusmodi contractus similis est tutori et debitori pupilli; et ideo mandatore convento et damnato, quanquam pecunia soluta sit, non liberari debitorem ratio suadet; sed et præstare debet creditor actiones mandatori adversus debitorem, ut ei satisfiat. Et huc pertinet tutoris et pupilli debitoris non fecesse comparationem; nam cum tutor pupillo tenetur ob id quod debitorem ejus non convenit, neque judicio cum altero accepto, liberatur alter: nec si damnatus tutor solverit, ea res proderit debitori: quin etiam dici solet tutulæ contraria actione agendum, ut ei pupillus adversus debitores actionibus cedat.

(*c*) Papinianus, lib. 3. Quæstionem, ait mandatorem debitoris solventem, ipso jure reum non liberare; propter mandatum enim suum solvit et suo nomine, ideoque mandatori actiones putat adversus reum cedi debere.

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Such cession of actions against the debtor of a different obligation, may be made even *ex intervallo* after the payment, in which respect it differs from that against the co-debtors of the same obligation, of which we shall speak in the following paragraph.

§ II. *Whether Payment by one of the Debtors extinguishes the Obligation of all the other Debtors of the same Obligation; and of the Cession of Actions.*

[519] If the payment of one obligation may liberate the debtors of a different obligation, having the same object, as we have seen in the preceding paragraph; *a fortiori*, the payment by one of the debtors of the same obligation ought to liberate all the others, whether they be principals or accessaries, such as sureties.

[520] This rule is subject to a limitation in the case of the cession of actions; for, if one of the co-debtors or sureties, upon paying the debt, procures a cession of the rights and actions of the creditor, the debt is not considered as extinguished in respect to those against whom the actions have been ceded.

Many questions may be proposed concerning this cession of actions: 1st. What persons upon payment of a debt, have a right to demand a cession of the action of the creditor against the other debtors who are liable to it? 2nd. Is the creditor so far obliged to make this cession, that he cannot demand his debt wholly, or in part, from those to whom he was obliged to cede them, when he has by his own act disabled himself from such cession? 3d. Does the cession take place *pleno jure*? or, must it be demanded, and when? 4th. What is the effect of it?

Upon the first question it must be admitted as a principle, that all those who are bound for a debt for others, or with others, by whom they ought to be discharged either wholly or in part, have a right, upon paying, to demand a cession of the actions of the creditor against the other debtors.

It is upon this principle that *Julian* decides, that a surety is entitled, upon payment, to have a cession of the actions of the creditor, as well as against the principal debtor, as against all other persons who are liable: *fidejussoribus succurri solet, ut stipulator compellatur ei, qui solidum solvere paratus est, vendere cæterorum nomina. L. 17. ff. de Fid.*

For the same reason, the creditor cannot refuse a debtor in solido, from whom he demands the whole debt, a cession of his actions against the other debtors. *L. 47.(a) ff. Locat.*

This obligation of the creditor to cede his action is founded upon the rule of equity, that as we are obliged to love all mankind, we are

(a) Cum apparebit emptorem conductoremve pluribus vendentem vel locantem, singulorum in solidum intuitum personam; ita demum ad præstationem partis singuli sunt compellandi, si constabit esse omnes solvendo, quanquam fortasse justius sit, etiam si solvendo omnes erunt, electionem conveniendi quem velit, non auferendam actori, si actiones suas adversus cæteros præstare non recuset.

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obliged to give them everything which they have an interest in having, when we can do so, without detriment to ourselves.

A debtor in solido having then a just interest to have a cession of the actions of the creditor against his co-debtors, in order to compel them to bear a part of a debt for which they are equally liable with him, the creditor cannot refuse it to him. For the same reason he cannot refuse it to a surety, or generally to any others, who, being liable to the debt, have an interest to be discharged from it wholly or in part, by those for whom or with whom they are debtors.

But if a stranger pays a debt to which he was not liable, and without having any interest to discharge it, the creditor is not obliged, if he does not think proper, to cede him his actions. *L.* 5.(*a*) *Cod. de Solut.*

This is subject to an exception with respect to bills of exchange: if a stranger, for the sake either of the drawer or some one of the indorsers, or the acceptor, acquits a bill of exchange of which he was not debtor, the cession of the actions of the creditor cannot be refused to him, he is even subrogated to it *pleno jure*, by the ordonnance of 1673, as we have seen in our treatise upon bills of exchange.

[521] Upon the second question, whether the creditor ought to be excluded from his demand, against one of the debtors, *per exceptionem cedendarum actionum*, when by his own act he has deprived himself of the power of ceding his actions against the others, there is no difficulty with regard to *mandatores pecuniæ credendæ*. *Papinian* decides it in formal terms, in the law 95. § 11. *ff. de Solut.* "*Si creditor a debitore culpa sua causa cediderit, prope est ut actione mendati nihil a mandatore consequi debeat; cum ipsius vitio acciderit, ne mandatori posset actionibus cedere.*"

The reason is evident: it is a principal common to all reciprocal contracts, that where we have contracted mutual obligations, I am not admissable to demand the performance of yours, when by my own fault I fail in the performance of mine. According to this principle, if you have lent a certain sum to *Peter* by my order, and by your own fault have lost the action which you had acquired by the loan, and consequently cannot cede it to me, you ought not to be allowed to demand from me the money which I have obliged myself by the contract of mandate to reimburse to you; since you have by your own fault rendered yourself incapable of fulfilling your obligation, to cede to me your action against *Peter* upon the loan. *V. supra, n.* 445.

Ought the same decision to be followed with regard to sureties? May a surety, from whom the creditor demands the payment of a debt, be discharged from the demand, so far as he might have obtained a repetition by a cession of the actions of the creditor, when such creditor has by his own act rendered himself incapable of ceding them to him? The reason for doubting is, that I see no text of the laws which expressly contains such decision, with regard to sureties. The

(*a*) Nulla tibi adversus creditorem alienum actio superest, eo quod ei debitam quantitatem offerens, jus obligationis in te transferri desideras, cum ab eo te nomen comparasse non suggeras; licet, solutione ab alio facta nomine debitorus, evanescere soleat obligatio.

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law 95. § 11. above cited, which gives this *fin de non reçevoir* to *mandatores pecuniæ credendæ*, does not appear to me decisive as to sureties; for there is not the same reason for it: a person who lends a sum of money to *Peter*, by the order of another, has by the contract of mandate included in the order which he has executed, contracted a formal obligation towards the *mandator pecuniæ credendæ*, to cede and preserve the action which he would acquire by the loan made to *Peter*, in performance of the mandate. It cannot be said in the same manner with respect to a surety, that the creditor has contracted a similar obligation in his favour; the engagement of a surety is an unilateral contract, by which he alone is obliged. If the creditor is obliged to cede his actions to the surety, at the time of payment, it is the principle of equity alone which obliges him to do so, for he has no interest to refuse it; but he ought only to be obliged to cede them such as they are; and is not subject to any imputation for not having retained them, and for having disabled himself from ceding them. There is another difference which *Cujas* observes, *ad L.* 21. *ff. de Pact.* A person by whose order I have lent a sum of money to *Peter*, not having any action against *Peter*, has an absolute occasion for my ceding to him my actions against *Peter*; but a surety, having of his own right an action against his principal, has no absolute occasion for the cession of the action of the creditor against the principal debtor, although the cession of hypothecations may be useful to him; *nec usquam legitur* says *Cujas*, *cogi creditorem fidejussori cedere actionibus sortis.*

Nor only is there no text of law, which decides that the surety can exclude the creditor from the whole or part of his demand, on account of his having rendered himself incapable of ceding his actions either against the principal debtor, or against any of the other sureties; there are even passages which seem to imply the contrary: such is the law 22. *ff.*(a) *de Pact.* where it is said, that a creditor may make an agreement with the principal debtor, not to demand the payment of the debt from him, and may nevertheless reserve the power of demanding it from the surety. In this case, the creditor may demaad the payment from the surety, although he has, by the agreement with the debtor, incapaciated himself from ceding his actions against him. The law 15. § 1. *ff. de Fid.* appears likewise to decide, that the creditor who by his own act has rendered himself incapable of ceding his actions to one surety against the other, is not on that account in any wise excluded from his demand, *si ex duobus qui apud te fidejusserant in viginti, alter, ne ab eo peteres, quinque tibi dederit vel promiserit; nec alter liberabitur, et si ab altero quindecem petere institueris, nulla exceptione summoveris;* nevertheless the creditor has disabled himself from ceding his actions to the one from whom he demands the fifteen, so as to enable him to recover five from the other. Notwithstanding these reasons, it must be decided, that when the creditor has by his own act incapaciated himself from ceding to

(a) Nisi hoc actum est, *ut duntaxat a reo non petatur*, [*à fidejussore petatur*]: tunc enim fidejussor exceptione non utetur.

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the surety his actions, either against the principal debtor, or against the other sureties, whether because he has discharged them, or because he has by his neglect allowed his demand against them to be dismissed, the surety may *per exceptionenem cedendarum actionum*, obtain a declaration that the demand of the creditor is inadmissible, for so much as the surety might have procured by the cession of actions, which the creditor has disabled himself from making.

This is not subject to any difficulty with regard to the action against the principal debtor: for as we have observed *supra, n.* 370, it being of the essence of the engagement of a surety not to be obliged to more than the principal debtor, the discharge of the debtor by the creditor discharges the surety likewise, and all the exceptions *in rem*, and prescriptions, which the principal debtor acquires, are also acquired to the surety. We have answered *supra, n.* 380, to the argument founded upon the law 22. *de Pactis*.

When the creditor has rendered himself incapable of ceding his actions against one of the sureties to the others, by discharging him, or by suffering the demand against him to be dismissed, it ought in like manner to be decided, that he should be excluded *per exceptionem cendendarum actionum*, from his demand against them, not for the whole, but for that part for which they would have had recourse, if the creditor had not rendered himself incapable of ceding his action. For instance, if there were four sureties, all solvent, the creditor can only demand his debt from the three others, with the deduction of the fourth, for which they would have had recourse against the one who has been discharged; and if, amongst the other three, there happened to be one insolvent, the creditor should make a deduction from the demand against the two that are solvent, not only for the fourth, for which he who was discharged was liable on his own account, but also for his third of the portion of the insolvent.

The reason of this decision is, that when several persons become sureties together for one principal debtor, they rely upon the recourse which they will have against each other; and it is only in this confidence that they contract the engagement, which otherwise they would not have done; it is not just, therefore, that the creditor should by any act of his deprive them of it.

Observe, that if the surety whom the creditor has discharged, only become such after the engagements of the others, the latter would not have the exception *cedendarum actionum* against the creditor; for in contracting their engagement, they could not reckon upon a recourse against the one who had not then concurred in the engagement: it is to this case that the decision of the law 15. § 1, above cited, ought to be confined.

What has been already said with respect to sureties, must be applied to debtors in solido; when several persons contract an obligation in solido, they only oblige themselves each for the whole, under a confidence of the recourse which they shall have against the others, upon paying the whole; therefore, when the creditor, by his own act, deprives them of such recourse, by rendering himself incapable of ceding his actions against the one that he has discharged, he ought

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no longer to be admitted to claim in solido against the others, except subject to the deduction of the portion for which they would have had recourse against the one whom he has discharged. *Vide supra n.* 275.

When the creditor has allowed some right of hypothecation upon the goods of any one of his debtors to be lost, whether by omitting to oppose the adjudication of the property in favour of other persons, or by suffering persons purchasing, without the charge of the hypothecation, to acquire a liberation from it, by a possession of ten or twenty years, can the co-debtors in solido, and sureties, oppose the exception *cedendarum actionum*, upon the ground that he has disabled himself from ceding to them the hypothecary action which he has suffered to be lost, and upon which they had relied for recourse, in case they should be compelled to pay the whole? I do not think that they can; the exception *cedendarum actionum*, as it appears to me, ought not to be opposed to the creditor, unless by a positive act on his part, he has rendered himself incapable of ceding his actions against one of the debtors by discharging his person or property; or unless, by allowing a demand that he has instituted to be dismissed, he has laid himself open to a suspicion of collusion. But a mere negligence on his part, in not interrupting the possession of the purchasers, or in not opposing the adjudication of other creditors, ought not to subject him to any imputation; 1st, because as he is only obliged to the cession of his actions by the mere principle of equity, not having contracted in this respect any precise obligation to the other debtors and sureties to preserve them, it is sufficient that he acts with good faith; that is, that he does nothing contrary to his obligation, and he ought not to be answerable in this respect of mere negligence: 2d, the other debtors and sureties might as well as the creditor have taken care of the right of hypothecation which he has lost; they might summon him to interrupt, at their risks, the possession of the purchasers, or to oppose the adjudication; it is only in the case where they have put the creditor *en demeure*, that they can complain of his having lost his hypothecation; but when they have been no more vigilant than he has, they cannot charge him with a negligence which is equally imputable to themselves.

[521 B] The third question, whether the cession of the actions of the creditor is made *pleno jure*, has already been agitated, *supra, n.* 280, with regard to debtors in solido: we have there established, contrary to the opinions of *Dumoulin*, that it does not take place *pleno jure*, and that it ought to be required; but when it has been required, it is not necessary in our *French* practice to proceed against the creditor, if he refuses; and that the law supplies the refusal of the creditor, and transfers his actions to the person who had required the cession of them. What we have said with respect to debtors in solido, may likewise be applied to sureties.

The cession ought to be made or required at the very time of payment; without that, the payment having extinguished the credit and the actions of the creditor, a cession cannot afterwards be made of actions which no longer exist.

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It is only *mandatores pecuniæ credendæ*, who, for a particular reason, may, *ex intervallo*, obtain a cession of the actions of the creditor. See *supra*, *n.* 445.

Observe, that there are certain cases in which the law transfers the rights and actions of the creditor to the person who has paid the debt, although he has not required the cession; these are, 1st. When a person, to prevent a protest discharges a bill of exchange for the honour of any of the parties, he is subrogated *pleno jure* to all the rights and actions of the holder, as we have seen *supra.*

2d. If, during the community of goods between husband and wife, an annuity, which was only due by one of them, has been redeemed by the money of the community; the other is, as to his or her part, in the community, subrogated *pleno jure* to all the actions of the creditor against the debtor.

3d. Where one hypothecatory creditor, to strengthen his right of hypothecation, pays to another what is due to him by the common debtor, such creditor has no need of acquiring a subrogation; he is subrogated *pleno jure* to the credit which he has discharged, and to the hypothecations and rights which depend upon it, *L.* 4.(*a*) *Cod. de his qui in prior:* it is evident, that he only paid for the sake of acquiring the subrogation.

With regard to a third person in possession of an estate, who, to avoid a process, has paid the debt for which his estate was hypothecated; if, upon paying, he fails to require a subrogation to the rights of the creditor, he will not indeed be subrogated to all the rights of the creditor; but he may at least, according to our usages, exercise them upon this estate against all the other creditors, posterior to him whom he has paid; for, in liberating the estate from the hypothecation, *meliorem fecit in eo fundo cæterorum creditorum pignoris causam*, and he may therefore *per exceptionem doli* retain against them what he has paid in discharge of the hypothecation; good faith does not allow them to profit at his expence; *dolo faciunt si velint ejus damno locupletari;* this case is similar to that in which the possessor of an estate subject to hypothecation, has laid out money in improvements.

The cession of actions, or at least the requisition of such cession, is necessary, in order to be subrogated to hypothecatory credits, except in the cases which we have mentioned: but with regard to credits, to which there is a personal privilege attached, such as funeral expenses, expenses of a last illness, rents of houses, and debts due to the revenue, &c. it is not necessary to require a subrogation, the privilege attached to these credits passes *pleno jure* to those who have discharged them, and they exercise it in the same manner as the privileged creditor whom they have paid might have done, *eorum ratio prior est creditorem, quorum pecunia ad creditores privilegiarios per-*

(*a*) Si prior respubl. contraxit, fundusque èi est obligatus, tibi secundo creditori offerenti pecuniam potestas est, ut succeedas etiam in jus reipub.

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venit. L. 24. § 3. *ff. de Reb. Auth. Jud. Pos.*(a) *alius L.* 6.(b) § 5. *ff. de Privil. Cred.*

[522] Upon the fourth question, what is the effect of the cession of actions? we must refer to *L.* 36. *ff. de Fid.* by which we learn that payment by any person to a creditor, with subrogation to his rights and actions, is considered not so much a payment as a sale, which the creditor is supposed to make of his credit, and of all the rights depending upon it, to the person from whom he receives the money; *non in solutum accepit, sed quodam modo nomen debitoris vendidit, d. L.;* therefore, the credit thus discharged, is deemed still the right which depend upon it, in favour of the person who is subrogated; he may exercise them as the creditor to whom he is regarded as procurator *in rem suam* might have done.

This subrogation is only made for the whole, when the person who pays ought to have recourse for the whole against the principal debtor.

But when the person paying ought only to have recourse for part, and is debtor without recourse, and on his own account, the subrogation will only be for the portions for which he might have recourse, and the payment will be as to the portion of which he is debtor, without recourse, and on his own account a pure and absolute payment, which will have entirely extinguished the debt for that part.

For instance, suppose that there are four debtors in solido; if one of them who is debtor of the whole with respect to the creditor, and of a fourth with respect to his co-debtors, pays the whole debt with a subrogation, the subrogation can only affect the three-fourths, for which he ought to have recourse against his co-debtors; but as to the fourth, for which he was debtor without any right to reimbursement, the payment made by him is a pure and absolute payment, which so far extinguishes the debt to the extent of such part.

[523] It is a great question, whether this debtor may exercise in solido the actions of the creditor to which he is subrogated for the three-forths, against each of his co-debtors; we have treated of this at length, *supra, n.* 281. The same question may be proposed with respect to a surety subrogated to the actions of the creditor against his co-sureties; and as the reason is the same the decision should be so likewise.

It remains to observe, that it is only by a fiction of law, established in favour of the person who pays with a subrogation, that the credit is supposed to subsist: in truth it is paid and extinguished; for the real intention of the parties was to make a payment and not a transfer; therefore, if a person in redeeming an annuity, of which he was debtor in solido, or surety, takes a subrogation to the rights of the creditor of such annuity, he is not subject to the hypothecations which the creditors of the proprietor of the annuity had upon it, as a real assignee of the annuity would have been; the redemption though made

(a) Eorum ratio prior est creditorum, quorum pecunia ad creditores privilegiarios pervenit. *Pervenisse* autem quemadmodum accipimus? Utrum si statim profectas et ab inferioribus ad privilegiarios? An vero & si per debitoris personam; hoc est, si ante ei numerata sit, & sic debitoris facta. creditori privilegiaro numerata [est]? Quod quidem potest benigne dici, si modo non post aliquod intervallum id factum sit.

(b) Not found in the Digest.

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with a subrogation being a real payment, has extinguished the annuity, and consequently, the hypothecations, which are extinguished *rei obligatæ interitu:* a subrogation to the actions of the creditor being a mere fiction, established in favour of the person who paid, cannot be opposed to him, according to the maxim *quod in favorem alicujus introductum est, non debet contra ipsum retorqueri.*

§ III. *Of the Effect of partial Payments.*

[524] Regularly payment of a part of what is due extinguishes the debt as to that part; therefore, if you owe me ten pounds, and pay me five, the debt is extinguished for a moiety. *L.* 9. § 1. *ff. de Solut.*

[525] To this rule there are three exceptions.

First, with respect to the alternative obligations, which are not extinguished in any degree by a partial payment of one of the things due by the way of alternative, until the residue is discharged. For instance, if a countryman promises a particular cow, or ten pounds, as a portion with his daughter, and pays his son-in-law five pounds, he does not by this payment, as long as the cow lives, extinguish any part of his obligation, until he pays the other five pounds. The payment which has been made is in a state of suspense. It is confirmed, and becomes valid by paying the other five pounds, which will wholly extinguish the debt. If he thinks proper, he may elect to give the cow, and in that case, the payment of the first five pounds, will be void, and may be reclaimed, as having been unduly paid. *L.* 26.(*a*) § 13. *ff. de Cond. Ind.*

If, after paying the five pounds, the cow dies, so that it can no longer be given in discharge of the obligation, which therefore becomes a determinate obligation for the money, the partial payment becomes binding, and the obligation is to that extent extinguished.(*b*)

[526] The second exception relates to obligations of an indefinite thing of a certain kind *obligationes generis.* The same observation must be applied to this case as to alternative obligations. Therefore, if a countryman engages to give his son-in-law a horse generally, and in discharge of the obligation gives him the share of a particular horse, which he holds in partnership with another person, this does not extinguish any obligation, until he buys the other share,

(*a*) Si *decem aut Stichum* stipulatus, solvam quinque: quæritur an possim condicere? Quæstio ex hoc descendit, an liberer in quinque; nam, si liberor, cessat condictio; si non liberor, erit condictio? Placuit autem (ut Celsus lib. 6, & Marcellus lib. 20, Digestorum, scripsit) non periri partem dimidiam obligationis. Ideoque eum qui quinque solvit, in pendenti habendum, an liberaretur, petique ab eo posse reliqua quinque, aut Stichum; & si præstiterit residua quinque, videri eum & in priora debita solvisse; si autem Stichum præstitisset, quinque eum posse condicere, quasi indebita. Sic posterior solutio comprobabit, priora quinque utrum debita, an indebita solverentur? sed et si post soluta quinque, et Stichus solvatur, & malim ego habere quinque & Stichum reddere, an sim audiendus, quærit Celsus? Et putat natam esse quinque condictionem: quamvis utroque simul soluto, mihi retinendi, quod vellem, arbitrium daretur.

(*b*) In the case supposed, it might not be unreasonable to decide, that the payment and receipt of the first five pounds indicate an election to discharge the obligation by payment of the money, and render that which was before an alternative, a determinable obligation.

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and gives it acccordingly. Until that is done, the son-in-law may demand an entire horse, offering to abandon the share which has been given. *L.* 9.(a) § 1 *ff. de Solut.*

These decisions apply whether the obligation is contracted by one debtor or more, or in favour of one or more creditors. *L.* 34.(b) § 1. *ff. de Solut. d. L.* 26. § 14.(c) *ff. de Cond. Ind.*

[527] The third exception is, where the debtor has given one or more particular things by way of discharge for a sum of money which he owed. If this payment is defeated in any part, by an eviction, the obligation is not partially extinguished, and the creditor may, upon offering to restore the residue, resort to his original demand; for probably he would not have consented to such a payment, but from the expectation of retaining the whole. *L.* 46. *pr.* & § 1. *ff. de Solut.*

ARTICLE VII.

Rules for the Application or Imputation of Payments.

First Rule.

[528] The debtor has the power of declaring on account of what debt he intends to apply the sum which he pays:(d) "*quoties quis debitor ex pluribus causis, unum solvit debitum, est in arbitrio solventis, dicere quod potius debitum voluerit solutum.*" *L.* 1. *ff. de Solut.*

(a) Qui *decem* debet, partem solvendo in parte obligationis liberatur, & reliqua quinque sola in obligationes remanent. Item qui Stichum debet, parte Stichi data in reliquam partem tenetur. Qui autem *hominem* debet, partem Stichi dando, nihilominus hominem debere non definit; denique homo adhuc ab eo peti potest. Sed si debitor reliquam partem Stichi solverit, vel per actorem steterit quominus accipiat, liberatur.

(b) Si duo rei stipulandi *hominem dari* stipulati fuerint, & promissor utrique partes diversorum hominum dederit, dubium non est quin non liberetur; sed si ejusdem hominis partes utrique dederit, liberatio contingit; quia obligatio communis efficiet, ut quod duobus solutum est, uni solutum esse videatur. Nam ex contrario, cum duo fidejussores *hominem* dari spoponderint, diversorum quidem hominum partes dantes non liberantur, at si ejusdem hominis partes dederint liberantur.

(c) Idem ait & si duo heredes sint stipulatoris, non sic posse, alteri quinque solutis, alteri partem Stichi solvi. Idem & si duo sint promissoris heredes, secundum quæ liberatio non contingit, nisi aut utrique quina, aut utrique partes Stichi fuerunt solutæ.

(d) This rule is followed in the *English* law, as is fully established by several cases, and is manifest from daily practice. *Pinnel's* case, 5 *Co.* 117, cited *ante* 495, *n.* The manner of tender and payment shall always be directed by the person who makes it, and not by the person who accepts it. *Colt* v. *Nettervill* 2 *P. Wms.* 304. A bill for a specific performance alleged that the plaintiff had paid 6*d* as earnest; the defendant pleaded that he did not accept it as earnest; and by the Lord Chancellor, it is not material in what manner the defendant accepted it, but how the other paid it; for, *quicquid solvitur, solvitur ad modem solventis.*—The defendant being indebted to the plaintiff upon bond, and also upon a book debt, paid the money due on the bond at the day; the plaintiff said it should be for the book debt: the defendant said he paid it upon his bond, and not otherwise. The plaintiff brought his action on the bond, and adjudged against him. *Anon. Cro. Eliz.* 68. *Hawkshaw* v. *Rawlings*, 1 *Str.* 23, seems contrary to all the other cases upon this subject; for there, one of three obligors pleaded payment by the other obligors, and acceptance in satisfaction. The plaintiff replied, that he did not receive it in satisfaction, and the replication was holden to be good. *Parker*, *Ch. J.* Suppose a man owes me 100*l.* on a bond, and 100*l.* on another account, and he pays me 100*l.* I may apply it to which I will; and though he paid it in satisfaction of the bond, yet if I did not receive it as such, it will be no dischrge. *Pratt*, *J.* There can be no payment in satisfaction, without an acceptance in satisfaction

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The reason which *Ulpian* gives is evident, "*possumus enim certam legem dicere, ei quod solvimus.*" *d. L.*

According to our rule, although regularly the interest should be paid before the principal, yet if the debtor of the principal and interest, upon paying a sum of money, has declared that he paid on account of the principal, the creditor who has agreed to receive it cannot afterwards contest such application: *Respondi si qui dabat, in sortem se dare dixisset, usuris non debere proficiere. L.* 102. § 1. *ff. de Solut.*

Second Rule.

[529] If the debtor, at the time of paying, makes no application, the creditor, to whom the money is due, for different causes, may make the application by the acquittance which he gives.(*a*) "*Quoties non dicimus in id quod solutum sit, in arbitrio est accipientis, cui potius debito acceptum ferat.*" *d. L.*

It is requisite, 1st. That this application be made at the instant; "*dummodo in re præsenti fiat, in re agendâ, ut vel creditori liberum sit non accipere, vel debitori non dare, si alio nomine solutum quis corum velit; postea non permittitur.*" *L.* 2. *L.* 3. *ff. p. t.*

2d. That it be equitable; "*in arbitrio est accipientis, cui potius debito acceptum ferat: dummodo* (adds the law) *in id constituat solutum, in quod ipse si deberet, esset soluturus, id est, non in id debitum quod est in controversia, aut in illud quod pro alio quis fidejusserat, aut cujus dies nondum venerat. d. L.* 1. *ff. de Solut.*

Bachovius ad Tr. t. 2. *disp.* 29. *ch.* 3. *l. c.* says, that this limitation ought to be understood in this sense, that as long as the thing is still entire, and as long as the debtor has not received from the creditor an acquittance, importing the application, he may object to the application which the creditor would make to the account of those debts which the debtor had least interest to acquit, and consequently, may demand that the creditor should either make an equitable application by his acquittance, or restore his money. But if the debtor has consented to the application, by receiving the acquittance which contains it, he cannot, according to *Bachovius*, contradict this application, notwithstanding it may be made to the debt which he had least interest in discharging; because *volenti non fit injuria*, and be-

(*a*) In *Manning* v. *Western*, 2 *Vern.* 606, it was held by Lord *Cowper*, C. that the rule *quicquid solvitur, solvitur ad modum solventis* is to be understood, when the person paying declares, at the time of payment on what account he pays; but if the payment is general, the appointment is in the receiver. And in *Bloss* v. *Cutting*, at *Suffolk* assizes, cited 2 *Str.* 1194, where the defendant owed money on two bonds, and paid money on account, but gave no direction which he would have it applied to, upon a case reserved, it was determined that the plaintiff had the election. This right of the receiver to apply the payment, which is generally adopted in practice, is more extensive than the right for the same purpose in the civil law: for that seems to be confined to an application contained in the acquitance given for the payment. Whereas, with us, the election may be made at any time afterwards. But in the subsequent notes, it will be seen that our courts have, in several cases (most of which are collected in *Viner's* Abr. tit. Payment,) directed an application from the circumstances of the case, nearly correspondent with the rules in the text.

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cause otherwise the position, that when the application has not been made by the debtor, it is referred to the creditor, would not be true. For if we suppose that the creditor can only make the application to the debt, which the debtor had most interest in discharging, and consequently to the debt to which the law would apply the payment, if no application was made by the creditor, it follows, that the application which the creditor makes is useless, and that he has not the choice. This is the reasoning of *Bachovius*.

It may be answered, that it is not necessary to the truth of the rule, which refers the choice of the application to the creditor, if it is not made by the debtor, that the creditor should in all cases have this choice; it is sufficient that he may have it in certain cases; and when the different debts are such that it is of little consequence to the debtor, that one should be discharged rather than another. In this case the creditor has the choice of application, if the debtor does not make it; and instead of the payment being applied by the law to the debt of the longest standing, or to all proportionately, if they were all of the same date, which, as we shall see, would be the case, if no application were made, the application will be referred to that to which the creditor shall choose to make it.

Suppose, for instance, that I am your creditor for 1000*l.* the price of an estate which I sold to you in 1750, by an act before notaries; and in another sum of 1000*l.* the price of another estate which I sold you by an act before notaries, in 1760: after having paid me the interest of both sums, you pay me 1000*l.* without mentioning on account of which of the two debts you intend to pay it; it is indifferent to you to which of the two the application should be made, since both are hypothecatory, may be demanded, and carry interest; but if it is of material importance to me to make the application to the debt of 1760, in order to preserve my hypothecation of 1750; for if I did not make this application, it would be the debt of 1750, which, as the most ancient, would be supposed to be paid.

The other argument opposed by *Bachovius* appears more plausible, namely, that the debtor, who, by taking a receipt which contains the application, has consented to such application, is not admissible to contradict it, whatever interest he had that it should be made on account of the other debt. However, I do not think that this ought to be decided indiscriminately: for, if the debtor is an illiterate person, the application, which has slipped into the receipt, ought not to prejudice him when the sum paid equals or exceeds the amount of the debt which the debtor had the most interest to discharge; so that the creditor could have had no reason for not making the application in which the debtor had the greatest interest. For instance, suppose that a countryman owes a procureur the sum of three hundred livres, for the price of a plot of land which he has sold him, and about a year's interest; and also five or six hundred livres for fees; if the peasant pays the procureur the sum of four hundred livres, and the procureur gives him a discharge for this sum, specifying that it is on account of the fees which are due to him, it is evident that this application is a surprise upon the debtor, and that the debtor has a right

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to demand, that, notwithstanding what is stated in the receipt, the payment should be applied to the three hundred livres which he owed for the price of the estate, and consequently, that the interest should be declared to have ceased from the day of payment. On the contrary, if the creditor might have had a sufficient reason for not making the application to the debt, which it was of the most importance to the debtor to acquit, as, because the sum paid was less than that due on such account, and the creditor was not obliged to receive the payment of the debt in part, the application to another debt cannot be contradicted; because the creditor, who has it in his power to refuse the payment, has only accepted it upon condition of the application which he has made, and which has been agreed to by the debtor.

Observe, that when it is expressly stated in the discharge, that the sum is received on account of all the different claims of the creditor, "*ex universo credito*," this general application is only understood to comprise the debts for which the creditor has a right of action, and not those which are purely natural. *L.* 94.(*a*) § *fin. de Solut.*

It also appears to me, that this expression should only be understood as comprising those debts of which the term of payment is expired.

Third Rule.

[530] When the application has neither been made by the debtor nor by the creditor, it ought to be made to that debt which the debtor at the time had the most interest to discharge.(*b*)

Corollary I.

The application should rather be made to a debt which is not contested, than to one that is; rather to a debt which was due at the

(*a*) Cum Titius Gaio Seio deberet, ex causa fideicommissi certam quantitatem, & tantundem eidem ex alia causa, quam peti quidem non poterat, ex solutione autem petitionem non prætat: Titii servus actor, absente domino, solvit eam summam quæ efficeret ad quantitatem unius debitii: cautumque est ei solutum ex universo credito. Quæro id, quod solutum est, in quam causam acceptum videtur? Respondi: si quidem Titio Seius ita cavisset, ut sibi solutum ex universo credito significaret, crediti appellatio solam confideicommissam pecuniam demonstrare videtur; non eam quæ petitionem quidem non habet; solutione autem facta, repeti pecunia non potest. Cum vero servus Titii actor, absente domino, pecuniam solverit; ne dominum quidem nummorum in eam speciem obligationis, quæ habuit auxilium exceptionis, translatum foret, si ex ea causa solutio facta proponeretur; quia non est vero simile dominum ad eam speciem solvendis pecuniis servum præpossuisse, quæ solvi non debuerunt; non magis quam ut nummos peculiares ex causa fidejussionis, quam servus non ex utilitate peculii suscepti solverit.

(*b*) If one owes 40*l.* by bond, for the payment of 20*l.* at such a day, and 20*l.* by contract to the same person, payable the same day, and at the day he pays 20*l.* without telling for which it is, it shall be a payment in equity upon the bond, because that is most penal to him. *Anon.* 12 *Mod.* 559.

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