time of payment, than to one which was not. *L.* 3.(*a*) § 1. *L.* 103.(*b*) *ff. de Solut.*

Corollary II.

Among several debts which are due, the application ought rather to be made to the debt for which the debtor was liable to be imprisoned, than to debts merely civil, in respect of which process could only issue against his effects.

Corollary III.

Among civil debts the application should rather be made to those which produce interest, than to those which do not.(*c*)

Corollary IV.

The application ought rather be made to an hypothecatory debt than to another. *L.* 97.(*d*) *ff. de Solut.*

Corollary V.

The application ought rather to be made to the debt, for which the debtor had given sureties, than to those which he owed singly. *L.* 4.(*e*) *in fin. L.* 5. *ff. d. t.* The reason is, that in discharging it, he

(*a*) Quod si forte â neutro dictum sit; in his quidem nominibus, quæ diem [vel conditionem] habuerunt, id videteur solutum, cujus dies venit.

(*b*) Cum ex pluribus causis debitor pecuniam solvit, Julianus elegantissime putat, ex ea causa eum solvisse videri debere, ex qua tunc cum solvebat, compelli poterit ad solutionem.

(*c*) So held, *Brownlow*, 107. *Heyward* v. *Lomax*, *Vern.* 24. *Anon.* 8 *Mod.* 236. In *Goddard v. Cox*, before *Lee*, *C. J.* at *N. P.* 2d *Str.* 1194. Where *A.* owed money as executrix of B. and other money on her own account to C. and afterwards married D. who incurred a further debt to C. and made several payments generally, it was held by the Chief Justice, that as the defendant had not applied the money, the right devolved upon the plaintiff; and as the defendant by the marriage was equally liable for the debt incurred by the wife, *dum sola*, as for what was due from himself, the plaintiff might apply the money to discharge the wife's own debt; but as the demand against her as executrix depended on the assets, he was of opinion that the plaintiff could not apply any part of the money to that.

(*d*) Cum ex pluribus causis debitor pecuniam solvit, utriusque demonstratione, cessante, potior habebitur causa ejus pecuniæ quæ sub infamia debetur, mox ejus, quæ pœnam continet, tertio, quæ sub hypotheca vel pignore contracta est: post hunc ordinem potior habebitur propria, quam aliena causa, veluti fidejussoris; quod veteres ideo definierunt, quod verisimile videretur diligentem debitorem admonitu ita negotium suum gesturum fuisse. Si nihil eorum interveniat, vetustior contractus ante solvetur. Si major pecunia numerata sit, quam ratio singulorum exposcit, nihilominus primo contractu soluto, qui potior erit, superfluum ordini secundo, vel in totum, vel pro parte minuendo videbitur datum.

(*e*) Et magis, quod meo nomine, quam quid pro alio fidejussoris nomine debeo, et potius quod cum pœna, quam quod sine pœna debetur: et potius quod satisdato, quam quod sine satisdatione debeor.

In his vero, quæ presenti die debentur, constat quoties indistincte quid solvitur, in graviorem causam videri solutum; si autem nulla prægravat (id est, si omnia nomina similia fuerint) in antiquiorem, gravior videtur, quæ [&] sub satisdatione videtur, quam ea, quæ pura est.

discharges himself from two creditors, from his principal creditor, and from his surety whom he is obliged to indemnify. Now, a debtor has more interest to be acquitted against two, than against a single creditor.(*a*)

Corollary VI.

The application ought rather to be made for a debt, of which the person who has paid was principal debtor, than to those which he owed as surety for other persons, *d. L.* 97. *L.* 4. *ff. d. t.*

All these corollaries may be subject to exceptions, which are left to the discretion of the judge.

For instance, although in general the application is to be made to the debt, which is due rather than to that which is not, nevertheless, if the other would become due in a few days, and may be enforced by arrest, I think it ought in the application to be preferred to an ordinary debt, which is due at present; for it was the interest of the debtor, rather to acquit a debt for which in a few days he would be subject to arrest, although the term of payment was not yet expired, than to acquit ordinary debts whose term was expired.

In like manner, although a payment is to be applied to a debt, which may be enforced by arrest, rather than to those purely civil; yet if the debtor was a person who from his dignity, and riches, might flatter himself that the creditor would not proceed by arrest against him, if this debt does not carry interest, the application should rather be made to a debt purely civil which does.

Fourth Rule.

[531] If the debts are of an equal nature, and such that the debtor had no interest in acquitting one rather than the other, the application should be made to that of the longest standing,(*b*) *si nulla causa prægravit in antiquiorem. L.* 5. *ff. d. t.*

Observe, that of two debts contracted the same day, but with different terms, which are both expired, the debt of which the term was the shorter, and consequently which expired sooner, is understood to be the more ancient. *L.* 89.(*c*) § 2. *ff. hoc titulo.*

(*a*) This reason does not seem very satisfactory, for though there are two creditors, there is only one debt: the interest of the creditor to retain the obligations of the surety is much greater than that of the debtor to discharge him.

(*b*) This would, in most cases, render the rule that the creditor has the right of application, if not made by the debtor at the time of payment, a mere nullity: for it must be very seldom that the two debts become due at precisely the same time; but where A. being in trade, owed B. 100*l.* and after leaving off trade, borrowed 100*l.* more, and paid 100*l.* generally, it was held by *Holt, Ch. J.* that it should be applied to the former, so that the creditors should never charge him with a commission of bankruptcy for that which remained. *Comb.* 463. *Anon.*

See *supra, n.* 530.

(*c*) Lucius Titius duabus stipulationibus, una quindecim sub usuris majoribus, altera viginti sub usuris levioribus Seium eadem die obligavit, ita ut viginti prius solverentur: id est idibus Septembribus; debitur post diem utriusque stipulationis cedentem, solvit viginti sex; neque dictum est ab altero, pro qua stipulatione solveretur. Quæro,

Fifth Rule.

[532] If the different debts are of the same date, and in other respects equal, the application should be made proportionately to each. "*Si par et dierum, et contractuum causa sit, ex summis omnibus proportione solutum.*" *L.* 8. *ff. de Solut.*(*a*)

Sixth Rule.

[533] In debts which are of a nature to produce interest, the application is made to the interest before the principal; "*primo in usuras, id quod solvitur, deinde in sortem, accepto feretur.*" *L.* 1. *Cod. h. t.*

This holds good even if the acquittance imported that the sum was paid to the account of the principal and interest, "*in sortem et usuras.*" The clause is understood in this sense, that the sum is received to the account of the principal after the interest is satisfied. *L.* 5.(*b*) § *fin. de Solut.*

Observe, that if the sum paid exceeds what is due for interest, the remainder is applied to the principal, even if the application had been expressly made to the interest, without mentioning the principal. *L.* 102.(*c*) § *de Solut.*

This decision ought to be understood, with reference to a principal which can be demanded. But if the debtor of an annuity had paid more than he owed for the arrears, he would have a repetition of such surplus, and could not insist upon having it applied to the principal of the annuity; for, properly speaking, the principal of an annuity is not due; it is only in *in facultate solutionis*, and the creditor is not presumed to have consented to the annuity being redeemed in part.

[534] The rule which we have established, that the application ought to be made to the interest before the principal, does

an quod solutum est eam stipulationem exoneravit, cujus dies antecessit; id est, ut viginti sortes solutæ videantur et in usuras eorum sex data? Respondit, magis id accipi, ex usu esse.

(*a*) A. was bound as surety for B. to C. and B. owed C. a further debt. An account was stated between B. and C., including both, and a bill of sale was made in satisfaction of the whole debt, and it was held that the money raised thereon should be applied towards both debts in proportion. The Lord Chancellor (after stating the general right of the creditor to elect) said that as the payment was made pursuant to a preceding account of both debts, it should be so proportionably rated. *Perry* v. *Roberts*, 2 *Chan. Cas.* 84. *Vid. Styart* v. *Rowland*, *Show.* 216.

(*b*) Apud Marcellum, lib. 20. Digestorum, quæritur, si quis ita caverit debitori, *in sortem et usuras se accipere*, utram pro rata et sorti, et usuras decedat; an vero prius in usuras, et si quid superest, in sorte? Sed ego non dubito, quin hæc cautio *in sortem et in usuras*, prius usuras admittat; tunc deinde, si quid super fuerit, in sortem cedat.

(*c*) Titius mutuam pecuniam accepit, et *quincunces usuras* spopondit, easque paucis annis solvit postea nullo pacto interveniente, per errorem et ignorantiam semisses usuras solvit. Quæro, an patefacto errore, id quod amplius usurarum nomine solutum esset, quam in stipulatum deductum, sortem minueret? Respondit, si errore plus in usuris solvisset, quam deberet, habendam rationem in sortem ejus quod amplius solutum est.

not hold with regard to interest due by a debtor, from the time of a judicial demand being made as penalty for his delay; such interest is awarded by way of damages, and forms a distinct debt from the principal; and what the debtor pays is applied rather to the principal than to this interest, according to the third corollary above stated.

This is established by an *arrêt* of 1649, and another of 1706.

[535] When the creditor pays himself out of the price of a thing which was hypothecated to him, and which he has sold, the application is to be directed by other rules than those above established.(*a*)

First Rule.

The first rule is, that the application ought in this case to be made rather to the debt for which the thing was hypothecated, than to others for which it was not, whatever interest the debtor may have had to acquit the latter rather than the former. *L.* 101.(*b*) § 1. *ff. de Solut.*

When the debt for which the thing is hypothecated carries interest, the creditor may make the application to the interest, before the principal. *L.* 48.(*c*) *d. t.*

Second Rule.

When the thing was charged as a surety for different debts the application is made to that whose right of hopothecation is strongest; for instance, to a privileged debt rather than to a simple hypothecation. Among simple hypothecations, the application will be made to the debt of which the hypothecation was the most ancient. If the rights of the hypothecation were equal, the application should be made to all by contribution *pro modo debiti.* *L.* 96.(*d*) § 3. *ff. d. t.*

(*a*) A creditor by judgment, and also by bond, receives 200*l.* of the purchaser of the estate of the debtor, but gives no notice to the debtor that it was to be applied towards the payment of the bond debt; and *per curiam*, it shall be applied towards satisfaction of the judgment, being part of the purchase money. *Brett* v. *Marsh*, *Vern.* 468.

(*b*) Paulus respondit, *aliam causam esse debitoris solventis, aliam creditoris pignus distrahentis.* Nam cum debitor solvit pecuniam, in potestate ejus esse commemorare, in quam causam solveret; cum autem creditor pignus distraherit, licere ei pretium in acceptum referre, etiam in eam quantitatem, quæ natura tantum debebatur; et ideo deducto eo, debitum peti posse.

(*c*) Titia cum propter dotem bona meriti possiderit, omnia pro domina egit, reditus exegit et moventia distraxit; quæro an ea, quæ ex re mariti percepit, in dotem ei reputari debeant? Marcellus respondit, reputationem ejus, quod proponeretur, non iniquam videri; pro soluto enim magis habendum est, quod ex ea causa mulier percepit; sed si forte usurarum quoque rationem arbiter dotis recuperandæ habere debuerit, ita est computandum, [ut] prout quidque ad mulierem pervenit, non ex universa summa decedat; sed prius in eam quantitatem, quam usurarum nomine mulierem consequi oportebat; quod non est iniquum.

(*d*) Cum eodem tempore pignora duobus contractibus obligantur, pretium eorem pro modo pecuniæ cujusque contractus creditor accepto facere debet; nec in arbitrio ejus electio erit, cum debitor pretium pignoris consortioni subjecerit, quod si temporibus discretis superfluum pignorum obligari placuit: prius debitum pretio pignorum jure solvetur secundum superfluo compensabitur.

ARTICLE VIII.

Of Consignation and Offers of Payment,

[536] Consignation is a deposit which a debtor makes of the thing that he owes into the hands of a third person, and under the authority of a court of justice.

[537] Consignation is not properly a payment, for a payment essentially includes a transfer of property in the thing which is paid; whereas it is evident that a consignation does not transfer the thing consigned to the creditor, who can only acquire a property by voluntarily receiving it, *Dominium non acquiritur nisi corpore et animo.* But although the consignation, made upon the refusal of the creditor, is not an actual payment, it is equivalent to a payment and extinguishes the debt no less than if an actual payment had been; *obsignatione totius debitæ pecuniæ solemnitur facta liberationem contingere manifestum est. L.* 9. *cod. de Solut.*

[538] To render the consignation valid and equivalent to a payment it is necessary *qu'il n'ait pas tenu au debiteur de payer au creancier*, and that the creditor should be placed *en demeure*, by an effectual offer of payment.

An offer, to be effectual, must be made to the creditor himself, if he has a capacity of receiving; if not, to the person who has the quality of receiving on his behalf, as his tutor or curator, &c.

If there is a person indicated by the contract to whom the payment may be made, the offer may be made to that person: for the debtor having a right of paying to him by the terms of the agreement, it is a necessary consequence that he is not obliged to go elsewhere in search of the creditor.

[539] 2d. It must be made by a person capable of paying, for a person who has not a capacity to pay, has not a capacity to offer a payment.

[540] 3d. The offer must be of the entire sum, unless a liberty is expressly given of paying by instalments, otherwise the creditor, who is not obliged to receive his debt by parts, is not placed *en demeure.*

[541] 4th. When the debt is contracted under a condition, the condition must have taken place, and if there is any term stipulated *in favour of the creditor*, the term must have expired: for, as long as the creditor is not under any obligation to receive, no delay can be imputed to him.

[542] 5th. The offer must be made at the place appointed for the payment, *ita demum oblatio debiti liberationem parit, si eo loco quo debetur solutio fuerit celebrata. L.* 9. *cod. de Solut.* Therefore, if money is payable to a creditor in his dwelling-house, an offer cannot be effectively made elsewhere; if the payment is to be made at some other place, the creditor may be required to appoint a particular spot, as his domicil there, for the purpose.

If the thing which is due is a specific article, to be delivered at the

place where it is, there may be a summons to take it away, which is equivalent to an offer of payment; and thereupon the debtor may obtain an order from the judge to deposit it in another place, if he wants to occupy his own rooms in a different manner.

[543] A formal act must be prepared of these proceedings, and of the summons before a judge, for the purpose of directing a consignation. The summons is to appear immediately, and the judge thereupon directs a consignation, assigning the creditor to be present at such consignation, at a time and place particularly specified.

But the previous order of the judge is not absolutely necessary; the summons may merely specify that the consignation will be made at a particular time and place; and a consignation made accordingly, and duly notified, is valid, and the subsequent judgment and confirmation has a retrospective effect, to the time of the consignation.

[544] Such a consignation ought to be made at the time and place indicated, and of the entire sum due unless there is a special provision for paying it up by parts.

[545] The effect of a consignation, if it is adjudged to be valid, is that the debtor is thereby absolutely discharged; and although *subtilitate juris,* he continues to be the owner of the things consigned, until they are taken away by the creditor, they are no longer at his risk, but at that of the creditor, who from being a creditor of a certain amount generally, becomes the creditor of the particular articles which are so consigned, *tanquam certorum corporum:* and he is no longer the creditor of his original debtor, who is entirely liberated, but of the consignatory, who obliges himself by a quasi-contract, to deliver the articles in his custody to the creditor, if the consignation is adjudged good, or to the debtor if it is declared to be null.

Hence it follows, that any augmentation or diminution in the value of the money which may be consigned, enures to the profit or loss of the creditor, if the consignation is valid; for wherever the debt is of a specific thing, it is at the risk of the creditor; if the consignation is invalid, the debtor takes the articles back as he finds them.

Supposing an augmentation to take place in the value of money subsequent to the consignation, the debtor cannot, with a view to taking advantage of it, withdraw the moneys consigned, and insist upon the consignation being void, for no man can contradict his own act. Any forms which the debtor may have omitted to observe, being established in favour of the creditor, the creditor alone has a right to object to an irregularity in the proceeding.

There is a further question: supposing the consignation to have been regularly made, and the debtor to have afterwards withdrawn the money consigned, whether the consignation is to be regarded as never having been made so far as relates to joint debtors and sureties? In support of the negative proposition, it may be said, that the consignation having been regularly made, extinguishes the debt and discharges all who were under any obligation; that the sureties

and joint debtors having been liberated, it shall not be in the power of the debtor making the consignation, by withdrawing the things consigned, to revive an obligation which had become extinct. An argument is drawn from the law *Fin. ff. de pact.*(*a*) which decides that where a debtor by a *pactum de non petendo*, with his creditor, has acquired an exception in favour of himself and his sureties, he cannot, by renouncing the pact upon a subsequent agreement, deprive his sureties of the benefit of the exception. Much less, it is said, shall it be in his power to receive the obligation, from which the sureties have been absolutely discharged by consignation. It is further urged, that since after a real payment which extinguishes the debt, a voluntary restitution of the money by the creditor to the debtor will not revive the debt; upon the same principle, after a consignation which operates as a payment, and has the same effect of extinguishing the debt, a restitution to the debtor, of the money consigned shall not revive the obligation. Notwithstanding these reasons there is a decision of 1624, reported by *Basset* IV. 21, 2. that the consignation should be considered as never having taken place, and that the sureties should continue liable. *Basset*, who reports this determination, assigns as a reason for it, that the consignation which extinguishes the debt is not a momentary consignation, but one *quæ in suo statu manserit*, and not withdrawn by the debtor. But may it not be replied, that this is merely begging the question? For it is the very point in discussion, whether a debtor who has made a regular consignation may withdraw it to the prejudice of his sureties. I think a distinction should be made as to whether the consignation is withdrawn before it is ordained, or confirmed by the judge, or after. In the first case, I think that the consignation should be deemed not to have taken place, and the sureties consequently would not be discharged: for, the act of consignation not being in itself equivalent to a payment, it is the sentence of the judge which gives it that effect, and extinguishes the debt. It is agreed that the sentence has a retrospective operation, and the consignation which it confirms, has the effect of extinguishing the debt from the instant of its being made. But a consignation neither ordained nor confirmed by the judge, and withdrawn by the debtor, can neither extinguish the debt nor liberate the sureties, and should be regarded as no consignation at all. In the second case, where the money consigned is not withdrawn until after sentence, I think that it ought not to prejudice the sureties, or joint debtors who have been fully liberated.(*b*)

(*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*) There is no judicial proceeding in *England* analogous to a consignation; but a tender to the creditor is, in many respects, similar in its effects.

By tendering the money which is due from him, the debtor is discharged from further interest; and if an action is brought against him he is entitled to costs, but he must still pay the debt due from him at the time of the tender; and the effect of the tender is avoided, if the money is not paid upon a subsequent demand. The tender

CHAPTER II.

Of Novations.

THIS chapter will be divided into six articles: we shall see in the first, what a Novation is, and its several kinds; in the second, we shall treat of the debts which may be the subject of a Novation; in the third, of the persons who may make a Novation; in the fourth, in what manner it is made; in the fifth of its effect; and in the sixth, of Delegation, which is a particular kind of Novation.

ARTICLE I.

Of the Nature of a Novation and its several kinds.

[546] A Novation is a substitution of a new debt for an old. The old debt is extinguished by the new one contracted in its stead, for which reason, a novation is included amongst the different modes, in which obligations are extinguished.(*a*)

must be of the whole sum which is due, and the money must be actually produced but it is sufficient to produce it in bags.

In consequence of a temporary pressure, a person cannot be arrested who has made a tender in bank-notes; and the act of parliament contains the provision, that in the oath which is the foundation of an arrest, such a tender must be distinctly negatived. As it was not probable that such a provision, introduced *sub silentio* in a voluminous act of parliament, would be immediately known to the public, many persons were liberated from custody in consequence of it, by not one of whom any such tender had in all likelihood been made.

In respect to other acts than the payment of money, the person who is under an obligation to do any act must perform it at his peril, unless the act requires the concurrence of the other party, and then he must do everything which can be done without such concurrence; but if the plaintiff discharges the defendant from doing the act, it is a sufficient excuse; and upon the same principle, where the obligation of one of the parties is to arise upon a performance of the obligation of the other, the right of the latter arises upon a discharge by the former, in the same manner as in cases of actual performance. See the discussion of this subject in *Jones* v. *Berkeley*, *Doug.* 684.

(*a*) It is a settled principle in the law of *England*, that a mere agreement to substitute any other thing in lieu of the original obligation, is void, unless actually carried into execution, and accepted as satisfaction. No action can be maintained upon the new agreement, nor can the agreement be pleaded as a bar to the original demand. See *Lynn* v. *Bruce*, 2 *H. Blackstone*, 317. *James* v. *David*, 5 *T. R.* 141., and the cases there cited. If divers things are to be performed by the accord, the performance of part is not sufficient, but all ought to be performed, 9 *Co.* 79. *B* The ground of this principal is, that *interest reipublicæ ut sit sinis litium:* that accord executed is satisfaction; accord executory is only substituting one cause of action in the room of another, which it is said may go on to any extent. *James* v. *David*, *ub. sup.* But what substantial reason there is for considering this as a ground of objection, independent of authority, or why it should not be competent to parties, by mutual agreement, to substitute one cause of action, as well as one payment, for another, it is not easy to perceive.

But where an engagement is entered into by deed, that deed gives, in itself, a substantive cause of action, and the giving such deed may be a sufficient accord and satisfaction for a simple contract debt. *Vide Roades* v. *Barns*, 1 *Bur.* 9. *Co. Lit.* 212. *B.*

There are several cases in which the giving a bill of exchange was held to be a sufficient payment. *Vide Kearslake* v. *Morgan*, 5 *T. R.* 513, and the cases there cited.

[547] A novation may be made in three different ways, which form three different kinds of novations.

The first takes place, without the intervention of any new person where a debtor contracts a new engagement with his creditor, in consideration of being liberated from the former. This kind has no appropriate name, and is called a novation generally.

[548] The second is that which takes place by the intervention of a new debtor, where another person becomes a debtor in my stead, and is accepted by the creditor, who thereupon discharges me from it. The person thus rendering himself debtor for another, who is in consequence discharged, is called expromissor; and this kind of novation is called *expromissio*.

The expromissor differs entirely from a surety, who is sometimes called in law, *adpromissor*. For a person by becoming a surety does not discharge, but accede to the obligation of his principal, and becomes jointly indebted with him.

[549] The third kind of novation takes place by the intervention of a new creditor, where a debtor, for the purpose of being discharged from his original creditor, by the order of that creditor, contracts some obligation in favour of a new creditor.

There is a particular kind of novation called a delegation, which frequently includes a double novation: we shall treat of this in Article VI.

ARTICLE II.

Of the Debts necessary to constitute the subject of a Novation.

[550] It results from the definition which has been given, that there can be no novation without two debts being contracted, one of which is extinguished by the substitution of the other.

It follows that if the debt of which it is proposed to make a novation by another engagement, is conditional, the novation cannot take effect until the condition is accomplished. *L.* 8.(*a*) § 1. *de Novat.*

Vide also *Louviere* v. *Laubray*, 10 *Mod.* 36. And a promissory note is upon the same footing with a bill of exchange. It certainly is highly reasonable that the law should be so considered, because such a bill or note is a direct and full cause of action, not only to the party to whom it is so given, but also to any other holder. But in *Drake* v. *Mitchell*, 1 *East.* 251. upon covenant against three, for non-payment of money, the defendants pleaded that one of them had given a promissory note, upon which the plaintiff had judgment, and it was held that this was no defence; the ground of the decision was, that it was not stated that the note was accepted in satisfaction; but it was said by Lord *Ellenborough*, that one may agree to accept of a different security in satisfaction of his debt.

If another person engages in lieu of the original debtor, and it is agreed that in consideration thereof the original debtor shall be discharged, (which kind of engagement is the same with that hereafter discussed, under the name of Delegation) it is a matter of familiar practice that this shall be regarded as a payment, and operates as a discharge.

See however *Lobby* v. *Gildart*, 3 *Lev.* 55. See also *Cumbur* v. *Wane*, *Str.* 426. *Heathcoate* v. *Crookshanks*, 2 *T. R.* 24. *Hardcastle* v. *Howard*, cited *ibid.*

(*a*) Legata vel fideicommissa, si in stipulationem fuerint deducta, et hoc actum, ut novetur, fiet novatio, si quidem pure vel in diem fuerint relicta, statim: si vero sub

Therefore, if there is a failure in the accomplishment of the condition, there can be no novation, because there is no original debt to which the new one can be substituted.

Also, if the conditional debt, of which it is intended to make a novation by a new engagement, is a specific thing, which has been destroyed or perishes, before the condition is accomplished, there will be no novation even if the condition should exist: for, since the accomplishment of the condition cannot confirm a debt of a thing which has no existence, there is no original debt to which the new one can be substituted.

[551] *Vice versâ*, if the first debt does not depend on any condition, but the second engagement, intended as a novation, is conditional, the novation can only take effect by the accomplishment of the condition of the new engagement, before the first debt is extinct.

Therefore a novation is prevented from taking place, not only upon failure of the condition, but also upon the extinction of the original debt before the condition is accomplished, as for instance, by an extinction of the thing which forms the object of it; for the accomplishment of the condition cannot induce the novation of a debt no longer in existence. *L.* 14.(*a*) *ff. de Novat.*

[552] A mere term for payment is very different from a condition; the debt exists though the term of credit is not expired; therefore, a novation may be made of a debt payable at a future day, by a pure and simple engagement, or of a pure and simple engagement by another engagement allowing a term of credit; and in either case, the novation takes effect from the first, without waiting for the expiration of the term. *L.* 5. (*b*) *L.* 8. § 1.(*c*) *ff. de Novat.*(*d*)

conditione, non statim, sed ubi conditio extiterit. Nam et alias qui in diem stipulatur statim novat, si hoc actum est; cum certum sit diem quandoque venturum, at qui sub conditione stipulatur, non statim novat, nisi conditio extiterit.

(*a*) Quoties quod pure debetur, novandi causa sub conditione promittitur; non statim sit novatio; sed tunc demum, cum conditio extiterit. Et ideo si forte Stichus fuerit in obligatione, et pendente conditione decesserit, nec novatio contingit; quia non subest res eo tempore, quo conditio impletur. Unde Marcellus, et si post moram Stichus in conditionalem obligationem, putat.

(*b*) In diem obligatio novari potest, et priusquam dies advenerit. Et generaliter constat, et stipulatione in diem facta novationem contingere, sed non statim ex ea stipulatione agi posse, antequam dies venerit.

(*c*) Legata vel fideicommissa, si in stipulationem fuerint deducta, et hoc actum ut novetur; fiet novatio, si quidem pure vel in diem fuerint relicta, statim; si vero sub conditione non statim, sed ubi conditio extiterit. Nam et alias qui in diem stipulatur, statim novat, si hoc actum est, cum certum sit diem quandoque venturum; at qui sub conditione stipulatur, non statim novat, conditio extiterit.

(*d*) There is a subtlety in these distinctions which should preclude our assent to them if they are considered otherwise than as mere rules of positive law. They are founded upon too strict an application of the rule, that a failure in the accomplishment of a condition, induces the absolute nullity of the engagement; whereas a conditional obligation, whilst it is capable of taking effect, is still a real obligation, and there is nothing unreasonale in admitting the dissolution of it as a ground of compensation. Nor, on the other hand, is it unreasonable that an absolute engagement of a small amount, may be compensated by a conditional obligation of a large amount; or a case may be put of substituting one conditional engagement for another. For instance, I owe you 100*l.* upon a bottomry bond, which depends upon the arrival of

[553] It is indeed of the essence of a novation, that there be two debts contracted, an original debt and another substituted in its room; but it is sufficient if the first precedes the second, by an imaginary point of time. The novation may take place the same instant in which the first obligation is contracted.

For instance, you sell me an estate for a thousand pounds; by the same contract, a third person engages to pay you that sum, and you accept him for your debtor. It may be conceived that during an imaginary point there exists a debt from me of which there is a novation, by the engagement of the third person. Although there is no space of time in which any debt from me really exists, there is a novation which takes place the same instant that the debt is contracted.

See another instance. *L.* 8.(*a*) § 2 *ff. de Novat.*

[554] The novation is valid, whatever may be the nature of the first debt, or of that substituted in its place; *non interest qualis præcessit obligatio, seu civilis, seu naturalis, qualiscumque sit novari potest, dummodo sequens obligatio, aut civiliter teneat, aut naturaliter. L.* 1. § 1. *ff. de Novat.*(*b*)

But they must not be obligations which the law reprobates and annuls; for these cannot produce any effect. *V. supra, p.* 2. *ch.* 2.

ARTICLE III.

What Persons may make a Novation.

[555] The consent which the creditor gives to the novation of the debt, being equivalent, so far as regards the extinction of the debt, to a payment of it; it follows that only those to whom a valid payment may be made, can make a novation of a debt.

Therefore, for the same reason that a valid payment cannot be made to a minor, to a wife not authorised by her husband, to an interdict; it ought to be decided, that such persons cannot make a novation of what is due to them. *L.* 3.(*c*) *L.* 20.(*d*) § 1. *ff. d. t.*

[556] *Vice versâ*, a person to whom a debt may be paid may,

my ship *Cæsar*, and is of course conditional; it is agreed that that debt shall be abandoned, but that I shall in lieu thereof engage by way of insurance, to pay you 500*l.* upon the loss of your ship *Hector*. The insurance must be paid, though by the loss of the *Cæsar* the obligation of bottomry never took effect; and the bottomry bond is extinguished, though by the safe arrival of the *Hector* nothing is due upon the insurance.

(*a*) Si quis ita stipulatus a Seio sit, QUOD A TITIO STIPULATUS FUERO, DARE SPONDES? an, si postea a Titio stipulatus sim, fiat novatio, solusque teneatur Seius? Et ait Celsus novationem fieri, si modo id actum sit, ut novetur; id est, ut Seius debeat quod Titius promisit, nam eodem tempore, et impleri prioris stipulationis conditionem, et novari ait; eoque jure utimur.

(*b*) This is consonant to the admitted principle of the *English* law, that a preceding moral obligation is a sufficient consideration for a promise.

(*c*) Cui bonis interdictum est, novare obligationem suam non potest, nisi meliorem suam conditionem fecerit.

(*d*) Pupillus sine tutoris actoritate non potest novare; tutor potest, si hoc pupillo expediat; item procurator omnium bonorum.

likewise in general make a novation; *cui recte solvitur, is etiam novare potest. L.* 10. *ff. de Novat.*

Hence it follows, that any one of several creditors in solido may make a novation. *Venuleius* so decides. *L.* 31.(*a*) § 1 *ff. de Novat. et Deleg.* which decision as it appears to me ought to be followed, although *Paulus* is of a contrary opinion. *L.* 27.(*b*) *ff. de Pactis.* The interpreters have endeavoured in vain to reconcile them. See *Wissembach, ad tit. de Novat.* 10.

[557] In like manner a tutor, a curator, a husband may make a novation, *L.* 20.(*c*) § 1. *L. fin.*(*d*) § 1. *ff. d. t.* As may also a person having a general procuration from the creditor. A person who has only a particular power to receive from the debtors cannot, because his power being limited to receive *non debit egredi fines mandati.* It is the same with those persons called *adjecti solutionis gratiâ*, of whom we have spoken in the preceding Chapter, Art. II. § 4, they cannot make a novation. *L.* 10.(*e*) *ff. de Solut.* although a valid payment may be made to them.

ARTICLE IV.

In what Manner a Novation is made.

§ I. *Of the Form of a Novation.*

[558] By the *Roman* law, a novation could only be made by stipulation; the form of a stipulation is not in use in our law; mere agreements have the same force as a stipulation had in the *Roman* law, therefore a novation is made by a mere agreement.

§ II. *Of the Intention to make a Novation.*

[559] In order to constitute a novation, the consent of the credi-

(*a*) Si duo rei stipulandi sint, an alter jus novandi habeat, quæritur; et quid juris unusquisque sibi adquisierit? Fere autem convenit, et uni recte solvi, et unum judicium petentem totam rem in litem deducere; item unius acceptilatione perimi utriusque obligationem; ex quibus colligitur, unumquemque perinde sibi adquisisse, ac si solus stipulatus esset; excepto eo, quod etiam facto ejus, cum quo commune jus stipulantis est, amittere debitorem potest. Secundum quæ, si unus ab aliquo stipulatur; novatione quoque liberare eum ab altero poterit, cum id specialiter agit, eo magis cum eam stipulationem similem esse solutioni existimemus, alioquin, quid dicemus, si unus delegaverit creditori suo communem debitorem, isque ab eo stipulatus fuerit.

(*b*) Si unus ex argentariis sociis cum debitore pactus sit, an etiam alteri noceat exceptio? Neratus, Atilicinus, Proculus, nec si in rem pactus sit, alteri nocere; tantum enim constitutum, ut solidum alter petere possit. Idem Labeo; nam nec novare alium posse, quamvis ei recte solvatur. Sic enim et his, qui in nostra potestate sunt, recte solvi quod crediderint, licet novare non possint; quod est verum. Idemque in duobus reis stipulandi dicendum est.

(*c*) See *supra n*, 555.

(*d*) Adgnatum furiosi; aut prodigi curatorem, novandi jus habere minime dubitandum est, si hoc furioso vel prodigio expediat.

(*e*) Quod stipulatus ita sum, MIHI AUT TITIO? Titius nec petere, nec novare, nec acceptum facere potest, tantumque ei solvi potest.

tor, or of some persons having authority from him, or a quality to make a novation for him, is requisite.

By the ancient *Roman* law, such consent might easily be presumed; but according to the constitution of *Justinian*, in the last law(*a*) *cod. de Novat.* such intention should be positively declared, without which, there could be no novation; and the new engagement which is contracted, is to be considered rather as having been made to confirm and accede to the first, than to extinguish it.

The reason of this law is, that a person should not easily be presumed to abandon the rights which belong to him. Therefore, as a novation implies an abandonment by the creditor of the first claim, to which the second is substituted, it ought not to be easily presumed, and the parties ought expressly to state it.

Nevertheless, in our jurisprudence we have not adopted this law in so literal a manner as to require that the creditor should declare in precise and formal terms, that he intends to make a novation; it is sufficient, that his intention, in whatever manner expressed, should be so evident as not to admit of doubt. This is established by *D'Argentrè*, upon the Art. 273, of the Ancient Custom of *Brittany*. For instance, I am a creditor of *Peter* for a sum of 1000*l.* an act passes between *James*, the debtor of *Peter*, and me, by which it is declared, that *James* obliges himself in my favour to pay me the 1000*l.* which is due to me by *Peter;* and it is added, that I have, as a favour to *Peter*, (*pour faire plaisir a Pierre*) agreed to be satisfied with the present obligation which *James* has entered into with me; it ought to be decided in this case, that there is a novation, and that *Peter* is discharged against me, although it be not said in precise and formal terms, that I discharge *Peter*, and accept the obligation of *James*, as a novation for that of *Peter*. For the terms which I have used *as a favour to Peter*, sufficiently indicate my intention of discharging *Peter*, and taking *James*.

But unless the intention evidently appears, a novation is not to be presumed. Therefore if I attach the goods of *Peter* in the hands of *James*, and *James* merely undertakes to pay the money due to me from *Peter*, without any expression on my part of taking the security for the sake of *Peter*, or some other intimation, which renders it evident that I intend that *Peter* shall be discharged, it will not be considered as a novation, but *James* will be only deemed to have acceded to the obligation of *Peter*, who continues bound as my debtor. This was adjudged by an *arrêt* of the Parliament of *Toulouse*, reported by *Catelan, vol. 2. l. 5. ch. 38.*(*b*)

(*a*) Si quis vel aliam personam adhibuerit, vel mutaverit, vel pignus acceperit, vel quantitatem augendam, vel minuendam esse crediderit, vel conditionem seu tempus addiderit, vel detraxerit, vel cautionem minorem acceperit, vel aliquid fecerit, ex quo veteris juris conditores introducebant novationes; nihil penitus prioris cautelæ innovari, sed anteriora stare, et posteriora incrementum illis accedere: nisi ipsi specialiter remiserint quidem priorem obligationem, et hoc expresserint, *quod secundum magis pro anterioribus elegerint.*

(*b*) Upon this principle it was held by the Court of King's Bench, in *White* v. *Cuyler*, 6 *T. R.* 176, that the undertaking of a surety by deed did not extinguish the obligation of the principal debtor. And in the case of *Hamilton* v. *Cullenden*, in the Supreme Court of *Pennsylvania*, it appeared that *Cullenden* gave the plaintiff a mort-

So if, subsequent to the contracting of a debt, some act passes between the debtor and creditor, allowing a further time, or appointing a different place for payment, or authorising a payment to some other person than the creditor, or agreeing to take something else in lieu of the sum due, or by which the debtor engages to pay a larger sum, or the creditor to accept a smaller; in these and similar cases, according to the principle that a novation is not to be presumed, it should be decided, that no novation had taken place, and that the parties intended only to modify, augment, or diminish, the obligation, and not to extinguish the old debt, and substitute a new one, unless the contrary is particularly expressed.

§ III. *Whether the granting an Annuity for the Price of a sum due the Grantor, necessarily includes a Novation?*

If, by an agreement between the creditor and a debtor of a sum of money, the debtor has granted an annuity to his creditor, for the sum which he owed to him, will there in this case necessarily be a novation? Several writers maintain that there is no novation in this case, where the parties have not so declared; and *a fortiori*, if they have expressly declared by the instrument, that they did not intend to make any novation; they contend that by the constitution(*b*) of the annuity, the creditor does not give a discharge of the sum due to him, that he only consents not to demand the sum, provided the interest of it is paid to him; consequently, that the old debt always subsists, although, under a new modification, that is to say, that instead of being demandable as formerly, it is become a debt of which the principal is alienated, and can no longer be demanded, so long as the debtor pays the annuity.

This opinion appears to me to be subject to much difficulty; it is the essence of the constitution of an annuity, that the person who grants the annuity should receive the price of it; if, then, my debtor of a certain sum, as a thousand pounds, in consideration of that debt grants me an annuity of fifty pounds, it is necessary that he should receive the sum of a thousand pounds for the price of the annuity; and he can only be supposed to have received it by having a discharge from the former debt as a consideration for the annuity; the constitution of the annuity therefore includes a discharge from me of this sum; it includes a compensation of the sum, of which he was my debtor, with a like sum which I was to give him for the price of the annuity; now it is evident, that such discharge and compensation extinguish the debt, and form a novation.

It cannot be said, that the principal of the annuity is my old debt, which continues to subsist under a new modification of the principal

gage and bond; that *Cullenden's* executors afterwards sold the equity of redemption to *Bird*, who gave his bond to the plaintiff for the amount of the principal and the interest then due, which was ruled to be no discharge of the preceding bond. The discussion, as is usual in *American* Courts turned principally upon the authorities of the *English* law. 1 *Dallas's Reports*, 420.

(*a*) The granting an annuity is expressed by the terms *constitution de rente.*

of the annuity, instead of being a debt which might be demanded as before: for, besides its being extinguished by the constitution of the annuity, as we have just shown, the right acquired is that of an annual payment, which runs on for ever, until redeemed, rather than of the principal, which, as it cannot be demanded, is not properly due, and is *in facultate solutionis magis quam obligatione.*

These reasons appear conclusive for deciding that an act, by which the debtor of a certain sum grants an annuity to his creditor, in consideration of such sum, necessarily includes a novation, even if it were expressed in the act, that it was not the intention of the parties to make a novation; for a protestation cannot prevent the essential and necessary effect of an act. Therefore this clause appears to me to be capable of no other effect than to prevent the extinction of the hypothecations of the old debt, and to transfer them to the new, as may be done according to the law 12. § 5. *ff. qui potior.*(*a*)

Although these reasons appear to me very strong to decide that the act, by which a debt, which may be demanded and converted into the purchase of an anuity, essentially contains a novation; nevertheless, the contrary opinion appears to have had the suffrages of authors in its favour; it is authorised by two *arrêts*, which are said to have decided the question; the first of the 13th *April*, 1683, is reported in the *Journal du Palais*, *tom.* 2. edition in folio.

In that case, *Ligondez*, a debtor in solido with *Sablon*, of the sum of 6000 livres, had afterwards constituted an annuity for it, as well in his own name, as on behalf of *Sablon*, and the contract contained a reservation of the obligation and the hypothecations: the creditor having assigned *Sablon* to execute the contract of constitution, or to pay the sum of 6000 livres, *Sablon* was adjudged to do so; the reporter infers from this *arrêt*, that it was decided that a debtor of a sum of money might constitute an annuity for such sum without making a novation of his debt. But I think the consequence is not well drawn, and that the respective arguments of the parties, mentioned in the *Journal*, do not come to the point of the decision of the cause; the true reason for which *Sablon* was adjudged to pay or to execute a contract of constitution, appears to me to be, that *Ligondez*, having executed a contract, as well in his name as on behalf of *Sablon*, and consequently, the creditor only having consented to the conversion of his debt of 6000 livres into an annuity, upon condition that the contract should be executed by both the debtors, the conversion of the debt into an annuity, and the novation and extinction of that debt which were to result from it, depended upon this condition; therefore as the refusal of *Sablon* to execute the contract, amounted to a failure of the condition, there was not any novation, the debt subsisted, and *Sablon* was rightly adjudged to pay.

The other *arrêt* is of the 6th *September*, 1712, and is contained in the 6th volume of the *Journal des Audiences*. In this case, three

(*a*) "Si prior creditor postea novatione facta, eadem pignora cum aliis acceperit, in suum locum eum accedere; sed si secundus non offerat pecuniam, posse priorem vendere, ut primam tantum pecuniam expensam ferat, non etiam quam postea credidit: & quod superfluum ex anteriore credito accepit, hoc secundo restituat.

several persons had contracted, in solido, an obligation to pay a certain sum; two had actually paid each their third, and the creditor, upon receiving it, reserved the right of solidity; *Lebegue* and *De Villemenard* had, by a note, promised to constitute an annuity for the remaining third, and it was said in the note *without prejudice to the right of solidity:* a long time afterwards the creditor assigned *Montpensier*, one of those who had paid their third parts, subject to the reservation of solidity, to pay the remainder or to accede to the constitution of the annuity, and he was adjudged to do so. Then, it is argued, it was decided, that the constitution of an annuity, by a debtor, did not necessarily induce a novation and the extinction of the debt; otherwise, in the foregoing case, *Montpensier* the co-debtor in solido of the sum which remained due, and for which the annuity was constituted; would have been liberated from the debt, and would not have been adjudged by the *arrêt* to pay it.

I do not know what the reason was upon which the condition of the *arrêt* was founded; but in support of our principles, it may be said, that the *arrêt* did not decide what has been inferred, but rather decided that by the clause of reservation the creditor was considered as having only consented to the conversion of the debt into an annuity, upon the condition that all the other debtors in solido should accede to the contract for the annuity, and consequently, the refusal of *Montpensier* to accede to it having defeated the condition, the debt continued to subsist.

§ IV. *Of the Necessity of there being some Difference between the new Debt and the old.*

[560] When there is a new agreement made between the same creditor and the same debtor, without the intervention of any new person; although it be expressly declared by the act, which contains the new engagement, that the parties intend making a novation; to render it a valid novation it is necessary that the act should contain something different from the former obligation; either in the quality of the obligation, as if the former were determinate, and the second alternative, *aut vice versâ;* or in the accessary parts of the obligation, as the place of payment. It is also a sufficient difference if the former obligation were contracted with the security of another person, or under a hypothecation, and by the new one I engage without a surety, without hypothecation; *aut vice versâ.*

If the new engagement, made without the intervention of another person, does not contain anything different from the first, it is evident that the contracting of it is of no signification. *Instit. tit.*(*a*) *quib. mod. tol. obl.* § 4.

[561] When the innovation is made with the intervention of a new debtor, or of a new creditor, the difference of the creditor

(*a*) Sed si eadem persona sit, a quo postea stipuleris; ita demum novation sit si quid in posteriore stipulatione novi sit; forte si conditio, aut dies, aut fidejussor adjiciat aut detrahetur.

or debtor is in itself, and without any other difference, sufficient to form a proper novation.

§ V. *Whether the consent of the former debtor is essential to a Novation.*

[562] A novation made with the intervention of a new debtor, may be made between the creditor and the new debtor, without the first, whose debt is to be thereby extinguished, concurring in it, or consenting to it. *Liberat me is, qui, quod debeo, promittit, etiamsi nolim. L.* 8. § 5. *ff. de Novat.*

The reason is, that the novation, so far as it affects the former debtor, amounts only to a discharge from his debt, by the new engagement which the third person contracts in his place; now one person may discharge the debt of another, without his assent, as we have seen in the preceding chapter. *Ignorantis enim et inviti conditio melior fieri potest. L.* 53. *de Solut.*

ARTICLE V.

Of the Effect of a Novation.

[563] The effect of a novation is, that the former debt is extinguished in the same manner as it would be by a real payment.

Where one of several debtors in solido alone contracts a new engagement with the creditor, as a novation of the former debt, the first debt being extinguished by the novation, in the same manner as it would have been by a real payment, all his co-debtors are equally liberated with himself. And as the extinction of a principal obligation induces that of all accessary obligations, the innovation of the principal debt extinguishes all accessary obligations such as those of sureties.

If the creditor wished to preserve the obligations of the other debtors and sureties, it would be necessary for him to make it a condition of the novation, that the co-debtors and sureties should accede to the new debt; in which case, in default of their acceding to it, there would be no novation, and the creditor would preserve his ancient claim.

From the principle that a novation extinguishes the ancient debt, it follows also, that it extinguishes the hypothecations which are accessary to it; *novatione legitimè factâ liberantur hypothecæ, L.* 18. *ff. de Novat.*

But the creditor may, by the very act which contains the novation, transfer to the second debt the hypothecations which were attached to the first. *L.* 12. *ff. qui potior.*

For instance, if by an act of 1750, you borrow from me a sum of 1000*l.* with an hypothecation of your estates, and by an act in 1760, you contracted a new obligation in my favour, and it is expressed in

the act, that by force of the new obligation, you shall be discharged from that of 1750, *of which the parties intended to make a novation, reserving the hypothecations*, I shall by this clause retain my former rank and priority of hypothecation in support of my new demand.(*a*) *L.* 3. *L.* 21.(*b*) *ff. dict. tit.*

Observe, that if the new debt were larger than the first, I should only preserve my rank of hypothecation so far as the sum which was due to me by the act of 1750; for the transfer of the hypothecation to the new demand ought not to operate to the prejudice of the intermediate creditors.

Observe also, that such transfer of the hypothecation can only be made with the consent of the person to whom the things hypothecated belong. In the above instance, it is evident that you have consented to this transfer, since you were a party to the act in which the reservation is contained. But if a third person, by an act of 1760, obliged himself to pay me the sum which you owed me by the act of 1750, and it is said, that by reason of these presents, the debt of 1750 shall be discharged, *reserving the hypothecations*, although the novation may be made without your intervening, the hypothecation upon your estates attached to your debt of 1750, cannot be transferred to the new debt of 1760, unless you intervene and give your consent; as the new debtor, to whom the things hypothecated do not belong, cannot, without the assent of you to whom they do, hypothecate them for the new debt. This is decided by *Paulus* in the law 30, *ff. de Novat.* "*Paulus respondit, si creditor a Sempronio novandi animo stipulatus esset, ita ut a prima obligatione in universum discederetur; rursum easdem res a posteriore debitore sine consensu debitoris prioris obligari non posse.*"

According to the same principles, if one of several debtors in solido contracts a new obligation in favour of the creditor, and it is expressed in the act that the parties intend to make a novation of the first debt, reserving the hypothecations; such reservation can only affect the hypothecation of the goods of the debtor who contracts the new debt, and not those of his co-debtors, which cannot be hypothecated for the new debt without their consent.

Whatever reservation the creditor may make by the act which contains the novation, the sureties of the former debt cannot be obliged for the new, unless they consent to it.

(*a*) Creditor, acceptis pignoribus, quæ secunda conventione secundus creditor accepit, novatione postea facta, [pignora] prioribus addidit; superioris temporis ordinem manere primo creditori placuit, tanquam in suam locum succedenti.

(*b*) Titius Seiæ ob summam, qua ex tutela ei condemnatus erat, obligavit pignori *omnia bona sua, quæ habebat, quæque habiturus esset;* postea mutuatus a Fisco pecuniam, pignori ei res suas omnes obligavit, & intulit Seiæ partem debiti, & reliquam summam, novatione facta, eidem promisit, in qua obligatione similiter, ut supra, de pignore convenit; quæsitum est, an Seia præferenda sit Fisco, & in illis rebus, quas Titius tempore prioris obligationis habuit, item in his rebus, quas post priorum obligationem adquisivit, donec universum debitum suum consequatur? Respondit, nihil proponi, cur non sit præferenda.

ARTICLE VI.

Of Delegation.

§ I. *What a Delegation is, and how it is made.*

[564] Delegation is a kind of novation, by which the original debtor, in order to be liberated from his creditor, gives him a third person, who becomes obliged in his stead to the creditor, or to the person appointed by him.

Delegare est vice sua alium reum dare creditori, vel cui jusserit. L. 11. *ff. de Novat.*

It results from this definition, that a delegation is made by the concurrence of three parties, and that there may be a fourth.

There must be a concurrence, 1st. Of the party delegating, that is, the ancient debtor who procures another debtor in his stead.

2d. Of the party delegated, who enters into an obligation, in the stead of the ancient debtor, either to the creditor or some other person appointed by him.

3d. Of the creditor, who, in consequence of the obligation contracted by the party delegated, discharges the party delegating.

Sometimes there intervenes a fourth party, *viz.* the person indicated by the creditor, and in whose favour the person delegated becomes obliged, upon the indication of the creditor, and by the order of the person delegating.

To produce a delegation, the intention of the creditor to discharge the first debtor, and to accept of the second in his stead, must be perfectly evident; therefore if *Peter*, one of the heirs of my debtor, in order to liberate himself from an annuity to me, has, upon a partition of the succession, charged his co-heir *James* with the payment of it, *Peter* will not be liberated, unless I formally declare my intention, that he shall be so; and though I receive the annual payments from *James*, for a considerable time, it must not be concluded, that I have taken him as my sole debtor, in the place of *Peter*, and discharged *Peter*. *Arg. L.* 40.(*a*) § 2. *ff. de Pact.*

§ II. *Of the Effect of a Delegation.*

[565] A delegation includes a novation, by the extinction of the debt from the person delegating, and the obligation contracted in his stead by the person delegated. Commonly, indeed, there is a double novation; for the party delegated is commonly a debtor of the person delegating; and in order to be liberated from the obligation to him, contracts a new one with his creditor. In this case there is a novation both of the obligation of the person delegating, by his giving his creditor a new debtor, and of the per-

(*a*) Tale pactum, *profiteor te non teneri*, non in personam dirigitur; sed, cum generale sit, locum inter heredes quoque litigantes habebit.

son delegated, by the new obligation which he contracts. *Arg. l.* 40.(*a*) § 2. *ff. de Pact.*

[566] If the person delegated were not in truth the debtor of the party delegating him, although he would not have entered into the engagement, except upon the supposition of being such debtor, the obligation will not be the less binding, and he cannot resist the payment of it, saving his recourse against the person delegating him. The creditor who receives no more than is due from the original debtor, whom he has discharged, ought not to suffer by the mistake. *Si per ignorantiam promiserit, nulla quidem exceptione uti poterit adversus creditorem, quia ille suum recepit; sed is qui delegavit, tenetur condictione. L.* 12. *ff. de Novat.*

It would be otherwise, if the person to whom the substitute was obliged were not the creditor of the delegant, whether the delegant himself was in error upon the subject, and supposed him to be such, or whether he intended to make a donation. In either case, the substitute who contracts his obligation under a mistake, and upon the erroneous persuasion that he is indebted, will not be obliged, and may resist the demand, the error being discovered. *L.* 7.(*b*) *ff. de Dol. Except. L.* 2.(*c*) § 4. *ff. de Donat.*

The reason of the difference is, that in this case the person to whom the substitute is obliged, *certat de lucro captando;* whereas the other, who has engaged by mistake, *certat de damno vitando.* And more favour is always due to him, *qui certat de damno*, than to him *qui certat de lucro.* Therefore, he ought not to be only discharged from his obligation, contracted under a mistake, but even to have a repetition of what he has paid in consequence of it, according to the rule, *Melius est favere repetitioni, quam adventitio lucro.* In the preceding case, on the contrary, the creditor to whom the substitute is obliged, *versaretur in damno*, if the substitute was discharged from his obligation.

[567] If the substitute only obliges himself under a condition, the whole effect of the delegation will be in suspense, until the condition is accomplished, and as the obligation of the substitute depends upon the accomplishment of the condition, so likewise does the discharge of the delegant from his obligation, which can only become extinct by the new obligation contracted in its stead. And the obligation of the substitute to the delegant likewise depends upon the same condition; for the substitute can only be discharged from his obligation to the delegant, so far as he contracts in his stead an obligation to the creditor.

Although the substitute is not liberated as against the delegant, until the accomplishment of the condition, still the delegant, by whose order he has obliged himself upon such condition, cannot insti-

(*a*) Vide supra, n. 564.

(*b*) Julianus ait, si pecuniam quam me tibi debere existimabam, jussu tuo spoponderim, cui donare volebas; exceptione doli mali potero me tueri; & præterea condictio mihi adversus stipulationem competit, ut me liberet.

(*c*) Item si ei, quem creditorem tuum putabas, jussu tuo pecuniam, quam me tibi debere existimabam, promisero; petentem doli mali exceptione summovebo; et amplius incerti agendo cum stipulatore, consequar, ut mihi acceptam stipulationem.

tute any suit against him, until the condition has failed; for as long as it may take effect, it is uncertain whether the substitute will be obliged to him, or to the new creditor. This is the decision of *L.* 39.(*a*) *ff. de Reb. Cred.*

§ III. *Whether the Delegant is answerable for the Insolvency of the Substitute?*

[568] Regularly where the person delegated contracts a valid obligation to the creditor, the delegant is entirely liberated, and the creditor has no recourse against him, in case of the substitute's insolvency. The creditor, by accepting the delegation, must follow the condition of the substitute. *Nomen ejus secutus est.*

There is an exception to this principle, if it is agreed that the debtor shall at *his own risk* delegate another person. *Paulus* decides, that in this case the creditor may maintain an action against the delegant for any loss sustained by the insolvency; for when at the request of my former debtor, I take another person in his stead, and at his risk, it amounts to a contract of mandate. I become his mandatory by assenting to the delegation, and of course am entitled to an indemnity from what the execution of it may cost. Now this mandate costs me the sum which is not paid by the substitute; therefore, I ought to be indemnified from it.

But for this purpose, I must not have omitted using proper diligence to obtain a payment, whilst the substitute continued solvent, for otherwise, it is my own fault if I lose the money. And according to the rules of the contract of mandate, the mandatory has no claim to an indemnity, except for the expense which he has incurred, without any fault of his own. *Venit in actione mandati, quod mandatorio, ex causa mandati, abest inculpabiliter.*

As it is not the delegation itself, but the contract of mandate, which is supposed to intervene between the delegant and the creditor, which renders the delegant responsible for the insolvency of the substitute; it is for the creditor who would take advantage of this contract of mandate, to show by writing, that it has intervened, and that he has only accepted the delegation at the risk of the delegant. Such an agreement is not presumed, as has been decided by an *arrêt*, reported by *Bouvot.*

Cujas ad L. 26. § 2. *ff. Mand. ad Libr.* 33. *Paul. ad Edic.* states another exception to our principle, which is, that although the delegation is not made with a condition that it shall be at the risk of the delegant, yet if the substitute, at the time of the delegation, was insolvent, and this circumstance was unknown to the creditor, the delegant should be bound. This decision is founded in equity. Delegation is a contract of mutual interest, in which each party intends to receive as much as he parts with. The equity of such agreement consists in their equality, and they are not equitable, when one of the parties parts with too much, and receives too little in return. According to

(*a*) Itaque tunc potestatem conditionis obtinet, cum in futurum confertur.

these principles, your delegating to me a debt from an insolvent person, in lieu of a debt of the like amount from yourself, is manifestly unequal: for by such a delegation, you receive an actual release of your debt, which release has a real and effective value of as much as the debt amounts to, and for that value you give me nothing in return, but a credit upon an insolvent debtor, the value of which is little or nothing. In order then to atone for the injustice of such a contract, it is proper that you should bear the loss arising from the insolvency of the debtor, whom I have by mistake accepted in your stead.

It would be otherwise, if, at the time of the delegation, I were apprised of the insolvency. The delegation in this case is not a contract of mutual interest, but a real benefit, voluntarily conferred upon you, and having a knowledge of the fact, I can have no reason to complain. *Volenti non fit injuria.*

Despeisses rejects this sentiment of *Cujas*, and contends, that unless it is expressly agreed that the delegation shall be at the risk of the delegant, *suo periculo*, the creditor can never object to the insolvency of the debtor, whom he has consented to receive by way of delegation, whatever ignorance he may allege. His reason is, that otherwise the delegation would never have the effect of liberating the delegant, which is the effect naturally incident to it, since the creditor might always pretend that he was ignorant of the insolvency of the person delegated.

These reasons appear sufficient for the rejection of *Cujas's* opinion, as a matter of law; which however, appears indisputably right in point of conscience.

§ IV. *Difference between Delegation, Transfer, and simple Indication.*

[569] It remains to observe, that the delegation is something different both from transfer and simple indication.

The transfer which a creditor makes of his debt does not include any novation. It is the original debt which passes from one of the parties, who makes the transfer, to the other who receives it; and the person having the transfer is, properly speaking, only the procurator *in rem suam* of the creditor. Besides, the transfer only takes place between these two persons, without the consent of the debtor necessarily intervening.

For the nature of a transfer, see *Pothier's Treatise on Sales*, Part VI. ch. 3.

A delegation also differs from a simple indication.

When I indicate to my creditor a person from whom he may receive payment of the money which I owe him, and to whom I give him an order for the purpose, it is merely a mandate, and neither a transfer nor novation. I remain the debtor, and the person designated by the order does not become such in my stead.

So where the creditor indicates a person to whom his debtor may pay the money, this indication does not include any novation; the

debtor does not contract any obligation to the person indicated, but continues the debtor of his creditor who made the indication.

As to this kind of indication, see *supra*, Ch. I. Art. II. § 4.

CHAPTER III.

Of the Release of a Debt.

[570] THE release which the creditor makes of the debt, is also one of the modes in which obligations are extinguished, for it liberates the debtor *pleno jure*.

ARTICLE I.

In what Manner the Release of a Debt is made.(a)

§ I. *Whether the Release of a Debt may be made by a mere Agreement?*

[571] According to the principles of the *Roman* law, there was a difference between civil obligations resulting from consensual contracts, which were contracted by the mere consent of the parties, and other civil obligations, which resulted from real contracts,(b) or from stipulations. With respect to those contracted by the consent of the parties, the release might be made by a simple agreement, by which the creditor agreed with the debtor to hold him acquitted, and such agreement extinguished the obligation *pleno jure*.

(a) In *England*, a release can only be by deed sealed and delivered.

If several persons are jointly and severally bound in a contract, a release to one operates as a discharge to all.

If there is a covenant never to sue a sole debtor, or all the debtors, who are jointly bound, this has the effect of a release; but a covenant not to sue for a particular time, is no bar to an action, though it is a valid contract, and an action may be maintained for damages on the breach of it. Also, a covenant never to sue *one* of several debtors, is no defence either to the person with whom it is made, or the others. *Dean* v. *Newhall*, 8 *T. R.* 168. The reason of these distinctions is to be found in certain ulterior principles, and the distinctions themselves are by no means arbitrary. When a creditor covenants never to sue his debtor, the sum which the debtor is afterwards compelled to pay would be the measure of damages for an infraction of that covenant, and consequently, to admit a right of action, would be a mere circuity. When the covenant is not to sue for a limited time, if that would stop the right of action, a legal maxim, that a personal action once suspended by the act of the parties is absolutely extinct, would attach and defeat the right of suit, not only during the limited time, but ever afterwards contrary to the true intention. And the objection of circuity cannot apply when there are several debtors, and the covenant only extends to one. It is not to be presumed, that the intention of the person covenanting was to produce a collateral effect with respect to others, when a distinct and reasonable effect may be produced, by giving the party, claiming the benefit of the covenant, redress for any injury which he may personally sustain from the infraction of it. See Appendix, No. XI.

(b) Real contracts were those which required the interposition of a thing (*rei*), as the subject of them; for instance, the loan of goods to be *specifically returned*.

L. 35.(*a*) *ff. de R. I.* With respect to other civil obligations: for the release to extinguish the obligation *pleno jure*, it was necessary to have recourse to the formality of an acceptilation,(*b*) either simple, if the obligation resulted from a stipulation, or *Aquilian*, if from a real contract; *v. tit. de Accept. in Inst. & Pand.* A simple agreement by the creditor to acquit the debtor, did not extinguish such obligations *pleno jure;* but only gave the debtor an exception, or *fin de non reçevoir*, against the action of the creditor; demanding the payment of the debt, contrary to the faith of the agreement.

This distinction and these subtleties are not admitted in the law of *France*, in which we have no such form as an acceptilation; and all debts, of whatever kind, and in whatever manner contracted, are extinguished, *pleno jure*, by a simple agreement of a release between the creditor and debtor, provided the creditor is capable of disposing of his property, and the debtor is not a person to whom the creditor is prohibited by law from making a donation.

Therefore all that is said in the title, *ff. de Accept.* concerning the form of an acceptilation, and particularly that acceptilation cannot be made under a condition. *L.* 4. *ff. de Acceptil.* has no application in the law of *France.*

With us there is nothing to prevent the creditor making the release of the debt depend upon a condition, and the effect of such a release is to render the debt conditional, the same as if it had been contracted under the opposite condition to that of the release.

§ II. *In what case is a tacit Release presumed?*

[572] A release of a debt may be made, not only by an express agreement, but also by a tacit agreement, resulting from facts that induce a presumption to that effect. Thus, if a creditor has restored to his debtor the writing containing the obligation, he is presumed to have released the debt. *Si debitori meo reddiderim cautionem, videtur inter nos convenisse ne peterem. L.* 2. § 1. *ff. de Pact.*

If the writing were subscribed by several debtors in solido, and the creditor had restored it to one of them, some doctors cited by *Bruneman, ad L.* 2. *ff. de Pact.* have held that the restoration of the writing ought only to be presumed a personal discharge of the debt to the debtor, to whom the writing is given up. It appears to me on the contrary, that it ought to be presumed, that the creditor intended to

(*a*) Nihil tam naturale est, quam eo genere quidque dissolvere, quo colligatum est: ideo verborum obligatio verbis tollitur: nudi consensus obligatio centrario consensu dissolvitur.

(*b*) Acceptilation may be regarded in a great degree as the converse of stipulation, being a certain formality, by which the debtor asked the creditor, whether he had received what the other had promised: to which he answered, that he had; and this was held to operate as a release, without actual payment. But as this simple mode of acceptilation only discharged obligations contracted verbally, the *Aquilian* stipulation was introduced, which consisted of a mutual interrogation, whereby the original obligation was first converted into a verbal obligation, and afterwards discharged by acceptilation.

release and entirely extinguish the debt; for if he only intended to discharge one of the debtors, he would have retained the writing which would be necessary to enforce payment from the others.

[573] Upon the question, whether the possession of the writing by the debtor, is in itself a sufficient ground for the presumption that it was delivered up by the creditor, *Boiceau*, following some ancient doctors makes a distinction; he says, that if the debtor alleges that he has paid the debt, his possession of the writing is a sufficient ground for the presumption, and that the writing should be deemed to have been restored upon the acquittal of the debt, unless the creditor proves the contrary; but that if he alleges that the creditor has released him from the debt, the possession is not sufficient, and he ought to prove that the creditor had voluntarily released the debt, and given up the writing; for a release is a donation, and a donation ought not to be presumed; *nemo donare facile præsumitur;* and besides it is an agreement which, according to the ordonnance, ought to be established by writing. I think this not a solid distinction, and that it ought to be decided generally from the possession of the debtor, that the creditor shall be presumed to have given up the security, either as acquitted or released, until the creditor shows the contrary. As for instance, that it has been taken surreptitiously. It is to no purpose to say that a donation is not to be presumed, for that only means that it is not to be presumed easily and without sufficient ground: now, according to the law cited, there is a sufficient ground to presume a donation and release of the debt, when the creditor gives up the security, and the circumstance of the security being in the possession of the debtor, is a sufficient reason for presuming that the creditor has given it up; as that is the most natural way of the possession passing from the one to the other.

The argument derived from the ordonnance which declares that agreements, whose object exceeds 100 livres, shall be proved by writing, is not better than the other; the intention of the ordonnance was only to exclude parol proof, and not the presumptions resulting from acts avowed by the parties.

A distinction adduced by *Boiceau*, found upon the relative situation of the debtor, is more plausible. If the debtor were the general agent, or clerk of the creditor, having access to his papers, the possession alone might not be a sufficient presumption either of a payment or release. So if he was a neighbour, into whose house the effects of the creditor had been removed on account of a fire.

[574] The restitution of an article pledged does not induce a presumption either of the release or payment of the debt. *L.* 3.(*a*) *ff. de Pact.* for the creditor might have no further intention than to remit the pledge, and not to release the debt.

[575] A creditor is presumed to have released the solidity to debtors in solido, when he has admitted them to pay singly. *V. supra. n.* 277. *& seq.*

(*a*) Postquam pignus vero debitori reddatur, si pecunia soluta non fuerit, debitum peti posse dubium non est, nisi specialiter contrarium actum esse probetur.

[576] When there is a contract between you and me, involving mutual obligations, and before it is executed on either side there is a new agreement, by which I liberate you from your engagement, you are likewise presumed to have discharged me from the reciprocal obligation. Thus, if I sell you an estate, and we afterwards agree that I shall discharge you from the purchase, you will be deemed to have also discharged me from the sale. *L.* 23.(*a*) *ff. de Accept.*

[577] The omitting to except one debt in the release which is given for another, forms no presumption of a release of that which is not mentioned. *L.* 29.(*b*) *ff. de Oblig. & Act.*

So if there is a statement of mutual accounts, and one of the parties omits including a demand which he has upon the other, it is no presumption of that demand being released, it will be rather considered as an accidental omission, which will not deprive the creditor of his right of recovering the debt, notwithstanding its not being comprised in the account.

But such a presumption may arise where three circumstances concur. 1st. When the debtor and creditor are nearly related, or a great friendship subsists between them. 2d. Where not only one but several accounts have passed without any notice of the demand. 3d. When the creditor has died, not having made any claim. Upon such a concurrence *Papinian* directs that a release shall be presumed. This is the decision of the famous law, *Procula*, 26.(*c*) *ff. de Probat.*

§ III. *Whether a Release may be made by the mere Will of the Creditor, without an Agreement.*

[578] We have seen that a valid release may be made, either by an express or tacit agreement between the creditor and the debtor. Some authors are of opinion, that it may be made by the mere will of the creditor, declaring that he makes a release, provided he be capable of disposing of his effects. This is the opinion of *Barbeyrac*, in his notes upon *Puffendorf:* his reason is, that every person, who has the disposal of his effects, may at his pleasure renounce the rights which belong to him, and that by renouncing he looses them. *Paulus* in the law 2.(*d*) § 1. *ff. pro. Derel.* expressly decides, that

(*a*) Si ego tibi acceptum feci, nihilo magis ego à te liberatus sum: Paulus, imo, cum locatio, conductio, emptio, venditio, conventione facta est, et nondum res intercessit, utrinque per acceptilationem, tametsi ab alterutrâ parte duntaxat intercessit, liberantur obligatione.

(*b*) Lucio Titio cum ex causa judicati pecunia deberetur, et eidem debitori aliam pecuniam crederet, in cautione pecuniæ creditæ non adjecit sibi *præter eam pecuniam* [illegible] *sibi ex causa judicati:* Quæro, an integræ sint utræque Lucio Titio petitiones? [illegible] *spondit*, nihil proponi cur non sint integræ.

[illegible] magnæ quantitatis fideicommissum a tratre sibi debitum, post mortem [illegible] cu[illegible]redibus compensare vellet, ex diverso autem allegaretur, *nun-* [illegible] *fr*[illegible] *vixit, desideratum, cum variis ex causis sœpe* [*in*] *rationem solvisset;* Divis commodus, cum super eo negotio cognationem, quasi tacite fratri fideicommissum fuisset

[illegible]re eam rem domini esse, nisi ab alio possessa fuerit:

we may by our will renounce, and lose the rights of dominion of a corporeal thing which belongs to us; for the same reason, we may renounce the right of credit which we have against our debtor: and, as there can be no doubt, without a right of credit in the person in whose favour it was contracted, the renunciation, and abandonment which the creditor makes of his right of credit, necessarily induces extinction of the debt. According to these principles, if a creditor at *Orleans* has written a letter to his debtor at *Marseilles*, by which he intimates a release of his debt; although the debtor dies after the letter was written, but before it came to hand, so that no agreement can be said to have intervened between him and the creditor, nevertheless, according to the principles of *Barbeyrac*, it must be decided that the debt is extinct, and that the creditor, who by the letter has declared his intention of renouncing his demand, cannot enforce it against the heirs of the debtor.

I do not think that this opinion of *Barbeyrac* could be followed in practice; I readily agree with him, that (supposing a metaphysical case) a creditor, who had an absolute intention of abdicating his right, may by his will alone extinguish it; but where a creditor declares that he makes a release to his debtor of his debt, he should not be presumed to have this absolute intention of abdicating his demand, but rather that of making a gift of it to his debtor. Now, as every gift requires the acceptance of the donatary, it should be held that the creditor only intended to abdicate his right of credit, upon his release and gift receiving their perfection by the acceptance of the debtor; therefore, in the case supposed, I think it ought to be decided contrary to the opinion of *Barbeyrac*, that the release of a debt, communicated by letter, ought not to have any effect, if the debtor to whom it was made happens to die before the letter arrives.

Even if the principle of *Barbeyrac* was to be followed, it could only be when the release was pure and simple: when it was made under certain conditions, it is evident that it could have no effect, before the debtor had accepted the conditions.

§ IV. *Whether a Release may be made in part.*

[579] A release of a debt may be made either wholly or in part: the *Roman* laws excepted, with regard to an acceptilation, the case where the thing was not susceptible of parts. For instance, if I were obliged in your favour to impose a certain right of servitude upon my estate for the advantage of yours, the acceptilation of this debt could not be made by parts. *L.* 13. § 1.(*a*) *ff. de Acceptil.*; but

Julianus, desinere quidem omittentis esse, non fieri autem alterius, nisi possessa fuerit; et recte.

(*a*) Si id, quod in stipulationem deductum est, divisionem non recipiat, acceptilatio in partem nullius erit momenti; ut puta, si servitus fuit prædii rustici vel urbani. Plane si *ususfructus* sit in stipulatum deductus, puta fundi Titiani, poterit pro parte acceptilatio feri, et erit residuæ partis fundi ususfructus. Si tamen *viam* quis stipulatus, accepto iter vel actum fecerit, acceptilatio nullius erit momenti: hoc idem est probandum si actus accepto fuerit latus; si autem iter et actus accepto fuerit latus, consequens erit dicere liberatum eum qui viam promisit.

with us, there is nothing to prevent such a debt being released in part, as for a half, a third, &c. and the effects of this release will be, that you can only demand from me the right of servitude, upon giving me the half or third, &c. of the value.

ARTICLE II.

Of the different Kinds of Releases.

We may distinguish two different kinds of releases, the one we call a real release, the other a personal discharge.

§ I. *Of a real Release.*

[580] A real release is where the creditor declares that he considers the debt as acquitted; or when he gives a discharge as if he had received the payment of it, although he has not.

Such a release is equivalent to a payment and renders the thing no longer due; consequently it liberates all the debtors of it, as there can be no debtors, without something is due.

§ II. *Of a personal discharge.*

[581] A personal release or discharge is that, by which the creditor merely discharges the debtor from his obligation: such discharge *magis eximit personam debitoris ab obligatione, quam extinguit obligationem;* it only extinguishes the debt indirectly, where the debtor, to whom it is granted, was the sole principal debtor, because there can be no debt without a debtor.

But if there are two or more debtors in solido, a discharge to one of them does not extinguish the debt; it only liberates the person to whom it is given, and not his co-debtor; the debt is extinguished, however, as to the part of the person to whom the discharge was given, and the other only remains obliged for the remainder. The reason is, that if each is debtor for the whole, it is only on condition that the creditor shall cede to him his rights and actions against the other. The creditor having by his own act rendered himself incapable to cede them, against the debtor whom he has discharged, the other ought not to suffer by it, as we have seen, *supra, n.* 250.

A discharge to a principal debtor induces that of his sureties; for it would be useless to discharge him, if his sureties were not discharged likewise, since the sureties, if they were obliged to pay, would have recourse against him; besides, there can be no sureties without a principal debtor. This rule, however, is subject to an exception with respect to contracts, *d'attermoiement, supra, n.* 380.

Contra vice versâ, a discharge to a surety does not discharge the principal debtor, for the obligation of the surety depends upon that of the principal, but the obligation of the principal does not depend

upon that of the surety: there cannot be a surety without a principal debtor, but there may be a principal without a surety.

A personal discharge to one surety does not discharge his co-sureties, *L.* 23(*a*) *ff. de Pact. L.* 15.(*b*) § 1. *ff de Fidej.* Nevertheless, if the co-sureties were entitled to compute upon having recourse against the one who is discharged, having contracted their engagements at the same time with him, or after him, it is equitable that a discharge granted to him should liberate them, in respect of the part for which, after payment of the debt, they would have had recourse against him, if he had not been discharged. As the creditor was not entitled, by discharging such surety and depriving them of their recourse to prejudice them, they may with respect to this part oppose the *actio cedendarum actionum*, as we have seen, *n.* 250.

This decision, that a discharge granted to a surety neither liberates the principal debtor nor the co-sureties, holds good even where the creditor has received a sum of money from the surety to discharge him from his engagement; the principal will not on that account be at all discharged; for such sum is not given by the surety in payment, and to be applied in deduction of the debt, but as a price for the discharge of his engagement.

§ III. *Whether a Creditor may lawfully receive a consideration for discharging a Surety, without appyling it in Reduction of the Debt; and several Questions depending thereon.*

[582] What we have just said leads to the celebrated question whether after a person has become surety for my debtor, to whom I have lent a sum of money, I may not only in point of law but also in point of conscience, receive something from the surety, to discharge him from his engagement, and afterwards exact payment of the whole from the principal, without applying any part of what I have received from the surety in reduction of the debt? *Dumoulin*, in his *Treatise de Usur. Q.* 34, decides that it may be lawfully done, if, at the time of discharging the surety, there was reason to apprehend the insolvency of the principal debtor. I am not thereby guilty of usury; for usury consists in receiving something beyond the sum lent, as a price and recompense for the loan; it consists in receiving a reward for a service which ought to be gratuitous. This is received on a totally different account. The risk of the debtor's insolvency, which was the subject of apprehension, was the risk of the surety and not of myself. I may take this risk upon myself and discharge the

(*a*) Fidejussoris autem conventio nihil proderit reo, quia nihil ejus interest a debitore pecuniam non peti; immo, nec confidejussoribus proderit, neque enim, quomodo cujusque interest. Cum alio conventio facta prodest, sed tunc demum, cum per eum, cui exceptio datur, principaliter ei, qui pactus est, proficiat: sicut in reo promittendi, et his, qui pro eo obligati sunt.

(*b*) Si ex duobus, qui apud to fidejusserant in viginti, alter, ne ab eo peteres, quinque tibi dederit vel promiserit, nec alter liberabitur: et, si ab altero quindecim petere institueris, nulla exceptione summoveris: reliqua autem quinque, si a priore fidejussore petere institueris, doli mali exceptione summoveris.

surety, and am under no obligation of doing so for nothing. This risk is appreciable, and I may fairly receive a sum of money for the price of it.

This, supposing me to be a creditor of *Peter* for 1200*l.*, and you to be his surety. The affairs of *Peter* become deranged, and there is reason to apprehend that there may be a loss of half the debt, or more. This risk would fall upon you. You offer me 300*l.* for taking it upon myself, and giving you a discharge, which offer I accept; afterwards, *Peter's* affairs come round, and he pays the whole debt, by which I am gainer of the 300*l.* received from you. This gain is perfectly fair, it is the price of the risk, which I have undertaken in your stead, of losing 600*l.* or more. Neither the principal debtor nor you have any reason to complain. The principal cannot, for he has no interest in the matter; he pays what he owes and nothing more; you cannot complain, for if you have given me 300*l.* more than was due to me, I have given you an equivalent by taking the risk upon myself. It is a contract of hazard between us, and is as equitable as a marine insurance. It may perhaps be objected in the case of a loan, that the risk of the borrower's insolvency cannot entitle the lender to any extra compensation: I answer that this principle is only true as it affects the debtor; the risk which a creditor runs of losing the sum which he has lent, through insolvency, cannot give him any right to demand anything beyond this sum from the debtor, as on his part it would be a pure loss, and he would receive nothing in return; besides, his poverty ought to be a reason for relieving rather than oppressing him; but the risk of the debtor's insolvency may give the creditor a right to receive something from a third person who was subject to that risk, as a consideration for taking it upon himself, for the third person, by having a discharge, receives something in return.

When there is no reason to doubt the solvency of the principal, *Dumoulin*, *ibid.* decides, that the creditor cannot lawfully take any thing from the surety to liberate him from his engagement. It may be opposed, that the right which I had against the surety was a right *in bonis*, which was part of my property; I give him up this right by a release, and there is no reason why I should not receive something in lieu of what I part with; I answer, that according to the rules of commutative justice, I cannot demand more in lieu of any thing which I part with, than an equivalent for that thing, that is to say, what it may be appreciated at; and if it cannot be appreciated at any thing, nothing can be demanded for it. Now, such is the right which I have against the surety, and which is the subject of the release. Thus, suppose *Peter* owes me a hundred pounds, and there is no suspicion of his solvency, I have securities upon property of considerably greater value; you are his surety, and I release you from your engagement; what value can be placed upon the right resulting from such an engagement? My debt, with all the rights connected with it, is worth a hundred pounds, and no more; without the addition of your engagement, it is worth that sum, because it is supposed to be fully secured; consequently the right which I release

cannot be valued at any thing. By remitting it I suffer no loss, and therefore I cannot fairly receive any thing by way of remuneration.

Observe, that where a surety gives something to a creditor for his discharge, it ought to be presumed in point of law, that there was some apprehension of insolvency, for a person is not presumed to throw away his property without any prospect of advantage. *Nemo res suas jactare facile præsumitur.*

Even if it should be fully proved, that, at the time of the surety paying a consideration for his discharge, there was no real ground for apprehending the insolvency of the debtor, the surety, so long as the debt in fact continues unpaid, has no right of repetition, except upon an offer to renew his former obligations. *Dumoulin, ibid.*

The surety may in this case offer to pay the debt, deducting what he has already paid for his discharge; and if he were surety of an annuity, the payment should be first applied to the arrears which are due, and then to the principal: and upon paying, he may demand to be subrogated to the rights of the creditor; for although he was discharged, he ought not to be regarded as an entire stranger, as he makes the payment in order to obtain what he has already given to be so. *Dumoulin, ibid.*

With respect to the principal debtor, he can never have any right of repetition against the creditor, for what has been unduly received in order to liberate the surety, nor any right to make a deduction on that account when he pays; for, the surety not having any recourse against the principal for what he has paid upon such a consideration, the principal has no interest in the subject.

But if the surety has recourse against the principal for what he has paid in discharge of the engagement; as, if the principal was bound to the surety to pay the debt in a limited time, and it was agreed that after the principal was put *en demeure*, the surety might purchase his own discharge from the creditor upon the best terms he could, for which the principal should indemnify him; in this case the principal might retain the sum in making his payment; for as the surety will have recourse for it against him, it is the same as if he had paid the money himself. *Dumoulin, ibid.*

ARTICLE III.

What Persons may make a Release, and to whom.

§ I. *What Persons may make a Release.*

[583] It is only the creditor when he has the power to dispose of his property, or a person having a special authority from him, who can release a debt.

A person having a general procuration, a tutor, a curator, an

administrator, have not this right *L.* 37.(*a*) *ff. de Pact. L.* 22.(*b*) *ff. de Adm. Tut.* for all these persons have only the power of administering and not of giving; now, a release is a donation.

A release of part of a debt given to a debtor, in case of failure, must be excepted, as it is not made so much *animo donandi*, as with an intention to insure, by that means the payment of the remainder of the debt, instead of losing the whole; such release may be deemed an act of administration of which these persons are capable.

Releases of a part of the seignoral profits, due on the alienation of an estate, made to a person who wishes to compound for such profits, previous to his concluding his bargain for the purchase, are also acts of administration, to which tutors and other administrators are competent: for, in this case, such releases are rather compositions than donations; they are not made so much *animo donandi*, as to avoid losing the profits due upon the alienation by the bargain going off.

Tutors, and other administrators, may make a release of a part of the profits, even after the conclusion of the sale, and in the case of necessary exchanges, provided such release be not excessive, and are conformable to those which the lords are accustomed to make; for though it cannot be disputed but that such releases are real donations, *liberalitas nullo jure cogente facta*, yet usage has rendered them not indeed an obligation but a matter of propriety now, donations of this kind are not forbidden to tutors and other administrators. *Arg. L.* 12.(*c*) § 3 *ff. de Adm. Tut.*

Where there are several creditors *in solido*, *corrie*, *credendi*, one of them may, without the others, make a release of the debt, and such release discharges the debtor from all the others, the same as a real payment. *L.* 13.(*d*) § 12. *ff. de Accept.*

§ II. *To whom the Release may be made.*

[584] It is evident that the release of a debt can only be made to the debtor; but, it is presumed to be made to the debtor, whether the agreement which contains it is with the very person of the debtor, or with his tutor, curator, or other administrators.

As parents, by the ordonnance of 1731, *art.* 7, have a quality to accept donations made to their minor children, though not under their tutelage, they may consequently accept any release from the creditors, of their children.

(*a*) Imperatores Antoninus et Versus rescripserunt, *debitori reipublicæ a curatore permitti pecunias non posse, et cum Philippensibus remissæ essent, revocandas.*

(*b*) *Vide supra, n.* 555.

(*c*) Cum tutor non rebus duntaxat, sed etiam moribus pupilli præponatur: in primis mercedes præceptoribus, non quas minimas poterit, sed pro facultate patrimonii, pro dignitate natalium constituet; alimenta servis, libertisque, nonunquam etiam exteris, si hoc pupillo expediet, præstabit; solemnia munera parentibus cognatisque mittet. Sed non dabit dotem sonori alio patre natæ, etiamsi aliter ea nubere non potuit; nam etsi honeste, ex liberalitate tamen sit, quæ servanda arbitrio pupilli est.

(*d*) Ex pluribus reis stipulandi si unus acceptum fecerit, liberatio contingit in solidum.

[585] When there are several debtors in solido, the creditor may by a release to one of them extinguish the debt, and liberate all the others. *L.* 16.(*a*) *ff. de tit.* But it must appear that the creditor intended to extinguish the debt, for if his intention was only to discharge the person of the debtor, his co-debtors are not liberated, except for the part of him who is discharged, as was seen in the preceding paragraph.

[586] A release being a donation, it is requisite to its validity, that the debtor to whom it is made be not a person to whom the laws forbid a donation to be made: a release by a wife to her husband, of what he owed her, or by a sick person to his physician, would not be valid.

This ought not to extend to releases made rather by composition than by donation, such as those made in cases of failure, and composition seignoral profits.

Although the release of part of a seignoral profit, to a person to whom a donation could not legally be made, were not made by way of composition but through liberality, as in the case of a necessary exchange, it ought to be valid, and ought not to be regarded as a prohibited donation, if it do not exceed what the lord is in the habit of making to strangers, as if it is only the release of a fourth part.

CHAPTER IV.

Of Compensation (set off.)(*b*).

[587] Compensation is the extinction of debts of which two persons are reciprocally debtors, by the credits of which they are reciprocally creditors, *compensatio est debiti et crediti inter se contributio. L.* 1 *ff. de Compens.*

For instance, if I owe you the sum of 50*l.* upon a loan; and on the other hand, I am your creditor of the same sum for the rent of a house, which has accrued since the loan, my debt to you will be extinguished by way of compensation, by the credit of a like sum against you; and *vice versâ* your debt to me will be extinguished by your credit against me.

The equity of compensation is evident; it is established upon the common interest of the parties between whom it is made; it is clear that each of them has an interest to compensate rather than pay what they owe, and to have an action to recover what is due to them. This reason is adduced by *Pompinius* in the law 3. *ff. de Compens. Ideo compensatio necessaria est, quia interest nostra potius non solvere*

(*a*) Si ex pluribas obligatis uni accepto feratur, non ipse solus liberatur, sed et hi qui secum obligantur, nam cum ex duobus pluribus que ejusdem obligationis parricibus uni accepto fertur, cæteri, quoque liberantur: non quoniam ipsis accepto latum est sed quoniam velut solvisse videtur is qui acceptilatione solutus est.

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

quam solutum repetere. He adds, that compensation avoids a useless circuity, *quod potest brevius per unum actum expidiri compensando incassum protraheretur per plurus solutiones et repetitiones.*

We shall see with respect to this subject, 1st. Against what debts compensation may be opposed; 2d. What debts may be opposed in conpensation; 3d. In what manner compensation is made, and what are its effects.

§ 1. *Against what Debts Compensation may be opposed.*

[588] Regularly, compensation may be opposed against the debts of every thing susceptible of it.

The debts of things susceptible of compensation are, debts of a certain sum of money, of a certain quantity of corn, wine, and other consumable things.

The debt of an indeterminate thing of a specific kind, though not consumable, is likewise susceptible of compensation. For instance, if by a contract of sole, you oblige yourself to give me a horse indeterminately, without saying what horse; this is a debt susceptible of compensation; and if, before it is paid, I became sole heir to a person who has left you a horse indeterminately, and in this quality am your debtor of a horse; it is evident that you may oppose by way of compensation the debt of the horse, due from me by the will against that due from you by the agreement.

On the contrary, where a thing, although in its nature consumable, is due as a specific and determinate object, the debt is not susceptible of compensation. For instance, if I have bought from you six pieces of wine, of this year's vintage, of your vineyard of St. *Denis:* and on the other hand, before you deliver them to me, I become sole heir of a person, who has by his will bequeathed to you six pieces of wine, and in this quality am your debtor of six pieces of wine; you cannot oppose against the debt to me of six pieces of your wine, that of the six pieces of which I am your debtor, and I may require you, without any regard to the compensation, to deliver me the six pieces of wine from your cellar, upon offering to give you six other pieces of good wine. The reason is, that compensation being a reciprocal payment between two parties, a creditor cannot be obliged to receive in compensation any other thing than what he would be obliged to receive in payment; now according to the rule *aliud pro alio invito creditori solvi non potest, supra, n.* 494, the creditor of a specific and determinate thing cannot be obliged to receive any thing in payment, than that specific and determinate thing which is due to him; and it would not be competent to offer in payment any other thing, although of the same kind; for the same reason, he cannot be obliged to accept any other thing in compensation. The debt of a specific and determinate thing, although of a consumable nature, is therefore not susceptible of compensation.

There is, however, one case in which the debt of a specific determinate thing may be susceptible of a compensation; for if I were your creditor of an undivided part of a specific thing, as if you had

sold me an undivided part of an estate, and, before you delivered it to me, I become heir of a person who was your debtor of another undivided part of the same estate, you may oppose against the debt to me, of a part of this estate, the compensation of another part, which is due from me to you. *Sebast. de Medicis, Tract. de Compens. P.* 1. § 3.

[589] Where the thing due is susceptible of compensation, such a compensation may be opposed from whatever cause the debt proceeds.

It may even be opposed against the debt of a sum due by virtue of a judicial condemnation. *L.* 2.(*a*) *Cod. de Compens.*

There are, however, some debts, against which the debtor cannot propose a compensation.

1st. In the case of spoliation, no compensation can be opposed against the demand for the restitution of the things of which any person has been plundered, according to the well known maxim, *spoliatus ante omnia restituendus, V. Sebast. de Medicis, Tract. de Compens. P.* 2. § 28.

2d. A depositary is not admitted to oppose any compensation against a demand for the restitution of the deposit, *in causa depositi compensationi locus non est. Paulus Sent.* 11, 12, 13.

This text of *Paulus* should be understood chiefly of an irregular deposit, such as is spoken of in the laws 24.(*b*) 25,(*c*) § 1. and 26.(*d*) § 1. *ff. Depositi*, by which a sum of money is entrusted, to be mixed with other sums deposited by other persons, and to be restored, not in specie but in amount. If it were an ordinary deposit, such as a bag of money sealed, compensation would not be allowed, not only

(*a*) Ex causa quidem judicati [si debitum] solum repeti non potest, ea propter nec compensatio ejus admitti potest. Eum vero, qui judicati convenitur, compensationem pecuniæ sibi debitæ implorare posse, nemini dubium est.

(*b*) *Centum nummos, quos hoc die commendasti mihi, adnumerante servo Sticho actore, esse apud me ut notum haberes, hac epistola, manu mea scripta, tibi notum facio; quæ quando voles, & ubi voles, confestim tibi numerabo. Quæritur*, propter usurarum incrementum? *Respondi*, depositi actionem locum habere: quid est enim aliud *commendare*, quam deponere? Quod ita verum est, si id actum est, ut corpora nummorum eadem redderentur: nam si, ut tantundem solveretur, convenit, egreditur ea res depositi notissimos terminos. In qua quæstione, si depositi actio non teneat, cum convenit tantundem, non idum reddi, rationem usurarum haberi non facile dicendum est. Et est quidem constitutem, id bonæ fideii judiciis, quod ad usuras attinet, ut tantundem possit officium arbitri, quantum stipulatio: sed contra bonam fidem & depositi naturam est, usuras, ab eo desiderare temporis ante moram quia beneficium in suscipienda pecunia dedit: si tamen ab initio de usuris præstandis convenit, lex contractus servabitur.

(*c*) Qui pecuniam apud se non obsignatum ut tantundum redderit, depositam ad usus proprios convertit; post moram in usuras quoque judicio depositi condemnandus est.

(*d*) *Lucius Titius* ita cavit: Ε'λαβον, και εχω εις λογον παρακαταθηκης τα προγεγραμμενα τω αργυριω δηναρια μυρια, και παντα ποιησω, και συμφωνω, και ομολογησα, ως προλεγραπται, και συνεθεμην χορηγησαι σοι τοκον εκαστης, μνας εκαστω μηνος οβολους τεσσαρας; μεχρι της αποδοσιως παντος τω αργυριω, id est: *Suscepi habeogue apud me titulo depositi suprascripta denarium argenti decem millia; meque ad præscriptum omnia præstaturum & promitto, & profiteor; conventione scilicet initia, ut quod omne argentum reddatur, in singulas menses, singulasque libras usurarum nomine, quaternos tibi obolos subministrem. Quæro* an usaræ peti possunt? *Paulus respondit* eum contractum, de quo quæritur depositæ pecuniæ modum excedere: [&] ideo secundum conventionem usuræ quoque actione depositi peti possunt.

because it is a deposit, but upon the general rule, that specific things are not susceptible of compensation.

The depositary cannot, indeed, oppose to the restitution of the deposit a compensation of the credits which he has against the person who entrusted him with it, when these credits arise upon other accounts: but when the credit arises from the deposit itself, as, for the expenses which he has been obliged to incur for the preservation of it, there is a right of compensation, not only in the case of an irregular deposit, but also with respect to the deposit of a specific thing, which may be retained, *quasi quodam jure pignoris*, until the credit is discharged. This is the common decision of the doctors, cited by *Sebast. de Med. Tr. de Compens. P.* 1. § 19.

It is upon this principle that the receivers of consignations retain out of the sums consigned the fees belonging to their offices.

3d. The debt of a sum of money given, or bequeathed to me for my sustenance, and with a provision that it shall not be seized by my creditors, is a debt against which no compensation can be opposed. For this clause prevents its being seized by other persons, and as it cannot be employed in discharge of what I owe to them, it also prevents its being employed in payment of what I owe to the person who was debtor of it. *Sebastian de Medicis, Tract. de Comp. P.* 1. § 14, gives another reason for this decision; that provisions are necessary to existence, it would be a kind of homicide committed by the person who is charged to furnish them, if he refuses to do so under any pretext whatever, even of compensation, *necare videtur, qui alimonia denegat. L.* 4. *ff. de Agnos. Liber.*

4th. A feudal tenant cannot oppose the compensation of a sum due to him from the lord against his obligation to go or send to pay him the rent-service due at the accustomed day and place. The reason is, that this includes the debt, not only of a sum of money, but of the recognition of an immediate seignory, which is not susceptible of valuation, nor consequently of compensation.

This duty is not susceptible of compensation even against a debt of a like nature. Thus, if I owe you a rent service of three pence payable at your Manor Hall, on *St. Martin's* day, for an estate situate in your seignory, under penalty of five shillings; you owe me a like sum, payable the same day, for an estate situate in mine, under a penalty of only three shillings: no compensation can take place. The reason is, that compensation, when it takes place, should give each party what belongs to him. If I owe you five hundred pounds, and you owe me the same, a compensation, by procuring me a discharge, gives me in effect the five hundred pounds which were due from you; for the liberation from the five hundred pounds, which I owed you, is really worth five hundred pounds; but in the case proposed, the discharge from recognizing your seignory of the estate which I hold of you, cannot give me a recognition for that which you hold of me; therefore, in this case, compensation cannot be admitted, since it cannot give to each of us what belongs to us: besides, *monumenta censuum interturbarentur. Molin. in cons. par. ad. Art.* 85. *gl.* 1. *n.* 38.

Observe, that rent-service is not susceptible of compensation in this sense: the tenant cannot be discharged from going or sending to pay it, but it may be so far susceptible of it, that the tenant who is creditor of his lord for a sum of money, may, at the time and place at which the rent is payable, offer, in lieu of the money which he owes for the rent-service, a discharge for the like sum due to him by the lord; for by going and making this offer, he satisfies the obligation of acknowledging the seignory: such a compensation, however, ought not to be permitted, except where the rent consists of a sum rather considerable, and not in the case of a small sum, payable as an acknowledgment. (*les menus cens.*) *Dumoulin, ibid.*

The question, whether a debtor, who is obliged by an oath, to the payment of a debt, may, in point of conscience, as well as in point of law, oppose a compensation of what is due to him from his creditor, has already been touched upon. Several doctors, and more especially some canonists, have held the negative for a frivilous reason, that an oath ought to be accomplished in *forma specifica.* The opinion of those who hold the affirmative is preferable; an oath for the performance of an obligation only serves to render the debtor more culpable, if he contravenes it, and to induce him, through the fear of rendering himself guilty of perjury, not to do so: but an obligation although confirmed by an oath, remains the same, and the oath does not prevent its being discharged in all the different ways in which obligations may be acquitted and consequently by compensation. *Seb. de Med. Tr. de Compens. n.* 2. § 25.

Compensation may be opposed, not only against debts due to individuals, but even against debts due to towns, corporations or communities. The law, 3. *Cod. de Comp.* however, excepts certain particular debts due to towns, to which the debtor is not permitted to oppose any compensation.

The law 1. *Cod. d. t.* admits a compensation even against the public revenue, upon condition however, that both the debt for which the compensation is made, and that opposed in compensation, belong to the same department: *rescriptum est compensationi in causa fiscali locum esse, si eadem statio quid debeat quæ petit. d. l.* 1. For instance, I could not oppose, in compensation of my capitation at *Orleans*, the arrears of an annuity due to me upon the tallies at *Paris.*

§ II. *What debts may be opposed in Compensation.*

[590] For a debt to be opposed in compensation, it is necessary, 1st, that the thing due be of the same kind as that which is the object of the debt, against which the compensation is opposed: *compensatio debiti ex pari specie, licet ex causa dispari admittitur. Paulus, sent.* 11. *v.* 3. For instance, I may oppose in compensation of a sum of money which I owe you, the debt of a like sum which you owe me; these debts are *ex pari specie:* but I cannot oppose, in compensation of a sum of money which I owe you, the debt of a certain quantity of corn, which you owe me.

The reason is, that compensation being a payment, upon the same

principle that I cannot insist upon paying any thing else to my creditor in lieu of what I owe him, *supra, n.* 494. I cannot oblige him to receive in compensation of a sum of money which I owe him, the corn which he owes me: for this would be obliging him to receive the corn for the money, consequently, to receive something different from what is due to him.

Although a debt of an indeterminate thing of a certain kind cannot be opposed to a debt of a certain specific thing of the same kind, as was observed in the preceding Article, *n.* 588. *contra, vice versâ*, the debt of a specific thing may be opposed to a general debt of the same kind. For instance, I am your creditor for six pipes of wine, of a particular vintage, which you have sold to me, and your debtor for six pipes of wine generally which a person to whom I have succeeded has left to you; you cannot set off the quantity due from me against the particular wine which is due from you, because you have no right to offer any thing in payment but those six pipes of wine. On the contrary, if you demand the six pipes which I owe you generally, I may set off the six pipes which are due from you particularly, because if that wine had been actually delivered, I might have offered it in payment of the wine which I owe to you.

Observe, that as this compensation, *speciei mihi debitæ ad quantitatem* depends upon my choice, it does not take place until that choice is actually declared, and until I oppose such compensation; whereas compensations which are made *quantitatis ad quantitatem*, take place immediately upon the debtor becoming also a creditor, as will be shown in the sequel.

[591] The debt opposed by way of compensation must be fully due, *quod in diem debetur, non compensabitur antequam dies veniat, L. 7. ff. de Comp.* The reason is evident, compensation is a reciprocal payment by each of the parties; now the debtor whose credit is not expired, not being liable as yet to pay the debt, is not bound to allow it as a compensation for his own demand.

The term of payment which must be expired, in order to oppose the debt in compensation, is one to which the debtor is entitled by virtue of the agreement. It would be otherwise with respect to a term of grace. For instance, if I have a judgment against my debtor for 1000 livres, and the judge has allowed him three months to pay it, and a month after the sentence the debtor, becoming heir of my creditor, to whom I owe a like sum, demands it of me, I may oppose in compensation the debt which he owes me, although the term of three months allowed him is not yet expired; for it is only a term granted as a matter of grace, in order to stop the rigour of an execution, but which cannot delay the compensation: *aliud est diem obligationis don venisse, aliud humanitatis gratia tempus indulgeri solutionis, L.* 16. § 1. *ff. de Compens.*

[592] 3d. The debt opposed by way of compensation must be liquidated. *L. fin.*(*a*) § 1. *Cod. de Compens.*

(*a*) Ita tamen compensationes objici jubemus, si causa, ex qua compensatur, liquidata sit, & non multis ambagibus innodata.

A debt is liquidated when it is evident that it is due, and to what amount, *cum certum est an et quantum debeatur.*

A disputed debt, then, is not liquidated, and cannot be opposed in compensation, unless the person who opposes it has proof at hand, and is in a situation to justify his claim promptly and summarily.

Even if it be evident that it is due, if it is not clear to what amount it is so, and if the liquidation depends upon an account of which a long discussion would be necessary, the debt is not liquidated and cannot be opposed in compensation.

[593] 4th. The debt must be determinate; therefore, if a person charge his heir to give me a hundred pounds, or his two coach-horses, and I am indebted to the heir in the like sum of a hundred pounds, I cannot oppose the legacy to his demand, whilst he has an election to give me the horses, because the money is not due determinately. But if the choice had been given to me, I might insist upon the compensation, which, however, would only attach upon my choice being declared: "*si debeas decem milia aut hominem utrum volet adversarius; ita compensatio admittatur, si adversarius palam dixissit, utrum voluisset.*" *L.* 22.

[594] 5th. The debt must be due to the very person who opposes it as a compensation, "*ejus quod non ei debetur qui convenitur sed alii compensatio fieri non potest.*" *L.* 9. *Cod. dict. tit.*

Therefore, I cannot set off, against a debt due from myself, one which is due to a person of whom I am tutor or curator, or to my wife, having a separate estate.

If I had a community with my wife, what is due to her is due to me, and I may therefore oppose it to the claim of my creditor.(*a*)

Papinian in *L.* 18. § 1. *ff. de Compens.* carries this principle so far as to decide, that my creditor is not bound to accept, by way of compensation, what is due from him to a third person, although that person intervenes, and expressly signifies his consent. "*Creditor compensare non cogitur quod alii quam debitori suo debet: quamvis creditor ejus pro eo, qui convenitur, propriunt debitum velit compensare.*" Thus you demand a payment of a hundred pounds which is due to you from me. You owe the like sum to *Peter*, and I produce an instrument by which *Peter* consents that the money due to him shall be allowed as a compensation for my debt to you. *Papinian* insists, that you are not bound to accede to this compensation; but *Barbeyrac*, in his notes upon *Puffendorf*, is justly of opinion that *Papinian* has carried a legal subtlety too far, and that the compensation ought to be admitted. For, as it is indifferent to you whether you receive the money from *Peter*, or from me, it is unjust to institute your suit against me for the payment of this sum, when *Peter* is

(*a*) But the *English* law does not admit the husband to set off a debt due to the wife; nor, on the other hand, can a debt due from the wife be set off against a demand of the husband: the distinction of a community or separation of property does not exist, except through the medium of trustees. In the following instance, the *English* law would clearly not accord with the opinion which *Pothier* has adopted from *Barbeyrac.*

willing that you should receive it from him on my account, by way of compensation for that which you owe him.

There is a distinction, by which *Barbeyrac* may be reconciled with *Papinian*. If the sum which I owe to *Peter* is equal to that which you owe me, I cannot avoid a compensation, when you make *Peter* an intervening party to the suit, and he consents to it; in this case, the opinion of *Barbeyrac* ought to be adopted. But if the sum which you owe to *Peter* is less than my debt to you, notwithstanding *Peter* may agree to the compensation, you are not obliged, according to the decision of *Papinian*, to accept of it, unless at the same time I offer to pay the balance; for, otherwise, you would be obliged to accept of your debt by parcels, which you are not bound to do. It is only where I am personally your creditor, to the amount of part of the debt due from me to you, that compensation takes place, and notwithstanding your dissent, extinguishes your demand, so far as the two accounts concur.

It is the concurrence of the qualities of debtor and creditor in the same person which induces *pleno jure* a compensation to the extent of their concurrence; as a person cannot be truly my creditor, without deducting what is due from him to me, nor my debtor, without the like deduction of what is due from me to him.

A person to whom the rights of a creditor are ceded, is not, according to the subtlety of law, a creditor, but only a procurator, or attorney in *rem suam*. Nevertheless, as he is in effect a creditor, when he has given notice to the debtor of the transfer of the debt, he may oppose the compensation of such a debt against a demand from him by the debtor, as much as any debt due to him on his own account: *in rem suam procurator datus, si vice mutua conveniatur æquitate compensationis utetur. L.* 18. *ff. de Comp.*

[595] The rule which we have just established, that we can only oppose by way of compensation what is due to ourselves, is subject to an acception in the case of sureties. A person required to pay a sum of money to which he is liable as a surety, may oppose as a compensation, not only what is due from the creditor to himself, but also what is due to the principal debtor. "*Si quid a fidejussore petitur equissimum est fidejussorem eligere quod ipsi, an quod reo debetur compensare malit.*" *L.* 5. *ff. d. t.*

The reason is, that it is of the substance of such an engagement that the surety cannot be obliged to more than the principal, and, consequently, that he may avail himself of all the same grounds of defence: *supra, n.* 380. Now the pricipal debtor may oppose, by way of compensation, what is due from the creditor to him; consequently, the surety may also oppose the compensation of the same debt.

It is not the same *vice versâ;* the principal cannot oppose to his own creditor the compensation of a debt to his sureties.

As to whether a debtor in solido may oppose what is due to his co-debtor, *vid. supra, n.* 274.

[596] The debt which is opposed as a compensation must be due from the same person to whom it is opposed. For instance, if a person demands from me the payment of his debt, I cannot oppose

to him, by way of compensation, a debt from the minors, to whom he is tutor; and *vice versâ*, if in his quality of tutor he demands from me the payment of the debt due to the minors, I cannot oppose a compensation of what he owes me himself: "*Id quod pupillorum nomine debetur, si tutor petat non posse compensationem objici ejus pecuniæ quam ipse tutor suo nomine debet.*" *L.* 23. *d. t.*

For the same reason, I cannot oppose to my creditor a compensation of what his wife owes me, when she has a separate property; but I may do it, if their property is held in common, because he is bound for the debts of his wife, and has himself become debtor by the community of property between them. This would hold good, even if there had been a clause of separation, with respect to debts; unless he proves by an inventory that there is no money of his wife in his hands; for, otherwise, he is debtor of what is due by his wife. An argument may be drawn in favour of our decision, from the law 19.(*a*) which decides, that the compensation of what is due by a slave may, to the extent of his *peculium*, be opposed to the master; the debt of the slave being to that extent the debt of the master.

If my creditor has transferred the debt which is due from me, I may oppose to the demand of the assignee, not only what is due from himself, but also what is due from the original creditor, provided his debt to me was contracted before I had notice of the transfer; for as the credit could not pass to the assignee, until it was notified to the debtor, according to the maxim of the law of *France*, *transport ne saisit s'il n'est signifié;* and as it rests till that time in the original creditor, the claims, which I in the mean time acquire against him, extinguish *pleno jure*, so far as they concur the claims which he has against me.

If the mutual credit is given after notice of the transfer, it does not produce any compensation, because, by the signification of such transfer, the person transferring has ceased to be my creditor; or, if he is so, it is merely *subtilitate juris, et non juris effecti.*

Although I were creditor previous to the transfer, yet if, purely and simply, I assented to such transfer, with full knowledge of my right, I should be deemed to have renounced the right of compensation, and could not oppose it to the assignee, who had relied upon my assent, (my rights against the original creditor being saved). This was decided by some *arrêts, cited by Dispeisse.*

[597] According to the principles of the *Roman* law, I may oppose to you, in compensation of what I owe you here, a sum which you owe me, payable in another place, allowing the expense of remitting it from that place to this. *L.* 15.(*b*) *ff. de Comp.* A creditor, according to the principles of the *Roman* law, having an

(*a*) Debitor pecuniam pulicam servo publico citra voluntatem eorum solvit, quibus debitum recte solvi potuit; obligatio pristina manebit, sed dabitur ei compensatio peculii fini quod servus publicus habebit.

(*b*) *Pecuniam certo loco a Titio dari* stipulatus sum: is petit a me, quam ei debeo, pecuniam: quæro an hoc quoque pensandum sit, quanti mea interfuit, certo loco dari? Respondit, si Titius petit, eam quoque pecuniam, quam certo loco promisit, in compensationem deduci oportet; sed cum sua causa, id est, ut ratio habeatur, quanti Titii interfuerit, eo loco, quo convenerit, pecuniam dari.

action *de eo quod certo loco*, to oblige his debtor to pay in the place where he happens to be, a sum payable in another place, upon allowing the expense of a remittance, he may consequently oblige him to compensate. But this action, *de eo quod certo loco*, not being in use with us, and as the creditor cannot demand the payment of a sum payable in a certain place, any where else than in that place, *supra n.* 239, it would seem a necessary conclusion, that he could not oppose it in compensation of what he owed in another place; nevertheless, *Domat. P. 1. L. 4. T. 2. sect. 2. n.* 8, thinks that this compensation ought to be admitted, upon allowing the value of the remittance. This appears sufficiently equitable, as compensation is very favourable.

[598] It is evident, that I cannot oppose to you, in compensation of what I owe you, the principal of an annuity, which you owe to me, but merely the arrears which have accrued; for the principal of an annuity is not properly due, it is only *in faculate luitionis.*

§ III. *How a Compensation is made; and of its Effects.*

[599] Compensation is made *pleno jure, placuit quoid invicem debetur ipso jure compensare, L.* 21. *ff. de Comp.* There was, however, in this respect, according to the *Roman* law, a difference between debts proceeding from contracts *bonæ fidei*, and those proceeding from contracts *stricti juris.* This difference was abrogated by the constitution of *Justinian*, in the law *fin. cod. d. t. Compensationes ex omnibus ipso jure fieri sancimus d. l.*

When it is said that compensation is made *ipso jure*, it means that it is made by the mere operation of law, without being pronounced by the judge, or opposed by the parties.

As soon as a person who was creditor of another has become his debtor of a sum of money, or other matter susceptible of compensation with that of which he was a creditor; and *vice versâ*, as soon as a person who was debtor of another, becomes his creditor of a sum susceptible of compensation with that of which he was debtor, a compensation is made, and the respective debts are from thenceforth extinguished, to the extent of their concurrence, by virtue of the law of compensation.

This interpretation is conformable to all the explanations which lexicographers have given to the term *ipso jure. Ipso jure fieri dicitur*, says Briston, *quod ipsa legis potestate et auctoritate absque magistratus auxilio et sine exceptionis ope fit. Verba ipso jure*, says Spigelius, *intelliguntur sine pacto hominis. Ipso jure consistere dicitur*, says Pratejus, *quod, ex sola legum potestate et auctoritate, sine magistratus opera, consistit.*

Our principle that compensation extinguishes mutual debts, *ipsa juris potestate*, without being opposed or pronounced, is established not only by the term *ipso jure*, a term to which no other sense can be given, but also by the effects which the texts of law give to compensation.

For instance, *Paulus, sent.* 11. 5. 3. says that if my creditor demands from me the whole sum of which he was creditor, without offering to deduct the amount for which he has become my debtor, he incurs by this demand the penalty of an excessive claim, *si totum petat, plus petendo, causa cadit,* which evidently supposes our principle, that even before I have opposed a compensation to my creditor, the debt for which he has become my debtor has already lessened and extinguished his demand so far as they concur.

The other effects of compensation about to be mentioned, likewise establish our principle.

With regard to those texts of law, which have been usually opposed to this principle, and which speak of compensation opposed to the demand of a creditor, and of compensations admitted or rejected by the judge, they contain nothing from which it ought to be concluded, that compensation cannot take effect, without being opposed or pronounced. It is true, that if a person who was my creditor of a certain sum, has since become my debtor for as much, institutes a demand against me for payment, I shall be obliged, in order to protect myself, to oppose the compensation of the sum for which he has become my debtor; otherwise, the judge, who sees the proofs of his demand against me, and who cannot divine the demand which I have on my part against him, would of course decide in his favour. Mention is therefore made in these texts of compensations opposed by a party, admitted or rejected by the judge; but it ought not to be concluded from thence, that the debt was not previously acquitted by force of the compensation. I am only obliged to oppose the compensation for the purpose of informing the judge, that it has taken place; in the same manner as I am obliged, if any demands a debt from me which I have paid, to oppose and produce the acquittances.

It is also usual to oppose to our principle the *L.* 59. *Cod. de Compens.* in which a compensation is called *mutua petitio;* and which seems to suppose that the respective actions of the parties subsist until the judge has pronounced a compensation. The answer is, that it is only in a very improper sense that the compensation opposed by the defendant is, in this law called *mutua petitio,* which only signifies the simple allegation of the mutual demand of the defendant, by which that of the plaintiff was extinguished. Our answer is founded upon the law 21. *ff. de Comp.* where it is expressly shown, that the person alleging the compensation does not make a reciprocal demand, but merely defends himself from the demands against him, by showing that, so far as the amount of the sum opposed in compensation, it does not subsist: *postquam placuit inter omnes,* says this law, *id quod invicem debetur ipso jure compensari, si procurator absentis conveniatur, non debebit de rato cavere,*(*a*) before he is admitted to allege the compensation, which he would be if he was making a demand or opposite claim: "*quia nihil compensat, sed ab initio minus ab eo petitur;*" that is to say, "*non ipse compensat, non ipse aliquid mutua*

(*a*) This may be translated—*give pledges to prosecute.*

petit, sed allegat compensationem ipso jure factum, quæ ab initio jus petetoris ipso jure minuit."

[600] The effects of compensation are the consequences of the principle thus established; these are 1st, that if my creditor, to whom I have given goods in pledge, becomes my debtor, I may reclaim the goods upon offering the balance, if any, in his favour; the compensation of the debt due to me being equivalent to a payment. This is the decision of the law 12.(*b*) *Cod. de Compens.*

2d. If you had a debt due from me which carried interest, and afterwards became my debtor of a sum, which from its nature did not carry interest, my debt would be held to be discharged to the extent of the mutual credit, from the time of such credit taking place, and interest would only be due for the balance from that time. For instance, if you were my creditor of a sum of 1000*l.* for the price of an estate which you have sold and conveyed to me, and afterwards you become sole heir to *Peter*, who owed me the sum of 800*l.* for a loan; from the time of your becoming heir to *Peter*, and in that quality, my debtor of 800*l.* that is, from the death of *Peter*, your demand of 1000*l.* is to be regarded as acquitted to the amount of 800*l.* and subsisting only for the remaining 200*l.* and from that time the interest will only continue to run upon the remaining 200*l.* This is decided by the constitution of *Severus*, of as stated by *Ulpian*; "*Cum alter alteri pecuniam sine usuris, alter usurariam debet, constitutum est a divo Severo concurrentis apud utrumque quantitatis usuras non esse præstandas.*" *L.* 11. *ff. de Compens.*

The same decision occurs in the constitution of *Alexander*: "*Si constat pecuniam invicem deberi, ipse jure pro soluto compensationem haberi oportet ex eo tempore, ex quo ab utraque parte debetur utrique quoad concurrentes quantitates, ejusque solius quod amplius apud alterum est usuræ debentur.*" *L.* 4. *Cod. dicto titulo.*

This effect only takes place in ordinary compensations, *quantitatis certæ ac detriminatæ ad certam ac determinatum quantitatem*: which operate *pleno jure*; but, upon compensations which only take effect from the day of their being opposed, the interest only ceases from that time. For instance, if you were my creditor of 100*l.* for the price of an estate which you have sold to me, and which consequently carried interest, and afterwards become sole heir of *Peter*, who has left me two coach-horses or 100*l.* at my choice; the interest of the 100*l.* due to you would not cease from the day of the death of *Peter*, on which you became my debtor of the legacy, but only from the day when I declared my choice of the 100*l.* for my legacy; as it is only from this day that a compensation takes place, as we have already observed, *supra*, *n.* 593.

[601] Although my creditor is not bound to receive a real payment in parcels, *supra*, *n.* 498. yet if he becomes my debtor for a less sum, he is obliged to suffer a partial discharge of his debt,

(*b*) Invicem debiti compensatione habita, si quid amplius debeas, solvens, vel accipere creditore nolent offerens et consignatum deponens, de pignoribus agere potes.

by virtue of the compensation, as results from the laws above cited.

[602] 4th. If I were your debtor of 3000*l.* upon three different accounts, and afterwards become your creditor of 1000*l.* the compensation of my demand of 1000*l.* ought to be made against that debt which it is most my interest to acquit. The reason is, that as compensation is in lieu of a payment, and as payments are applied to that debt which the debtor has most interest to discharge, *supra*, *n.* 530. compensation ought to be made in the like manner.

This decision only applies when all the debts from me to you were incurred previous to the demand which I have acquired against you. But if being your debtor of 1000*l.* I become your creditor of the same sum, and afterwards contracted a new debt in your favour: although I might have a greater interest in acquitting the last debt than the first, you may demand the payment of it, without my being entitled to oppose the compensation of the debt from you, as this became extinct as soon as it arose, being *pleno jure* compensated with my former debt. *Tindar. tract. de Comp. Art.* 7. *in fin. Sebast. Med. P.* 2. § 12.

[603] If my creditor of a certain sum afterwards becomes my debtor to the same amount, and, notwithstanding the compensation which has *pleno jure* extinguished our respective demands, I pay him the amount of his debt, I may recover the sum which I have so paid, by the action called *condictio indebiti.* This is decided by *Ulpian*, in the law 10.(*a*) § 1. *ff. de Compens.*

This text proves very evidently the principle which we have established, that compensation is made *pleno jure*, and by mere operation of law, extinguishes the respective debts, without its being opposed by the parties, or pronounced by the judge; otherwise, if at the time of payment, no compensation had been opposed, or pronounced, it could not be said that I had paid what I did not owe.

Hence arises a question upon the following supposition: I was your debtor for 1000*l.* I have since become sole heir to *Peter*, who was your creditor of a like sum, upon a partition of property: notwithstanding the compensation, I have paid you the 1000*l.*; afterwards your effects, and especially those which were alloted to you by the partition with *Peter*, have been seized by your creditors. I oppose the decree, and demand a preference out of the price of these goods, for the money due to me as heir of *Peter*, on account of the privilege attached to partitions; are the other creditors entitled to oppose this preference? it appears that they are; for the demand of *Peter* upon the partition became extinct, by virtue of the compensation, upon my succeeding to it: the payment which I afterwards made could not revive our respective demands, which the compensation had extinguished; it could only give me a simple action to recover the sum which I paid you, as having been paid when it was not due; and this action has no hypothecation, or at most a simple hypothecation, from

(*a*) Si quis igitur compensare potens, solverit, condicere poterit, quasi indebito soluto.

the day of the acquittance, if it was before a notary. It ought not to be in my power, by voluntarily paying you a debt which was extinguished by the compensation, to revive my demand, and the hypothecation attached to it to the prejudice of the other creditors, and of the right of priority in hypothecation, which they had acquired by the extinguishment of our respective demands.

Notwithstanding these reasons, I think, that a distinction must be made upon this question. If, after the succession of *Peter* had devolved upon me, but before I knew of the demand against you, I paid you the 1000*l.* which I owed you, I think I ought to retain my priority for the demand to which I have succeeded, and that in this case no compensation should be deemed to have taken place. The reason is, that compensation being a fiction of law, which supposes the parties to be respectively paid, as soon as they become at once creditors and debtors, such fiction, which is established in favour of the parties between whom the compensation is made, should only take place where it is not prejudicial to them, and has not led them into any error, for a benefit of the law ought never to be prejudicial to those in whose favour it is constituted; *beneficium legis non debet esse captiosum.* It ought not then to be supposed that there is any compensation in this case; for it would be prejudicial to me; it would lead me into an error; it would, without any fault of mine, be the cause of my losing 1000*l.* for which I had a privileged hypothecation. It must be decided otherwise, if I did not pay you the 1000*l.* till after the inventory of the succession of *Peter* had been taken, which apprised me of the demand that the succession had against you; there is nothing in this case to prevent its being held that the compensation has extinguished our respective demands, it is not the law of compensation which has caused me any prejudice, or led me into an error. If I lose the 1000*l.* which I have foolishly paid to you, I ought not to impute it to the law of compensation, but to myself, in having voluntarily paid you a debt which I knew was acquitted by the compensation; and it ought not to be in our power by this payment to revive my demand in fraud of the right acquired by subsequent creditors.

[604] What ought to be decided in the following case? I was your debtor for 1000*l.*; I have since become your creditor for the same amount; as, by becoming sole heir of *Peter*, to whom you owed a like sum; upon being sued by you, I have neglected to oppose the compensation of the debt from you to me; I am condemned to pay you, and have paid in execution of the sentence; have I any redress? I cannot, as in the preceding instance, have an action *condictio indebiti.* The law 2. *Cod. de Comp.*(*a*) decides, that although I might oppose the compensation of my demand against your action, in execution of the sentence, the action *condictio indebiti* cannot be maintained, because a person who has paid in execution of a sentence cannot be regarded as having paid without a cause: now, the action

(*a*) Ex causa quidem judicati [si debitem] solum repeti non potest, ea propter nec compensatio ejus admitti potest. Eum vero qui judicati convenitur, compensationem pecuniæ sibi debitæ implorare posse nemine debium est.

condictio indebiti only attaches, when the payment has been made without any cause, and consequently, without a sentence: *pecuniæ indebitæ per errorem non ex causa judicati solutæ esse repetetionem jure condictionis non ambigitur. L.* 1. *Cod. de Cond. indeb.* Shall I then, in this case be deprived of all redress? Under the circumstances it should be held that, although according to the subtlety of law, the compensation extinguished our respective demands from the instant that I succeeded to the demand which *Peter* had against you, yet, this compensation ought to be regarded as not having taken place; the demand to which I have succeeded, and the action arising from it, ought to be restored to me, and I should be admitted to the prosecution of it. The reason is, that this compensation having by the sentence been deprived of its effect against you, and with respect to your demand against me, the principle of equity does not allow it to subsist against me, and with respect to my demand against you. This is properly decided by *Tindarus*, in his treatise *de Compens.* and it is in this sense that he explains the law 7. § 1. *ff. de Compens.* which says, *si rationem compensationis judex non habuerit, solva manet petitio;* that is to say, where the judge has condemned one party in favour of the other, notwithstanding the compensation which had extinguished their respective demands, whether it had not been opposed, or, being opposed, the judge had omitted to decide upon it; the demand which the party against whom the decision is made had upon the other, is preserved, *salva manet petitio. Lex enim*, says Tindarus, *hoc casu restituit actionem peremptam, ex maxima necessitate, sicut facit in multis casibus, æquitate suggerente, v. L.* 1. *in. fin. ff. ad Velejan.*

Is my demand restored with or without hypothecations which were attached to it? I think this question must be answered with a distinction; if there is no ground to suspect that it was by collusion with you, and in order to give you the money, to the prejudice of your creditors, that I have omitted to oppose the compensation of the demand to which I have succeeded: for instance, if, at the time of the sentence, the death of *Peter* was scarcely known, or at least the inventory of his succession, which alone could give me any knowledge of the demand, had not been made, I think, that my demand ought to be restored with its hypothecations; but if, with notice of the demand, I had suffered myself to be condemned in your favour, without opposing the compensation, or had only opposed it *perfunctoriè*, without establishing it, so that the judge did not determine it in my favour; in this case my claim will indeed be restored, but I shall not be permitted to exercise the hypothecations attached to it, to the prejudice of the creditors subsequent to me in the order of hypothecation, and who, upon my succeeding to the claims of *Peter*, have acquired a priority of hypothecation, by the compensation and extinction which then took place of our respective claims; as it is contrary to equity, that by a collusion between you and me, I should deprive the creditors of the right which they have acquired.

CHAPTER V.

Of the Extinction of a Debt by Confusion.

[605] By confusion is meant the concurrence of two qualities in the same subject, which mutually destroy each other.

The particular instance of it at present under consideration, is the concurrence of the characters of creditor and debtor, of the same debt in the same person. We shall examine, 1st. In what cases this confusion takes place, 2d. The effect of it.

The *Roman* jurists admitted another kind of confusion, in the case of a surety succeeding to the principal debtor, *aut vice versâ;* of this we shall say nothing at present, having already treated of it, *supra*, Part II. ch. 6. § 1. Corol. 6.

§ I. *In what Case this confusion takes place.*

[606] This confusion takes place, when the creditor becames heir of his debtor, or *vice versâ*, when the debtor becames heir of the creditor; for the heir succeeding to all the rights of the deceased, and being subject to all his obligations, (*succedant a tous les droits, tant actifs que passifs*) when the creditor becomes the heir of the debtor, he becomes, in his quality of heir, debtor of the very same debt of which he is creditor on his own account; and *vice versâ*, when the debtor becomes the heir of the creditor, he becomes creditor in that quality of the same debt, of which he was on his own account the debtor. In both these cases, the qualities of creditor and debtor of the same debt become united in the same person.

The same consequence ensues when the creditor succeeds to the debtor, by any other title which renders him subject to his debts, as if he is his universal donatary; and where the debtor succeeds, by whatever means, to the right of the creditor. In all these cases, the qualities of creditor and debtor of the same debt concur in the same person.

The same thing occurs when the same person becomes the heir, both of the debtor and creditor, or succeeds to both of them under any universal title.

The acceptance of a succession upon trust, to render a specific account (*sous benefice d'inventaire,*) does not induce any confusion, for it is one of the effects of the *benefice d'inventaire*, that the beneficiary heir and the succession are regarded as different persons, and their respective rights are not confounded.

Of the Effects of Confusion.

[607] It is evident that by the concurrence of the opposite characters, of debtor and creditor in the same person, the two characters are mutually destroyed: for, it is impossible to be both at once; a person can neither be his own creditor or his own debtor. From hence indirectly results the extinction of the debt, when there is no other debtor; for as there can be no debt without a debtor, and

the confusion having extinguished the character of the debtor, in the only person in whom it resided, and there being no longer any debtor, there cannot be any debt. *Non potest esse obligatio sine persona obligata.*

[608] The extinction of the principal debt, which takes place by confusion, when the creditor becomes heir of the principal debt, or *vice versâ*, induces an extinction of the obligations of the sureties, *L.* 38.(*a*) § 1. *ff. de Fid. L.* 34.(*b*) § 8. *L.* 71.(*c*) *ff. de Solut.* for, as the obligations of the sureties are merely accessary to that of the principal, *fidejussor accedit obligationi rei principalis*, they cannot subsist any longer than the principal obligation, to which they accede according to the rule of law. "*Quum principalis causa non subsistit, ne ea quidem quæ sequenter locum habent.*". *L.* 139. § 1. *ff. de Reg. Jur.* and "*Quæ accessionum locum obtinet, extinguentur cum principales res prerempta fuerint.*" *L.* 2. *ff. de Pecul. Leg.*

Besides, the existence of a surety implies that of a principal debtor on whose behalf the surety is obliged; therefore, when, by reason of a confusion, there is no longer a principal debtor, for whom the surety is obliged, there can be no longer any surety. The reason is given in *L.* 38. § 1. *ff. de Fid. quia nec reus est pro quo debeat.*

And it is also a repugnancy that I should be security to any man for himself, it therefore necessarily follows, that the obligation of the surety is extinguished, when the principal, by succeeding to the rights of the creditor, is the very person entitled to the benefit of the obligation. *Fidejussores ideo liberari, quia pro eodem apud eundem debere non possunt, h.* 34. § 8. *de Solut.*

[609] *Contra vice versâ*, the extinction of the accessary obligation of the surety by confusion, does not induce an extinction of the principal obligation. *Si creditor fidejussori heres fuerit, vel fidejussor creditori, puto convenire confusione obligationis non liberari reum. L.* 71. *ff. de Fidejuss.* The reason of the difference is, that though the accessary obligation cannot subsist without the principal, the principal does not in any degree depend upon the subsistence of the accessary.

Confusion in this respect differs from payment; for, by payment the thing is no longer due; the thing when paid ceases to be due by whomsoever the payment may be made. Now, there can be no debtor either as principal or accessary, when there is no longer any thing due: therefore, the payment by the surety having produced the effect, that what was due from him (being the same thing which was due

(*a*) A Titio, qui mihi ex testamento sub conditione decem debuit, fidejussorem accepi, et ei heres extiti: deinde conditio legati extitit: quæro an fidejussor mihi teneatur? Respondit, si ei a quo tibi erat sub conditione legatum, cum ab eo fidejussorem accepisses, heres extiteris, non poteris habere fidejussorem obligatum, quia nec reus est, pro quo debeat, sed nec res ulla quæ possit deberi.

(*b*) Quidam filium familias a quo fidejussorem acceperat, heredem instituerat. Quæsitum est, si jussu patris adisset hereditatem, an pater cum fidejussore agere posset? Dixi, quotiens reus satisdandi rero satis accipiendi heres existeret, fidejussores ideo liberari: qui pro eodem apud eundem debere non possent.

(*c*) This law is not applicable to the subject.

from the principal) is no longer owing at all; and there being nothing owing, it necessarily follows that the obligation of the principal is extinct, as well as that of the surety by whom the payment was made.

It is the same thing when there is a real release, compensation, novation, or any other kind of liberation, which is equivalent to payment.

On the contrary, the only effect of confusion is that the person of the debtor, in whom the character of creditor concurs, ceases to be obliged, because no man can be obliged to himself, *personam eximit ab obligatione:* but there is nothing to prevent the subsistence of the obligation of the principal debtor, although there may be no longer any obligation in the surety.

For the same reason, when a creditor of two debtors in solido, becomes the heir of one of them; or *vice versâ*, when one of them becomes heir of the creditor, the obligation of the other debtor continues to subsist.

In regard to the question, whether it subsists as to the whole, the law 71. *ff. de Fidej.* decides, that if the debtor in solido were in partnership, the one who only owed the whole, subject to recourse against the other in whose person the confusion took place, was only obliged as to the portion for which he had no such recourse, as it would be unjust that he should lose his right in consequence of the confusion.

According to the laws of *France*, as each of the debtors in solido, although not engaged in partnership, has recourse against the others for their shares, as we have seen, *supra*, *n.* 28, it must be stated indiscriminately, that in case of a confusion taking place in the person of one of the debtors in solido, the other will only be obliged, subject to the deduction of so much as he could have claimed from the party, in whom the characters unite; we have already seen *supra*, *n.* 275, that if the creditor discharges one of the debtors in solido, the other only continues obliged for so much as he could not have claimed from the first, if he had paid the whole. For the same reason, the co-debtor of the party, who is discharged by way of confusion, should only be liable, subject to the deduction of that part for which he would have had recourse against him.

[610] If a person to whom *Peter* owed a certain sum, has transferred that debt to me, and before *Peter* had acceded to, or had regular notice of the transfer, the creditor has become his heir, there will indeed be a confusion and extinction of the debt; but as the creditor, in consequence of the transfer, became my debtor, as to that particular claim, and as it is by accepting the succession, which is his own act, that the credit is extinct, he is answerable to me for the amount; for every debtor is bound to pay the value of what was due from him, when it has ceased to exist in consequence of his own act, as we shall see, *infra*, *n.* 625.

If the transfer had been assented to, or notified previous to the time of the person by whom it was made becoming heir of the debtor, there would be no confusion, because he would, in effect, have been no longer the creditor, and I should have become so in his stead.

[611] If the creditor becomes heir not of the debtor himself, but of the person against whom the debtor has a right of indemnity, there will not, properly speaking, be any confusion of the debt, but it will nevertheless be indirectly and effectively extinguished. The creditor cannot enforce the payment of it from the debtor, after succeeding to the obligations of the party, who was bound to indemnify him.

[612] In order to induce a confusion of the debt, the characters not only of debtor and creditor, but of sole debtor and sole creditor, must concur in the same person.

If a person, who was only creditor for part, becomes sole heir of the debtor, it is evident that the confusion and extinction can only take place, with respect to the part for which he is creditor; *vice versâ*, if a creditor of the whole becomes heir of the debtor for part, the confusion only takes place with respect to that part.

It is equally evident, that if the creditor is only one of several heirs to the debtor of the whole, the confusion and extinction only takes place in respect of the part for which he is heir, and for which he is liable to all the other debts of the succession; the demand continues to subsist against the others, as to the parts for which they are respectively liable to the debts of the deceased. *L.* 50. *ff. de Fid. L.* 4. *Cod. de Hered. Act.*(*a*)

CHAPTER VI.

Of the Extinction of an Obligation by the Extinction of the thing due; or when it ceases to be susceptible of Obligation; or when it is lost, so as not to be known where it is.

ARTICLE I.

General Exposition of the Principles respecting this mode of Debts becoming extinct.

[613] There cannot be any debt without something being due, which forms the matter and object of the obligation; whence it follows, that if that thing is destroyed, as there is no longer any thing to form the matter and object of the obligation, there can be no longer any obligation. The extinction of the thing due, therefore, necessarily induces the extinction of the obligation.(*b*) *L.* 33. 37.(*c*) *ff. de Verb. Oblig.*

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

(*b*) Si Stichus certo die dari promissus, ante diem moriatur, don tenetur promissor.

(*c*) *Vi. au* 10. *Mort.* 268. 40 *E.* 3. 62 *Noys, max.* 35. 1 *Rep.* 98. In the case of *Williams* v. *Hide*, *Palmer*, 548, the plaintiff declared, that in consideration he had lent the defendant a horse, the defendant promised to redeliver it. The defendant pleaded that in consequence of diseases the horse died, so that it could not be delivered, and the plea was adjudged good.

[614] For the same reason, if the thing which was due, in consequence of something that afterwards occurs, is no longer susceptible of being the matter and object of an obligation, the obligation itself cannot continue. That is the case where the thing which was due can no longer be an article of commerce: therefore, *Ulpian* says: *Is qui alienum servum promisit, perducto eo ad libertatum, non tenetur. L.* 51.(*a*) *ff. de verb. Oblig.*

According to this principle, if you were bound to convey to me a certain plot of land, which afterwards, under the authority of the law, was taken for a common highway, my claim upon that plot of land, would be extinct; for, being no longer susceptible of contracts, it cannot be the object and matter of a claim or obligation; therefore, as there is no longer any thing which can form an object of my claim, the claim itself cannot subsist.

[615] An obligation becomes extinct, not only when the object of it ceases generally to be susceptible of obligation, but also when the thing due to me is no longer susceptible of being so, although it may be susceptible of an obligation in favour of another person.

The first example of this is in *L.* 136 (*b*) § 1. *ff. de verb. Oblig.* You engage to procure a right of way for me to my estate over an adjoining field. Before the right is granted, I sell the estate without transferring the benefit of the contract; the claim is extinct, because the right of way which was the object of it cannot be due to me, as such a right could only belong to the owner of the estate.

[616] A second instance, is that where a person, to whom a specific thing was due under a lucrative title, becomes the owner of that thing under another lucrative title; the claim in respect of it is extinct. *Omnes debitores qui speciem ex causa lucrativa debent, liberantur, cum ea species ex causa lucrativa ad creditores pervenisset. L.* 17. *ff. de Oblig. et Act.*

The reason of this arises from the principle already stated. When I become proprietor of what was due to me, it cannot any longer be due to me, for another person can never owe me that which is already my own. It is a repugnancy that any one should be under an obligation, of giving me that I already have. *Nam quod meum est, amplius meum fieri non potest.* The obligation therefore cannot subsist, since there is no longer any thing to form the subject of it.

From this rule the corollary is deduced, *Duæ causæ lucrativæ, in eandem rem et personam, concurrere non possunt.*

[617] In order to induce the extinction of a debt, by the creditor becoming proprietor of the thing due, it is necessary that he should have acquired a full and absolute property in it; if that is not the case, the debt subsists, and the debtor is bound to do what remains in order to perfect and complete the property.

For instance, if a person left me an estate, which he knew did not

(*a*) Si certos nummos, puta qui in arca sint, stipulatus sim, et hi sine culpa promissoris perierint: nihil nobis debetur.

(*b*) Si qui *viam ad fundum suum dari* stipulatus fuerit, postea fundum partem ve ejus ante constitutam servitutem alienaverit; veanescit stipulatio.

belong to him, and after his death, and before the accomplishment of the legacy, the proprietor had made a donation of the same estate, reserving the usufruct, my claim, in respect of this estate upon the heir of the testator, is not extinct, though I have become proprietor of the thing which was due to me, because something is wanting to complete my property, viz. the usufruct with which my estate is charged; the heir then, so far continues my debtor of the estate, that he must purchase the usufruct for me or pay me the value of it.

If the gift had been of the whole property, but subject to revocation upon any event, as the birth of a child,(*a*) the donor not having any at the time of the donation, there is still something wanting to complete my property, according to the rule, "*Non videtur perfectè cujusque id esse, quod ei ex causâ auferri potest.*" *L.* 139. § 1. *ff. de Reg. Jur.* Therefore, the debtor remains under the obligation of preserving the estate to me, in case of such event taking place.

[618] It is also necessary to the extinction of my claim, that my property in the thing due should arise from a lucrative title. If I only acquired it by an onerous title, as by purchasing it, the debtor is not liberated; for I cannot be deemed to have perfectly acquired it, when I have paid any thing for the acquisition; *hactenus mihi abesse res videtur, quatenus sum præstaturus. L.* 34. § 8. *ff. de Leg.* 10. My claim then subsists so far as to entitle me to a reimbursement of what I have paid.

[619] Lastly, for my claim to be extinguished when I become proprietor, although by a lucrative title of the thing due to me, the claim must also be founded upon a lucrative title; for if I were creditor upon an onerous title, as by purchase, the claim would not be extinguished." "*Quum creditor ex causa onerosa, vel emptor, ex lucrativâ causa rem habere cœperit nihilominus integras actiones retinent.*" *L.* 19. *ff. de Oblig. et Act. adde L.* 13.(*b*) § 15. *ff. de Act. Empt.*

For instance, if I buy from you an estate to which you have no title, and afterwards I become proprietor by a donation or legacy from the real owner, my claim arising from the sale is not extinct; because every debtor, upon an onerous title, such as a seller, is bound to warrant the thing due, and this warranty consists in the obligation of the seller to cause the buyer to have the thing purchased by virtue of the sale, *præstare emptori rem habere licere ex causâ venditionis ipsa factæ.* It is sufficient then to support the obligation of warranty, if my ownership of the property does not result from the sale, although I become the proprietor by other means.

[620] There is little difference between a thing being lost, so that it cannot be known where it is, and its having actually ceased to exist. Therefore, if this loss takes place without any fault

(*a*) This seems to be a condition implied by law in case of a donation.
(*b*) Si fundum mihi *alienum* vendideris, et hic ex causa lucrativa meus factus sit, nihilominus ex empto mihi adversus te actio competit.

in the debtor, as when the thing is taken by robbers, the debtor is liberated as much as if the thing had no longer existed, with this difference, that as a thing once destroyed can never be renewed, the debtor is in that case absolutely liberated from his obligation; whereas the thing which is only lost may be recovered, and in this case the debtor is only liberated whilst the loss continues.

There remains a question upon this subject; where the debtor of a specific thing, who has not taken upon himself the risk of accidents, and is only answerable for his own neglect, alleges that the thing is lost without his fault, or by accident, is it incumbent on the creditor to prove that the loss was occasioned by the fault of the debtor, or, on the other hand, must the debtor prove the accident which he alleges to have taken place? I think that the proof is incumbent on the debtor. If the person who asserts a claim is obliged to show the foundation of that claim by proof, the other party is equally bound to prove what constitutes the foundation of his defence. The creditor who demands payment of what his debtor has engaged to give him, ought to prove the credit which is the foundation of his demand. The debtor who resists that demand, upon the plea that he is discharged by an accident, which occasioned a loss of the thing due, should prove the accident which is the foundation of his defence.

This is conformable to the doctrine of *Ulpian L.* 19. *ff. de Prob.* "*In exceptionibus dicendum est reum partibus actoris fungi oportere, ipsumque exceptionem velut intentionem implere, id est, probare debere.*"

ARTICLE II.

What kind of Obligations are subject to be extinguished by the Extinction of the thing due, or upon its losing the Capacity to be due.

[621] It is evident that obligations of a certain specific thing, are extinguished, with the extinction of that thing.

With respect to alternative obligations, they are not extinguished by the extinction of one of the things due in the alternative; but the obligation, which was before alternative, becomes determinate in respect of the other which remains. The reason is, that in case of an alternative obligation of two things, both the things are due, *supra*, *n.* 246. If any one remains, that one continues due, and consequently suffices for the subject of the obligation.

For instance if you have two horses, and engage to give me one of them, the death of one will not extinguish the obligation, and you will be bound to give me the other; *non jam alternatè, sed determinatè.*

It is the same, if one of the things due to me in the alternative is no longer capable of being due to me; as if I become the owner, upon a lucrative title, of the one, the obligation subsists as to the other. *Si Stichum aut Pamphilium mihi debeas, et alter ex eis meus sit*

factus ex alia causâ, reliquus debetur mihi à te. *L.* 16. *ff. de Verb. Oblig.*

The principle which we have established, that an alternative obligation is not extinguished by the extinction of one of the things due in the alternative, or upon its no longer being susceptible of the obligation, only applies when the extinction takes place, whilst the obligation continues to be alternative; but if the obligation had become determinate to one of the things, as by the debtor's making an offer of payment, and placing the creditor *en demeure* to receive it; there can be no doubt but the obligation would become extinct, by the extinction of the thing so offered. *L.* 105.(*a*) *ff. de Verb. Oblig.*

[622] The extinction of obligations by the extinction of the thing due, cannot take place with regard to obligations of a sum of money, a certain quantity of corn, or wine, or to obligations of an indeterminate thing, as a cow or horse, not specifying any cow or horse in particular. There cannot be in this case any extinction of the thing due, as there can be no extinction of what is indeterminate. *Genus nunquam perit.* Therefore, the 11th law of the code *si certum petat*, decides, that the debtor of a sum of money is not discharged, in consequence of his effects being destroyed by fire, *Incendium ære alieno non eximet debitorem:* for the money and other articles which have perished in the flames, are not the things which were due. It is a sum of money, which, not being determinate, cannot perish. But if the obligation, which was originally indeterminate, became determinate by an offer of the debtor to pay, and putting the creditor *en demeure* to receive it, there can be no doubt but that the obligation would be extinguished by the extinction of the particular thing so offered.

[623] Where the obligation is not absolutely indeterminate, and relates to a thing indeterminate in itself, but constituting part of a determinate set of things, it is extinguished by the extinction of all those things.

For instance, if a person owes me a pipe of *the wine which he has in his cellar*, and there are a hundred pipes there, as long as any one remains, the obligation subsists; but if they are all destroyed, it is extinct.

This decision takes place where the terms of the obligation are restrictive, and confine the obligation to that set of things. It is otherwise, if the terms were merely demonstrative. For instance, if a person was obliged to furnish me a tun of wine, *to be taken from those in his vault* (*a prendre dans ceux de sa cave*), though all the tuns in the vault of the debtor should perish by accident, the obligation would not be extinct; because it was not restrained, to the tuns alone which were in the vault. The terms *to take* are not restrictive, they are only demonstrative, and only designate *unde solvetur;* they

(*a*) Stipulatus sum, Damam aut Erotem servum dari; cum Damam dares, ego, quominus acciperem, in mora fui: mortuus est Dama: an putes me ex stipulatu actionem habere? Respondit, secundum Massurii Sabini opinionem, puto te ex stipulatu agere non posse: nam is recte existimabat, si per debitorem mora non esset, quominus id, quod debebat, solveret, continuo eum debito liberari.

do not restrain the disposition, but only concern the execution to it.(*a*)

ARTICLE III.

What Extinctions of the Thing due extinguish the Debt; and in what Cases, and against what Persons, it continues, notwithstanding such Extinction.

[624] The extinction of the thing due extinguishes the debt, when the thing is wholly destroyed; if any part remains, the debt continues to subsist, so far as regards such part. For instance, if I was creditor of a flock of sheep, which had been sold or left to me, and there only remained one sheep, the others having died; or if I was creditor of a house which had been burnt, the debt of the flock would subsist, as to the remaining sheep; and in the same manner the debt of the house would subsist, as to the scite and the materials that were saved.

[625] For the extinction of the thing due to extinguish the debt, it must happen without the act or fault of the debtor, and without his having been detained *en demeure*.

If the loss happens by the act of the debtor, it is evident that the obligation is not extinct, but is converted into an obligation of the value; for the debtor cannot by his own act discharge himself from his obligation, and deprive the creditor of his claim.

This decision applies even where the debtor destroys the thing before he is apprised of the debt. *L.* 91.(*b*) § 2. *ff. de Verb. Oblig.*

[626] If the loss takes place not precisely by the act of the debtor, but in consequence of his default, for want of proper care, the debt is not extinct, but is converted in like manner into an obligation of the value.

What amounts to such default is differently estimated, according to the different nature of the contracts. *Supra, n.* 142.

[627] Lastly, the loss of the thing due does not extinguish the obligation, when it happens after the debtor is placed *en demeure* to give it. *L.* 82.(*c*) § 1. *ff. de Verb. Oblig.*

In order to prevent the obligation being extinguished by the extinction of the thing due, it is necessary, 1st, that the loss should take place during the continuance of the delay; for if the delay of the debtor had been purged, either by actual offers made by him to

(*a*) If a person engaged to give me a dozen of wine, and to supply me with the best wine in his cellar, though he had no wine in his cellar, the obligation would not be void for want of an object; nor consequently, if all the wine in his cellar was used, would it become void by extinction.

(*b*) De illo quæritur, an & his, qui nesciens se debere occiderit, teneatur: quod Julianus putat in eo, qui cum nesciret a se petitum codicillis, ut restitueret, manumisit.

(*c*) Si post moram promissoris homo decesserit, tenetur nihilominus, proinde ac si homo viveret: & hic moram videtur fecisse, qui litigare maluit, quam restituere.

the creditor, by which he would have placed the creditor *en demeure* to receive what was due, or by a mutual agreement between the parties, the subsequent loss would put an end to the obligation. As the *demeure* of the debtor no longer subsists, it cannot have the effect of perpetuating the obligation, notwithstanding the extinction of the thing due. *L.* 91.(*a*) § 3. *de Verb. Oblig.*

2d. The loss must be such as would not equally have happened, if the thing had been delivered to the creditor when it was demanded. *L.* 47.(*b*) § *Fin. de Leg.* I. *L.* 24.(*c*) § 1. *ff. de Pos.* *L.* 12.(*d*) § 4. *ff. ad Exhib.* *L.* 15.(*e*) § *Fin. ff. de Rei. Vind.* For the delay only perpetuates the debt after such expiration, in respect of damages; and if the creditor has not suffered any injury in consequence of the delay, no damages can be due for it. Now it is clear, that he does not suffer any damage, if the loss would have equally happened to himself.

It would be readily presumed, that the loss would not equally have happened, if the creditor was a dealer in such articles for the purpose of sale.

If the thing is consumed by fire, whilst it remains in the possession of the debtor, it is evident that it would not have been so lost, if it had been delivered to the creditor.

Where the restitution of a thing is demanded from those who have taken it by fraud or violence, no inquiry is made, whether it would equally have perished, if it had remained in the possession of the proper owner; for these persons are indiscriminately liable for the value of it, when it has perished in their possession. *L.*(*f*) *Fin. ff. de Cond. Furtiv.* *L.* 19.(*g*) *ff. de Vi & Arm.* *Quod ita receptum*

(*a*) Sequitur videre de eo, quod veteres constituerunt, quoties culpa intervenit, debitoris perpetuari obligationem, quemadmodum intelligandum sit. Et quidem si effecerit promissor, quominus solvere possit, expeditum intellectum habet constitutio; si vero moratus sit tantum, hæsitatur, an si postea in mora non fuerit extinguatus, superior mora? Et Celsus adolescens scribit, eum, qui moram fecit in solvendo Sticho, quem promiserat, posse emendare eam moram postea offerendo; esse enim hanc quæstionem de bono & æquo, in quo genere *plerumque sub auctoritate juris scientiæ* (inquit) *erratur*. Et sane probabilis hæc sententia est, quam quidem & Julianus sequitur; nam dum quæritur de damno, & par utriusque causa sit, quare non potentior sit, qui teneat, quam qui persequitur.

(*b*) Item si fundus chasmate perierit, Labeo ait, utique æstimationem non deberi; quod ita verum est, si non post moram factam id evenerit; potuit enim eum acceptum legatarius vendere.

(*c*) Reference incorrect.

(*d*) Si post judicium acceptum homo mortuus sit, quamvis sine dolo malo, & culpa possessoris, tamen interdum tanti damnandus est, quanti actoris interfuerit per eum non effectum, quo minus tunc, cum judicium acciperetur, homo exhibetur; tanto magis si apparebit, eo casu mortuum esse, qui non incidisset, si tum exhibitus fuisset.

(*e*) Si servus petitus, vel animal aliud demortuum sit, sine dolo malo & culpa possessoris, pretium non esse præstandum plerique aiunt. Sed est veries, si forte distracturus erat petitor, si accepisset, moram posse debere præstari; nam si ei restituisset, distraxisset, & pretium esset lucratus.

(*f*) Ante oblationem interemptæ rei furtivæ damnum ad furem pertinere, certissimi juris est.

(*g*) Merito Julianus respondit, si me de fundo vi dejeceris, in quo res moventes fuerunt, eum, mihi interdicto, unde vi restituere debeas, non solum possessionem soli, sed & ea, quæ ibi fuerunt; quanquam ego moram fecero, quo minus interdicto te convenirem; subtractis tamen mortalitate servis aut pecoribus, aliisve rebus casu inter-

odio furti & violentiæ. These persons are deemed *en demeure* from the first taking, and without any demand being necessary.

[629] When the thing due has perished by the act or fault of the principal debtor, or after he has been placed *en demeure*, the claim for the value of it subsists, not only against himself and his heirs, but also against his sureties; and, in general, against all who have acceded to his obligation. *L.* 11.(*a*) § 4. and 5. *ff. de Verb. Obl. L.* 58.(*b*) § 1. *ff. de Fid. L.* 24.(*c*) § 1. *ff. de Usur.* for which *Paul* assigns this reason, *Quia in totam causam spoponderunt.* The sureties, by engaging on behalf of their principal for a particular thing to be given, are deemed to have engaged likewise for the performance of all the secondary obligations derived from the principal obligation, such as that of keeping the thing with the proper care until it is delivered, and generally for the application of all the integrity and fidelity which are incident to the accomplishment of the principal obligation. They cannot, therefore, be liberated from their obligation, by the mere loss of the thing due, when that loss occurs in consequence of the default of the principal debtor, or after his delay. Having, as we have said, engaged as sureties for the application of that care which ought to be applied by their principal, in the preservation of the thing engaged to be given, and for the fidelity which is due from him, in the accomplishment of the obligation, they are responsible for the neglect by which the debtor has suffered the thing to be lost, and for the unwarrantable delay by which he has contravened the faithful performance of his obligation.

These principles seem contrary to the rule *unicuique mora nocet, L.* 173.(*d*) § 2 *ff. de Reg. Jur.* for from this rule it might seem to follow, that the delay of the principal debtor should only prejudice himself and not his sureties. *Cujas*, and other interpreters, reconcile the rule with the principle by this distinction. The delay of the principal debtor cannot affect his sureties, so as to enhance their obligation, *non nocet ad augendam obligationem.* For instance, in regard to debts of a sum of money, the delay of the debtor cannot charge his sureties, who have only engaged for a certain definite sum, so as to make them liable(*e*) for interest due by the debtor, from the day of

cidentibus, tuum [tamen] unus nihilominus in eis restituendis esse; quia ex ipso tempore delicti plus quam frustator debitor constitutus est.

(*a*) Nunc videamus, in quibus personis hæc constitutio locum habeat? quæ inspectio duplex est; ut primo quæramus, quæ personæ efficiant perpetuam obligationem; deinde quibus eam producent. Utique autem principalis debitor perpetuat obligationem. Accessiones, an perpetuent, dubium est. Pomponio perpetuari placet; quare enim facto suo fidejussor suam obligationem tollat? cujus sententia vera est. Itaque perpetuatur obligatio, tam ipsorum, quam successorum eorum. Accessionibus quoque suis, id est, fidejussoribus, perpetuant obligationem; quia in totam causam spoponderunt.

An filius familias, qui jussu patris promisit, occidendo servum, producat patris obligationem; videndum est. Pomponius producere putat, scilicet, quasi accessionem intelligens eum, qui jubeat.

(*b*) Cum facto suo reus principalis obligationem perpetuat, etiam fidejussoris durat obligatio; veluti si moram fecit in Sticho solvendo, & is decessit.

(*c*) Cum reus moram facit, & fidejussor tenetur.

(*d*) Unicuique sua mora nocet, quod et in duobus reis promittendi observatur.

(*e*) May it not be observed, that the meaning of the rule is to impose and not to

his being placed *en demeure;* for the delay of the debtor does not affect the sureties *ad augendam eorum obligationem:* therefore it cannot oblige the sureties to pay interest, who are only obliged for the principal sum. This is the case of law 173; but in debts of a specific thing, the delay of the debtor may affect the sureties, whose engagement is unlimited, so as to perpetuate their obligation, and prevent their being liberated by any loss which may happen during the continuance of the delay. *Non nocet ad augendam obligationem sed nocet ad perpetuandam.*

[630] *Contra, vice versâ,* if the thing has perished by the act or fault of the surety, or after he has been placed *en demeure,* the surety alone will be liable for the value of it; the principal debtor will be liberated by its extinction; *L.* 32.(*a*) § *Fin. ff. de Usur. L.* 49.(*b*) *ff. de Verb. Oblig.* The reason of the difference is, that the surety is in truth obliged for the principal debtor; but the principal debtor is not obliged for the surety, and consequently, he cannot be bound by the obligation which the surety has contracted by his act, neglect, or delay.

[631] If the thing is lost by the act or fault of one of the co-debtors in solido, or after he is placed *en demeure,* the other co-debtors are liable. *L.* 18.(*c*) *ff. de duobus reis. Vid. supra, n.* 273.

[632] If the thing is lost by act or fault of one of the heirs of the debtor, or after his *demeure,* his co-heirs will not be liable. *L.* 48.(*d*) § 1. *ff. de Leg.* 1.; for, although as possessors of the goods, they are subject to an hypothecation for the whole of the debt, they are not individually and personally debtors for more than their respective portions; they are not personally debtors in solido, nor liable one for another.

[633] The principle which has been established, that the debtor of a specific thing is discharged from his obligation, when the thing is lost, without any act, default or delay, on his part, is subject to an exception, when he has, by a particular clause in the contract, expressly taken the risk of such loss upon himself. For instance, if I give a precious stone to a lapidary, to polish, and it is broken, without any fault on his part, and in consequence of some intrinsic defect; although regularly this loss, which takes place with-

restrain, or limit an obligation, that it imports positively, that a person chargeable with delay shall be himself liable to the consequences, without including or referring to the negative proposition, that no other person shall be liable, upon the same contingency, to the claim of the party interested in objecting to the delay; there is nothing in the rule equivalent to the words *tantum* or *soli.*

(*a*) Item si fidejussor solus moram fecerit, non tenetur; sicuti si Stichum promissum occiderit; sed utilis actio in hunc dabitur.

(*b*) Cum filius familias Stichum dari spoponderit, & cum per eum staret, quominus daret, decessit Stichus; datur in patrem de peculio actio, quatenus maneret filius ex stipulatu obligatus. At si pater in mora fuit, non tenebitur filius, sed utilis actio in patram danda est. Quæ omnia & in fidejussoris persona dicuntur.

(*c*) Ex duobus reis ejusdem Stichi promittendi factis, alterius factum alteri quoque nocet.

(*d*) Si unus ex heridibus servum legatum occidisset, omnino mihi non placet co-heredem teneri, cujus culpa factum non sit, ne res in rerum natura sit.

out any blame of his, and by mere accident, discharges him from the obligation of restoring the stone entire, nevertheless, if he had particularly engaged to take that risk upon himself, he would be bound to pay me the value. *L.* 13.(*a*) § 5. *ff. Locat.* These agreements, by which a debtor charges himself with casualties, have nothing contrary to the equality which ought to be maintained in contracts especially where the person undertaking the risk receives an equivalent. For instance, in the case supposed, the lapidary, who has taken the risk upon himself, would be deemed to have contracted for a greater price upon his work, than if he had not done so.

So in case of a loan of things to be restored in specie (*commodatum*), if the borrower undertakes to answer for any loss which may casually take place, as in the case mentioned, *L.* 1.(*b*) *Cod. Commod.* he is deemed to have a compensation for risk, by the engagement, if the things lent, which the lender was under no obligation of assisting him with gratuitously, and which might have been let out for a reward.

In case of pledges, the creditor who takes upon himself the risk of the article pledged, as in *L.* 6.(*c*) *Cod. de Pign. Act.* is indemnified by the security which he acquires, and which his debtor, who had not engaged to find him security, was not obliged to procure him.

Even where the debtor receives nothing for the risk which he undertakes, if he intends therein to exercise an act of liberality towards the other party, there is nothing unfair in the engagement. On the other hand, if the debtor has no such intention, but meaning to receive an equivalent, charges himself with risks, the agreement is unjust in point of conscience, if he does not receive an equivalent adequate to the risk. In point of law, such an equivalent is presumed.

A debtor may charge himself not only with risks of a particular kind, as in *L.* 13.(*d*) § 5. *ff. Locat.* he may charge himself generally with all risks, by which the things may be lost. *L.* 6.(*e*) *Cod. de Pig. Act.* But however general the undertaking may be, it includes only such risks as might have been foreseen, and not those which there could be no room to apprehend.(*f*) *Arg. L.* 9.(*g*) § 1. *ff. de*

(*a*) Si gemma includenda aut insculpenda data sit, eaque fracta sit, si quidem vitio materiæ factum sit, non erit ex locato actio, si imperitia facientis, erit. Huic sententiæ addendum est, nisi periculum quoque in se artifex receperat; tunc enim, etsi vitio materiæ id evenit, erit ex locato actio.

(*b*) Ea quidem, quæ vi majore auferuntur, detrimento eorum, quibus res commodantur, imputari non solent. Sed cum is, qui à te commodari sibi bovem postulabat, hostilis incursionis, contemplatione periculum amissionis, ac fortunam futuri damni in se suscepisse proponatur. Præses provinciæ, si probaveris eum indebitatem tibi promisisse, placitum conventionis implere eum compellet.

(*c*) Quæ fortuitis casibus accidunt, cum prævideri non potuerint (in quibus etiam aggressura latronum est) nullo bonæ fidei judicio præstsatur : & idea creditor pignora, quæ hujusmodi, causa interierint, præstare non compellitur; nec a petitione debiti submovetur; nisi inter contrahentes placuerit, *ut amissio pignorum tiberet debitorum.*

(*d*) See *supra, hoc numero.*

(*e*) See *supra,* law just quoted.

(*f*) I think it is clear, that the law of *England* would adopt the opposite rule.

(*g*) Transactio, quæcunque sit, de his tantum, de quibus inter convenientes placuit, interposita creditur.

Transact. Gauthier, Tract. de Contract. sur. § 24. thinks that this decision should hold, even if the clause was expressed in these terms. "Charges himself with all accidents whether foreseen or not." See our Treatise of the *Contract of Hiring.* Part III. Ch. 1. Art. II. § 5. where we have treated at length of all these clauses.

ARTICLE IV.

Whether an Obligation, extinguished by the Extinction of the Thing due, is so far destroyed as not to subsist with regard to any Part of the Thing which may remain, or with regard to the Rights and Actions belonging to the Debtor in reference thereto.

[634] Where the extinction of the thing due is not total, and some part of the thing remains, the obligation beyond a doubt subsists as to such residue. Thus if you was my debtor of a particular flock of sheep, which should all die but one, or of a house which was destroyed by lightning, it is clear that you would be my debtor of the remaining sheep or of the scite and the remaining materials of the house. For although that one sheep could not constitute a flock, it is nevertheless, according to the strictest propriety of expression, a part of the flock, as the scite and materials are also a part of the house. It may be said then in these cases, that the flock which was due to me still subsists, not totally, but in part, and in respect of the one surviving sheep; and also that the house subsists in part by the continuance of the scite and materials, and such remaining part may yet be the subject of an obligation.

There is more difficulty in the case of such a total extinction of the thing due, that what remains cannot be regarded as part of such thing. This is the case where the obligation relates to one individual thing, as an animal.

It is a question, whether the obligation continues in respect to what may remain thereof? For instance, if you are my debtor of a particular cow, and the cow dies without your fault, have I a right to demand the hide?

The reason(*a*) for doubting is, that the death of the cow induces a total extinction of the thing due; it cannot be said that the cow in part subsists; the hide is indeed part of the cow, but still it cannot be properly said to be part of the living cow which was due to me. There being a total extinction of the thing due, it may be said that the obligation itself is totally extinct, and that I cannot demand anything, not even the hide, for that is not the cow which you had engaged to give me. There was nothing in contemplation between us respecting the hide, which might remain after the animal's death; you have not engaged to give me that, that is not what is due to me, consequently I have no right to demand it. It is supposed that *L.*

(*a*) It seems difficult to suppose that in this case any doubt could be seriously entertained. The ground of the question appears merely a play upon words.

49. *ff. de Legat.* 2. decides this question. *Mortuo bove, qui legatus est, neque corium neque caro debetur.* Notwithstanding these reasons, I think that the creditor would be well founded, even in this care, in demanding what remained: 1st. Justice pleads in favour of this decision. In effect when the cow which I have bought and paid for, dies without your fault before delivery, would it not be a manifest injustice, that you should derive an advantage from the loss which I sustain in consequence of the death, by retaining for your profit, and to my prejudice, the hide of the animal which you owed to me? 2d. The principles of law also establish this decision. It is indisputable, that in whatever manner my property may perish, any part of it which remains still belongs to me, *meum est quod ex re meâ superest, L.* 49. *ff. de Rei Vend.* Now if the *jus in re*, the right which I have in a thing, such as the dominion or right of property, continues after the extinction of that thing, to subsist as to what remains of it, why should not the *jus ad rem*, or the right in respect of that thing, the claim which I have for the thing to be given to me, equally continue with respect to such residue, to subsist after extinction of the thing? Upon the same principle that *meum est quod ex re meâ superest*, it is to be inferred that *mihi debetur quod ex re mihi debitor superest.* This is justly decided by *Brunus* in his *Treatise de Interitu;* after having established that *forma dat esse rei*, and that *deducta forma substantiali, res interisse videtur*, he says *peremptâ forma si quid ex re superest, potest durare circa illud quod remanet jus, actio, et obligatio.*

It will be easy to answer the reasons in support of the opposite argument. It is said the total extinction of the thing due entirely extinguishes the debt; and consequently the creditor, can have no right to demand the residue. The answer is, that when the extinction is so absolutely total, that nothing at all remains, it is freely agreed that the obligation is wholly extinct; but where the extinction is not so entire but that something remains, although not properly a part of the thing due, I deny that such an extinction is fully and perfectly a total extinction of the thing, such as ought totally to extinguish the obligation, I contend ought to subsist with respect to such residue. It is false reasoning, and a *petitio principii*, to advance the contrary as a principle since that is precisely the point in question. Lastly, it is said, that the debtor engaged to give the beast which was living at the time of the contract, and not the skin after the animal was dead. The answer is, he did not *formaliter* engage to give the skin, but he engaged to do so *implicitè et eminenter;* an obligation to give any thing includes *eminenter*, all that the thing comprises, and contains, and consequently all that remains after the extinction of the thing itself. With respect to the law 49.(*a*) *ff. de Leg.* 2. which is opposed to this reasoning, and which says, that when an animal given as a legacy is dead, the legatee has no right to demand either the skin or the flesh; the answer is, that it must be necessarily implied that in the case supposed, the death must be understood as taking place before the

(*a*) See *supra* in the text.

legacy attached: that is in the life-time of the testator, if the legacy was absolute, or before the accomplishment of the condition, if it was conditional, for if the death had happened after the legacy had attached, and property had thereby vested in the legatee, there can be no doubt that all that remained would belong to him, conformably to the rule, *meum et quod ex re meâ superest, ideo vindicari potest, L.* 49. § 1. *ff. de Rei Vind.* Now supposing, as we necessarily must, that the animal had died before the legacy vested, no conclusion can be drawn from that law, repugnant to our decision: for, if it is established by that law, that the legatee cannot demand the residue, the reason is, not that by the death of the animal the debt is extinct, for the death having taken place before the right to the legacy attached, the debt could never have been contracted; but that it was impossible that the legacy could take effect, as the death of the testator could not confirm the legacy of a thing not in existence.

The obligation also subsists after the extinction of the thing due, in respect of anything accessary to it. Thus, you were my debtor of a particular horse with his equipments, and the horse afterwards died without any fault in you, I should still have a claim upon you for the equipments. The law 2. *ff. de Pecul. Leg.* is not repugnant to this decision. It is said, *quæ accessionum locum obtinent, extinguuntur, cum principales res peremptæ fuerint.* The answer is, that this rule takes place whilst there is no obligation as yet contracted. The law refers to a slave, who being given as a legacy together with his peculium, dies before the legacy vests. The peculium not being given *per se*, but only as being accessary to the slave and the legacy of the slave not having any effect, the whole falls to the ground. In this case, no obligation has been fully contracted. But where an obligation has been contracted for any particular thing, with its accessaries the creditor having acquired a right, *jus ad rem*, with respect to the accessaries, as well as with respect to the principal subject, this right ought to be preserved, even after the extinction of the principal subject.

[635] Where the thing which was due is destroyed, without the fault of the debtor, or is prevented from being the object of a contract, or is lost so that it cannot be known where it is, if the debtor has any rights or actions in respect to it, his obligation subsists so far as to entitle the creditor to the benefit of these rights and actions. For instance, if you were my debtor of a horse, which, without any fault on your part, was killed by a third person or wrongfully taken away, or disposed of, without its being known what had become of him, you would be discharged from your obligation of the horse, but you would be obliged to let me have the benefit of your right of action, against the person who had killed or taken him. Also, if you were my debtor of a piece of land, which was taken for some public purpose, you would be discharged as to the land, but would be obliged to subrogate to me your right of compensation. These rights being for my benefit, must be pursued at my expense.

CHAPTER VII.

Of several other Ways in which Obligations are extinguished.

ARTICLE I.

Of Time.

[635] Regularly, lapse of time does not extinguish obligations; persons who enter into an obligation oblige themselves and their heirs, until the obligation is perfectly accomplished.

But there may be a valid agreement, that an obligation shall only continue to a certain time. For instance, I may become surety for a person upon condition, that my undertaking shall not bind me after the expiration of three years. By the *Roman* law, an agreement, by which the debtor agreed that he should only be obliged for a certain time, or until the occurrence of a certain condition, although valid, did not, at the expiration of the time, or upon the accomplishment of the condition, *pleno jure* extinguish a debt, but only gave the debtor an exception or *fin. de non reçevoir*, against the demand of the creditor, *exceptionem pacti*, *L.* 44. § 1. *ff. de Obl. & Act. L.* 56. *ff. de Verb. Obl.* § 4. The reason which the jurists give for this, is that obligations once contracted, can only be extinguished in certain particular manners, in which the lapse of time and the accomplishment of a condition are not included.

The *French* law does not admit of these subtleties, and we hold the debt to be acquitted *pleno jure*, by the expiration of the time, during which alone the debtor consented to remain obliged.

If the person who is only bound for a limited time, is regularly proceeded against in a Court of Justice within that time, his obligation is perpetuated, and he will only be liberated by payment; for his own unjust delay ought not to procure a benefit to himself, to the detriment of his creditor. This is conformable to the rule of law; *omnes actiones, quæ morte, aut tempore pereunt, semel inclusæ judicio, solvæ permanent.*" *L.* 139. *de Reg. Juris.*

In instruments which import that one of the contracting parties shall only be bound for a certain time, it is very necessary to attend to the true intention of that condition. For instance, if *Peter* borrows a hundred pounds from you, to be returned on demand, and it is agreed that I shall be his surety for three years only; it is evident that the meaning of that agreement is, that unless a suit is instituted against me within three years, I shall be entirely discharged, for there can be no other meaning. But if you make a lease for six years, and I become surety for the rent with a clause, that I should be bound for six years only, that would not imply that at the end of six years I should be discharged from my engagement, though the arrears had not been paid. But the construction should be, that out of caution, and though no such explanation was really necessary, I

chose to declare that my engagement should be confined to the tenancy of six years, and not to any fresh contract that the tenant might make with you, after the expiration of that time, whether expressly or by tacit renewal.

ARTICLE II.

Of Resolutory Conditions.

[636] Upon the same principles, which admit, that a person may contract an obligation which shall only continue a certain time, he may also contract an obligation which shall only continue until the occurrence of a certain condition. As for instance, in becoming surety for any one, I may declare that my engagement shall only continue until the arrival of a certain vessel, upon which he has a bottomry, and my obligation becomes extinct upon the arrival of that vessel. This is called a resolutory condition, respecting which *vide supra*, Part II. Ch. 3. Art. II.

In mutual contracts, which contain reciprocal engagements between each of the contracting parties, the omission of one side to execute his part, is often made a condition resolutory of the obligation of the other.

For instance, if I sell you my wine upon condition, that unless you remove it within eight days I shall be discharged; this is a resolutory condition.

The mere lapse of the time within which you were to satisfy the condition, in this and similar cases, would alone, according to the simplicity of natural principles be sufficient to extinguish and dissolve my engagement. But, according to the usages in *France*, the creditor is summoned by an officer to perform the condition, or to appear before the judge who will declare the engagement to be void, in default of his doing so.

Even if it is not expressed in the agreement, that the non-performance of your engagement shall be a condition resolutory of mine, such non-performance will, in many cases amount to a rescission of the bargain, and consequently to an extinguishment of my obligation. But it is necessary for this purpose, that I should have rescission pronounced by the judge upon an assignation to you for the purpose. Suppose for instance, I have sold you my library purely and simply; if you delay paying me the price of it, the non-performance of your engagement will justify the non-performance of mine: but this extinction of my engagement does not take place *pleno jure;* it takes place by the sentence of the judge, upon an assignation for you to take away the library, and pay me the price of it, or for the agreement to be declared void: in this case, it is at the discretion of the judge, to give you such time for performing your obligations as he shall think proper; and when that time is expired, I may obtain a sentence for the rescission of the sale, discharging me from my engagement.(*a*)

(*a*) See Vol. I. Appendix, No. XI.

ARTICLE III.

Of the Death of the Creditor and of the Debtor.

§ 1. *General Rules.*

[637] Regularly, a claim is not extinguished by the death of the creditor; for a person is supposed to stipulate as well for himself as for his heirs, and other universal successors.

Therefore by the death of the creditor, the claim passes to the persons of his heirs, who succeed to all his rights;(*a*) and if he has no heirs, it is deemed to vest in the vacant succession, which, in this respect, *personæ vicem sustinent defuncti.*

In like manner the obligation is not extinguished by the death of the debtor; for we are deemed to engage as well for ourselves, as for our heirs, and other universal successors. Therefore, when the debtor dies, the obligation passes to his heirs, who succeed to all his rights and obligations, (*droits tant actifs que passifs;*) and if he leave no heirs, it falls upon the vacant succession which represents him.

The principle, that obligations pass to the heirs of the debtor, and that the right which results therefrom passes to the heirs of the creditor; holds good not only with regard to obligations which consist in giving, but also with regard to those for doing anything, according to the constitution of *Justinian* in the law(*b*) 15. *Cod. de Cont. et Com. Stip.*

§ II. *Of Claims which are extinguished by the Death of the Creditor.*

[638] There are, however, certain claims which are extinguished by the death of the creditor; such as those which have for their object something personal to himself; as if a person obliges himself to allow me the use of a certain book whenever I should require it, or to accompany me in my journeys, the object of my claim being personal to myself, the claim will be extinguished by my death.

(*a*) Accordingly it has been determined, that a covenant to make a lease for years to a man and his assigns, imported an obligation to make a lease to his executors; the covenantee having died before the time appointed for making the lease, *Plowden*, 284. Upon the same principle, where a condition of a bond was to settle certain land in such a manner, by such a day, and the obligor died before the day, so that the bond was saved at law, by the act of God; the Lord Chancellor, notwithstanding, decreed the lands to be settled, and so it has been often done. *Holtham* v. *Ryland*, 1 *Eq. Ab.* 18. *Powell, Cont.* 450.

(*b*) Si quis spoponderit insulam, cum moriebatur, ædificare stipulatori, impossibilis veteribus videbatur hujusmodi stipulatio; sed nobis sensum contrahentium discutientibus, verisimile esse videtur hoc inter eos actum, ut incipiat quidem contra morientem obligatio, immineat autem heredibus ejus, donec ad effectum perducatur. Nemo enim ita stultus invenitur, ut tali animo faceret stipulationem, ut putaret posse tantum ædificium in uno momento horæ extollere: vel eum, qui moritur, talem habere sensum, quod ipse sufficeret ad hujus operis completionem.

But if I had obtained a judgment for damages against my debtor, for the non-performance of his obligation; this claim of the damages, into which my original claim would be converted, would pass to my heirs.(a)

A claim for the reparation of injuries is also extinguished by the death of the creditor or person injured, if, during his life-time, he has not made any complaint or demand in a Court of Justice; he is presumed in this case to have forgiven and pardoned the injury, *L.* 3.(b) *ff. de Injur.*(c)

Annuities for the life of the creditor are extinguished by his death; but arrears due to the time of his death pass to his heirs.

§ III. *Of Claims which are extinguished by the Death of the Debtor.*(d)

[639] There are also some debts which are extinguished by the death of the debtor. Such are those which have for their object some personal act of the debtor himself; as if a man engages to serve me as a shepherd, or in any other capacity.(e)

If the debtor, for non-performance of such an obligation, is condemned in damages, this obligation, which succeeds to his principal and original obligation, devolves upon his representatives.(f)

(a) Even without any judgment by the creditor, his representatives might, I conceive, sustain an action for the non-performance in his life time, of an agreement personal to himself.

(b) Injuriarum actio neque heredi neque in heredem datur.

(c) In the law of *England*, there are some distinctions upon this point; the following summary by Mr. *Toller*, will suffice for the present purpose.

"In general, an executor has a right to a compensation, whenever the testator's personal estate has been damnified, and the wrong remains unredressed at the time of his death. But an executor has no right of action for an injury done to the person of the testator, nor to his freehold, as for felling trees, or for cutting the grass."

I conceive it as a fair result from this distinction that an injury, founded upon any relative character, such as that of master and servant, is not extinguished by the death of the testator, the benefits arising from such relation, being in some degree a matter of property; this observation, if applied to the seduction of a daughter, where the injury to parental feeling is the principal object of regard, may appear extravagant, but the enticing away a confidential clerk in an extensive business is principally injurious, as it affects the property, and there is no line of distinction.

By *Stat.* 17. *Charles* II. Ch. 8. if a person dies after obtaining a verdict, the suit continues so as to entitle his executors to the benefit of the judgment; and the statute does not seem to make any difference in regard to the foundation of the action, or to induce any exception of mere personal injuries.

If the party is alive on the first day of the assizes, as the whole period of the assizes is for this purpose regarded as one instant, his death taking place before the trial is not material. 1 *Salk.* 8.

(d) See Appendix to Part I. Ch. 1. § 1. Art. V. No. IV.

(e) *Calcraft* covenanted to pay to *Cook*, and his executors, 8*s.* a week, during the life of *Cook* and his wife; and *Cook* covenanted that he would not at any time deal in magazines and periodical pamphlets. *Cook's* widow and administratrix brought an action for the weekly payments, and *Calcraft* pleaded that she had dealt in magazines, by which he had lost the benefit of agreement. The court were of opinion that this was no answer; for it appeared by the agreement that the covenant by *Cook* was only a restriction laid on himself, and must expire with his life. 3 *Wils.* 380.

(f) If the right of action has attached in the life of the person contracting the engagement, I conceive it will be a sufficient foundation for a claim against his representa-

In other cases than those of personal acts, a person who engages for the performance of any act, and dies before it is performed, although he has not yet been put *en demeure* to do it, transmits the obligation to his heirs.

By the *Roman* law, obligations arising from offences were for the most part extinguished by the death of the debtor, (or person committing the injury,) unless the demand had been brought into judgment in his life-time; they did not affect his heirs, except perhaps to the extent of the benefit which they derived therefrom, in the succession of the deceased.

The action called *condictio furtiva*, for the repetition of property stolen, was alone maintainable against the heir, although he did not derive any benefit from it. *L.* 9. *ff. de Cond. Furt.*

The principles of the canon law were different. It was only the penalty attached to the offence which was extinguished by the death of the person committing it; but the obligation of repairing the injury which a person had wrongfully committed fell upon his heirs. This is the decision of Cap. *Fin. de Sepult.* and Cap. 5. *X. de Rapt.* The *French* law has, in this respect, preferred the principles of the canon law, as being more equitable than those of the *Roman* law; and according to the practice of the courts, although the heirs of the person who committed the injury, have not derived any advantage from it, they are answerable for the damages even though no action had been commenced against the deceased. This is attested by *J. Fab.* upon the *Inst. tit. de Act.* § *Pœnales*, and *D'Argentré* upon the Art. 189. of the *Coutume of Brittany*.(*a*)

tives; but I cannot adduce any authority in support of this opinion, which is founded solely on the general nature of the subject.

(*a*) The common maxim of the *English* law is, that, *actio personalis moritur cum persona*, but this is not generally, much less universally true.

The extent and application of it was considered by Lord *Mansfield*, in the case of *Hambly* v. *Trott*, *Cowp.* 371, in which it was decided that an action of trover could not be maintained against an administrator, for a conversion by his intestate. In the course of his argument, he cited a case in which a person had cut down timber belonging to the queen; and, upon an information against his widow after his decease, *Manwood* Justice said, "In every case where any price or value is set upon the thing, on which the offence is committed, if the defendant dies, his executor shall be chargeable; but where the action is for damages only, in satisfaction of the injury done, then the executor shall not be liable." Here, therefore, (said Lord *Mansfield*,) "is a fundamental distinction; if it is a sort of injury, by which the offender acquires no gain to himself, at the expense of the sufferer, as by beating or imprisoning a man, there the person injured has only a reparation for the delictum in damages, to be assessed by a jury. But where, besides the crime, property is acquired, which benefits the testator, there the action for the value of the property shall survive against the executors. As for instance, the executor shall not be chargeable for the injury done by his testator, in cutting down another man's trees, but for the benefit arising to his testator, for the value or sale of the trees, he shall; so far as the tort itself goes, an executor shall not be liable, and therefore it is that all public and private crimes die with the offender. And the executor is not chargeable, but so far as the act of the offender is beneficial, his assets ought to be answerable, and his executor therefore should be charged. So far as the cause of action does not arise *ex delicto* or *ex maleficio* of the testator, but is founded in a duty which the testator owes the plaintiff, upon principles of civil obligation, another form of action may be brought, as an action for money had and received."

The principle above laid down, that "so far as the act of the offender is beneficial, his assets ought to be answerable, and his executor shall be charged," must not be

CHAPTER VIII.

Of Bars and Prescriptions.

ARTICLE I.

General Principles of Legal Bars, and the Nature of Prescriptions.

[640] The legal bars to the maintenance of a claim, (*fins de non reçevoir contre les creances,*) are certain causes which prevent the creditor from enforcing such claims in a court of justice.

The first kind of *fin de non reçevoir*, is the authority of a legal adjudication, when the debtor has been judicially discharged from the claim of his creditor; there results from this judgment a bar (*fin de non reçevoir*) against the creditor, which renders him incapable of pursuing his claim, unless he invalidates the sentence upon an appeal, or otherwise procures it to be rescinded by the regular course of law. This is the bar which is called in law, *exceptio rei judicatæ*, as to which see the Digest, *tit. de Except. rei jud.* See also Part IV. c. 3. f. 3. *post.*

A second bar is that, which results from the decisory oath of the debtor, who has sworn that he does not owe any thing, upon such oath having been deferred to him by the creditor. There results from this oath, a bar called *exceptio jurisjurandi*, which renders the creditor inadmissable to prosecute his claim, whatever proof he may afterwards have in support of it; we shall treat of this oath *infra*, Part IV. Ch. 3. § 3. Art. I.

[641] A third *fin de non reçevoir* is that, which results from the lapse of the time to which the law has limited the action arising from the claim. The *fin de non reçevoir* is more particularly called a prescription, although prescription is a general term which may also be applied to all other *fins de non reçevoir.*

It is of this kind of *fin de non reçevoir*, that we shall treat in the present chapter.

[642] *Fins de non reçevoir* do not extinguish the claim, but they render it inefficacious, by depriving the creditor of his actions to enforce it.

indiscriminately assented to. Where a person takes my property and sells it, I may elect to waive the wrong, and treat the act as an agency, giving me a right to demand the money actually received; but if there is no sale, it is a mere wrong, and can only be treated as such, however beneficial to the wrong doer. With all the latitude which has been given to the action, for money had and received, in order to effectuate the purpose of moral justice, it cannot be supposed that such an action would be maintainable against a person digging stones from a quarry, and therewith building a house; and if the action could only be sustained against the party himself, as for a wrong, it is impossible to maintain that the accident of his death would induce a new right of action against his executors, as founded on a contract.

The statute before alluded to, of 17 Ch. II. c. 8, provides, that in all actions the death of either party, between verdict and judgment, shall not be alleged for error in any action whatever.

And further, although *fins de non reçevoir* do not *in rei veritate* extinguish the claim, they induce, so long as they subsist, a presumption that it is extinguished and discharged.

Therefore, when my debtor has acquired a *fin de non reçevoir* against my claim, I am not only disabled from maintaining an action against him, I cannot even oppose such claim by way of compensation, against any claims which he may have acquired against me, after the *fin de non reçevoir* has attached; for the *fin de non reçevoir*, which subsists against my claim, is a presumption of its being extinguished.

But if a person who owed me a sum of money, became my creditor of an equal sum, before the time necessary to induce a prescription had elapsed, and consequently before the bar had taken place, and afterwards, when the time of prescription upon my demand had become complete, he insisted upon payment of his, although I could not set up my own as a ground of action, I might avail myself of it by way of compensation. This is an instance of the maxim which prevails in the schools: *Quæ temporalia sunt ad agendum, perpetua sunt ad excipiendum.*

The reason is, that as compensation operates *pleno jure*, *supra*, *n.* 599, the instant that you become my creditor, your demand and mine which was not then barred by prescription, are mutually compensated and extinguished.

Upon the same principle that such a bar, as long as it subsists, induces a presumption that the claim is extinct, it is nugatory to become surety for a claim that is so barred. Besides, the same exception *in rem*, which may be opposed against the principal demand by the debtor, may also be opposed by the surety.(*a*)

A bar must be opposed by the debtor; it is not supplied by the judge.

It may be waived by a renunciation of the debtor, either express or tacit.

A bar which is thus waived, can be no longer opposed to the prosecution of the claim. There is no way of waiving it more effectually than the payment of the debt; for as the bar has not extinguished the debt, there can be no doubt but that the payment is valid. Nevertheless, if the debtor who paid the debt was a minor, he might obtain restitution against such payment in the same manner as against any other renunciation.

(*a*) This relates to the accessorial obligation of sureties, which has been stated at length in a former chapter, and which absolutely requires the subsistence of a valid principal obligation; it does militate against an *original* obligation, for the performance of an act previously incumbent on another, who has acquired the benefit of a prescription.

ARTICLE II.

Of Prescriptions of thirty Years.

[643] Regularly, an action upon any claim ought to be instituted within the term of thirty years: when the creditor has let this term elapse without commencing his action, the debtor acquires a prescription, which may be opposed to the demand.

§ I. *The Reasons upon which it is founded.*

[644] This prescription is founded, 1st. Upon a presumption of payment, or release arising from the lenth of time; as it is not common for a creditor to wait so long, without enforcing payment of what is due, and as presumptions are founded upon the ordinary course of things, *ex eo quod plerumque fit. Caujas in parat. ad tit. de Prob.*; the laws have formed the presumption, that the debt was acquitted or released.

Besides, a debtor ought not to be obliged to take care for ever of the acquittances, which proves a demand to be satisfied; and it is proper to limit a time beyond which he shall not be under the necessity of producing them.

2d. It is also established as a punishment for the negligence of the creditor. The law having allowed him a time to institute his action, the claim ought not to be received, when he has suffered that time to elaspe.

§ II. *When and against whom it runs.*

[645] It follows from what has been said, that prescription only begins to run from the time when the creditor has a right to institute his demand, because no delay can be imputed to him before that time. Hence it is a general maxim, with regard to this subject, *contra non valentem agere nulla currit prescriptio*; consequently a prescription cannot begin to run, whilst the debt is suspended by a condition.

If there is any time of credit allowed, although the right of the creditor is already perfect, the prescription does not begin until that time has expired, because the creditor cannot previously sue with effect.

When a debt is payable at several terms, I see no inconvenience in holding, that the time of prescription begins to run from the expiration of the first term, for the part then payable, and for the other parts only from the day of expiration of the respective terms of payment. For instance, if you owed me 3000 livres, payable by three yearly instalments, the first payment to be made on the 1st *January*, 1735, the prescriptions for one third of the debt would begin to run from the 1st *January*, 1735; for the second, from the 1st *January*,

1736; for the remaining third, from the 1st *January*, 1737; and the debt will be prescribed, for the first, in 1765; for, the second, in 1766, and for the last, in 1767.

[646] From our principle, that the time of prescription does not begin to run, until such a time as the creditor is enabled to prosecute his demand, it follows, that it cannot run against the claims which a woman, even with a separate property, has against her husband, so long as the marriage continues; for being under his power, she is prevented from proceeding against him.

It is the same with respect to claims and actions which she has against third persons, if such third persons have recourse over against her husband; for in this case the wife is supposed to have been prevented from proceeding by her husband, whose interest it was to do so, on account of the recourse which the debtor had against him.

A prescription cannot run against a beneficiary heir,(*a*) for the claims which he has against the beneficiary succession; for he cannot proceed against himself.

[647] Prescriptions does not run against minors, although they have a tutor: this exception is not founded upon the rule, *contra non valentum agere, non currit prescriptio*, since they have a tutor who may sue for them, but upon a particular indulgence to the infirmity of their age. The customs of *Paris* and *Orleans* have dispositions for this purpose; they except minors from the law of prescription, by saying that it runs *inter majores*.

If the creditor leaves several heirs, some of whom are of full age, and others minors; and the object of the claim is something divisible, *natura, aut saltem intellectu*, as if it is the claim of a certain estate; the time of prescription, which will not run against the minors for their parts, will not be thereby prevented from running against those of full age.

But if the right is indivisible; as if I promise a person to grant a servitude for the benefit of the house, the prescription will not, so long as any of his heirs are minors, run even against the others, because the claim being indivisible, and not susceptible of parts; cannot be barred in part: it is in this case that the minor is said to aid the major *in individuis*

[648] It is a question, whether prescription runs against persons not having use of reason? These persons either have the benefit of curators, or they have not. In the latter case, they fall within the rule *contra non valentem agere, &c.* and it is clear that no prescription can run against them. The question then is confined to such as have curators. It may be urged in their favour, that minors are excepted from the law of prescription, though provided with tutors, and these persons are usually compared to minors, and are still more incapable of attending to their affairs, and therefore their situation requires compassion, and the protection of the law; and consequently it appears that the exception granted to infants should

(*a*) An heir who is only subject to accounting for the amount actually received, and is not like heirs in general, subject to all the debts of the deceased.

be extended to them. *Catelan, T.* 11. *l.* vii. 13. reports an *arrêt* of his parliament by which it was so decided.

The reasons which may be adduced in support of the opposite opinion are, that the laws, by granting minors an exception from the effects of prescription, grant them a privilege; and the nature of privileges granted to particular persons is, that they are not to be extended to others, even under the pretext of a parity of reason. It may be even said, that there is not an entire parity of reason. The law might more readily except from the rules of prescription the time of minority, because it has certain limits; whereas insanity usually continues during life, and may last a hundred years; and the prescription, which is so necessary for general tranquillity, would be interrupted for a very considerable time, if persons destitute of reason were excepted. Besides, as minors are the hope of the state, there is a reason for assisting them which does not apply to other persons: this opinion may be supported by the authority of the gloss in Ch. 13. *Extra de Presc.*, which, in enumerating those against whom prescription does not run, does not include persons of an insane mind. *Bretonnier sur Henrys, t.* 2. 4. 21. seems inclined to this opinion.

[649] When a person is absent in a very distant country, for instance, in the *East Indies*, and the agent who had a procuration from him in his own country is dead, so that there is nobody to take charge of his affairs, the prescription nevertheless takes place. He does not fall within the rule *contra non valentem, &c.* for, however distant he is, he may receive intelligence from his own country, and transmit another procuration. But there may be circumstances under which it is not possible to do so, and when these are fully made out, he may have the benefit of the rule.

[650] The time of prescription runs against a succession, although vacant, abandoned, and without a curator: for the creditors of such succession, who are persons having an interest in the preservation of the rights of the succession, may procure the appointment of a curator, therefore, they cannot avail themselves of the rule *contra non valentem, &c.*

Henrys has expressed an opinion, that a prescription ought not to run against the rights of a succession, while the heir is availing himself of the time for deliberation allowed by the ordonnance.

This opinion has not been followed; the heir, during that time, had the power, without binding himself by the acceptance of that quality, to exercise all conservatory acts, and to interrupt the course of prescriptions; therefore, he is not within the rule *contra non valentem, &c.*

[651] Prescription takes place even against the farmers of the king's revenue, for the debts dependent on the rights which they hold in farm; nor is this repugnant to the maxim of there being no prescription against the king, for that maxim only concerns the king's domains, which are imprescriptible; but the debts to the farmers, which only relate to the rights held by themselves, are not the

substance of the royal domain, but the fruits of it, and the fruits belong to the farmers.

The king himself is not considered as subject to any human law, nor consequently to the law of prescription; but his farmers are subject to the laws, and consequently to the law of prescription, as well as any other, and are bound to pursue their demands within the limited time.

[652] The prescription of thirty years does not take place against the church; but only the prescription of forty years, of which we shall speak *infra*.

But it is the church rather than the person of the beneficiary that is exempted from the ordinary prescription. Therefore, that prescription is allowed, except when it relates to the ground and foundation of the right. But the arrears of rents due to the church, and other casual profits, which rather concern the personal benefit of the incumbent than the church itself, are subject to the common prescription of thirty years.

When the church succeeds to the interest of an individual, it has only the same right with the individual as to the time which had elapsed prior to the succession, according to the rule, *qui alterius jure utitur, eodem jure uti debet.*

The time of prescription, therefore, ought only to be extended according to the proportion which remained to run at the time of the succession. Therefore, as ten years are added to the ordinary prescription of thirty years, which is the addition of one-third, when a prescription begins first to run against the church; so when it has begun to run against a private individual, to whom the church succeeded, there ought to be an addition of one-third to the time which remained at the period of the church coming to the succession. Thus, if fifteen years had elapsed, ten years are not to be added to the remaining fifteen, but only five, being one-third of the fifteen, and the prescription will be accomplished at the end of thirty-five years in the whole.

Vice versâ, when an individual succeeds to the right of the church, he ought to enjoy the privilege of the church for a prescription of forty years, as to the time which is passed; and the prescription ought only to be reduced to thirty years, with respect to the remainder of the time. For instance, if twenty years had run against the church at the time of the right of dissolving upon the individual, as twenty years is only one half of the time, which is necessary to bar the church, to complete the prescription, it was necessary to allow the remaining half, not of the full time for prescribing against the church, but of the time of prescribing against the individual, that is fifteen years, the time for prescription against individuals being one fourth less than against the church; when the individual succeeds to the church, one-fourth must be deducted from the time which would remain, supposing the right of the church to have continued. Therefore, in the case supposed, five years are deducted from the twenty which remained to run.

Secular communities have the same privilege with the church, and

a prescription cannot be acquired against them, under forty years. *Tronçon sur Paris le maitre, &c.*

§ III. *Of the effect of the trentenary Prescription.*

[653] The effect of the prescription is, that when it is accomplished, the debtor may, by opposing it to the claim of the creditor obtain a judgment, declaring him to be discharged from the demand.

[654] Could the creditor in this case defer, at least to the debtor, an oath whether he has paid the debt? No; for this prescription is established not only upon a presumption of payment which results from the length of time which has elapsed, but also as a punishment for the negligence of the creditor. The law having limited the time for bringing an action; after the expiration of that time, the creditor retains his claim, if it has not been acquitted, but he can no longer support an action for it; he has no longer *jus persequendi in judicio quod sibi debetur*, and consequently he has no longer the right of requiring from his debtor the oath which forms a part of this right of action.

[655] A prescription begun or complete against the creditor takes effect against his heirs, and other successors, either by an universal or a particular title, so that they have only the time which remained to the creditor when they succeed to him; and if the time had expired against the creditor, the same *fin de non reçevoir*, which had attached against him, will continue to subsist against them. This is evident; for as they succeed to the rights of the creditor, and as all the right which they have is derived from him, they cannot have more from it than he had himself. *Nemo plus juris in alium potest transferri, &c.*

[656] There is greater difficulty with regard to a substitute, as to whether the time of prescription, which has run against the heir before the substitution takes effect, is to be imputed to the substitute after his right has attached. The reason for doubting is, that the substitute does not derive his right from the heir who was charged with a substitution in his favour and against whom the prescription has begun to run. Nevertheless, it must be decided, that the prescription, whether begun or complete against the first taker, has the same effect against the substitute; for although the substitute does not derive his claim from the first taker, but from the testator who made the substitution, yet the right passes from the first taker to the substitute, and it can only pass such as it is, and, consequently, partially or wholly subject to prescription, if it was so in the lifetime of the first taker; for as he was the actual creditor up to the time of the substitution taking place, it was against him that the prescription ought to have taken place, and, in fact, did take place. The first taker could not *faciendo*, by disposing, transferring, or hypothecating the claim, prejudice the right of the substitute; because he could only transfer it such as it was, and consequently, *cum causa fideicommissi*

with the charge of the substitution; but he may *non faciendo, non utendo*, suffer the action depending upon such claim to perish. This is the precise disposition, of the law 70. § *Fin. ff. ad Trebel. Si temporalis actio in hereditate relicta fuerit, tempus quo heres experiri ante restitutam hereditatem potuit, imputabitur ei, cui restituta fuerit.* It is true, that this law only speaks of annual actions; because, in the time of the jurist, whose law this is, ordinary actions were not subject to the prescription of any length of time; but after, they became subject to that of thirty years; there is the same reason for the decision. This is the opinion of *Richard, Traité des Subst. p. 2. ch.* 13. No. 93, 94.

[657] Prescription has its effect not only in point of law but sometimes even in point of conscience. It is true that the debtor, who must know that he has not paid, cannot in point of conscience, avail himself of the prescription, and for this reason, it is called *improborum præsidium;* but as the prescription induces a presumption that the debt has been acquitted, the heirs of the debtor may, conscientiously, presume that such is the fact, and consequently may take advantage of prescription, if they have no knowledge, nor any just ground of belief to the contrary.(*a*)

§ IV. *In what Manner Prescriptions not yet accomplished are interrupted.*

[658] The time of prescription is interrupted either by an acknowledgment of the debt, or by a judicial interpellation.

Any act,(*b*) by which the debtor acknowledges the debt, interrupts the time of prescription, whether it be passed with the creditor, or without him. For instance, if, in the inventory of the effects of the debtor, the debt is included amongst the charges (*parrmi le passif*,) such inventory, though not made with the concurrence of the creditor, is an act which recognises the debt, and interrupts the prescription.

[659] So far as the debtor is concerned, it is of no signification whether the act containing the acknowledgment was before a notary, or under private signature; but with respect to a third person, who is interested in having the debt prescribed, the act is of no service to the creditor, if it is only under private signature, unless it has acquired a date anterior to the accomplishment of the prescription, and which is authenticated either by a register (*le contrôle*,) or by the decease of some of the persons who have subscribed it; for otherwise, these acts under private signature have no date as against third persons, except from the time of their being exhibited. This was established for the purpose of preventing the frauds which might be occasioned by the facility of antedating.

[660] A verbal acknowledgment of the debt, when it exceeds 100 livres, can hardly be of any use to the creditor; because, ac-

(*a*) *Vide* Appendix, No. XV. (*b*) Act here means written instrument.

cording to the ordonnance of 1667, verbal evidence is not allowed where the object is above that sum, and where written evidence might have been procured. I think, however, that the decisory oath may be deferred to the debtor, with regard to his having acknowledged the debt within the time, and in the manner imputed to him; *nec obstat*, that the creditor cannot, as has been already decided, after the time of prescription is accomplished, defer the oath as to the fact of payment; the difference is, that where the accomplishment of the prescription is an undisputed fact, it is clear, that the creditor has no longer any right of action, and, consequently, has no right to defer the oath; but in this case it is not agreed that the time of prescription is accomplished, and that the creditor has lost his right of action; but the creditor, on the contrary, maintains, that there was an interruption; it is true, that it lies upon him to prove it; *nam incumbit onus probandi ei qui dicit;* but in *inopia probationis*, he may defer the oath as to that fact. If the debt does not exceed 100 livres, I think the creditor may be admitted to give verbal evidence, that the debtor at such a time acknowledged the debt, and promised to pay it.

[661] The payment of the arrears of an annuity is an acknowledgment of such annuity; but as the acquittances are in the possession of the debtor, this acknowledgment is, in general, of no use to the creditor, who cannot produce them; at least, unless he takes counterparts, or the acquittances were passed before a notary, and the minutes of them are preserved.

The journal of the creditor, in which he has entered the payments made to him cannot serve as a proof of such payments, because a man cannot make evidence for himself. *L.* 5.(*a*) *Cod. de Prob.*

If the annuity were due to a community, I think that accounts, solemnly rendered, in which the receiver had charged himself with such payments, would be evidence thereof, and consequently of the interruption of the prescription. For it is not probable, that the receiver, unless the money had been actually paid to him, would have been foolish enough to charge himself with it, and thereby oblige himself to the payment instead of the debtor. Besides, whether the debtor had actually paid the annuity, or the receiver had charged himself with it, and accounted for it as paid, without its being so, the community, has received it, and had the benefit of it; there cannot then be any prescription, for that only takes place when the creditor has neither had the benefit of the annuity, nor used due diligence to obtain it. This is the jurisprudence of the *Chatelet d'Orleans.*

[662] The second manner in which the time of prescription is interrupted is, by the judicial interpellation of the debtor; which is made by a command to pay, if the debt is subject to immediate execution, and by a process of assignation, if it is not so.

As each of these processes is executed by a serjeant, who is an officer of justice, they each contain a judicial interpellation.

(*a*) Instrumenta domestica, seu privata testatio, seu adnotatio, si non aliis quoque adminiculis adjuventur, ad probationem sola non sufficiunt.

They each of them interrupt the time of prescription, provided they are accompanied by the formalities which are requisite for their validity; if they are void, for want of any such formality, they do not; for, *quod nullum est, nullum producit effectum.*

A process before an incompetent judge does not, in strictness, interrupt the prescription; nevertheless, when the question of competence may have been doubtful, the Court, in pronouncing the incompetence of the judge, sometimes refers the parties to the proper judge, with a clause, requiring him to proceed between the parties, according to the state in which the proceedings were at the time of removing the process. *Imbert.* 1. 22. 7. & 8. *Dumoulin, in Styl. Parl. p.* 7. *art.* 102. cites an *arrêt*, of the 17th *July*, 1515, which referred to the judge of *Anvers* with this clause, an assignation that had been made by mistake, before the judge of *Saumer.*

[663] When there are several debtors in solido, the acknowledgment of any one of them, or a judicial interpellation to any one of them, interrupts the prescription, with respect to all the others. This is decided by *Justinian* in law *Fin. Cod. de duob. reis*, as we have already seen, *n.* 272.

It is otherwise with respect to several heirs of the same debtor; an acknowledgment by one, or an interpellation of one, only interrupts the time of prescription with respect to the part for which he is personally the debtor, and does not prevent the prescription of the part due from the other, who has neither acknowledged the debt, nor received any judicial interpellation: for a debt may be prescribed as well as extinguished in part.

This is the case even with respect to a debt for which each heir is, by way of hypothecation, liable to the whole: for, as each is only personally liable for his own debt, though subject to hypothecation for the whole, the creditor, by the interpellation of one, only exercises his right of personal action, in respect to the part for which that one was liable, and has only used his right of hypothecation upon the share of the property fallen to that one, but has not used his right of personal action as to the shares of the others, or his right of hypothecation with respect to their shares of the effects, and, consequently, the prescription is acquired to them as well against the personal action as against the right of hypothecation. Why, it may be said, will not the interpellation of one of the persons, in possession of the property hypothecated for my claim, interrupt the prescription against the other possessors of the same property, in the same manner as an interpellation of one of several debtors in solido interrupts the prescription against the others? The answer is, that my right of personal credit against debtors in solido is one and the same personal right, and, therefore, by the interpellation of any one I use my right as to the whole claim, and interrupt the prescription not only against that particular debtor, but also against the others; the right against them not being a different right, but precisely the same with that which I have exercised by the interpellation. On the contrary, the rights of hypothecation, which I have in the different effects hypothecated for my claim, are *real* rights, which consequently reside in the

different things that are subject to them, and therefore are as distinct from each other as the things in which they reside. For instance, when the house A and the house B are hypothecated to me for a certain claim, the right of hypothecation in A is as distinct from that in B, as the house A is distinct from the house B. I do not, by instituting an hypothecatory action against the possessor of A, and using my right of hypothecation in A, use any right in B, and consequently this action cannot interrupt the prescription of the hypothecation in B. According to these principles, the hypothecatory action against one of the heirs of my debtor only interrupts the prescription as to the rights of hypothecation in the share of that one, and not in the shares of the others.

When the debt is of an indivisible thing, such as a right of predial survitude, as each of the heirs, is, in this case, personally debtor of the whole, an interruption of the prescription against one is an interruption against all; it is otherwise, when the thing due is even intellectually susceptible of division.

The judicial interpellation of one of the debtors in solido interrupts the prescription, not only against the other debtors, but also against their heirs; the reason being the same.

In like manner, the judicial interpellation of the heir of one of the debtors in solido interrupts the prescription against all the other debtors.

But the interpellation of one of the heirs of one of the debtors in solido, of a divisible debt, only interrupts the prescription against the other debtors, so far as that heir is liable for the debt. Suppose, for instance, I have two debtors in solido, one of whom has left four heirs an interpellation of one of these heirs only interrupts the prescription against the other debtor in solido, to the amount of the fourth, for which the heir interpellated was liable; for by such interpellation I only use my right as to the one-fourth, and consequently the prescription is acquired by the other heirs of solido for the remainder; and it is acquired by the other heirs of the deceased debtor *in toto*, as I have not in anywise used my right with respect to the shares for which they were liable.

[664] It is a controverted question; whether an interpellation to the principal debtor, or an acknowledgment by him, interrupts the prescription against the sureties? *Bruneman ad L. Fin. Cod. pe duob reis*, and the doctors cited by him, and *Catelan*, amongst the moderns, hold the affirmative. They insist, that the same reason which induced *Justinian* so to decide, with regard to debtors in solido, holds good with regard to sureties. This reason is, that the claim which a creditor has against several debtors in solido, being one and the same claim; after an interpellation against one of them, the others cannot say to the creditor, that he has not exercised the claim which he had against them. Now, say these authors, the same reason applies to the case of sureties; the claim which the creditor has against them is the same that he has against the principal, to whose obligation they have only acceded; whence it follows, that the creditor, by the interpellation of the principal, and using his claim against him,

has also used his claim against the sureties; the claim being one and the same. They add, that if *Justinian* does not speak of sureties, it is only because they are, as to this point, comprised under the term *correi;* since they are, *rei ejusdem obligationis*, they are co-debtors, not indeed as principals, but as accessory debtors of the same obligation. *Duperrier*, and the other authors cited by him, maintain the negative. They say, that there is a great difference between sureties and co-debtors in solido. When I have sold a thing to several purchasers, who have obliged themselves in solido for the payment of the price, the claim against them is one and the same claim having the same cause, and for which there is only one and the same kind of action, viz. the action *ex vendito* against each of them; whence it follows, that in exercising my claim by the judicial interpellation of any one of them, I exercise it against all the rest. It is otherwise, say they, with respect to the principal debtor and his sureties; the claim against the principal and that against his sureties, are indeed claims of one and the same things, and therefore, a real or fictitious payment by the one discharges the other: but still they are distinct claims, arising from different contracts, and producing different actions. For instance, when I sell any thing to one man, and another engages as his surety for the price, the claim against the buyer, and that against the surety are, it is true, claims of one and the same thing, but still they are distinct claims: that against the principal results from the contract of sale, and produces the action *ex vendito:* that against the surety results from his special engagement as such, producing a different action, viz. the action *ex stipulata:* and as the claims are separate and distinct, it cannot be said that the creditor, by using his claim against the principal, exercises it also against the surety, and therefore the interpellation of the principal does not interrupt the prescription as to the surety. These authors draw an argument from the law *Fin. Cod. de duob reis;* this law, by deciding that the acknowledgment or interpellation of one of the debtors shall interrupt the prescription as to the others, assigns as a reason: *cum ex una stipe, unoque fonte unus effluxit contractus, vel debiti causa ex eadem actione apparuit.* Now, say they, sureties do not fall within the terms of this law, for though they are debtors of the same thing with the principal debtor, they are debtors by virtue of a different contract, and the action against them is different from that against the principal.

It may be replied, that the engagement of the sureties in a contract purely accessary, the sureties do nothing more thereby than accede to the debt of the principal debtor, the contract does not, properly speaking, form a new claim, but only gives the creditor new debtors, who accede to the debt of the principal; the claim which the creditor has against them is the same as that against the principal. As to the argument, that by the *Roman* law the action *ex stipulata* against the surety is a different action from that against the principal debtor; I answer, that it does not therefore follow, that it is founded upon a different claim; the stipulation, upon which the action *ex stipulata* is founded, is not itself the title of the claim, but rather the corroboration of it, with the accession of the sureties.

§ V. *In what Manner Prescriptions, after being accomplished, are destroyed (se couvrent.)*

[665] A prescription, although accomplished, is destroyed, if the debtor afterwards acknowledges the debt, this acknowledgment excludes him from the *fin de non reçevoir*, which resulted from the accomplishment of the time of prescription, and consequently destroys and annihilates it.

There is a great difference between an acknowledgment made after the time of the prescription is accomplished, so as to destroy it, and one made before, which has the effect only of interrupting it; the latter may be made not only by the debtor himself, but also by a tutor, curator, or person having a general procuration: it may be made by the debtor himself, though a minor, without his being entitled to restitution against it.

On the contrary, an acknowledgment made after the time of prescription is accomplished, so as to revive the debt, can only be made by the debtor himself, and he must be of full age; it cannot be made by a tutor, a curator, or a person having a general procuration, but only by one having a special procuration for the particular purpose. The reason is, that an acknowledgment made after the prescription is accomplished for the purpose of destroying it, involves a gratuitous alienation of the *fin de non reçevoir*, acquired by the completion of the time; now the gratuitous alienation of a right exceeds the authority of a tutor, curator, or person acting under a general power.

From the same principle there results a second difference between an acknowledgment after the time of prescription is accomplished, and one before: the latter interrupts the prescription in respect of and against all persons whatever; the former only destroys it against the debtor making the acknowledgment and his heirs, but not against his co-debtors in solido, or sureties, or third persons, who have acquired an interest in the lands hypothecated for the debt. For the right of prescription having been once acquired by the accomplishment of the time, the debtor may, by his subsequent acknowledgment, very well renounce the prescription, so far as regards himself and his heirs, but cannot prejudice the right acquired by third persons.

[666] If a mere acknowledgment of the debt destroys the prescription, *a fortiori*, should the actual payment do so likewise.

A person, therefore, is deemed to owe what he pays after the time of prescription is accomplished, and is not entitled to repetition.

And further, he who pays a part of the debt against which he had a prescription, entirely renounces the prescription, even as to the residue, *Arg. L.* 7.(*a*) § *pen. & fin. ff. de Sct. Maced.* at least, unless

(*a*) Hoc amplius cessabit senatus-consultum, si pater solvere cœpit, quod filius familias mutuum sumpserit: quasi datum habuerit, § 16. Si pater familias factus solverit partem debiti, cessabit senatus-consultum: nec solutum repetere potest.

he protests, at the time of payment, that he only means to acknowledge the debt so far as the sum paid.

According to these principles, it is clear that a debtor, by paying any arrears, destroys the prescription of an annuity.

[667] A sentence of condemnation against the debtor, when it has acquired the force of *res judicata*, that is when it is no longer open to appeal, likewise extinguishes the prescription; and the debtor cannot afterwards be admitted to oppose the prescription, even if he has omitted to do so in the suit upon which the condemnation intervened, for this condemnation gives the creditor a new title.

ARTICLE III.

Of the Prescription of Forty Years.

[668] According to the dispositions of several provinces, amongst which is that of *Orleans*, an hypothecary debtor, that is, one who has obliged himself by an act before a notary, cannot oppose the prescription of thirty years, but only that of forty.

These dispositions are conformable to the principles of the *Roman* law, and to the constitution of the Emperor *Justinian*, in the law *cum notissimi*(a) *Cod. de Præscr. trig. vel. quadr.* which establishes this prescription of forty years; and it seems that they ought to be followed in the provinces, the customs of which are silent upon the subject. Such is the opinion of the commentators upon the customs of *Paris*, cited by *Le Maitre*.

To understand fully the reason of this law, and the grounds upon which an hypothecary debt is not like other debts, prescribed at the end of thirty years, we must examine the nature of the prescription of thirty years.

The prescription of the personal claim, and that of the rights of property, and other real rights, are two distinct things, which ought not to be confounded; they have no resemblance to each other, except in point of time; and they are very different with respect to the manner in which they are acquired.

The prescription against personal claims is acquired by the debtor, without any act on his part, and results merely from the creditor not having instituted any action, and from there not having been any acknowledgment within the time limited by the law; it does not properly extinguish the claim, for that can only be done by a real, or supposed payment; it only extinguishes the action of the creditor, which at first had no limitation, but was by this law limited to thirty

(a) Cum notissimi juris sit, actionem hypothecariam in extraneos quidem supposite ei detentatores annorum triginta finiri spatiis, si non interruptum erit silentium, ut lege cantum est, id est, etiam per solam conventionem, aut si ætas impubes excipienda monstretur, in ipsos vero debitores, aut heredes eorum primos vel ulteriores nullis expirare lustrorum cursibus: nostræ provisionis esse perspeximus, hoc quoque emendare, ne possessores ejusmodi prope immortali timore teneantur.

years. The action is extinguished *non ipso jure*, but by an exception, or *fin de non reçevoir*, which the law allows the debtor against it.

The second kind of trentenary prescription is that, by which a person who has possessed an estate for thirty years as his own, and as free from incumbrances, acquires the property of the estate, exempt from any incumbrances which might affect it, although he does not show any title.

The prescription, instead of being acquired, like the former, by the mere nonfeazance of the creditor, without any act of the debtor, is, on the contrary, acquired by the fact of possession in the person who prescribes.

The debtor who had hypothecated his estate could not by this kind of hypothecation, acquire a liberation from the right which he had himself constituted; because he could not be regarded as possessing the estate as free from a right created by himself, neither could his heir; for *hæres succedit in virtutes et vitia possessionis defuncti*, *L.* 11. *Cod. de Acq. Poss.* and the possession of the heir is regarded as the same with that of the deceased. Therefore, although the debtor, or his heirs, might have acquired by the first kind of trentenary prescription, a bar against the personal action of the creditor, they would always continue liable to the action arising from the hypothecation of the same creditor; for the estate would always remain hypothecated for the debt, which although prescribed, and destitute of an action, would subsist as a natural debt, and be sufficient foundation for the hypothecation(*a*) *L.* 5. *ff. de Pig. et Hyp.*

Although *Anastasius* by the law 4. *Cod. de Præs. Trig.* had introduced the prescription of forty years against all actions, which were not subject to that of thirty, this was held not to extend to the hypothecatory action against the debtor, for the reasons already stated.

At length *Justinian*, as we have seen, extended the prescription of forty years to the hypothecatory action against the debtor and his heirs; this is the disposition of the law *Cum Notissimi.*

[669] If the debtor, who is obliged, both personally and by way of hypothecation, had sold the estate to a third person, who wished to include in the prescription of thirty years, opposed by himself the time of the party from whom he derived his title, and who was personally obliged, he ought to add to the thirty years one third of the time which had passed previous to his own acquisition: for, as the person from whom he claims, could only prescribe after the period of thirty years, and one fourth of that time, the other cannot in his right prescribe within a shorter time, according to the rule, *Qui alterius jure utitur, eodem jure uti debet.*

[670] The disposition of the law, *Cum Notissimi*, has only been adopted with respect to hypothecations, upon acts passed be-

(*a*) Res hypothecæ dari posse sciendum est pro quacunque obligatione; sive mutua pecunia datur, sive dos, sive emptio vel venditio contrahatur; vel etiam locatio et conductio vel mandatum: et sive pura est oblgatio, vel in diem vel sub conditione: et sive in præsenti contractu sive etiam præcedat. Sed et futuræ obligationis nomine dari possum: sed et non solvendæ omnis pecuniæ causa, veram etiam de parte ejus; et vel pro civili obligatione vel honoraria, val tantum naturali; sed [&] in conditionali obligatione non alias obligantur nisi conditio extiterit.

fore notaries. Debtors by judgment have the benefit of the ordinary prescription of thirty years, although the ordonnance of *Moulins* gives a right of hypothecation where there is a judgment; for the law gives this hypothecation rather to the personal action, *ex judicato*, than to the debt upon which the adjudication is founded. Therefore the hypothecation is extinguished by the same prescription of thirty years as the personal action.

It is the same with respect to all other hypothecations, given by the laws, they are extinguished with the personal action to which they are attached.

[671] The mixed (*personelle réelle*) action for seignoral rents, and similar causes, is also subject to the ordinary prescription of thirty years.

ARTICLE IV.

Of Prescriptions of six Months, and one Year, against the Actions of Tradesmen, Artizans, and other Persons.

§ I. *In what Cases the Prescription of six Months takes place.*

[672] According to the ordonnance of *Louis* XII. of the year 1510, Art. VI. VIII. drapers, apothecaries, bakers, and other dealers by retail should not be receivable after six months from the first supply, to demand the price of their goods, unless there has been a judicial interpellation, or the allowance of an account.

This ordonnance has not been exactly observed.

The custom of *Paris* has made a distinction; conformably to the ordonnance, it only allows six months to persons who deal in petty articles, or do petty pieces of work, after which time, computing from the first delivery, it declares them not recivable.

The 126th article of the custom is as follows: "trades-people, and sellers of things by retail, such as bakers, pastry-cooks, butchers, salt-dealers, and the like, cannot maintain an action after six months from the first delivery."

Persons who deal in articles of greater value, such as drapers, mercers, goldsmiths, masons, carpenters, are allowed a year to institute their actions for what is due to them.

Apothecaries have also a year, Art. 127.

[673] The ordonnance of 1673, which at present is in this respect the general law of the kingdom, appears to have followed the distinction of the custom of *Paris*. It declares in the first title Art. 7, that dealers in wholesale, and by retail, masons, carpenters, tinmen, plumbers, glassmen, and others of like quality, shall be obliged to demand payment within a year after a delivery."

In the 8th article, it declares; that the action shall be commenced within six months, "for things sold by bakers, pastry-cooks, butchers, salt-dealers and the like."

[674] Our custom of *Orleans* has only admitted the prescription of six months, against demands for the hire of horses, Art. 266.

It expressly gives a year in article 265, for goods of trifling value, (*menues denrées*) and notwithstanding the ordonnance of 1663, it has always been customary, in this district, to allow a year indiscriminately to all tradesmen and artificers.

§ II. *In what Cases the Prescription of one Year takes place.*

[675] The prescription of one year takes place; 1st. Of common right, against the demands of tradesmen, and artificers included in the 126th article of the custom of *Paris*, and the 7th article of the 1st title of the ordonnance of 1673.

By the custom of *Orleans*, this prescription prevails against the demands of all tradesmen and artificers, without any distinction as to the goods, or work being of greater or less value.

2d. Against demands for the fees of physicians, and surgeons, according to the 125th article of the custom of *Paris*, which is followed in the provinces, where there is nothing established to the contrary. 3d. Against the demands of schoolmasters, and other instructors of children. Our custom of *Orleans* has this disposition, Art. 265, and it is the general law.

4th. For board and provisions. *Orleans*, 265, which is likewise the general law.

5th. For wages of servants. *Orleans*, 265, which is likewise the general law.

This term *servants*, comprehends as well domestics in the family, as those who are employed in agriculture and manufactures; but not day labourers, who have only forty days, as we shall see hereafter.

§ III. *In what Cases these Prescriptions do not take place.*

[676] These prescriptions of six months and a year, do not take place; 1st. When the claim is established by any act in writing, whether before a notary or under private signature, or by an allowance at the foot of an account, containing the charges, or in the books of the tradesman signed by the debtor; this is the sense of the terms of Article 9. Vol. 1. of the Ordonnance of 1673. "We will that the above shall be observed, unless within the year or six months, there is an allowance of the account or other written engagement, *un compte arrêté*, *cédule*, obligation on contract." In this case the claim is only subject to the prescription of thirty years.

[677] In the second place, these prescriptions do not prevail, if they have been interrupted by a judicial demand, before the expiration of the time and the demand has not been discontinued, this is common to all prescriptions.

[678] Thirdly, these prescriptions are not observed in consular jurisdictions in cases where goods have been supplied by one

tradesman to another, for the purpose of his business, and the parties have running accounts in their books. There is a famous case to this effect of the 12th *July* 1672, *Journal du Palais.* The custom of *Troyes* has a disposition for the purpose.

For instance, a shoemaker, or joiner, cannot oppose this prescription to a currier, or dealer in wood, who produce their books containing a running account.

[679] Fourthly, these prescriptions do not run against persons out of business (*les Bourgeois*) who sell the produce of their lands, such as corn, wine, wood; for the ordonnance as well as the customs only apply to persons in trade.

A person is not to be considered as a tradesman, who although actually in trade, sells the produce of his land which is different from the article that he deals in; as if a grocer sells the wine made in his vineyard.

Although a person out of business is not subject to the prescription of a year, yet if he makes his demand after a very considerable length of time, though less than thirty years, against a tradesman to whom he had sold the produce of his land, and who insisted that he had paid for it, though he had not any receipt to produce, it would be competent to the judge, in his discretion, to disallow the claim.

§ IV. *From what Time and against whom, these Prescriptions run.*

[680] The prescription against the demands of tradesmen and artificers runs from the day of each article supplied, or each piece of work being done: and a continuation of the supply or of the work does not interrupt it; this is expressed in the ordonnance of *Louis* XII. which says, *from the first supply;* by the custom of *Paris*, which says, *from the day of the first delivery*, and lastly by the ordonnance of 1673, Art. 9. which expressly declares that the prescription shall take place, *even although there shall be a continuance of the supply or of the work*, (*encore qu'il y eut continuation de fourniture ou d'ouvrage*).

The reason is, that the claim of the tradesman or artificer is composed of as many separate demands as there are parcels of goods or pieces of work; which produces so many different actions and each begins to run from the delivery, or from the work being done.

[681] With respect to physicians and surgeons, I think that the demand of a physician or surgeon, who has had the care of a person during an illness, should not be deemed to consist of as many different claims as there have been visits, but as one and the same demand, which was not complete until the attendance was finished, either by the patient's death or cure, or the discontinuance of the visits. Therefore, I think that the prescription ought only to run from the death of the patient, if he died of that complaint; or from the last visit, if there was a cure, or if the attendance was otherwise discontinued.

But if the physician or surgeon has given his attendance in different illnesses, there are as many demands and actions as illnesses,

which ought to be respectively prescribed from the termination of each case.

[682] In the provinces, the customs of which are silent respecting servants, it seems proper to follow the ordonnance of *Louis* XII. which declares that they shall not be allowed to demand their wages after the expiration of a year from their quitting the service; and that within the year they shall not demand the wages of more than three years. This is the opinion of *Henrys and Bretonnier*.

The customs of *Paris* and *Orleans*, having subjected the actions of servants for their wages to the prescription of one year, without distinguishing whether they remain in the employment of their masters or not, it may be contended, that the prescription of the servant ought to run from the expiration of each term of his service. For instance, according to this opinion, if a servant is hired for a year he can only demand for the year last preceding, and the subsequent fraction of a year; if he is hired for a month, he can only demand for the current month, and the twelve months last preceding.

The same should be decided with respect to salaries for the instruction of children.

[683] *Duplessis* and *Le Maitre* think that these prescriptions ought not to run against minors. My own opinion is that they run as well against minors as against persons of full age: 1st. Because the contracts upon which the action of tradesmen or artificers is founded, and against which this prescription is established, are made in their quality of tradesmen or artificers; now it is a principle that they are regarded as persons of full age, with respect to the contracts which they make in that quality, and with reference to their business or occupation. 2d. This prescription is not established as a penalty for the negligence of the creditor, which in a minor might be excused, but upon a mere presumption of payment, on account of its not being usual to wait so long for the payment of this kind of debts; which presumption is equally applicable to minors as others. 3d. As our customs do not accept minors from these prescriptions, which they have taken care to do from the prescription of thirty years, we ought not to make any such exception.

§ V. *Of the foundation and Effect of these Prescriptions.*

[684] These prescriptions are founded entirely upon the presumption of payment.

Hence it follows, that the creditor is not so far barred as not to be entitled to defer the decisory oath to the debtor, as to whether the sum demanded be really due or not, as formally decided by the ordonnance of 1673, Vol. I. Art. 10. The custom of *Orleans*, has the same disposition, Art. 265. Herein these prescriptions differ from others, which, being established by way of punishment of the creditor, deprive him entirely of the right of action.

[685] The debtor to whom the oath is deferred is obliged to swear that the sum demanded from him is not due; in default of his doing so, the oath is referred back to the plaintiff, and upon such oath he ought to obtain sentence of condemnation.

[686] When the widow or the heirs of the debtor are assigned, they cannot be compelled to swear whether the debt was really due from the deceased; because the oath can only be proffered to any person with respect to his own act, *Arg.*(*a*) *L.* 42. *ff. de Reg. Jur. Paulus* states it as a maxim, *heredi ejus, eum quo contractum est, jus-juran dum deferri non potest, Paul. Sent.* 11.—1—4.

But if they cannot be obliged to swear that the sum demanded is not due, the ordonnance at least allows an oath to be deferred as to whether they do not know it to be so; this is precisely declared by the article 10 above cited, and in default of their taking the oath, it is to be referred back to the plaintiff; the ordonnance even directs that this oath may be deferred to the tutors of the minor heir of the deceased.

[687] If the widow, who had a common property with her husband, should refuse to take the oath, or should even admit the sum claimed to be due, ought the heirs who offered to affirm that they had no knowledge of its being due to be condemned to pay? No: for the debt having by the death become divided between the widow and the heirs, the oath which was deferred to the widow, and upon her refusal is referred back to the plaintiff, only concerns that part of the debt which is due from her, and her refusal to swear, or acknowledgement, can only bind herself; she may by her act prevent the prescription as to what she owes herself, but not as to what is due by the heirs.

It is the same if any one of the heirs acknowledges the debt, this acknowledgment is only obligatory as to the part due from himself, and will not oblige the others who swear they have no knowledge of it.

[688] The creditor has not only the right of deferring the oath, notwithstanding the prescription; he may even, when the object of the demand does not exceed a hundred livres, be received to prove by witnesses that the defendant has offered to pay the sum due since the demand, or even at any time since the time when he alleges himself to have paid it. The reason is that although the action which is founded upon the sale is prescribed, that which arises from the promise to pay, when it is proved as it may be, is a new action which is not prescribed.

(*a*) Qui in alterius locum succedunt, justam habent, causam ignorantiæ, an id quod petiretur, deberetur. Fidejussores quoque non minus quam heredes justam ignorantiam possunt allegore. Hæc ita de herede dicta sunt, si cum eo agetur, non etiam, si agat; nam plane, qui agit, certus esse debet; cum sit in potestate ejus quando velet experiri; et ante debet rem diligentur explorare, et tunc ad agendum procedere.

ARTICLE V.

Of several other kinds of Prescriptions.

[689] The demand of day labourers for the payment of their hire, is prescribed at the end of forty days. Custom of *Orleans*, Art. 264.

This prescription, as well as the preceding, is founded upon a presumption of payment; it is presumed that these kind of persons who have occasion for their wages for their support, will not wait longer without obtaining payment, or at least demanding it.

Therefore this prescription, like the preceding, does not preclude the plaintiff from proffering the oath to the defendant, nor from proving verbally that the defendant has offered to pay, if the demand does not exceed one hundred livres.

It may be asked, whether the prescription for the whole only runs from the last day's work? Strictly speaking, the prescription would seem to run from each day as to that day's work; for as the labourer might demand payment, his right of action has commenced, and consequently the prescription of it ought to begin to run: nevertheless, it may be maintained that it ought only to run from the last day, especially if he has been kept all the time by the employer; because in general, labourers do not require to be paid until the work is finished.

[690] The demand of procureurs for their fees is prescribed at the end of two years from the decease of their clients, or the revocation of their authority. *Arrêt, 28th March*, 1692.

The second article establishes another prescription against procureurs. It declares that they shall not, in cases remaining undecided, demand their expenses and fees for more than six years back, although they have all along continued to be employed, unless they have been allowed and acknowledged by their clients, nor then, unless the amount is cast up, if it exceeds 2000 livres.

The *arrêt* only speaks of cases not decided; with respect to those which are terminated by a definitive judgment, the prescription of two years ought to run from the time when the authority of the procureur was determined by the judgment; in the same manner as it begins to run in cases still depending, from the time when the power ceases by revocation, or the death of the party.

[691] There is not any law which limits the time for bringing an action by notaries and officers of justice; it would be equitable to extend to them the prescription of six years, which is established with regard to procureurs; there being no law, the matter must very much depend upon circumstances.

There is another kind of prescription against procureurs and officers, which arises from their returning the processes and proceedings to their clients; the restoration induces a presumption of payment, and it is commonly said at the bar, *pieces rendues, pieces payees.*

As procureurs are obliged by the regulations to keep a book in

which they enter the payments made to them by their clients, in default of producing this book, they are barred from recovering their fees. *Rules of Court, 2d August*, 1692.

[692] The demand of a party for the restitution of papers intrusted to an advocate or procureur, is prescribed at the expiration of five years from the date of the definitive judgment or compromise, and at the end of ten years, if the case is not determined.

This prescription is of the same nature with the preceding, and is founded upon a presumption of the restitution of the papers; and therefore it does not exclude the decisory oath.

It is the same with regard to the prescription in favour of counsellors of the Court, judges in the parliaments, their widows and heirs; they are discharged from any demand for papers relating to a suit at the expiration of three years from the sentence when the case has been decided, or from the decease of the counsellor, or resignation of his office, when it has not.

We have no law with respect to inferior judges, but the prescription of five years, which is allowed to advocates and procureurs, cannot be refused to them.

[693] All these prescriptions are wholly founded upon the presumption of payment or satisfaction, and do not prevent deferring the decisory oath to the defendant, as to whether he has actually paid the money or retains the papers.

There are others against different kinds of actions, as that of ten years against rescissory actions(*a*) that of five years for the arrears of annuities and some others.(*b*)

PART IV.

Of the Proof of Obligations and their Payment.(*c*)

[694] He who alleges himself to be the creditor of another, is obliged to prove the fact or agreement upon which his claim is founded, when it is contested; on the other hand, when the obligation is proved, the debtor who alleges that he has discharged it is obliged to prove the payment.(*d*)

(*a*) Actions for setting aside contracts on account of form, fraud, minority, &c. these objections not being matter of defence, but requiring a suit for the rescission of the contracts.

(*b*) *M. Pothier* adds, that he reserves his observations upon these for the treatises upon the particular subjects.

(*c*) See Appendix, No. 16. Sec. I. (*d*) See Appendix, No. 16. Sec. II.

There are two kinds of proof,(*a*) written and verbal, of which we shall treat separately, in the two first chapters; confession and certain presumptions are also regarded as equivalent to proofs, as is likewise the oath of a party, in certain cases. We shall treat of these in a third chapter.

CHAPTER I.

Of Literal or Written Proof.

[695] Literal or written proof is that which results from acts or other writings. For instance, the literal proof of the obligations arising from agreements of sale or hiring is that which results from the writings that contain these agreements. The literal proof of the obligation arising from a judicial sentence is the act which contains the judgment.(*d*) Literal proof of the payment of any obligation is the acquittance given by the creditor.

These acts are authentic or private. Authentic acts are those which are received by a public officer, such as a notary, or register (*greffier*). Private writings are those which are made without the ministry of any public officer.

These acts are also either original or copies; they are likewise distinguished into primitive titles, and titles of recognition. We shall treat in a summary manner of these different acts.

ARTICLE I.

Of Original Authentic Titles.

§ I. *What Acts are Authentic.*

[696] Authentic acts are those which are received by a public officer, with the requisite solemnities.

To induce this quality, the act must be received in the place where the officer has a public character and right of attestation; therefore, if a notary receives an act out of the limits of the jurisdiction within which he is established as such, this would not be an authentic act.

By a particular privilege of the chatelets of *Paris*, *Orleans*, and *Montpelier*, these notaries of these chatelets have a right to receive acts throughout the kingdom.

[697] Although there are regulations which prohibit subaltern notaries from receiving acts, except between persons belonging to the jurisdiction within which they are established, and relative

(*a*) See Appendix, No. 16. Sec, III. (*b*) See Appendix, No. 16. Sec. IV.

to property within the district, such acts are nevertheless authentic, these regulations having been regarded as *loix bursales*, and not having any effect.

[698] If the notary or public officer, were interdicted from the exercise of his functions, at the time of his receiving the act, the act would not be authentic.

It is also requisite to the authenticity of the act that the proper formalities should be observed. For instance, that the notary should be accompanied by another notary, or two witnesses, that the act should be upon paper, properly marked (*timbré*) that it should be checked and registered (*controlé.*)

[699] When the act is not authentic, whether from the incompetence or the interdiction of the officer, or for want of form, it has, if signed by the parties, at least the same credit against the party signing it as an act under private signature. *Boiceau*, Part II. Ch. 4.

§ II. *Of the Credit which is given to Authentic Acts against the Parties.*

[700] An original authentic act has in itself full credit (*fait par lui meme pleine foi*) as to what is contained in it.

Nevertheless when such act is produced out of the jurisdiction of the officer who received it, it is customary to verify the signature of the officer by an act of legislation subjoined to it.

This legislation is an attestation of the judge royal of the place, certifying that the officer who has received and signed the act is in fact a public officer, notary, &c.

The signature of the officer who has received the act, carries full credit of every thing which the act contains, and of the signature of the parties who have subscribed it, which it is consequently unnecessary to establish by any further proof, (*de faire reconnoitre.*)(*a*)

Nevertheless, authentic acts may be impeached as false;(*b*) but until that charge has been decided, and they are adjudged to be so, credit is given to them provisionally, and the judges ought to ordain their provisional execution: this is decided by the law 2 *Cod. Act. l. Corn. de Fals.*(*c*) This decision is very wise. Criminality is not to be presumed; and it would be very dangerous to let it be in the power of debtors, to delay the payment of the legitimate debts, by accusations of forgery. It is in consequence of this principle that *Dumoulin, in Cons. Par.* § 1. *gl.* 4. *n.* 41. decides that a vassal, who produces an act acknowledging the performance of fealty (*un port de foi*) which is disputed by the lord as false, ought to be discharged provisionally from a feodal seizure.

(*a*) *Vide infra*, No. 708.

(*b*) For this purpose there must be an original process, called *inscription de faux.*

(*c*) Satis aperte Divorum Parentum meorum rescriptis declaratum, est, cum morandæ solutionis gratiâ a depitore falsi crimen objicitur nihilominus salva executione criminis debitorem ad solutionem compelli opportere.

§ III. *In respect to what Things Authentic Acts have Credit against the Parties.*

[701] Authentic acts are entitled to credit, principally against the persons who were parties to them, their heirs, and those deriving title under them. They have full credit against such persons as to all the operative part (*tout le dispositif*) of the act, that is to say, of every thing which the parties had in view, and which constitutes the object of the act.

[702] They are entitled to full credit, with respect to what is stated in enunciative terms, when the enunciations have relation to (*ont un trait a*) the disposition. *Dumoulin, in Cons. Par.* § 8. *gl.* 1. *n.* 10. For instance, if a person by an act acknowledges his obligation to pay an annuity in these terms. "He acknowledges that such a house in his possession is subject to an annuity of ——— to *Robert*, the arrears of which have been paid to this day, and which he engages to continue," these terms, the arrears of which have been paid, although only enunciative, are, nevertheless, proof of payment against a person who is party to the act, because they have relation to the disposition of the act, and it was proper to specify in the act what was due for arrears.

[703] With regard to enunciations in the act, which are absolutely foreign to the disposition, they may very well make a semi-proof,(*a*) but they are not full proof even against the parties to the act. *Dumoulin, ibid.*

For instance, if in the contract for sale of an estate to me from *Peter*, it is said that the estate came to him by succession from *James*, a third person, who, as part heir of *James*, claimed a portion of it from me, could not prove merely by this enunciation in my contract that the estate was in fact part of the succession of *James*, because the enunciation was absolutely foreign to the disposition of the act, and I had no interest in opposing the insertion of it.

§ IV. *In respect of what Things Authentic Acts have Credit against third Persons.*

[704] The act proves against a third person, *rem ipsam*, that is to say, that the transaction which it includes has intervened. *Dumoulin, ibid. n.* 8.

For instance, an act, containing a sale of an estate, proves even against a third person that there was really such a sale at the time which the act imports.

Therefore, if the lord of a seignory enters into an engagement with

(*a*) In this treatise there are several references to semi-proofs, a subject to which there does not appear to be anything immediately correspondent in the *English* law. The effect of a semi-proof was, to allow the admission of parol evidence, or the suppletory oath of the party. It would be by no means an adequate representation, to state merely as being one circumstance, which, in conjunction with others, may be deemed sufficient evidence of a disputed fact.

a receiver, who obliges himself to pay all the seignoral profits arising within a certain time, the act, containing the sale of an estate situate within the seignory, is a proof that there was a sale of the estate, *probat rem ipsam*, against the receiver, although he is no party; and consequently the lord may demand from him an account of the dues arising on the sale, of which he ought to have obtained payment.

But the act is no proof against a third person, not party to it, of any thing which it states by way of enunciation.

For instance, if it were stated in the contract for sale of a house that it is entitled to a right of prospect over the adjoining premises, this enunciation will be no proof against the owner of those premises, who is a third person, not party to the act.

[705] This rule is subject to an exception, for *in antiquis enunciativa probant*, even against third persons, when such enuntions are supported by long possession. *Cravett de Antiq. Temp. p.* 1. *c.* 4. *n.* 20.

For instance, although long usage does not give a right of servitude (or easement), nevertheless, if my house has for a long time enjoyed a prospect over the house adjoining, and in the ancient contracts of acquisition by the persons under whom I claim, it is stated, that there is such a right of prospect, these ancient contracts, supported by my possession, will be evidence of my right against the proprietor of the adjoining house, although he is a third person, and those under whom he claims were no parties to the contracts.

[A sentence follows solely applicable to the customary law of *France*, which does not admit of an intelligible translation. The purport of it is, that in those provinces which do not admit a right called *franc aleu*, without a positive title, if the ancient contracts of sale declare the estate to be in *franc aleu*, the enunciation is evidence against the lord. Perhaps it would be in some degree analogous, to suppose that the ancient title deeds of an estate stated it to be subject to a certain modus in lieu of tithes.]

[706] From this principle, that authentic acts prove *rem ipsam* against third persons, the question may arise, whether an inventory, made before a notary, of the titles of a succession, stating an obligation for a certain sum entered into, by a particular person, at a specified time, before a given notary, is evidence against the debtor, who is a third person, and was not present at the making of the inventory, without its being necessary to produce the instrument, containing the obligation? This must be answered in the negative; for from the inventory proving *rem ipsam*, it only follows that there is an instrument purporting to contain such obligation, but not that the debt is due, because the non-production of the instrument induces a presumption that it had some defect, which prevents its establishing the debt, or that subsequent to the inventory, it was returned to the debtor, upon his discharging the obligation.

Nevertheless, if it were shown that, since the inventory, there had been a fire in the house where the writings where kept, which had destroyed them, the mention of the obligation in the inventory might

be evidence of the debt, as it appears to be taken for granted, by the law 57. *ff. de Adm. Tut.*(a), this decision might prevail, in case the debtor did not allege that he had discharged it; or perhaps, in case the time appointed for payment had not arrived, the presumption would be, that the debt had not been discharged. All this depends very much upon circumstances, and is left to the prudence of the judges.

ARTICLE II.

Of Private Writings.(b)

[707] There are different kinds of private writings, acts under common private signatures; acts taken from public archives; censive (manorial) papers and terriers, tradesmen's books, domestic papers, writings not signed: tallies also have some resemblance to private writings.

§ I. *Of Acts under common private Signature.*

[708] Acts under common private signatures have the same credit against those who have subscribed them, their heirs or successors, as authentic acts. But there is this difference between the two, that the latter do not require any recognition, whereas the creditor cannot, by virtue of any act under a private signature, obtain a condemnation against the person subscribing it, his heirs or successors, unless he has previously concluded for(c) the recognition of the act, and obtained a judgment thereon (*conclu à la reconnoissance de l' acte & fait statuer sur cette reconnoissance.*) See the edict of *December*, 1684.

There is in this respect a difference between the person who has himself subscribed the act, and his heirs or successors. The latter, when they are assigned to acknowledge the signature of the deceased, may possibly not be acquainted with it, and therefore, they are not obliged directly, to admit or deny it; and upon their declaration that they do not know whether it is genuine or not, the judge directs a verification.(d) Whereas a person who has himself subscribed the act, cannot be ignorant of his own signature, and therefore must directly

(a) Chirographis debitorum incendio exustis, cum ex inventario tutores convenire eos possent ad solvendum pecuniam, aut novationem faciendam cogere, cum idem circa priores debitores propter eundem casum fecessint, id omississent circa debitores pupillorum: an si quid propter hanc cessationem eorem pupilli damnum contraxerunt judicio tutelæ consequantur? Respondit si ad probatum fuerit, eos tutores hoc per dolum vel culpam prætermississe, præstari ab his hoc debere.

(b) See Appendix, No. 16. § 5.

(c) To conclude for any given subject, means to require a judgment in support of what is demanded: for instance, in the present example, to require a judgment pronouncing the act to be genuine, the prayer of a bill in equity may be compared to the conclusions referred to.

(d) See Appendix, § 6.

admit or deny it; and unless he positively denies it, the judge will pronounce a recognition of the act as subscribed by him.

[709] In consular jurisdictions,(a) when the defendant denies the truth of his signature, the consular judges ought to refer the case to the ordinary judge, to call for the recognition of the signature, and, in the mean time, the piece has not any credit. But there is this peculiarity in these jurisdictions, that as long as the defendant does not expressly dispute the truth of the signature, the piece has full credit, and the complainant may obtain a judgment of condemnation, by virtue thereof, without demanding a previous recognition. Declaration of 15 *May*, 1703.

[710] There is also a peculiarity with respect to *cedules*,(b) and promises, by which a person engages to pay a sum for the loan of money, or other thing, that when the promise is in a different hand-writing from that of the person subscribing it, it is requisite that such person, besides his signature, should write with his own hand the amount of the sum which he obliges himself to pay, which is commonly done in these terms *good for* (bon pour) *such a sum*. This was ordained in the king's declaration of the 22d *September*, 1733, in order to prevent surprise upon persons who sign acts presented to them, without having read the contents.

But as commerce would be cramped, if all kinds of persons were obliged to this formality of writing, with their own hand, the sum which they oblige themselves to pay, and there are many persons who cannot write any thing beyond the signature of their name, the law excepts from its disposition tradesmen, artisans, labourers, and country people, against whom promises subscribed by them, are entitled to credit, although they do not contain any more of their writing than their signature.

[711] When the sum written in the hand of the debtor, without the body of the *cedule* or promise, is less than the sum expressed in the body, which is of a different handwriting; for instance, if in the body it is said, I acknowledge to owe such a one the sum of 300 livres, and at the foot, without the body of the promise, it is written in the hand of the debtor, *good for* 200 *livres*, there is no doubt but that the promise is only binding for the 200.

If the body of the promise is wholly written in the hand of the debtor, as well as the *bon*, in case of doubt, as to what is really due, the decision ought, *cæteris paribus*, to be in favour of liberation; according to the rule, that *semper in obscuris quod minimum est sequimur*, *l. q. ff. di R. I.* Therefore, in the case supposed, the promise is only valid for 200 livres; but if the cause of the debt, expressed in the body of the promise, shows that the sum in the body is that which is really due, it must be decided otherwise. For instance, if the promise written in the hand of the debtor says, I acknowledge to owe the sum of 300 livres, for fifteen yards of broad cloth, which he has sold and delivered to me, and it appears that that kind of cloth

(a) These are jurisdictions established with relation to commercial disputes.
(b) *Cedule* may be defined to be a note in writing.

was about the price of twenty livres a yard, the promise will be binding for 300 livres, although it be underwritten good for 200 livres.

[712] The same rules must be followed in deciding upon the opposite case: when the sum expressed in the body of the promise is less than that expressed in the *bon*, as if it were said, I acknowledge to owe 200 livres, and at the foot, *good for* 300 *livres; cæteris paribus*, the presumption is for 200 livres, unless from what is expressed, as to the cause of the debt, it appear that the amount really due is 300.

[713] When a person acknowledges himself to be debtor and depositary of a certain sum, according to the particulars specified in the margin, the sum to which those particulars amount is the sum due, although different from that expressed in the act; which in such case is an error of calculation.

[714] Acts under private signature are no evidence against the party subscribing them, when they are in his own possession.

For instance, if a note is found amongst my papers, by which I acknowledge that I owe you a certain sum that you have lent me, this will be no proof of the debt: for, being in my possession, the presumption is, either that I wrote it under the expectation that you would lend me the amount, and that the loan not having taken place, the note had remained with me, so that if you had in fact lent it, I had repaid it, and the note had been thereupon returned.

The same principle applies to acts of liberation, notwithstanding they are more favoured. For instance, if there appears amongst the effects of my creditor, an acquittance signed by him, for the money which I owe him, it will be no evidence of payment: for, being in his possession, it will be presumed that he had written it beforehand, under the expectation of my coming to pay the debt, and that as I had not done so, he had kept it.

[715] Acts under private signature, like authentic acts, are no evidence against third persons, further than to show that the thing contained in the act really took place, *probant rem ipsam*; but they have not that effect to the same extent as authentic acts: for the latter, having a date verified by the attestation of the public officer, who received them, are evidence against third persons, that what is contained in the act took place on the day thereby specified; whereas acts under private signature, being liable to be antedated, are commonly no evidence against third persons, that what they contain really passed, except from the day of their being exhibited.

Therefore, if I had seized the estate of my debtor, by virtue of an hypothecation, and the farmer who is upon the estate opposes the seizure, and pretends that it belongs to him, and in proof of that allegation, produces an act under private signature, by which it is said that the debtor sold him the estate, and this act has a date anterior not only to my seizure, but also to my debt: he will not thereby obtain a removal of my seizure, for the act being under private signature, does not prove against me, who am a third person, that the sale which it imports took place at the time specified in it; the act is not

considered as having any date, except from the day of producing it to me, and as it is only produced after the seizure, it does not prove any sale before the seizure, when it was no longer in the power of my debtor to make a sale to my prejudice.

If, however, there was any circumstance to ascertain the date of the act, such as the death of one of the parties who had subscribed it, this would be evidence, even against third persons, of the act having been passed previous to such death.

§ II. *Of private Writings taken from public Archives.*

[716] The name of public archives is given to repositories of titles established by judicial authority. *Archivum*, says Dumoulin, *est quod publicé autoritate potestatem habentis erigitur.*

These repositories being only established for the preservation of genuine titles, they assure the truth of those which are found in them. Therefore, acts under private signature, with the attestation of the treasurer of the archives, are entitled to credit, without recognition. *Dumoulin in Cons. Par.* § 8. *gl.* 1. *n.* 26.

§ III. *Of Terriers and censive (manorial) Papers.*(a)

[717] A person cannot make titles for himself: therefore acts which are not passed by any public person, such *ceuillerets*, that is, registers of the lord of a manor, of the estates held under him, and the dues and services annually payable to him, do not prove the performance of those services, and consequently, are not a sufficient foundation for the lord to demand a recognition of them.

Nevertheless, when they are ancient and uniform, they form semi-proof, which joined with others, such as the acknowledgments of the proprietors of the neighbouring estates, may sufficiently establish the demand of the lord.

[718] These kinds of papers, which are not authentic, are no proof for the lord against other persons: but they are proof for others against him. Therefore, if the lord usurps upon my possession of an estate, I may support my demand for recovering it by his terriers, by which it appears, that he received the quit-rent of it from me and my father, to whom it was stated that he had made a grant of it.

But when the tenant makes use of the censive papers against the lord, the lord may, in his turn, make use of them against him; and in this case, the papers of the lord are full proof in his favour, *Dumoulin, ibid. n.* 20. For instance, if in the case supposed the tenant offers the censive papers of the lord, to prove that the estate belongs to him, as having been granted by the lord to hold of his manor, by certain services; the lord may use the same papers to prove that the estate is subject to all the dues and services which are there mentioned; and they are, in this case, a full proof in his favour.

(a) See Appendix, No. XVI. § 4. *ad fin.*

Nevertheless, they would, even in this case, only be a proof in favour of the lord, of facts that have some relation to the subject, on account of which, they are made use of against him. For instance, the lord could not prove by these papers that another estate in my possession is also held of him. *Dumoulin, ibid.*

§ IV. *Of Tradesmen's Books.*(a).

[719] As a person cannot make a title for himself, according to the principle which we have already established, it follows, that the books of tradesmen in which they insert, from day to day, the goods which they deliver to different persons, cannot be a full and entire proof of the goods being supplied, against the persons who are debited for them.

Nevertheless, it has been established in favor of commerce, that when these books are so regular on the face of them, that they are written, from day to day, without any blank; when the tradesman has the reputation of probity, and his demand is made within a year after the delivery, they make a semi-proof; and judges often even decide in favour of the demands of tradesmen, by admitting their oath; as supplying the defect of proof arising from their books.

This is the sentiment of *Dumoulin, ad L.* 3. *Cod. de Reb. Cred.*(b) *tom.* 3. *p.* 635. *col.* 2. of the edition of 1681; where speaking of the books of reputable tradesmen, he says, "*rationes ejus quamvis non plenam probationem, nec omnino semiplenam inducant, tamen inferunt aliquaam præsumptionem ex qua possit ei deferri juramentum, ita ut per se rationes probent.*"

This ought more particularly to be allowed between one tradesman and another.

[720] *Boiceau, p.* 2. *c.* 8, requires that the books of the tradesman should be fortified by other circumstances; for instance, by proof that the defendant was accustomed to deal with the tradesman, and to purchase from him on credit. Such a fact, or some other of the same kind, being admitted, or proved by witnesses in case it is denied, this author decides, that the affirmation of the tradesman that he has supplied the goods mentioned in the book ought to be allowed.

[721] It may be added, that this should only be admitted when the charges do not amount to too considerable a sum, or contain any thing which is improbable, with reference to the situation of the defendant.

For instance, it would not be deemed probable, if it was stated in the books of a tradesman, that he had sold and delivered to me ten ells of black cloth, in the space of a year; as it is not likely that I should want more than one habiliment(c) in the course of a year, for which four ells would be sufficient.

(a) See Appendix, No. XVI. § 6.

(b) In bonæ fidei contractibus, necnon [etiam] in cæteris causis, inopiâ probationum, per judicem causâ cognitâ res decidi opportet.

(c) I conceive the learned writer must allude to his gown, as judge, or professor.

[722] With respect to petty dealers, who do not belong to the class of tradesmen, but to the dregs of the people, *Boiceau, ibid.* thinks that their books are not entitled to credit.

[723] After having shown how far the books of tradesmen are evidence in their favour, it remains to see what proof they are against them. And there is no question, but that they form a complete proof against them, as well of the agreements which they have made, as of the goods and payments which they have received.

This is the case even when the entry is made by the hand of a different person from the tradesman, provided it is clear that it is the journal which he is in the habit of using: for, being in his possession, the presumption is, that every thing contained in it was written with his consent. *Dumoulin, ad. L.* 3. *Cod. de Reb. Cred.*

Dumoulin, ibid. states, as a first limitation to the rule, that to make a tradesman's book evidence against him, of any sum which he acknowledges himself to owe, it is in general requisite that the cause of the debt should be expressed; for as there cannot be any debt without some cause to produce it, and the writing alone does not make the debt, the demand of the debt cannot be supported until the cause of it appears.

But it is sufficient that a cause should appear by presumption and conjectures. Therefore, if one tradesman has written in his book that he owed so much to another, though the cause of it is not expressed, his book will be proof against him, if the other is a person from whom he was in the habit of getting the goods, used in his business; for, in this case, the presumption is, that the debt was for such goods. *Dumoulin, ibid.*

The second limitation, stated by *Dumoulin*, is, that credit should be only given to the book, and not to the loose papers (*papiers volants,*)(*a*) that are contained in it.

The third limitation is, that the journal of a tradesman is no proof for me against him, unless I consent to its being used by him against me; for a person cannot claim a benefit from a piece which he rejects. *Dumoulin, ibid. Nam fides scripturæ est indivisibilis. Dort. ad. L. si ex. fals.* 42. *Cod. de Trans.*

§ V. *Of the domestic Papers of Individuals.*(*b*)

[724] After having treated of the journals and papers of tradesmen, it comes next in order to speak of those of private persons.

It is clear that what we write in our domestic papers is no proof in our favour against any person, who has not subscribed them: "*exemplo perniciosum est ut ei scripturæ credatur, qua ununquisque sibi adnotatione propria debitorem constituit.*" *L.* 7. *Cod. de Prob.* But are they proof against us? *Boiceau, p.* 2. *c.* 8. *n.* 14. distinguishes

(*a*) All the *French* jurists speak of loose papers under this metaphor.
(*b*) See Appendix, No. XVI. § 6.

between writings which acknowledge an obligation from ourselves, and those which import the liberation of a debtor.

In the former case, for instance, if I have written in my journal, or on my tablets, that I have borrowed twenty pistoles of *Peter*, *Boiceau*, *ibid.* thinks that if this entry is signed by me, it is a complete proof of the debt against myself and my heirs, and that if it is not signed, it is only a semi-proof, which ought to be fortified by some confirmatory circumstance.

I think the distinction of *Boiceau* a plausible one, but for a reason different from those assigned by him: when the note which I have made of the loan in my journal is not signed, it appears to have been made only for the purpose of keeping an account for my own use, and not to serve the creditor as a proof of the loan: and, as he has no note to produce, the presumption is, that he has returned my note to me upon payment of the debt; and that thinking myself sufficiently secure by the restitution of the note, I have neglected to cross out the entry, and mention the payment. But my signature of the entry is an indication, that it was made with the intention of serving the creditor as a proof of the debt, and therefore, it ought to have that effect.

Although I have not signed the entry, if I have in any other manner declared or intimated, that I made it for the sake of serving as a proof, in case I should be surprised by death, as if I had declared by the entry, that the person who lent me the money, declined receiving any note for it; the entry, in this case, although not signed, ought to be allowed as a proof of the debt against me and my heirs.

When the entry, although signed, is crossed out, it is no longer any proof in favour of the creditor; on the contrary, the circumstance of its being crossed, is a proof that I have repaid the money, if the creditor has not any engagement from me in his possession.

§ VI. *Of Private Writings not signed.*(a)

[725] There are three kinds of these writings; 1. Journals and tablets; 2. Writings on loose papers (*sur feuilles volants*,) and not at the foot in the margin, or upon the back of an act which is signed; 3. Those which are at the foot in the margin, or upon the back of a signed act.

We have spoken of the first kind in the preceding division.

Those of the second kind may be considered as they tend to oblige or to liberate.

With respect to those which tend to liberate, such as acquittances in the hand-writing of the creditor, not signed, and in the possession of the debtor; although we have decided in the preceding division, that receipts written in the journal of the creditor are full proof of the payment, without its being requisite that they should be signed, I do not think that the same decision should be applied to acquittances not signed upon loose papers, though wholly in the hand-

(a) See Appendix, No. XVI. § 6.

writing of the creditor, and in the possession of the debtor. The reason of this difference is, that it is not usual to sign the entries of receipts in a journal; whereas it is customary for the creditor to sign the receipt which he gives to his debtor: therefore, when the receipt is not signed, it may be supposed that it was given to the debtor before payment; for instance, as a draft for the debtor, to examine whether he approves of the form in which it is conceived, and which the creditor purposed signing, when the debt was paid. Nevertheless, if the acquittance is dated, and so wants nothing but the signature; if it is merely a common receipt, of which it is not usual to make a draft; in short, if there does not appear to be any reason for its coming into the possession of the debtor, before payment; in such case, I think it ought to be presumed, that the acquittance was casually forgotten to be signed, and that it ought to be admitted as proof of payment, especially if supported by the supplettory oath of the debtor.

With respect to unsigned writings, or loose papers, which tend to the obligation of the persons writing them, such as a promise, an act of sale, &c., though they are found in the hands of the person in whose favour the obligation is purported to be contracted, they are no proof against the person writing them, that the obligation really has been contracted: they may have been mere proposals never carried into effect.

[726] It remains to speak of unsigned writings, which are at the foot in the margin, or on the back of a writing signed; these tend either to liberate, or to produce a new obligation.

With respect to those which tend to liberation, a further distinction must be made between the case where the act, at the foot, or on the back of which they are, is, and has never ceased to be, in the possession of the creditor, and that in which it is in the possession of the debtor. In the first case, as when at the foot or on the back of a promise, signed by the debtor, in the possession of the creditor, there are acquittances of moneys received on account, these, although not signed or dated, are a full proof of payment; not only when they are in the hand-writing of the creditor, but in whose ever writing they may be, even in that of the debtor; as it is not probable that the creditor would have allowed him to write such receipts on a note in his own possession, if the payments had not been really made.

Further, even when writings not signed, which are at the foot, or on the back of an act in the possession of the creditor, and which, tend to liberate the debtor from the engagement contained in the act, are crossed out, they are still entitled to credit: for it ought not to be in the power of the creditor, in whose possession the act is, and still less ought it to be in the power of his heirs, by crossing the writing, to destroy the proof of payment which it contains.

[727] These dispositions apply when the act is in the hands of the creditor. What if it be in the hands of the debtor? As if there are duplicates of a contract of sale, and in the margin of that part which is in the hands of the buyer, the debtor of the price, there is a receipt not signed? These writings will have full credit,

if they are in the hand-writing of the creditor; such acquittances being on the act itself, which contains the obligation, have more force than unsigned acquittances upon detached papers. It is the same with respect to unsigned acquittances, in the hand-writing of the creditor, at the foot of a former acquittance which is signed; but if they are not in the hand-writing of the creditor, they are no proof of payment; as it ought not to be in the power of the debtor to procure a liberation from his debt, by getting any person, no matter who, to sign receipts upon the act in his possession.

Acquittances, though in the hand-writing of the creditor, and indorsed on the act in the possession of the debtor, are no evidence if they are crossed: for it is very unlikely that the debtor, who is in possession of the act, would have suffered them to have been crossed if there had been an effective payment; and it is reasonable to suppose that the creditor, having written the acquittance upon a proposal of payment, had obliterated it, because the proposal had not been carried into effect.

[728] With respect to writings not signed, which tend to produce an obligation; when they have reference to the act, at the foot, or on the back, or in the margin, of which they are contained, they are evidence against the debtor who has written them. For instance, if at the foot of a promise signed by *Peter*, by which he acknowledges that *James* has lent him a hundred pounds, there was written in the hand of *Peter*,—*I also acknowledge that James has lent me twenty pounds more.* This writing, although, not signed, would be evidence against *Peter;* because the terms *also*, *more*, have a reference to the act which is signed by him. *Boiceau*, 11. 2 and *Danty*, *ibid.*

So, if to a contract for the sale of a farm, signed by both parties, there is added a postscript, written by the seller, though not signed, importing that the stock upon the farm was included in the sale, this postscript would be evidence against him.

If it were in any other hand-writing, it is clear that it would be no evidence against the seller if produced by the buyer; but if the postcript were at the foot of the act, which is in the hands of the seller, though written by another person, it would be evidence against the seller; for he would not have allowed it to be subjoined to an act in his possession, unless the agreement had been such as it imports.

[729] When writings in the margin, &c. of an act have no relation to the act, and are not signed, they are to be regarded in the same manner as if written on any other loose papers. *Vid. supra*, *n.* 725.

§ VIII. *Of Tallies.*

[730] Tallies are the parts of a piece of wood cut in two which two persons use to denote the quantity of goods supplied by the one to the other.

For this purpose each of them has one of the pieces; that in possession of the debtor, is properly called the tally, and the other the *echantillon.*

When the goods are delivered the two pieces are joined together and a notch is cut in them, denoting the quantity supplied; such are the tallies of bakers.

These tallies are used instead of writings, and are a kind of written proof of the quantity supplied, when the buyer has the echantillon to join to the tally.

ARTICLE III.

Of Copies.

[731] It is a rule common to all copies, that when the original title subsists, they are no proof of any thing which is not contained in the original; as the notaries ought not, even under pretence of interpretation, to add any thing in the ingrossments and transcripts delivered to the parties, which is not contained in the original minutes.

Therefore, there can hardly be any question respecting the credit which is due to copies so long as the original subsists; for if there is any doubt as to the contents, recourse may be had to the original.

There may be more difficulty with respect to the credit due to copies in case the original is lost. It is requisite to distinguish between those made by a public officer from those which are not. And the first must be further distinguished into three different kinds; 1st. Those which are made by the authority of a judge, the party present or duly summoned; 2d. Those which are made without the authority of a judge, but in the presence of the parties; 3d. Those which are made without the parties being either present or summoned: we shall treat of these kinds in the three first paragraphs. The register of insinuations contains copies made by a public officer: we shall treat of it in a fourth paragraph. We shall treat in the fifth, of copies not made by public officer. And in the sixth, of copies of copies.

§ I. *Of Copies made by the Authority of a Judge, the Party being present or duly summoned.*

[732] He who would have a copy of this kind, which is as good as an original, presents a petition to the judge; the foot of which the judge ordains that a copy shall be made from the original of such an act, at a given place, and on a particular day and hour, and that the parties interested shall be summoned to attend; in consequence of this order, the parties are summoned to attend at the hour and place appointed.

The copy which is made in consequence of this order by a public officer, whether in the presence of the parties or their absence, after

having been duly summoned, is called a copy *en forme.* If the original is afterwards lost, it has the same credit against the parties summoned, their heirs, and successors, as would have been given to the original itself. *Dumoulin, in. Cons. Par.* § 8. *gl.* 1. *n.* 37.

[733] Observe, that when these copies are recent, the enunciation which they contain of the order of the judge, and of the assignation of the parties, is not a sufficient proof that these formalities have been observed. Therefore, the copy is not allowed in default of the original, as making the same proof which the original would have done, without producing the order of the judge and the assignation.

But when the copies are ancient, the enunciation of the observance of the formalities, is a sufficient proof that they have been observed, according to the rule *enunciativa in antiquis probant;* and it is not necessary to produce either the order of the judge or the assignations.

For a copy to be reputed ancient, so as to dispense with the production of the proceedings which are therein stated to have taken place, it is not requisite that it should be so old as thirty or forty years, as is necessary for supplying the defects of making full proof, which we shall speak of *infra, n.* 737; ten years is sufficient. Upon this principle it has been decided, that the purchaser of an estate under a judicial decree, whose title is impeached, is not obliged, after the expiration of ten years, to produce the proceedings upon which the decree was founded.

[734] These copies, *en forme,* which, with respect to persons present or duly summoned have the same credit as the original, have not, with respect to other persons, any other effect than copies made without any persons being summoned or present, which we shall speak of, *infra,* § 3. *Dumoulin, ibid. d.* 2. 37.

§ II. *Of Copies made in the Presence of the Parties, but without the Authority of a Judge.*

[735] These are not properly copies *en forme,* since they are made without the authority of the judge; nevertheless, they have the same effect between the parties who were present, their heirs and successors, as copies *en forme,* and are regarded as such when the original is not forthcoming.

They derive this authority from the agreement of the parties; for, the parties have by their presence, when the copies are made tacitly, agreed that they should be in lieu of the original. These copies however, have not always the same force as copies *en forme;* for as they derive all their force from the agreement of the parties, it follows, that they cannot have any force in respect of things, upon which the parties have no power to make any agreement, and which are not at their disposal.

[The illustration relates to the grant under a chief rent (*bail à emphitèose*) of an estate belonging to a benefice, which was

only good if accompanied by certain formalities, not particularly mentioned;—the copies of the instruments requisite for that purpose, made in the presence of a predecessor, have not the same credit against the successor as the originals or copies *en forme;* for the predecessor, who had not the free disposition of the benefice, could not, in prejudice of his successors, agree that such copies shall be allowed to be conformable to original acts, establishing the validity of an alteration of the estate.]

§ III. *Of Copies made in the Absence of the Parties, and without their being judicially summoned.*

[736] Copies which are taken from the originals, without the presence of the parties, and without their being summoned, are not in general a full proof against them, of the contents of the original, in case of the original being lost; such a copy is only an *indicium* or commencement of proof; which is sufficient to admit a proof by witness, to supply the defect of the copy.

This decision holds good, whether the copy was made with or without the order of a judge; for it is the same thing, whether there was an order which has not been made use of by summoning the party, or no order at all,

This decision, according to *Dumoulin*, takes place even when the copy has been made by the same notary who received the original. For instance, I pass a procuration before *George*, a notary, for *Peter*, to sell my house to *James; Peter* sells the house to *James* by virtue of this procuration, a copy of which is inserted at the foot of the contract of sale; which copy is signed by *George*, who attests that he has taken it word for word from the original received by him. Afterwards I claim the estate from *James*, and the original of the procuration which I had given to *Peter* being lost, there is nothing to show against me but this copy. The copy will not be a full and entire proof of my having given the power; the reason is, that this copy proves indeed that there was an original from which it was taken; but not having been taken in my presence, or after summoning me, it is no proof against me that the original had all the characters requisite to entitle it to credit; it does not prove that my signature which is said to have been subjoined to the original, was genuine: it is true that the fact is attested by the notary who received the original, and who saw me sign it; but, says *Dumoulin*, a notary can only attest and verify what he is required to attest by the parties. "*Non potest testari nisi de eo de quo rogatur a partibus;*" he can only attest what he sees and hears, *propriis sensibus*, at the time of the attestation; now at the time of making this copy, he only saw that there was an original, but he did not at that time see me sign it; he was not required by me to attest that there was a regular original signed by me, from which he took the copy, since it is supposed to have been taken in my absence; and consequently he could not give to such copy the authority of an original. *Dumoulin, dict.* § 8. *gl.* 1. *n.* 48. 62, 63, 64, &c.

[737] What we have said is subject to an exception with respect to ancient copies: for these, whether made by the same notary who received the original, or another, are evidence against all persons in default of the original: because they enounce that there was a regular original, and *in antiquis enunciativa probant.*

This is laid down by *Dumoulin, ibid. n.* 41. "*Si exemplum esset antiquum & de instrumento antiquo (non enim sufficeret originale fuisse antiquum, si exemplum esset recens.) Tunc ratione antiquitatis puto quod plenè probaret contra omnes quantum ipsum originale probaret; ratio quia habet authenticum testimonium de autoritate & tenore originalis, cui antiquitas loco cæterarum probationum quarum copiam sustulit, authoritatem plenæ fidei supplet.*"

A copy is commonly reputed to be ancient when it is thirty or forty years old: for, according to *Dumoulin, ibid. n.* 81 & 82. except in matters relative to rights which only admit an immemorial and centenary possession, as to which an act is only deemed ancient after a hundred years, acts are reputed ancient when they are thirty or forty years old. They may even, according to this author, be allowed as ancient at the end of ten years, *ad solemnitatem presumendam nisi agatur de gravi præjudicio alterius, ibid. n.* 83.

§ IV. *Of the Register of Insinuations.*(a)

[738] The copy of a donation which is transcribed in the register is not evidence of the donation; otherwise it would be in the power of an ill-disposed person to make a forged donation, which he would get transcribed in the register of insinuations; and elude the proof of the forgery, by suppressing the original. But *Boiceau, p.* 1. 11. thinks that the register is at least a commencement of proof by writing, which should authorise a testimonial proof of the donation. *Danty* is of opinion that there is considerable difficulty in this decision. To render such proof admissible, I would have at least two things concur; 1st. That it should be manifest, that the minutes of all the acts passed by the notary, within the year in which it is pretended that the donation was made, are missing: for, if only the minute of this supposed donation was not to be found, suspicions would arise from the suppression of the act, which would create a doubt respecting either the truth or the form of it, and prevent the admission of proof by witnesses. 2d. I think the donatary should be required to offer proof by witnesses who were present when the act was passed, or at least, who had heard the donor admit it; and that it should not be sufficient to prove that some person had seen the donation in the hands of the donatory; for the witnesses who had seen the act might not know whether it was authentic or had the proper forms.

[739] If the insinuation had been made at the request of the donor, and he had signed the register; *Boiceau* decides, that it would be evidence of the donation, for the reason mentioned above; that judicial copies, made in the presence of the parties, have the

(a) This register appears by the context to be appropriated to the entry of donations.

same credit against a party who was present when they were made as originals.

§ V. *Of Copies altogether informal and not made by any public Person.*

[740] Copies not made by any public person, are those which are called absolutely informal; they do not, even if ancient, form any proof, and can at most furnish a very slight inference.

Nevertheless, if a person produced such an informal copy, in order to draw some inference from it, the other party might make use of it as a proof against him, because by producing it himself, he is deemed to recognise the truth of it; as a person ought not to produce any pieces which he does not believe to be true.

When a copy has been made by a public person, as a notary, but without calling in witnesses, or another notary, it is not considered as made by a public person, and is equally informal, as if it had been made by any private individual; for a person is not considered as having a public character, except so far as he acts in conformity to it. "*Persona publica,*" says Dumoulin, "*agens contra officium personæ publicæ, non est digna spectari ut persona publica.*"

§ VI. *Of Copies of Copies.*

[741] It is evident that a copy taken not from the original, but from a preceding copy, although *servatus juris ordine*, can only be equal proof with that from which it was taken, and against the same persons.

Sometimes this second copy, although taken *servato juris ordine*, is not the same proof against the same persons as the preceding copy would have been: as when the person to whom it is opposed had not the same reasons for contesting the original, at the time of taking the preceding copy, as he has at present with respect to the person who has taken the second.

Dumoulin, § 8. *gl.* 1. *n.* 34. gives this example; *Peter* has a copy made in the presence of my attorney, of the whole of the testament of one of my relations, and whom I have succeeded as heir, and obtains a legacy of a hundred crowns; this copy is taken from an original deposited with a notary. Afterwards *James* comes and demands a legacy of ten thousand crowns, by virtue of the same testament; and as the original has since disappeared, he presents a petition to have a copy taken in my presence, or after summoning me, from the copy taken by *Peter*. *Dumoulin* says, that this copy, taken by *James* from that of *Peter*, is not a full proof against me, as the copy taken by *Peter* from the original, would be in favour of himself; because, says he, *nova contradicendi causa subest.* I have now reasons for contradicting and contesting the original, which I had not when *Peter* took his copy; the demand of *Peter* was for an inconsiderable legacy of a hundred crowns, and it was not worth my while on ac-

count of that, to take the trouble of contesting the original, and I therefore neglected the means which I then had of doing so; but now that *James* demands ten thousand crowns, I have a very strong interest in seeing whether the original testament appears to be regular. Therefore, although I made no objection to the copy of *Peter* being taken, as the copy of a regular testament, it does not follow, that I am bound to acknowledge the same thing with respect to the copy of *James*, taken from that of *Peter*.

ARTICLE IV.

Of the Distinction between Primary Titles, and Titles of Recognition.

[742] The primary title, as the name implies, is the first title which has been passed between the parties, between whom an obligation has been contracted, and which contains such obligation. For instance, the primary title of an annuity is the contract by which it is granted. Titles of recognition are those which have been subsequently passed by the debtors, their heirs, or successors.

[743] *Dumoulin, d.* § 8. *n.* 88. distinguishes two kinds of titles of recognition, those which are in the form which he calls *ex certâ scientiâ*, and those which he calls *in formâ communi*.

Recognitions *ex certâ scientiâ*, which he also calls *in formâ speciali et dispositiva n.* 89. are those in which the tenor of the primary title is set out. These recognitions have the particular quality of being equivalent to the original, in case that should be lost, and they prove the existence of it against the person acknowledging, provided he has the disposition of his rights, and against his heirs, and successors, and consequently excuse the creditor from producing the original, in case of its being lost. *Dumoulin, ibid. n.* 89.

Recognitions *in formâ communi* are those in which the tenor of the original title is not set out; these only serve to confirm the original title, and to stop the course of prescriptions; but they only confirm the original title, so far as it is true; they do not prove the existence of it, or excuse the creditor from producing it. *Ibid.*

Nevertheless, if there are several accordant recognitions, some or even one of them is ancient and supported by possession; they may be equivalent to the original title, and excuse the creditor from producing it, more particularly when the original title is extremely ancient.

[744] Both kinds of recognition have this in common, that they are relative to a primary title, that the person making the recognition, is not considered as thereby contracting any new obligation, but only as acknowledging the former obligation contracted by the primary title. Therefore, if the recognition admits that the party making it, is obliged further or otherwise than as the primary title imports; by producing the primary title, and showing the error which has slipped into the recognition, he will be relieved.

This decision prevails even when the error appears in a long succession of recognitions; the original title must always be adhered to when it is produced.

"*Hoc tantum interest,*" says *Dumoulin, ibid. n.* 88. "*inter confirmationem in formâ communi et confirmationem ex certâ scientiâ quod illa (in formâ communi) tanquam conditionalis et præsuppositiva non probat confirmatum, hoc (ex certâ scientiâ) fidem de eo facit, non tamen illud in aliquo auget vel extendit, sed ad illum commensuratur et ad ejus fines et limites restringitur, &c.* And elsewhere, § 18. *gl.* § 1. *n.* 19. he says in general of recognitions, that "*non interponuntur animo faciendæ novæ obligationis, sed solum animo recognoscendi; unde simplex titulus novus non est dispositorius.*"

[745] If the recognition, on the contrary, is for less than is imported by the primary title; if there are several accordant recognitions which go back for thirty years, which time is sufficient to induce a prescription, or to forty years when the creditor is a privileged person, the creditor cannot by producing the original title support a claim for more than is contained in the recognitions, because there is a prescription acquired for the remainder.

ARTICLE V.

Of Acquittances.

[746] In the same manner as acts are passed by the proof of engagements, they are also passed for the proof of payments. These are called acquittances.

An acquittance, is evidence against the creditor who has given it, his heirs, or other successors, whether it were passed before notaries, or under private signature of the creditor.

There are even certain cases in which an acquittance is sufficient evidence, without being either passed before a notary, or signed by the creditor. See these cases *supra, n.* 724, 725, 726, 727, 728.

Acquittances either express the sum which has been paid, without expressing the cause of the debt, or they express the cause of the debt, without expressing the sum paid, or they express neither, or both.

Acquittances which express the sum paid, though they do not express the cause of the debt, are nevertheless valid; as if they were to say, *Received from* A. B., *so much this first day, &c.* In case the creditor giving the acquittance, had at the time several claims against the debtor to whom it was given: the debtor may apply it to that, which he has the greatest interest in having discharged, as we have seen *supra,* Part III. ch. 1. Art. VII.

[747] Acquittances which only express the cause of the debt, without expressing the sum which has been paid, are also valid, and are proof of payment of all that is due at the time for the cause expressed. For instance, if it were said, "*Received from such a one, what he owes me for the wine of my vineyard of St.* Denis,

such an acquittance is evidence of payment of what he owed me for the wine of that vineyard, the whole vintage, if the whole was due, the residue, if any part had been paid.

But this acquittance does not extend to what is due, for other causes than that which is expressed, and it is not necessary to make an express exception. For instance, if I had given you an acquittance in the terms above specified, which only relate to the wine of *St. Denis;* you could not set it up in answer to my demand, for the wine of other vineyards.

When the debt, of which the cause is expressed in the acquittance, is one which consists in arrears, (or periodical payments) as rent or an annuity, it is evidence of the payment of all that was due, up to the last preceding day of payment; but does not extend to the proportion which has incurred since. For instance, if you are my tenant of a house, the rent of which is payable at the feast of St. *John*, or my debtor of an annuity payable at that feast, and I give you an acquittance in these terms; 10th December, *Received of A. B., his rent or the arrears of an annuity;* this acquittance is good for all the arrears up to the preceding feast of St. *John*, but does not extend to the proportion which has since accrued.

Suppose the acquittance was not dated; as the want of a date prevents it being known at what time the acquittance was given; the debtor cannot thereby prove what was the term preceding and up to which the payment has been made; in this uncertainty the acquittance proves nothing more than that the debtor has made one payment, and consequently he cannot avail himself of it any further. If it was the heir of the creditor, who gave the acquittance, it would be good for the arrears accrued in the life-time of the deceased: because it is clear that those were prior to the acquittance, since the heir could only give an acquittance, from the time of his having that quality.

When the debt, the cause of which if expressed in the acquittance, is one divided into several kinds of payments, as if my father-in-law, has promised me a fortune of 2000*l.* for the portion of his daughter, by four yearly payments; an acquittance from me to him without expressing the sum in these terms, "Received from my father-in-law, what he owes me (*ce qu'il me doit*) for my wife's portion," ought in like manner to be only applied to the terms of payment then elapsed, and not extended to the subsequent instalments: for although a sum, of which the term of payment is not arrived, may in one sense be very truly said to be owing: yet in common signification, which is the proper rule for construing the acquittance, these terms, *qu'il me doit*, are only understood of sums that may be demanded, and of which the term of payment is arrived; and therefore it is commonly said *Qui a terme ne doit rien, Loysel.* Besides it is not to be presumed, that a debtor would pay before the term.

There would be much more difficulty if the acquittance were in these terms *I have received my wife's portion;* these general and indefinite terms would appear to compromise the whole of the portion,

and consequently the part of which the term of payment had not yet arrived.

When the acquittance does not express either the sum which has been paid, or the cause of the debt; as when it is conceived in these terms *Received from J. S. what he owes me;* this is a general acquittance, which comprises all the different debts that were due, at the time of its being given. If amongst the debts there were some which could be demanded, at the time of giving the acquittance, and others which could not, it would extend only to the former, for the reasons already mentioned.

A fortiori, the acquittance ought to be referred to the principle of annuities due by the debtor, but only to the arrears up to the last preceding term of payment.

These debts ought also to be excepted, of which it is not probable that the creditor had any knowledge at the time of the acquittance. For instance, if you were my creditor of certain sums on your own account, and of others as the heir of *Peter*, whose succession had already fallen to you, but of which the inventory had not been made, a general acquittance from you to me in these terms, "Received from J. S. what he owes me," does not comprise what I owe to the succession of *Peter:* for, as you had no knowledge of the effects belonging to the succession of *Peter*, at the time of your giving the acquittance, it ought not to be presumed that you intended to include in the acquittance what I owed you as heir of *Peter*, of which you were probably entirely ignorant.

If I owed you certain sums on my own account, and others as surety of another person, would an acquittance from you to me in these terms, *Received from J. S. what he owes me*, include what I owed you as surety? The reason of doubting is, that these terms taken literally, and in their generality, seem to include it, for I really owe, what I owe as surety; nevertheless, I think it ought to be presumed that you meant only to acquit me, from what I owed on my own account, *proprio nomine*, and not what I owed as surety; 1st. Because I might defend myself from paying what I owed as surety, until after the discussion of the principal debtors; and therefore in some sense, and in the common course of expression, I did not owe this money previous to such discussion. 2d. Because as I have recourse against the principals, for what I pay as surety, it must be presumed that I would require a particular acquittance for such payment, and that I should not be satisfied with these general terms.

If at the time of your giving me the general acquittance, I owed you several sums, one of which was secured by a note, that continued afterwards in your possession, would it be included? The reason for doubting arises from your retention of the note, which you ought to have delivered up, and which should not have remained with you, if I had discharged it; the reason for deciding that it is included is the generality of the terms, *what he owes me*, which comprises all debts owing at the time; the fact may be, that relying upon the general acquittance, I have neglected to get back my note, which might not be immediately at hand.

[749] The fourth kind of acquittance is that, which expresses both the sum paid, and the cause of the debt; this can hardly be subject to any difficulty. If the sum paid exceeded what was due for the cause expressed in the acquittance, the debtor, supposing that he did not owe any thing else, would have a right of repetition for the excess by the *condictio indebiti:* if he was a debtor on another account, he might apply the excess to that so far as he had an interest in having it discharged.

The question whether an acquittance for one or more years of an annual payment, is a ground for presuming the payment of the preceding years, is treated *infra*, ch. 3. § 2. Art. I.

CHAPTER II.

Of Parol or Testimonial Evidence.

Parol or testimonial proof is that which is made by the disposition of witnesses.

ARTICLE I.

General Principles respecting the Cases in which this Proof is admitted.

[750] The corruption of manners, and the frequent instances of the subornation of witnesses, have rendered us much more difficult in admitting parol evidence than the *Romans* were. In order to prevent this subornation of witnesses, the ordonnance of *Moulins*, of the year 1566, *Art.* 54, directs, that in all cases, exceeding the value of 100 livres, contracts shall be passed, by which alone proof shall be received of such matters, without receiving any proof by witnesses, beyond what is contained in such contracts.

This disposition was confirmed by the ordonnance of 1667, *Tit.* 20, *Art.* 2. which is expressed as follows: "Acts shall be passed before notaries, or under private signatures, of every thing exceeding the value of a hundred livres, and no proof shall be received by witnesses against or beyond the contents of acts, even when they relate to a less sum than one hundred livres."(*a*)

In the succeeding article, the ordonnance excepts the case of unforeseen accidents, and cases where there is a commencement of proof by writing.

(*a*) See Appendix, No. XVI. § 3.

There is also in the first article an exception with respect to consular jurisdictions.

From these dispositions of the ordonnances, we may deduce four general principles, which determine the cases in which parol evidence ought to be received or rejected.

These principles are, 1. A party who had it in his power to procure a proof, in writing, is not admitted to give parol evidence, when the subject exceeds the value of a hundred livres, unless he has a commencement of proof in writing.

2. When there is an act in writing, those who are parties to it, their heirs and successors, cannot be admitted to give parol evidence against or beyond such act, even when the subject does not exceed a hundred livres, unless they have a commencement of proof in writing.

3. Parol evidence is admitted of things whereof the parties could not procure a proof in writing, whatever may be the value of the subject.

4. In like manner, when by a fortuitous and unexpected event, acknowledged by the parties, or proved to have taken place, the written proof has been lost, parol evidence may be admitted, whatever may be the value.

ARTICLE II.

First Principle. A party who has it in his power to procure a Proof in Writing, is not admitted to give Parol Evidence, when the subject exceeds the value of a hundred Livres, unless he has a Commencement of proof in Writing.

[751] The ordonnance of *Moulin* says, "We ordain that of all things exceeding the sum or value of 100 livres, contracts shall be passed," &c.

The ordonnance of 1667, *Tit.* 20, *Art.* 2, says, "Acts shall be passed of all things exceeding the value of 100 livres."

Although the ordonnance of *Moulin* does not say of *all agreements*, but uses the term *things*, which is more general, the commentators upon it, are of opinion, that its disposition only extended to agreements, because it says, CONTRACTS *shall be passed*, and the term *contracts* is confined to agreements.

The ordonnance of 1767 having avoided the use of the term *contracts*, and having said, *acts shall be passed of all things* it is unquestionable, that its disposition includes not only agreements, but generally all things of which the party demands permission to make proof, and of which he could have procured proof in writing. For instance, although the payment of a debt is not an agreement, the debtor who could have obtained an acquittance, which is a proof in writing, is not, when the payment exceeds 100 livres, permitted to make proof of it by witnesses.

[752] It was doubted before the ordonnance of 1667, whether *an*

involuntary(*a*) deposit was included in the disposition of the ordonnance of *Moulins*, which directs that an act shall be made of all things exceeding the value of 100 livres, and excludes parol evidence. The reason of doubting was, that acts in writing are not commonly made of deposits, and a person who entrusts any thing to the care of a friend, will not in general, venture to require a written acknowledgment, as the deposit is only made for his own convenience. Notwithstanding these decisions, the ordonnance of 1667, *Tit.* 20. *Art.* 1, has decided, that a voluntary deposit is included in the general rule, and that proof by witnesses ought not to be admitted of it, because the person who made the deposit was not obliged to do so, or might have required a written acknowledgement, and for want of doing so, he ought to run the risk of his depositary's fidelity, and take the blame upon himself, if he had reposed his confidence unworthily.

Some *arrêts*, previous to the ordonnance of 1667, had also admitted proof, by witnesses, of loans for use (*commodata*,) because such a loan, like a deposit, is commonly made between friends, without taking any written acknowledgment; but the ordonnance of 1667 having declared, that a voluntary deposit was comprised in the general law, which requires a proof in writing, the same ought to be concluded, *a fortiori*, respecting such a loan, since a person trusts as much when he makes a deposit, as when he lends a thing to be used; and he who makes a deposit, has greater reason to be apprehensive of giving offence by demanding a written acknowledgment, than he who accommodates another with the loan of an article, to be specifically returned.

[753] A question is also made, whether bargains in fairs and markets ought to be included within the dispositions of the ordonnance. The reason of doubting is, that these bargains, in general, are made verbally, when there is a notary by to reduce them into writing. Nevertheless, it has been decided, that they are included; for as notaries are now established in the most insignificant places, and consequently, in all places where there are fairs, it is not a matter of much difficulty for the parties, when they make a bargain on credit, to call in a notary, if they cannot write themselves.

Observe, however, that with respect to bargains between one tradesman and another, whether made in or out of fairs, the judges-consuls are not restrained by the disposition of the ordonnance, and may, according to circumstances, admit proof, by witnesses, although the object exceeds the sum of 100 livres. It appears, by the process-verbal of the ordonnance of 1667, that the judges-consuls were supported in this usage, notwithstanding that of *Moulins;* that of 1667 preserves it expressly, by those terms of article 2, *without making any alterations in respect of what is observed in the jurisdiction of consuls.* (*Sans rien innover à ce qui s'observe en la jurisdiction des consuls.*

[754] When a person claims damages, for the non-performance of a verbal agreement to do or not to do any thing; and it is

(*a*) It is so in the original before me; but the context evidently requires the word *voluntary* to be substituted for involuntary.

uncertain whether such damages will or will not amount to 100 livres, the plaintiff, in order to be admitted to give parol evidence of the agreement, for the non-performance of which damages are claimed, ought to restrain his demand to a sum certain, not exceeding 100 livres; he ought even to do so in the first instance; for if he has once concluded for a larger sum, and thereby acknowledged that the object of the agreement exceeded 100 livres, and consequently, that the agreement was within the ordonnance, he will not, by afterwards reducing his demand, be admitted to give parol evidence. An argument, in support of this decision, may be drawn from an *arrêt* of the 7th *December*, 1638, reported by *Bardet* VII. 46, in the case of a tailor, who having instituted a demand against a widow, for clothes furnished to her husband, to the amount of 200 livres, was excluded from the parol evidence, which he offered to give of her undertaking to answer for the debt, though he reduced his demand to 100 livres.

[755] I demand from you 60 livres, as the remainder of the price of a thing which I pretend to have sold you for 200 livres; you deny having bought any thing from me: ought I to be admitted to prove this sale by witnesses? *Boiceau*, I. 18, decides in the affirmative; he cites laws which do not appear to me to have any application to the question. It is true, that when the question relates to the competence of a judge, who has only authority to decide to the extent of a certain sum, *quantum petatur, quærendum est, non quantum debeatur, L.* 19, § 1, *ff. de Jurisd.* because the judge only gives his judgment as to what is demanded. But in the case before us, the question whether the proof of the agreement ought to be allowed, depends upon whether the agreement is such as the ordonnance requires to be reduced into writing; now that is decided by the object of the agreement, which exceeds 100 livres, and not by what remains due. I cannot then be admitted to prove the agreement by witnesses, although the demand is only for the remaining 60 livres. This is the opinion of the commentator on *Boiceau.*

For the same reason, if, being heir of my father to the extent of one-fourth of his succession, I demand from you 50 livres, as the fourth part of a sum of 200 livres, which I pretend to have been lent to you by him, I shall not be admitted to prove the loan by witnesses.

[756] But in each of the preceding cases, if the plaintiff offered parol evidence, not of the sale for 200 livres, or of the loan of that sum, but of the promise made by the defendant to pay him the 60 livres remaining due, or the 50 livres for the fourth share, I think the proof ought to be received; for this promise is a new agreement, confirmatory of the former, and as the object of this agreement does not exceed 100 livres there is nothing to prevent its being proved by parol.

[757] When several claims do not separately exceed the value of 100 livres, but they exceed that amount altogether, is the proof of all these claims admissible? It would seem that it ought to be so; for the ordonnance only having required acts to be made of things which

exceed the value of 100 livres, no blame appears imputable to the party, for not having procured a proof by writing, and he ought not to be debarred from proof by witnesses. Nevertheless, the ordonnance of 1667, Art. 5, decides the contrary: for as the spirit of the ordonnance, in excluding such proof, is to prevent persons being exposed to the subornation of witnesses with respect to iniquitous demands for considerable sums, exceeding 100 livres; it ought to be refused, whether the sum demanded be for one cause or for several; because it is as easy to suborn witnesses to depose to several false claims, as to depose to one singly. With respect to the objection, the answer is that the creditor is not obliged to procure proof in writing, so long as his claims do not exceed 100 livres; but when to those that do not exceed that sum, he adds another, which makes the whole amount to more than 100 livres, he ought to require an act in writing.

The ordonnance contains an exception when the claims or rights proceed from different persons. Therefore I may be admitted to prove a loan of 60 livres, of which I demand payment in my own right, and another of 80 livres, as heir of my father, although together they exceed 100 livres.

ARTICLE III.

Second Principle. That Proof by Witnesses ought not to be received against or beyond what is contained in a Writing.(a)

[758] Written evidence is, in our law, regarded as superior to parol; therefore, the ordonnance prohibits parol evidence being admitted against the contents of a writing.

For instance, if I have made a note, by which I acknowledge myself to owe a person 100 livres, and which I promise to pay him at the end of two years; I shall not be admitted to prove by witnesses that I received no more than 60, and that the remainder was for interest, which I was required to include in the note; for this proof would be contrary to what is contained in the writing, and I must take the consequence of having given such a note.

[759] The ordonnance is not satisfied with excluding proof by witnesses, of what is directly contrary to an act; it does not permit it to be received beyond the contents of an act, or respecting any thing which is alleged to have been said at the time, before or after. For when there is an act, the party must take the consequences of not having that expressed, which he now alleges to have taken place.

For instance, the debtor will not be admitted to prove by witnesses, that a certain term was allowed for payment, if it is not expressed in the act; neither of the parties will be admitted to prove by parol,

(a) See Appendix, No. XVI. § 9.

that it was agreed that the payment should be made at a certain place.

A fortiori, the creditor will not be allowed to prove by witnesses that more is due than the act imports.

[760] It would be offering to prove something beyond the contents of an act, if the party required to prove what is contained in any detached memorandum (*une apostile ou renvoi*), not signed, or at least marked (*paraphés*) by the parties, though written in the hand of the notary, for these extraneous additions, are not considered as part of the act. As if in the margin of a lease, by which the tenant is to pay 600 livres a-year, there is written (*un renvoi*) in the margin, *six capons more*, the landlord would not be allowed to prove by witnesses, that the tenant had agreed to pay such six capons.

What if the marginal addition were in the hand-writing of the tenant? *Vi. supra, n.* 728.

[761] When there is an act in writing of a bargain, and the time and place of making it are not expressed, they can be proved by witnesses? For instance, where a debtor demands to be received to the benefit of cession, can the creditor, in opposition to this demand, be admitted to prove, by witnesses, that the bargain which was the foundation of his demand, and of which there was an act in writing, was made at a fair, although this is not expressed in the act? *Danty* 1. 9. *in fine*, decides, that this proof may be admitted; and that such evidence of the place where the bargain is made, is not a proof beyond the contents of the act; the time and place of making the bargain being circumstances extrinsic to the agreement, and not making part of the agreement contained in the act. This decision is subject to some degree of difficulty.

[762] All proof by witnesses, beyond the contents of an act, being prohibited, a party would not be allowed to examine the witnesses who assisted at the act, or even the notary who received it, to explain the contents, and depose to what was agreed upon at the time of making it. *Domat. p.* 1. *l.* 3. *t. b.* 2. *n.* 7.

[763] This exclusion of parol evidence against any beyond the contents of acts, takes place without distinction, even when the subject is below the value of 100 livres, as the ordonnance of 1667, *t.* 20. *Art.* 2, expressly declares.

[764] Can a person who is debtor of 100 livres, or a less sum, by virtue of an act, be admitted to prove, by witnesses, the payment of the whole, or part of the debt? It seems that he ought to be so admitted, and that the disposition of the ordonnance, which forbids the proof by witnesses against and beyond the contents of the act, is not applicable to this case: for the debtor, by demanding liberty to prove his payment, does not demand to prove any thing against the act, which contains his obligation; he does not attack the act; he agrees to every thing that is contained in it; the proof of which he requires to make is not then against the act, nor excluded by the ordonnance; yet I observe, that in practice, whether from a misinterpretation of the ordonnance, or for some other reason, parol

evidence is not admitted of the payment of a debt, of which there is an act in writing.

[765] Observe, that the ordonnance only excludes a proof by witnesses against the contents of an act, because it is in the power of the parties to procure a proof, in writing, by counter letters; but if a party, in opposition to an act, alleges acts of violence, by which he was compelled to pass it, or acts of fraud, by which he has been surprised into giving his consent or signature, or the like; as it was not in his power to have a proof, in writing, of such facts as these, there is no doubt but that he ought to be admitted to prove them by witnesses, even when he attacks the act by way of civil process.

A fortiori, when the act is impeached for criminalty, as if it is alleged, that an act is one of those cases of exorbitant usury which require an extraordinary procedure.

[766] It remains to observe, that the prohibition of parol evidence against or beyond the contents of an act only extends to the persons who were parties to it, and who are to blame themselves, for not having inserted what was intended, and for not taking a counter letter; but this prohibition cannot affect third persons, in fraud of whom, things might be stated in the acts contrary to the truth of what has passed, for nothing can be imputed to such third persons, and they ought not to be excluded from proving by witnesses the fraud which has been practised upon them, and of which it was not in their power to have any other evidence.

Therefore, a lord may be admitted to prove by witnesses, in opposition to a contract of sale, that an estate was sold for a larger price than that which is expressed in the act, with a view of diminishing the dues to which he is entitled; *vice versâ*, a relative may prove that an estate was sold for a less considerable price than that which is expressed in the act in fraud of his right of retrait.(*a*) And many other instances of these frauds might be adduced.

ARTICLE IV.

Of Commencement of Proof by Writing.

[767] A first kind of commencement of proof, by writing, is, when there is no proof against any one by an authentic act, to which he was party, or by a private writing, written or signed with his hand, not of the whole that is alleged against him, but of something which leads to it, or makes part of it.

It is left to the discretion of the judge, to decide upon the extent of the commencement of proof by writing, which shall be sufficient to admit a proof by witnesses.

(*a*) *Retrait* was a right belonging, in some provinces, to the lord or relations of a seller, to take an estate sold at the price agreed to be given by a stranger. *Pothier* has an express treatise upon the subject.

Boiceau gives several examples of this commencement of proof by writing.—*First Example.* You assign me to give up an estate, of which I am in possession, I assert, that you have sold it me, and that I have paid the price; I have no other proof than a writing, signed by you, by which you promise to sell it for a certain price; this act does not prove the sale, and still less the payment, of the price; but joined to my possession of the estate, it forms, according to this author, a sufficient commencement of proof, to allow my giving parol evidence of the sale. *Boiceau*, 11. 10.

Danty, ibid. observes, that this decision should be subject to an exception, where the promise to sell imported that there should be an act passed before a notary; for the parties having declared their intention, that there should be such an act, it is not to be supposed that the sale was proceeded in, if no such act appears.

I think, that even when the promise to sell does not import that an act shall be passed before a notary, the judge ought to be very cautious in admitting it as a commencement of proof sufficient to let in parol evidence of the sale; and that he ought not to allow it, if the estate was at all considerable, as it is not to be presumed that such an estate would be sold verbally, and without any act.

Second Example. I demanded from you 50 crowns, for the price of certain goods sold and delivered. I have no other proof than your note, which states, *I promise to pay J. S.* 150 *livres, for the price of the goods which* HE IS *to deliver to me;* this is not a complete proof of my demand; as the note does not prove that I have delivered the goods: but it is a commencement of proof, which ought to let in parol evidence of the delivery. *Boiceau, ibid. Danty.*

Third Example. You have passed a procuration to me, to resign your office; before I have obtained an authority to receive the office, you revoke the procuration. I maintain that you have sold me this office, for a given sum which I have paid you, and consequently, that you cannot revoke your procuration, without returning the price: I have no other written proof of what I advance, than your procuration to resign: this procuration is not a proof of the sale, and still less of the payment of the price; but it is proof of a fact which has relation to it, and which consequently may be regarded as a commencement of proof, so as to let me into parol evidence of the contract of sale, and of the payment of the price. Such is the opinion of *Loiseau*, in his treatise on these offices. *L.* 11. 61. cited by *Danty*, 11. 1. 14.

[768] *Fourth Example.* You write me a letter, by which you request me to advance to the bearer, your son, 150 livres, which he has occasion for at the University; I assign you to repay me. I have omitted to get an acknowledgment from your son, but I am in possession of your letter. This is not a full proof that I have advanced the money, but it is a commencement of proof by writing, sufficient to allow a proof by witnesses.

If the person to whom the letter had been written had not been willing to advance the money, and your son had applied to another, to whom he had given the letter, the letter in possession of this last,

would be a weaker proof than in the preceding case; nevertheless, *Danty*, 11. 2, 11. judges that even this is sufficient to authorise a proof by witnesses.

If the person to whom you directed me to advance the money was one against whom you would have a right of repetition; I should not be admitted to give parol evidence against you, unless I had taken his receipt: for, admitting that I have advanced the money, I cannot demand it from you, without having taken the receipt, which would be requisite to support your demand of repetition.

[769] If I have lent a minor a sum of money, and demand the repayment of it, alleging, that it has turned out to his advantage; the note which I have from him, acknowledging the loan, ought not to be regarded as a sufficient commencement of proof, so as to allow a proof by witnesses, that the money has been advantageously employed; for this would be rendering it easy for usurers to lend money to minors, and to recover it back, by engaging false witnesses to depose, that it had been usefully employed. *Danty*, 11. 4. 3.

[770] A second kind of commencement of proof by writing is, when I have a proof against any one by an authentic writing, to which he was a party, or by a private writing, signed by him, that he was my debtor, but without such writing proving the sum; this is a commencement of proof by writing, which ought to admit me to prove the same by witnesses.

First Example. I demand from you the payment of a hundred crowns. I have your billet which says, *I* promise to pay J. S. the sum of one hundred ——— which he has lent me; the word crowns has been omitted in the note; you pretend that you have only borrowed a hundred sous which you offer to pay me; your note is a commencement of proof by writing, which ought to admit me to give parol evidence of the loan of 100 crowns.

Note, that in default of making such proof I could only demand 100 sous, according to the rule, *semper in obscuris quod minimum est sequimur.* Observe also, that in order to admit me to give parol evidence, it is requisite that there should be some probability in the amount of the sum which I pretend to have lent; therefore in the case supposed, I should not be admitted to prove by witnesses, that I had lent you a hundred thousand livres.

Another example of commencement of proof by writing; I demand from you a hundred pistoles, which I pretend that I have left in your custody as a deposit; I have no act of this deposit, but I have your note by which you acknowledge yourself to be my debtor, but without expressing for what sum, in these terms; *I will satisfy you with respect to what you know;* this letter does not contain a proof of the deposit of 100 pistoles, but it proves that you are my debtor; this is a commencement of proof by writing, which ought to admit me to proof by witnesses. *Arrêt* reported by *Chassonée*, and cited by *Dante*, 11. 1. 14.

[771] Private writings not signed form a third kind of commencement of proof, by writing, of what they contain against the

person who has written them. For instance, I demand from a person thirty pistoles, which I pretend that I have lent him; I produce a note, by which he acknowledges the loan, written in his own hand, and dated, but not signed; this note is not sufficient to prove the loan; but it may according to circumstances, form a commencement of proof by writing, sufficient to authorise a proof by witnesses.

A fortiori, an acquittance written by the creditor, though not signed, of which the debtor is in possession, is a commencement of proof by writing of payment, which ought to admit the debtor to proof by witnesses, the proof of liberation being more favourable than that of obligation. *Danty*, 11. 1. 7.

Observe, however, that for an unsigned acquittance to be allowed as a commencement of proof, by writing of the payment of a debt, it is requisite that the debt in discharge of which the payment is made should be expressed; a vague unsigned receipt is not any commencement of proof by writing.

In certain cases, an acquittance, though not signed, is a full proof, as when it is written in the journal of the creditor, or on the back of the promise.

[772] According to the principles which we have laid down, the commencement of proof by writing ought to result, either from a public act, to which the person against whom the proof is offered was a party, or from a private act, signed, or at least written by him.

An act written by the party requiring the proof, cannot serve him as a commencement of proof, because no person can make evidence for himself.

From this however we must except the books of tradesmen, which, when they appear to be in proper order, are a commencement of proof in favour of those who have written them, as we have observed *supra*, ch. 1. Art. II. § 4.

[773] The writing of a third person cannot be such a commencement of proof as the ordonnance requires; for such third person is as a witness, and what he has written can only be equivalent to his parol testimony. Hence arises the decision of the question, whether the acknowledgment which a widow makes by her inventory, of a debt due from the community, is to be regarded as a commencement of proof by writing against the heirs of her husband? I do not think it is: for the widow can only be regarded as a witness, with respect to the heirs of her husband and the part demanded from them; and consequently her acknowledgment, so far as regards the heirs, does not amount to more than the deposition of a witness, and ought not, as it should seem, to form a commencement of proof by writing against them. Nevertheless, *Vrevin* upon the art. 54. of the ordonnance of *Moulins*, states an *arrêt*, which in consequence of such an acknowledgment of the widow, admitted a proof by witnesses against the heirs; but this *arrêt* was given at a time when the minds of people were not habituated to the disposition of the ordonnance of *Moulins;* which at that time was regarded as a law, contrary to the

common law of the kingdom, and which could not be too much restrained.

It is the same with respect to an acknowledgment of a debt by one of the heirs, of a debt of the deceased; which is no commencement of proof against his co-heirs.

[774] Hence also arises the decision of the question, whether an act received by an incompetent notary, is a commencement of proof in writing, of what is contained in it against the parties who are said to have contracted, when the act is not signed by the parties, they being unable to sign? I think it is not: for an incompetent notary, being only a private person at the place where he has acted, his act can only be equivalent to the deposition of a witness, when the parties have not subscribed it. If the parties had subscribed it, it would, as we have observed, be good as a private writing.

I think the same decision should take place, when the writing is defective for want of some formality, as if a notary had received it without the assistance of witnesses; for, the notary not having comported himself as a public person, his act cannot be regarded as the attestation of a public person, and is only equivalent to the simple deposition of a witness, *supra, n.* 740. *in Fin.*

ARTICLE V.

Third Principle. A party who could not procure Proof by Writing ought to be admitted to give Parol Evidence.

[775] The ordonnance of *Moulins*, confirmed by that of 1667, did not, by ordaining that acts shall be made in writing, intend to require an impossibility, or even to require any thing which was too difficult, and which would cramp and hinder commerce, therefore it only excluded those from giving proof by witnesses, who might easily have procured proof in writing.

Whenever then it was not in the power of the creditor to procure a written proof of the obligation contracted in his favour, parol evidence of the fact inducing such obligation ought not to be refused, to whatever sum the object of the obligation may amount.

[776] According to this principle, parol evidence of injuries and neglects (*delicta et quasi delicta*) can never be refused; whatever may be the amount of the reparation which is demanded; for it is evident that it was not in the power of the person suffering from them to procure any other.

[777] For the same reason, every one is allowed to give parol evidence of the frauds which have been practised against him. For instance, parol evidence ought to be admitted of secret agreements, for giving the property of a party deceased, to persons who are prohibited from receiving it, in fraud of his heirs; for it is evident that it is not in the power of the heirs to have proof in writing of such fraud.

[778] It is the same with respect to the obligation arising from a quasi contract, as such obligation arises without the act of the persons in whose favour it is contracted, and it was not in his power to procure written evidence of it: he ought not to be precluded from proving the fact which he alleges by witnesses.

For instance, if a person during my absence occupies my lands, gets in the harvest and vintage, and sells the produce, he ought to give me an account of this administration; if he denies such administration, I ought to be allowed to prove it by witnesses; for I could not procure any other proof.

[779] There are also certain agreements made under particular circumstances, which hardly allow of an act being made in writing, when they take place, and of which the ordonnance therefore allows parol evidence, whatever may be the value, of the object.

Such are deposits made in case of necessity, as fire, shipwreck, tumults, &c. The ordonnance of 1667, *tit.* 20. Art. 3. expressly exempts these from the disposition which excludes parol evidence, in cases exceeding the value of 100 livres.

For instance, if in case of a fire, the owner of a house deposits the goods which he saves with his neighbours, and they deny such deposit, he will be admitted to prove it by witnesses, whatever may be the value of the goods deposited. For the precipitation, with which he was obliged to make the deposit, would not allow him to procure a proof in writing.

It is the same when in case of a civil commotion, or an incursion of enemies, I get my furniture out by a back way, and intrust it with the first person I meet with to save it from the enemy, or the insurgents, who are just entering at the front of my house; or when a vessel is driven on shore, and I hastily confide my goods to any body who is at hand; in all these cases, it is evident that it would be impossible to procure a proof in writing, and therefore the ordonnance of 1667 allows a proof by witnesses.

[780] For a similar reason, the ordonnance in the same title Art. 4. allows proofs by witnesses, of deposits made by travellers with innkeepers, for it is not usual for acts in writing to be made of such deposits, and an innkeeper would not have leisure to make an inventory of all the articles intrusted with him by travellers, who are daily and hourly arriving.

ARTICLE VI.

Fourth Principle. A person who has accidentally lost a written Proof may be allowed to give Parol Evidence.(a)

[781] The same reason which renders it necessary to receive parol evidence, from a person who could not procure evidence in writing, also makes it necessary when the party, by some

(a) See Appendix, No. XVI. § 5.

unforeseen accident, has lost the instruments which would furnish him with written evidence.

For instance, if in the case of a fire, or the pillage of my house, I had lost my papers, among which were the notes of my debtors, to whom I had lent money, or the acquittances for sums which I had paid to my creditors; whatever the amount of such notes or acquittances might be, I ought to be allowed to give parol evidence of the sums which I had lent or paid, because it is by an unforeseen accident, and without my fault that I have lost the notes and acquittances, which would have furnished me with written evidence.

I may make this proof by witnesses, who depose that they have seen in my hands, before the fire, the notes of my debtors or the acquittances of my creditors, whose hand-writing they are acquainted with, and of which they remember the contents; or who depose to any knowledge of the debt or the payment.

But before the judge can admit this proof, it is requisite that the accident which has occasioned the loss of the writings should be clearly established. For instance, in the case above supposed, it is necessary that it should be admitted that my house has been burned, or pillaged, or that I should be in a condition to prove it, before I could give parol evidence of the loan or payment.

If the person who demands permission to give parol evidence, only alleges that he has lost his titles, without any proof of an inevitable accident occasioning such loss, he cannot be allowed to give parol evidence of the titles having existed; otherwise, the ordonnance which prohibits parol evidence, in order to prevent the subornation of witnesses would become illusory; for there would be no more difficulty in a person, who wished to prove by witnesses a loan or a payment that had never taken place, suborning witnesses who would say that they had seen the notes or acquittances in his possession, than in suborning them to say that they had seen the loan or payment of the money.(*a*)

ARTICLE VII.

In what Manner the Proof of witnesses is made.(*b*)

[782] When a creditor demands permission to prove the obligation which he alleges any person to have contracted in his favour; and in like manner, when a debtor offers proof of having paid the money which is demanded from him; if the proof is admissible according to the principles stated in the preceding articles; the judge gives an interlocutory sentence, by which he permits the party to give the parol evidence that he requires; the other party being at liberty to prove the contrary.

This sentence is called an appointment to make inquests. In execution of the sentence, the parties ought within the time, and accord-

(*a*) See Appendix, No. XVI. § 5. (*b*) See Appendix, No. XVI. § 10.

ing to the forms prescribed by the ordonnance of 1667, *Tit.* 22, to produce the witnesses and have them examined before the judge, or a commissioner; and an act is made of their depositions which is called an inquest.

[783] For the inquest to be allowed as containing a sufficient proof of the fact, which the party has undertaken to prove, it is requisite that such fact should be proved by at least two witnesses, whose depositions are valid.

The testimony of a single witness is not allowed as a proof, however worthy of credit he may be, and whatever may be the dignity of his situation, *etiamsi præclaræ curiæ honore præfulgeat. L.* 9. *Cod. de Testib.* But a single witness makes a semi-proof, which, being supported by the oath of the party, may sometimes, in matters of very slight importance, be admitted as sufficient.

It is upon this principle that our custom of *Orleans, Art.* 156, decides, that when a person suffers his beasts to depasture in the land of another, where they commit some damage, the proof of the obligation resulting from this damage may be made by one witness, and the oath of the complainant, provided he does not claim more than 20 sols, if the damage has been committed in the day, or 40 sols if it has been committed in the night. See the articles 160, and 161.

When a person makes two different claims, which he has been admitted to prove, it is requisite that the proof of each should be made by two witnesses; if he examines two witnesses, one of whom only speaks to one claim, and the other to the other, there is no proof of either.

It would be the same, if the debtor had been admitted to the proof of two different payments; it would be requisite that each payment should be proved by two witnesses.

What, if I were admitted to the proof of one single demand, and in order to prove it were to examine several witnessess, who each deposed of different facts in support of my claim, but each fact was only proved by one witness; would the conjunction of all these witnessess, each speaking to a seperate fact, be a sufficient proof of the demand? For instance, if I were admitted to prove that I had lent you ten pistoles, and one witness deposed that he was present at the loan, and another that he had heard you acknowledge the debt; would these separate witnessess of each fact form a proof of the loan? *Cravett de Antiq. Temp.* 17. *tom de Tract. p.* 175. *n.* 15. *& seq.* decides in the affirmative. The reason is, that as your acknowledgment supposes the existence of the loan, the deposition of the second witness concurs with that of the first in attesting such loan; the loan then, which is the only fact that I am to prove, is attested by two witnesses and consequently fully proved.

It would be the same if neither of the witnesses had been present at the loan, and the first witness deposed to an acknowledgment at one time, and the second at another; the loan would be fully proved by the deposition of two witnesses; for they both agree in deposing to a knowledge of the loan; as the time of making the acknowledgment is immaterial, so far as relates to its verifying the loan, it ought

to be immaterial, whether they both depose to one acknowledgment made at one time, or each deposes to a different acknowledgment made at different times; it is sufficient that they both depose to a knowledge of the debt, and it is of no importance how that knowledge was acquired; whether by one and the same acknowledgment in the presence of them both, or by separate acknowledgments in the presence of each.(a)

[784] Although two witnesses are sufficient for the proof of a fact, nevertheless, as the party who is admitted to prove is not sure what the witnesses will depose, he may examine as many as ten upon one fact; the examination of a greater number ought not to be allowed for in the taxation of costs.(b) *Ordin. of* 1667. *t.* 22. *Art.* 21.

[785] For a deposition to be valid it is requisite, 1st. That it should not be defective in point of form, otherwise it is declared void, and the judge pays no regard to it. See as to these forms the ordonnance of 1667. *t.* 22.

Observe, that when the deposition of a witness is declared null, on account of the act of the judge, who has omitted some of the formalities prescribed for the examination of the witnesses, the witness may be examined again, *Tit.* 22. *Art.* 36. but not when the nullity proceeds from the party who has neglected the observance of any proceedings directed for the completion of inquests.

2d. There must not be any exception against the person of the witness; we shall see the cause of exception in the following article.

[786] 3d. The deposition should not contain any thing to induce a suspicion of its sincerity. Therefore a deposition ought to be rejected, when it contains contradictions or facts beyond the reach of probability.

Above all, it is requisite that the witness, who says he has a knowledge of any fact, should show how he has such knowledge. *L.* 4. *Cod. de Test.*(c) *Barth. ad d. l.* For instance, if I would prove that you had sold me such a thing, it would not be sufficient for the witness to say in vague terms, that he knew you had sold me that thing; he should state how he had that knowledge; for instance, that he was present at the agreement; or that he had heard you say you had made such a sale; if he said that he knew it from a third person, his deposition would not be any proof.(d)

[787] A proof which a party makes by the deposition of two or more witnesses, who support what he has advanced, is not valid, except so far as it is not destroyed by the inquest of the other party. For instance, if upon a demand of damage upon an insult or reproach (*d' injuries,*) I examine witnesses, who say that they were

(a) See Appendix, No. XVI. § 11.

(b) This phrase may be thought wholly *English;* but the original expression is *taxe depens.*

(c) Sola testatione prolatam, nec aliis legitimis adminiculis causam adprobatam, nullius esse momenti certum est.

(d) See Appendix, No. XVI. § 12.

present at the quarrel, and that you had said such and such things, which I had not retaliated; and on your side, witnesses are examined, who says that it was I who used such language to you, and that you had not retaliated; the inquests mutually destroy each other, and there is no proof on either side.

But if my witnesses were more numerous than yours, and were respectable persons, of known integrity, whilst yours were of the dregs of the people, the proof resulting from my inquests ought to prevail, and not to be destroyed by yours. *L.* 3. *§.* 1. *ff. de. Test. numerus testium dignitas & autoritas confirmat rei de qua quæritur fidem.*

ARTICLE VIII.

Of the Quality of Witnesses, and the Exceptions which may be proposed against them. (*a*)

[788] Witnesses produced to prove a fact are not required to have all the qualities which are necessary in those who are called upon to be present at the execution of written acts, in order to give them proper solemnity; women, foreigners not naturalized, members of ecclesiastical communities (*religieux profès,*) are admitted to depose in judical examinations. The reason of this difference is, that there is a power of selecting witnesses to complete the solemnity of acts; whereas no person can be brought to depose upon a matter of fact, but those who have a knowledge of it.

The causes of exception which may be proposed against a witness, so as to exclude his testimony, may be referred to four heads; want of reason—want of good fame—suspicion of partiality—and suspicion of subornation.

Of Want of Reason.

[789] It is clear, that the deposition of an infant child, and of a person out of his senses, ought to be rejected.

With respect to children approaching the age of puberty, and who consequently begin to have some use of reason, their depositions ought not to be indiscriminately rejected, but it ought to be left to the prudence of the judge, who may admit their evidence, when it is well connected, and the fact which they speak to is not beyond the reach of their judgment.

Those who pretend indiscriminately to reject the evidence of persons under the age of puberty, rely upon the law 3. § 5. *ff. de Test.*,(*b*) which excludes their evidence upon a capital charge of public

(*a*) See Appendix, No. XVI. § 13.

(*b*) Lege Julia de vi cavetur; *Ne hac lege in reum testimonium dicere liceret, qui se ab eo, parenteve ejus liberaverit, quive impuberes erunt; quique judicio publico damnatus est, qui eorum in integrum restitutus non erit; quive in vinculis custodiave publica erit; quive ad bestias ut depugnaret, se locaverit: quæve palam quæstum faciet, feceritve; quive ob*

violence; but I do not think that ought to be regarded as a general decision, and applied to civil questions.

Of the Want of good Fame.

[790] The depositions of those who are rendered infamous by any condemnation, ought to be rejected; this is taken for granted by the ordonnance of 1667, *Tit.* 23. *Art.* 2.

Not only the loss of a state of good fame, but even the suspension of that state, by a decret for the apprehension of a person, is a ground for rejecting his deposition; because for a witness to be worthy of credit, it is not sufficient that he should be free from crime, he must also be free from all legitimate suspicion.

It is the same also with respect to a decret of personal adjournment, when the accusation, from its nature, may induce an infamous punishment.

The ordonnance of 1667, in the article above cited, considers a decret as well as a condemnation as sufficient ground for the rejection of a witness.(*a*)

Of the Suspicion of Partiality.

[791] The suspicion of partiality is a just cause of exception against the deposition of a witness; witnesses, to be worthy of full credit, ought to be entirely disinterested.

Upon this foundation, the depositions are rejected, 1, of those who have any personal interest in the decision of the cause, although they are not parties to it.

For instance, if in consequence of a commencement of proof, in writing, I am admitted to give parol evidence, that you have sold me a certain estate, the deposition of the lord, of whom the estate is held, ought to be rejected, because he has an interest in the decision of the cause, on account of the profits which would be due to him, if it should be adjudged that there was a sale.

[792] 2. Upon the same foundation we reject the depositions of witnesses, who are related to or connected with both, or either of the parties, as far as the fourth degree of collaterals inclusive. Ordonnance of 1666. *Tit.* 22. *Art.* 11.(*b*)

Observe that relatives or connections of a party cannot depose in his favour, even against him; kindred and alliance induce a supicion of either amity or hatred, either of which is repugnant to impar-

testimonium dicendum pecuniam accepisse judicatus vel convictus erit. Nam quidam propter reverentiam personarum, quidam propter lubricum consilii sui, alii vero propter notam & infamiam vitæ suæ, non admittendi sunt ad testimonii fidem.

(*a*) A decret is the ordonnance of a judge, by which he cites the accused to answer the accusation against him.

A decret de puse de corps, answers to a warrant; a decret d'ajournement personnel, to a summons.

(*b*) Parentes et liberi invicem adversus se nec volentes ad testimonium admittendi sunt.

tiality; *suni apud concordes excitamenta charitatis inter iratos vero incitamenta odiorum.* This is the reason assigned in the *procès* verbal of the ordonnance.

It appears by this *procès* verbal, that the disposition met with considerable opposition, and passed against the opinion of the first president and the other magistrates of the parliament. By the *Roman* law, only fathers and mothers and children were excluded giving evidence against each other. *L.* 4. *Cod.*(*a*) *de Test. L.* 9. *ff. h. tit.*(*b*) All collateral relations were admitted, except that in criminal accusations, relations to the degree of children of *second* cousins were not compellable to give evidence against their kindred. *L.* 4. *ff. d. tit.*

[793] Upon the same foundation we commonly reject the depositions of servants, or other domestics, of either of the parties. I say *commonly*, for the ordonnance does not contain an absolute prohibition of admitting these depositions, as it does with respect to relations, but contents itself with directing it to be mentioned at the head of each deposition, whether the witness was a servant or domestic of the parties, and then intimates, that it is left to the judge to act as he thinks proper, and to admit or reject the testimony, according to the different circumstances.

We call those *servants*, (*serviteurs*,) who have wages to do every thing which is ordered, without their being principally appointed to any particular kind of service.

Thus a person may be a servant without being a domestic, such as a gardener or gamekeeper, whom a person living in town has at his country estate; they are not properly his domestics, as they do not live with him, but they are his servants, because he has them at wages, and may command them, when he is in the country, to render him all the services for which they may be qualified.

In this respect, these persons differ from those with whom we make a bargain to do a certain work for a certain sum, such as the persons usually employed in the culture of vineyards; they are not properly our servants, and we have no right to command them, or to require any thing else from them, than the work which they have engaged to do. Therefore it is customary to admit the vignerons of either party as witnesses.

Domestics are those who reside in our house, and eat our bread, whether they are at the same time our servants, such as coachmen, footmen, cooks, &c. or whether they are not properly servants, such as apprentices, clerks to procureurs, &c.

The depositions of servants or domestics are more particularly rejected, when they are examined for and at the request of their masters; for this purpose, it is usual to cite the law 6. *ff. de Test.* which says, *idonei non videntur esse testes, quibus imperari potest ut testes fiant;* this law, however, is not perfectly applicable; it was intended

(*a*) Lege Julia judiciorum publicorum cavetur, ne invito denuncietur, ut testimonium [litis] dicat adversus socerum, generum, vitricum, privignum, sobrinum, sobrinam, sobrino, natum cosve qui in priore gradu sint.

(*b*) Tesdis idoneus pater filio, aut filius patri non est.

for slaves, and for sons under the authority of their father, who were subject to a power from which they could not withdraw themselves;(a) whereas servants with us are free persons.

Upon the same foundation of a suspicion of falsehood, the evidence of the advocate, or procureur of either of the parties, ought not to be admitted. *L.* 25.(b) *ff. de Test.*

Their testimony would be liable to the suspicion of partiality, if they were witnesses in favour of their parties, and there would be an indecency in admitting them as witnesses against them.

For the same reason a tutor, or curator, who in that quality is a party on behalf of his minor, or interdict, cannot be a witness for or against him. Administrators of hospitals and other persons in similar situations cannot be witnesses for or against the hospitals, &c.

But the relations, and even the children of those who are only parties in the qualified character of tutors, or curators, or administrators, and likewise their servants and domestics, may be witnesses: for these persons are not properly parties, but the minor, the interdict, or the hospital, are the parties by their ministry.

For the same reason when a body corporate is a party, the members of it ought not to be received as witnesses; their testimony would be suspected of partiality, if they were witnesses for the community, and it would be indecent to oblige them to be witnesses against it.

But as every member of such a community is a person distinct from the community, according to the rule, *universitas distat a singulis* 7. § 1. *ff. quod cui univ.* there is no objection to the relations or domestics of any such member being admitted as witnesses, where the community is a party.

[795] 5. The suspicion of partiality is in general a sufficient cause for rejecting the depositions of witnesses, who are engaged in any process with the party against whom they are produced. The reason is, that it rarely happens that any litigation is carried on without some bitterness, and that law-suits usually excite a spirit of enmity between the litigant parties.

As criminal procedures more especially excite great enmities, it is clear that the deposition of a witness ought to be rejected, who is the accuser in a criminal process against the party, against whom he is produced. This is conformable to the *novel*, 90. *c.* 7.(c) With respects to civil suits, I do not think that they ought to be indiscriminately regarded as a sufficient cause of exception; if that had been the intention of the legislator, he would have expressed it, as he has

(a) The original passage strongly marks the difference between the terms puissance and pouvoir. "Qui etoient soumis à une puissance a laquelle il n'etoit pas en leur pouvoir de se soustraire."

(b) *Mandatus* cavetur, *ut præsides attendant, ne patroni in causa, cui patrocinium præstiterunt, testimonium dicant.* Quod et in executoribus negotiorum observandum est.

(c) Si vero quis dicat odiosum præsentem ad testimonium sibi constitutum, et approbaverit statim quoniam criminalis inter eos lis movetur: non adsit ad testimonium quis usque adeo intestus est, donec de crimine judicetur. Si vero aliter odiosus esse dicatur, aut conventus pecuniarie: procedat quidem testatio, tempore vero disputationum surventur hujusmodi quæstiones.

done with respect to kindred and connections; from his not having done so, it is to be presumed, that he intended to leave it to the prudence of the judge, to admit or disallow the exception according to circumstances. For instance, he will admit the exception, if the suit is one which involves the whole fortune of the party, *lis de omnibus bonus;* for the animosity resulting from a cause is generally in proportion to the magnitude of the interest. The exception ought also to be admitted, if the cause in which the witness is engaged, though not important in point of value, is one which attacks the good name or probity of a party; but when a cause is of trifling consequence, if the probity of the parties is not at all called in question by it, if it only turns upon mere questions of legal right, I do not think it ought to be considered as a sufficient exception. Such causes are not in their nature calculated to produce enmity, and if they excite any heat, it is but in a slight degree; and it would be judging unfavourably of mankind, to suppose that a trifling warmth in a witness against a party could alter the sincerity of the testimony which he gives, under the sanction of an oath.

The judge ought, above all, to see whether the cause in which a party is engaged with a witness, produced against him, and which he would urge as an exception, is not an affected process, instituted at a time when he foresaw that the testimony of the witness would be offered, and with a view of opposing it, as an exception; when that appears, the judge ought not to pay any regard to the exception.

If the party has seized and taken in execution the property of a witness produced against him, that is also a cause of exception, for the same reason as a process between them, since it has a still greater tendency to excite a spirit of animosity.

Of Suspicion of Subornation.

[796] A legitimate suspicion of subornation is also a just cause of exception, for which the deposition of a witness ought to be rejected; there is a cause for such suspicion, and the deposition of the witness is rejected, when it is proved and acknowledged that the party who produces him has, since the appointment for his examination, made him any present; or given him meat or drink at a tavern; but if the witness had only been at the tavern in company with the party, but at his own expense, this would be no ground of exception.

It is also a kind of suspicion of subornation, when it is proved that the party who produces the witness, had sent him his deposition in writing.

See the *arrêt*, 5th vol. of the *Journ.* cited by *M. Jousse*, upon Art. 1 of the said title, 23 of the ordonnance of 1667.(*a*)

(*a*) In *Ambler*, 252, a deposition was suppressed because the attorney for the plaintiff had written down the whole in the exact form of the deposition, before it was taken.

CHAPTER III.

Of Confession, Presumptions, and the Oaths of the Parties.

SECTION I.

Of Confession.

Confession is Judiciary or Extrajudiciary.

§ I. *Of Judiciary Confession.*

[797] A judiciary confession is the acknowledgment which a party makes before a judge, of a fact on which he is interrogated; and of which confession the judge gives an act or written memorial.

The confessions or acknowledgments which the parties make, by acts of precedure signified in the course of an instance,(*a*) may also be considered as a kind of judiciary confession when the procureur has a power from his party to make them; and he is deemed to have such power so long as it is not disavowed.

[798] A judiciary confession made by a person capable of being a party in a cause (*standi in judicio*) is full evidence of the fact acknowledged, and relieves the other party from making any proof of it. Therefore if a debtor who is assigned for the payment of a debt, confesses himself to owe the sum demanded, the creditor is relieved from proving the debt, and may, upon this confession, obtain a judgment of condemnation; *vice versâ*, if the creditor who has an engagement for his debt, makes a judiciary acknowledgment of the payments alleged by the debtor, these payments are regarded as certain facts, and the debtor is not under the necessity of proving them.

[799] Observe, that when I have no other proof than your confession, I cannot divide it. Suppose, for instance, that I claim from you 200 livres, which I allege that you have borrowed, and of which I demand the payment; you admit the loan, but add, that you have repaid it; I cannot found a proof of the loan upon your confession, which is at the same time a proof of payment, for I can only use it against you such as it is, and taking it altogether. *Si quis confessionem adversam allegat, vel depositionem testis, dictum cum sua quantitate approbare tenetur.* Bruneman(*b*) *ad L.* 28. *ff. de Pact.*

[800] The proof resulting from confession is not so decisive against the party who made it, but that it may be destroyed

(*a*) In other words the pleading of a cause.
(*b*) See the observations on answers in Chancery, Appendix, No. XVI. § 4.

by showing it to be founded on mistake; and in this respect, such proof is less than that which results from the presumption, *juris et de jure*, of which we shall treat in the following sections, and which excludes all proof to the contrary.

If, for instance, I claim from you a sum of 200 livres, which I assert that I lent your father, and the only proof I produce is a letter from your father, requesting such a loan, and upon this demand you acknowledge yourself to be my debtor for that sum, such confession is a proof of the debt against you, and whereas, previous to the confession, you might have been discharged from my demand without proving anything, upon merely saying that you know nothing of the loan, and that the letter produced by me is not sufficient evidence of it; the contrary is now the case, and your confession is a sufficient proof to entitle me to a condemnation against you, unless you produce proofs that the loan was not made, and that you had acknowledged it by mistake; as if, for instance, you produce my letter in answer, stating that I could not advance the money, and affirm that you had only found it since your confession; the error under which you made the confession being made out by this letter, destroys your confession and the proof resulting from it; for as a consent founded upon error is not a real consent, according to the rule, *non videntur qui errant consentire*, *L.* 116. § 2. *ff. de R. J.*, so a confession founded upon error is not a real confession, *non fatetur qui errat*, *L.* 2. *de Confessis.*

Observe, that the error in a confession can only be taken advantage of, by proving some fact which has come to the knowledge of the party, subsequent to the making of the confession, as in the case just supposed; but the person who makes the confession cannot allege that he did so under an ignorance of law, for it is his own fault not to have informed himself of that before; therefore the law 2. above cited, after having said *non fatetur qui errat*, adds *nisi jus ignoravit.*(*a*)

This distinction between error of law and error of fact will appear by the following example; suppose a minor, being of sufficient age to make a testament, leaves a considerable sum of money to his preceptor; the heir being assigned, confesses that he owes the preceptor the sum mentioned in the testament; if the heir afterwards finds a codicil containing a revocation of the legacy, his confession occasioned by the ignorance of such codicil, which is an error of fact, is annulled; but if the legacy is not revoked, and he only alleges the confession to have been by error, because he was ignorant of the law which disallows the giving of legacies by minors to their preceptors, this being an error of law cannot be propounded; and the proof resulting from the confession will continue to subsist.

It remains to observe that when a defendant, who has confessed himself to owe the sum demanded, wishes to prove the error of the confession; if the proof of the facts by which he would evince such error requires a long discussion, the plaintiff may require him to be

(*a*) See Appendix, No. XVIII.

condemned, provisionally to pay the sum which he has confessed; for until these facts are proved, the proof resulting from his confession subsists, and the effect of it ought to be provisionally allowed.

§ II. *Of Extrajudiciary Confession.*

[801] Extrajudiciary confession is that which is not made by any judicial act (*qui est fait hors justice.*)

We do not mean to speak here of the confessions which parties make of their obligations, by the act of contract in which they are contained; or by acts of new title and of recognition, which are passed expressly for that purpose. We have treated of the credit given to such acts in the first chapter.

The confessions which we here speak of, are those which the debtor makes either in conversation or by letter, or which incidentally occur in some act not passed expressly for that purpose. *Dumoulin* distinguishes those confessions which my debtor makes to myself, from those made to a third person not in my presence.

When it is to myself that the debtor has confessed the debt, his confession is a complete proof of the debt; but if it were made in a vague manner, and without expressing the cause, it forms, according to this author, no more than an imperfect proof which requires to be confirmed by the suppletory oath, which the judge ought to administer to me.

When the confession is made to a person who represents me, as my tutor or curator, or procureur, &c. it is the same thing as if it had been made to myself.

When it is made to a third person out of my presence, it is only an imperfect proof, which ought to be perfected by a suppletory oath; such are the distinctions made by *Dumoulin, ad. L.* 3.(*a*) *d. de Ribus Credit.*

These principles of *Dumoulin* appear to me to require a distinction: when my debtor, after having admitted in an extrajudiciary manner that he owed me a certain sum, upon being assigned to pay it, denies having ever contracted such debt, the confession which he has already made convicts him of a falsehood and establishes the proof of the debt of which I demand the payment, so that he cannot afterwards be allowed to allege without proof that he had paid the sum, which he at first denied having ever owed.

But if upon being assigned he admits having once really owed me that sum, but insists that he has paid it; whether the confession was made to a third person or to myself, whether in a conversation or a letter, or in some other act not made for the purpose of serving as proof of the debt, it will not be any proof that the money still remains due.

Observe with respect to what *Dumoulin* says, of a confession to a third person being only an imperfect proof of the debt, that there are certain cases in which it ought to make a complete proof.

(*a*) See this law, No. 829 *post.*

Guthierez, de contr. jur. qu. 54. *n.* 5, puts the case where a debtor, making an acknowledgment to a third person, says, he does it to discharge his conscience. For instance, if a man under the apprehension of approaching death, sends for two persons to whom he declares that he owes me a hundred livres, which I had lent him without any written acknowledgment, such a confession, though made to a third person, appears to me to be a competent proof of the debt.

When my debtor, in an inventory made upon the dissolution of a partnership, inserts on the debtor side of the account (*dans le passif,*) the debt which he owes to me; this confession, although not made in my presence, ought also, I conceive, to be a complete proof of the debt.

If the extrajudiciary confession which the debtor makes of the debt in the presence and at the request of the creditor, is a complete proof of the debt, an extrajudiciary confession made by the creditor, in the presence and at the request of the debtor, is *a fortiori* a perfect proof of payment; for as the law favours liberation, it ought to be presumed more easily than obligation. It is the same if the acknowledgment is made by the creditor, in the presence of one who requests it on the part of the debtor, for this is in a manner making it in the presence of the debtor himself, *Guthierez, ibid.*

There are even doctors cited by *Guthierez,* who think that an extrajudiciary confession of payment, made by the creditor though in the absence of the debtor, is a complete proof of payment; but *Guthierez* thinks it only makes an imperfect proof. It ought to depend a great deal upon circumstances.

[802] It is incumbent on the party who offers to prove the existence, or payment of a debt, by the confession of the opposite party, to make out such confession: which he may do either by writing or by witnesses. If, however, the fact which I would prove by your extrajudiciary confession, is a fact of which parol evidence is not admissible, I could not be admitted to give parol evidence of the confession. For instance, if I demand the restoration of a book of the value of more than 100 livres, which I assert that I have lent to you, and I offer an allegation that you have admitted such loan, in the presence of witnesses; I cannot be allowed to prove such confession by witnesses, because that would be indirectly admitting me to give parol evidence, of the loan of a thing of above the value of one hundred livres, which the ordonnance disallows.

[803] A confession can only be evidence against the person who has made it, if he has a capacity to oblige himself; the confession of a married woman not authorized, or a minor, is not any proof.

[804] Confession is a proof not only against the person who makes it, but also against his heirs; nevertheless, if a person confesses himself to owe a debt to another, to whom the law prohibits his making a donation, such confession will not be proof of the debt against his heirs, at least unless the cause of the debt appears to be well supported by the circumstances stated. This case falls within the maxim, *qui non potest donare non potest confiteri.*

[805] A tacit confession ought to have the same effect as one which is express. Therefore as a payment is a tacit confession that a person owes what is paid, it follows, that it is a proof against him that it was really due.

If, therefore, he would reclaim it as having been unduly paid, the person who received it is not called upon to prove that it was actually due; he has a sufficient proof in the tacit confession made by the payment: it lies upon the party who made the payment to prove the mistake. This is the decision of law 25, *ff. de Probat.*(*a*)

Nevertheless *Paulus* whose law this is, states two exceptions to it; the first is, that if the person assigned to make restitution begins by denying the payment, which is afterwards proved, he ought to be obliged to prove that the thing paid was actually due. The reason of this exception is, that the presumption against the debt, which results from a denial of the payment, destroys the presumption in favour of it, resulting from the payment having in fact been made.

Paulus, states a second exception in favour of minors, women, soldiers and peasants. As such persons are easily taken advantage of, he holds it requisite that whoever receives any thing from them in payment, shall be bound to prove that the thing was really due. This exception does not appear to be one which should be indiscriminately admitted. It should depend very much upon circumstances.

SECTION II.

Of Presumptions.

[806] Presumption may be defined to be a judgment which the law, or which an individual makes respecting the truth of

(*a*) Cum de indebito quæritur quis probare debet non fuisse debitum? Res ita temperanda est: Ut si quidem is qui accepisse dicitur rem, vel pecuniam indebitam, hoc negaverit et ipse qui dedit legitimis probationibus solutionem adprobaverit: sine ulla distinctione ipsum, qui negavit se se pecuniam accepisse, si vult audiri compellendum esse ad probationes præstandas, quod pecuniam debitam accepit, per etinam absurdum est, eum, qui ab initio negavit pecuniam suscepisse, postquam fuerit convictus eam accepisse, probationem non debiti ab adversario exigere. Sin vero ab initio confiteatur quidem suscepisse pecunias, dicat autem non indebitas ei fuisse solutas, præsumptionem videlicet pro eo esse qui accepit, nemo dubitat. "*Qui enim solvit nunquam ita resupinus est, ut facile pecunias suas jactet et indebitas effundet,*" et maxime si ipse qui indebitas dedisse dicit, homo diligens est, et studiosus paterfamilias cujus personam incredibile est in aliquo facile errasse, et ideo eum qui dicit *indebitas solvisse* compelli ad probationes quod per dolum accipientis, vel aliquam justam ignorantiæ causam indebitam ab eo solutum, et nisi hoc ostenderit, nullam eum repetitionem habere. § 1. Sin autem is qui indebitum queritur vel pupillus vel minor sit, vel mulier, vel forte vir quidem perfectæ ætatis, sed miles, vel agricultor et forensium rerum expers, vel alias simplicitate gaudens et desidæ deditus; tunc cum qui accepit pecunias, ostendere bene eas accepisse, et debita ei fuisse solutas, et si non ostenderit, eas redhibere. § 2. Sed hæc si totam summam indebitam fuisse solutam is, qui dedit, contendat. Sin autem pro parte queritur, quod pars pecuniæ solutæ debita non esset; vel quod ab initio debitum fuit, sed vel dissoluto debito, postea ignarus iterum solvit, vel exceptione tutus, errore ejus, pecunias dependit: ipsum omnimodo hoc ostendere, quod vel plus debito persolvit, vel jam solutam pecuniam per errorem repetita solutione dependit, vel tutus exceptione suam nesciens projecit pecuniam, secundum generalem regulam quæ, "*eos qui opponendas esse exceptiones adfirmant, vel solvisse indebito contendunt, hæc ostendere,*" exigit.

one thing, by a consequence deduced from another thing. These consequences are founded upon what commonly and generally takes place: *præsumptio ex eo quod plerumque sit cujac: in parat. ad tit. cod. de probat et præs.*

For instance, the law presumes that a debt has been paid when the creditor has returned the debtor his note, because a creditor does not commonly and ordinarily return the note to a debtor, until after payment.

Alciatus says, that the term presumption is derived from *sumo* and *præ*, because *sumit pro vero habet pro vero*, it takes a thing to be true, PRAE *id est ante aliunde probetur*, without any other proof being requisite.

Presumption differs from proof properly so called; the latter attests a thing directly and of itself; presumption attests it by a consequence deduced from another thing. This may be illustrated by examples; the credit which is given to an act, purporting to be an acquittance on the payment of a debt, is a written proof of such payment; the credit which is given to the depositions of witnesses, who have seen the creditor receive from his debtor the sum due to him, is a parol proof of payment; for the acquittance and depositions directly and in themselves attest the fact of payment. But the evidence which acquittances for rent, for the last three years, afford of the rent for the preceding years having been paid, is a presumption; because these acquittances establish the fact, not directly and in themselves, but by an inference of the law, established upon the consideration of its being usual to pay the preceding rent, before the subsequent.

There are, with respect to obligations, different kinds of presumptions: some are established by law, and are called presumptions of law; others not established by any law, are called simple presumptions; of the presumptions of law, some are called *presumptiones juris et de jure*, others simply presumptions of law, *presumptiones juris*.

§ I. *Of Presumptions*, juris et de jure.

[807] Presumptions *juris et de jure*, are those which are such absolute proof as to exclude all evidence to the contrary. *Alciatus* defines a presumption *juris et de jure* as follows: *est dispositio legis aliquid præsumentis, et super præsumpto tanquam sibi comperto statuentis.* It is, says Menochius, *tr. de præs. L.* 1. 9. 3. called *præsumptio* JURIS, because *a lege introducta est*, ET DE JURE, *quia super, tali præsumptione lex inducit firmum jus, et habet eam pro veritate.*

[808] These presumptions *juris et de jure*, amount to more than written or parol proof, or even than confession.

Written as well as parol proof, may be overturned by proof to the contrary; it does not preclude the person against whom it bears, from being allowed to offer contradictory proof, if he can.

For instance, if a person claiming from me a hundred livres, which he alleges himself to have lent me, produces an obligation before a

notary by which I acknowledge the loan; the written evidence arising from this obligation may be destroyed, by an opposite proof which I am not precluded from making, if I can; as by producing a counter-letter, acknowledging that I have not received the sum mentioned in the obligation.

It is the same with respect to confessions, though made *in jure*. We have seen in the preceding section, that the proof which results from these may be destroyed by an opposite proof, of its having been made by mistake.

On the contrary, presumptions *juris et de jure* cannot be destroyed; and the party against whom they operate, is not admitted to prove any thing in opposition to them, as we shall see in the following sections.

The principal kind of presumptions *juris et de jure*, is that which is founded on the authority of *res judicata:* this requires to be treated at length, which will be done *exprofesso*, in the next section.

The presumption arising from the decisory oath is also a kind of presumption *juris et de jure*, of which we shall treat, with other oaths, in the fourth section.

§ II. *Of Presumptions of Law.*

[809] Presumptions of law (*de droit*) are also established upon some law (*loi*), or by argument from some law, or legal authority (*quelque loi, ou texte du droit*), and are therefore called *præsumptiones juris*; they have the same credit as a proof, and render it unnecessary for the party in whose favour they operate to make any proof of his demand or defence; but they differ from presumptions *juris et de jure*, since they do not exclude the party against whom they militate, from being admitted to prove to the contrary; and if he succeeds in doing so, he destroys the presumption.

[810] When two persons of the same province, the custom of which authorises a community of property between husband and wife, intermarry, it is a presumption of law, that they have agreed to have such a community as the custom admits; the wife, therefore, who demands from the heirs of the husband, her share of the property which he has acquired, has no occasion to offer any proof of such agreement.

This presumption is established by the dispositions of the customs, which import that husband and wife are one and common, &c. (*un et communs, &c.*) for it is the same as if they had said, that it should be presumed that they had agreed to become one and common, &c., and it is founded upon its being customary in such province, for persons on their marriage to agree, that there shall be a community, from which the law deduces the inference, that parties who marry, without saying any thing upon this subject, should be presumed to have tacitly made such an agreement, *præsumptio enim ab eo quod plerumque fit:* but this presumption not being *juris et de jure*, does not exclude the proof of a particular agreement to the contrary.

[811] It is also a presumption of law, in our city of *Orleans*, that the walls which separate contiguous properties, are common to the neighbours on both sides, to the height of seven feet from the ground.

The party who would rest any thing upon such wall, cannot be prevented by his neighbour from doing so, and he is not obliged to give any evidence of his right of community, which is sufficiently supported by the presumption established by the custom; but this presumption may be destroyed by the neighbour adducing proof, that the wall belonged exclusively to himself.

[812] The law 3 *Cod. Apoch. de Publ.*(*a*) contains also a presumption of law; it provides that a person, who has acquittances for the tributes of three successive years, shall be presumed to have paid for the time preceding. Although this law relates only to tributes, the decision of it has been extended to arrears of rents, whether seignoral or in lease, and other annual payments, *nam ubi eadem ratio, idem jus statuendum est.* This decision is founded upon the reason, that as it is common to demand those debts first which are of longest standing, a repeated payment of the subsequent debts should induce a presumption of having paid the preceding; it is also founded upon the assistance which ought to be given to debtors, by not obliging them to keep too many acquittances, or to keep them for too long a time, lest any of them may be lost. *Perez. ad d. Tit. Cod.*

There are some who go so far as to say, that the acquittance for a single year induces a presumption of having paid for all the preceding; but this opinion does not appear to be authorised.

This presumption only takes place, when the arrears of the preceding years are due to the same person, who has given the acquittance for the succeeding, and by the same person to whom the acquittances were given; there are also other exceptions. See what we have said on this subject, in the treatise on the *Contract of Hiring*, (*Louage*) Part III. c. I. Art. III.(*b*)

This presumption, not being *juris et de jure*, does not exclude the

(*a*) Quicunque de provincialibus et collatoribus, decurso posthac quantolibet annorum numero, cum probatio aliqua ab eo tributariæ solutionis exposcitur, si trium cohærentium sibi annorum apochas securitatesque pretulerit, superiorum temporum apochas non cogatur ostendere, neque de præterito ad illationem functionis tributariæ coerceatur, nisi forte aut curialis, aut quicunque apparitor, vel optio vel actuarius, vel quilibet publici debiti exactor vel compulsor possessorum vel collatorum habuerit cautionem, aut id quod reposcit deberi sibi, manifesta gestorum adsertione patefecerit.

(*b*) In the passage referred to, the same principles are stated rather more at length. The other exceptions there mentioned are, that the receipts of the annual officers of a public company (*Fabriciers d'une fabrique*) are no presumption of payment having been made for former years to their predecessors, as they have more interest in procuring the payment of what accrues in their own time: and that if *A.* and *B.* are tenants *in solido*, and *A.* agrees with *B.* to pay the future rent; *B.* agreeing to pay the arrears then due, a receipt to *A.* for the three subsequent years, and given for his accommodation in expectation of obtaining the former arrears from *B.*, will be no bar to a subsequent demand of those arrears from *A.*

It is added, that the presumption alluded to, only applies when there are three separate acquittances for different years, and not when there is only one acquittance for three years together.

creditor, against whom it operates, from proving that the former arrears are still due; and that, since receiving the acquittance for the three last years, the debtor has acknowledged the former arrears to be unpaid.

[813] The law 2, § 1, *ff. de Pact.* furnishes us with another example of a presumption of law. This law presumes that a debt is aquitted, when the creditor returns the debtor his note; the presumption is founded upon its not being either customary or probable, that a creditor should return the note before the debt was acquitted; but not being *juris et de jure*, it does not exclude the creditor from proving that the debt has not been paid. We have spoken of this presumption *supra*, *n.* 572.

The presumption of payment, which arises from the note being crossed, *chirographum cantellatum*, is similar to the preceding. It is a presumption of law, founded upon its being an ordinary sign of payment, when a note appears to be crossed, and the debtor is excused from giving other proofs of payment; but this presumption may be destroyed by the creditor proving that the note was crossed by mistake, and that the debt was not really paid; *L.* 24, *ff. de Probat.*(*a*) as if the creditor produced a letter from the debtor in these terms: I return you the note of my late father which you sent me crossed, upon my promise to discharge it, which I am much distressed (*Je suis au desespoir*) that it is not in my power to perform, &c.

[814] The presumption of payment, or release of the seignoral profits on alienation, which arises from accepting the performance of fealty, without making any reservation, is another kind of presumption of law; it is established by the 66th Article of our custom of *Orleans*, and is founded upon its being customary for the lord to make such a reservation when he has not received his profits, and does not intend to remit them; this presumption excuses the vassal from making any other proofs, or producing any acquittance for the payment of the profits; but it does not exclude the lord from proving that the profits are still due, as, by letters in which the vassal acknowledges himself to be indebted for them.

Many other examples might be adduced, but those which we have mentioned will be sufficient.

§ III. *Of Presumptions not established by any Law.*

[815] There are some presumptions, which, without being established by any law (*loi*,) are sufficiently strong to have the same credit as presumptions of law (*droit*,) saving a right the party against whom they militate to make proof to the contrary. The following is a common example: when the party disavows a procurer, who has taken possession for him, (upon a demand, *qui a occupé pour elle sur une demande*) if the procureur is in possession of the

(*a*) Si chirognaphum cancellatum fuerit, licet præsumptione debitor liberatus esse videtur, in eam tamen quantitatem quam manifestis probationibus creditor sibi adhuc deberi ostenderit, recte debitor convenitur.

process upon which the demand is made (*l' exploit de demande,*) and the officer who served the process is not disavowed, this process in the possession of the procureur is a presumption in his favour, equivalent to the proof of a mandate, and is a sufficient ground to overrule the disavowal.

The presumption is still stronger, if the procureur is also in possession of the titles of the party, upon which the demand is founded, and the presumption arising from these titles also precludes the party from disavowing the officer; so, when the procureur of the defendant is in possession of the titles of his party, which were used as a defence in the cause, these titles are a proof of the employment of the procureur.

These presumptions relieve the procureur from giving any other proofs of his mandate; but they do not exclude the party, making the disavowal, from proving, if he can, that he did not authorise the the procureur to take the possession; as if he were to produce a letter from the procureur in these terms: "*I have received the titles which you sent me, for the purpose of consulting our advocate: I shall do nothing without your orders.*" Such a letter, which establishes that the titles were only sent for the purpose of consultation, and by which the procureur submits to wait for directions, previous to forming a demand, destroys the presumption arising from his possession of the title.

Observe with respect to officers, that their having possession of the titles, is a very sufficient presumption of their authority, to make a common assignation or commandment; but it is very dangerous from thence to establish a presumption of the like authority for seizures, executions, and sales; because we every day see officers taking advantage of a writing which is placed in their hands to make a commandment, and, contrary to the creditor's intention, making seizures, the expense of which is ruinous to the debtor, and sometimes also to the creditor.

The other presumptions which we call simple, do not alone and by themselves form any proof; they only serve to confirm and complete the proof which is otherwise given.

[816] Sometimes, however, the concurrence of several of these presumptions united is equivalent to a proof. *Papinian*, in law, 26. *ff.*(*a*) *de Probat.* gives the following example: A sister was charged with the payment of a sum of money to her brother; after the death of her brother, there was a question, whether this was still due to his successor; *Papinian* decided that it ought to be presumed, that the brother had released it to his sister, and he founded the presumption of such release upon three circumstances; 1st. From the harmony which subsisted between the brother and the sister; 2d. From the brother having lived a long time without demanding it;(*b*)

(*a*) Procula, magnæ quantitatis fideicommissum a fratre sibi debitum, post mortem ejus in ratione cum heredibus compensare vellet, ex diverso tamen allegaretur *nunquam id a fratre, quamdiu vixit, desideratum, cum variis ex causis sæpe* [*in*] *rationem fratris pecunias ratio Proculæ solvisset.* Divus Commodus cum super eo negotio cognosceret, non admisit compensationem, quasi tacite fratri fideicommissum esset relictum.

(*b*) I do not think either of these two grounds sufficiently appears from the law

3d. From a great number of accounts being produced which had passed between the brother and sister, upon their respective affairs, in none of which there was any mention of it. Each of these circumstances, taken separately, would only have formed a simple presumption, insufficient to establish that the deceased had released the debt; but their concurrence appeared to *Papinian* to be a sufficient proof of such release.

SECTION III.

Of the Authority of Res judicata.(*a*)

The particular kind of presumption, *juris et de jure*, which results from the authority of *res judicata;* appeared to merit a separate discussion in this section.

We shall see, 1st. What judgments have the authority of *res judicata;* 2d. What judgments are null, and consequently cannot have that authority; 3. What is the authority of *res judicata;* 4th. With respect to what things it operates; 5th. Between what persons.

ARTICLE I.

What Judgments have the Authority of Res judicata.

[1] A judgment to have the authority, or even the name of *res judicata*, must be a definitive judgment of condemnation or dismissal, RES JUDICATA *dicitur quæ finem controversiarum pronunciatione judicis accipit, quod vel condemnatione vel absolutione contingit. L.* 1. *ff. de rejudic.*

A provisional condemnation then cannot have either the name or the authority of *res judicata*, for although it gives the party obtaining it a right to compel the opposite party to pay, or deliver provisionally the money or things demanded, it does not put an end to the cause, or form a presumption *juris et de jure*, that what is ordered to be paid or delivered is due, since the party condemned, after satisfying the provisional sentence, may be admitted in the principal cause, to prove that what he was ordered to pay is not due, and consequently to obtain a revocation of the judgment. *A fortiori* interlocutory sentences, or *arrêts*, cannot have the authority of *res judicata.*

[2] The ordonnance of 1667, *L.* 27. *Art.* 5, specifies three cases, in which definitive judgments have the authority of *res judicata.* It is there said, "Sentences, and judgments having the authority of *res judicata*, are those which are given in the last resort or not appealed from; those against which an appeal is not receivable, either

itself; which does not state anything of the harmony between the parties, or necessarily imports a great length of time.

(*a*) This section not being in the first edition, is distinguished by a separate series of numbers.

because the parties have formerly acquiesced, or because the appeal has not been made within the limited time, and those the appeal from which is declared to be extinct. (*peri*)."

We shall treat separately of these three cases.

First Case.

Of Judgments in the last Resort, or not appealed from.

[3] The ordonnance in this article, couples judgments from which no appeal has yet been made, with those in the last resort, because until such appeal they have a kind of authority *res judicatæ;* similar to that of judgments in the last resort, which gives the party, in whose favour they are pronounced, a right of carrying them into execution, and form a presumption *juris et de jure*, against the other party, which precludes him from alleging any thing in contradiction of them; but this authority, and the presumption derived from it, are only momentary, and cease as soon as an appeal is made.

This is the case even where the sentence ought to be executed provisionally, notwithstanding the appeal, for such execution only gives the sentence the effect of provisional judgments, which as we have already mentioned have not the authority of *res judicata.*

[4] With respect to judgment in the last resort, such as the *arrêts* of the supreme courts, and in certain cases the sentences of presidial and consular judges; they have when definitive a stable and perpetual authority *res judicatæ.*

When the judgment in the last resort is contradictory, (that is when it is given after the appearance of the defendant,) it has this authority, as soon as it is given; but when it is by default, the party against whom it has passed, is allowed eight days from the signification of it to his procureur, or if he has not appointed any procureur, to himself, or at his domicil, to form an opposition. This opposition destroys the effect of the judgment; therefore, judgments by default do not acquire a stable and perpetual authority *res judicatæ*, until the eight days are expired.

[5] *Arrêts*, and judgments, in the last resort can never be questioned, by the ordinary mode of appeal, but *arrêts* may be so in certain cases, by the extraordinary course of *requête civile.*

Presidial judgments in the last resort, may also in the same cases be impeached by a *requête* of opposition which is likewise an extraordinary proceeding, and only differs from a *requête civile*, in not requiring the same formalties, such as making a deposit agreeably to the 16th article, of the last title of ordonnance of 1667; and annexing a consultation, or certificate of the opinion of ancient advocates, according to the 13th article.

As these *requêtes* do not stay the execution of *arrêts*, and judgments in the last resort, (art. 18.) and the party cannot oppose any exceptions to the judgment, except those which are the foundation of

the *requête*, and cannot impeach it on the merits, Art. 31. 37, it follows, that *arrêts* and judgments do not, by being subject to such *requêtes*, lose the authority of *res judicata;* but this authority is not stable and perpetual, since it may be destroyed by the recission of the judgment; it only becomes so when the time for the *civile requête* has elapsed, or when the *requête* has been dismissed, as it cannot be repeated, Art. 41.

[6] The ordonnance expresses the different cases, in which a *civile requête* is admitted, it makes a distinction between minors, and persons of full age, between private individuals, and the church.

The causes for which individuals though of full age, are allowed the benefit of a *civile requête*, are contained in the 34th Art. of Tit. 35; it is there said; "*persons of full age shall not be allowed the benefit of* civile requête, *except in the following cases,*" 1st. *Personal fraud.*

That is to say, when the party in whose favour the judgment was given, used some deceit and artifice to obtain it, as by suppressing decisive writings, or adducing false writings, as will be mentioned hereafter.

2d. If *the procedure directed by us* [viz. *the* king] *has not been followed;* this *vice* renders the judgment null.

3d. If *judgment has been given upon things not demanded, or not contested, or if more has been adjudged than was demanded.* This is also a vice which renders a judgment null, and of which we shall speak in the following article.

4th. If *the court has omitted to pronounce respecting any of the subjects in demand.*

5th. *If there is a contrariety between* arrets *or judgments, in the last resort between the same parties upon the same grounds, and in the same courts or jurisdictions; saving in case of contrariety between different courts or jurisdictions, thé right of obtaining relief in our grand council.*

6th. *If in one and the same* arrêt *there are contrary dispositions.*

7th. *If judgment has been given upon false writings.*

Observe, it is not sufficient to rescind a judgment, that the party in whose favour it has been given, may have produced false writings, it must appear that they were the foundation of the judgment, *causa judicati in irritum non devocatur; nisi probare poteris eum qui judicaverat, secutus ejus instrumenti fidem quod falsum esse constiterit adversus te pronunciasse, L. 3. Cod. si. ex Fals. Instr.*

It is also necessary, that the writings should not have been contested as false, in the procedure upon which the judgment has been given; for in this case, the truth or falsity would be a question already decided by the judgment, and which consequently could not be renewed; as Mr. *Fousse* has properly observed in his commentary upon this article.

But although the party applying to be relieved by *civil requête*, may by mistake have admitted the truth of the writing, of which he now alleges that he discovered the falsity, he is not debarred from

impeaching it, and the judgment founded upon it. *L.* 11. *ff. de Excep.*(*a*)

8th. *Or upon offers or consent which have been disavowed, and the disavowal adjudged to be well founded.*

If my procureur has given a consent, or made offers upon which I have been condemned, and I deny that I have given him authority to make such offers, I may be relieved by *civile requête;* for this purpose I must make a formal disavowal of my procureur, and obtain a judgment declaring the disavowal to be well founded.

9th. *Or if there are decisive writings newly discovered, and kept back by the other side.*

This is an instance of personal fraud, in the party in whose favour the judgment was given, and affording ground for a *civile requête*, as has been already mentioned.

The recovery of these writings is not alone sufficient as we shall see *infra*, Art. 3. The ground of relief is the suppression of them, by the opposite party.

[7] When the *arrêt* is against minors, the church, or communities, there is another ground for *civile requête*, besides those which have been mentioned; that is, if they have not been defended, or not been defended properly (*valablement*) Art. 35.

These terms ought to be interpreted by the plan of the Article 36; which appears in the *proces verbal*, of the ordonnance, *p.* 463, where it is said, "the above provisions shall extend to ecclesiastics, to communities, and minors. And we also allow them the benefit of a *civile requête*, if they have not been defended; that is to say, if the *arrêts* or judgments in the last resort, have been given by default, or foreclusion; if they have not been properly defended, in case the principal points of defence, in fact, or law, have been omitted, although the *arrêts* or judgments were contradictory, or upon the hearing of the parties, so however, that it shall appear that they were not defended, or were not properly defended, and that the omission of the proper defence has been the cause of the judgment."

The *proces verbal*, contains an approbation of this plan. Hence it follows, that it was only retrenched, *brevitatis et compendii studio*, because every thing which it imports, was held to be sufficiently comprised under the general terms.

Observe, that the church is always presumed not to have been sufficiently defended, unless the affair was communicated to the legal officers of the crown; the 34th Article makes the want of this cause of *civile requête*.

Observe also, that the church has these rights only, with respect to

(*a*) Qui adgnitis instrumentis, quasi vera essent, solvit post sententiam judicis: quæro, si post, cognita rei veritate, et repertis falsis instrumentis, accusare vetit, et probare falsa esse instrumenta, ex quibus conveniebatur, cum instrumentis subscripserat ex præcepto, sive interlocutione judicis, an præscriptio ei opponi possit? cum [&] Principalibus Constitutionibus manifeste cavetur, *etsi res judicati esset ex falsis instrumentis, si postea falsa inveniuntur, nec rei judicatæ præscriptionem oppona.* Modestinus respondit: ob hoc. quod per errorem solutio facta est, vel cautio de solvendo interposita proponitur ex his instrumentis, quæ nunc falsa dicuntur, præscriptioni locum non esse.

the substance of its domain, *arrêt* 27 *November*, 1703, reported in the *Journal of Audiences. Jorn.* 3; when the matter only concerns the current revenues, it is considered as the cause rather of the incumbent than of the church.

[8] When the party against whom the *arrêt*, has been given, is entitled to a *civile requête* in any of the above cases; he ought to institute the necessary proceeding for that purpose, within six months, after the signification of the *arrêt* made subsequent to his attaining his majority, Art. 5.

If he dies within that time, his heirs have a new six months from the time of a new signification, and if they are minors, the time only runs from a signification after their majority.

The church, and communities, as well lay, as ecclesiastical, and private individuals, who are out of the realm, on the public service, have a year from the signification of the *arrêt*, Art. 7.

If the incumbent of a benefice dies within the year, the successor has a further term of a year, from the signification of the *arrêt*, Art. 9. a person coming in upon resignation, has only the remainder of the term allowed to his predecessor, and is not entitled to any new signification, it being presumed that he has been apprised of the *arrêt* by the predecessor.

[9] When the *requête* is founded upon the falsity of writings, or upon writings being newly discovered, the term of six months, or a year, only begins to run from the time of the discovery; provided, says the ordonnance, Art. 12, *there are proofs in writing, and not otherwise.*

It is not sufficient then after the expiration of ordinary term, to say, that I only lately discovered the forgery or the existence of the writing; I must also have a proof in writing of the time of discovery.

For instance, if the party in whose favour the *arrêt* was given, dies several years afterwards, and it appears by the inventory of his sealed papers, that the writing which had been suppressed is found amongst them; this is a proof in writing, that the discovery was made at the time of exhibiting the inventory.

So if the party in whose favour the *arrêt* has been given against me, produces the same several years afterwards in another process, in which it is adjudged to be forged, the judgment declaring it to be so, will be a proof in writing of the time of the forgery being discovered.

[10] The causes for which redress may be obtained by *requête*, against *presidial* judgments given in the last resort, are the same as those for which a similar relief may be obtained against *arrêts.*(*a*)

With respect to the time within which the application must be made, the only difference is, that instead of having six months, in the case of private individuals; and a year in the case of the church, of communities, and persons absent, *reipublicæ causa*, the time is limited to three months in the one case, and to six months in the other.

(*a*) The term arrêts is confined to the judgments of the parliaments.

§ II. *Second Case.*

Of Judgments from which the Appeal is no longer receivable.

[11] The ordonnance in enumerating the judgments, which have the force of *res judicata*, and which consequently form the presumption *juris et de jure*, whereof we are treating, mentions, in the second place, those from which an appeal is no longer receivable.

It mentions two circumstances, on account of which the appeal can no longer be received, the first is when the parties against whom the judgment has been given, have formally acquiesced in it.

The ordonnance by the term *formally*, does not mean that in order to exclude the party from his appeal, it is requisite that he should have acquiesced in the judgment in express terms, and have passed an act for the purpose, it only requires that the acquiescence shall be shown in an unequivocal manner; therefore if the party has applied for a term of payment, whether at the time of the judgment or afterwards, it is clear that he is from that time precluded from appealing; as that is an unequivocal mark of his acquiescence in the judgment. *Ad solutionem dilationem petentem acquievisse sententiæ manifeste probatur, L. 5. Cod. de Re. Jud.—à fortiori*, must he be deemed to have acquiesced, when he has entered upon payment, whether of the sum imported by the condemnation, or of the expenses which are decreed against him, at least with the exception of those cases, where the sentence is subject to execution provisionally, and he has paid by constraint, protesting that he does so without prejudice to his right of appeal.

When the party who has acquiesced in the sentence, is in a situation which entitles him to obtain restitution against his acquiescence, on account of minority, fraud, or any other cause, the authority of *res judicata* is not conclusive and perpetual; but is destroyed by such restitution being obtained.

[12] The second cause for which an appeal is no longer receivable, is that the party has suffered the time within which it ought to be made to elapse.

Our laws differ very much with respect to this time, from those of *Rome*. By the *Roman* law, the party who conceived himself to be injured by the sentence, might appeal from it the same day, *vivâ voce* in open court. *Si apud acta quis appellaverit, satis erit si dicat appello. L. 2. ff. de Appell.*

Such an appeal being authorized by the law, the *Roman* magistrates were not offended at the party who was dissatisfied with their judgment, pronouncing his appeal in their presence, provided it was done in a respectful manner, and without any expressions reflecting on the judge or his sentence. *L. 8. ff. de Apel.*(a)

(a) Illud sciendum esse, eum qui, provocavit, non debere conviciari ei a quo appellat: cæterum oportebit cum plecti, et ita Divi Fratres rescripserunt.

When the party did not appeal on the day of pronouncing the sentence, the mode of appeal was by presenting a memorial to the judge, whose decision was appealed from; this memorial ought to contain the names of the appellant, and of the party against whom the appeal was made, the sentence and the grounds of complaint against it, and conclude with praying the judge to transmit letters which were called *apostoli*, before the judge of appeal. The party was only allowed two or three days for making this appeal, when he proceeded in his own name, or three days when he was only party in the qualified character of procureur, tutor, curator, or administrator. *L.* 5. § 5.(*a*) *ff. App. L.* 1. § 11, 12, 13, *ff. quand. App.*(*b*)

The only days included in this computation, were those on which the judge held a public audience, and which were called *utiles d. L.* 1. § 7.(*c*) § 9.(*d*)

Justinian, by his *Novel* 23, *cap.* 1,(*e*) extended this time, and allowed an appeal to be made within ten days from the time of the sentence.

These principles of the *Roman* law, although very opposite to our own, appear very wise and well calculated to promote the tranquillity of society, by shortening litigation. The king of *Prussia* has adopted them in his code, and allows only ten days for appeal, agreeable to the provisions of the *Novel*. The party injured by the sentence suffers no prejudice from the shortness of this delay, it was in his power from the commencement of the process before the first judge, to foresee that he might lose his cause; and he had time during the whole

(*a*) Si quis ipso die, inter acta voce appellavit, hoc ei sufficit; sin autem hoc non fecerit, ad libellos appellatorios dandos biduum, vel triduum computandum est.

(*b*) In propria causa biduum accipitur. Propriam causam ab aliena quemadmodum discernimus? et palam est, eam fuisse propriam causam, cujus emolumentum vel damnum ad aliquem suo nomine pertinet. § 11.

Quare procurator nisi in suam rem datus est, tertium diem habebit: in suam autem rem datus, magis est, ut alterum diem observet, ut si in partem proprio nomine in partem [pro] alieno litigat, ambigi potest, utrum biduum an triduum observetur et magis est ut suo nomine biduum, alieno triduum observetur. § 12. . . . . .

Tutores, item defensores rerum publicarum, et curatores adolescentium, vel furiosi tertium diem habere debent, idcirco quia alieno nomine appellant. Ex hoc apparet, tertio die provocandum defensori, si modo quasi defensor causam egit non suo nomine; cum obtentu alieni nominis suam causam agens tertio die appellare potest.

(*c*) Dies autem istos, quibus appellandum est, ad aliquid utiles esse oratio D. Marci voluit, si forte ejus a quo provocatur, copia non fuerit ut ei libelli dentur; ait enim *is dies servabitur, quo primo adeundi facultas erit.* Quare si forte post sententiam statim dictam, copiam sui non fecerit is qui pronunciavit, ut fieri adsolet, dicendum est nihil nocere appellatori, nam ubi primum copiam ejus habuerit, poterit provocare. Ergo si statim se subduxit, similiter subviendum est.

(*d*) *Adeundi* autem *facultatem* semper accipimus, si in publico sui copiam fecit; cæterum si non fecit, an imputetur alicui, quod ad domum ejus non venerit, quodque in hortos non accesserit & ulterius quod ad villam suburbanam? Magisque est ut non debeat imputari; quare si in publico ejus adeundi facultas non fuit, melius dicetur facultatem non fuisse adeundi.

(*e*) Sancimus omnes appellationes, sive per se, sive per procuratores, seu per defensores, vel curatores vel tutores ventiltentur, posse intra decum dierum spatium à recitatione numerandum, judicibus ab iis quorum interest offerri; sive magni, sive minores sint (excepta videlicit sublimissima prætoriana præfectura) ut liceat homini intra id spatium plenissime deliberare, sive appellandum ei sit sive quiescendum: ne timore instante opus appellatorium frequentetur, sed sit omnibus inspectionis copia, quæ indiscussos hominum calores potest refrænare.

continuance of it, to deliberate upon the course which *he* would take in that event.

[13] According to the principles of the law of *France*, the party who considers himself injured by a sentence, unless he has done some act importing an acquiescence, or has been summoned to appeal or submit, has ten years, which begin to run from the signification of the sentence. Order of 1667, *l.* 27, *art.* 17.

Double this period (that is twenty years) is allowed to the church, to hospitals, colleges and communities, in suits relating to their domains: and this time also begins to run from the signification of the sentence. *Ibid.*

Long as these delays are, I have heard practisers say, that this disposition of the ordonnance was not always observed in the parliament of *Paris*, and that appeals have been sometimes allowed after the time was expired.

The party in whose favour the sentence has passed, may abridge these delays, by summoning the other party to appeal, if he thinks fit; but this summons cannot be made until the expiration of three years, in case the sentence is against private individuals; or six years, if it is against the church, or any community on account of their domains. Order 1667, *d*, *tit. art.* 12.

The effect of this summons is, that no appeal can be received after the expiration of six months, from the time of its being served.

If, before the expiration of three years, or six years, or six months, the party against whom the sentence has been given dies, or (if he is an ecclesiastic) resigns his benefice, his heir, or universal legatee, or successor, ought to have a year, from the expiration of the time, allowed to the person whom he has succeeded, and a summons ought to be served upon him at the end of this additional year, even where there has been already a summons to the deceased, or the predecessor, and the heir, or successor, will only have six months from the time of this summons, *Art.* 12, 13, 15.

These terms do not run against minors, but they run against persons out of the realm, even on the public service.

§ III. *Of Judgments against which the Appeal is declared to be lost.*

[14] The ordonnance places, thirdly, amongst judgments having the force of *res judicata*, those from which the appeal is declared to be lost.

The appeal is lost when it has been discontinued for three years, and a judgment has been obtained declaring the right of peremption to be acquired.

This judgment has the effect of a confirmation of the sentence appealed against, and gives it the force of a *res judicata*, as the appellant is precluded from renewing his appeal.

This is not attended with any difficulty, when the tribunal where the appeal was depending, is a tribunal in the last resort; the judgment of peremption being in that case a judgment in the last resort,

gives the force of *res judicata* to the judgment, which is thereby confirmed. When the tribunal where the appeal was depending is not of the last resort, there may be an appeal to a superior tribunal; but upon this appeal the judges are only to examine whether the peremption was acquired, and if it appears to them that it was, they ought to confirm the sentence without enquiring into the merits of the original judgment; if, on the contrary, it is decided that the peremption was not acquired, the parties are referred back to the former tribunal to proceed upon the original appeal.

Appeals which are not contested may fall into peremption as well as those which are.

The assignation before the judge of appeal, though not followed up by any other proceeding, is in itself sufficient to render the appeal subject to peremption, and the party in whose favour the sentence was given, may, at the end of three years, from the service of the assignation, obtain a judgment of peremption. This was fixed by a regulation of the court, of the 28th of *March*, 1692.

When the assignation has been followed by any proceedings, the three years are only computed from the time of the last proceeding.

This term runs even against minors, saving their recourse against their tutors. *Bouchel*, in his *Bibliotheque verbo peremp.* states several decisions to that effect.

The term may be interrupted in several different manners, by the death of either of the parties, by their change of state, by the death of one of the procureurs, &c.

[16] Although the time has elapsed, the peremption is not acquired until there is a judgment declaring it to be so, and if after the expiration of the time, and before such judgment, there is any procedure on behalf of the party against whom the appeal was preferred, and he does not disavow his procureur, the peremption is destroyed, and cannot be opposed until the expiration of a further term of three years.

ARTICLE II.

Of judgments which are null, and which consequently cannot have the authority of Res judicata.

[17] There is a great difference between a judgment which is null, and one which is improper: a judgment is null when it is not according to the regular form of proceeding, *sententia injusta;* it is improper *sententia iniqua* when the judge has made a wrong decision; as by condemning a party to pay what he did not owe, or discharging him from the payment of what he did; an improper judgment, given according to the regular form, may have the force of *res judicata*, when it falls within any of the cases of the preceding article, and however unjust it may really be, it is to be regarded as equitable, and no proof can be admitted to the contrary.

On the contrary, a judgment which is null, and given contrary to

the regular form of procedure, cannot have the authority of *res judicata*, at least unless the nullity has been cured.

A judgment may be null in respect either of what it contains, or of the parties between whom it has been given, or of the judge who has given it, or of the non-observance of the proper course of procedure.

§ I. *Of Judgments which are null in respect to what is contained in them.*

[18] A judgment is null when the object of the condemnation which it pronounces is uncertain, *sententia debet esse certa*, for instance, if a judgment were expressed in the following terms: "We condemn the defendant to pay the plaintiff what he owes him." It is evident that such a judgment would not have the authority of *res judicata*, and would be absolutely null; for what is due to the plaintiff not being specified, either in the judgment or in any act, to which it refers, the judgment has no certainty, this is decided by the law, 3 *Cod. de Sent. quæ sine certâ quant.* "*Hæc sententia* omnem debiti quantitatum cum usuris competentibus solve *judicata actionem præstare non potest, cum apud judices ita demum sine certâ quantitate facta condemnatio autoritate rei judicatæ censeatur, si parte aliquâ actorum certa sit quantitas comprehensa.*"

[19] It is not however necessary that the object of the condemnation should be expressed by the judgment; it is sufficient if it appear by any act to which the judgment refers. For instance, a judgment condemning the defendant to pay what is demanded from him, is valid and may have the authority of *res judicata*, when the cause of the demand is expressed on the proceeding to which the judgment refers. *Cum judex ait, solve quod petitum est valet sententia. L.* 59. § 1. *ff. de Re Judicat.*

[20] Neither is it necessary that the object of the condemnation should be liquidated, it is sufficient if it may become so by reference to experts; therefore a judgment which condemns the defendant to pay damages, or to indemnify the plaintiff, may have the authority of *res judicata;* although the amount of the damages or the indemnity, being as yet unliquidated the object of the condemnation is not liquidated and certain; for it will become so by the estimation to be made by the experts. This is decided by *Alexander Severus*, "*Quamquam pecuniæ quantitas sententiâ non contineatur, sententia tamen rata est, quoniam* INDEMNITATE *reipublicæ præstari possit. L.* 2. *Cod. de sent. quæ sine certâ quant.*

[21] 2. A judgment is null when the object of the condemnation is any thing impossible. *Paulus respondit, impossibile præceptum judicis nullius esse momenti. L.* 3. *ff. Quæ sent. Idem respondit, ab ea sententia, cui pareri rei natura non potuit, sine causa apellari. d. l.* § 1.

[22] 3. A judgment is null when it pronounces any thing which is expressly contrary to law, *si expressim sententia contra juris*

rigorem data sit. Si SPECIALITER (that is expressly) *contra leges, vel Senatus consultum, vel constitutiones fuerit prolata. L.* 19. *ff. de Apell. Cum contra sacras constitutiones judicatur, appellationis necessitas remittitur. L.* 1. § 2. *ff. quæ sunt sine apell.*

Observe, that the judgment is only null if it pronounces expressly against the law; if it declares that the law ought not to be observed; but if it merely decides that the case in question does not fall within the law, although in truth it does so, the judgment is not null; it is only improper, and consequently can only be avoided by the ordinary course of appeal: this is laid down by *Callistratus*, "*Quum, prolatis constitutionibus, contra eas pronunciat judex, eo quod non existimat causam de qua judicavit per eas juvari. non videtur contra constitutiones sententiam dedisse, ideoque ab ejusmodi sententiâ apellandum est, alioquin rei judicatæ stabitur. L.* 32. *ff. de re judicat.*

Observe also, that judgments, which pronounced expressly against the laws, were, with the Romans, null *pleno jure;* with us, relief must be obtained against them by an application to the Council, when it cannot be had by the ordinary course of appeal.

[23] 4. A judgment is null when it contains inconsistent and contradictory dispositions. For instance, an action is brought to recover from me an estate which I have purchased from you, whereupon I vouch you to warranty, the judgment dismisses the demand against me, and condemns you to pay me the price of the estate, with damages. These two dispositions are contradictory, and the judgment is null, and the demandant may, if it is a judgment in the last resort, be relieved by *civile requête*, upon the ground that the judgment is contradictory, and contains a disposition which, by condemning the person vouched to warranty, is inconsistent with the disposition which he complains of, as dismissing his demand. If he allows the time for a *civile requête* to go by, the judgment will against him acquire the force of *res judicata*, but I think that, although you have not had recourse to a *civile requête*, I can never put the judgment in execution with respect to you, because the dismissal of the demand against me is always repugnant to the condemnation against you, as it is contrary to good faith, that whilst I retain the property; I should demand from you the price of it.

[24] 5. A judgment is null, when it pronounces upon what is not in demand, or condemns a party to the payment of more than is demanded from him; for the judge is only to decide upon the demands which are brought before him, and therefore can only give judgment in respect of such demands. *Potestas judicis ultra id quod in judicium deductum est, nequaquam potest excedere. L.* 18. *ff. Comm. Div.*

[25] And in like manner a judgment is null when it dismisses the defendant from a demand in which he has acquiesced; for in this case, as well as in the other, the judge has decided upon what was not submitted to him. The ordonnance of 1667, *tit.* 35, *art.* 34, has combined these two cases, by directing, that a *civile requête* shall be allowed, when judgment is given upon what is not demanded or contested.

[26] These nullities, which arise from the judge having decided upon what was not submitted to him, do not operate *pleno jure;* they ought to be taken advantage of, either by the ordinary course of appeal, when the judgment is not in the last resort, or by *civile requête* when it is; and when the party has allowed the time for these to elapse, without impeaching the judgment, the nullities are cured.

§ II. *Of Nullities in respect of the Parties between whom Judgments are given.*

[27] A judgment, to be valid, ought to be given between persons capable of being parties in a judicial proceeding, or as it is expressed, of standing in judgment, "*quæ habent legitimam standi in judicio personam.*"

All procedures by, or against persons incapable of being such parties, as well as the judgments founded upon such procedures, are *ipso jure* void.

[28] Persons incapable of being parties are, 1st. those who have lost their civil state, either by a condemnation to capital punishment, or by religious profession; nevertheless ecclesiastics who have left their children to serve a benefice, such as *curés*, and regular canons, are deemed capable of being parties to a suit, either as plaintiffs or defendants; for although their benefice does not restore them to their civil state, nevertheless, as the administration of the revenues, and the right of the benefice, as well as their own provision from it, are committed to their charge, it is necessary that they should be enabled to be parties in judicial proceedings, respecting those revenues and rights, and in actions arising from penal obligations, contracted by them, or in their favour.

[29] Minors, who are under the authority of a tutor, are also incapable of being parties in a suit; the actions in which they are concerned can only be brought by their tutors, in the quality of tutor, and those against them can likewise only be brought against their tutor, in his quality as such, and not against themselves.

When the minor has not any tutor, a person who wishes to institute a proceeding against him, ought to present a memorial to the judge of the *domicil* of the minor, praying him to convene the relations of the minor, for the purpose of appointing a tutor, against whom the action may be brought.

When minors are emancipated, they may be parties themselves, but it must be with the assistance of a curator, who is to be named for that purpose by the judge, and ought to be included in the cause.

[30] Women, under the authority of a husband, cannot in the customary provinces, sue or be sued, without being authorised by their husbands, or in case of their refusal by the court. Therefore it is not sufficient for those who have a cause of action against a married woman, to assign her, without assigning her husband also.

A wife is deemed to be sufficiently authorised when her husband is

a party with her in the cause; and in this respect judicial acts are different from those which are extra-judicial; for the contract of a married woman is not valid from the mere circumstance of her husband being a party with her to the contract; it is requisite that he should authorise her in express terms.

The rule that a married woman cannot sue, or be sued, without being authorised is subject to some exceptions. Our *Custom of Orleans*, *art.* 200, permits her to proceed without her husband on account of affronts (*injures*) which she alleges to have been committed against her, and to defend herself against actions for affronts which she is alleged to have committed.

[31] It remains to observe, with respect to all persons, who are incapable of being parties to a suit, that this incapacity does not prevent an accusation being maintained against them, when they have committed any crime, and they may defend themselves against such accusation.

[32] From the principle that a judgment could only be valid when given between persons capable of being parties to a suit, it was deduced as a consequence in the *Roman* law, that a judgment against a party, who at the time of giving it was dead, was null; for a person who had no longer an existence could not have any capacity. Upon this principle *Paulus* said, *Eum qui in rebus humanis non fuet sententiæ datæ tempore, inefficaciter condemnatum vidari. L.* 1. *ff. quæ sunt sine App.*

In *France*, when the death of either of the parties has not taken place until the cause was ready for judgment, that is when all the procedures are complete, and the cause has been fully heard, the death of either party does not prevent the judge from giving a valid decision. This is the disposition of the first article of *tit.* 26, of the ordonnance of 1667, which has thus disregarded the subtlety of law, in order to avoid the superfluous delays and expense that would arise from a renewal of the proceeding.

When a party dies in the course of the proceeding, and the procureur notifies his death to the procureur of the other party, which is called an *exoine de mort*, the other party cannot take any further proceedings, and no judgment can be given until the cause has been resumed by the heirs, or other successors of the deceased; or after assigning them to resume it, a judgment has been given that it shall be taken as resumed; and proceedings between the notification of the death and the resumption of the case, and the judgments upon them are absolutely void. *d. tit. art.* 1 & 2. Until the death is signified, the procedure of the other party, and the judgements thereon are valid. *Art.*3.

[33] A judgment is also null when a party has sued or defended, on behalf of another, without being entitled to do so.

For instance, in our province of *Orleans*, where a woman under the rank of nobility, who marries a second time, loses the tutelage of her children, and does not carry it to her second husband, if such a husband, under a mistake, of which I have known some instances, makes a demand on behalf of the children, in the quality of their

step-father, the judgment upon this demand will be null for want of quality.

For the same reason, if a husband, who may institute and defend actions respecting the moveable property of his wife alone, and without her concurrence, supposing by mistake that it is the same thing with respect to her landed estates, institutes or defends any actions relative to these without his wife, in the quality of her husband, the judgment will be void. For the same reason, if a tutor, after his authority is determined, continues to proceed on behalf of the persons who were under his charge, this procedure and the judgment thereon will be nullities.

But if, by the account which he has rendered, he has charged himself with what was owing from the debtors of the minor, he may proceed in his own name against the debtors, as having a cession of their debts.

[34] When I have given any one a special procuration to institute a demand for me, the demand ought to be made in my name; if it were made in the name of the person having the procuration, the procedure would be void; hence the maxim that no persons in *France* can sue by procuration but the king.

§ III. *Of Judgments which are null in respect of the Judges giving them, or on account of the Non-Observance of the requisite formalities.*

[35] A judgment may be null in respect of the judge, by whom it is given, when he was without character, as if he had not been received into his office, if he was under an interdiction, if he was incompetent.

Observe, that the nullity arising from these defects does not opeperate *pleno jure*, but must be taken advantage of by appeal to a superior court.

[36] The non-observance of some formalities may also render the judgment void, of which several examples may be adduced.

[The illustration in the text will not admit of an intelligible translation; the effect of it may be stated, by the case of signing judgment by default, without any appearance being entered by or for the defendant.]

These nullities do not operate *pleno jure*, but must be taken advantage of by way of opposition or appeal, or when the judgment is in the last resort by *civile requête*.

ARTICLE III.

What is the Authority of Res judicata?

[37] The authority of *res judicata* induces a presumption that every thing contained in the judgment is true, and this pre-

sumption being *juris et jure*, excludes every proof to the contrary; *res judicata pro veritate accipitur. L.* 207. *ff. de R. I.*

For instance, the party who is condemned to pay any thing is presumed really to owe it; the party in whose favour the judgment is given, may consequently, after signifying it, compel the other to pay the money, by the seizure and sale of his effects, and no proof can be be received from him in contradiction of the debt.

Vice versâ, when the judgment has dismissed the demand, there arises so strong a presumption, that the things demanded are not due, that the demand can never afterwards be renewed, the judgment produces an exception called *exceptio res judicatæ*, which precludes the demand from being renewed.

[38] As the authority of *res judicata*, excludes all proof in contradiction of what has been adjudged; the party against whom the judgment has passed, is not allowed to offer evidence that the judge has fallen into any error of calculution; *res judicatæ, si sub prætextu computationis instaurentur, nullius erit, litium finis. L.* 2. *Cod. de Re Judicat.*

Nevertheless, if the error appears on the face of the judgment itself, it may be rectified; as if the judgment were to state; "We declare *James* to be indebted to *Peter* in 50*l.* for hay, and in 25*l.* for straw; which sums, amounting together to 100*l.*, we condemn him to pay," this error appearing on the face of the judgment will correct itself, and *Peter* can only demand 75*l.* and not 100*l. L.* 1. § 1. *ff. Quæ sunt sine Apell.*(*a*)

The authority of *res judicata*, so completely excludes all proof to the contrary, that the party against whom the judgment has been given, cannot impeach it even by decisive writings, which have been since discovered, "*Sub specie novorum instrumentorum postea repertorum, res judicatas restaurari exemplo grave est. L. Cod. de Re Judicat.*"

This principle, that a judgment cannot be rescinded on account of writings being afterwards discovered, was in the *Roman* law, subject to an exception, in cases where the judge, on account of the doubtful nature of the cause, had administered the suppletory oath to the party in whose favour he decided; in this case the losing party might be relieved against the judgment upon the ground of decisive writings afterwards discovered. *L.* 31. *ff. de Jurej.*(*b*)

(*a*) Si calculi error in sententia esse dicatur, appellare necesse non est; veluti si judex ita pronuntiaverit: "Cum constet, Titium Seio ex illa specie quinquaginta, item ex illa specie viginti quinque debere: idcirco Lucium Titium Seio centum condemno," nam quoniam error computationis est, nec appellare necesse est, et citra provocationem corrigitur. Sed et si hujus quæstionis judex sententiam confirmaverit, si quidem ideo quod quinquaginta et viginti quinque fieri centum putaverit; adhuc idem error computationis est, nec appellare necesse est; si vero ideo, quoniam et alias species viginti quinque fuisse dixerit, appellationi locus est.

(*b*) Admonendi sumus, interdum etiam post jusjurandum exactum, permitti constitutionibus Principum, ex integro causam agere, si qus nova instrumenta se invenisse dicat, quibus nunc solis usurus sit. Sed hæ constitutiones tunc videntur locum habere, cum a judice aliquis absolutus fuerit; solent enim sæpe judices, in dubiis causis, exacto jurejurando, secundum eum judicare, qui juraverit. Quod si alias inter ipsos jurejurando transactum sit negotium, non conceditur eandem causam retractare.

This exception ought not to be allowed in the law of *France*, for as the ordonnance of 1667, *T.* 35. Art. 34, only allows the party against whom an *arrêt*, or judgment in the last resort has been given, the benefit of a *civile requête*, upon the subsequent discovery of such writings, where it appears that they have been kept back by the opposite party; it follows, that it cannot be admitted in any other case.

ARTICLE IV.

With regard to what Things the Authority of Res judicata *takes effect.*

[40] The authority of *res judicata* only takes effect with regard to the object of the judgment.

Therefore a party whose demand has been dismissed, can only be excluded by the exception *rei judicatæ* from making a new demand, if the object of the demand is the same.

For this purpose three things must concur; 1st. The demand must be of the same thing; 2d. It must be for the same cause; 3d. It must be made in the same quality.

Quum quæritur hæc exceptio (rei judicatæ) noceat necne; inspiciendum est an idem corpus sit, quantitas eadem, idem jus; et an eadem causa petendi, et eadem conditio personarum; quæ nisi omnia concurrant, alia res est. L. 12. *L.* 13. *L.* 14. *ff. de Excep. Rei Judicat.*

But if there is this concurrence, it is immaterial whether the demand be made *eodem an diverso genere judicii.*

§ I. *Of the first Requisite* ut sit eadem res.

[41] This principle, that the *exceptio rei judicatæ* can only avail in case the second demand is for the same thing as the first, must not be understood too literally. "*Idem corpus in hac exceptione non utique omni pristina quantitate vel servatâ, nulla adjectione diminutioneve factâ; sed pinguis pro communi utilitate accipitur.*" *L.* 14. *ff. de Excep. Rei Judicat.*

For instance, although the flock which I demand now, does not consist of the same sheep which it did at the time of the former demand; the demand is for the same thing, and therefore is not receivable. "*Si petiero gregem (et victus fuero), et vel aucto vel minuto numero gregis, iterum eundem gregem petere obstabit mihi exceptio.*" *L.* 21. § 1. *ff. de Tit.*

[42] I am likewise held to demand the same thing, when I demand any thing which forms a part of it. "*Sed et si speciale corpus ex grege petam, puto obstaturam exceptionem.*" *d. L.* 21. § 1.

This is laid down by *Ulpian*, "*Si quis, quum totum, petisset, partem petat, exceptio rei judicatæ nocet, nam pars in toto est; eadem enim res accipitur, et si pars petatur ejus quod totum petitum est, nec*

interest utrum in corpore hoc quæratur, an in quantitate, vel in jure." *L. 7. ff. de Excep. Rei Judicat.*

[43] I am also held to demand the same thing, which was before in judgment, when I demand any thing issuing from it, and which could only belong to me, as far as the thing from which it issued would have done so.

For instance, if I have demanded from you in the courts of one of our Colonies a female negro, alleging that I had bought her from you, and paid for her, and my demand has been dismissed by a judgment in the last resort, I cannot afterwards, upon the same grounds, demand a child, of which she has been delivered, for as I could have no other title to the child, than I had to the mother, that would be renewing the question which had been determined by the former judgment. "*Si ancillam prægnantem petiero (supple et victus fuero), et post litem contestatam conceperit et pepererit, mox partum ejus petam, utrum idem petire videor, an aliud, magnæ questionis est, et quidem ita definiri potest, toties eandem rem agi, quoties apud Judicem posteriorem id quæritur, quod apud priorem quæsitum est: in his igitur fere omnibus exceptio (rei judicatæ) nocet.*" *d. L. 7. § 1.*

[44] For the same reason, if I fail in my demand for a principal sum, I cannot afterwards demand the interest which would only be due as arising from the principal. The converse of this does not hold good, for though I have failed in my demand of the interest, I may still demand the principal, for the principal may be due in cases when the interest is not. "*Si in judicio actum sit, usuræque solæ petitæ sint, non est verendum ne noceat exceptio rei judicatæ.*" *L. 3. ff. d. t.*

[45] If I have failed in a demand against you for a footway over your estate, and afterwards demand a right of way for beasts of burthen, shall I be held to demand the same thing, and will you consequently be entitled to oppose the exception *rei judicatæ?* The reason of doubting in favour of the affirmative is, that the present right seems to include the former, since whoever has a right of passage for beasts of burthen, has also a right to a foot-way; and as it has been decided that I have no right to a foot-way, it follows *a fortiori*, that I have not the other; the reason for deciding the contrary is, that as these rights of servitude are entirely distinct, the demand of one of them has a different object from the demand of the other, and therefore it cannot be said that I am demanding the same thing which I did before, and consequently my demand cannot be barred by the exception *rei judicatæ.* To the argument adduced on the other side, I answer, that it has only been decided that I had not any foot-way, nor consequently *a fortiori*, any cattle road by virtue of such foot-way; it does not follow, that I may not have another kind of servitude for a cattle way, respecting which there was not any question in the former judgment. This is decided by *Ulpian. Si qui iter petierit, deinde actum petat, puto fortius defendendum aliud videri tunc petitum aliud nunc et ideo exceptionem rei judicatæ. cessare. L. 11. § 6. ff. de Tit.*

The contrary must be decided, when the demand, although more

extensive, is for the same kind of servitude. Of which *Africanus* gives the following example: "*Egi tecum jus mihi esse ædes meas usque ad decem pedes altius tollere, post ago jus mihi esse usque ad viginti pedes altius tollere: exceptio rei judicatæ procul dubio obstabit, sed et si rursus ita agam jus mihi esse ad alios decem pedes tollere, obstabit exceptio, cum aliter superior pars jure haberi non possit, quam si inferior quoque jure habeatur.*" *L. 26. ff. dict. Tit.*

§ II. *Of the second Requisite that the Demand be founded on the same Cause* (ut sit eadem causa petendi.)

[46] It is not a sufficient ground for the exception *rei judicatæ*, that the present demand is for the same thing, unless it is also for the same cause, *oportet ut sit eadem causa petendi.*

There is in this respect a difference between personal actions and real.

Although I have failed in a personal action, by which I demanded any thing as due from you, by virtue of a certain clause of obligation; this does not preclude me from demanding the same thing, as due for a different cause.

Suppose for instance, it has been agreed between you and me, that for a piece of work which I was to do for you, and have actually done, you should give me 10*l.* or your horse, at my election; afterwards you sell me the horse for a certain price, and I institute the action *ex empto* against you to deliver it, and not being able to prove the sale, the demand is dismissed, this does not preclude me from demanding the same horse, by the *actio ex prescriptis verbis*, by virtue of the agreement.

On the contrary, in *real* actions; if I claim any thing which you possess, and which I pretend belongs to me, a judgment in your favour would preclude me, from making any new demand against you for the same thing, even if I should offer to show that it belonged to me, on a different account from that on which I had claimed it before.

The reason of the difference is, that the same thing may be due to me by virtue of different obligations; and I have as many different claims, and as many actions against my debtor, as there are different causes of obligation, which actions involve as many different questions, and a judgment dismissing one of them, decides nothing with regard to the others, and consequently cannot preclude me from pursuing them; the judgment in the action *ex empto*, which decides that you do not owe me the horse by virtue of the sale, does not establish that you do not owe it to me by virtue of a different contract, nor consequently preclude me from demanding it, by an action founded upon such contract.

It is otherwise with respect to the right of property; although there may be several different claims for the same thing, there can be only one right of property in it; therefore, when my demand against you, claiming the property of a certain thing has been dismissed, and it has been decided that the thing does not belong to me, I can have no other action against you founded upon a claim of the

same property, for that would be to renew the question already decided, for the single question was whether the thing belonged to me or not; and it is of no signification that I omitted to propose any claim, upon which the demand could have been established; it is sufficient that it might have been proposed.

This is laid down by *Paulus*. *Actione in personam ab actionibus in rem in hoc differunt, quod cum eadem res ob eodem mihi debeatur, singulas obligationes singulæ causæ sequuntur, nec ulla earum alterius petitione vitiatur; at quum in rem ago, non expressâ causâ ex qua rem meam esse dico omnes causæ una petitione apprehenduntur: neque enim amplius quam semel res mea esse potest, sæpius autem deberi potest. L.* 14. § 2. *ff. de Except. Rei. Jud.*

Hence the rule, *non ut ex pluribus causis deberi nobis idem potest, ita pluribus causis idem possit nostrum esse.*

[47] What has been said respecting a real action, only holds good when the demand has been made in a general manner, and without restriction, for if it was restrained to a certain ground, upon which I claimed to be the proprietor of the thing in question, a judgment that I was not entitled upon that ground, would not exclude me from demanding it upon any other.

For instance, if I claimed an estate as heir at law of a relation, and disputed his will on the ground of its being forged, or invalid, although I failed in my demand, I should only be precluded from demanding the same estate upon any other ground. *Etsi quæstionis titulus prior inofficiosi testamenti causam habuisset, judicatæ rei prescriptio non obstaret eandem hereditatem aliâ causâ vindicanti. L.* 3. *Cod. de Pet. Hered. adde. L.* 47. *ff. de Pet. Hered.*(*a*)

[48] However general the first demand may have been, the judgment does not preclude me from making a new claim, by virtue of a title which has since accrued, for the decision that I was not the proprietor at that time, does not prevent my afterwards becoming such. The question whether I have acquired the property, by a title which has accrued since the judgment, is entirely different from that before decided; for it is a settled principle that the *exceptio rei judicatæ*, only applies when the same question is renewed, which has already been decided.

§ III. *Of the third Requisite, that the Condition of the Persons should be the same.*

[49] The third requisite to the exception *rei judicatæ*, is that the person who demands the same thing as before, should demand it in the same quality, and that the demand should also be made from the defendant, in the same quality as before. For instance, if I demand any thing from you merely in the quality of tutor of a

(*a*) Lucius Titius, cum in falsi testamenti propinqui accusatione non obtinuerit, quæro an do non jure facto, nec signato testamento querela illi competere possit? Respondit, non ideo repelli ab intentione non jure facti testamenti, quod in falsi accusatione non obtinuerit.

minor, a failure in that demand does not prevent my making another in my own right, and *vice versâ*, for in the first case, I was not, properly speaking, a party; the real party was the minor, by my ministry; the new demand in my own name is not then between the same parties, and cannot be precluded by the decision of the first; the authority of which only prevails between the same parties, as we have already seen.

§ IV. *That it is immaterial whether the Demand be made in the same or a different Form of proceeding* (eodem an diverso genere Judicii.)

[50] Provided the three things, which are mentioned in the preceding paragraphs concur, the authority of *res judicata* equally attaches, whether the demand is made in the same form of action or another. *Eodem an diverso genere judicii generaliter, ut Julianus definit, exceptio rei judicatæ obstat, quoties inter easdem personas eadem questio revocatur, vel alio genere judicii. L.* 7. § 4. *ff. de Ex Rei. Jud.*

Several instances may be stated of this principle: suppose, for example, you proceed against me by the action *quanto minoris*, to obtain an abatement in the price of a horse, which you allege to have a certain fault against which I have warranted him, it is decided that the horse has not that fault, or that the warranty did not extend to it, and the demand is dismissed; if you afterwards institute another action against me to rescind the sale, on account of the same fault, I may oppose the exception *rei judicatæ*, although the new demand is made in a different form, and aims at a different conclusion, the three requisites already mentioned concur, it is the same horse, *eadem res*, there is also *eadem causa petendi*, for the question in both cases is, whether I have warranted against the fault which you complain of, and the question is between the same parties, the difference of the actions, and of the conditions, does not prevent their having the same object and being *eadem res, cum quis actionem mutat, et experitur, dummodo de eadem re experiatur, etsi diverso genere actionis quam instituat videtur de eadem re agere.*(a)

(a) This doctrine is clearly illustrated by the case of *Kitchen* or *Hitcher* v. *Campbell*, 3 *Wils.* 304. 2 *Bl.* 827, where the plaintiffs having failed in an action of trover, were not allowed to recover in assumpsit for money had and received, it appearing to the court that the cause of action was such, that trover might have been maintained; and that a party shall not bring the same cause of action twice to a final determination; and what is meant by the same cause of action, is where the same evidence will support both the actions, although the actions may happen to be grounded upon different writs, and this is the test to know whether a final determination in a former action is a bar or not to a subsequent action.

In the instance cited in the text, the *English* and the *Roman* law would I conceive certainly coincide, for I apprehend there is no case in which the purchaser of a horse having a right on account of a false warranty to return him, and rescind the sale, may not bring an action on the case upon the warranty, but in the converse case, to support an action founded on the rescission of the sale, there must be a return within a reasonable time, which is not necessary in an action on the warranty; therefore a failure in the first, is not uecessarily a bar to the other.

ARTICLE V.

Between what Persons the Authority of Res judicata *takes place.*

[51] The authority of *res judicata* only takes place between the parties to the judgment, it gives no right to or against third persons, *res inter alios judicatæ, neque emolumentum afferre his qui judicio non interfuerunt, neque prejudicium solent irrogare. L. 2. Cod. Quib. res. jud. non nocet.*

Sæpe constitutum est res inter alios judicatas aliis non præjudicare. L. 6. 3. de Re jud.

In order to apply this principle, we must inquire what persons are to be considered as the same parties, so that the judgment is to be held conclusive between them, and between what persons on the other hand the judgment is to be regarded as *res inter alios judicata*, from which no right can ensue for or against them.

[52] A case is held to be decided between the same parties, not only when the same persons have appeared as parties themselves, but also when they have appeared by their tutors, curators, or other legitimate administrators.

For instance, if the tutor of a minor makes a demand upon me in that quality, which is dismissed, and the minor, after he comes of age, prefers the same demand, he may be repelled by the *exceptio rei judicatæ*, for he is considered as the real party in the former cause.

For the same reasons, if the officers of a parish institute a demand against me, in that character which has been dismissed, and their successors make the same demand, I may oppose the exception *rei judicatæ;* for the parish was party to the first demand, and cannot, by the ministry of its new officers, repeat a demand which was decided against it, in the persons of their predecessors.

[53] The successors of the parties, are considered as the parties themselves, and therefore a judgment has the same authority for or against them, as it had with respect to those whom they have succeeded.

For instance, a judgment of dismissal against you, gives me the same exception against your heirs, as against yourself.

[54] This is quite indubitable with respect to heirs and other universal successors, who are *in loco hæredum*. In real actions, the person who succeeds another in the subject of the suit, even by a particular title, is regarded as the same party.

For instance, if you claim a certain estate from *Peter*, the judgment which discharges him from your demand, will give the *exceptio rei judicatæ*, to any person afterwards purchasing from him, for the purchaser is considered as the same party. *L.* 11. § 3. *ff. de Exc. Judicat.*(*a*)

(*a*) Julianus scribit: Cum ego et tu heredes Titio extitissemus; si tu partem fundi,

For the same reason, if I have a dispute with the owner of an adjoining estate, for the purpose of compelling him to remove a work which as I allege throws the water from his estate upon mine, and after judgment either of us sells our estate, the *exceptio rei judicatæ* will be allowed for or against the purchaser. *de L.* § 9.(*a*)

The laws cited relate to a purchaser, and there is no question but that he has the same exceptions as the seller, who would be bound to defend any action against him, and to save him harmless from the consequences of it.

Although this reason does not extend to successors by a lucrative title, to which no warranty is attached, they are nevertheless to be considered as the same parties, with the persons whom they have succeeded in the property in question, and have the same benefit of the judgment.

For instance, if I have obtained a decision against you, that my estate did not belong to you, or that it was not subject to a servitude claimed by you, and you afterwards institute a similar claim against the person to whom I have given the estate, he may oppose the exception *rei judicatæ*, against you, as having succeeded to my rights.

The reason is, that as we are deemed in agreement respecting any thing which belongs to us, to stipulate for our successors, and the right arising from the agreement passes to them, as we have seen, *supra*, *n.* 67, 78. So when we engage in a litigation, respecting any thing which may belong to us, we are deemed to contend as well for ourselves, as for all who may succeed us; and the right arising from the judgment, ought to pass to all our successors, *eadem enim debet esse ratio judiciorum in quibus videmur quasi contrahere conventionem.*

[56] And as a successor is entitled to the benefit of a judgment in favour of the person under whom he claims, a judgment against the latter may, *vice versâ*, be opposed to the former, provided his title has only accrued subsequent to the process upon which the judgment was given. For instance, *Peter* claims an estate from you, and judgment is given against him, he afterwards gives me a special hypothecation upon the estate, whereupon I institute an action against you, you may oppose the exception *rei judicatæ* against me, for it was decided by the judgment against *Peter*, that the estate did not belong to him, and consequently that he could not hypothecate it to me.

It would be otherwise, if the hypothecation had been previous to the process against you; for a judgment, that *Peter* was not at that time the proprietor of the estate, does not decide that he was not such at the time of the hypothecation. And if I show that he was the proprietor, then it is sufficient, although he might afterwards, and at the

quem totum hereditarium dicebas, a Sempronio petieris, et victus fueris; mox eandem partem a Sempronio emero; agenti mecum familiæ erciscundæ, exceptio obstabit; quia res judicata sit inter te et venditorem meum: nam etsi ante eandem rem petissem, et agerem familiæ erciscundæ; obstaret exceptio, *Quod res judicata sit inter me et te.*

(*b*) Si egero cum vicino aquæ pluviæ arcendæ, deinde alteruter nostrum prædium vendiderit, et emptor agat, vel cum eo agatur, hæc exceptio nocet; sed de eo opere, quod jam erat factum, cum judicium acciperetur.

time of the process with you, have ceased to be so. *L.* 11, § 10, *ff. de Ex. Re Jud.*(*a*) *L. de Pig. & Hyp.*(*b*)

[57] Although a successor is considered as a party to a judgment, for or against the person under whom he claims, the latter is not *e converso* a party to a judgment, for or against the former, and therefore such a judgment cannot be taken advantage of by or against him. *Julianus scribit; exceptionem rei judicatæ a persona autoris ad emptorem transire solere; retro autem ab emptore ad autorem reverti non debere. L.* 9, § 2, *ff. de Ex. Rei. Jud.*

He gives the following example: *Si hæreditariam rem vendideris, ego eandem ab emptore petiero et vicero; petenti tibi non opponam exceptionem, at si ea res judicata non sit inter me et eum cui vendidisti. dict.* §.

Item si victus fuero, tu adversus me exceptionem non habebis. L. 10.

[58] We have established that a judgment is considered as having intervened between the same parties, so far as respects either the parties themselves, or those deriving their title under them; on the other hand, the judgment as to all who were not parties to it, either by themselves, or those under whom they claim, is *res inter alios judicata*, and cannot be opposed, either by or against them; and this is the case although the question is the same, to be decided upon the same principles, and depending upon the same facts.

This will appear from an instance stated by *Paulus*. I entrust a sum of money with a person who has left several heirs, I demand from one of those heirs the restitution of his share, and the judge not having paid sufficient attention to my proofs, dismisses the demand; if I demand from the other heirs the shares for which they are liable, they cannot oppose against me the judgment in favour of their co-heir, because with respect to them it is *res inter alios judicata*, which cannot give them any right, although the question is the same with that already decided against me in favour of the co-heir, and depends on the same facts, that is to say, whether I really entrusted the money to the deceased, or whether he returned it to me, *si cum uno herede depositi actum, sit tamen et cum cæteris hæredibus recte agetur, nec exceptio rei judicatæ ei proderit, nam etsi eadem quæstio in omnibus judiciis vertitur, tamen personarum mutatio cum quibus singulis suo*

(*a*) Si rem, quam a te petierat Titius pignori Seio dederit, deinde Seius pignoratitia adversus te utatur; distinguendum est quando pignori dedit Titius, et siquidam antequem peteret; non opportet ei nocere exceptionem, nam et ille petere debuit, et ego salvam habere debeo pignoratitiam actionem, sed si postea quam petit, pignori dedit, magis est, et noceat exceptio rei judicatæ.

(*b*) Si superatus sit debitor, qui rem suam vindicabat, *quod suam non probat;* æque servanda erit creditori actio Serviana, probanti, *res in bonis eo tempore, quo pignus contrahebatur illius fuisse.* Sed et si victus debitor vindicans hereditatem, judex actionis Servianæ, neglecta de hereditate dicta sententia, pignoris causam inspicere debet. § 1. Per injuriam victus apud judicium, rem quam petierat, postea pignori obligavit; non plus habere creditor potest, quam habet, qui pignus dedit. Ergo summovetur rei judicatæ exceptione; tametsi maxime nullam propriam, qui vicit, actionem exercere possit: non enim quod ille non habuit, sed quid in ea re quæ pignori data est, debitor habuerit considerandum est.

nomine agitur aliam atque aliam rem facit. L. 22, ff. de Ex. Rei Jud.

This principle, that the authority of *res judicata* only extends to the parties to the cause, and their successors, is connected with another, which we have established in the preceding article, viz. that the authority of *res judicata* only applies to the same thing which was before in judgment.

For instance, in the preceding example, the judgment in favour of one of the heirs does not afford the *exceptio rei judicatæ* to the others, not only as being *res inter alios judicata*, but also because the object of the demand is different; for although both the demands are for parts of the same debt, they are not for the same parts. The judgment in favour of the one heir has decided nothing with respect to the parts of the others, and therefore cannot as to them have the authority of *res judicata*. This is what is meant by the jurist in the law already cited, *mutatio personarum cum quibus singulis suo nomine agitur aliam atque aliam rem facit.*

So, when the creditor has left several heirs, a judgment in favour of the debtor, upon the demand of one, cannot be opposed to the others, it being as against them, *res inter alios judicata*, and a different thing; for the parts demanded by the other heirs, although parts of the same demand, are not the same parts, which were before in judgment.

[59] It is otherwise when the thing due to several heirs, or other co-proprietors, is something indivisible, such as a right of servitude; for, as this is not susceptible of parts, each is creditor or co-proprietor of the whole. And therefore the judgment, upon the demand of any one, has the same object as the demand of the others, and is *eadem res;* and it may likewise be said, that it is not *res inter alios judicata*, with respect to the other creditors or proprietors; for, from the indivisibility of their right, they are regarded as the same party, and therefore the authority of the judgment extends to themselves: if it was in favour of their co-proprietor, or joint creditor, they are entitled to the benefit of it; if it was against him, they are bound by it.

Nevertheless, if the judgment was given by collusion, the law allowed the others to renew the question, *si de communi servitute quis bene quidem deberi intendit, sed aliquo modo litem perdidit, culpa suâ non est æquum hoc cæteris damno esse, sed si per collusionem cessit litem adversario; cæteris dandam esse actionem de dolo* (that is as the *Gloss* very well explains it *replicationem de dolo contra exceptionem rei judicatæ.*) *L. 19, ff. si Serv. vind.*

According to our usages, the judgment against one of several creditors, or co-proprietors of an indivisible right, may indeed be opposed to the others; but they are not obliged to allege collusion in order to avoid the effect of it; they may appeal although the immediate party has acquiesced; and if the judgment is in the last resort, may form an opposition to it.

So, if there be several debtors of an indivisible thing, they are regarded as one party, and consequently a judgment against any of them is deemed to be against all, except that those who were not

parties themselves may be relieved by appeal or opposition, as above mentioned.

[61] In consequence of the obligation of the surety being dependent upon that of the principal debtor, the surety is also regarded as the same party with the principal, in respect to whatever is decided for or against him. Therefore, if the demand against the principal has been dismissed, provided it was not upon grounds personal to himself, the surety may, in case he is afterwards proceeded against, oppose the *exceptio rei judicatæ* to the creditor. *Si pro servo meo fidejusseris et mecum de peculio actum est* (supple *et judicatum sit nihil a servo meo deberi,*) *si postea te cum eo nomine agatur excipiendum est de re judicata.* *L.* 21. § 4. *de Ex. rei Jud.*

The creditor cannot in this case reply, that it is *res inter alios judicata*; for as it is of the essence of the engagement of a surety, that his obligation depends upon that of his principal, that the surety cannot owe more than the principal, and that he may oppose all the exceptions *in rem*, which could be opposed by the principal; it follows, that whatever has been decided in favour of the principal, must be taken to be decided in favour of the surety, who ought in this respect to be considered as the same party.

Vice versâ, when the judgment was against the principal, the creditor may oppose it to the surety, and demand that it should be carried into execution against him, but the surety is allowed to appeal against this judgment, or to form an opposition to it if it is in the last resort; *admittuntur ad provocandum fidejussores pro eo pro quo intervenerunt.* *L.* 5. § 1. *ff. de Apell.*

[62] According to the *Roman* law, the right of the legatees depended upon that of the instituted heir, and therefore a judgment against the heir, declaring the testament to be null was not looked upon as *res inter alios judicata*, with respect to the legatees, and might be opposed to them, they being considered on account of the dependency of their right, as in some degree as the same parties; but they are admitted to appeal from the judgment, *L.* 5. § 1 & 2. *ff. de Apell.*;(*a*) or when the judgment was in the last resort, to form an opposition to it.

It was otherwise with respect to a judgment, which upon the demand of a legatee, declared the testament to be void, and dismissed the claim; this with respect to the other legatees was regarded as *res inter alios judicata*, which could not be opposed to them, and from which it was not necessary for them to appeal. *L.* 1. *ff. de Ex. Rei Jud.*(*b*) The reason of the difference is, that the right of the legatees did not depend upon that of their co-legatee, against whom the

(*a*) Si heres institutus victus fuerit ab eo, qui de inofficioso testamento agebat: legatarus et qui libertatem acceperunt, permittendum est appellare, si querantur per collusionem pronunciatum; sicut Divus Pius rescripsit, § 2. Idem rescripsit, legatarios causam appellationis agere posse.

(*b*) Cum res inter alios judicatæ nullum aliis præjudicium faciant: ex eo testamento ubi libertas data est, vel legato agi potest: licet ruptum vel viritum, aut non justum dicatur testamentum; nec si superatus fuerit legatarius, præjudicium libertati sit.

judgment was given, as it did upon that of the instituted heir, *cum ab institutione heredis pendeant omnia quæ testamento continentur.*

SECTION IV.

Of the Oaths of the Parties.

[817] There are three principal kinds of oaths, which are used in civil suits; 1st. The oath which one of the parties defers or refers back to the other, for the decision of the cause, and which is therefore called the decisory oath. 2d. The oath to be taken by a party who is interrogated upon facts and articles. 3d. The oath which the judge, of his own motion, defers to one of the parties, either for the decision of the cause, or in order to fix and determine the quantity of the condemnation, this is called *juramentum judiciale.*

ARTICLE I.

Of the Decisory Oath.

[818] The decisory oath, as we have already said, is that which one of the parties defers or refers back to the other, for the decision of the cause.

§ I. *With respect to what Things the Decisory Oath may be deferred.*

[819] The decisory oath may be deferred in any kind of civil contest whatever, in questions of possession, or of claim; in personal actions, and in real, *jusjurandum, et ad pecunias, et ad omnes res locum habet. L.* 34. *ff. de Jurej.*

It can, however, only be deferred to a party respecting his own personal acts; a party is not obliged to take it, with respect to the acts of another person; to whom he is heir, or to whose rights he has succeeded; for although I cannot be ignorant of my own act, I am not obliged to know the acts of others, whom I may represent, *hæredi ejus cum quo contractum est, jusjurandum deferri non potest,* Paulus, 11. 1. 4.

A person, therefore, who demands from me the price of any thing, which he alleges that he has sold to the deceased, whom I have succeeded as heir cannot defer to me the oath with respect to the fact of a sale; for that is not my act, but the act of the deceased, which I am not obliged to know; but the oath may, according to our usage, be deferred, as to whether I have any personal knowledge of the debt.

§ II. *In what Cases the Decisory Oath may be deferred.*

[820] The plaintiff may defer the oath to the defendant, whenever he conceives that he has not a sufficient proof of the fact, which is the foundation of his claim. And in like manner, the defendant may defer it to the plaintiff, when he has not a sufficient proof of his defence.

This oath may be demanded, either before or after the contestation of the cause, upon an appeal, as well as in the original suit.

It is a controverted question, whether any commencement of proof is necessary, in order to enable the plaintiff to defer the oath. The *Gloss ad L.* 3. *Cod. de Reb. Credit. Bartholus Baldus*, and several other writers, cited by *Mascardus de Probat. conclus.* 957, require some commencement of proof. The reasons which they allege for this opinion, are 1st. That it is a general principle of the law, that the defendant ought to be dismissed from a demand, which is not proved against him, without any proof on his part being necessary *actore non probante, qui convenitur, etsi nihil ipse præstet, obtinebit. L.* 4. *Cod. de Edendo.* Then, say they, the defendant ought not to be compelled to take any oath, in order to obtain his liberation from the demand against him, since the law says, that he is not bound to any thing, *etsi nihil præstet.* 2d. It is also a principle of law, that it is for the plaintiff to furnish the proofs of his demand, and not for the defendant to furnish proofs against himself, *intelligitis quod intentionis vestræ proprias adferre debitis probationes, nec adversus se ab adversariis adduci. L.* 7. *Cod. de Test.* Then the plaintiff, who has not adduced any proof of his demand, should not be allowed to procure one by the oath of the defendant. 3d. It is said, that a person ought not, without any ground, to involve another in a law suit, and put him to the inconvenience of making an affirmation, which timid persons are often afraid to do, even as to matters of which they have the greatest certainty. It is also attempted to derive some arguments from the *L.* 31. *ff. de Jurej.* and the laws, 11 & 12 *Cod. de Reb. Cred.* The contrary opinion, that the plaintiff may defer the oath without any commencement of proof, to entitle him to demand the oath, is more correct, and is embraced by *Cujas, Obs.* XXII. 28. *Duaren, Doneau, Fachinée*, and several others; it is also that of *Vinnius*, who has very perfectly examined the question, *Sel. Quæst.* 142, and whose observations we at present merely copy: the reasons upon which it is established, are, 1st. That nothing more ought to be required from a plaintiff than is required by the law which establishes the use of the decisory oath; now the edict of the prætor which establishes this right, does not require any commencement of proof; it says generally, *eum a quo jusjurandum petitur, jurare aut solvere cogam. L.* 34. § 6. *ff. de Jurej.* 2d. It may frequently happen, that a demand of which there is not any commencement of proof, may still be very just. For instance, I have lent an acquaintance a sum of money, without taking any acknowledgment; my demand for the repayment of this money is not the less just, from my not having

any commencement of proof of the loan of it; the judge ought not then to neglect any of the means which he has for the discovery of the truth; I present such means by deferring the oath; if the defendant refuses to swear, either that the money was never lent, or that it was returned, his refusal will be a tacit acknowledgment of the debt; the judge ought then to avail himself of this mode of discovering the truth, and allow me to defer the oath; although I have not any commencement of proof of my demand, the defendant's refusal to swear will be a complete proof of the debt, and of his wrongfully refusing the payment of it, *manifestæ turpitudinis et confessionis est nolle jurare. L.* 38. *ff. de Jurej.* 3d. This opinion is also established by formal texts of the law. It is said in law 12 *Cod. de Reb. Cred.* that the oath may be deferred, even at the commencement of the cause, *in principio litis*, and consequently before the plaintiff has given any proof. The law 35 *ff. de Jurej.* is expressed in terms still more formal; it says, that the oath may be deferred, *omnibus aliis probationibus deficientibus.*

The reasons above stated, in support of the first opinion, are frivolous, and may easily be answered; when it is said, that the defendant is intitled to his discharge, from a demand against him, without being bound to do any thing on his own part, *etiamsi nihil ipse præstet;* it is only meant that he is not under the necessity of producing any witness, or voucher, not that he is not compellable to take the oath, if it is deferred to him. As to what is said in law 7. *Cod. de Test.* that a defendant is not obliged to furnish proofs against himself, this is only referable to the position in the preceding parol of the law, that the defendant is not obliged to produce any witnesses or letters against himself, *nimis grave est quod petitis, urgere partem diversam ad exhibitionem eorum per quos sibi negotium fiat*, but has no application to the decisory oath; a party cannot complain that he is hardly dealt with, when he is made the judge in his own cause. With respect to what is said of the inconvenience of putting a person without any reason, to the trouble of an affirmation; I answer, that it is impossible to avoid every kind of inconvenience. To support a law suit, is a much greater inconvenience than to make an affirmation, which may put an end to the suit at once; yet a person, by instituting a demand against me, without any proof, may put me to a great deal of trouble and inconvenience; and why should he not be equally allowed to do so, by deferring to me the oath? The *Romans* established a kind of remedy for these inconveniences, by obliging the parties, who instituted or contested a demand, to swear that they did so *bonâ fide*, and the party who deferred the oath, was in like manner obliged to swear, that he did so wholly with a view to establish the truth, and without any intention of harassing the opposite party; this was called *juramentum de calumnia;* these oaths are not in use with us. With respect to the laws referred to, in support of the first opinion, they prove nothing upon the subject. The law 31, relates only to the suppletory oath required by the judge, and not to the decisory oath. In the law 12, the question is indeed, whether the oath was properly or improperly deferred; but this respects either

the nature of the fact, or the quality of the respective parties, and has no relation to requiring a commencement of proof.

§ III. *Of the Persons, by and to whom the Decisory Oath may be deferred.*

[821] As the decision of the contest, and the right of the parties, is made to depend upon this oath, it follows, that it can only be deferred, by or to those who have the disposition of their rights.

Therefore it cannot be deferred by a minor, without the authority of his tutor, *L.* 17. § 1. *ff. de Jurej.*(*a*) neither can it be deferred to him. *L.* 34. § 2.(*b*) *ff. dic. Tit.*

According to this principle, an insolvent person cannot, in fraud of his creditors, defer this oath to his debtor, for he cannot dispose of his rights in fraud of his creditors. Therefore, the creditors, without paying any regard to the oath made by the debtor, of their debtor, may proceed against him for the recovery of the debt. *L.* 9. § 5. *ff. dic. Tit.*(*c*)

Some doctors have maintained, that a person to whom the oath cannot be referred back, on account of the fact not being within his own knowledge, cannot defer it to the opposite party, whose own act is the subject of it. This is the opinion of *Nutta, Cons.* 35, which is founded upon the *L.* 35. *ff. de Jurej.* where it is said, that the person to whom the oath is deferred, cannot complain of any injury as he mey refer it back, *de injuria queri non potest, cum possit jusjurandum referre.* Then says he, by argument, *e contrario*, the person to whom the oath is deferred, is not obliged to accept the condition, in case he cannot refer it back. This consequence is of no importance; what is stated is only an additional reason for the person to whom the oath is deferred, not having any reason to complain; the principal reason, which is stated elsewhere, and which is alone sufficient, is, that no man can complain of being made the judge of his own cause. The opposite sentiment, which is that of *Fachinée*, of *Cravetta*, and of other doctors cited by him, is founded upon more solid reasons. We ought not to require from the person who defers the oath more than is required of him by the law; now there is no law which requires that the person to whom the oath is deferred, should be one who is able to refer it back; on the contrary, the *L.* 17.(*d*) § 2, expressly

(*a*) Pupillus tutore auctore jusjurandum defere debet, quod si sine tutore auctore detulerit, exceptio quidem obstabit: sed replicabitur qui rerum administrandarum jus ei non competit.

(*b*) Pupillo non defertur jusjurandum.

(*c*) Sed et si quis in fraudum creditorum jusjurandum detulerit debitori, adversus exceptionem jurisjurandi, replicatio fraudis creditoribus debet dari. Præterea si fraudator detulerit jusjurandum creditori, ut juret *sibi decem dari opportere*, mox bonis ejus venditis, experiri volet; aut denegari debet actio, aut exceptio opponitur fraudatorum creditorum.

(*d*) Si tutor qui tutelam gerit, aut curator furiosi prodigive, jusjurandum detulerit: ratum in habere debet, nam et alienare res et solvi eis potest: et agendo rem in judicium ducunt.

permits a tutor and curator to defer the oath, in respect to causes in which they are engaged in those qualities, although it cannot be referred back, since the cause of the pupil, or interdict, does not relate to the personal act of the tutor, or curator.

A procureur cannot defer the oath, unless he has, either a special power for the purpose, or else is a procurator *omnium bonorum*, which is a general power of conducting the affairs of his principal. *L.* 17.(*a*) § 3.

§ IV. *Of the Effect of the Oath being deferred, referred, taken, or refused.*

[822] The person to whom the oath is deferred, ought either to take it or refer it back; and if he will not do either, the cause should be decided against him, *manifestæ turpitudinis, et confessionis est nolle jurare nec jusjurandum referre. L.* 38. *ff. d. Tit.*

If the fact in question is not the act of both parties, but only of him to whom the oath is deferred, he will not have the option of referring it back, but is under an absolute obligation to take the oath upon pain of losing the cause.

If the party makes the oath required of him, it will form a presumption *juris et de jure* of the truth of what he has affirmed; and as we have already observed in the second division of this section, no proof can ever be received to the contrary.

If he refers the oath back, the party to whom it is referred will be absolutely bound to take it, or the cause will be decided against him; if he does take it, whatever he affirms will in like manner be deemed to be conclusively proved; and no evidence can be admitted to the contrary.

All these rules are comprised in the *L.* 34. § *Fin. ff. de Jurej.*(*b*)

When the defendant is the party to whom the oath is deferred, or referred back, his oath that he does not owe what is demanded gives him an exception, called *exceptio jurisjurandi*, which entitles him to have the demand, dismissed with costs *en faire donner congé avec depens.*

This exception being founded upon a presumption *juris et de jure*, excludes the plaintiff from giving any evidence, that the defendant was perjured; as is shown by *Julianus, adversus exceptionem jurisjurandi, replicatio doli mali non debet dari, cum prætor id agere debet ne de jurejurando quæratur. L.* 15. *ff. de Excep.*

He would not even be admitted to make such proof by writings newly discovered, in which respect a decisory oath has more effect

(*a*) Procurator quoque quod detulit, ratum habendum est: scilicet si aut universorum bonorum administrationem sustinet, aut si id ipsum nominatum mandatum sit, aut si in rem suam procurator sit.

(*b*) Cum res in jusjurandum demissa sit, judex jurantem absolvit, referentem audiet, et si actor juret, condemnet reum; si solvat, absolvit, non solventem condemnat ex relatione, non jurante actore, absolvit reum.

than the suppletory oath, which we shall speak of *infra*, Art. III. *Gaius* takes notice of this difference in *L.* 31. *de Jurej.*(*a*)

When it was the plaintiff to whom the oath was deferred or referred back, his oath that what he demanded was due, gave him by the *Roman* law, an action *in factum*, similar to the *actio judicati*. *L.* 8. *Cod. de Reb. Cred.*(*b*) Upon which action the only question was, whether the oath had been regularly taken, without admitting any defence in respect of the original cause of action. *In qua* (*actione*) *hoc solum quæritur, an juraverit dari se opportere, L.* 9. § 1. *de jurej. Dato jurejando, non aliud quæritur quam an juratum sit; remissâ quæstione, an debeatur. L.* 5. § 2. *ff. dict. Tit.*

With us the plaintiff may at once obtain judgment for payment of his demand with costs, and no defence can be received in opposition to it.

This effect results from the principle of natural law, *quid tam congruum fidei humanæ, quàm ea quæ inter eos placuerunt, servari. L.* 1. *ff. de Pact.* In fact, when one of the parties defers the oath, for the purpose of determining the matter in dispute, and the other accepts the condition, and takes the oath, or declares himself ready to take it, there is a mutual agreement to abide by what shall be affirmed; which agreement is obligatory upon the party deferring the oath, and excludes him from offering any proof in contradiction of what is sworn.

As an agreement only produces an obligation, in consequence of the mutual consent of the parties, it follows, that a person who has deferred the oath, may retract the proposal at any time before the opposite party has accepted the condition, by swearing, or at least declaring his readiness to swear, what is required. *L.* 11. *Cod. de R. C. et Jurej.*(*c*) Observe, that a party who has revoked his demand of the oath, cannot defer it a second time. *D. L.* 11.

When the party to whom I have deferred the oath has accepted the condition, and declared himself ready to take it, I cannot revoke the offer, but I may discharge him from taking the oath, and in that case what he offers to swear will be taken as proved, in the same

(*a*) Admonendi sumus, interdum etiam post jusjurandum exactum, permitti constitutionibus principum, ex integro causam agere, si quis nova instrumenta se invenisse dicat, quibus nunc solis usuras sit. Sed hæ constitutiones tunc videntur locum habere, cum judice aliqus absolutus fuerit: solent enim sæpe judices in dubiis causis, exacto jurejurando, secundum eum judicare qui juraverit. Quod si alias inter ipsos jurejurando transactum sit negotium, non conceditur eandem causam retractare.

(*b*) Actore delato, vel relato jurejurando, si juraverit, vel ei remissum sit sacramentum, ad similitudinem judicati in factum actio competit.

(*c*) Si quis jusjurandum intulerit, et, necdum eo præstito, postea (utpote sibi allegationibus abundantibus) hoc revocaverit: sancimus nemini licere penitus iterum ad sacramentum recurrere, (satis enim absurdum est redire ad hoc, cui renunciandum putavit, et cum desperavit aliam probationem, tunc denuo ad religionem convolare) et judices nullo modo [eos] audire ad tales iniquitates venientes. Si quis autem sacramentum intulerit, et [hoc] revocare maluit, licere quidem [ei] hoc facere, et alias probationes, si voluerit, præstare: ita tamen ut hujusmodi licentia usque ad litis tantummodo terminum ei præstetur. Post definitivam autem sententiam, quæ provocatione suspensa non sit, vel quæ, postquam fuit appellatum, corroborata fuerit: nullo mode revocare juramentum, et iterum ad probationem venire cuiquam concedimus: ne reperita lite, finis negotii alterius causæ fiat exordium.

manner as if he had actually sworn it. *L.* 6.(*a*) *L.* 9. § 1.(*b*) *ff. de Jurej.*

[823] From the principle which we have established, that the decisory oath derives all its effects from the agreement of the parties, it follows, that as an agreement has no effect except with regard to the object of it, and that only between the contracting parties and their heirs, "*animadvertendum est ne conventio in aliâ re factâ aut cum aliâ personâ, in alia re, aliave personâ noceat. L.* 27. § 4. *ff. de Pact.* so the effect of a decisory oath is confined to the particular object of it.

The question whether a demand is the same, may be decided by the application of the several rules, which were established in the preceding section, Art. IV. with respect to a judgment.

And in like manner, the fact affirmed upon a decisory oath, is only taken to be proved so far as regards the person who deferred it, and his heirs and others succeeding to his rights; but has no effect with respect to third persons, *jusjurandum alteri nec nocet, nec prodest. L.* 3. § 3. *ff. de Jurej.*

Therefore, if one of several heirs has assigned me to pay his share of a debt, which he pretends was due from me to the deceased, and has deferred to me the oath with respect to the existence of the debt, upon which I have sworn that nothing was due, it is only this one who will be excluded from his demand; his co-heir will not be debarred from claiming his share, and if he proves the subsistence of the debt, I shall be condemned to pay that part, notwithstanding my oath that I did not owe any thing; for the oath has no effect, except against the party by whom it was deferred, and not against his co-heir.

[824] Nevertheless, if one of two creditors *in solido* has deferred the oath, and I have affirmed that I did not owe any thing, it would be conclusive against the other. For this there is the particular reason, that a payment to one creditor *in solido* is a discharge from all: now an oath, by which the debtor affirms that he does not owe any thing, is equivalent to a payment to the person by whom the oath is deferred, *nam jusjurandum loco solutionis cadit. L.* 27, and consequently is a discharge from the claim of the others.

[825] As a decisory oath is no proof against any other persons than those by whom it was deferred, neither is it any proof, except in favour of the person to whom it has been deferred, and who has taken or been discharged from taking it, *L.* 3. § 3.(*c*) *ff. de Jurej.*

Nevertheless, if my debtor, to whom I have deferred the oath, has sworn that he did not owe any thing, I cannot demand the debt from

(*a*) *Remittit jusjurandum*, qui deferente se, cum paratus esset adversarius jurare, gratiam ei fecit, contentus voluntate suscepti, jusjurandi. Quod si non suscepit jusjurandum, licet postea jurare actor nolit deferre, non videbitur remissum: nam quod susceptum est, remitti debet.

(*b*) Jurejurando dato, vel remisso, reus quidem adquiret exceptionem sibi, aliquis; actor vero actionem adquirit, in qua hoc solum quæritur, *an juraverit, dari sibi oportere*, vel cum jurare paratus esset, jusjurandum ei remissum sit.

(*c*) *Vi. supra*, this page.

his sureties, for the debtor has an interest in not making any demand from the sureties, who would have recourse against him, for any thing which they might be obliged to pay and therefore a demand against his sureties would be, indirectly, a demand against himself. *L.* 28. § 1. *ff. de Jurej.*(*a*)

Vice versâ, if I had deferred the oath to the surety, and he had sworn that nothing was due, the law above cited, decides that this would avail the principal, because it is regarded as a payment. *d. l.* 28, and a payment by the surety liberates the principal.

For the same reason, an oath deferred to one debtor *in solido*, will operate in favour of the others.

These decisions apply, provided the oath is *de re non de persona*, for if the surety only swore that he did not contract the engagement, the principal could not derive any advantage from it. *D. L.* 28. § 1. *L.* 42. § 1.(*b*) *ff. de Jurej.* So if one of the debtors *in solido* only swore that he did not contract the obligation, this would not be of any service to the others.

From the principle, that the decisory oath derives all its effect and authority from the agreement of the parties, this further consequence may be drawn, that if the party by whom it has been deferred would have just cause of restitution against the agreement, he may, by obtaining such restitution, destroy the effect of the oath.

As fraud is a ground of restitution against all agreements, if I can prove that I was induced by any fraud of yours to deter the oath, I may, by appeal from the judgment which has been given in your favour in consequence of your oath, or by *civile requête*, if the judgment is in the last resort, obtain letters of rescission, upon which, without regard to the act, whereby I have deferred the oath, or to the subsequent proceedings each party will be restored to his former situation. We may state as an instance of fraud your suppression of a writing, which establishes my claim against you, if, in consequence of my not having the writing, I defer the oath to you as to the justice of my claim; as it was your suppression of my title, and consequently your fraud which induced me to do so, I may, if I can obtain proof of this suppression, obtain restitution against the act by which the oath was deferred, as having been occasioned by such fraud.

This decision is not contrary to that of the law 15, *ff. de Excep.* above referred to, No. 822; which says, that *adversus exceptionem jurisjurandi non debet dari replicatio doli mali;* for the fraud spoken of in this law, is only the perjury which the party who deferred the oath, may allege to have been committed in the taking of it; this perjury cannot be proved by even the most decisive titles afterwards discovered, because the oath operates as a presumption *juris et de*

(*a*) Quod reus juravit, etiam fidejussori proficit, a fidejussore exactum jusjurandum, prodesse etiam reo, Cassius ei julianus aiunt: nam quia in locum solutionis succedit, hic quoque eodum loco habendum est; si modo ideo interpositum est jusjurandum, ut de ipso contractu, et de re, non de persona jurantis ageretur.

(*b*) Si fidejussor juraverit, *se dare non opportere*, exceptione jusjurandi reus promittendi tutus est; at si, quasi omnino idem non fidejussisset, juravit, non debet hoc jusjurandum reo promittendi prodesse.

jure, by which what is sworn is conclusively taken to be true. Therefore, when you have sworn that you did not owe any thing, there cannot afterwards be any question, *an debeatur*. *L.* 5. § 2. *ff. de Jurej.* But as the oath has only this authority, insomuch as it is deferred, and taken in an effectual manner, the question, whether it was deferred and taken, is still open *quæritur an juratum sit*, § 2. and the person who deferred it, may show that it was not effectually taken by proving your fraud; that is, by proving the artifices which you have used to induce him to deter it, as in the instance supposed, by your suppression of his title.

As minority is a cause of restitution, minors may sometimes obtain restitution against the effect of the oaths deferred by their tutors or themselves, with the assistance of their curators: this cannot be done indiscriminately, it ought not to be done, if they had no other proof at the time of deferring the oath, which would in that case be an act of prudence. This is shown by *Ulpian: si minor detulerit, et hoc ipso captum se dicat, adversus exceptionem jurisjurandi replicari debebit, ut Pomponius ait. Ego autem puto hanc replicationem non semper esse dandam, sed Prætorem debere cognoscere an captus sit, et sic in integrum restituere; nec enim utique qui minor est, statim se captum docuit. L.* 9. § 4. *ff. de Jurej.*

ARTICLE II.

Of the Oath of a Party interrogated upon Facts and Articles.

[826] When a party signifies facts upon which he obtains an order, that the opposite party shall be interrogated by the judge, the oath, which is taken upon such interrogatory, is very different from the decisory oath, for it forms no proof in favour of the party by whom it is made, but is evidence against him. The reason of the difference is, that the person who causes his adversary to be interrogated upon facts and articles, does so, not for the purpose of having the cause decided by the answer, but merely with a view of deducing some proofs, or presumptions, from the admissions which the party interrogated may make, or the contradictions which he may fall into; *ut confitendo vel mentiendo se oneret*, *L.* 4. *ff. de Inter. Inj. fac.*

[827] Observe, that a person who would take advantage of the confession made by the opposite party, upon his interrogatory, cannot divide the answer, but must take it altogether.(*a*) If, for instance, I have no proof of the loan which I allege that I have made to you of a sum of money, I cannot take advantage of your acknowledgment of the loan, and reject the additional declaration that you have repaid the money; but I must take one part with the other; and, therefore, if I would make your answer a proof of the loan, I must also admit it as a proof of payment, without requiring

(*a*) See App. No. XVI. § 4.

from you any other evidence of that fact; at least, unless I am in a condition to prove that the payment could not be made at the time and place which you allege. With respect to these interrogatories, see the ordonnance of 1667, and the commentary of Mr. *Jousse.*

ARTICLE III.

Of the Oath called Juramentum Judiciale.

[828] The oath called *juramentum judiciale* is that which the judge of his own accord, defers to either of the parties.

There are two kinds of it, 1. That which the judge defers for the decision of the cause, and which is understood by the general name of *juramentum judiciale*, and is sometimes called the suppletory oath, *juramentum suppletorium.*

2. That which the judge defers, in order to fix and determine the amount of the condemnation that he ought to pronounce, and which is called *juramentum in litem.*

§ I. *Of the oath which the Judge defers for the Decision of the Cause.*

[829] The use of this oath is established upon the authority of the law, 31. *ff. de Jurej.* which says, "*solent judices in dubiis causis exacto jurejurando secundum eum judicare qui juraverit,*" and the law, 3 *Cod. de rebus creditis*, where it is said, "*in bonæ fidei contractibus, necnon in cæteris causis, inopiâ probationum, per judicem jurejurando, causâ cognitâ, rem decid opportet.*"

From these texts it follows, that to warrant the application of this oath, three things must concur:

1. The demand, or the exceptions, must not be fully proved, as appears by the terms of *L.* 3. *Cod.*—INOPIA PROBATIONUM. When the demand is fully proved the judge condemns the defendant without having recourse to the oath; and on the other hand, when the exceptions are fully proved, the defendant must be discharged from the demand.

2. The demand, or exceptions, although not fully proved, must not be wholly destitute of proof; this is the sense of the terms *in rebus dubiis*, made use of in the law 31; this expression is applied to cases in which the demand, or exceptions, are neither evidently just, the proof not being full and complete, nor evidently unjust, there being a sufficient commencement of proof. *In quibus*, says *Vinnius. sel. quæst*, 1, 44. *judex dubius est, ob minus plenas probationes allatas.*

3. The judge must have entered upon the cognisance of the cause, to determine whether the oath ought to be deferred, and to which of the parties. This results from the terms *causâ cognitâ*, in *L.* 31.

[830] This cognisance of the cause consists in the examination of the merits of the proof, of the nature of the fact, and the qualities of the parties. When the proof of the fact which is the subject of the demand, or the exceptions, and upon which the decisions of the cause depends, is full and complete, the judge ought not to defer the oath, but to decide the cause according to the proof.

Nevertheless, if the judge, for the more perfect satisfaction of his conscience, defers the oath to the party in whose favour the decision ought to be, and the fact upon which it is deferred is the proper act of the party himself, and of which he cannot be ignorant, he cannot refuse to take it, or appeal from the sentence: for although the judge might, and even ought to have decided the cause in his favour, without requiring this oath, the proof being complete, he has still done no injury by requiring it, since it costs the party nothing to affirm what is true, and his refusal weakens and destroys the proof which he has made.

[831] When the plaintiff has no proof of his demand, or the proof which he offers only raises a slight presumption, the judge ought not to defer the oath to him, however worthy of credit he may be. Nevertheless, if the circumstances raise some doubt in the mind of the judge, he may, to satisfy his conscience, defer the oath to the defendant.

So, when the demand being made out, the exceptions against it are only supported by circumstances, which are too slight to warrant deferring the oath to the defendant, the judge may, if he thinks proper, defer the oath to the plaintiff, before he decides in his favour.

I would, however, advise the judges to be rather sparing in the use of these precautions, which occasion many perjuries. A man of integrity does not require the obligation of an oath, to prevent his demanding what is not due to him, or disputing the payment of what he owes; and a dishonest man is not afraid of incurring the guilt of perjury. In the exercise of my profession for more than 40 years, I have often seen the oath deferred; and I have not more than twice known a party restrained by the sanctity of the oath, from persisting in what he had before asserted.

[832] The proper case for deciding by the oath of the parties is, when the proof is already considerable, and not quite complete.

From this rule we must, however, except causes of great importance, such as those of marriage. In these, if the plaintiff fails in proof, the defect cannot be supplied by his oath, but the case must be decided with the defendant.

In ordinary cases, if the defendant's proof of his exceptions is considerable, without being complete, the judge ought to supply the deficiency by his oath, in the same manner as he ought under similar circumstances to supply, by the oath of the plaintiff, the deficiency in his proof of the demand.

The judge in choosing to which of the parties he will defer the oath, should also consider their quality, which of them is most worthy of

credit, which should know most of the subject; *inspectis personarum et causæ circumstantiis. Cap. fin. X. de Jurej.*

[833] *Dumoulin, ad L.* 3. *Cod. de Reb. Cred.* states as an instance of incomplete proof which may be perfected by the oath of the defendant, that which results from the extrajudicial confession of a debtor, made in the absence of the creditor, or in his presence, without expressing the circumstances or cause of the debt.

The books of tradesmen are also an incomplete proof of their dealings, which may be supplied by their oath, when they are persons of acknowledged probity, *supra, n.* 719.

The doctors state as an instance of proof, which may be completed by the oath of the plaintiff, the deposition of a single witness when he is a man of credit; but it appears by our law that it is only in very trivial cases, that the deposition of a single witness, in addition to the oath of a plaintiff will be sufficient to support the demand. See *supra, n.* 783.

[834] Although the cause has in the first instance been decided by the oath of one party, the judge of appeal may defer the oath to the other if he thinks it preferable, as we see every day.

[835] It remains to observe the following difference between an oath deferred by the judge and that deferred by the party: the first may be referred back; whereas, when the oath is deferred by the judge, the party must either take it or lose his cause; such is the practice of the bar, which is without reason charged by *Faber* with error; in support of it, it is sufficient to advert to the term *refer;* for I cannot be properly said to refer the oath to my adversary, unless he has previously deferred it to me. See *Vinn. Sel. Quæst.* 143.(*a*)

§ II. *Of the Oath called* Juramentum in Litem.

[836] The oath called *juramentum in litem*, is that which the judge defers to a party, for the purpose of fixing and determining the amount of the condemnation, which he ought to pronounce in his favour.

The interpreters of the *Roman* law distinguish two oaths of this kind, one of which they call *juramentum affectionis*, the other *juramentum veritatis.*

Juramentum affectionis is the oath deferred by the judge to determine the value of the thing, whereof I have been deprived by the fraud of the adverse party, not as it is considered in itself, but according to my own attachment for it.

The judge will in this case estimate the amount of the consideration, by what I swear to be the value, that I *bonâ fide* set upon it, as a matter of personal attachment, a price of affection which may exceed the real value of the thing.

(*a*) The use of the term *refer*, in the *English* language, would prevent the full application of this argument. The word *referre* is only fully translated by the phrase to *refer* BACK.

It is of this oath that *Ulpian* says, *non ab judice doli æstimatio ex eo quod interest fit, sed ex eo quod in litem juratur. L.* 64. *ff. de judic.* and elsewhere, *res ex contumaciâ æstimatur ultrâ rei pretium. L.* 1. *ff. de in Lit. Jur.*

This *juramentum affectionis* is not in use with us; we only allow the *juramentum veritatis.*

[837] The oath is administered, whenever the plaintiff has lawfully established his right to the restitution of a thing, and it only remains to ascertain the sum in which the defendant ought to be condemned, for the non-restitution of things, the value of which can be known only to the plaintiff. The judge in this case decides upon the plaintiff's estimate of the value, having first administered the oath, that it shall be fairly and conscientiously made.

For instance, if a traveller has deposited a trunk with an innkeeper, and the trunk has been stolen, and nobody but the traveller himself knows what was contained in it, the judge can only determine the amount of the condemnation by his oath upon the subject.

[838] With the *Romans*, the judge often allowed the plaintiff an indefinite latitude as to the sum, at which he estimated the things of which he demanded restitution, *jurare in infinitum licet.*

It was however in the discretion of the judge, when he thought proper to limit the sum, beyond which the estimate should not be carried. *Judex potest præfinire certam summam usque ad quam juretur. L.* 5. § 1. *ff. d. Tit.*

With us, the judge, after hearing the parties, limits the extent to which the oath of the plaintiff ought to be received, with respect to the value of the thing demanded.

In fixing this sum, he should pay regard to the quality and situation of the plaintiff, and the greater or less degree of probability which appears in his allegations: the nature of the cause ought also to be taken into consideration; much less indulgence should be shown to a defendant, who had wilfully deprived me of my property, than to one who had only been guilty of imprudence and want of care.

Although the judge may have referred the matter to the estimation of the plaintiff, without previously limiting the sum, he is not bound to follow it if it appears excessive: *etsi juratum fuerit, licit judici absolvere vel minoris condamnare. L.* 5. § 2. *ff. de Tit.*

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