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THE

CIVIL LAWS OF FRANCE

TO

THE PRESENT TIME.

SUPPLEMENTED

BY NOTES

ILLUSTRATIVE OF THE ANALOGY BETWEEN

THE RULES OF THE CODE NAPOLÉON,

AND

THE LEADING PRINCIPLES OF

THE ROMAN LAW.

35334

BY DAVID MITCHELL AIRD, ESQ.,

BARRISTER-AT-LAW, MIDDLE TEMPLE;

AUTHOR OF "BLACKSTONE ECONOMIZED," ETC., ETC.

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THE RIGHT HONOURABLE

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LORD CHIEF JUSTICE OF ENGLAND,

THE FOLLOWING WORK IS,

WITH HIS LORDSHIP'S KIND PERMISSION,

RESPECTFULLY AND GRATEFULLY INSCRIBED,

BY

THE AUTHOR.

PREFACE.

The Roman Civil Law, comprised in the *Institutes*, the *Code* and *Digest*, and *Novel Constitutions* of the Emperor Justinian, has come down to modern times, and the laws of every part of Europe have been influenced, more or less, by it; and no country more so than France; for, as may be seen from the Notes which supplement this work, the Roman Civil Law, modified to suit the spirit of civilisation, has been judiciously embodied in the *Code Napoléon*; and the clear and comprehensive nature of the Code has been so valued that its leading principles have been adopted in the Rhenish Provinces of Germany, Spain, Belgium, Holland, and carried by colonists into the colonies, such as the Mauritius, the Cape of Good Hope, Guiana, Demerara, Louisiana; while Lower Canada is almost entirely governed by its rules.

Convinced of the importance to the legal student of a knowledge of the Civil Laws of France, whose principles are so widely extended, I have endeavoured to place before him a concise and lucid translation of the *Code Civil des Français;* and that the rules which it contains may be easily comprehended, I have avoided unnecessary technicalities, and taken pains to substitute English equivalents for French idioms.

In order to fix the student's attention and strengthen his legal knowledge, I have appended Explanatory Notes, which show the analogy that exists between the Laws of France and the leading principles of the Roman law, purposely omitting all reference to those obsolete rules which are foreign to the legislation of modern Europe.

To render the work more pleasing, and the study of the Code more effective, I have blended, when the sense of the rules could be easily grasped, several articles into one distinct paragraph, so that the student will be saved the interruptions that render reading unpleasant and study unattractive. References, however, are given, by the use of which the various articles in the *Code Civil* may be at once referred to.

The *Code Napoléon*, from its lucidity and simplicity, cannot fail to interest the young student; it will serve as a pleasant introduction to the wide domain of legal science; while advantages of a practical nature must be gained from a knowledge of a legal system whose principles are all but universal.

The task has been a tedious one; but if I have succeeded in placing before the legal student a work that will prove practical and profitable to him, I shall deem myself well rewarded for the time and labour bestowed upon it.

DAVID MITCHELL AIRD.

3 PUMP COURT, TEMPLE,

January, 1875.

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THE

CIVIL LAWS OF FRANCE.

BOOK I.

OF THE CIVIL LAW.

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THE

CIVIL LAWS OF FRANCE.

INTRODUCTORY CHAPTER.

OF THE CIVIL LAW.

PREVIOUS to the *Code Napoléon*, the civil legislation of France was divided into two general systems, the *customary* and the *written* law, each of which branched into a multitude of subdivisions. There were more than 180 general customs, extending more or less over the various provinces. Independently of customary and written law, considered as local law, France was governed also by the Roman law, the laws of the Prince, and the decisions of the local Parliaments.

Charles VII. formed the project of uniting the whole legislation of his kingdom; Louis XI. entertained the same idea; Henry II. resumed it; finally, Lamoignon, in the reign of Louis XIV., drew up his decrees; but all remained in abeyance till, on the night of the 4th August, 1789, when equality of rights throughout France was proclaimed, the Constituent Assembly ordered a Code of Civil Law common to the whole kingdom to be drawn up. Cambacérès undertook the task, but failed. Tronchet, Bigot de Préameneu, Malleville, and Portalis

were commissioned to draw up a system, following, by the orders of Napoleon, the order of the different *projets* presented by Cambacérès, for the purpose of its being laid before the nation at large. Before offering it for discussion to the Council of State, it was submitted to the nation through the medium of the Press, and by this means the general and individual wisdom of France was collected upon every article. From the Committee of Legislation the Code was sent to the Tribunat, and after various conferences and discussions, it was referred to the Legislature in its separate headings, and each heading was separately promulgated by decrees from March, 1803, to March, 1804, when the whole formed the *Code Civil* or *Code Napoléon*, which every real admirer of jurisprudence well knows how to appreciate.*

The *Civil Law* of France may be defined as "A general rule of conduct prescribed by the supreme power of the State for its subjects to obey." It is a rule of conduct commanding what is *right*, and prohibiting what is *wrong*. It is a positive and permanent law so long as it is not legally changed by the Legislature. It is promulgated by the chief of the State, declaring that the law has passed through all the necessary forms for its completion, commanding the judicial and administrative authorities to *publish* it, to *obey* it, and to see that it is *observed*.

Every law consists of several parts :—1. DECLARATORY, whereby the *rights* to be observed and the *wrongs* to be avoided are clearly defined and laid down.——2. DIRECTORY, whereby the citizen is instructed and enjoined to observe those *rights*, and to abstain from the commission of *wrongs*. ——3. REMEDIAL, whereby a method is pointed out to recover a man's private rights or redress his private wrongs. ——4. VINDICATORY, the *sanction* or *vindicatory* branch of the law, whereby it is signified what punishment or penalty shall be incurred by such persons as commit wrongs by transgressing the law, or by neglecting their duty.

* The sources from which the French law has been derived are the Institutes, the Pandects, the Code, and the Epitome Juliani.

Code Napoleon.

The *Code Napoléon* consists of a Preliminary Article and Three Books. The First Book treats of *Persons;* the Second, of *Things;* and the Third, of the different modes of *Acquiring Property.*

Preliminary Article.

[*Code Napoléon*—Articles 1-6.]

Laws are executory in all the French territory, by virtue of the promulgation by the Executive, and are binding on every part of the territory so soon as their promulgation can be known.

The promulgation made by the Executive shall be deemed to be *known* in the department of the seat of Government one day after the promulgation; and in each of the other departments after the expiration of the same interval, allowing as many days as there are distances of sixty miles (*dix myriamètres*) between the city where the promulgation was made and the chief town of each department.

All laws are *prospective*, and never *retrospective*, and have no binding force before their promulgation.

Laws relating to the police and the safety of the citizen are binding upon all persons residing in French territory.

Real property, even when possessed by foreigners, is governed by French law.[1]

Frenchmen, even residing in a foreign country, are subject to French laws respecting their *status* and privileges.

A judge who refuses to give judgment under pretext of the silence, obscurity, or insufficiency of the law may be prosecuted as guilty of denying justice.[2] Judges are forbidden to pronounce, by way of general and legislative disposition, upon cases brought before them; that is, without the authority of the law.

No one can derogate, by private arrangements, from laws which concern public order and morals.

[1] This is in accordance with the rule of Private International Law, that the *lex loci rei sitæ* prevails in cases in which real property is involved.

[2] By the Roman law, a judge *qui litem fecit*, *i.e.*, who from ignorance, or other preventible cause, gave a wrong decision, was liable to an action *quasi ex delicto.* He might have relieved himself from this liability by obtaining the advice of lawyers whose business it was to render such assistance.

CHAPTER II.

OF PERSONS.

Enjoyment and Privation of Civil Rights.

Code Napoléon—Articles 7-21.]

EVERY Frenchman enjoys rights,* signifying that all who are born of French parents have equal rights,[3] and that the property of a minor, as well as the property of an insane person of full age, is placed under the protection of the law.

Any person, born in France, of alien parents, may, at the age of 21, claim the *status*[4] of a Frenchman, provided, in the event of his residing in France, he declares his intention to fix his *domicile* there; or if residing in a foreign country, he makes the same declaration, and fixes his *domicile* in France, within a year from the date of his declaration.

Every child of a Frenchman, born in a foreign country, is French; and every child of a Frenchman so born, whose father has lost his *status* as a Frenchman, may recover his nationality by making, at full age, the above declaration.

An alien enjoys in France the same *civil* rights as a

* Civil rights differ from political rights. Women and minors enjoy civil rights; and every Frenchman, on attaining his majority (21 years), has also political rights, such as the right of voting, and of filling any public office or place of trust.

[3] Among the Romans, it was not every man who possessed rights, neither did every man who possessed rights possess them in an equal degree. The *civil capacity for rights* depended on the existence of certain qualifications, which were determined partly by the public and partly by the private law.

[4] *Status*, the legal capacity of a *persona*, the elements of which were liberty, citizenship, and membership in a family.

Frenchman. An alien woman who marries a Frenchman follows the *status* of her husband.

By the Naturalisation Act of 1867, an alien, at the age of 21, who has resided three years in France, may, on making the prescribed declaration, be admitted to the enjoyment of all the civil rights of a French citizen; and if the alien has rendered any important military or civil service to France, one year's residence will be sufficient to secure his naturalisation. By the same Act, in certain cases, aliens who have never resided in France may be naturalised by having an appointment conferred upon them by the French Government.

An alien, though not residing in France, may be summoned before the French tribunals for debts contracted in France with a Frenchman, and also for debts contracted by him in a foreign country with Frenchmen. A Frenchman may also be summoned before a French tribunal for debts contracted by him in a foreign country, even with an alien.

In all but commercial matters, the plaintiff, if an alien, must give security for costs, unless he possesses in France sufficient real property to cover costs.

Privation of Civil Rights.

The *status*[5] of a Frenchman is lost:—1. By being naturalised in a foreign State.——2. By accepting, without the authority of the French Government, any public appointment conferred by a foreign State.——3. By settling in a foreign country, without any intention of returning. Proprietors of commercial establishments in a foreign country are not considered as having settled there with the intention of not returning.

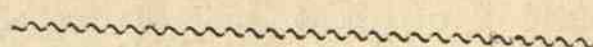
A Frenchman who has lost his *status* as a Frenchman may resume it by returning to France with the authority of the French Government, and by declaring his intention to fix his domicile in France, and renouncing any privilege contrary to French law.

[5] By the Roman law, the loss of a *status* was called *capitis diminutio*, and like the *caput* itself, was of three kinds:—1. *Capitis diminutio maxima*, when liberty was lost.——2. *Capitis diminutio media*, when the right of citizenship was lost.——3. *Capitis diminutio minima*, when a Roman citizen underwent a change with respect to his previous family relations.

A Frenchwoman who marries an alien follows the *status* of her husband; and, if she becomes a widow, she may resume her former *status*, provided she resides in France, or returns there with the permission of the Government, and declares, as prescribed, her intention to fix her domicile in France.

A Frenchman who, without the permission of the French Government, enters into the military or naval service of a foreign power, loses his *status* as a Frenchman, and cannot return to France without the permission of the French Government, nor resume his status of a Frenchman, except by going through the same formalities as an alien; without prejudice to the penalties prescribed by the criminal law against Frenchmen for bearing arms against their own country.

All persons convicted of felony were formerly considered as civilly dead, but civil death (*la mort civile*) was abolished by the Act of May, 1854,* and *civil degradation* and *legal interdiction* are now substituted.†



* Consequently, Articles 22 to 33 are repealed.

† *Civil degradation* is the loss of civil and political rights; *legal interdiction* is the deprivation of the management of property.

CHAPTER III.

OF REGISTRATION OF BIRTHS, MARRIAGES, AND DEATHS.

Actes de l'Etat Civil.*

[*Code Napoléon*—Articles 34-111.]

THE year, day, and hour of a birth, death, or marriage must be entered in the register; also the Christian name, surname, age, profession, and domicile of all parties named in the registration. The registrar must not add anything which has not been declared by the parties. If any of the parties interested in the registration cannot appear personally, he may be represented by means of a power of attorney. Witnesses to the registration must be males of full age.

The registrar must read over the registration to the parties. The registration must be signed by the registrar, the parties, and witnesses; and if any of them cannot sign, the reason must be stated. The registration must be entered in the registers, one of which is kept in the parish; the other, at the end of the year, is sent to the court of first instance.

Extracts may be obtained by any person from the registrars, and such extracts are certified (*legalisés*) by a judge of the court of first instance. When there are no registers, or when the registers have been lost, the registration may be proved by documents or witnesses.

* The word *acte* in this case signifies a document or instrument which proves the existence of a fact; and *état civil*, the *status* of a person and his condition in civil society. *Les Actes de l'Etat Civil* are documents written by public officers appointed for the purpose, authenticating the births, marriages, and deaths of persons.

All registrations relating to the birth, marriage, or death of Frenchmen or foreigners made in a foreign country are valid, if drawn up according to the form used in the said country.

Every registration of birth, marriage, or death of Frenchmen made in a foreign country shall be valid, if it has been made conformably to the French laws by diplomatic agents or the consuls.

In every case, when mention of a registration is to be made in the margin of a registration previously registered, it must be done at the instance of the interested parties, either on the parish register or on the duplicate copy in possession of the court of first instance.

A registrar is responsible for alterations made in registrations, but he has his remedy against the person who made the alterations. Any alteration or forgery made in the registration of births, marriages, and deaths, or writing of such registration on a fly-leaf, or otherwise than in the proper register, subjects the public officer to damages, without prejudice to a criminal action.

The public prosecutor is bound to examine the state of the registers when deposited among the rolls of the court, and must draw up a concise statement, and point out any infraction committed by the registrars, who are liable to a fine.

In all cases where a court of first instance is called to adjudicate upon questions of registration, interested parties have a right of appeal.

Registration of Births.

The birth of a child must be declared, within three days after confinement, to the registrar of the place, to whom the child must be brought; such declaration is made by the father, and in his absence by the *accoucheur*, or any other person present at the confinement; and, when the mother is confined away from home, by the person in whose house the birth took place. The birth must then be immediately registered in the presence of two witnesses. The day, hour, place of birth, sex, and the Christian name given to the child must be stated in the registration; also the Christian and surname, profession, and domicile of the parents, and those of the witnesses.

Every person who finds a new-born child must take it to the

registrar, with the clothes and other articles found with it, and must state the place, and when and where found; a note of which is taken, stating the apparent age of the child, its sex, the name given to it, and the officers to whom it has been given in charge. This statement is inscribed upon the register.

If a child is born at sea, it must be registered in the ship's log-book within 24 hours, in the presence of the father, if there, and two witnesses; and when the vessel arrives in port, the master must give two copies of the registration to the proper authorities, to be registered at the domicile of the father, if known, otherwise of the mother.

The affiliation of an illegitimate child must be registered at the time of the affiliation, and the fact must be stated in the margin of the registration of birth, if there is one.

Registration of Marriages.

Before solemnizing a marriage the officer of the civil State must have the banns published on two distinct Sundays, the latter, eight days after the first publication. The banns, with Christian names, surnames, trades or callings, and domiciles of the parties to be married, and those of their parents, must be posted on the door of the town-hall, and the marriage cannot take place till three days after the second publication.

If the marriage does not take place within twelve months, fresh banns must be published.

When opposition is made, the registrar is not at liberty to celebrate the marriage till the opposition has been withdrawn, or annulled by the decision of a court of justice, under a penalty of 300 francs and damages.

The certificates of the births of both contracting parties must be produced, and given to the registrar. If unable to produce such certificates, a declaration, before a justice of the peace, of seven witnesses of either sex, relatives or not, who remembered the births, will be accepted; but it must be sanctioned by a court of first instance.

The contracting parties must obtain the consent of their parents or grand-parents; in default, of the family; and an affidavit of such consent, executed by a notary, must be produced.

The marriage is celebrated in the parish in which one or both of the contracting parties have resided for a period of six months.

On the day appointed by the parties for the marriage ceremony, the registrar* in the town-hall reads, in the presence of four witnesses, the prescribed articles, which detail the respective rights and duties of husband and wife. The registrar then asks the parties if they consent to be husband and wife, and on receiving an affirmative reply, he proclaims in the name of the law that they are lawfully united by marriage, which is immediately registered.

In the registration of marriages, there must be inserted:—1. The Christian name, surname, profession, age, place of birth, and domicile of both husband and wife.——2. If of full age, or minors.——3. Christian names, surnames, professions, and domicile of the parents.——4. The consent of the parents, or in default, that of the family.——5. Necessary summons, if served.——6. The banns.——7. The oppositions, if made, or if withdrawn.——8. The declaration of consent by husband and wife.——9. Christian names, surnames, ages, professions, and domiciles of the witnesses.——10. Declaration that there has or has not been a marriage settlement, and the date of such deed, and name and domicile of the notary who executed it.

Registration of Deaths.

No interment can take place without the authority of the registrar, who must view the body of the deceased to assure himself of the death; and twenty-four hours must elapse from death to interment, except in special cases. The registration of deaths is made by the registrar in presence of two witnesses, and it must contain the Christian name, surname, age, profession, and domicile of the person deceased, and the same particulars of the persons who make the declaration.

In cases of deaths in hospitals or public establishments, the directors or masters of such establishments are bound to give notice within twenty-four hours to the registrar, who is bound

* In France the *registrar (officier de l'état civil)* who celebrates marriages is either the mayor or a municipal officer.

to inspect the body, and after inspection, send the registration of the death to the registrar of the last domicile of the deceased person, who enters it upon his register.

When there is any sign or indication that the deceased met death by violence, interment must not take place till the superintendent of the police ascertains, by the assistance of a medical man, the cause of death and the circumstances connected with it; and his statement must be sent to the registrar of the place, who, again, must send it to the registrar of the domicile of the deceased person, if known.

The registrar of a criminal court is bound to send, within twenty-four hours after the execution of a criminal, to the registrar of the place where the person was sentenced to death all the information necessary for the registration of the death. In cases of deaths in prisons, the gaoler must send for the registrar, who enters the death upon his register. In cases of deaths by violent means, in prisons, or by the extreme penalty of the law, no mention must be made of such circumstance; the death is only registered in the usual form. In cases of deaths at sea, the death must be recorded, in the presence of two witnesses, by one of the officers, upon the log-book, and a copy of it sent, when the vessel arrives in port, to the registrar of the domicile of the deceased person, to be entered upon the register.

Registration of Births, Marriages, and Deaths of the Military out of the French Territory.

Registration* of the military out of the French territory must be drawn up in the form stated, with the following exceptions:—The quartermaster in each corps, and the captains of detachments, must act as registrars, and enter all registrations in registers kept for the purpose. In cases of births, the officer must send, within ten days, a copy of the registration to the registrar of the last domicile of the father, if known, or of the mother.

Deaths must be attested by three witnesses, and a copy of

* By the decree of June 16, 1808, officers cannot marry without the permission of the Minister of War; nor can non-commissioned officers or privates without the consent of their commander.

the registration must be sent to the registrar of the domicile of the deceased person.

The marriage banns of the military must be published at their last domicile, and twenty-five days before the celebration of the marriage such banns must be made public to the corps.

Immediately after marriage a copy of the registration must be sent to the registrar of the last domicile of husband and wife.

Deaths in hospitals out of the French territory are registered by the directors, and a copy sent to the quartermaster, who must forward a copy to the last domicile of the deceased person.

In each of these cases the registrar of the last domicile must at once enter the registration upon his books.

Rectification of Registrations.

Whenever rectification on the ground of error is demanded, the action must be adjudged by a competent court, subject to appeal. Interested parties are made parties to the action in the hearing of the public prosecutor.

Judgments of rectification can never be set up against interested parties who did not demand it, or who were not summoned. Judgments of rectification must be entered upon the registers as soon as the registrars have received notice, and mention made in the margin of the amended registration.

Domicile.

The domicile* of every Frenchman, as far as regards civil rights, is where he has his principal establishment or abode. A change of domicile is effected by the fact of a person taking up his residence in another place, with the intention of fixing his principal domicile there; the proof of such intention results from an express declaration before the municipalities of the place left, as well as to the municipalities of the new domicile. In default of such declaration, proof of *intention* depends on circumstances; but a temporary removal, by any public appointment, does not change the domicile; a life-appointment does.

A wife claims the domicile of her husband; a minor not

* *Domicile* differs from *residence.* It preserves a right notwithstanding the fact of absence.

emancipated, that of the father, mother, or guardian; an interdicted person, that of his guardian; and a servant that of his or her master or mistress, when living in the same house.

The domicile is the place where the rights of succession commence *(la succession s'ouvre)*. When a deed contains a clause selecting a domicile other than the real one for the execution of such deed, any legal notice may be lawfully served at the specified domicile.[6]

[6] By the Roman law, there were three sorts of domiciles. The first, the place of birth, *domicilium originis;* the second, that which was voluntarily chosen by a party, *proprio motu*, for the performance of a special act; the third, the true, fixed, and permanent home and principal domicile of a person, to which, whenever he was absent, he had the intention of returning (*animus revertendi*).

CHAPTER IV.

OF ABSENCE.

Presumption of Absence.*

[*Code Napoléon*—Articles 112-143.]

WHEN it is necessary to administer the property of a person presumed to be absent, and who has not appointed a trustee, interested persons may bring an action before the court of first instance for the administration of his effects. The court will then appoint a curator to represent the absentee with regard to inventories, accounts, partitions, and liquidations in which the absentee may be interested; and the public prosecutor is especially charged to watch his interest, and to be heard in all suits in which he is concerned.

Declaration of Absence.

When a person has been missing, and not heard of for four years, interested parties may apply to the court to have the absence proclaimed. The court will order an inquiry to be made in the district where the missing person resided, and after the expiration of one year the court will then adjudge the absence. If no trustee has been appointed by the absentee, his presumptive heirs may insist upon being put into provisional possession, on giving security for the proper administration of the estate during the absence of the owner; but if the absentee has appointed a trustee, his presumptive heirs cannot, unless the power of the trustees has expired, demand the declaration of absence nor enter into the provisional possession till the lapse of ten years

* *Absence*, in the sense referred to, means the disappearance of a person, without anyone having received intelligence of his existence.

from the disappearance, when the absence will be adjudged and the presumptive heirs may enter into possession. The will, if there be one, is then read before all interested parties, and the legatees and donees, and all parties having a claim on the property, can, on giving security, put in their claims.

If the absentee has been married, with property in common, the husband or wife may, if he or she desires that the property shall remain in common, prevent any other person from being put into provisional possession, and he or she may become the administrator of the property; but if the consort prefers a provisional division of the property, he or she then enforces his or her claims, and gives security for that part of the property which he or she may eventually be bound to return. A wife choosing to continue the community may afterwards renounce it. Provisional possession is only considered as a trust, of which an account must afterwards be rendered.

A person who has been put in provisional possession, or a consort who has chosen to remain in community, is obliged to have an inventory taken of the personal property of the absentee, in the presence of the public prosecutor or a justice of the peace. Persons put into provisional possession may, for their safety, insist upon the real property being inspected by an expert appointed by the court, who reports upon its condition. Persons put in provisional possession, or legal administrators who have used the property, are bound to return the fifth part of the revenue, if the absentee reappears within fifteen years from his disappearance; and the tenth, if he reappears after the lapse of fifteen years; and after thirty years, the whole of the revenue belongs to them.

If the absence has continued for thirty years from the period that parties were put into possession, or if one hundred years have lapsed since the birth of the absentee, the securities shall be discharged, and all parties having claims may demand the partition of the property of the absentee, and be put into absolute possession by the court.

When the death of an absentee is proved, his property at once devolves upon his heirs, and those who had the provisional possession of the property must restore it, with the exception of the fruits to which they are entitled, as previously stated.

If the absentee reappears, or it is proved that he is alive during the provisional possession, the effects of the "Declara-

tion of Absence" cease; or if it be proved even after final possession had been adjudged that he was alive, he can enter into possession of his property in the state in which it is at the time of his reappearing, and may recover the value of that which has been disposed of.

The children and the direct descendants of an absentee may, in like manner, recover the property, if they can prove that the absentee had reappeared, or was alive within thirty years from the adjudgment of final possession.

Whoever claims a right from a person whose existence is uncertain must prove that the person was living when the right accrued, without which proof he will not be able to establish his claim.

When a legacy or heirship falls to a person whose existence is uncertain, it devolves exclusively to the next of kin; but the right of the absentee will not be void till the lapse of time prescribed by prescription; that is, thirty years.

An absent spouse, whose consort has married again, has alone the power of disputing the validity of the second marriage; and if the absentee has not left heirs, the other spouse may demand provisional possession of the estate.

Guardianship of Minors whose Fathers have Disappeared.

If a father disappears, leaving children who are minors, the mother shall be entitled to the guardianship, with full power to exercise all the rights of the absent husband as to their education and the administration of their property.

If the mother is dead at the time of the disappearance, or if she dies before the absence of the father has been declared, the guardianship of the children devolves upon the nearest ascendants, and in default of such, upon a provisional guardian; the same rule applies when a missing consort has left children by a former marriage.

CHAPTER V.

OF MARRIAGE.*

[*Code Napoléon*—Articles 144-226.]

By the laws of France, a man cannot marry till he has attained the age of eighteen; nor can a woman till she is fifteen. In certain cases, dispensation respecting age may be obtained from the Government.

There must be *consent* to validate a marriage.[7] A second marriage, when the first husband or wife is living, is absolutely void.†

The consent of both father and mother is required by a son under twenty-five years of age, and by a daughter under twenty-one; if the parents disagree as to the consent, that of the father suffices. If the father or mother is dead, or cannot give consent, the consent of one is sufficient. If both are dead, then the grandfather and grandmother take the place of the parents. If the grandfather and grandmother of the same line disagree, the consent of the grandfather suffices; dissent between the two lines carries consent.

When a man has attained his twenty-fifth year, and the

* Marriage is a civil institution, entered into by two persons willing and able to contract, and not labouring under any legal disability. Each party must exercise *free-will;* for it is the *consent*, and not the mere union of the parties, that constitutes the marriage.

† As in England, it is a felony for a man or woman to marry, he or she having a wife or husband living. It is called *bigamie* (bigamy).

[7] By the Roman law, the essential part of marriage was the *consent.* The different forms and varied ceremonies were merely accessories. If the persons who were desirous of marrying were in the power of anyone, the consent of the latter was required; if refused, the marriage was absolutely void.

woman her twenty-first, both are still bound to ask, by a formal notification, the consent of their parents; and till the man has attained his thirtieth year, and the woman her twenty-fifth, this formal act must be repeated twice, from one month to another; and one month after the third application it is lawful for the parties to marry, with or without consent. After the age of thirty, it is lawful to marry, in default of consent, a month after one formal notice has been given, which notice must be served upon the father and mother or grandfather, by two notaries, or by one notary and two witnesses.

In the event of the parents or ascendants to whom the notification should be made being absent, a copy of the judgment declaring the absence must be produced; or, in default of it, *un acte de notoriété*,* drawn up, on the declaration of four witnesses, by the justice of the peace.

So rigid are the marriage laws in France, that if these rules are neglected, if the registrar neglects to state in the marriage certificate that the consent of the parents had been obtained, he is liable to a fine of 300 francs and six months' imprisonment; and when the prescribed notices are not carried out, to a fine of 300 francs and one month's imprisonment.

The same formalities are required for illegitimate children when affiliated. If not affiliated, marriage cannot take place before the party is twenty-one years of age without the consent of a special guardian appointed for the purpose. If neither parents nor grand-parents are alive, the consent of the family council is required.

Marriage is prohibited between all in the direct line, whether legitimate or illegitimate, and between persons related by marriage in the same line. Marriage is also prohibited between an uncle and a niece; an aunt and a nephew; also between brothers-in-law and sisters-in-law,[8] but in the two latter cases the Government can dispense with the prohibition.

* A declaration before a justice of peace.

[8] The Institutes do not notice the marriage of a brother-in-law and a sister-in-law. It was permitted up to the time of Constantine, who forbad it. The prohibition was renewed by Valentinian, Theodosius, and Arcadius. The marriage of first-cousins, previously forbidden, was made legal by Arcadius and Honorius.

Celebration of Marriage.

Marriage[9] is a civil ceremony in France, and must be celebrated publicly before the registrar of the parish where one of the contracting parties has resided six months. If the parties have not resided six months, the banns must be published at the parish of their former residence. If the contracting parties, or one of them, cannot marry without the consent of another person, the banns must also be published in the parish where such person resides.

A marriage contracted in a foreign country between a Frenchman and a Frenchwoman, and between a French person and a foreigner, is valid in France, if celebrated according to the forms of the country, provided it has been preceded by the publication of banns and with the consent of parents. If the parties return to France, the certificate of marriage must be registered within three months after returning at the place of their abode.*

Opposition to Marriage.

The right of opposing the solemnization of a marriage belongs to a person connected by marriage with one of the two contracting parties. The father, and in default of the father, the mother, and in default of the father and mother, the grandfather and grandmother, may also oppose the marriage; and in default of ascendants, the brother or sister, uncle or aunt. First cousins of full age can only oppose the marriage in the two following cases:—1. When the consent of the family council has not been obtained.——2. When the opposition is founded on the insanity of the proposed husband.

* The registration of births, marriages, and deaths made in a foreign country before the French Consul, according to the French laws, without any other formalities, is valid.

[9] The Roman notion of marriage was that of a complete personal unity of the husband and wife (*consortium omnis vitæ*). Marriage gave neither party any right over the property of the other, except when the wife passed *in manum*, and then all she had belonged to the husband. In the later years of the Republic, marriages were generally made without the wife passing *in manum;* and before the time of Justinian marriage *in manum* had altogether ceased.

Every reason for opposition must be clearly stated, and the court of first instance decides within ten days. An appeal to a superior court may be made, which appeal is tried ten days after the citation. If the appeal be rejected, the opposers, if not ancestors, may be condemned to pay damages.

Petition for Nullity of Marriage.

A marriage contracted without the *free* consent[10] of both parties cannot be impugned except by the party whose consent had not been voluntary; and when a marriage has been contracted by false personation, the nullity of marriage can only be sued for at the suit of the injured person; but when cohabitation has continued for six months after the false personation is revealed, the marriage cannot be set aside.

A marriage, contracted without the consent of the parents,[11] or the consent of those persons already mentioned, if such consent is required, can only be impugned by those whose consent was required by the law; or by one of the married persons who had not obtained the specified consent; but after one year's cohabitation, the suit is not maintainable.

All marriages contracted under the prescribed age, or under the other disabilities previously stated, may be impugned either by the married parties, or by those legally interested, or by the public prosecutor; but marriages by minors cannot be set aside if they have lived together six months after they have attained full age; or if the woman be pregnant before the lapse of six months.

In all cases a suit for nullity of marriage may be maintained by those who have a legal interest in the marriage, but not by collateral relations nor by children of another marriage, unless they have a direct interest in it.

If a husband or wife contract a second marriage while the first wife or husband is alive, he or she may sue for nullity of

[10] *Nuptias non concubitus sed consensus facit:* Not *cohabitation*, but *consent*, makes the marriage.

[11] In the Roman law, consent of the *paterfamilias* must precede the marriage; but if the *paterfamilias* knew of the marriage, and did not oppose it, his assent was presumed.

marriage ; but not till the validity or nullity of the first marriage has been adjudged.

Marriages not publicly celebrated by the registrar may be impugned by the parties themselves, by the parents and grandparents, by the public prosecutor, and by all who are interested in the marriage.*

If the banns have not been regularly published, the registrar may be fined in a sum not exceeding 300 francs, and the contracting parties in sums proportionate to their incomes ; which fine may be imposed even if the nullity of marriage be not adjudicated.

No man nor woman can claim the privileges of the married state unless the registrar's certificate can be produced. Living as man and wife is not sufficient ; but if the parents are dead, after having lived publicly as man and wife, their children's legitimacy cannot be disputed under the pretence that no certificate of their parents' marriage can be produced ; provided the legitimacy is proved by a status of legitimacy (*possession d'état*) agreeing with the certificate of the children's births.

When it is proved on a trial before a criminal court that one of the parties in the trial has been legally married, an extract from the finding of the court, inscribed in the registrar's books, has the same effect with regard to the married parties and children born of the marriage as the original registration. If the parents die before the discovery of a fraud in the registration, a criminal action may be brought by all interested in the validity of the marriage, or by the public prosecutor, against the registrar ; if dead, a civil action may be brought against his heirs.†

When a marriage has been declared void from some informality, the husband and wife as well as the children will be entitled to all civil rights resulting from the marriage, provided the marriage was contracted in good faith (*bonâ fide*). If good faith only subsisted on the part of one of the married parties, the innocent party and the issue will be alone entitled to civil rights.‡

* Clandestine marriages are rigidly opposed by French law.

† This takes place when the registrar has forged, or even omitted, any of the prescribed forms required by law.

‡ It is customary in France, after the civil contract of marriage is

Obligations Arising from Marriage.

By the mere fact of marriage, husband and wife contract to support, educate, and bring up their children. Sons and daughters have no legal claim upon their parents for a marriage-portion, or for any sum of money. Children, when their parents or grand-parents are in want, are bound to support them according to their means.

Sons-in-law and daughters-in-law are, in similar circumstances, bound to maintain their fathers-in-law and mothers-in-law, except when the mother-in-law contracts a second marriage, or when the tie of affinity is broken by the death of one of the married parties. These obligations are reciprocal.

If a person, bound by law to maintain his relation, can show that his relative is no longer in want, or that he himself is unable to pay for his maintenance, the court may order him to receive him into his own house, and there supply him with the necessaries of life. This obligation is also reciprocal.

Respective Rights and Duties of Husband and Wife.

A husband and wife are bound to be faithful, and to help and support each other. A husband is bound to protect his wife, and a wife is bound to obey her husband.

A wife is bound to live with her husband, and to accompany him wherever he may think proper to reside; and the husband is bound to receive his wife, and to provide her, according to his means and station, with all the necessaries of life.

A wife cannot sue in a civil action without the authority of her husband, even when she carries on a business in her own name, or when she has property settled upon her, or when separate estates exist between the man and wife; nor can she give or receive gratuitously, sell, or mortgage, or purchase property without the consent of her husband; but the court of first instance has the power of overruling the non-consent of the husband.

performed, for the parties to go to church to have the marriage celebrated by the priest; but this is not compulsory. A priest cannot act without the certificate proving that the marriage has taken place before the registrar.

If the wife carries on a business distinct from her husband, she may, without his authority, bind herself for things which appertain to the business. In this case the husband also is bound by her acts, unless their estates are separate. A wife is not considered a trader on her own account when she only retails the goods of the business carried on by her husband.

If a husband is convicted of felony, interdicted, or disappears, the wife cannot maintain an action nor contract without the authority of the court of first instance.

All general powers given by a husband to a wife, even by marriage settlement, are void, except those which relate to the administration of her own property.

If the husband is a minor, the authority of the court of first instance is required to enable the wife to contract or to maintain an action.

A wife, husband, or heir is alone entitled to plead against a nullity of contract founded upon the non-compliance with these formalities.

A wife can make her will without the authority of her husband.[12]

[12] By the Roman law, a wife could not make her will if in the power of her father, or *in manum* (as long as it existed) of her husband.

CHAPTER VI.

OF DISSOLUTION OF MARRIAGE.

[*Code Napoléon*—Articles 227-228.]

MARRIAGE can only be dissolved by the death of one of the consorts; while both live, marriage is indissoluble.*

A widow[13] cannot contract a new marriage till the lapse of ten months from the death of her former husband.†

Judicial Separation.

[*Code Napoléon*—Articles 306-311.]

On sufficient grounds, either the husband or wife may sue for a judicial separation.‡ It can never lawfully take place by the mutual consent of the parties, but must be determined in a court of law.

* Divorce was abolished by an Act of May 8, 1816; and dissolution of marriage by civil death by the Act of May 31, 1854, consequently, Articles 229 to 305 are repealed. Under the old Code Napoléon, divorce in certain cases was allowed; but soon after the Restoration (1816), divorce was abolished. Several attempts have been made to re-establish the law of Divorce, but in each instance they have failed.

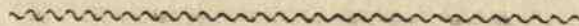
† A marriage contracted contrary to this rule is neither void nor voidable; but the registrar is subject to a penalty of from 16 francs to 300 francs; and if the late widow bears a child within three hundred days from the death of her former husband, or more than one hundred and eighty days from the celebration of the new marriage, the court has the power of deciding the paternity of the child.

‡ There are four causes:—Adultery on the part of the wife.——2. When a husband keeps a mistress in a house common to both husband and wife *(domicile conjugal)*.——3. Acts of cruelty or violence.——4. When one of the consorts has been found guilty of felony.

[13] By the Roman law, a widow was not allowed to marry a second husband until a year *(annus lucti)* had expired from the death of the first husband.

The wife against whom a separation has been adjudicated on account of her adultery is condemned to imprisonment for not less than three months, nor more than two years; but the husband can stop the punishment by condoning the offence and taking her back.

A judicial separation* in every case involves a separation of property.[14]



* Judicial separation, as before stated, does not dissolve marriage, and neither of the parties can marry during the life of the other.

[14] By the Roman law, a marriage could be dissolved at the wish of either party; but unless the consent to separate were mutual, the person seeking the divorce without good cause was subject to a penalty. After divorce, either party might marry again.

CHAPTER VII.

OF PATERNITY* AND FILIATION.

[*Code Napoléon*—Articles 312-342.]

A HUSBAND is considered in law the father of all children conceived by his wife[15] during marriage, unless he can prove that from the three hundredth to the one hundred and eightieth day previous to the birth of the child he was absent; or by some physical disability incapable of cohabiting with his wife. A husband is not allowed to disown a child on alleged impotency; nor can he do so on account of adultery on the part of his wife, unless the birth has been concealed from him, when he is empowered to adduce evidence to prove that he is not the father.

By the statute of 6th December, 1850, in cases of judicial separation, a husband may disown a child born three hundred days after the separation, unless there has been a reconciliation.

A child born before one hundred and eighty days from the marriage cannot be disowned by the husband in the following cases:—

1. If he knew that the woman was with child before marriage.
2. If he was present at the registration of the birth.
3. If the child is not likely to live (*viable*).

The legitimacy of a child may be disputed when born three hundred days after separation.

In the various cases where the husband is allowed to dispute paternity, he must do so within one month after the

* There are three kinds of paternity, and consequently the same of filiation:—1. Legitimate paternity.——2. Illegitimate paternity.——3. Adoptive paternity, which is a civil imagery of legitimate paternity.

[15] *Pater is est quem nuptiæ demonstrant.*

birth, if near the spot where the birth took place; if absent, within two months after his return; if the birth has been concealed, within two months after the disclosure.

If the husband dies before the expiration of the time allowed for disputing the paternity without having impugned it, his heirs shall have power to dispute the legitimacy of the child, within two months from the time that the child was put in possession of the property, or from the time that the heirs were disturbed by the child in their possession. All extra-judicial notices respecting the disavowal by the husband or his heirs are invalid, unless an action against a special guardian, in presence of the mother, be filed in a court of law within a month.

Proof of Filiation of Legitimate Children.

The filiation of legitimate children is proved by the registration of the birth on the parish register; in default, if the child has enjoyed the *status* of legitimacy; that is, has always borne the name of the father from whom he claims paternity, been treated by him as his offspring, and recognised as such by the family. In neither case can the legitimacy be disputed; and if the child has been registered in a false name, or as having been born of unknown parents, filiation may be proved by witnesses; this proof cannot be admitted when there is *primâ facie* written evidence to the contrary, which consists of family deeds and private and public documents. If disputed, the civil courts can alone decide the case.

If a misdemeanour by false registration or by changing the *status* of the child has been committed, a criminal action may follow after the civil action has been decided. There is no prescription admissible against the claim of an infant, but the heirs of an infant who has not put in a claim cannot maintain an action, unless the infant dies a minor, or within five years after the infant has attained its majority. The heirs may follow up the action when it has been commenced for the infant, unless it has been formally given up, or left in abeyance for three years.

Children born out of wedlock, other than the offspring of incest or adultery, may be legitimatized by the subsequent lawful marriage of the parents, provided they have been affili-

ated before marriage, or by the marriage registration.[16] In this case, such children enjoy the same rights as others born in wedlock.

Affiliation of Illegitimate Children.

The affiliation of a bastard must be made before a public notary, if not registered at the birth; and the affiliation by the father, without the consent of the mother, binds the father only.

The affiliation during marriage of a bastard, which one of the parties had by another consort before marriage, does not prejudice the other married person, nor the children born of such marriage. Nevertheless, should there be no children by the marriage, the bastard will be heir to the parent who acknowledged it.

An affiliated child cannot claim the same rights as a legitimate child. The rights are hereafter explained in the chapter "Of Successions."

All persons having a legal interest have a right to impugn an affiliation.

Inquiry as to paternity is not allowed, but in cases of rape, when the time of conception is reconcilable with the deed, the ravisher may be declared the father of the child.

Inquiry as to maternity is admissible, but the child who claims a mother must prove that he is the child born of her. Such proof is admissible by witnesses when there is *primâ facie* evidence in writing.

In cases of incest or adultery inquiry is not admissible.

[16] By the Roman law, *legitimatio* was an act—generally the subsequent marriage of father and mother—by which a child, not being the issue of a lawful marriage, acquired the name and *status* of a legitimate child; a mode introduced by Constantine.

CHAPTER VIII.

OF ADOPTION AND FRIENDLY GUARDIANSHIP.

[*Code Napoléon*—Articles 343-387.]

ADOPTION[17] is only permitted to persons of either sex who are upwards of fifty years old, who are childless at the time of the adoption, and without legitimate descendants; and the adopter must be at least fifteen years older than the person whom he or she proposes to adopt. No one can be adopted by more than one person, except by husband and wife, when the consent of both is required.

Adoption being a very grave and irrevocable act, no one can adopt who has not for six years at least maintained and paid unremitting attention to the person whom he proposes to adopt, unless the adopted has saved the adopter's life in battle, at sea, or from a fire. In this case, it is sufficient that the adopter be of full age, but older than the adopted, without children or legitimate descendants; and, if married, he must have the consent of his or her consort to the adoption.

Adoption cannot take place till the adopted has attained his majority. If the father and mother of the adopted, or one of them, is alive, and he has not attained the age of twenty-

[17] With the Romans, adoption was an act by which a citizen acquired the *patria potestas*, through the mere effect of the civil law, apart from any tie of blood. There were two kinds:—1. *Adoptio* (proper), by which in earlier times *filii-familias* were transferred from the *potestas* of one to that of another. Justinian completely altered the character of *adoptio*. Unless the adopter was an ascendant, the adopted son did not pass from the house of one to the other, but merely gained a right to succeed to his adoptive father, should the latter die intestate.——2. *Adrogatio*, by which persons *sui juris*, *i.e.*, *patres-familias*, became subject to the *potestas* of another. The effect of *adrogatio* was that the *adrogatus* himself, and all his natural and adopted children then under his power, became subject to the *adrogator*.

five, he must produce proof of consent. Adoption confers the name of the adopter, which is added to the family name of the adopted. The adopted continues a member of his own family, in which he retains all his rights. Marriage is prohibited between the adopter, the adopted, and their descendants; between adopted children by the same person; between the adopted and children who may be born to the adopter*; also between the adopted and the husband or wife of the adopter, and between the adopter and the husband or wife of the adopted.[18]

The natural obligation continues between the adopted and his parents, to maintain them, if necessity requires. A like duty devolves upon both the adopter and the adopted. The adopted acquires no right of heirship to the property of the relatives of the adopter, but he has the same right of succession to the property of the adopter as if he had been born in lawful wedlock, even when children are born to the adopter subsequent to the adoption.

If the adopted die without lawful descendants, property given by the adopter or inherited by him which has not been disposed of, returns—without prejudice to legal claims—to the adopter or his heirs; and the property which actually belonged to the adopted goes to his own relations. If during the life of the adopter the adopted dies without issue, the adopter succeeds, as previously stated, to the property which he himself had given; but this right is restricted to himself, and does not extend to his heirs even in the descending line.

Forms of Adoption.

The adopter and the person who is willing to be adopted must appear before a justice of the peace where the adopter resides, and a declaration of their mutual consent to adopt and be adopted, is then made.

A copy of the declaration must be sent within ten days to the

* In France, the adopted party is generally considered as being related by blood to the adopter; and, with the Romans in later times, adoption did not produce its full effect unless an ascendant was the adopter.

[18] *Adoptio* was a very common practice amongst the Romans. In France, adoption was not allowed till 1792, when it was authorised and afterwards carefully regulated by the Code Napoléon.

public prosecutor of the court of first instance in the jurisdiction of the domicile of the adopter, and the court, after having ascertained that all the conditions required by law are complied with, and that the adopter is a person of good character, pronounces, without assigning any reason, "*Il y a lieu,*" or "*Il n'y a pas lieu à l'adoption,*"—"There is ground," or "There is no ground for adoption." Judgment must be confirmed or negatived within a month by the Court of Appeal, and its decision publicly proclaimed and posted in such places as the court may deem fit. Within three months after the decision, the adoption must be registered by the registrar of the place where the adopter resides, and if not registered within the specified time, the adoption will be void. If the adopter dies after his declaration has been received by the justice of the peace, but before the courts have adjudged, the adoption will be admitted, if there are no grounds for disapproval.

Friendly Guardianship.

Any person above fifty years of age, who has no offspring nor legitimate descendants, may, on obtaining the consent of the parents, or of the surviving parent, or in default, of a family council, become the friendly guardian (*tuteur officieux*) of any infant.* If the parents of the infant are unknown, the consent of the municipal authorities of the place where the infant resides must be obtained.

A married person cannot become friendly guardian without the consent of his or her consort.

The justice of the peace where the infant resides draws up a statement setting forth the *request* and *consent* to the friendly guardianship.

This guardianship can only take place when it is for the benefit of the infant, who must be under fifteen years of age; and the obligation that such friendly guardian undertakes is, without prejudice to any private stipulations, to support the ward, to educate and bring him or her up, and to put the ward

* *Friendly Guardianship:* A step taken preparatory to adoption; a kind of benevolent contract, for the friendly guardian binds himself to support and bring up the minor. He is likewise bound to administer the property of the minor, and give security for his administration.

in a position to earn a livelihood. If the ward has property, and had a previous guardian, the administration of the property, as well as the care of the infant, devolves upon the friendly guardian, who nevertheless cannot, as the other guardian could, charge the property with the expenses of education and maintenance.

If the friendly guardian, after five years of guardianship, is fearful that his own death might take place before the ward comes of age, he may adopt him by will, which will take full force, provided the friendly guardian leaves no legitimate offspring. When the friendly guardian dies without having adopted his ward, the latter is entitled to be supplied with the means of subsistence during his minority.

If, when the ward has attained his majority, the friendly guardian wishes to adopt him, he must obtain his consent, and adhere to the forms previously described for adoption.

If the ward, three months after he has attained his majority, requests his guardian to adopt him and is refused, the friendly guardian is bound, if the ward is incapable of earning his livelihood, to support him till he is able to do so. This is without prejudice to stipulations that may have been entered into.

The friendly guardian who has the trusteeship of the ward's property is bound, in all cases, to render an account of his administration.

Parent and Child.

Parental authority is a right founded upon nature and confirmed by the civil law, which gives parents, under certain conditions, the government of their children; also the administration and use of their property.

A child, irrespective of age, is bound to honour and respect his parents. A minor remains under the father's control until he has attained his majority or has been emancipated. The father, during marriage, alone exercises the control; but in the absence of the father, the mother has power to exercise such authority.[19]

A minor cannot leave his home without his father's per-

[19] By the Roman law, parental authority was restricted to the father, and to the paternal ascendants.

mission, except for voluntary enlistment after the full age of twenty years.

A father justly aggrieved by the misconduct of his child may, if the minor has not attained the age of sixteen, cause him to be imprisoned for one month; and from the age of sixteen to emancipation or majority, he may get a warrant to imprison him for six months. A widow is not empowered to cause the imprisonment of her offspring, except by consent of two of the nearest paternal relatives of the minor. The infant can appeal, when the court, after fully examining the case, may revoke or modify the judge's order. These rules apply equally to illegitimate children when legally affiliated.

The father during marriage, and in the event of his death, the mother, enjoys the usufruct of the property possessed by the infant till he attains the age of eighteen, or till he is emancipated, which may take place before he has attained his eighteenth year.* The conditions of such usufruct are:— 1. To follow the rules that regulate usufructs.——2. Maintenance, education, and support of the infant according to his rank in life.——3. The payment of rents and the interest upon moneys due.——4. Funeral expenses, and those attendant upon the last illness.

In the event of the mother marrying again, this usufruct ceases to be enjoyed by her; and in no case does it extend to property that minors may have acquired by their own industry, nor to property that has been given or bequeathed to them under the express condition that the parents are not to reap any benefit from it.

* See "Rights of the Usufructuary," page 78.

CHAPTER IX.

OF MINORITY—GUARDIANSHIP.

[*Code Napoléon*—Articles 388-475.]

A MINOR is a person of either sex who has not attained the age of twenty-one.[20]

The father, during marriage, is legally the administrator of the property of his infant children. When not entitled to the usufruct, he is accountable for the property and rents; if entitled to the usufruct, he is only accountable for the property.

After the death of one of the parents, the guardianship[21] of infant children not emancipated devolves, in full right, upon the survivor. The father, however, may appoint, by will, or by legal declaration, a special trustee, without whose advice the mother cannot act as guardian.

If the wife is *enceinte* at the time of her husband's death, a special trustee is appointed by the family council; but after the birth of the child, the mother becomes guardian, and the trustee supplementary guardian. The mother is not bound to accept the guardianship, and in the event of her refusing, she must discharge the duties of guardian till one be appointed.

If a widow, being guardian, wishes to marry again, she must, before marriage, summon a family council, which must decide whether she is to continue the guardianship; if she

[20] With the Romans, at certain periods in the life of the minor, he received a new designation. He was as *infans* up to the age of seven; at fourteen (twelve for females) he reached the age of puberty *(pubertas)*; at twenty-five he attained his complete majority *(perfecta ætas)*. The capacities and liabilities were augmented at each stage.

[21] By the Roman law, *tutela* (guardianship) was the power (*vis ac potestas*) over a *liberum caput*, permitted by the civil law for the protection of one who, because of his years, could not protect himself.

neglects calling a meeting, she loses the guardianship, and she and her new husband are jointly and severally responsible for the guardianship which she has unlawfully kept. When a family council decides on the mother continuing the guardianship, her new husband then becomes joint-guardian, and both are jointly and severally responsible for all acts subsequent to the marriage.

The right of selecting a guardian, a relative or not, belongs only to the surviving parent; but a widow marrying again, and not having kept the guardianship of the children of her first marriage, cannot appoint a guardian for them; but when the widow has continued to be guardian, she may appoint a guardian, if approved of by the family council.

A person appointed guardian by the father or mother is not bound to act unless he is one of the persons bound by law to accept the guardianship. When a guardian has not been appointed by the parents, the guardianship devolves upon the paternal grandfather, and in default, to the maternal grandfather, and so ascending in such manner that the paternal ascendant shall in all cases be preferred to the maternal one in the same degree.

When an orphan, not emancipated, is left without a guardian being appointed by his father or mother, and not having male ascendants, a guardian is then appointed by the family council.*

When a minor residing in France possesses property in the colonies, or *vice versâ*, a special guardian is appointed, who acts independently of the guardian.†

Supplementary Guardian (*Subrogé-tuteur*).

In all guardianships there must be a supplementary guardian

* A *family council* consists of, with the justice of peace, six relatives, half paternal and half maternal, residing in the parish, or within the distance of twelve miles from the domicile of the minor; and when there are not a sufficient number of relatives, the justice of peace then appoints persons who had been intimate with the father or mother of the infant.

† Guardianship is a personal charge which does not pass to the heirs of the guardians, but the heirs are responsible for their administration, and if of full age, must continue the guardianship till a new guardian be appointed.

appointed by the family council, whose duty consists in looking after the interests of the minor when adverse to those of the guardian.[22]

Immediately a guardian is appointed, he must summon a family council to nominate a supplementary guardian; and if a guardian acts without this formality, the relatives, creditors, or other parties interested, or the justice of peace, may withdraw him from the guardianship, and make him responsible for any *lâches* that he may have committed. In no case has the guardian a vote in the nomination of a supplementary guardian, who must be selected, except in the case of brothers of full blood, from the line to which the guardian does not belong. In the event of death, or absence, or withdrawal of the guardian, the supplementary guardian does not succeed by right, but he is bound, under a penalty, to summon a family council for the nomination of a new guardian. The duties of the supplementary guardian cease at the same period as those of the guardian.

Exemptions from Guardianship.

Public officers are exempted from guardianship, as are also the military in active service; but if a guardianship be accepted by them, no excuse will discharge them from the duty. No citizen, not being a relative, can be forced to accept guardianship, except in cases where no relative resides within the distance of twenty-four miles. Every person may refuse to be a guardian who has attained the age of sixty-five, and at the age of seventy he may relinquish the guardianship. All afflicted persons are exempted, and may be discharged if afflicted during guardianship. Two guardianships are a sufficient excuse for declining a third guardianship; and the father who is a guardian is not bound to accept a second guardianship, except that of his own children. A parent who has had five legitimate children may decline all guardianships except those of his children; sons who have died in military service are included in the number; but other dead children are not reckoned, except they have left living issue. The

[22] At Rome, when there was litigation between the guardian and his ward, a special guardian (*curator*) was appointed to protect the interests of the ward in the action.

birth of children during guardianship forms no ground for discharge.[23]

When a guardian is present at his nomination, if he declines, he must immediately state his objections; if absent, he must, within three days after notice, summon a family council, and give his reasons for declining. If his excuses are rejected, he may apply to the court to have them admitted; but during the litigation he must act as provisional guardian. If the objections are admitted by the court, the family council are liable for costs; if rejected, the costs must be paid by the guardian.

Incapacity, Exclusion, and Deprivation of Guardianship.

Persons incapable of acting as guardians, or members of the family council, are:—1. Minors, except fathers and mothers who are minors.——2. Interdicted persons.——3. Women, except the mother or grandmother.——4. All persons who have, or whose father or mother has, a lawsuit with the minor by which his *status* or property may be compromised. All persons convicted of felony are excluded; and if convicted during the guardianship, they cease to be guardians. Persons notorious for their bad conduct, and those guilty of mismanagement or fraud, are excluded or deposed, and in both cases cease to be members of the family council.

When there is cause for the dismissal of a guardian, it must be decided by a family council, called at the instance of the supplementary guardian or a justice of peace.

If the family council excludes or dismisses a guardian,[24] reasons must be assigned, and the guardian must be heard or summoned; and if he does not accept the decision of the family council, the court of first instance will confirm or reject it, to which decision there is a right of appeal. A guardian thus excluded or dismissed may sue the supplementary guardian, with a view to the reversal of the decision of the family council by the court.

[23] These rules of exemption from serving the office of guardian are to a great extent similar to those prevailing in the Roman law, as given detailed in the title of the Institutes, "*De Excusationibus Tutorum vel Curatorum.*"

[24] With the Romans, a tutor or curator was *suspectus* when he was unfaithful in performing his duties, or of bad character. Poverty was no ground of *suspicio*.

Duties of a Guardian.

The duties of a guardian are:—To take charge of the person of the ward; to represent him in all civil matters; and to manage his property with fidelity (*en bon père de famille*), otherwise he is responsible for damages resulting from bad management. A guardian can neither buy the property of the minor nor take it on lease, unless the family council has authorised the supplementary guardian to grant him such lease; nor can he buy up any claim or debt against his ward.

Ten days after the guardian is apprised of his appointment he must request that the seals be broken, and an inventory be taken of the ward's property, in presence of the supplementary guardian. If the guardian has a claim against the ward, he must declare the fact in the inventory, otherwise the debt will be forfeited.

In the course of the month following the completion of the inventory, the guardian must sell by public auction, in presence of the supplementary guardian, all movables, with the exception of those ordered to be reserved by the family council; but fathers and mothers, when guardians to their children, are not obliged to sell the movables, if they prefer to take charge of them; and in that case they must be valued by a public valuer, and the estimated value, if they cannot give up the goods, must be refunded to the ward.

When a guardian—except in cases of parents—enters upon his duty, the family council arranges as near as possible the amount that is to be allowed for the ward's annual expenses; and if desirable, the necessary outlay for the management of the property.[25] The surplus arising from the estate must, by order of the family council, be invested; and if neglected during a period of six months, the guardian is held responsible for the interest. If the guardian neglects to call the family council respecting the investment, the guardian is responsible for the interest of all sums not invested.

The guardian, though a parent, cannot borrow for a ward, nor can he alienate or mortgage the infant's estates, without

[25] By the Roman law, it was the duty of the Prætor to ascertain the pupil's means, and to fix the nature and amount of his expenses. For this purpose, the tutor was bound to appear and declare the exact amount of the pupil's property. A tutor not appearing might be removed as *suspectus*.

the authority of the family council, which cannot be granted except in cases of necessity or obvious advantage, and then the decision of the family council must be sanctioned by the court of first instance. The sale must be made by public auction, in presence of the supplementary guardian, and by a judge of the court of first instance, or a notary appointed by the court, and it must be advertised or placarded for three consecutive weeks. These formalities are not required in cases of partition of property ordered by a court of first instance.

A guardian can neither accept nor refuse a succession that falls to his ward, unless he is authorised by the family council. The acceptation is conditional (*sous bénéfice d'inventaire*); that is, the power of refusing, if after examination it is found that the assets are not greater than the liabilities.

In cases where the succession has been renounced for the minor, and not accepted by another, it may be taken up by the guardian when authorised by the family council, or by the minor himself when he has attained his majority; but without power to impugn any sale or act that may have legally taken place during the vacancy of the succession.

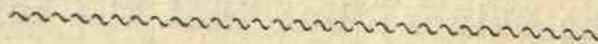
A gift or bequest made to a minor cannot be accepted by a guardian without the authority of the family council; nor can a guardian bring an action in respect of real property, nor acquiesce in a demand relative to similar claims, without the authority of the family council. The same authority is required to enforce a partition of property; but the guardian can, without such authority, answer a claim for partition directed against the minor; but that the minor may obtain all the rights of a person of full age, the partition must be made by a court of law, and the valuation taken by valuers appointed by the court of first instance.

A guardian cannot compromise (*transiger*) suits in which the minor is interested, unless authorised by the family council, or unless the *transaction* is approved of by the court of first instance. A guardian who has serious cause for dissatisfaction respecting the behaviour of his ward may submit his complaints to a family council, and if authorised by them, may, conformably to the *parental power*, previously described in such cases, have the ward imprisoned. Every guardian at the close of his guardianship is answerable for his administra-

tion; and every guardian, except a father or mother, may be required, during guardianship, to submit to the supplementary guardian a statement of his administration at such periods as the family council may appoint. These statements are drawn up and sent in free of charge on unstamped paper, and without any legal formality; but the winding-up account, when the minor attains his majority or emancipation, is made at the minor's expense, and all necessary expenses incurred by the guardian are allowed.

All agreements between a guardian and his ward are invalid until the guardian has rendered a detailed account of his administration, and delivered the vouchers (*pièces justificatives*), the whole confirmed by the ward's receipt, dated at least ten days before the agreement.

Moneys remaining due to the ward by the guardian bear interest from the closing of the account, but the moneys due to the guardian by the ward bear interest only after demand of payment. A ward cannot bring an action against his guardian relative to the guardianship after ten years, computing from the day of the majority of the ward.



CHAPTER X.

EMANCIPATION.*

[*Code Napoléon*—Articles 476-487.]

MARRIAGE virtually emancipates a minor, and a minor, though unmarried, may be emancipated by his father, and in default of father, by his mother, when he attains the full age of fifteen. This is effected by the simple declaration of the father or mother before a justice of peace. A minor who is an orphan may also be emancipated by the family council, but he must have attained the full age of eighteen. In this case the emancipation is effected by the decision of the family council, under the presidency of the justice of peace. If a guardian takes no steps to emancipate his ward, and one or more of the ward's relatives deem him deserving of being emancipated, they can call upon the justice of the peace to convoke a family meeting to determine the matter. When a minor is emancipated, and a curator appointed,† the guardian

* In France, emancipation is either *tacite*, resulting from marriage; or it is *expresse*, that is, when it is the result of a declaration made before a justice of peace, or by the decision of the family council.

† The guardian of an emancipated minor is called "curator," whose duties are less responsible.

[26] Among the Romans, *emancipatio* was a solemn act by which the paterfamilias divested himself of his power over his *filius-familias*, so that the *filius-familias* became *sui juris*.

[27] With the Romans, amongst persons *sui juris*, those subject to *curatela* were:—1. *Impuberes*, whose tutors were unfit for the duty, or who had been excused for a time from the *tutela*; for, if a person had one tutor, he could not have a second.——2. *Adolescentes*, boys over fourteen, girls over twelve, but in either case, under twenty-five.——3. *Furiosi* and *prodigi* (madmen and spendthrifts) under interdict, though above twenty-five.——4. Lunatics and persons suffering under incurable disease, and deaf and dumb.

must render an account of his administration, assisted by the curator appointed by the family council.

An emancipated minor cannot grant leases for a period exceeding nine years, but he may receive his rents, give receipts, and manage his common affairs as if he were of full age.[28] He, however, cannot bring, or be defendant in, an action respecting real property, or give or receive the principal of a debt or the produce of a sale, without the sanction of his curator; who, in the latter case, must see that the money be properly invested.

An emancipated minor cannot borrow under any pretext without the authority of the family council, officially confirmed by the court of first instance ; nor can he sell or alienate his estates, otherwise than by the rules applicable to minors. In the event of his having contracted obligations, the court will take into consideration the nature of the transactions, and the *bona fides* of the contracting parties, and may reduce them accordingly ; but in this case the emancipated minor may be deprived of his privileges of emancipation, and be again placed under guardianship, and remain a ward until he attains his majority.

An emancipated minor engaged in trade is considered as of full age in all transactions that relate to his business.

[28] By the Roman law, *emancipatio* only modified the condition of the minor; it did not put an end to the minority, nor did it confer all the rights resulting from majority.

CHAPTER XI.

OF MAJORITY AND INTERDICTION.

[*Code Napoléon*—Articles 488-518.]

MAJORITY is fixed at the completion of the twenty-first year, at which age every man is considered in full possession of all civil rights.

Idiotcy, insanity, and madness constitute incompetency, and consequently are followed by *interdiction.**

Every relative, husband or wife, may apply to a court of first instance to have *interdiction* adjudged against his relative, wife, or husband, if he or she has reasonable cause for so doing.

In cases of madness, if *interdiction* is not demanded (*provoquée*) by the spouse or relatives, it must be done by the public prosecutor, who may also demand it in cases of idiotcy or insanity, when the idiot or insane person is unmarried and without relatives.

All actions of *interdiction* must be brought before the court of first instance, when the court will call a family council, constituted as previously stated, to give their advice respecting the state of the person whose interdiction is demanded. Those who bring the charge cannot be members of the family council; but a husband or wife, and the children of the person whose interdiction is demanded, may be admitted, but they have no voice in the deliberation. Interdiction must be adjudged publicly, and in the presence of interested parties, or after they have been summoned to appear.

In non-suiting the plaintiffs, the court, if necessary, may

* *Interdiction*, which is adjudged by a court of law, places the interdicted person in the same *status* as a minor. It is necessitated by imbecility, insanity, or madness.

make an order that the defendant shall not hereafter plead in a suit, nor compound, nor borrow nor receive money or goods, nor give a discharge for them, nor alienate nor mortgage his estate, without the concurrence of a trustee appointed by the court. In case of an appeal against the judgment of the court of first instance, the court of appeal may, if necessary, make or order a fresh examination.

All final judgments of interdiction or appointments of trustees must be, at the instance of the instigators, notified to the parties, and posted within ten days in the hall of the court and at the offices of the notaries of the district; after which all subsequent transactions of the interdicted person without the concurrence of the trustee are void; and if the insanity was notorious, transactions previous to the judgment may also be repudiated.

After the death of a person acts done by him cannot be impugned on the ground of insanity, except his interdiction had been demanded or adjudged before his death; or unless the very transaction bears evidence of insanity.

If there is no appeal, or if the judgment has been confirmed in appeal, a guardian and a supplementary guardian are appointed, as prescribed in cases of "Minority, Guardianship, and Emancipation."

A husband is, of right, the guardian of his *interdicted* wife. A wife may be appointed the guardian of her *interdicted* husband, but in this case the family council prescribes the rules for her administration, leaving the wife only such remedy as a court may grant when she supposes herself wronged by the rules imposed upon her by the family council.

No person except a husband or wife, grand-parent, child, or grandchild is bound to remain the guardian of an *interdicted* person more than ten years. At the expiration of that period a guardian may claim his release, and demand that someone else be appointed in his place.

The income of an *interdicted* person must be applied in alleviating his misfortune, and providing remedies for his cure, according to the amount of his property. The family council may order that he be attended at his own house, or that he be placed in a private establishment, or even in an asylum.

When the marriage of the offspring of an *interdicted* person

is proposed, the marriage portion, or the *avancement hoirie*,* and other matrimonial settlements, are ruled according to the advice of the family council, confirmed by the court of first instance.

Interdiction ceases when the cause is removed, but the same formalities that established the interdiction must be gone through to annul it; and after judgment is pronounced, the *interdicted* person resumes the exercise of his full rights.†

Judicial Adviser.

In cases of profligacy,† the court of first instance may be called upon to appoint a judicial adviser (*conseil judiciaire*), without whose concurrence a profligate cannot plead in a suit, compromise, borrow, receive moneys, sell, or mortgage his property.[29]

* An advance on the property to which the heir at the death of parents or relatives is entitled.

† A kind of *interdiction*, applicable to profligacy.

[29] At Rome prodigals were, for some purposes, classed with madmen, and the law required the appointment of a *curator* for the protection of their interests.

BOOK II.

OF THE LAW OF PROPERTY.

CHAPTER I.

OF PROPERTY.

[*Code Napoléon*—Articles 516-536.]

PROPERTY is either movable (*personal*) or immovable (*real*).[30]

Things, by their nature, or by law, or by their *destination*, are *immovable* (real property). Land and buildings are, by their nature, immovables; so are wind or water mills, when fixed on piles and forming part of a building.

Uncut crops and ungathered fruit are also immovables; but as soon as crops are cut or fruit plucked, although not carried away, they become movables. If only a portion be cut, that portion alone is movable.

Trees, once felled, or underwood as soon as cut, become movables.

Live stock that a landlord entrusts to a farmer or *métayer** for farming purposes are considered, while they remain on the farm, immovables; but stock entrusted (*à cheptel*) to others than the farmer or *métayer*, are movables.

Pipes attached to a house or land for the supply of water are *immovables*. Things which an owner has placed on his land for working purposes are *immovable* by *destination*. Such are live stock used for agricultural purposes, and all agricultural implements; seeds given to farmers or to *colons-partiaires*;† pigeons belonging to dove-houses; rabbits in war-

[30] The Romans divided things into corporeal *(tangi possunt)* and incorporeal *(tangi non possunt)*.

* A *métayer* is a farmer holding land who gives the owner one-half of the produce—a common practice in France.

† A kind of *métayer*, but he only acquires, not a half, but a portion of the produce, as agreed upon. Also a common practice in France.

rens; bee-hives; fish in ponds; presses, coppers, stills, vats, and casks; implements required for the working of forges, paper-mills, and such like works; straw and manure are likewise immoveables. All fixtures that cannot be separated without being broken or damaged, or injuring the portion of the building to which they are fastened, are immovables; mirrors when the framework forms part of the wainscoating, and the same with pictures and other ornaments. Statues placed in a niche expressly made are also immovables, although they could be removed without being damaged or broken. Usufructs of real property; servitudes; and actions brought to recover real property, are likewise considered immovables.

Movables (Personal Property).

Personal property is movable either by the nature of the *thing* or by law.

Personal property consists of things which can be carried, or can move or be moved from place to place. All bonds and claims for sums of money or for personal effects, shares in companies, and annuities, whether granted by government or by individuals, are movables. A rent granted in perpetuity in consideration of the sale or cession of real property is movable, and is always redeemable; the creditor is allowed to settle the conditions of redemption, and he may stipulate that the rent shall not be redeemed until a specific time, not exceeding thirty years.

Boats, ferry-boats, ships, mills, and floating baths, and all works not fixed upon piles, and not forming part of a house, are movables. Materials from demolished edifices, also those collected for the construction of a new building, are movables while unused.

The legal meaning of the word *meuble*,* without qualification, does not extend to ready-money, precious stones, assets,

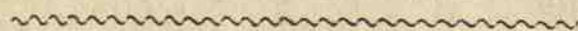
* The word *meuble* has several significations; sometimes it means anything that is not *immovable;* sometimes it has a restricted meaning, as stated; and sometimes it signifies only the furniture. When the word *meuble* is used *without specification*, the intention of the testator will be considered; thus, when a testator bequeaths his *meubles* to Peter and his *immeubles* to Paul, the legacy made to Peter comprehends all that is not real property.

books, medals, scientific instruments used in art or trade, body-linen, horses, carriages, arms, grain, wine, hay, and other such commodities; nor does it comprehend goods in trade.

The words *meubles meublants* comprehend things for the use and ornament of apartments; such as tapestries, beds, seats, mirrors, clocks, tables, and china. Pictures and statues are comprised, but not collections of pictures or china which may be in galleries or private rooms.

The sale or gift of a furnished house only comprises the *meubles meublants*.

The sale or gift of "a house with everything in it"* does not include ready-money, securities, nor title-deeds, or documents that may be found in the house; but all other movables.



* The words, "*Une maison avec tout ce qui s'y trouve*," are used in a *sale*, in an *exchange*, in a gift *inter vivos*, or in a *will*. They are less extensive than the words *biens meubles*, and more extensive than *meubles meublants*, which include all the *movables* that are in the house except the money and deeds which may be found in it.

CHAPTER II.

OF POSSESSION OF PROPERTY.

[*Code Napoléon*—Articles 537-550.]

PRIVATE persons may dispose of their own property[31] as they please, subject to the existing legal enactments; but property that does not belong to private individuals must be administered and alienated according to special regulations.

Highways, roads, and streets kept at the expense of the State; navigable rivers, and streams used for floats; banks, shores, harbours, fortifications, roadsteads, alluvions, and all portions of the national territory which cannot become private property, are considered the property of the State. All unclaimed property, and property without an owner, and the property of all who die without heirs, or abandoned successions, also become the property of the State. Gates, walls, ditches, and ramparts of military places, or those no longer used for military purposes, belong to the State, unless legally alienated or prescribed.

Parish (*communal*) property is that to which the inhabitants of one or several parishes have an acquired right. A person may have over property a right of ownership, a right of use, or a servitude.

Ownership.

Ownership is a right to use and dispose of a thing absolutely, provided no use is made of it contrary to law. No

[31] By "*res*," the Romans meant everything that could form an object of rights, in opposition to "*persona*," which comprehended every person who had rights and was subject to them. Rights and duties were designated "*Things Incorporeal.*"

one can be compelled to relinquish his property, except it is for public utility (*pour cause d'utilité publique*), and then a just and equitable indemnity is given. The ownership of a thing, whether real or personal, confers a right over all that arises from it or attaches to it, either naturally or artificially.[32] This right is called Right of Accession.*

* There are two kinds of accession: *natural* and *artificial*. Accession is natural if it arises without man's labour, as alluvium; it is *artificial* when it results from man's labour; for instance, if a third party builds with his own materials upon the land of another person, the latter has a right to claim the building.

[32] The doctrine of property arising from *accession* is grounded on the right of occupancy derived from the Roman law. Commentators have used the word *accessio*, not only for the increase, but also for the mode in which the increase becomes one's property.

CHAPTER III.

OF RIGHT OF ACCESSION OVER THE PRODUCE OF A THING.

[*Code Napoléon*—Articles 551-577.]

THE natural or industrial produce of the earth—fruits, the increase of animals—belong to the proprietor by right of accession.[33]

The fruits of a *thing* only belong to the owner, on condition that he pays a third party the expenses of work, tillage, and seed supplied by such third party.

A person simply *in possession* is entitled to the produce only when *bonâ fide* possessor; otherwise he is bound to render the produce and the thing itself to the owner when claimed.

A person is considered in *bonâ fide* possession when he is in possession by virtue of a conveyance which he does not know to be defective; but he ceases to be considered in *bonâ fide* possession the moment he is cognizant of the defect.

Right of Accession over that which is United and Incorporated with a Thing.

All that is united and incorporated with a thing belongs to the proprietor, according to the following established rules:—

Ownership of the soil includes all above and beneath.[34] The owner can plant and construct whatever he pleases, observing the restrictions in the chapter on "Servitudes" hereafter explained; he can build, excavate, and take from such excava-

[33] By the Roman law, the proprietor of a *thing* acquired property in its *fruits* at the moment of their production; so, too, the *young* of animals; also the children of female slaves, irrespective of the father. *Fructus pendentes pars fundi sunt.*

[34] *Cujus est solum est usque ad cœlum et ad inferos.*

tions all products, within the limits of the statutes relating to mines,* and the police regulations.

All buildings, plantations, and works above or underneath the soil are presumed to have been made by the landlord, and to belong to him until the contrary is proved; without prejudice to the right which a third person may have acquired or may acquire by prescription, whether it is a vault under another building or any part of the building. If a landlord erects buildings, or plants trees, or erects out-works with materials which do not belong to him, he must pay the value thereof, and may be condemned to pay damages; but the owner of the materials is not allowed to remove them; and when buildings are erected and trees planted by a third party with his own materials and plants, the ground landlord has a right either to retain them, or cause such third party to remove them. If the landlord insists upon the demolition of the buildings or the destruction of the plantation, it must be done at the expense of the third party, and he may even be compelled to pay damages to the landlord. If the landlord prefers retaining such buildings or plantations, he must pay the value of the materials and labour, without reference to the increased value of the land; but if these outbuildings, plantations, and works have been erected or made by a third person who has been evicted, but not adjudged to return the produce, on account of his having acted *bonâ fide*, the landlord cannot insist upon the demolition of the works;[35] but he has his choice, either to repay the value of the materials and the price of labour, or to pay the party a sum equivalent to the increased value of the estate.[36]

* The Statute of 21st April, 1810, declares that all gold, silver, or platina, iron, lead, coal, &c., belong to the State; but if the working of the mine is not granted to the proprietor, he must be indemnified.

[35] The rules contained in the Institutes providing for the cases of the erection of structures where the ground and materials did not belong to the same person were similar; needless destruction of buildings was in all cases prohibited.

[36] By the Roman law, *adjunctio;* that is, when a thing belonging to one was attached or united to that which belonged to another, whether by inclusion, soldering, sewing, construction, writing, or painting, the whole generally became the property of the latter. An *adjunctor* who acted *malâ fide* lost his property, and was not entitled to compensation, unless the thing added was considered as *impensæ necessariæ.*

Land imperceptibly gained from a river or stream by the washing-up of sand or soil is called *alluvion*, and it becomes the property of the adjoining proprietor, on condition, in cases of navigable rivers, of leaving a towing-path, conformably to prescribed bye-laws. Land so acquired, by the imperceptible shifting of the bed of a stream from one side to the other, gives no right to the proprietor on the opposite side to reclaim the land which he has lost. This right does not apply to the derelictions of the sea. With respect to lakes and ponds, the proprietor always retains the land which the water covers when at full height, but he acquires no right over land bordering the pond which may be overflowed by an extraordinary flood. If a river or stream suddenly carries away a field to a lower or opposite bank, the owner of the part carried away may claim his property, but he must do so within a year.[37]

Islands, islets, and alluvions which form themselves in the bed of a navigable river, belong to the State, if there be no title nor prescriptive right to the contrary; but the islands and alluvions which form themselves in an unnavigable stream belong to the nearest landed proprietor of the shore where the island is formed. If the island forms itself in the middle of the stream, it belongs to the proprietors of both sides, divided by an imaginary line drawn through the middle of the water. If a river or stream, by altering its course, cuts and surrounds the field of an adjoining owner, and forms an island, the owner of the field retains the ownership of the land, although the islet is formed in a river or in a navigable stream. If a river or navigable stream changes its course, the ground acquired by the change belongs to the owners of the property, in proportion to the extent that their respective estates adjoin the banks.[38]

Pigeons, rabbits, and fish passing to another dove-house,

[37] By the Roman law the time for making this claim expired when trees had taken root in the land thus carried away. The details of the rules of "Accession" in the French and Roman law are to a great extent the same.

[38] By the Institutes, the new bed followed the condition of the river; and if, after some time, the river returned to its former channel, the new bed again became the property of those who possessed the lands contiguous to the banks.

warren, or pond acquire a new ownership, provided they have not been attracted by artifice or fraud.

Right of Accession Relative to Personal Property.

The right of *accession* respecting *movables* which belong to two distinct individuals is entirely ruled by principles of equity. The following rules determine cases not specified:—When two *things* belonging to two different persons have been united so as to form one whole, but are nevertheless separable, so that one can remain in entirety without the other, the whole thing belongs to the one who has the principal part, on condition of his paying the other the value of his portion.[39] The principal part is deemed that to which the other was only united for the use, ornament, or completion of the first; but if the thing added be of greater value than the principal object, and had been added unknown to the owner, the latter can demand a separation, although the article may, by that act, be deteriorated or diminished in value. If two things are united so as to form one whole, but one cannot be deemed as an addition to the other, that is deemed the principal which is the most valuable; or the largest, if the value of both be nearly equal.

If an artificer[40] (*specificator*) or any person whatsoever uses materials which do not belong to him to make some new object, whether the material can or cannot be restored to its original shape, the owner of the material has a right to claim the *thing* made on paying the price of the workmanship;[41] but if the workmanship is of more value than the material used, the labour is then considered the princi-

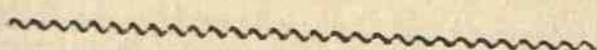
[39] *Accessorium non ducit sed sequitur suum principale.*

[40] *Specificatio* is the act of transforming an original or raw material into a new product. When, by the Roman law, the *specificator* worked on his own material, of course he was proprietor of the new article; but if he used the material of another, a question arose whether the new article belonged to the *specificator*, or to the proprietor of the raw material. By the Roman law, the thing produced belonged to the owner of the material, if it could be returned in its former condition; but if not, it belonged to the *specificator*. The French law rules that the thing remains the property of the owner of the material, but the latter is bound to pay the *specificator* for his labour.

pal, and the workman has the right of retaining the thing formed on paying the price of the material to the owner. When a person has used materials partly his own and partly another's in making some object, without the materials of either party being destroyed, but in such a way that they cannot be conveniently separated, the thing remains the joint property of the two parties. When a thing has been made by materials belonging to different owners, but of which none of the parties can claim the largest share, if the materials can be separated he whose materials were used without his knowledge may demand a separation; but if the materials cannot be conveniently separated, a common ownership is acquired, in proportion to the quantity, quality, and value of the materials belonging to each. If the materials belonging to one be much superior in value, he may claim the thing made by paying the other the value of his materials. When a thing remains in common between the owners of the materials of which it is made, it must be sold by auction for their mutual benefit.

In all cases where materials have been used to make a new product without the owner's knowledge, the owner can claim the thing, or he can demand materials of a similar kind, alike in quality, quantity, weight, and value.

Persons using another man's materials without his knowledge are liable to damages, without prejudice to a criminal prosecution.



CHAPTER IV.

OF USUFRUCT, RIGHT OF COMMON, RIGHT OF HABITATION.

[*Code Napoléon*—Articles 578-636.]

USUFRUCT is the right of *using* (*usus*) and enjoying the fruits (*fructus*) of things belonging to others,* on condition of not destroying or wasting the substance over which such right extends.

Usufruct is established by law,† or by agreement.

Usufruct may be established[42] *absolutely*, or on a *certain day*, or on *condition;* and it may be established upon any kind of property, real or personal.

* The owner of a *thing* over which another has the usufruct is said to have a *nue-propriété* (naked *right*), *nuda proprietas*. Usufruct is a right over a corporeal thing, and if the thing perishes, the usufruct itself necessarily perishes also.

† Usufruct established by law is of two kinds:—1. A father or mother exercising parental authority enjoys the fruits of the hereditaments of their offspring till he has attained his eighteenth year.—— 2. The surviving parent is entitled, in the succession of his or her child, to the third in usufruct of the half belonging to the collaterals of the other line. Usufruct by *volonté* is that which is constituted by a man's act, either for a pecuniary consideration, as by sale and exchange; or gratuitously, by deed of gift or legacy.

The *jus utendi* denotes the right to make *use* of a thing, and to derive from it whatever services it can render, without taking any of its products, and without altering the thing itself—such as *using* beasts to plough; living in a house. The *jus fruendi* denotes the right to gather all the fruits of a thing. Hence the *usufructuarius*, who has the right of *use* and the right of *enjoyment*, has more than the *usuarius*, who has the right of use only, but less than the proprietor, who has in addition the *jus abutendi*.

[42] The Prætors held that the exercise of the right of *usufruct* was a *quasi-possessio*, and protected this *quasi-possessio* by possessory interdicts and the *actio publiciana in rem*.

Rights of the Usufructuary.

The usufructuary has the right of using all the *fruits* of the *thing*, whether natural, industrial, or civil.

Natural fruits are the natural products of the earth. The produce and increase of animals are also natural fruits.

Industrial fruits are those produced by industry and culture.*

Civil fruits are the rents of houses, interest of money, arrears of rent, and rent of farms let on lease.

Natural and industrial fruits, hanging from branches and growing from roots, belong, from the beginning of the usufruct, to the usufructuary; and when the usufruct terminates they belong to the owner, without recompense for labour or seed; but without prejudice to such portion of the *fruits* as may have been acquired by a *colon-partiaire.*

Civil fruits accrue from day to day, and belong to the usufructuary during the term of the usufruct. This rule applies to the rents of farms let on lease, as well as to the rents of houses and other civil fruits.

If the usufruct includes things which are consumed by being used, as money, grain, or liquors, the usufructuary has the right of using them, subject to restoring the same quantity and quality, or their value, at the expiration of the usufruct.

The usufruct of a life-annuity gives the usufructuary, during the term of the usufruct, a right to receive all arrears. When the usufruct comprises things which decrease in value by usage, such as linen and furniture, the usufructuary has a right to use them for their special purpose, and to deliver them up at the termination of the usufruct as they are; but he is responsible for things deteriorated wrongfully or by carelessness. When the usufruct comprises coppice, the usufructuary is bound to follow the customary order and quantity of the felling. If he neglects to fell the quantity, neither he nor his heirs are entitled to indemnification.

Trees taken from a nursery, without injuring it, form part of the usufruct, on condition that the usufructuary conforms to the usage of the place in replanting. The usufructuary, also, in conforming to the practice of the old owners, reaps the

* Productions arising from labour, such as the harvest or vintage.

benefits arising from the regular fellings of larger timber, either when the fellings are made periodically upon a specified portion of ground, or when they consist of a certain number of trees taken indiscriminately on the estate. In all other cases the usufructuary cannot interfere with full-grown timber, but he may use trees blown down or accidentally uprooted for the repairs of the estate; he can also, for that purpose, fell trees, but the necessity for this must be made apparent to the owner. He may cut props for the vines and all the produce, conformably to the custom of the country or the practice of the owner. Dead fruit-trees and trees blown down or uprooted by accident belong to the usufructuary, on condition that he replaces them. The usufructuary may either work the estate himself, or let it on lease; or he can even sell his right, or give it away. If he lets it on lease, he must conform to the periods to which leases are limited; and for their duration, to the rules established relative to a husband with regard to a wife's property.*

The usufructuary is entitled to profit by any increase that may accrue to the estate by alluvion. He is entitled to all rights of servitude, rights of way, and all other servitudes possessed by the owner himself; also to the use of mines and quarries that are at work at the beginning of the usufruct that the proprietor had; but if there is a question about a working which cannot be made without a grant from the State, the usufructuary cannot use it till he has obtained permission from the Government. He has no right over unopened mines, quarries, or peat-bogs; nor can he claim treasure which may be discovered during the usufruct. The *nu-propriétaire* cannot by his own act, or otherwise, infringe upon the rights of the usufructuary; and on the other hand, the usufructuary cannot, at the termination of the usufruct, claim an indemnity for improvements which he has made. The usufructuary or his heirs may take away mirrors, pictures, and other ornaments placed there by the usufructuary; but he must restore the places to their former condition.

* A husband cannot lease the property of his wife for more than nine years.

Obligations of the Usufructuary.

The usufructuary takes the things as he finds them; but before he can enter into the right conferred upon him, he must have an inventory made of all the personalty, and a statement made out of all the realty subject to the usufruct in the presence of the owner, or after having given him notice; and he must give security that he will use his rights *en bon père de famille*,* unless that obligation be dispensed with by the deed establishing the usufruct.

A father or mother having the legal usufruct of the property of their children is not bound to give security; nor is a seller or a donor who reserves the usufruct of the property. When the usufructuary cannot give security,[43] the real property is leased or legally sequestered. The moneys included in the usufruct, also moneys realised by the sale of the products, are invested, and the interest of these sums, as well as the rents for leases, belong to the usufructuary.

In default of security being given by the usufructuary for personal property, the owner may order a sale of all movables subject to deterioration by tear and wear, the proceeds of which are invested, and the interest belongs to the usufructuary during the usufruct. Nevertheless the usufructuary may demand, and the judges may order, according to circumstances, that a portion of movables, necessary for his own use, be left him, on his own security, on the condition that he will produce or replace them at the expiration of the usufruct. Delay in giving security does not deprive the usufructuary of the fruits to which he has a right, and which belong to him the moment the usufruct commences. The usufructuary is bound to make good all minor repairs; substantial repairs are charged to the proprietor, unless occasioned through the neglect of minor repairs subsequent to the commencement of the usufruct, in which case the usufructuary is bound to make them good. Substantial repairs comprehend all walls, vaults, beams and roofs, terraces, dykes, and sur-

* As a *bonâ fide paterfamilias.*

[43] By the Prætorian law, the usufructuary was required to give security by providing a *fidejussor* (surety):—1. To enjoy like a *bonus paterfamilias.*——2. To restore, at the expiration of the usufruct, whatever remained of the thing enjoyed.

rounding walls. All others are considered minor repairs. The usufructuary is not bound to rebuild decayed buildings, nor houses destroyed by age or accident.

The usufructuary is bound, during the usufruct, to pay all annual charges upon the estate, such as taxes and rates which, by custom, are deemed charges on the fruits. With regard to fresh assessments that may be made on the property during the continuance of the usufruct, the owner must pay them, and the usufructuary is charged with the interest; or the usufructuary may advance the money, and be recouped at the expiration of the usufruct.

A testamentary legacy of an annuity, or of a pension for maintenance, must be paid by the general legatees of the usufruct; and the usufructuary by special legacy is not liable for debts for which the estate is mortgaged. If compelled to pay them, he has his remedy against the owner, except as to clauses under the title "Gifts and Testaments."*

A usufructuary or residuary or general legatee must, concurrently with the owner, pay the liabilities in the following manner:—The value of the property subject to the usufruct is estimated, and the share of the debts is fixed according to the valuation. If the usufructuary advances the sum necessary to pay all liabilities, he is reimbursed, without interest, at the termination of the usufruct; but if the usufructuary is unwilling to make such advance, the owner may either pay the sum and charge the usufructuary with the interest for his share during his usufruct; or he may sell a part of the property necessary to meet the liabilities.

The usufructuary is only liable for law expenses relating to the usufruct, and judgments resulting therefrom. If during the usufruct a third person encroaches upon the property, or otherwise infringes upon the rights of the owner, the usufructuary is bound to give the owner notice; in default of which he is held responsible for all damages, as if he himself had been guilty of such infractions. If the usufruct is only applicable to an animal which happens to

* If, before or after the will, the *thing* bequeathed has been mortgaged for a debt of the testator, or the debt of a third party; or, if it is subject to usufruct, the person bound to deliver the legacy is not obliged to disencumber it, unless bound to do so by a clause in the will.

die without any fault on the part of the usufructuary, he is not bound to replace it, nor to pay its value. If a flock over which the usufruct extends entirely perish by accident or disease without blame being attached to the usufructuary, the latter is only responsible for the skins or their value; but if the flock is not entirely lost, the usufructuary is bound to replace those that have perished to the amount of the natural increase of the stock.

How a Usufruct Terminates.

A usufruct terminates by the death of the usufructuary; by the expiration of the time for which it has been granted; by the consolidation or union of the two qualities of usufructuary and proprietor in the same person; by non-usage of the right for thirty years; by the total destruction of the thing over which the usufruct is established. The usufruct may also be terminated by the abuse of the usufruct, either by the usufructuary injuring the property, or by allowing it to decay for want of proper repairs.[44]

Creditors of a usufructuary may, for the preservation of their rights, become parties in law-suits, and may offer to repair dilapidations and become securities for the future. A judge may, according to circumstances, decide upon the absolute extinction of the usufruct, or order the re-entry of the owner into possession upon paying annually to the usufructuary, or to his heirs or assigns, a fixed sum till the termination of the usufruct.

A usufruct granted to a corporation cannot last more than thirty years.[45] A usufruct granted until a third person attains a certain age continues to the period contemplated, although the person dies before he has attained the age fixed upon.

The sale of a thing subject to usufruct does not affect the

[44] By the Roman law, *usufruct* ended:—1. By the death of the usufructuary, or by his *diminutio capitis.*——2. By non-user (*non-utendo*).——3. By assignment to the *nuda-proprietas.*——4. By *consolidatio*, *i.e.*, uniting the possession, occupancy, or profits of land with the property, and *vice versâ.*——5. By changes in the substance of the thing.

[45] The Romans allowed one hundred years, reduced by the French Code to thirty.

right of the usufructuary. If he has not renounced his right, he continues to enjoy it.*

A usufructuary's creditors may *demand* that the renunciation of a usufruct made to their prejudice be annulled. If a portion of the thing subject to usufruct is destroyed, the usufruct continues upon the remainder. When the usufruct is established upon a building which happens to be destroyed by fire or other accident, or tumbles from age, the usufructuary has no claim either upon the soil or upon the materials; but if the usufruct was created over an estate of which such building formed a part, the usufructuary has a right over both the land and the materials.

Use and Habitation.

Rights of *use*† and *habitation* are created and lost in the same manner as usufructs, but the parties cannot enter in possession, as in the case of usufructs, without giving security and supplying statements and inventories. Parties having a right of use or habitation must exercise their rights in a *bonâ fide* manner.

Rights of use and habitation[46] are governed by the deed which created them. If the deed is not sufficiently explicit as to the extent of those rights, they are regulated as follows:—He who has the *use* of the fruits of an estate can only claim so much of them as is necessary for his own wants and those of his family; also for the use of children born to him subsequently to the grant of the use. The use

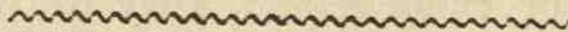
* As in the Roman law, the usufructuary and the *nu-propriétaire* have separate interests. Each has, however, the disposal of his right, without affecting the right of the other.

† The difference between *usufructus* and *usus* lies chiefly in the extent of the respective rights. The *usufructuary* has a perfect right of *use* and *enjoyment* in a thing belonging to another, in the manner of a *dominus*. He is entitled to let the premises, to sell the fruits, and even to sell or give away the entire right of the usufruct; while the *usuary* (*usuarius*) is only entitled to the right of *use*, such as using beasts to plough, living in a house, and using such fruits as are necessary for the wants of his family.

[46] The Roman jurists doubted whether *habitatio* was to be considered a distinct servitude. Justinian pronounced it to be so. The distinction was a fine one, and consisted chiefly in the circumstance that *habitatio* was "ocupation allowed as a *fact* rather than as a *right*."

cannot be transferred or let to another party. He who has the right of habitation in a house may live in it with his family, even though unmarried at the time that the right was conferred upon him. The right is restricted to himself and family, and cannot be let or transferred. When the *user* consumes all the *fruits* of the property, or when he occupies the whole of a house, he must pay for culture, for minor repairs, and taxes, as a usufructuary; but if he is only entitled to a portion of the fruits, or if he only occupies a part of the house, he only pays in proportion to that which he enjoys.

The right of *use* as regards woods and forests is regulated by special laws.



CHAPTER V.

OF SERVITUDES.

[*Code Napoléon*—Articles 637-710.]

A *servitude*[47] is a burden imposed upon an estate for the use of others who are not the owners of such estate. It gives no preference to one possessor over another, and it arises either from the natural situation of the place, or from obligations imposed by law, or by agreements between owners.

Servitudes* Arising from the Situation of the Place.

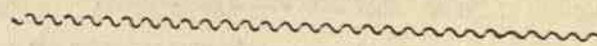
Low lands naturally receive water running from high grounds, when not interfered with by man's intervention. The owner of the low lands is not allowed to erect a dyke to prevent the flow of water, and the proprietor of the high ground is not allowed to render the servitude more burdensome. He who has a spring in his land may use it as he pleases, saving the right which the owner of the low land may have acquired by deed or by prescription. Prescription, in such cases, can only be acquired by an uninterrupted use for thirty years, reckoning from the time that the owner of the low land had completed his works to facilitate the fall and the flow of water on his property. The owner of a spring cannot change its course when it supplies the inhabitants of a township, village, or hamlet; but if the inhabitants have no right to it, either by purchase or prescription, the owner may claim an indemnity, settled by

* *Servitudes* bind a person to allow a thing to be done, or they oblige him to abstain from doing something.

[47] These fragmentary rights, these portions of the whole right comprised in the absolute ownership, were termed *servitudes*, because the thing was under a *kind of slavery*, for the benefit of the person entitled to exercise over it this separate right. As in the Roman law, a servitude establishes a real right in the thing servient, and therefore it may be enforced against every possessor of the thing.

experts. He whose property borders a running stream, not public property, may turn it and use it for the irrigation of his lands, on condition of restoring it to its ordinary course at the bottom of his grounds.

When a dispute arises between two landowners respecting the water, the court, in giving judgment, takes into consideration agricultural interests as well as the respect due to property; and in every case, local regulations as to the course and use of the stream must be observed.



By the Irrigation Acts of April, 1845, and July, 1847, and by the Drainage Act, 1854, all landed proprietors who desire to irrigate their lands by natural or artificial waters may obtain, by paying a fair indemnity, a flow of water through another man's grounds; but such servitudes cannot be enforced upon houses, yards, gardens, parks, and enclosed grounds adjoining habitations. Owners of lowlands must receive water flowing from such irrigated lands, equitable indemnification being made. The same right of letting off water on intermediate grounds may be granted to owners of lands totally or partially inundated, in order to get rid of the superfluous water.

Any owner who has a right to the use of water for the irrigation of his property may obtain power to erect waterworks abutting his neighbour's property by indemnifying him; but this servitude does not apply to buildings, yards, or gardens attached to houses. All disputes are referred to the court of first instance, and the court in giving judgment must take into consideration the importance of the work, and the respect due to property. All owners desirous of draining their lands may make a passage by pipes or otherwise, through the property belonging to an adjoining owner, when it lies between their property and a stream, on paying an indemnity. This servitude admits of the same exceptions, as before stated. The adjoining owner has a right to the use of such works for the drainage of his own ground by paying a proportionate share of the expenses.

Every owner may compel his neighbour to determine the boundary of his adjoining land, and the expense of fixing the boundaries is shared by both parties. Each may en-

close his property, but if, when doing so, he encloses another man's property, he is bound to give him a right of way. An owner who encloses his land loses his right of common in proportion to the quantity of land which he withdraws.

Servitudes Established by Law.

Servitudes created by law have for their object public utility or private benefits.

Everything that concerns towing-paths, making and repairing roads, and other public or parish works, are public servitudes. These servitudes are determined by laws or bye-laws. Law enforces upon owners different obligations with regard to each other, independently of any agreement. Part of these obligations are regulated by the rural police laws.

Party-Walls and Ditches.

In towns and in the country all boundary-walls, whether enclosing a house, a yard, a garden, or a field, are, if there is no proof to show to the contrary, presumed to be party-walls. It is a sign that the wall is not a party-wall, when it is perpendicular from top to bottom on one side, with a slanting top on the other, or where there is an overhanging coping on one side only; in such case the wall is deemed to belong exclusively to the party who is the owner of the property where the coping overhangs, or where the water falls.

The repairs and rebuilding of party-walls are shared by the owners in proportion to their joint rights. Nevertheless every joint-owner may refuse to share the expenses of repairing and rebuilding by abandoning his right, provided such party-wall does not support any building belonging to him. Every joint-owner may build against a party-wall, and fix beams or joists into it within two inches of the extremity, without prejudice to his neighbour's right to have the beam reduced to half the thickness of the wall, in the event of the latter desiring to fix beams in the same place, or to build a chimney against it. Every joint-owner may heighten the party-wall at his own expense, and if the party-wall is not sufficiently thick to bear the upper structure, he must rebuild the whole at his own expense, and the excess of thickness required must be

built upon his own ground. Every owner having property adjoining a wall may acquire a party-right in the whole or part of it, by paying the owner the half of its value, and half the value of the ground upon which it is built. One owner cannot make a recess in a party wall, nor use it as a support for a new structure, without the consent of his neighbour; or on refusal, without having the matter settled by arbitrators.

Every person in towns and suburbs may compel his neighbour to contribute to the construction and repairs of the boundary-walls that separate their houses, courts, and gardens, the height of the walls being determined by the usage of the place; and where there are no fixed rules or customs, every new built party-wall must, in towns of fifty thousand inhabitants or upwards, be ten feet high, including the coping; and in others, eight feet.

When the storeys of a house belong to different owners, if no mention in the deed is made respecting repairs and rebuilding, they must be made in the following manner:—

The main walls and roof are chargeable to all the owners, each in proportion to the value of the storey belonging to him. ——The owner of each storey must build and repair his own floor.——The owner of the first storey repairs the staircase which leads to it; the owner of the second storey, the stair from the first storey to the second; and so on.——When a party-wall or house has been rebuilt, the servitudes, both active and passive, continue without being increased, provided the reconstruction has taken place before a right by prescription has been acquired.

All ditches that separate two estates are presumed to belong to both owners, if there is no deed or sign to the contrary. It is a proof that the ditch is not in common when the bank or earth is thrown up on one side only, and then the ditch is deemed to belong to him on whose side the earth is thrown up. A party-ditch is kept up at the expense of both parties. Every hedge that separates two estates is deemed in common, unless only one of the estates is enclosed, or a deed or prescriptive right proves the contrary.

Trees of large growth cannot be planted except at a given distance from each estate prescribed by rules relating to them, or by usual and well-known customs; and in the absence of rules and customs, large trees must not be planted nearer than six feet

from the line separating the two estates, and half the distance for other trees and live hedges. When planted nearer, the adjoining owner may order them to be pulled up. An owner whose property is overhung by the branches of his neighbour's trees may compel him to cut off such branches; and if the roots encroach upon his property, he has a right to remove them.

Trees growing in a party-hedge are, like the hedge, deemed in common, and either of the owners may insist upon their being cut down.

Prescribed Distance of Certain Works.

An owner who sinks a well or cesspool near a party-wall, or erects a chimney, fireplace, forge, oven or furnace, or builds a cowshed, or keeps a structure for salt or other corrosive matter is, to avoid a nuisance, obliged to do so at a prescribed distance, regulated by rules and customs.

One neighbour cannot, without the consent of the other, make in a party-wall any window or opening of any kind whatever, even though it may be made a glass fixture. The sole owner of a wall not in common may make fixed windows with wire-work in his wall, but the meshes of the wire-work must not be more than three inches apart. Such windows or lights must not be placed lower than eight feet from the flooring of the room of the ground-floor, and six feet from the flooring of the upper storeys.

Front windows, balconies, or other such projections, cannot be made at a less distance than six feet from a neighbour's property, and side views cannot be made at a less distance than two feet. The distance is calculated from the outside front of the wall, and if there is a balcony or other projection, it is taken from the extremity of the outside projection.

Every landlord must construct the roofs of his houses so that the rain-water will discharge itself upon his own ground, or on the public way; not upon his neighbour's property.

Right of Way.

A proprietor whose land is shut in, without an outlet to the public road, may claim a right of way through his neighbour's ground by paying a sum proportionate to the damage occa-

sioned by making the passage. The road must be made through the neighbour's property, as near as possible to the public road, and where the least injury may result.

An action for damages for a right of way is liable to prescription. The right of way must be continued, although the action for indemnity is no longer admissible.

Right to Establish Servitudes.

Proprietors have a right to establish over their property, or in favour of it, such *servitudes* as they please, provided they are in no way contrary to public order or law. The use and extent of these servitudes are regulated by the deed that establishes them; or in the absence of a deed, as follows:—Servitudes are established either for the use of buildings, or for that of lands.[48] The former are called *urban*, whether the building is in town or country; the latter are called *rural.*

Servitudes are either *continuous* or *not* continuous. Continuous servitudes are those the use of which may be continued without the intervention of man; as drains, sewers, lights, and such like. Non-continuous servitudes are those which require the actual intervention of man for their exercise; such as a right of way, right of drawing water, right of pasture, and the like.

Servitudes are *apparent* or *non*-apparent. Apparent servitudes are those which are manifest by external signs, as a door, a window, an aqueduct. Non-apparent servitudes are those which have no external sign of existence, as a *prohibition* to build upon land, or to build above a given height.

How Servitudes are Established.

Continuous and *apparent* servitudes are established by deed, or by a thirty-years' possession. Servitudes continuous, but not apparent; and servitudes not continuous, apparent, or not apparent, can only be established by deed. Immemorial pos-

[48] The Romans divided *servitudes* into two classes:—1. *Servitutes rusticorum.*——2. *Servitutes urbanorum prædiorum. Prædium rusticum* means the soil; *prædium urbanum,* any structure whatever.

session does not suffice to establish them, except in cases of those already established by the custom of the place.

The known intention of a paterfamilias[49] is equivalent to a deed as regards continuous and apparent servitudes. There is no overt intention unless it is proved that two estates now divided belonged to the same owner, and that the servitude was established by him.

If the owner of two estates, over one of which there exists an apparent sign of servitude, disposes of one estate without stating in the contract the fact of the servitude, the servitude continues to exist actively or passively, in favour of or against the alienated land. The deed that establishes a servitude in respect of those servitudes that cannot be acquired by prescription can only be replaced by a deed acknowledging the servitude, signed by the owner of the estate subject to the servitude.

When a servitude is established, it is presumed that everything is granted for its *use;* as, for instance, the right of drawing water at a spring belonging to another necessarily implies a right of way.

Rights of the Owner of Estates to which Servitude is Due.

A person to whom a servitude is due is bound to make all the works necessary for its use and preservation. Such works are made at his own expense, unless the deed that established the servitude proves the contrary. When the owner of an estate, subject to servitude, is bound by deed to construct works necessary for the use and preservation of the servitude at his own expense, he may free himself from such obligation by abandoning the ground to which the servitude is due. If the estate for the benefit of which the servitude was established is divided, the servitude continues to each portion, without increasing the burden of the estate subject to servitude. Thus, in the case of a right of way, all co-proprietors must use the same road.

The owner of a property subject to servitude is not allowed to do anything that will tend to diminish or interfere with the use. He cannot alter the condition of the place, nor shift the servi-

[49] With the Romans, there were three modes of establishing servitudes:—1. By deed.——2. By prescription.——3. By the disclosed intention of the paterfamilias.

tude to a place different from that originally used. However, if the exercise of the original servitude has become more burdensome to the owner of the estate subject to servitude, he may offer an equally advantageous servitude to the other party, who is not at liberty to refuse. On the other hand, he who has the servitude can only use it according to his deed, without a right to make, on either of the estates, a change which may render the servitude more burdensome.

The Extinction of Servitudes.

Servitudes cease when the things subject thereto are in such a condition that they cannot be used; but they revive if the things are restored to a state of use, unless the servitude is barred by prescription. Every servitude terminates when the estate subject to servitude and the one that it benefits become the property of the same person. Non-user for thirty years extinguishes a servitude;[50] and the thirty years begin to run, according to the different kinds of servitudes, either from the day on which they ceased to be used, as in the case of non-continuous servitudes; or in the case of continuous servitudes, from the day on which an act has been done contrary to the servitude.

The manner of exercising servitudes is prescribed in the same way as the servitude itself. If the estate in favour of which the servitude is established belongs to joint-owners, the use by one prevents prescription against all the others. If amongst the joint-owners there is one against whom the prescription cannot run, for instance, a minor, he preserves the right of all the others.

[50] By *non-user*, Justinian fixed the period at ten years when the parties were present, and twenty years when absent.

BOOK III.

OF THE DIFFERENT MODES OF ACQUIRING PROPERTY.

CHAPTER I.

OF THE DIFFERENT WAYS IN WHICH PROPERTY IS ACQUIRED.

Code Napoléon—Articles 711-773.]

Ownership of property is acquired and transmitted by *succession*, by gifts *inter vivos*, by *testament*, and by the force of *obligations*.* It is also acquired by *accession*, or *incorporation*, and by *prescription*.

Unclaimed property belongs to the State. The use of property held in common is regulated by police enactments.

Hunting and fishing are regulated by private Acts.†

A proprietor who finds a treasure on his own estate becomes the owner; and if treasure is found in another person's ground, one-half belongs to the finder, and the other half to the owner of the land.[51] Treasure-trove comprises everything concealed or buried in the ground over which no one can prove ownership, and which is discovered by chance. Rights over things thrown in and cast up by the sea are regulated by private Acts, and they also apply to things lost for which there is no owner.

Succession.

Immediately after death succession commences.‡

When two or more persons having a right of succession perish by the same accident, and it is uncertain which was the survivor, the presumption of survivorship is deter-

* *Succession* is the transmission of the rights and obligations of a deceased person to one or more persons.

† See Acts, May 3, 1844; April 15, 1829; and January 24, 1867.

‡ As previously stated, the Act of 31st May, 1854, abolished civil death.

[51] The Emperor Hadrian introduced this rule into the Roman law

mined by the circumstances of the event, and in default of such knowledge, by consideration of age and sex. If under fifteen years of age, the eldest is presumed to be the last survivor; if above sixty, the youngest is deemed the survivor. When several are under fifteen years of age, and others above sixty, the former are deemed to have last survived. When those who have perished together had completed their fifteenth year and had not reached their sixtieth, and where the ages are equal or the difference does not exceed one year, the males are always deemed the last survivors; and when of the same sex, the youngest is deemed to have survived the elder.

The law regulates the order of succession among lawful heirs; in default of them, the property passes to the illegitimate children; after that, to the surviving father or mother; and failing these, to the State.[52]

Lawful heirs are absolutely entitled to the property, rights, and actions of the deceased, and they are bound to discharge all the liabilities of the succession. Illegitimate children, a surviving husband or wife,* and the State, must apply to a court of law to be put in possession of the estate.

Right of Succession.

To be entitled to a right of succession, the heir must necessarily be in existence at the time of the death. Thus an unborn infant, or an infant who is not likely to live when born, cannot be entitled; nor can anyone found guilty of having attempted to cause the death of the deceased; nor any one who has been adjudged guilty of having maliciously accused the deceased of a capital offence;† nor any heir of full age who, having been informed of the murder of the deceased, did not give information to the proper authorities. Default of giving such information cannot be set up against the ascendants or de-

* This does not apply to the right which a wife may have to the half of property held in common.

† *Accusation capitale* is such an accusation as might lead to condemnation to death, or to a penalty that would deprive the condemned of his status as a Frenchman.

[52] In case of intestacy, the Roman law regulated the succession, which devolved upon:—1. The *sui-heredes*, his heirs.——2. *Agnati*, members of the same civil family.——3. *Cognati*, blood-relations.

scendants of the murderer; nor against his relatives in the same degree; nor against a wife or husband, or brothers, sisters, uncles, aunts, nephews, or nieces.

An heir who has been excluded from the succession by reason of unworthiness is bound to give up all the fruits and revenues that he has received from the succession. His children, being heirs in their own right, are not excluded by reason of their father's delinquencies, but an unworthy father cannot in any case claim the usufruct granted by law to parents over the property of their children.

Order of Succession.

Successions devolve upon the children and descendants of the deceased person, and upon his ascendants and collaterals in the order and according to the rules hereafter mentioned.

Law, in regulating successions, neither regards the nature nor origin of property.* Every succession which falls to ascendants or collaterals is divided into two equal parts—one for the paternal, the other for the maternal line. Kindred of *half-blood* are not excluded by relatives of the whole blood of the same degree; but they only take a share in their own line, that is, *paternal* or *maternal*. The *whole blood* take in both lines. There is no devolution of property from one line to another, except where no ascendants nor collaterals can be found in one of the two lines.

The first division having taken place between the paternal and maternal lines, no further division is made among the various branches of the family, but the moiety devolving upon each line belongs to the nearest heir or heirs, except in the case of *representation*, hereafter explained. Proximity of heirship is determined by the number of generations; and each generation is called a *degree*. The series of degrees forms the line, and the series of degrees between persons descending one from the other is called the *direct* line; those who do not descend from each other, but from a common ancestor, are *collaterals*. There are two direct lines, the line *descending* and the line *ascending*. The former connects the ascendant

* In this point the French law resembles the Roman law. In England, *real* property devolves differently from *personal* property.

with those who descend from him; the latter is the line which connects him with those from whom he descends.

In the direct line degrees are counted by the generations between persons; thus the son with respect to his father is in the first degree; the grandson is in the second; and, in like manner, the father and grandfather with respect to sons and grandsons.

In the *collateral* line, the degrees are reckoned by the generations, from one of the relatives to, but not including, the common ancestor, and from him downwards to the other relative. Thus two brothers are in the second degree; the uncle and nephew are in the third; first cousins in the fourth; and so on.

Representation.

Representation is a legal fiction, the effect of which is to place the representative in the degree and rights of the person represented. It takes place *ad infinitum* in the direct descending line.

All lineal descendants *ad infinitum* represent their ancestors; that is, stand in the same place as the ancestor would have done had he been living.

Representation does not take place in favour of ascendants; the nearest in each of the two lines excludes the more remote.

In the collateral line representation is admitted in favour of the children and descendants of brothers and sisters of the deceased person, whether they come to the succession concurrently with uncles or aunts; or, if all the brothers and sisters are dead, the succession devolves upon their children in equal or unequal degrees. In all cases where representation is admitted, the division takes place *per stirpes*. If the same root has produced several branches, the subdivision is made from the root in each branch, and the members of each branch divide *per capita* (*par tête*).

Representation cannot be made of a living person, but persons who have renounced a succession may be represented.

Successions Devolving upon Descendants.

Children or their descendants succeed to their father and

mother, to their grandfathers, grandmothers, or other ascendants, without distinction of sex or regard paid to primogeniture, and whether they are the issue of different marriages or not. They inherit, *per capita*, when all are in the same degree and in their own right; they take *per stirpes* when all or some of them succeed by representation.

Successions Devolving upon Ancestors.

If the deceased person leaves no issue, nor brother, nor sister, nor descendants from them, the succession is divided in equal moieties between the ascendants of the paternal and the maternal lines. The ancestor in the nearest degree takes the moiety that devolves to his line in exclusion of all others. Ascendants in the same degree succeed *per capita*. Ascendants succeed, in exclusion of all others, to things given by them to their children or other descendants who died without issue, when the things given are found in the succession; and if alienated, the ascendants receive the price which may still be due, and the right of action which the donee may have.

When parents survive their children who have died without issue, but leaving brothers or sisters, or their offspring, the succession is divided into two equal parts. One moiety devolves upon the parents, who share alike; the other moiety goes to the brothers, sisters, or their representatives. If one of the parents has previously died, the portion that would have devolved to him or her is added to the moiety accruing to the brothers, sisters, or their representatives, as hereafter explained.

Succession of Collaterals.

In the event of the predecease of the father and mother of a person dying without issue, his brothers, sisters, or their descendants are entitled to the succession, to the exclusion of the ascendants and other collaterals; but if the father and mother of the person dying without issue survive, they take the half of the succession; and if only one survives, the brothers, sisters, and their descendants take three-fourths. In both cases, if the brothers and sisters are by the same marriage, the succession is equally divided; but if by different marriages, the succession is divided into two shares,

between the paternal and maternal lines. Brothers and sisters of the whole-blood share in both lines, and those of the half-blood in their own line only. If there are brothers and sisters on one side only, they succeed to the whole, to the exclusion of all relatives of the other line.

In default of brothers or sisters, or their issue, and of ascendants in one of the lines, the succession devolves, one-half to the surviving ascendants, and the other half to the nearest of kin of the other line.

A surviving parent is entitled to the usufruct of the third part of the property to which he has not succeeded.

Relatives beyond the twelfth degree do not succeed; in default of relatives of one line being capable of succeeding, the relatives of the other take the whole.[53]

Irregular Successions.

Illegitimate children are not heirs, but the law grants them rights over the property of their deceased parents when they have been legally acknowledged; but they have no right over the property of the relatives of their father or mother. Their rights are regulated as follows:—When the father or mother leaves legitimate issue, the illegitimate child takes one-third of what he would have been entitled to had he been legitimate; the half, if there are no legitimate issue except relatives in the ascending line and brothers and sisters; three-fourths, when the father or mother dies without issue, or without ascendants or descendants, or brothers or sisters.

Illegitimate children have a right to the whole of their parents' property when the parents die leaving no relative capable of succeeding. In the event of illegitimate children dying before their parents, their offspring or their descendants may claim their rights; but illegitimate children or their descendants must deduct from their claims such sums as they may have received from their deceased parents,* which they

* Illegitimate children and their descendants cannot receive, by gift *inter vivos* or by will, property beyond the limits prescribed by law.

[53] In the Roman law, *cognati* (blood-relations) were only entitled to succeed as far as the sixth degree; or, in the case of children of a second-cousin, in the seventh degree. There was no such limit to the succesion of members of the civil family *(agnati)*, persons under the power of the paterfamilias.

must return, as prescribed by law. They have no claim when they have received, in the life-time of their parents, the half of the amount above stated, with the express declaration of the parents that they intend to limit the claim of the illegitimate child to that which he has received; but if he has not received the half of what he is entitled to, he may claim the sum necessary to make up the half.

The offspring of adultery or incest have no rights of inheritance; but the law awards them maintenance, which is regulated by the position of the parents and the number and circumstances of the legitimate heirs. When the father or mother of the offspring of adultery or incest has caused the child to learn a trade or calling, the child cannot set up any claim for maintenance against the succession.

When an illegitimate child dies without issue, the succession devolves upon the father or mother who acknowledged him; or on both, by moiety, if he has been acknowledged by the two; and where the father and mother have died first, the property which he received from them, if in the succession, passes to the legitimate children of his parents, and the remainder passes to his own brothers or sisters, or their descendants.

Rights of the Surviving Husband or Wife, and of the State.

When a husband or wife dies, leaving no relatives of a degree capable of succeeding, nor illegitimate children, the property in the succession goes to the survivor, and in default of surviving husband or wife, to the State. The survivor, or the State, who claims a right to the succession, is bound to have an inventory made, and must *demand*, as in a beneficiary succession, to be put into possession by the court of first instance. The survivor is bound to invest the personal property, or give security to restore it, in the event of heirs of the deceased appearing within three years, after which the surety is discharged. This rule is also applicable to illegitimate children who succeed as heirs for want of legitimate relatives.

CHAPTER II.

OF THE ACCEPTANCE OR RENUNCIATION OF SUCCESSIONS.

Acceptance.

[*Code Napoléon*—Articles 774-814.]

A SUCCESSION may be accepted purely and simply, or it may be accepted under "privilege of inventory" (*sous bénéfice d'inventaire*).*

No one is bound to accept a succession that falls to him.

A married woman cannot legally accept a succession without the authority of her husband or a court of law, as explained in the chapter on "Marriage." Successions falling to minors or *interdicted* persons cannot be legally accepted, except in accordance with the rules previously stated with regard to *minority, guardianship*, and *emancipation*.

Acceptance dates from the day of the death of the deceased persons, and may either be *express* or *implied*. It is *express* when the title or qualification is recorded in a deed; *implied*, when the heir does an act showing his intention to accept, which he would have no right to do except in the capacity of heir.

Acts purely conservatory, or superintending the provisional administration, are not deemed acts of acceptance, provided the title or quality of heir has not been assumed.

The gift, sale, or transfer by a co-heir of his claims to a stranger, or to a co-heir, implies an acceptance of the succession. A voluntary renunciation in favour of one or more of his co-heirs, or in favour of all his co-heirs without distinction, when he receives a price for it, is an acceptance.

When a person, to whom a succession has devolved, dies

* *Sous bénéfice d'inventaire;* an acceptance without liability for debts beyond the amount of the assets of the succession.

without having renounced or accepted it expressly or by implication, his heirs may, in his right, accept or renounce it; but if they cannot agree, the succession must be accepted *sous bénéfice d'inventaire.* A person of full age cannot dispute his express or implied acceptance of a succession, unless his acceptance has been the result of fraud; nor can he disclaim it under pretence of lesion, unless the value of the succession has been absorbed or diminished more than a half by the discovery of a will which was unknown at the time of the acceptance.

Renunciation of Successions.

Renunciation of a succession is never presumed; it must be effected by a declaration at the registrar's office of the court of first instance, and entered in a register kept for that purpose. When an heir renounces, he is deemed never to have been heir, and his share accrues to his co-heirs. If he has no co-heirs, it devolves to the next of kin. A person cannot claim as *representative* of an heir who has renounced; if the party who renounces is the only heir of his degree, or if all his co-heirs have renounced, the children take in their own right. Creditors of an heir who renounces may be empowered to accept the succession to the amount of their claims; and if there is a surplus, that goes to the next of kin.

The power of accepting or renouncing a succession is limited to thirty years. As long as the right to accept is not barred by prescription, the right of acceptance by the heirs of the person who renounced continues, unless the succession has been accepted by other heirs, without prejudice to rights which third parties may have acquired over the property.

A party cannot, even by marriage settlement, renounce the succession of a living person; nor can he alienate the contingent rights which he may have to such succession. Heirs who abstract or conceal the property of a succession lose the power of renouncing; they remain absolute heirs, and have no claim on the things carried away or concealed.

"Privilege" of Inventory.

The declaration of an heir that he will only accept *sous bénéfice d'inventaire* must be made at the office of

the registrar of the court of first instance of the district in which the succession commenced, and inscribed on the register kept for that purpose; and such declaration has no effect unless a faithful and exact inventory of all the property of the succession is drawn up in the forms prescribed by law. The heir is allowed three months to make the inventory, and after that time, forty days to consider whether he will accept or renounce the succession. Over all perishable goods the court grants him a power of sale. If he renounces, expenses fairly incurred by him are charged upon the property of the succession.

After the expiration of the above term, if a suit is preferred against him, he may demand a further delay, which the court may grant or refuse according to circumstances; in which case the expenses of the prosecution are at the charge of the succession if the heir can prove that he was not aware of the death, or that the period of delay was insufficient, either on account of the situation of the property, or by delays arising from disputes. If he cannot give such proofs, the costs fall upon him personally. Nevertheless, after the expiration of the above term, he still preserves the power of making an inventory and remaining beneficiary heir, if he has not otherwise acted as heir, or has not been adjudged in the quality of simple and absolute heir. An heir who is guilty of receiving stolen goods of the succession, or who knowingly and fraudulently has omitted to include in the inventory any effects belonging to the succession, forfeits the *bénéfice d'inventaire.*

Sous bénéfice d'inventaire confers on the heir the following advantages:—1. Non-liability for debts of the succession, except to the value of the property received by him, besides the power of freeing himself from debts, by abandoning all the property of the succession to the creditors and legatees.[54] ——2. The right to keep his own property separately from that of the succession, and to pay himself any claims that he may have upon the estate.

The heir who enjoys the benefit of inventory is bound to

[54] A similar institution existed in the Roman law. Justinian established the *beneficium inventarii.* The heir, within a certain time, made an inventory of the property of the deceased, keeping his own property separate. If there was a surplus, the heir took it; if a deficiency, he was not liable.

administer the property of the succession, must render an account to the creditors and legatees, and is answerable for any balance that may be due to the succession. All movables must be sold, after due notice, by public auction. The real property must also be sold in the form prescribed by law, and the beneficiary heir is bound to pay over the proceeds to the mortgage creditors who have proved their claims. Creditors or any interested party may insist upon security being given for the value of the property comprised in the inventory, in default of which, both personal and real property are sold, and the proceeds are used for the payment of charges on the succession; if there are opposing creditors, the proceeds are paid as directed by the judge. Creditors not opposing have only their remedy against the legatees, and in both cases all claims are barred by prescription after the lapse of three years. The expenses of the seals, if any have been affixed, of the inventory, and of statements, are chargeable to the succession.

Vacant Successions.

When no one comes forward within the prescribed time to claim the succession, or if the succession is renounced by the heir, it is pronounced *vacant*, when the court of first instance appoints a trustee, who has an inventory made, manages all the affairs, pays claims, and acts as *l'héritier bénéficiaire.*[55] He receives a salary, which is not allowed to *l'héritier bénéficiaire.*

[55] A modification of the *substitutio* of the Roman law.

CHAPTER III.

OF PARTITION.

[*Code Napoléon*—Articles 815-892.]

No one can be compelled to remain joint-owner of a property, and partition may be always obtained notwithstanding prohibitions and agreements to the contrary; but an agreement to suspend partition for a limited time is valid, if it does not exceed five years, which, after that time, may be renewed. Partition may be demanded even though one of the co-heirs enjoys separately a part of the property of the succession, if there has been no deed of partition, nor possession sufficient to involve prescription. With respect to minors, co-heirs, or interdicted persons, partition may be obtained by guardians specially authorised by the family council; and in the case of absent co-heirs, relatives put in possession may sue for partition.

A husband may, without the consent of his wife, demand the partition of the real and personal property which has accrued to her, and has fallen into the community; but for things not in common, the husband requires her consent. The co-heirs of the wife cannot effect a partition without suing both husband and wife.

If all the heirs are present, and of full age, affixing seals is not necessary, and they may make the partition as they please; but if the heirs are not present, or if among them there are minors or interdicted persons, or if creditors insist, the seals must be affixed and an inventory made as prescribed by law.

Actions of partition, and disputes arising therefrom, are submitted to the court of first instance, which adjudges summarily; or the court may appoint one of the judges, on whose report it decides.

Each of the heirs may demand his share in kind of the real and personal property; but if there are opposing creditors,

or if the majority of the co-heirs think a sale is necessary, the personal property is sold by auction; and if the real property cannot be properly divided, it must be sold by auction before the court; but if the heirs are of full age, they may agree to have the auction made before a notary.

After the sale of the real and personal property, the co-heirs go before a notary, to have the partition arranged, when each accounts for the gifts he has received, and the sums due from him to the succession. Each co-heir must give back to the estate the gifts he has received, and the sums he owes the succession. The estate is then equally divided in lots amongst the co-heirs, and should there be an inequality in the lots, an indemnity in money or rent-charge is given.

The lots are arranged by one of the co-heirs, or by an expert appointed by the judge, and afterwards drawn at hazard. If disputes arise, the notary makes a report, on which the court decides. If co-heirs are absent, or if some of the co-heirs are minors or interdicted persons, the partition must then be made before the court, when, if necessary, the family council appoint a special guardian to each minor having opposing interest.

Any person, though a relative, but *not* a co-heir, who purchases a share of a succession from one of the co-heirs, may, on being indemnified, be excluded from the partition, at the demand of one or more of the co-heirs.

After partition, each co-heir is entitled to the deeds relating to his share of the property; but if the property is in one lot, he who has the largest share keeps the deed, which, when required for legal purposes, is always at the command of the other parties; and where there is only one deed for the whole estate, one of the co-heirs is appointed by the others to be its custodian; and if they cannot agree, the judge appoints one.

Hotchpot ("*Des Rapports*").*

Every heir, even beneficiary, and a donee who becomes an heir after the gift, must return to the co-heirs all that he has received by gift or will from the deceased, unless expressly stated in the deed of gift or in the will that it is an extra

* A confused mingling of divers things; a blending or mixing of lands or chattels, answering, in some respects, to the *collatio bonorum* of the Roman law.

share, not subject to restitution;* and even in this case, he cannot retain more than the disposable portion allowed by law. An heir who renounces a succession may retain a gift or legacy made to him to the amount of the disposable portion allowed by law.

A donee who was not the presumptive heir at the time of the gift, but who was so on the opening of the succession, is bound to return the gift, unless the donor has exempted him. Gifts and legacies made to the son of a person who becomes entitled to succeed when the succession commences are not considered returnable. A father, coming to the succession of the donor, is not bound to return the gifts. In like manner, a son who becomes in his own right the heir of a donor is not obliged to return the gifts made to his father; but if he succeeds by representation, he is obliged to return the donations made to his father, even if he has renounced his succession. Gifts and legacies made in favour of the wife of a husband who has become heir are not returnable to the succession; but if made to both of them, the one who is the heir must return the half; if both are heirs, the whole must be returned. Returns are only made to the succession of the donor, and they comprise gifts made to a co-heir, or moneys given in payment of his debts. Sums paid for setting an heir up in business, or for debts due by him, are returned; but not expenses incurred for his maintenance, education, apprenticeship, equipment, marriage, and marriage presents. The same rule applies to profits resulting from transactions which the heir may have had with the deceased, or from a *bonâ fide* partnership regularly drawn up by deed.

A donee is not responsible for immovables that have perished by accident or without his fault.

Fruits, and interest upon things returnable, are due only from the day of the commencement of the succession. Returns are due only from the co-heir to his co-heirs. They are not due to the legatees, nor to the creditors of the succession.

* *Rapport à succession* is the *giving back*, in kind or otherwise, to the bulk of the succession, things that an heir may have received from the deceased, so that the whole shall be divided amongst the different co-heirs. The law presumes that the deceased, who has not shown a contrary intention, desires to maintain equality amongst his heirs, and that the liberality that he bestowed upon one is only an *avancement d'hoirie.*

A return may be made of the thing itself, or its value may be deducted from the claims of the legatee or donee; but if the real property has not been alienated by the donee, its return may be insisted upon, if there is not in the succession real property of a similar kind that can conveniently be divided in lots between the other co-heirs. If alienated before the commencement of the succession, its value at that time need only be returned. In every case, the donee is reimbursed for keeping the thing in repair, and for outlays in improvements; he, however, is responsible for deterioration caused by his negligence.

When the return is made in kind, it is added to the estate free from liabilities created by the donee; but mortgagees have a right to prevent a return being made in fraud of their claims.

When a gift of real property, made to a person capable of succeeding, and not returnable, exceeds the disposable portion allowed by law, the return of the excess is made, if possible, of the thing itself; if not possible, when the excess exceeds half the value of the property, the donee must return the whole of it, reserving his right to take first from the succession the value of the disposable portion; but if such portion is more than the half of the value of the property, he may retain the whole by compensating his co-heirs.

The return of goods is made by taking a less share in the succession; the return of money is made by taking a less amount; if insufficient, the return is made in goods, or in default, in real property.

Payment of Debts.

Co-heirs contribute to the payment of debts and liabilities, each in proportion to his share in the succession. The general legatee (*à titre universel**) contributes his share; but *specific* legatees are not liable for debts, but are liable to actions arising from mortgages.

When the real property of a succession is encumbered by

* A legacy is said to be *à titre universel* (general) when it does not amount to a bequest of any particular thing or money distinguished from all others of the same kind. *Specific* legacy is a bequest of a particular thing or sum of money.

annuities secured by mortgage, any of the co-heirs may insist upon the annuities being redeemed before proceeding to allotment; but if the co-heirs allot the property as left, the encumbered portion of the estate is valued as if unencumbered, and the capital of the annuity is deducted from the valuation; and the heir who takes the encumbered portion is alone responsible for the annuity, and must guarantee to hold his co-heirs free from all future liability.

The heirs are liable severally for the debts and liabilities of the succession to the amount of their respective shares; but by mortgage each heir is liable for the whole, saving his remedy against the co-heirs or against the general legatees for their respective shares.

A specific legatee who has paid the debt with which the estate was encumbered enters into the rights of the creditor against the heirs and general legatees. The co-heir or general legatee who, in consequence of a mortgage, has paid more than his share of the common debt, has his remedy against the other co-heirs or legatees for their respective shares.

In the event of one of the co-heirs or a general legatee being insolvent, his share of the mortgage debt must be proportionately paid by the others.

Writs issued against the deceased person previous to his death may be enforced against the heir, but a week's notice must be given before execution. The heir may, however, demand that his property be separated from that of the deceased. This *demand* cannot be made, when there is *novation** of the debt, by the heir being accepted as debtor. If personal property, the right must be enforced within three years; if real property, as long as it remains the property of the heir.

Creditors of a co-heir may insist upon being present at the allotment; but when it is made they cannot interfere, unless the allotment has been made contrary to an opposition legally set up by them.

Effects of Partition and Warranty of Lots.

Each co-heir is deemed to have succeeded to all the effects comprised in his allotment, and never to have had any claim upon any other portion of the succession.

* *Novation*, see page 151

Co-heirs are sureties to each other against molestations and evictions proceeding from causes anterior to the partition ; but they are not liable for evictions specified in the deed of partition, or evictions arising by the fault of the evicted co-heir.

The guarantee for the solvency of the debtor of an annuity continues for five years after partition.

Rescission in Matters of Partition.

Partitions may be rescinded in cases of violence or fraud, or by one of the co-heirs proving that he has been deprived of more than the fourth of his share. The simple omission to include a thing belonging to the succession in the partition does not give ground for an action of rescission, but merely for a supplementary allotment. An action in rescission is admissible against any act tending to promote partition between the co-heirs ; but after partition, an action is not admissible ; nor is an action admissible after a *bonâ fide* sale of a successional right made by a co-heir to his co-heir or co-heirs.

A co-heir who has alienated his lot, in whole or in part, cannot bring an action for fraud or violence, if the alienation took place subsequently to the discovery of the fraud.

CHAPTER IV.

OF GIFTS "INTER VIVOS."

[*Code Napoléon*—Articles 893-966.]

A PERSON cannot dispose of his property *à titre gratuit* (gratuitously) otherwise than by gift *inter vivos* or by *will*, according to the rules hereafter specified.

A deed of gift (*donation entre-vifs*[56]) is an instrument by which a donor divests himself actually and irrevocably of the thing given in favour of the donee who accepts it. A *will* is an instrument by which the testator disposes of the whole or part of his property, with power at all times of revocation.

Entails (*les substitutions*[57]) are prohibited in France, and every disposition by which the donee, the appointed heir, or the trustee is bound to preserve and render the gift to a third person is void, even in respect of the donee, the appointed heir, or the legatee.*

* Hereditary grants by the State, called *majorats*, which were an exception to this rule, were abolished by the Act of 12th May, 1835. Parents, however, are allowed to give, *in trust*, property *to the use* of the donee's children in the first degree, and brothers and sisters to the use of their brothers' or sisters' children, as will be explained hereafter.

[56] Justinian, in his "Institutes," mentions another gift which is incorporated in the laws of England,—*donatio mortis causâ*, a gift in prospect of death; a gift which shall be absolute in the event of the donor's death, but revocable if he lives.

[57] The *substitutio* of the Roman law was the appointment of several degrees of heirs. It was a conditional institution, wherein a second person was named as heir, should the person first instituted fail from any cause to accept the inheritance. A third might be appointed to succeed, if the second did not accept; and so on.

When a donation, inheritance, or legacy is not accepted by the donee, heir, or legatee, the appointment of a third person to receive it is not considered *substitution* (entail), and is valid; so is the gift of property to A and the usufruct to B.

In dispositions by gift *inter vivos* or by will, impossible conditions, and conditions contrary to law or morals, are void.

Power of Disposing or Receiving by Gift *inter Vivos* or by Will.

To make a gift or will, the donor or testator must be of sound mind. All persons may *give* or *take* by gift *inter vivos* or by will, unless declared incapable by law.

A minor under sixteen cannot make a disposition, except by marriage settlement. After sixteen, he can only dispose of the half of the property that a person of full age is entitled to do.

A married woman cannot make a gift *inter vivos* without the consent of her husband, or, in default of such consent, without the consent of the court of first instance; but she may, by will, bequeath her property without the consent of either.[58]

To be able to take by gift *inter vivos,* the child must be conceived at the time of the making of the gift; and, to take by will, the child must have been conceived at the time of the death of testator. In both cases the child must, when born, be likely to live (*viable*).

A minor, although sixteen years of age, cannot make a will in favour of his guardian; nor at full age can he make a gift *inter vivos* or bequeath property to his late guardian, till the account of the guardianship has been rendered and settled. In both cases, however, a minor may give or bequeath in favour of his parents or grand-parents, who are or have been his guardians.

[58] By the Roman law, women could not make wills if in the *power* of their father, or in the *manus* of their husbands. If they were not *in potestate* nor *in manu*, they could make a will, provided that the will was confirmed by the *auctoritas* of their tutor.

Illegitimate children cannot take by gift or by will more than the share that the law allows them in the succession.*

Physicians, surgeons' assistants, and chemists who have attended a deceased person in his last illness cannot take by gift or by will made during such illness. Pecuniary recompense for services rendered, and general legacies to relatives of the fourth degree, provided there are no heirs in the direct line, are excepted. The same rule applies to priests, clergymen, and rabbis. Gifts or legacies made in favour of hospitals, the poor, and public institutions, are only valid when authorised by the State.† Gifts or legacies in favour of persons prohibited by law from taking are void, although disguised under the form of a contract for a consideration, or in the name of an *interposed* person.‡

Of the Portions of Property Disposable by Gifts *inter Vivos* or by Will.

Gifts *inter vivos* or by *will* must not, when there is only one legitimate child at the death, exceed one-half of the owner's property; they must not exceed a third when there are two children; nor more than a fourth, when there are three or more.[59] This rule applies to descendants in whatever degree, who only take the place of the person they represent in the succession of the donor or testator.

Gifts *inter vivos* or by *will* must not exceed the half of the owner's property if, having no children, he leaves one or more ascendants in both the paternal and maternal lines; three-fourths, if he leaves ascendants only in one line. In default of ascendants and descendants, an owner may dispose of the whole of his property by gift or by will.

* See "Succession," page 95.

† By the Act of 14th July, 1819, gifts and legacies may be made in favour of aliens.

‡ *Personne interposée:* A party who lends his name to another to enable him to derive a benefit which he could not obtain in his own person.

[59] The Romans reserved a fourth of the inheritance (*portio legitima*) for the heir.

If the gift *inter vivos* or legacy is a usufruct or an annuity, and if the value exceeds the disposable portion, the heirs entitled to the reservation may either pay the annuity, or renounce the ownership of the disposable portion.

The value, in full ownership of the property alienated, either for a life annuity or with reservation of usufruct to one of the direct heirs, is charged upon the disposable portion, and the surplus, if any, returns to the estate; such charge and return cannot be claimed by the direct heir who has consented to such alienation, nor in any case by collateral heirs. The disposable portion may be given in whole or part, by deed *inter vivos* or by will, to the children and other heirs of the donor, without being subject to restitution, provided such disposition has been expressly declared an extra share *(préciput)*.* This declaration may be made in the deed of gift, in the will, or by a separate deed.

Abatement of Gifts and Legacies.

Gifts *inter vivos* or legacies that exceed the disposable portion are reducible to such portion as existed at the time the succession commenced; the abatement can only be sued for by those entitled by law to the reservation; it cannot be claimed by donees, legatees, or creditors of the deceased. Abatement is settled by fictitiously uniting to all the property left by the donor or testator at his decease that which he disposed of by gifts *inter vivos*. After deducting the debts, a settlement of the disposable portion is made upon the whole property, according to the rights of the heirs he has left. Abatement cannot take place till the value of all the property comprised in the testamentary disposition has been exhausted; and when such abatement is made, it begins with the last gift, and so on till the first. If the gift, subject to abatement, has been made to one of the heirs, that heir may retain, out of the property bestowed, if of the same nature, the share of the reserved portion which belongs to him as heir.

When gifts *inter vivos* exceed or equal the disposable portion,

* A benefit given to one of several co-heirs; also a benefit stipulated by marriage settlement in favour of the surviving husband or wife.

all the testamentary dispositions lapse; and when the testamentary dispositions exceed either the disposable portion or the portion which remains after deducting the gifts, the abatement is made in equal proportions, without distinction between general and specific legacies; but when the testator has expressly declared that one legacy shall be paid in preference to others, such legacy is not reducible unless the value of the others does not make up the legal reservation. A donee must return, from the time of the death of the donor, the fruits of that which exceeds the disposable portion, if the demand is made within a year; otherwise, from the day of the demand. Real property subject to abatement must be returned free from debts or mortgages created by the donee. An action in abatement or *revendication* may be maintained by the heirs against third parties detaining real property which, being part of the gift, had been alienated by the donee; seizure and sale being first made upon the property of the donee. Such action must be brought in the order of the dates of the alienations, beginning with the most recent.

Gifts *inter Vivos.*

All gifts *inter vivos* must be made before a notary in the usual form of a contract, and a minute kept by him, otherwise they are void. A gift *inter vivos* does not bind the donor, nor does it take effect, unless it has been expressly accepted by the donee. The gift must be accepted during the life of the donor, which acceptance may be made by a separate deed before a notary, and notice of the acceptance must be given to the donor. If the donee is of full age, the acceptance must be made by him, or by a person, in his name, having power to accept the donation for him.

A married woman cannot accept a gift without the consent of her husband, or in the event of his refusing, without being empowered to do so by the court of first instance, conformably to the rules respecting marriage. A gift to a minor not emancipated or to an interdicted person must be accepted by his guardian, conformably to the rules under the head "Minority, Guardianship, and Emancipation." An emancipated minor may, with the authority of his curator, accept; and the

parents or other ascendants of a minor, whether emancipated or not, although neither guardians nor curators of the minor, may accept for him. A deaf and dumb person who can write may accept for himself, or by procuration; if he cannot write, the acceptance must be made by a curator appointed for that purpose, conformably to the rules respecting "Minority, Guardianship, and Emancipation."* Gifts made in favour of hospitals, the poor of a parish, or public institutions, must be accepted by officials duly authorised to accept.

A gift duly accepted invests the ownership in the donee without the necessity of any other conveyance. Gifts *inter vivos* of real property capable of being mortgaged must, with their acceptances, be registered at the mortgage offices† where the property is situated; default of such registration may be pleaded by all interested parties, except by those whose duty it was to have the registration made, their assigns, and the donor. Minors, interdicted persons, and married women, are not entitled to restitution, on the ground of default of acceptance or registration of gifts; but they have their remedy against their guardians, curators, or husbands. A gift *inter vivos* can only comprise property in the actual possession of the donor; if it comprises property that will fall to him at a future period, the gift of such property is void. All gifts *inter vivos* made on conditions depending only on the will of the donor are void. They are also void if made subject to the condition of paying debts or discharging liabilities other than those existing at the time of the gift, and expressed in the deed of gift or in the statement which ought to be annexed to it. When the donor, having reserved for himself the right of disposing of a thing comprehended in the gift or of a fixed sum from the property bestowed, dies without having disposed of it, the thing or sum goes to his heirs, notwithstanding stipulations to the contrary.

These rules respecting present property, conditions depending on the will of the donor, discharge of debts, and reservation of

* See page 59.

† In France, in each *arrondissement* there is a mortgage office, where all transfers of property must be registered.

a right of disposal, do not apply to gifts in marriage settlements, or gifts from one consort to the other either in the marriage settlement or during marriage.

A gift of personal property is not valid unless a statement is drawn up setting forth the valuation of the things given, signed by the donor and the donee or the person who accepts for the donee; such statement must be annexed to the deed of gift.

A donor may reserve for his own benefit, or for the benefit of another, the use or usufruct of the real or personal property bestowed. When a gift of personal property is made with reservation of usufruct, the donee is bound, at the termination of the usufruct, to take the things as they are; but he may maintain an action against the donor or his heirs for the value of things, entered in the inventory that have disappeared. A donor may stipulate for the right of reversion of the things given, in the event of the donee himself, or the donee and his heirs, dying before him; but this right is restricted to the donor himself. This right of reversion cancels all alienations that may have been made of the property bestowed, which reverts to the donor free of all liabilities and mortgages; except in cases of mortgages for dowry or marriage settlements if the other property of the donee is not sufficient; but this only in cases where the gift and mortgage are made in the same marriage settlement.

Exceptions to the Rule of Irrevocability of Gifts *inter Vivos.*

A gift *inter vivos* cannot be revoked except for non-performance of its conditions, ingratitude, or in the event of the subsequent birth (*survenance*) of children of the donor after the gift.[60] In cases of revocation arising from non-performance of the conditions, the property reverts to the donor, free of all liabilities and mortgages incurred by the donee, with the same rights over the property detained by third parties that he would have had against the donee himself.

[60] By the Roman law, gifts *inter vivos* were irrevocable, except for ingratitude or non-performance of conditions. They were not revoked by the subsequent birth of a child of the donor.

A gift *inter vivos* cannot be revoked on account of ingratitude except in the following cases:—1. When the donee has attempted the life of the donor.——2. When he has been guilty of cruelty towards him, or committed a misdemeanour against him, or grievously offended him.——3. When he refuses him maintenance.

Revocation on the ground of non-performance of conditions or ingratitude must be sued for within a year from the day of the delinquency imputed to the donee; but such action cannot be brought against the heirs of the donee, nor by the heirs of the donor against the donee, unless commenced by the donor, or unless the delinquency took place within a year of the donor's death.

Revocation on the ground of ingratitude does not prejudice alienations or mortgages and other liabilities incurred by the donee, with which he may have encumbered the property, provided they are made before the registration of the demand for revocation, which must be entered at the mortgage office. In the event of revocation, the donee is bound to return the value at the time of the demand of the thing alienated.

Gifts as a marriage portion are not revocable on the ground of ingratitude.

All gifts *inter vivos* made by persons who had no children nor descendants living at the time of the donation, even gifts as a marriage portion, other than gifts by ascendants to the consorts, or by the consorts to each other, are absolutely revoked by the subsequent birth of a legitimate child of the donor, even if born after the donor's death; or, by the legitimation of an illegitimate child by a subsequent marriage, if it is born after the gift.

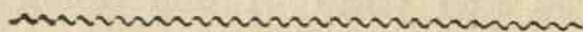
Gifts thus revoked can never be revived, even by the death of the infant, except by a new deed of gift. Property comprised in a gift that has been absolutely revoked returns to the estate of the donor free from all liabilities and mortgages of the donee.*

Every clause in a deed of gift, by which the donor renounces

* A purchaser from a donee takes all the risks of revocation liable to the donee.

the revocation of a gift on the subsequent birth of a child of the donor after the gift, is void.

A donee, his heirs or assigns, and third parties who possess the property bestowed, cannot claim a prescriptive right till thirty years after the birth of the last child of the donor.



CHAPTER V.

OF TESTAMENTARY DISPOSITIONS.

[*Code Napoléon*—Articles 967-1074.]

EVERY person of full age and of sound mind may dispose of his property by *will*, either by the appointment of an heir,[61] or by legacy, or in any other way manifesting that which he wishes to be done after his death. Two or more persons are not allowed to make their wills in the same instrument, either for the benefit of a third person or for the benefit of each other. A will may be *holographic*,* or made before a notary, or in the *mystique* form.

A holographic will is not valid unless it is wholly written, dated, and signed by the testator. No other formality is required.

A will publicly executed must be made before two notaries and two witnesses, or one notary and four witnesses. In this case, the will must be dictated by the testator, written by a notary, read to the testator and witnesses, and signed by the testator and witnesses. If the testator cannot sign the deed, the reason must be recorded.

No legatees nor relatives beyond the fourth degree, nor clerks of the notaries engaged in drawing up the will, can be witnesses.

When the testator desires to make a *mystique* will,† he must

* A testament written entirely by the testator, which, on account of the difficulty of the forgery of such a document, is held valid without witnesses.

† This *will* is called *mystique* (secret), as no declaration is made of the contents of the will, nor is the reading of the will to notaries or witnesses required.

[61] By the Roman law, the appointment of an heir by a testator was the fundamental principle of a testament—*caput atque fundamentum totius testamenti*.

sign it, whether he has written it himself or had it written by another person. The paper or envelope must be sealed, and presented to the notary in the presence of six witnesses, and the testator must declare that the packet contains his will, written by himself or by another person, and signed by himself. The notary inscribes this declaration upon the sealed packet, signs it, and has it signed by the testator and witnesses. If the testator cannot sign, an additional witness is required, who not only signs, but states the reason why the testator has not signed it. Persons who cannot read are not allowed to make a will in the *mystique* form, but a person who cannot speak, but can write, may make a *mystique* testament, provided the whole be written, dated, and signed by himself.

Witnesses to wills must be males of full age, French subjects, and in full possession of their civil rights.

Military men and persons employed in the army or navy may make their wills before a major, or any other superior officer, in the presence of two witnesses; or, if invalided, before the surgeon, assisted by the military commander of the hospital. These regulations only apply to persons engaged in war, or to those in garrison out of the French territory; and such wills are void if, at the expiration of six months after the testator has returned to a place where he can have the means of using the ordinary forms, he has not done so. In cases of quarantine, wills may be made before the justice of the peace, or any municipal officer, in presence of two witnesses. Such wills are invalidated six months after communication has been established.

Wills in the course of a sea-voyage may be made before the commander of a Government ship, assisted by the commissary; and in merchant vessels, before the purser, assisted by the captain or next in command. Such wills must be executed in the presence of two witnesses. In all cases a duplicate copy must be kept, and when the vessel enters a foreign port where there is a French consul, one of the copies must be left with the consul, who must forward it to be deposited

[62] By the Roman law, certain persons could not be witnesses, either on account of—1. Of some general disability, *e.g.*, women, minors, prodigals. ——2. Of some interest in the testamentary disposition. Persons under the power of the testator. The instituted heir, and certain individuals closely connected with him, were incompetent.

among the records of the justice of the peace at the place where the testator had his domicile. Such wills must be signed by the testator, the officers of the ship, and by one witness at least.

A Frenchman in a foreign country may make a holographic will, or a will according to the forms of the place. Such wills cannot be put in force respecting property in France, unless registered at the office of the last domicile of the testator; and if they apply to real property, at the mortgage office.

All these formalities must be observed, under pain of nullity.

Heirs, and Legacies in General.

Testamentary dispositions are either *universel*, *à titre universel*, or *à titre particulier*.

A *legs universel* is a testamentary disposition by which the testator gives to one or more persons the whole of the property which he leaves at his death. When there are heirs who are entitled by law to a portion of the property, such heirs are seized in full right of all the property, and the *légataire universel* must demand from them the delivery of the property comprised in the will; but when there are no heirs entitled by law to the reservation, the *légataire universel* is seized in full right.

Every *holographic* and *mystique* will must be opened by the president of the court of first instance, who, when there are no heirs, must issue an order to put the *légataire universel* in possession. The *légataire universel* who takes concurrently with an heir entitled to reservation is responsible personally for his share of the debts and liabilities of the succession, and by mortgage (*hypothécairement*) for the whole. He is bound to pay all legacies, subject to the abatements already explained.*

A *general* legacy (*legs à titre universel*) is that by which a testator leaves a certain part of his property, which the law permits him to dispose of, such as a half, a third, or all his real property, or all his personalty, or any fixed part of either. All other legacies are specific.

The legatees, *à titre universel*, are bound to demand the delivery of their legacies from the heirs entitled to reservation; in default, from the *légataire universel;* and in default of the latter, from the heirs entitled by succession.

* See page 115, "Abatement of Gifts and Legacies."

General legatees, like *légataires universels*, are responsible for their share of debts and liabilities of the succession, and by mortgage, for the whole.

When the testator has only left a part of his disposable property to a general legatee, the latter is bound to pay, proportionately with the heirs, his share of the specific legacies.

A *specific* legacy is a bequest of a particular thing, or a sum of money, or claims, the thing bequeathed being distinguished from all others of the same kind.

Every specific bequest gives the legatee from the day of the death of the testator a right to the thing bequeathed; but he cannot take possession till demand for delivery is made in the way already explained,* or till a delivery is voluntarily made.

The interest or fruits of the thing bequeathed accrue to the legatee from the day of the death and without legal demand:— 1. When the testator has expressly declared his intention to that effect in his will.——2. When a life-annuity or a grant has been bequeathed for maintenance.

Succession duties are paid by the legatees, unless exempted by the will. The thing bequeathed must be delivered with all necessary appurtenances, and in the state in which it was left at the death of the testator.

When property bequeathed has been afterwards enlarged, such additional property, even though it is contiguous, is not deemed to form part of the legacy; but buildings, embellishments, and improvements are considered adjuncts to the thing bequeathed.

If before or after the will the thing bequeathed has been mortgaged for a debt of the succession, or even for a debt of a third person; or if it is encumbered with an usufruct, he who has to pay the legacy is not bound to redeem it, unless expressly ordered to do so by the testator's will.

The bequest of a thing which does not belong to the testator, whether he was or was not aware of another's right to it, is void.

A legacy to a creditor is not deemed a set-off against his claim, nor is a legacy to a servant a payment of wages.

* See "General Legacies," page 123.

A specific legatee is not liable for the debts of the succession, except, as previously stated, in cases of abatement or mortgage.

Testamentary Executors.*

A testator may appoint one or more executors, and may give them seisin of the whole or of a portion only of his personalty; but, in the interest of legatees, his seisin is restricted to a year and a day from the death of the testator. The heir may, however, by giving the executors a sum sufficient for the payment of the legacies of personal property, or by guaranteeing such payment, put an end to the latters' seisin.

A person incapable of entering into a contract cannot become an executor. A married woman cannot be an executrix without the consent of her husband. If she has separate property, either by marriage settlement or by the decision of a court, she may be executrix with the consent of her husband, or in default, by judicial authority.†

Minors cannot act as executors, even with the authority of their guardians or curators.

When, among the heirs, there are minors, interdicted or absent persons, the executor must have seals affixed, and after summoning the heirs to be present, cause an inventory to be made. In the case of an insufficiency of moneys to pay the legacies, the executor must sell the personal property to the amount required. Care must be exercised in following the instructions of the will, and the executors must render an account of their administration at the expiration of a year from the death of the testator.

The powers of an executor do not pass to his heirs. Where there are several executors who have accepted, one may act for the others, but they are all responsible for the personal property entrusted to them; unless the testator has divided their duties, and each has kept within the power assigned to him.

* An *exécuteur* is a person appointed by a testator to carry out the directions and bequests in his will, and to dispose of the property according to his testamentary dispositions.

† See page 40.

Expenses incurred by the executor in the fulfilment of his duties are chargeable to the succession.

Revocation and Lapse of Wills.

A will cannot be revoked, in whole or in part, except by a subsequent will, or by a notarial act by which a change of intention is expressly stated. Subsequent wills, which do not revoke a preceding one in an express manner, annul only dispositions that are inconsistent with, or contrary to, the later will.[63]

The revocation of a will by a subsequent one, retains its full effect, although the last will remains unexecuted by reason of the incapacity of the heir or legatee, or of his refusal to accept.

Every alienation by the testator, even with right of redemption or exchange, is a revocation of the bequest of that which has been alienated, although the subsequent alienation has become void, and the property has reverted to the testator. Testamentary dispositions lapse if the persons in whose favour they were made do not survive the testator. Testamentary dispositions, made under conditions of an uncertain event taking place, lapse if the legatees die before the performance of the conditions. A condition, which merely suspends the performance of a disposition, does not deprive the appointed heir or legatee, or their heirs, of a vested right in the thing bequeathed. A legacy lapses if the thing bequeathed perish during the life of the testator; or later, if no blame be attached to the heir. A testamentary disposition lapses when the heir or legatee renounces, or is incapable of taking it; and his portion, if made to several conjointly, accrues to the benefit of the other legatees.

A bequest is deemed *conjointly* when it is made to several parties in the same will, and when the testator does not specify the portion that each party is to have. It is likewise deemed *conjointly* when the bequest in the same will to several persons cannot be divided without injuring the property.

[63] At Rome a will was revoked *(ruptum)*: —1. By making a subsequent will, even though the second will did not take effect.——2. By the introduction into the civil family of a *suus hæres*, unless he had been instituted in anticipation.

Bequests in favour of Grandchildren, Nephews, and Nieces.

Parents may give or bequeath the *disposable* portion of their property to one child, or to several of their children, conditionally on such property being afterwards surrendered to the children, in the first degree, of the said donees. When there are no children of the donees, gifts or bequests to brothers or sisters of the whole or part of the property not subject to reservation may be made, on condition that such property be restored to the children in the first degree of such brothers and sisters. In this case, all the children of both sexes share alike.

When a son or daughter, brother, or sister to whom property has been given or bequeathed without condition of restitution (*sans charge de restitution*) to their children, accepts a new gift or bequest on condition that the property previously given or bequeathed shall be subject to restitution, he or she is not permitted to separate the two dispositions by renouncing the second in order to keep the first.

The rights of persons entitled to restitution commence when the possession of the donee ceases; if such possession be given up before the allotted time, it must be done without prejudice to the claims of previous creditors.

In the event of insufficiency of unencumbered property of a husband, a wife has no claim upon the returnable property, except for the principal of the dowry, and in cases when the testator has so expressed it.

A testator or donor may, in the above cases, appoint a guardian to see that his dispositions are duly carried out. In default of such guardian, one must be appointed at the instance of the encumbered donee or legatee, within a month from the day of the death of the donor or testator. If this formality is not performed, the party whose duty it is to see to the appointment of a guardian loses the benefit of the disposition.

After the decease of a person who has made a disposition, subject to restitution, an inventory of his real and personal property must be made by the encumbered donee or legatee, in presence of the guardian appointed for the due performance of the gift or legacy; in default, by the guardian himself, or by any person interested in the succession. The encumbered legatee is bound to sell all the personal property by auction, except such as the donor or testator has ordered to be preserved.

Cattle and agricultural implements used for the working of the estate are valued, and their value refunded at the time of restitution. Within six months from the closing of the inventory, ready money and the proceeds of the sale of personal property, and all moneys received in payment of debts, must be invested; and sums afterwards received must be invested within three months. Such investments must be made according to the intention, if manifested, of the testator, and in presence, and at the instance of, the special guardian.

Gifts *inter vivos* and legacies encumbered with restitution must be made public, as regards real property, by the deeds being transcribed in full in the register at the mortgage office; and as to sums invested with privileges upon real property, by the registration of mortgages upon such property; in default of which creditors or third parties may set up their claims by ignoring the gift or legacy; but donees, legatees, and even heirs, cannot oppose the claimants of the succession on account of non-publication or non-transcription.

A specially appointed guardian is personally responsible for the omission of these formalities; and, in the event of their not being fulfilled, a minor is not entitled to restitution, even though his guardian has become insolvent.

CHAPTER VI.

OF PARTITION OF PROPERTY BY PARENTS AND GRAND-PARENTS.

[*Code Napoléon*—Articles 1075-1090.]

Parents and ascendants may distribute their property amongst their children and descendants by gifts *inter vivos*, or by *will*, according to the rules previously mentioned. If the distribution is not made to all the children or their representatives living at the death of the parent, the distribution is void, and a new partition may be legally sued for by the excluded children, or even by those who have been included. The distribution by a parent may be disputed on the ground of one of the children receiving less than a fourth of that to which he is entitled, or by the offspring receiving more than the law allows.

Gifts in Marriage Settlements.

All gifts in marriage settlements are governed by the same rules as those of gifts *inter vivos*.*

Parents, grand-parents, relatives, or strangers may, in a marriage settlement, dispose of the whole or part of the property which they might leave at their death in favour of the consorts, or, in the event of the donor surviving them, of their children. Such a gift, although only made for the benefit of husband and wife, or one of them, is deemed to be made for the benefit of their children, in the case of the donor surviving. It is irrevocable, but the donor has the power of taking from the gift trivial sums for presents.

A gift by marriage settlement may be made, in whole or part, both of present property and that which may accrue to

* See "Gifts *inter Vivos*," pages 111, 114, 117, 119.

the donor, on condition that a statement of the debts and liabilities of the donor is annexed to the deed at the time of the gift; in which case the donee, at the death of the donor, is at liberty to keep the property that the donor possessed at the time of the gift, by renouncing that subsequently acquired. In default of such statement, the donee is bound to accept or renounce the gift in its entirety. If he accepts the gift, he must take the property as it is at the time of the death, with all debts and liabilities. A like gift may be made on condition of paying all the debts and liabilities of the donor, and the donee is bound to fulfil all the conditions, unless he prefers to renounce the gift. When the donor reserves for himself a thing comprised in the gift, and dies without having disposed of it, the thing becomes the property of the donee or his heirs.

A gift by marriage settlement cannot be disputed on the ground of non-acceptance, but such a gift is void if marriage does not follow.* A gift likewise lapses if the donor survives the donee and his or her children.

All such gifts are reducible to the portion fixed by law.

* A marriage settlement always takes place before the celebration of marriage. The settlement is void if the marriage does not take place.

CHAPTER VII.

OF GIFTS BETWEEN MARRIED PERSONS.

[*Code Napoléon*—Articles 1091-1100.]

A HUSBAND and wife may, in a marriage settlement, make reciprocal gifts,[64] subject to the following limitations:—

Any gift *inter vivos* of present property, made between consorts in a marriage settlement, is not deemed to be made on condition of survivorship of the donee, if such condition is not formally expressed; and it is subject to all the rules and forms relating to gifts *inter vivos*. The same rule applies to all gifts made by third parties to consorts, except that such gifts are not transmissible to the issue of that marriage when one of the married persons dies before the other.

A husband or wife, when there is no issue, is allowed either by marriage settlement or during marriage, to give to each other all that he or she could give to a stranger; and further, the usufruct of that portion which cannot be disposed of to the prejudice of heirs; and when the husband or wife has issue, each may reciprocally give one-fourth in ownership, and another fourth in usufruct, or the moiety of the property in usufruct only.

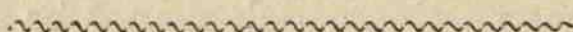
Minors cannot, in a marriage settlement, make a simple or reciprocal gift, except it is sanctioned by those whose consent is required for the validity of the marriage; but with such consent, he may give all that the law allows a person of full age to give to the other consort. All gifts made between consorts during marriage are revocable. The revocation may be made by the wife, without the authority of the husband or that of

[64] By the old Roman law, there could be no gift by a husband to a wife, or *vice versâ*, during the actual coverture. Justinian, however, allowed a *donatio propter nuptias* to be made after marriage, such a gift being placed on the footing of a dowry.

a court of law; but in the event of subsequent issue, such gifts are not revocable.

Married persons cannot during marriage, either by gift *inter vivos* or by will, make a reciprocal donation by one and the same deed.

A husband or wife, having children by a previous marriage, cannot give the new consort more than the portion allowed to a legitimate child; and, in no case, more than the fourth part of the property. Every colourable gift *(déguisé)*, or gift made to a person (*interposée*) who lends his name, is void. Gifts made by consorts to children of another marriage or to relatives, of which the other consort is heir, are deemed to be made to persons *interposées*.



CHAPTER VIII.

OF CONTRACTS OR OBLIGATIONS.

[*Code Napoléon*—Articles 1101-1167.]

A *contract* is an agreement by which one or more persons bind themselves to another or others, to *give*, to *do*, or *not* to do something.

A *contract* is either *synallagmatique* or *bilatéral*—binding contracting parties reciprocally to each other; *unilatéral**—binding one or more of the contracting parties to another or others who are not bound; *commutatif*—binding each party to give or to do a thing as an equivalent; *aléatoire*—depending on uncertain events; *de bienfaisance*—when one party secures to another a purely gratuitous benefit; *onéreux*†—by which both parties are bound to perform certain acts.

Conditions Essential to the Validity of Contracts.

Four conditions are requisite for the validity of a contract:—1. The consent of the party who binds himself.——2. Legal capacity to contract.——3. Something definite to form the object of the contract.——4. A lawful cause or consideration.

Consent.

Error, violence, or fraud nullifies *consent*.

Mistake is no ground for nullity of contract, except it be made respecting the nature of the thing itself. Mistake of person with whom it was intended to contract is no ground for nullity, unless the contract had been made purely out of consideration for the person with whom the contract was supposed to have been made.

* For instance, in a gift, the donor is only bound; and in a loan of things consumable, the borrower alone is bound.

† For a consideration.

Violence is a cause of nullity when exercised either by the contracting party or by any other person; also the contract is void when violence is exercised against husband or wife, or parents or children of one of the contracting parties. Reverential fear of a parent, without violence, does not invalidate a contract. A contract cannot be disputed on the ground of violence if, subsequently to the cessation of the violence, it has been expressly or tacitly approved, or if the time allowed for an action has lapsed.

Fraud is a cause of nullity in contracts when the fraud practised by one party is such that the other party would not have contracted had there been no such fraud. Fraud is never presumed, but must be proved.

Error, violence, and fraud are not causes of absolute nullity of contracts; they only give a right of action to annul or rescind them.

A person cannot, in general, bind himself, or stipulate in his own name except for himself; but a man can vouch for a third party performing an obligation, and in this case he is liable in damages if the obligation is not performed.[65] A man, in like manner, may stipulate for the benefit of a third person when the condition of the stipulation binds himself; and he who makes the stipulation cannot revoke it, if the third party has declared his assent to it. A person is deemed to have stipulated for himself, his heirs, and assigns, unless the contrary is expressed, or it is contrary to the nature of the contract.

Capacity of the Contracting Parties.

All persons are capable of contracting except those whose incapacity is expressly declared by law. Those incapable of contracting are:—1. Minors.——2. Interdicted persons.——3. Married women, in the cases specified by law.——4. Those who, by provisions of law, are prohibited from entering into special contracts.

Minors, interdicted persons, and married women cannot, on the ground of incapacity, dispute their engagements except in the cases provided by law. Parties capable of contracting

[65] By the Roman law, as a rule, one person could not contract for another; but in later times, the strictness of this rule was in some cases disregarded.

cannot set up the incapacity of the minors, interdicted persons, or married women with whom they have contracted.

Subject-Matter of Contracts.

Every contract has for its object a *thing* (*une chose*), that one party binds himself to *give*, to *do*, or *not* to do. The simple *use* or the simple *possession* of a thing may be, like the thing itself, the *object* of a contract. Those things only which are subjects of commerce can become the objects of contracts; and a contract must have for its object something determinate as to its kind; the quantity may be uncertain, provided it be capable of being ascertained. Future acquirements may be the object of a contract, but a person cannot renounce a succession not yet devolved, nor make any stipulation with regard to it, even with the consent of him whose succession is in question.

A contract without *consideration*, or with a *fraudulent* or unlawful consideration, is void. A contract may be valid, although the consideration has not been expressed. The consideration is unlawful when it is prohibited by law, or is contrary to morals or public order.

Effect of Contracts.

Agreements lawfully made legally bind all contracting parties, and they can only be set aside by mutual consent, or for causes authorised by law. They must be executed in good faith (*bonne foi*).

An agreement not only binds the contracting parties to all that is expressed in it, but also to all the consequences which, by equity, usage, or law, are incident to the nature of the contract.

Obligation of Giving.

An obligation to give implies the obligation to deliver the thing and to keep it safe until delivery, under penalty of damages. The obligation to keep the thing safely binds the person charged therewith to apply all the care of a prudent administrator (*bon père de famille*).

The obligation *to deliver* is binding by the mere consent of the contracting parties, and at once confers ownership upon the obligee, and puts the thing at his risk from the instant that the delivery ought to be made, although he may not have had the thing delivered, unless the obligor has received notice to deliver and has not delivered, in which case the risk remains with the obligor. No notice, however, is required when it is stated in the agreement that, by the sole lapse of the term specified, the obligor shall be in fault. Where the obligation to *give* or to *deliver* a thing purely personal is to two persons successively, the first person put in possession is preferred, although his right may have arisen subsequently, provided he is in *bonâ fide* possession.

Obligation to "Do" or "Not to Do."

The non-performance of the obligation to *do* or *not* to do involves damages; nevertheless the creditor has a right to demand that whatever has been done contrary to agreement shall be undone, and he may be authorised to undo it himself at the expense of the debtor, without forfeiting his right to damages; also, in case of non-performance, a creditor may be authorised to have the thing completed at the expense of the debtor. If the obligation is *not* to do, he who breaks the contract is liable to damages by the simple fact of the breach.

Damages Resulting from the Non-Performance of an Obligation.

Damages are recoverable when the debtor neglects to fulfil his obligation in due time, unless the thing which the debtor has bound himself to *give* or to *do* could not be *given* or *done* within the specified time; or unless he can prove that he has been delayed by some unforeseen event, and that no blame can be imputed to him. Damages are assessed according to the loss sustained, and the loss of the probable profits that might have accrued.

When it is stipulated that a certain sum shall be paid for damages in the event of non-performance of an obligation, such sum, and no other, is recoverable. In obligations limited to the payment of a fixed sum, damages for delay of payment are limited to the interest fixed by law, which is due only from

the day of the demand. Interest that ought to have been paid upon principal sums also bears interest, provided the interest in question has been due for at least one entire year. Nevertheless, moneys due, such as rents and annuities, bear interest from the day of the demand or date of the agreement. The same rule applies to restitution of fruits, and to interest paid by a third party to a creditor in discharge of the debtor.

Interpretation of Contracts.

In a contract it is necessary to consider the intentions of the contracting parties, rather than the literal meaning of the words of the contract. When a clause is susceptible of two meanings, it must be understood in that sense in which it may have some effect, rather than in that in which it can produce none. Expressions susceptible of two meanings must be taken in the sense which agrees best with the subject-matter of the contract. Whatever is ambiguous must be interpreted according to the usage of the country where the contract is made. The clauses generally used in a contract must be supplied, if not expressed. All the clauses of a contract are interpreted the one by the other, giving to each the meaning agreeing with the entire deed. In cases of doubt, the contract is interpreted against him who has stipulated, and in favour of him who has contracted the obligation. However general the wording of the contract may be, it applies only to the things about which it appears that the parties intended to contract.

When, in a contract, reference is made to a case to explain the obligation, the general terms of the contract are not restricted by it.

Effects of Contracts with Regard to Third Parties.

Contracts only bind contracting parties, and cannot affect third persons, but may benefit them in cases of gifts made to third parties and accepted by them.* Creditors may enforce all claims and suits of their debtors, except those which are exclusively personal. They may also, in their own name, impugn the acts of their debtors in fraud of their rights.

* See "Validity of Contracts," page 133.

CHAPTER IX.

OF THE DIFFERENT KINDS OF OBLIGATIONS.

Conditional Obligations.

[*Code Napoléon*—Articles 1168-1314.]

An obligation is *conditional* when it is made to depend upon a future and on an uncertain event, either by suspending its performance until the event happens, or by cancelling it if the event happens or does not happen. A *contingent* condition is one that depends upon a casualty, and over which neither of the contracting parties has any control. A *potestative* condition is when the performance of a contract depends upon an event which one of the contracting parties has power to prevent or cause to take place, and it renders the obligation void when stipulated by the person who binds himself. A *mixed* condition is one which depends upon the will of one of the contracting parties, and on that of a third person. Every condition for the performance of a *thing impossible*, or contrary to law, or inconsistent with good morals, is void, and nullifies the agreement which depends upon it; but an agreement *not* to do an impossible thing does not nullify the obligation contracted subject to that condition.

When an obligation is contracted under the condition that an event shall happen within a fixed time, such condition is deemed to have lapsed if the time expires without the event having occurred; but if no time has been fixed, it may always be fulfilled, unless it has become certain that the event will not happen.* This also applies to an obligation contracted

* For instance, A binds himself to pay £40 to B, if such a ship arrive from America within two months. The condition lapses if the ship does not arrive; or, if before that time, it is certain that the ship has been wrecked.

that an event shall not happen.* The condition is deemed fulfilled when the debtor, bound by such condition, prevents its fulfilment. The fulfilment of a condition has a retroactive effect to the day when the contract was made; and if the creditor dies before the fulfilment of the condition, his rights pass to his heirs or his assigns. A creditor may, before the fulfilment of the condition, do all acts conservatory of his rights.

Suspensive Conditions.

A *suspensive* condition is that which depends upon a future and on an uncertain event, or upon an event that has happened unknown to the contracting parties. In the former case, the obligation cannot be performed till after the event; in the latter, the obligation takes effect from the day that the agreement was made. When the obligation has been contracted under a suspensive condition, the thing which forms the matter of agreement remains at the risk of the debtor, who is only bound to deliver it when the condition is fulfilled. If the thing perishes without fault of the debtor, the obligation is cancelled; but if only deteriorated, the creditor may either rescind the obligation, or take the thing as it is without reduction of price. If deteriorated by fault of the debtor, the creditor may either rescind the obligation, or take the thing as it is with an adequate indemnity.

Conditions of Avoidance.

A condition of *avoidance* is that which, when fulfilled, cancels the contract.† It does not suspend the fulfilment of the obligation, but it binds the creditor to restore that which he has received, in case the event stated in the agreement happens. A condition of avoidance is always understood to exist in reciprocal *(bilatéral)* contracts, in the event of one of

* A agrees to sell his house to B, in the event of his son not marrying within a twelvemonth. If the son does not marry within a year, or if he dies before the expiration of the twelve months, the condition is fulfilled.

† For instance, A sells his house to B for £100, with the proviso that the sale shall be cancelled if A's son marries. If A's son marries, the sale is cancelled.

the parties not fulfilling his obligation; but it must be decided by a court of law.

Obligations with a Term.

A *term* differs from a *condition* inasmuch as it does not suspend the obligation, but delays its fulfilment. That which is due at a given time cannot be exacted before the expiration of the term; but that which has been paid in advance cannot be recovered. A term is always presumed to be stipulated in favour of the debtor, unless it results from stipulations or circumstances in favour of the creditor. An obligor who becomes a bankrupt, or who by his own act diminishes the security given to his obligee, cannot claim the benefit of the term.

Alternative Obligations.*

An obligor in an *alternative* obligation is discharged by delivering one of the two things which form the object of his obligation. The option belongs to the debtor, unless it has been expressly granted to the creditor. A debtor may discharge himself by delivering one of the two things promised, but he cannot compel the creditor to take part of one and part of the other. An obligation is pure and simple, although contracted in an *alternative* form, if one of the two things promised could not be the object of the obligation.† An alternative obligation becomes pure and simple if one of the things promised perish and cannot be delivered, even through the fault of the debtor. The value of such thing cannot be offered in its place. If both perish, and the debtor is in fault with respect to one of them, he must pay the value of that which perished last. In cases such as this, if the option has

* An *alternative* obligation may be thus defined :—That which comprehends two or more things equally due, but in such a manner that the debtor is discharged by paying one of them; as, "I bind myself to give you such a horse, or such an ox." Two things are comprised in the obligation, but only one is required to be paid.

† For example, A has promised B such a house or such a field. The field belongs to C, and therefore cannot be the object of A's promise. The obligation consequently is not alternative, but pure and simple.

been granted by the contract to the creditor, when either one of the two things has perished, and without the fault of the debtor, the creditor takes the one that remains; but if the debtor is in fault, the creditor may demand the one that remains, or the value of the other. Or, when both things have perished, and if the debtor is in fault with regard to one or both of them, the creditor may demand the value of the one or of the other, at his option. If both things perish without the fault of the debtor, and before he has received notice to deliver, the obligation is extinguished.*

The same rules apply to cases when the *alternative* obligations comprise more than two things.

Joint and Several Obligations (*Solidaires*) with regard to Creditors.

An obligation is joint and several among several creditors when the deed expressly gives to each the right of demanding the payment of the whole debt; and when the payment made to one of the creditors discharges the debtor, although the benefit of the obligation is divisible between the different creditors. The debtor has the option of paying to either of the joint and several creditors, so long as he has not been sued by one of them. Nevertheless, the release given by one joint and several creditor discharges the debtor only for the share of such creditor.

Every judicial proceeding which interrupts prescription against one of the joint and several creditors benefits all.

Obligations of Joint and Several Debtors.

A joint and several obligation among co-debtors exists when they are all bound to do the same thing, in such manner that each of them singly may be compelled to perform the whole obligation, and when the performance made by one discharges the others. An obligation may be joint and several, although one of the co-debtors is bound in a different way from the others for the performance of the same thing; for example, if one

* See article "Of the Performance of Obligations becoming Impossible," page 145.

is bound *conditionally*, whilst the engagement with the others is *absolute;* or, if one is allowed a term which is not granted to the others.

A joint and several liability is never presumed; it must be expressly stipulated, unless it arises by authority of law.

The creditor of a joint and several liability may apply to any one of the co-debtors that he chooses for payment, without such debtor being able to plead the benefit of division. Legal proceedings taken against one of the co-debtors do not prevent the creditor from taking similar proceedings against the others. If the thing due has perished through the fault of one or more of the joint and several debtors, or after they have received notice to pay, the other co-debtors are not discharged from the obligation of paying the value of the thing; but co-debtors not in fault are not liable for damages. The creditor can only recover damages from the co-debtors through whose fault the thing has perished, and from those who neglected the notice to pay.

Legal proceedings taken against one of the co-debtors bar prescription with respect to all the others. A demand of interest made against one of the joint and several debtors causes interest to run against all. A joint and several debtor sued by the creditor may plead all the exceptions which arise from the nature of the obligation, and all those which are personal to himself, as well as such as are common to all the co-debtors; but he cannot plead exceptions that are purely personal to any of the other co-debtors. When one of the co-debtors becomes sole heir of the creditor, or when the creditor becomes sole heir of one of the debtors, the confusion only extinguishes the joint and several debt for the share of such co-debtor or creditor. A creditor who consents to the division of the debt with regard to one of the co-debtors retains his joint and several right of action against the others, subject to a deduction of the share of the debtor whom he has discharged from the joint and several obligation. A creditor who receives separately the share of the debt of one of the debtors, without reserving in the receipt his general rights, renounces the joint and several obligation with regard only to such co-debtor. A creditor is not deemed to have discharged the debtor from his joint and several obligation, when he receives from him a sum equal to his share of the debt, unless

the receipt specifies that it is for his share. It is the same with regard to a demand made against one of the co-debtors for his share, if the latter has not complied with the demand, or if there has not been a legal adjudication. A creditor who receives separately and without reserve the share of one of the co-debtors in the arrears or interest of the debt, loses only his joint and several right for arrears and interest due, and not for those which may fall due, nor for the capital, unless the separate payments have been continued during ten consecutive years.

Obligations contracted jointly and severally towards the creditor are of right divisible among the co-debtors, each of whom is only responsible for his share.

The co-debtor of a joint and several debt who has paid the debt in full can only claim from each co-debtor his respective share. If one of the co-debtors is insolvent, the loss occasioned by his insolvency is apportioned among the others, including the one who has paid the debt. When a creditor has renounced his joint and several action against one of the debtors, if one or more of the co-debtors become insolvent, their shares are apportioned amongst the other debtors, including him who has been discharged from the joint and several liability. If the thing for which the debt has been jointly and severally contracted benefits only one of the co-debtors, the latter is liable for the whole towards his co-debtors, who are merely considered his sureties.

Divisible and Indivisible Obligations.

An obligation is *divisible* or *indivisible*, inasmuch as it has for its object a thing which in its delivery or performance is or is not susceptible of material or mental division.

An obligation is *indivisible*, although the thing may, by its nature, be *divisible*, if, from the description given in the contract, it is not susceptible of division or partial performance. The stipulation of joint and several liability does not give the character of indivisibility to an obligation.

A divisible obligation must be performed between a creditor and debtor, as if it were indivisible. The divisibility applies only to the case of their heirs, who cannot claim the debt, or be bound to pay more than their respective shares as representatives of creditors or debtors.

This rule is subject to the following exceptions with regard to the heirs of the debtor:—1. When the debt is secured by mortgage.——2. When the object of the obligation is a certain specific thing.——3. When it applies to an alternative debt of things at the option of the creditors, one of which things is indivisible.——4. When one of the heirs alone is charged by the deed with the performance of the obligation.——5. When it results either from the nature of the contract, or of the thing which is the object of it, or from the purpose of the contract, that the intention of the contracting parties was that the debt should not be partially discharged.

In the first three cases, the heir who possesses the thing due or the estate mortgaged may be sued for the whole, saving his remedy against his co-heirs; in the fourth case, the heir alone is bound to pay the debt; in the fifth case, each heir may be sued for the whole; but he has his remedy against his co-heirs.

Each debtor who contracts an indivisible debt jointly is bound for the whole, although the obligation was not contracted jointly and severally. The same rule applies to the heirs of a person who has contracted such an obligation. Each heir of a creditor may demand the full performance of the whole indivisible obligation, but he cannot by himself release the whole of the debt, or receive the value instead of the thing itself. If one of the co-heirs has released the debt or received the value of the thing, the others cannot demand the indivisible thing without making an allowance for the share of the co-heir who made the release or received the value. The heir of the debtor, when sued for the whole of an indivisible obligation, may demand delay to make the co-heirs party to the suit, unless the debt is of such a nature that it can only be discharged by the one so sued, who may alone be adjudged to pay; but he has his remedy against his co-heirs.

Obligations with Penal Clauses.

A penal clause (*clause pénale*) is that by which a person, to assure the performance of an agreement, binds himself to a penalty in case of non-performance. The nullity of the primary obligation carries with it that of the penalty, but the nullity of the latter does not carry with it that of the primary obligation.

A creditor may enforce the performance of the primary obligation, without demanding the stipulated penalty; but he cannot demand both, unless the penalty has been stipulated to be paid in the event of delay in the performance of the primary obligation. The penalty is not incurred until the debtor has made default in the delivery, or has received notice "to deliver," "to take," or "to do." The penalty may be modified by the judge, when the primary obligation has been partially performed. When the primary obligation, contracted with a penalty, is indivisible, the penalty is incurred upon its infraction by any one of the heirs of the debtor, and it may be demanded in full from him who has infringed it, or from each of the co-heirs for his share, and by mortgage for the whole, saving their remedy against him who has caused the penalty to be incurred. When the primary obligation contracted under a penalty is divisible, the penalty is incurred only by the heir of the debtor who breaks the obligation, and for the share only for which he was bound, without his having a right of action against those who have performed it.

This rule has exceptions when the penal clause has been added, with the intention that the payment should not be made in parts, one co-heir preventing the performance of the obligation in its entirety. In such case, the latter is liable for the whole penalty, and the co-heirs are liable for their respective shares, saving their remedy against him.

Extinction of Obligations.

An obligation becomes extinct:—By Payment—by Novation—by Release—by Compensation—by Confusion—by the Loss of the Thing—by Nullity or Rescission—by the effect of a Cancelling Condition—by Prescription.[66]

[66] The Romans had several ways by which *obligations* were extinguished *ipso jure*:—1. *Solutio*, the performance of that to which a person is bound.——2. *Novatio*, substituting a new obligation for an original liability.——3. *Acceptilatio*, a *stipulatio*, by which, to a question of the debtor, the creditor answered that he considered himself paid.——4. *Contraria voluntas*, the agreement of the parties to cancel an obligation which they had contracted.——5. *Confusio*, when a debtor became *hœres* of the creditor, or *vice versâ*.——6. *Compensatio*, set-off.——7 *Oblatio*, followed by *consignatio*, when the debtor deposited, by permis-

Payment.

Every payment presupposes a debt; that which has been paid where no debt was due may be recovered.[67] A voluntary discharge of family *(naturelles)* obligations is not recoverable. An obligation may be discharged by any interested person, such as a co-obligor or a surety, and it may be discharged by a third person not interested, provided such person performs the obligation in the name and for the discharge of the debtor. When he acts in his own name, he does not acquire the rights of the creditor. An obligation "to do" cannot be discharged by a third person without the consent of the creditor, when the latter has an interest in its being performed by the debtor himself. Payment, to be valid, must be made by the owner of the thing given in payment, with the right of alienating it; nevertheless, if a sum of money or other thing consumable by usage is given in payment, it cannot be recovered from a creditor who has consumed it in good faith, although the payment has been made by one who was not the owner, nor capable of alienating it. Payment must be made to the creditor, or to some one having his authority or authorised by a court of justice to receive it for him. Payment made to a person who has no authority to receive for the creditor is valid, if the creditor ratifies the payment or profits by it. Payment made in good faith to a person possessing the deed of obligation is valid, although such person may afterwards be dispossessed. Payment made to a creditor incapable of receiving it is not valid,* unless the debtor can prove that the thing paid has turned to the benefit of such creditor. Payment made by a debtor to his creditor, regardless of a seizure or an attachment, is not valid against the seizing or attaching creditor, who may, according to his right, compel the debtor to pay a second time; but in such cases, the debtor has his remedy against the creditor so paid.

A creditor cannot be compelled to receive anything dif-

sion of the *judex*, the whole debt, after an ineffectual tender thereof to the creditor at a fitting time and place.

* Minors, interdicted persons, and married women under certain arriage contracts.

[67] At Rome, if a person received something not due either legally or morally, erroneously paid, he was bound, *quasi ex contractu*, to restore it.

ferent from the one due to him, although the thing offered be of equal or greater value than the thing due. A debtor cannot compel his creditor to receive partial payment of a debt, even if the debt be divisible; a judge, however, in consideration of the debtor's circumstances, may suspend the suit, and give time for payment. A debtor of a certain and specific thing is discharged by the delivery of the thing in the condition in which it is at the time of delivery, provided that, if deteriorated, it has not arisen from any act or fault of himself, nor of persons for whom he is responsible; and provided also that he has not received notice to deliver before the deterioration. If the debt be of a thing determined only in kind, the debtor cannot be compelled to give a thing of the best quality, nor can he offer, in discharge, one of the worst.

Payment must be made at the place indicated in the agreement. If no place is stated, the payment, when it is of a certain specific thing, must be made at the place where the thing was at the time of the contract. In all other cases, payment must be made at the domicile of the debtor. The expenses attending payment are at the charge of the debtor.

Payment with Subrogation.

Subrogation is the substitution of a third person into the rights of a creditor. It is either *conventional* or *legal*. It is conventional when the creditor, receiving payment from a third person, puts him in his own place with regard to all his rights, actions, privileges, or mortgages against the debtor. It must be expressed, and executed at the time of payment. When the debtor borrows a sum for the purpose of paying his debt, and substitutes the lender into the rights of the creditor, in this case both the loan and the discharge must be executed before notaries. Subrogation takes effect without the consent of the creditor. It takes place by the sole operation of law:—1. In favour of a creditor who pays another creditor whose claim is preferable by reason of privilege or mortgage (*hypothèque*).*——2. In favour of the purchaser

* *Hypothèque:* The right acquired by the creditor over the immovable property which has been assigned to him by his debtor as security for his debt, although he is not placed in possession of it.

of an estate who applies the price of his purchase to the payment of creditors to whom the estate was mortgaged.——3. In favour of a party who, being bound with others or for others for the payment of a debt, has an interest in discharging it.——4. In favour of a beneficiary heir who, out of his own funds, pays the debt of the succession.

Subrogation takes effect both against sureties and debtors. It cannot prejudice the rights of a creditor who has been only paid in part. In such case, the creditor may enforce his claims for the remainder of the debt, in preference to him from whom he has received partial payment.

Application of Payments.

A debtor owing several debts has the right of declaring, when he pays, what debt he means to discharge. A debtor owing a debt which bears interest cannot, without the consent of the creditor, apply any payment which he makes in discharge of the capital, in preference to the arrears or interest. Any payment made on both capital and interest, less than the whole debt, is applicable first to the interest. When a debtor owing several debts has accepted a receipt by which the creditor states he has applied what he has received to a special debt, the debtor cannot afterwards demand application of payment to be made upon a different debt, except fraud or deceit has been resorted to on the part of the creditor. When the receipt bears no special application, the payment must be applied in discharge of the debt which the debtor has at the time the greater interest in paying among debts which are equally due; otherwise, on the debt due in preference to debts which are not due, although more burdensome. If the debts are of an equal nature, the application is made to the longest-standing debt; if all are equal, the application is made proportionately.

Tenders of Payment and Deposit.

When a creditor refuses to receive payment, the debtor may make an actual tender, and on the refusal of the creditor to accept, he may deposit the sum or thing offered. Such tender

and deposit discharge the debtor, and the thing thus deposited remains at the risk of the creditor.[68]

It is necessary for the validity of a tender :—1. That it be made to a creditor legally *capable* of receiving, or to a person having power to receive for him.——2. That it be made by a person legally *capable* of paying.——3. That it be of the whole sum, all arrears or interest due, of liquidated costs, and a sum for costs not liquidated.——4. That the term for payment has expired, if stipulated in favour of the creditor.——5. That the condition under which the debt has been contracted has been fulfilled.——6. That the tender of payment be made at the place agreed on for payment; and that, if there has been no special agreement for the place of payment, the tender be made personally to the creditor, or at his domicile, or at the domicile chosen for the execution of the contract.——7. That the tenders be made by an authorised officer appointed for the purpose.

It is not necessary for the validity of the deposit that it is authorised by a judge. It suffices :—1. That it be preceded by a notice to the creditor, stating the day, the hour, and the place when and where the thing offered is to be deposited.——2. That the debtor divests himself of the thing offered, by sending it to the dépôt appointed for the reception of deposits, with interest up to the day of the deposit.——3. That a statement be drawn up by the authorised officer of the nature of the things offered, of the refusal of the creditor to receive them, or of his non-appearance, and finally, of the deposit.——4. In case of non-appearance of the creditor, a statement respecting the deposit must be sent to him, with an order to take away the deposit. All expenses of tender and deposit are borne by the creditor, if valid.

So long as the deposit is not accepted by the creditor, the debtor may withdraw it; and if he does so, his co-debtors and sureties are not discharged; but when the tender and deposit have been declared valid by the court, the debtor cannot, even with the consent of the creditor, withdraw his deposit to the prejudice of his co-debtors or of his sureties. A creditor who

[68] The debtor was allowed a similar privilege at Rome. If, after an ineffectual tender made at a proper time and place, he brought the sum due into court (*oblatio*), and had it sealed up (*consignatio*), he was released from future liability.

consents to his debtor withdrawing his deposit after it has been declared valid by the court, cannot afterwards enforce the privilege or mortgage attached to it; the mortgage ceases to exist from the day that the deed, by which he has agreed to the withdrawal of the deposit, has been registered at the mortgage office. If the thing due is specific, and to be delivered in the place where it is, the debtor must give the creditor notice personally, or at his domicile, or at the domicile selected for the execution of the contract, to remove it. If, after such notice the creditor fails to take the thing away, and the debtor wants the place in which it stands, the latter may obtain permission from the court to deposit it elsewhere.

Cession of Property.

The surrender of property is the giving up by a debtor to his creditors all his property, when he finds himself unable to pay his debts.[69] The cession of property is either *voluntary* or *judicial*. The *voluntary* cession of property is that which creditors accept voluntarily, and which has no other effect than that stipulated in the contract entered into between them and the debtor.

A *judicial* cession[70] is a benefit which the law grants to an honest but unfortunate debtor, who, by giving up to his creditors all his property, secures his personal liberty, notwithstanding any contrary stipulation. Judicial cession does not confer ownership on the creditors; they have only the right of having the property sold for their benefit, and of recovering rents up to the time of sale. Creditors cannot refuse a judicial cession, except in cases provided by law. A judicial cession frees the debtor from imprisonment for debt,* but it does not discharge the

* The Act of July 22, 1867, abolished imprisonment for debt in civil and commercial matters, therefore *judicial cession* is implicitly repealed.

[69] At Rome, if the debtor made a voluntary cession of his goods (*cessio bonorum*) to his creditors, he escaped infamy, was exempt from arrest, and his after-acquired property was not liable beyond a certain amount.

[70] If such voluntary cession was not made, a sale was effected of the whole property; but Justinian enacted that the creditors should not be allowed to make such a sale, but should merely be put in possession of the debtor's goods.

debtor beyond the amount of the property ceded; and if insufficient, he is compelled to surrender all property that may accrue to him till the whole debt is paid.

Novation.

*Novation** is effected in three ways:—1. When the debtor contracts with his creditor a new debt, which is substituted for the old one, by which the latter is extinguished.——2. When a new debtor is substituted for a former one, who is discharged by the creditor.——3. When, by the effect of a new contract, a new creditor is substituted for the old one, towards whom the debtor is discharged.

Novation can be effected only between persons capable of contracting. Novation is never *implied;* the intention of the parties must be clearly *expressed* in the deed. Novation by the substitution of a new debtor may be effected without the concurrence of the previous debtor. The assignment, by which a debtor gives to his creditor a new debtor, who binds himself towards the creditor, does not effect novation, if the creditor has not expressly declared that he intended to discharge the debtor who made the assignment. A creditor who has discharged the debtor who made the assignment has no claim against him in the event of the person substituted becoming insolvent, unless the deed contains an express reservation respecting it, or unless the person substituted was already insolvent or a bankrupt at the time of the assignment.

Simply naming a person to pay in the debtor's place does not effect novation, nor is it effected when a creditor names a person with power to receive for him. The privileges and mortgages which attach to the former claim do not pass to the new one, unless the creditor has expressly reserved them. When novation is effected by the substitution of a new debtor, the original privileges and mortgages cannot pass on the property of the new debtor. When novation is

* The substitution of a new obligation for an old one.

[71] In the Roman law, the contract which cancelled a prior contract by *novatio* must have been by a particular form of words. Justinian decided that, unless the parties expressly declared it to be their wish that the first contract should be extinguished by the second, the first contract would be considered binding.

effected between the creditor and one of the joint and several debtors, the privileges and mortgages which attach to the old debt can only be reserved upon the property of him who contracts the new debt. When novation is effected between a creditor and one of the joint and several debtors, the co-debtors are discharged. Novation effected with the principal debtor discharges the sureties; nevertheless, if the creditor has stipulated, in the first case, for the consent of the co-debtors, and in the second case, for that of the sureties, the old debt remains if the co-debtors or the sureties refuse to accept the new debt.

Release.

The voluntarily delivery by the creditor to his debtor of the original deed of obligation under private signature, is a proof of discharge. A voluntary surrendering of the authentic copy of a deed (*la grosse du titre*) presumes the release or payment of the debt; saving proof to the contrary. Surrendering the private deed, or the copy of the authentic deed, to one of the joint and several debtors, benefits all his co-debtors. A release or discharge by agreement, granted in favour of one of the joint and several debtors, discharges all the others, unless the creditor has expressly reserved his rights against them, in which case he must deduct from the debt the share of him whom he has released.

Surrendering a thing given for security is not sufficient ground for the presumption of the discharge of the debt. A release or discharge by agreement, granted to the principal debtor, discharges his sureties; but if granted to the surety, it does not discharge the principal debtor. If granted to one of the sureties, it does not discharge the others.

That which a creditor receives from a surety, in discharge of his suretyship, must be deducted from the debt, and applied to the discharge of the principal debtor and of the other sureties.

Compensation—(Set-off).

When each of two persons is the debtor and creditor of each other, both debts are extinguished by *compensation* (set-off), in the manner and in the cases hereafter stated :—

Set-off takes place by the mere force of law, even without the knowledge of the debtors. Both debts are reciprocally extinguished so soon as they simultaneously exist up to their respective amounts.[72] Set-off only takes place between two debts when they are both for a sum of money, or a quantity of things that may be replaced by other things of a like nature, and which may be liquidated and due in a like manner. Payments in kind of grains or commodities, the value of which is regulated by the prices current, may be set-off against money due. Delay in payment, as granted by a judge, is not a bar to set-offs. A set-off takes place whatever may be the origin of either debt, except in the following cases:—1. The *demand* for the restitution of a thing of which the owner has been unjustly deprived.——2. The *demand* for the restitution of a deposit, or of a thing lent for use.——3. A debt of which the object is maintenance, and which has been declared not distrainable.

A surety may oppose a set-off for that which the creditor owes to the debtor, but the debtor cannot oppose a set-off for that which the creditor owes to the surety. A joint and several debtor cannot oppose a set-off for that which the creditor owes to his co-debtor.

A debtor who accepts absolutely and unconditionally the transfer which a creditor has made of his rights to a third person cannot oppose the set-off of the transferee, which he might have done against the transferror before the acceptance. A transfer which has not been accepted by the debtor, but of which due notice had been given to him, prevents only a set-off of debts subsequently to such notice. When two debts are payable at different places, set-off cannot be made without allowing for the expenses of remittance. When there are several debts subject to set-off due by the same person, the set-off is governed by the rules provided for the application of payments.*

Set-offs do not take place to the prejudice of the vested rights of third parties. Thus, a debtor who has become a

* See "Application of Payments," page 148.

[72] By the Roman law, *compensatio*, or set-off, occurred where one person had a debtor and creditor account with another, and set-off the items on one side against those on the other; adopted by the Romans to prevent unnecessary suits,—"*Ideo necessaria est compensatio, quia interest nostra potius non solvere quam solutum repetere.*"

creditor after an attachment has been notified to him cannot, to the prejudice of the attaching creditor, oppose a set-off. He who pays a debt, which is of right extinguished by a set-off, cannot afterwards, in enforcing the payment of the debt for which he has neglected to oppose a set-off, avail himself, to the prejudice of third parties, of the privileges or mortgages attached to such debt, unless he had a sufficient excuse for ignoring the claim which was a set-off to his debt.

Confusion.

When the characters of creditor and debtor are united in the same person, there arises confusion of right, which extinguishes both claims. The confusion which is personal to the debtor benefits his sureties, but that which is personal to the surety does not extinguish the debt. That which is personal to the creditor benefits his joint and several co-debtors only for that portion of which he was debtor.

Loss of the Thing Due.

When a certain specific thing, the object of an obligation, perishes, or has become unmarketable, or its existence can no longer be traced, the obligation is extinguished if no fault can be attributed to the debtor before he has received notice to deliver. It is likewise extinguished, even if he has received such notice, if the thing would equally have perished in the hands of the creditor if it had been delivered, unless he has made himself responsible for accidental circumstances. The debtor, however, must prove the accidental circumstances which he alleges.

In whatever way a thing stolen has perished or been lost, its loss does not discharge him who stole it from paying its value. When the thing perished, is unmarketable or lost, without any fault of the debtor, the latter is bound, if there are rights or actions for indemnity, to transfer them to his creditor.

Actions for Nullity or Rescission of Contracts.

All actions for nullity or rescission of contracts must be brought within ten years, if not otherwise limited to a shorter period by a special law.

In cases of violence, the period begins from the day it has ceased; in error or fraud, from the day of the discovery; in deeds executed by married women without authority, from the day of the dissolution of marriage; in deeds made by interdicted persons, from the day that the interdiction has been removed; in deeds by minors, from the day of their majority.

*Lesion** gives ground for rescission of contract in favour of a minor not emancipated, notwithstanding any agreement to the contrary; and to an emancipated minor, of contracts that exceed his legal capacity.†

A minor cannot recover on the ground of lesion, when it results from a casual or an unforeseen event. The simple declaration of a minor that he is of age does not prevent him from obtaining relief on the ground of lesion. A minor, being a trader, banker, or mechanic, is not relieved on the ground of lesion from contracts made for the purpose of his business or trade; nor is he relieved from stipulations contained in his marriage contract, when made with the consent and assistance of those whose consent is required for the validity of his marriage; nor is he relievable from obligations resulting from his own delinquencies. A person cannot dispute a contract made by him during minority, when he has ratified it after attaining his majority.

When minors, interdicted persons, or married women are entitled to relief from their contracts, the refunding of that which has been paid in consequence of these contracts during minority, interdiction, or marriage, cannot be claimed, if it can be proved that what has been paid has been for their advantage. Persons who have attained their majority are not entitled to relief from their contracts on the ground of lesion, except in special cases already mentioned. When the formalities required with respect to minors or interdicted persons, either for the alienation of immovables or the partition of succession, have been observed, such contracts and acts are considered as having been executed during majority or before interdiction.

* By the civil law, *lesion* is an injury suffered, in consequence of *inequality*, by one who does not receive a full equivalent for what he gives in a commutative contract.

† See "Minority and Emancipation," pages 52 and 59.

CHAPTER X.

OF PROOFS OF OBLIGATION AND OF PAYMENT.

[*Code Napoléon*—Articles 1315-1369.]

A PARTY who claims the performance of an obligation must prove the obligation.[73] On the other hand, he who claims to be exonerated must prove payment, or the ground for the extinction of the obligation, subject to the rules hereafter explained.

Deeds.

An *authentic deed* is one that has been executed by a public officer having authority to execute or attest the same in the place where the deed was drawn up, with all the requisite formalities. A deed rendered unauthentic through the incompetency or incapacity of the officer, or through informality, is valid as a private deed, if signed by all the parties. An authentic deed fully proves the contract between the contracting parties, their heirs and assigns; nevertheless, in cases of an impeachment of forgery, the court may suspend the fulfilment of the contract. A deed, whether authentic or under private signature, binds the contracting parties for all that is stated, provided the statement has a direct reference to the agreement; otherwise, the statement only serves as *primâ facie* proof. A deed of defeasance only affects the parties to it, and does not influence third persons.

A *private deed* (*sous seing privé*), acknowledged by the party against whom it is set up, or legally acknowledged, has the same effect between those who signed it, their heirs and assigns, as an authentic deed. A party against whom a deed under private signature is set up is obliged to acknowledge or disavow

[73] *Actori incumbit onus probandi.*

his writing or signature. His heirs or assigns may simply declare that they do not know the writing or signature of him under whom they claim. When a party denies his writing or signature, and when the heirs or assigns declare that they do not know either, the verification is ordered to be made by the court.

Private deeds relating to contracts of a reciprocal nature (*synallagmatiques*) are not valid unless there are as many *original* duplicates, as there are parties who have a distinct interest. One duplicate is sufficient for all the parties having the same interest. The number of duplicates made must be stated in each duplicate. Nevertheless, the default of such statement cannot be set up against him who has fulfilled his part of the contract.

A bill or promissory note, under private signature, by which one party binds himself to another to pay a sum of money or a specific thing, must be entirely written by the party who signs it, otherwise he must write "*bon*" or "*approuvé*," with the sum or quantity of things in full letters, before his signature; except in cases when the bill comes from tradesmen, mechanics, ploughmen, vine-dressers, day-labourers, and servants.

When the sum stated in the bill differs from that stated in the "*bon*," the obligation is deemed to be the lesser sum, even when both bill and "*bon*" have been written by the obligor, unless it is proved on which side the mistake lies.

In respect of third parties, deeds privately signed date only from the day of registration, from the day of the decease of him or one of those who signed it, or from the day that the transaction is recorded in a deed drawn up by a public officer.

Tradesmen's books do not afford proof of the supply of goods to persons not in trade, saving what is stated hereafter in respect of oaths. Tradesmen's books afford proof against themselves, but he who avails himself of such proof cannot set aside such part of them as may be adverse to his claim.

Private books and papers do not serve as proofs for the parties who have written them, but they may be set up against them: —1. In all cases when a payment received is acknowledged. ——2. When they contain an express statement that the memorandum has been made to supply the want of title in favour of the creditor. All that is written by a creditor at the end, in the margin, or on the back of a deed which has always

been in his possession, though neither signed nor dated by him, is proof against him when it tends to establish the discharge of the debtor. The same rule applies to that which is written by a creditor on the back, in the margin, or at the end of the duplicate of a deed or a receipt, provided such duplicate is in the hands of the debtor.

Talleys* corresponding with the counterparts afford proof between persons using this method to verify retail dealings.

Copies of Deeds.

Copies of deeds, when the original deeds exist, are only evidence of that which is contained in the original deed, the production of which may always be demanded and obtained. When an original deed is lost or destroyed, copies are evidence with the following distinctions: — Engrossments, or first authentic copies, are as good evidence as the original deed. The same rule applies with respect to copies taken by the authority of a magistrate, the parties having been present or duly summoned; also copies that have been taken in the presence of the parties, and with their mutual consent. Copies taken without magisterial authority, or without the consent of the parties, may, in the event of the loss of the originals, be given in evidence, when they are more than thirty years old; if less than thirty years old, they can only serve as *primâ facie* evidence. The same rule applies to copies from minutes not taken by the notary, or by one of his successors. Copies of copies may, according to circumstances, be considered as simple information.

The transcription of deeds in a public register can only be used as *primâ facie* evidence, and for this it is necessary:— 1. That it is proved that all the minutes of the notary of the year in which the deed was executed have been lost, or that the loss of the minute of the deed occurred from a particular accident.——2. That there is a regular index of the notary which proves that the deed was made at the same date. In this case, when proof by witnesses is admitted, those who were witnesses of the deed, if alive, are heard.

* *Talleys* (abolished in England by 23 Geo. III., c. 82): A stick split in two, on each of which is marked with notches what is due between debtor and creditor.

Ratification and Confirmation of Deeds.

A ratification of a deed does not dispense with the production of the original deed, unless its purport be specially set forth therein. That which it contains in addition to, or different from, the original deed has no effect; nevertheless, when there are several corresponding ratifications confirmed by possession, and one of these is thirty years old, the creditor is not required to produce the original deed.

The confirmation or ratification of a contract, against which the law admits an action for nullity or rescission, is only valid when it contains the substance of the contract, mention of the ground for rescission, and the intention to remedy the defect arising from it. In default of such confirmation or ratification, it is sufficient that the obligation be voluntarily performed after the period when it could be validly confirmed or ratified. Confirmation, ratification, or voluntary performance, in the forms and at the periods determined by law, implies renunciation of all objections and exceptions which might be set up, without prejudice to the rights of third parties.

A donor cannot amend, by any confirmative deed, the defects of a gift *inter vivos* void from informality. It must be legally re-executed. Confirmation, ratification, or voluntary performance of a gift *inter vivos*, by the heirs or assigns of the donor after his decease, implies their renunciation of the plea of informality, or any other exception.

Proof by Witnesses.

A deed must be executed before notaries, or privately signed, for all things exceeding the sum or value of 150 francs, even in the case of a voluntary deposit (*depositum*);* and no proof by witnesses can be admitted against or beyond the contents of the deeds, although the sum or value be under 150 francs. These rules are subject to the exceptions contained in the enactments that regulate commercial law. The same rule applies to cases where the action is brought for principal and interest, which together exceed the sum of

* A naked bailment of goods, to be kept for the bailor.

150 francs. A party who sues for a sum exceeding 150 francs cannot avail himself of proof by witnesses, although he may afterwards reduce his claim. Proof by witnesses, on a demand for a sum less than 150 francs, cannot be admitted, if it be declared that such sum is the remainder or part of a larger debt, not proved by writing. If, in the same action, a party brings several claims, of which there is no evidence in writing that such claims added together exceed 150 francs, proof by witnesses cannot be admitted, although the party alleges that such debts proceed from different sources, and were contracted at different times, unless such claims proceed from succession, gift, or otherwise, from different persons.

All claims, of whatever description, not proved by writing, must be included in a single deed; all other subsequent claims not proved by writing are not admitted.

These rules admit of exceptions when there is *primâ facie* evidence in writing; also in all cases where it is impossible for the creditor to obtain in writing an acknowledgement of the obligation. They also apply:—1. To obligations arising from *quasi* contracts, from misdemeanours, or involuntary wrongs.——2. To deposits made in cases of fire, falling of houses, riot, or shipwreck, and to deposits made by a traveller at an inn.——3. To obligations contracted in case of unforeseen accidents, when it was impossible to reduce them to writing.——4. In cases where the creditor has lost his deed by accidental or unforeseen circumstances, or by main force.

Presumptions.

Presumptions[74] are the consequences which the law or the judge deduces from certain *known* facts, and applied to facts *unknown*.

Legal presumption is that which is attached by a special law to certain acts or to certain facts. Such are:—1. Acts which the law declares void, as presumably done in fraud of its dispositions.——2. Cases in which the law declares ownership or discharge resulting from certain determinate

[74] The Romans divided presumptions into three classes:—1. *Juris et de jure*, when the law established the truth of any point on a presumption that could not be traversed on contrary evidence.——2. *Juris tantum*, a presumption established in law till the contrary was proved.——3. *Hominis vel judicis*, the conviction that arose from evidence.

circumstances.——3. The authority which the law attributes to a final judgment (*res judicata*).——4. The presumption which the law attaches to the admission or to the oath of a party.

The authority of a final judgment applies only to that which forms the subject of the judgment ; when the thing demanded is the same, when the demand is founded on the same cause, and between the same parties acting in the same qualities.

Legal presumption renders all proof unnecessary by the party in whose favour it exists. No proof is admitted against a legal presumption, when, on the basis of such presumption, it annuls certain acts or restrains an action, unless the law has reserved proof to the contrary, and saving what is hereafter stated respecting oaths and judicial admissions.

Presumptions not established by law are left to the wisdom and discretion of the judge.

Admissions of the Party.

An admission set up against a party is either *judicial* or *extra-judicial*. The allegation of a purely verbal extra-judicial admission is useless in all cases where proof by witnesses would not be admissible.

A *judicial* admission is a declaration made in court by the party or his attorney, and is sufficient proof against the party who makes it. The admission cannot be taken in part against him, nor can it be revoked, unless it is proved that it resulted from an error in fact ; it cannot be revoked on the ground of being an error in law.

Oaths.

A *judicial* oath is of two kinds :—1. That which one party offers to the other to make the decision of the cause depend upon it. It is termed *decisory*.——2. That which is administered *officially* by the judge to either of the parties.

The *decisory** oath may be administered in any kind of

* *Sacramentum decisionis :* a decisive oath resorted to in the civil law, where one of the parties to a suit, not being able to prove his charge, offers to refer the decision of the cause to the oath of his adversary. The adversary is bound to accept it, or tender the same proposal to the other party ; otherwise, the whole is taken as confessed by him.

dispute, but it can only apply to a fact which is personal to the party to whom it is offered. It can be administered in any stage of a cause, although there may be no *primâ facie* proof of the claim or exception on which it is grounded. A party who refuses to take the oath, or who does not refer it to his adversary; or an adversary refusing to take it when it is referred to him, is non-suited in his claim or exception. The oath cannot be tendered when the fact, which is the subject of it, is purely personal to him alone to whom it has been tendered, and is not common to both parties. When a party to whom the oath has been tendered or offered in return has made his declaration on oath, the adverse party is not allowed to prove its untruthfulness. A party who has tendered the oath or offered it in return cannot retract after the adverse party has declared that he is ready to take the oath.

The oath, when taken, is proof only in favour of or against him who tendered it, or in favour of or against his heirs or assigns. Nevertheless, if tendered by one of the joint and several creditors to a debtor, it only discharges the latter for the share of such creditor; if tendered to the principal debtor, it discharges the sureties; if tendered to one of the joint and several debtors, it benefits his co-debtors; if tendered to a surety, it benefits the principal debtor.

In the last two cases, the oath of the joint and several co-debtor, or of the surety, does not benefit the other co-debtors or the principal debtor, except it has been tendered upon the debt, and not upon the fact of the joint and several liability, or of the suretyship.

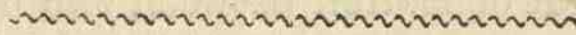
Oaths Officially Administered.

A judge may administer the oath to one of the parties, either to make the decision of the cause depend upon it, or simply to determine the amount for which judgment ought to be given.

The judge cannot administer the oath officially, either upon the claim or on the plea set up against it, except in the two following cases:—1. When the claim or plea is not fully proved.——2. When the claim is not totally void of proof.

In all other cases, the judge must either admit or reject the claim absolutely and unconditionally.

The oath, officially administered by the judge to one of the parties, cannot be tendered by him to the other party. The oath respecting the value of the thing claimed cannot be administered by the judge to the plaintiff, unless its value cannot be ascertained by any other means. The judge must in such cases determine the amount, inasmuch as he deems the plaintiff may be believed upon his oath.



CHAPTER XI.

OF OBLIGATIONS THAT ARISE WITHOUT CONTRACT.

Quasi-Contracts.

[*Code Napoléon*—Articles 1370-1386.]

CERTAIN obligations arise without any agreement (*convention*), either on the part of him who is bound, or on the part of him towards whom he has become bound. These obligations spring from *quasi-contracts* or *quasi-offences*.

Quasi-contracts are the purely voluntary acts of a party from which an obligation is created to a third party, and sometimes a reciprocal obligation between two parties.

When a man of his own accord voluntarily assumes the management of another person's business, with or without the knowledge of the latter, he contracts the tacit obligation to continue the management which he has begun, until the person for whom he acts is in a position to take it into his own hands. He must also provide for all accessories of such business, subjects himself to all the obligations which would arise from an express power given by the owner, and he is bound to continue his management, although the principal die, till the completion of the business, or until the heir is able to take the direction. He is bound to act as a prudent administrator. If the business has been well carried out, the principal is bound by the obligations contracted by the manager, and must indemnify him against all personal obligations which he has entered into on his behalf, and repay him all the necessary expenses which he has incurred.

A party, knowingly or by mistake, receiving that which is not due to him, is bound to restore it to the person from whom he has unduly received it. When a party, through mistake, pays a sum to another which is not due from him, he has a right to recover the same. Nevertheless the right ceases when, in consequence of the payment, the creditor has de-

stroyed his title, saving the remedy of the party who has paid against the real debtor. If the person who receives the money has acted in bad faith, he is bound to restore the amount paid, with interest from the day of payment.

If the thing unduly received is real or personal property, he who received it is bound to restore the thing itself, if it exists, or its value if it has perished or been deteriorated by his fault; he is even responsible for its loss by accident, if he received it in bad faith; but if the party who received it *bonâ fide* has sold it, he is only bound to pay the proceeds of such sale. A party who has recovered his property must allow, even to him who received it in bad faith, all the necessary expenses incurred for its preservation.

Offences and Quasi-Offences.

A person who causes injury to another is bound to make reparation.[75] He is responsible not only for the injury arising from his own act, but also for negligence and imprudence. He is also responsible for the acts of persons under his charge. Parents are responsible for the acts of their children under age who are living with them; masters and employers for the injuries caused by their servants or assistants in the performance of the duties for which they are engaged; schoolmasters and artisans for the injuries caused by their pupils and apprentices while under their care.

When it can be proved that the injury could not be prevented, such responsibility ceases.

The owner of an animal, or he who has charge of it, is responsible for the injuries caused by the animal, whether in his custody or whether it has strayed or escaped. The owner of a building is responsible for any injury caused by its falling, when it takes place from want of repair or bad construction.

[75] The Roman law made a distinction between *delicts* (private), and the so-called *quasi-delicts*. The former term was generally used with reference to theft, robbery with violence, damage wrongfully done, and certain outrages. Under the latter term were comprised other wrongful acts which bound the wrong-doer to make reparation.

CHAPTER XII.

OF MARRIAGE CONTRACTS, AND OF THE RESPECTIVE RIGHTS OF HUSBAND AND WIFE.

General Provisions.

[*Code Napoléon*—Articles 1387-1496.]

THE law does not interfere in matrimonial arrangements respecting property—except when there are no special agreements, which the parties may make as they think proper—provided they are not contrary to good morals, and not in violation of the following rules:—

Consorts cannot derogate from the rights incident to the authority of the husband over the persons of his wife and children, or the rights which belong to him as head of the family, nor from the rights conferred upon the surviving spouse under the titles of "Paternal Authority," "Minority," "Guardianship," and "Emancipation." They cannot make any agreement or renunciation which would change the legal order of succession, whether in reference to themselves in the succession by their children or descendants, or with reference to their children in the succession between themselves; without prejudice to gifts *inter vivos* or testamentary dispositions, which may take place in the forms and in the cases prescribed by law.

Husband and wife cannot stipulate in a general way that their union shall be regulated by any of the customs, laws, or local statutes which formerly prevailed in different parts of the French territory, now repealed by the present Code. They may, nevertheless, declare in a general manner that they intend to be married under the *régime de la communauté*,* or under the dotal system (*le régime dotal*). In such cases, the respec-

* Possession in common.

tive rights of husband and wife, and their heirs, are governed by the rules, under the title of "Community of Goods" and "Dotal System." However, by the Act of July 10, 1850, if in the registration of marriage it is stated that the husband and wife married without a marriage settlement, the wife shall be deemed, in respect of third parties, capable of contracting in general and common affairs; unless she has in the contract declared to have made a marriage settlement. The bare stipulation that the wife settles upon herself property in dowry, or that property has been so settled upon her, is not sufficient to subject the property to the dotal *régime,* unless in the marriage settlement there is an express declaration to that effect. Neither does the dotal system result from the bare declaration made by husband and wife, that they marry without community of goods, or that they will remain separate in property (*séparés de biens*).

In default of special stipulations which derogate from the system of community, or which modify it, the rules hereafter laid down form the common law of France:—

All marriage settlements must be drawn up before marriage by a notary, and cannot be altered after marriage.[76] Alterations in the settlement before marriage must be made in the same form as the marriage settlement. Any alteration or deed of defeasance is not valid without the presence and consent of all the parties to the marriage settlement. All alterations and deeds of defeasance, even executed with the above formalities, are not valid with respect to third parties, unless they have been drawn up at the end of the minute of the marriage settlement; and the notary cannot, under penalty, deliver an engrossment or copy of the marriage settlement without transcribing at the end the alterations or deed of defeasance.

A minor capable of contracting marriage is able to enter into all agreements of which such contract is susceptible, and the stipulations and gifts which he has made in it are valid, provided he has been assisted in the contract by the persons whose consent is necessary to the validity of the marriage.

[76] At Rome, it was the custom for the bride to bring a dowry as an equivalent for that which the husband gave in his marriage-gift (*donatio ante nuptias*).

Of Possession in Common.*

The *communauté*, either legal or conventional, begins from the day of the registration of marriage, and cannot be stipulated to commence at any other time.

Communauté, which is created by the simple declaration that the parties marry under that *régime*, or when there is no marriage settlement, is subjected to the rules hereafter explained.

Possession in common comprises rights to :—1. All the personal property which the husband and wife possessed at the time of marriage, and all that accrues to them during marriage, by succession or gift; unless the donor has expressed the contrary.——2. All the fruits, rents, and interest, of whatever kind, due or received during the marriage, and all that arise from property which belonged to the husband and wife at the time of the marriage, or which have accrued to them since, from whatever source.——3. All the real property acquired during marriage.

Real property (*immeubles*) is considered as having been acquired *in common*, if it is not proved that one of the consorts was the owner or in legal possession of it before marriage, or that it has accrued to him or her by heirship or gift.

Wood-fellings and the produce of quarries and mines are subject, as regards community, to the rules laid down concerning these articles in the title of "Usufruct, Use, and Habitation."†

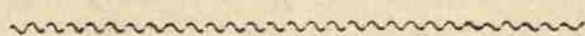
Real property which the husband and wife possess on the day of their marriage, or which accrues to them during the marriage by inheritance, is not in common. Nevertheless, if one of the consorts acquires real property after a marriage settlement, but before the celebration of the marriage, and the settlement contains a stipulation of community, the real property so acquired is in common, unless the acquisition was

* *Du régime en communauté:* The rights and interests of husband and wife in their property and their liability for the debts of each other are regulated by three laws:—1. The law of community.——2. The dotal law.——3. The law of separation of property. Under the *régime de communauté*, the husband and wife become joint owners of the property falling into the community, which includes their present and future personal property; also the real property which either of them acquires after the marriage otherwise than by gift or succession, and the rents of the real property which either of them possessed at the time of the marriage.

† See page 77.

made in performance of a clause in the marriage settlement; in which case it is regulated by the contract.

Gifts of real property made during marriage to one of the married parties do not fall into the community, but belong to the donee solely, unless it is expressly stated in the gift that the thing given shall belong to both in common. Real property abandoned or transferred by a father, mother, or other ascendants to one of the married parties, either in satisfaction of debts due by them to such party, or subject to the payment of debts due by the donor to strangers, does not fall in common; saving compensation or indemnity. Real property acquired during marriage in exchange for real property that belongs to one of the consorts does not fall in common, but is substituted in the place of that which was alienated; saving compensation when there is a difference in the value. A purchase made during marriage, at a judicial sale by auction,* or otherwise, of part of real property of which one of the consorts was joint owner, does not constitute an acquisition in common; the community, however, is indemnified for the amount withdrawn from it to make such purchase. When the husband personally and in his own name acquires, by purchase or by *licitation*, part or the whole of an estate of which the wife is joint owner, she, at the dissolution of the community, has the option either of abandoning the thing to the community, which then becomes her debtor for her share in the price, or of taking back the realty, and refunding to the community the price of the purchase.



Liabilities of the Community, and Actions resulting therefrom.

The liabilities of the *communauté* consist of:—1. All personal debts due by the consorts on the day when the marriage was solemnized, or by the successions which fall to them during its continuance; saving compensation for liabilities relative to the real property that belongs separately to one or other of the consorts.——2. Debts, whether of principal sums, arrears, or interest, contracted by the husband during the community, or by the wife with the consent of her husband; saving compensation in cases when it is due.——3. Arrears and interest only of such rents and debts as are personal to either of the

* *À titre de licitation.*

consorts.——4. Repairs chargeable to the usfructuary of *immovables* that do not fall in common.——5. The maintenance of the consorts, education and maintenance of their children, and all other charges incidental to marriage.

The *communauté* is only liable for the personal debts of the wife contracted before marriage when they are authenticated by public deed made before marriage, or by a private deed, proved to have been executed before marriage. Creditors of the wife who claim under deeds that are not proved to have been executed before marriage, cannot sue for payment except upon the bare property (*nue-propriété*)* of the real property belonging to her. The husband who asserts that he has paid a debt of this nature for his wife cannot demand compensation either from her or her heirs.

Debts upon successions of purely *personal* property that falls to consorts during the marriage are entirely chargeable to the community; but debts of a succession of purely *real* property are not chargeable to the community; saving the right of creditors to sue for payment upon the real property of such succession. Nevertheless, if such succession has fallen to the husband, the creditors of the succession may sue for payment, either out of his private property, or even out of that of the community; saving, in the second case, the compensation due to the wife or her heirs. If a succession of purely *real* property has fallen to the wife, and she accepts it with the consent of her husband, the creditors of the succession have a right to sue for payment out of all the personal property that belongs to her; but if she accepts it, upon the refusal of her husband under judicial authority, the creditors, in the event of the real property of the succession proving insufficient, can only sue out of the *nue-propriété* of her own real property.

When a succession, partly *real* and partly *personal*, falls to one of the consorts, the debts due by such succession are chargeable to the community to the extent of the portion of the debts that are assessed upon the personal property; regard being paid to the comparative value of the personalty and of the realty. Such assessment is determined by the inventory, which the husband is bound to see made, either in his own right, if the succession concerns him personally, or as directing

* Property of which the usufruct belongs to another.

and authorising the acts of his wife, if the succession has fallen to her. In default of an inventory, and in all cases where the omission to make one is prejudicial to the wife, she or her heirs may, at the dissolution of the community, sue for lawful compensation, and even prove by deeds, private writings, or by witnesses, and if necessary, by general rumour, of the description and value of the movable property not entered in the inventory. Such proof is never allowed to be made by the husband.

The rules relating to a succession partly real and partly personal do not prevent the creditors of such succession suing for payment out of the goods of the community, whether the succession has fallen to the husband or to the wife, when the wife has accepted it with the consent of her husband; saving, in either case, respective compensation. The same rule applies if the succession has been only accepted by the wife as judicially authorised, and such personal property has been confounded, in default of an inventory, with that of the community. If the succession has only been accepted by the wife as judicially authorised, and there has been an inventory, the creditors can only sue for payment upon the real and personal property of the said succession; and if insufficient, upon the *nue-propriété* of the real property belonging to the wife.

These rules respecting debts apply to gifts *inter vivos*, as well as to successions.

Creditors may sue for payment of debts contracted by the wife with her husband's consent, either upon the property of the community, or upon that of the husband or wife; saving compensation due to the community, or indemnity due to the husband.

All debts which a wife contracts, in virtue of the general or special power (*procuration*) of her husband, are chargeable to the community; and creditors cannot sue for payment either against the wife personally or upon her private property.

Management of the Community, and effects of acts of either Consort in relation to Marriage.

A husband solely administers the property of the community, and may sell, alienate, or mortgage it without the concurrence

of his wife; but he cannot, by gifts *inter vivos*, dispose of the real property of the community, nor of the whole or of a portion of the personalty, except it is for the settlement of children who are the issue of the marriage. He may, however, dispose of movables by voluntary and private gifts to any one, provided he does not reserve the usufruct for himself. He cannot bequeath more than his share of the community; if he bequeaths a thing belonging to the community, the donee cannot claim it in kind, unless in the partition it falls to the share of the heirs of the husband; if it does not, the legatee is compensated for the whole amount of the thing given out of the share of the heirs of the husband, or out of the private property belonging to him.

Penalties incurred by the husband for misdemeanours may be recovered out of the property of the community, compensation being made to the wife; those incurred by the wife can only be recovered out of the *nue-propriété* of her real property, so long as the community lasts. The criminal condemnation of one of the consorts affects only the delinquent's share in the community, and his or her private property.

Deeds executed by the wife without the consent of her husband, and even when she is judicially authorised, do not affect the property of the community, unless she contracts as a public trader and for the purpose of her business. A wife cannot bind herself or the property of the community, even for the purpose of releasing her husband from prison, or setting up her children in business in her husband's absence, until authorised by a court of law.

A husband has the management of all the property of his wife, and may sue solely in all actions that relate to her. He cannot alienate her real property without her consent, and in default of due care he is responsible for deterioration of the property of his wife.

Leases of the wife's property, made by her husband solely, which exceed nine years, are not, in the event of the dissolution of the community, binding on the wife or her heirs, except for the time which has still to run, either of the first period of nine years, if not lapsed, or of the second period, and so on, so that the leaseholder shall only have a right to complete the term of the nine years running. Leases for nine years, or for a shorter term, of the wife's property, which the

husband solely has granted or renewed more than three years before the expiration of the running lease, if rural property, or more than two years if house property, are void, unless they came into operation before the dissolution of the community.

A wife who binds herself jointly and severally with her husband in the affairs of the community, or in the affairs of her husband, is in respect of him only deemed a surety, and must be indemnified against the obligation she has contracted. A husband who becomes surety jointly and severally, or otherwise, in the sale of his wife's real property, has likewise a remedy, either upon her share in the common property, or upon her private estate, if he is sued.

If real property belonging to one of the consorts is sold, or if servitudes due to his or her private estates have been redeemed, and the price been paid to the community without reinvestment, such consort has a right to deduct from the common property the value of the real property sold or of the servitudes redeemed. Reinvestment is deemed to be made by the husband when, at the time of a purchase, he declares that it was made with the money arising from the alienation of real property that belonged solely to him, and that it was intended as a reinvestment. The declaration of the husband that the purchase is made with moneys arising from real property sold by his wife for the purpose of reinvestment is not sufficient, if such reinvestment has not been formally accepted by the wife. If she has not accepted it, she has, at the dissolution of the community, right to compensation for the value of the thing sold. Compensation for the value of real property belonging to the husband can only be claimed out of the bulk of the property in common; that for the value of real property belonging to the wife may be claimed out of the private property of the husband, if the property in common proves insufficient. In all cases, compensation is governed by the price realised at the sale, whatever may be alleged as to the value of the thing alienated.

Whenever a sum is withdrawn from the community to pay the personal debts or liabilities of one of the consorts, he or she for whom the money was withdrawn owes compensation for the amount. If the consorts have jointly given a marriage portion to their child, without mentioning the

amount which either intended to contribute, each is deemed liable for a moiety, whether the portion has been paid or promised out of the effects of the community, or out of the private property of one of the consorts. In the latter case, such consort has a right to be indemnified out of the property of the other for the moiety of the portion. A marriage portion settled solely by the husband upon a child of the marriage out of the common property, is chargeable to the community; and in the event of the wife accepting the community, she is responsible for the half of the marriage portion, unless the husband has expressly declared that he held himself responsible for the whole, or for a larger part than the moiety.

All marriage portions are guaranteed by the parties who make the settlements, and interest runs from the day of the marriage, unless otherwise stipulated.

Dissolution of the Community,* and its Consequences.

The community is dissolved:—1. By death.——2. By judicial separation.——3. By separation of property.

Communauté, in default of an inventory, does not continue after the death of one of the consorts; but interested parties may sue for a statement relative to the condition of the property in common, proof of which may be made by documents or common report. If there are children under age, the omission of an inventory causes the surviving consort to lose the usufruct of the revenues of such children, and the supplementary guardian who neglected to compel him or her to have an inventory made, is held jointly and severally responsible with him or her for all indemnities that may be adjudged in favour of the minors.

Separation of property can only be sued for in a court of law by the wife whose marriage portion is in peril, and when the disordered state of the husband's affairs affords reason to fear that his property will not be sufficient to satisfy the claims and rights of the wife. All voluntary separation of property after marriage is void.

* Formerly, "Civil Death" and "Divorce," now abolished, also dissolved the community.

Separation of property, although adjudged by a court of law, is void, if it has not been followed by the payment of the wife's claims, proved by an authentic deed, as far as the husband's property extends, or by a suit commenced within a fortnight after adjudication, and not afterwards interrupted. Every separation of property must, before execution, be publicly posted in the hall of the court of first instance; and if the husband is a merchant, banker, or tradesman, it must also be posted in the hall of the commercial court of his domicile, on pain of nullity. A judgment declaring the separation of property takes effect from the day that the *demand* was made.

Private creditors of the wife cannot, without her consent, demand the separation of property. Nevertheless, in cases of bankruptcy or insolvency of the husband, creditors may exercise her rights to the amount of their claims. Creditors of the husband may obtain redress against a separation of property adjudged, and even executed, in fraud of their rights; they may even make themselves parties in the suit, on the petition for separation, in order to contest it.

A wife who has obtained a separation of property must contribute, in proportion to her means and to those of her husband, to the expenses of the household, and to those of the education of their children. She must bear these expenses solely, if the husband has no means.

A wife judicially separated, or separated only in property, regains the uncontrolled management of her property. She may dispose of her personal property, but she cannot alienate her real property without the consent of her husband; or, on his refusal, without the authority of the court of first instance.

A husband is not responsible for any omission to invest or reinvest the price of the real property which the wife, separated in property, has alienated under the authority of a court of law, unless he has been a party to the contract, or unless the moneys have been proved to have been received by him, or used to his advantage. He is answerable for the omission of investment or reinvestment, if the sale took place in his presence and with his consent; but he is not responsible for the disadvantages of the investment.

The *communauté*, dissolved either by judicial separation, or by separation of property only, may be re-established by the

consent of both parties. This must be effected by a deed executed before notaries, and a copy of the deed must be posted in the hall of the court. In this case, the community so re-established resumes its effect from the day of the marriage, and the affairs are placed in the same position as if there had been no separation, without prejudice, however, to the carrying out of such obligations as the wife may have legally entered into. Every agreement by which the consorts re-establish the community that differs from that by which it was previously governed is void.

A dissolution of the community by a judicial separation, or merely of property, does not imply the enforcement of the rights of the wife's survivorship; but she may claim them at the death of her husband.

Acceptance of the Community, Renunciation, and Conditions relating thereto.

After the dissolution of the community, the wife or her heirs and assigns have the power of accepting or renouncing it; and any agreement to the contrary is void. A wife who has entered upon or interfered with the management of the affairs of the community cannot afterwards renounce it. Acts purely administrative or conservatory do not imply interference. A wife of full age, who in a deed has represented herself as common in property, cannot renounce the community, nor be relieved from the position she has assumed, unless there has been fraud on the part of the heirs of the husband. A widow who desires to retain the right of renouncing the community must, within three months from the day of her husband's death, cause a correct inventory to be made of all the goods of the community, in the presence of the husband's heirs, or after having duly summoned them; and forty days afterwards, she must make her renunciation at the registrar's office of the court of first instance of the domicile of her husband. The widow may, according to circumstances, ask the court for an extension of time for her renunciation, which, if granted, must be adjudged in presence of the heirs of the husband, or after they have been duly summoned.

A widow who has not renounced within the time prescribed

is not deprived of her right of renouncing, provided she has not interfered with the management of the community and has had an inventory made ; she can only be sued as being in community until she renounces, and she is liable for costs incurred up to her renunciation ; she may likewise be sued after the expiration of the forty days from the closing of the inventory, if it has been closed before the three months.

A widow who has abstracted or concealed any of the effects of the community is declared to have accepted the community, notwithstanding her renunciation ; and the same rule applies to her heirs. If the widow dies before the expiration of the three months without having made or completed the inventory, her heirs have a further delay of three months, reckoning from her death, to make and complete it, and of forty days after the closing of the inventory to deliberate on acceptance or renunciation. If the widow dies after completing the inventory, her heirs have, in order to deliberate, a fresh delay of forty days from her death. They may, however, renounce the community, according to the rules above stated with reference to widows.

A wife judicially separated, who has not, within three months and forty days after the separation, definitely accepted the community, is deemed to have renounced it, unless within the prescribed time she has obtained, in the presence of her husband, or after having duly summoned him, an extension of time from the court. The creditors of the wife may dispute the renunciation which she or her heirs may have made in fraud of their claims, and may accept the community in their own right. The widow, whether she accepts or renounces, has a right, during the three months and forty days which are allowed her for making the inventory and for deliberation, to take, for her own and her domestics' maintenance, such supplies that may be in the house, and in default, to borrow on account of the community; subject to the condition of using due discretion. She is not liable for rent for her residence during the delays, whether the house belongs to the community, or to the heirs of the husband, or held on lease.

In the event of the dissolution of the community by the death of the wife, her heirs may renounce the community within

the delays and according to the forms prescribed by law respecting widows.

Partition of the Community.

After the acceptance of the community by the wife or her heirs, the assets are divided and the liabilities borne in the manner hereinafter stated.

The consorts or their heirs must bring back to the community all that they owe for compensation or indemnity. Each consort, or his or her heirs, must bring back, likewise, the sums drawn from the community, or the value of the property taken from it for a marriage portion for a child of another marriage, or a child of the present marriage.

From the bulk of the property, each consort or heir takes :—1. His or her private property that did not enter into the community, if it exists in kind, or the property acquired by reinvestment.——2. The price of the real property alienated during the community and not reinvested.——3. Indemnities due to him or her by the community.

The claims of the wife take precedence over those of the husband, for property which no longer exists in kind. First, from the ready-money; next, from the personal property; and failing these, from the real property of the community. In the last case, the choice of the property is left to the wife and to her heirs. Deductions in favour of the husband are restricted to the property of the community. The wife and her heirs, in the event of the community proving insufficient, may enforce their claims upon the private property of the husband. The reinvestments and indemnities due by the community to the consorts, and the compensations and indemnities due by them to the community, bear interest from the day of its dissolution. After all the deductions of both consorts have been effected upon the bulk of the community, the surplus is divided by moiety between the consorts or their representatives. If the heirs of the wife do not agree, so that some have accepted and others have renounced the community, those who have accepted take only their respective shares in the property allotted to the wife; the remainder accrues to the husband, who is responsible to the heirs who renounced for such claims as the wife might

have enforced in the event of renunciation; but only to the extent of the shares of the heirs who renounced.

The partition of the community, in all that regards its formalities—the sale by auction of real property when there is occasion for it, the effects of the partition, the warranty resulting from it, and the payment of the balance—are subject to the rules prescribed, under the title "Of Successions for Partitions between Co-heirs."*

A consort who abstracts or conceals things belonging to the community forfeits his or her share of them. After partition, if one of the consorts is the personal creditor of the other—as when the price of the property of one has been applied to the payment of the personal debts of the other, or for any other cause—the consort may recover his or her claim out of the share of the community allotted to the debtor, or out of his or her private property. Personal claims which the consorts may have against each other do not bear interest, except from the day of the judicial demand. Gifts made by one of the consorts to the other are taken from the donor's share in the community, or out of his or her private property.

The widow's mourning, even if she has renounced the community, is chargeable to the heirs of her deceased husband, and its value is regulated according to the circumstances and position of the deceased.

The debts of the community are chargeable, one-half to each of the consorts or to his or her heirs. The expenses of seals, inventories, sales of personal property, liquidation, public auction, and partition form part of such debts.

The wife is not liable for the debts of the community, either with respect to her husband or creditors, beyond the amount of the benefit she derived from it, provided she has made a good and faithful inventory, and has rendered an account both of what is contained in such inventory, and of what has fallen to her in the partition. The husband is liable for the whole of the debts of the community contracted by him, but he has his remedy against his wife or her heirs for the half of such debts. He is liable only for half of such personal debts of his wife that were chargeable to the community. The wife may be

* See page 106.

sued for the whole of the debts contracted by herself that have fallen into the community, but she has her remedy against her husband or his heirs for half of such debts. A wife personally liable for a debt of the community cannot be sued for more than the half of such debt, unless the obligation is joint and several.

A wife who pays a debt of the community beyond her half cannot recover the excess from the creditor, unless it is stated in the receipt that what she paid was for her moiety. A consort who, when a mortgage has been made upon the property allotted to him or to her, is sued for the whole of a debt of the community, has of right a remedy against the other consort or his or her heirs for the moiety of such debt.

These rules do not prevent one of the joint-sharers from paying more than the moiety, or even the whole of the debts of the community; but when one has paid more than his or her share, he or she has a remedy against the other.

All the above rules respecting husband and wife apply to the heirs of either, and such heirs have the same rights, and are subject to the same actions, as the consort would have been whom they represent.

Renunciation of the Community, and its Effects.

A wife who renounces forfeits her right to the property of the community, and even to the *personal* property which she herself brought to it. She has a right to retain wearing apparel and linen for her own use.

A wife who renounces has a right to recover:—1. *Real* property belonging to her when not alienated, or the real property which has been bought as reinvestment.——2. The price of her real property which has been alienated, and reinvested without her consent.——3. All the indemnities that may be due to her by the community.

A wife who renounces is discharged from all the debts of the community, both as regards her husband and as regards creditors. She, however, is answerable to creditors for debts in which she bound herself jointly with her husband, or when the debt is one which she contracted herself; saving, in such case, her remedy against her husband or his heirs. She may enforce all her claims against the goods of the community, or

against the private property of her husband. Her heirs may do the same, except as regards linen and wearing apparel, and lodging and maintenance during the delays allowed for inventory and deliberation, which rights are purely personal to the surviving wife.

These rules apply even when one or both consorts have had children by a previous marriage. If, however, the *confusion* of personal property and debts gave to one of the consorts an advantage greater than that to which he or she is lawfully entitled, according to the rules regulating gifts *inter vivos* and *wills*, the children of the other marriage have a right to bring an action in curtailment (*en retranchement*).

CHAPTER XIII.

OF COMMUNITY BY AGREEMENT.

[*Code Napoléon*—Articles 1497-1581.]

MARRIED persons may modify the *legal community* of property by any kind of agreement not contrary to law.*

The principal modifications are :—1. That the community shall only comprise property acquired in common.——2. That the present or future personal property shall not be in common, or only partly so.——3. That it shall comprise the whole or part of the real property, present or future, by *changing it into personalty*.†——4. That the consorts shall pay separately debts contracted before marriage.——5. That in case of renunciation, the wife may take back, free and clear from all burdens, whatever she brought into the community.——6. That the survivor shall have a stipulated benefit (*préciput*).——7. That the consorts shall have *unequal* shares.——8. That a community of all their property in general shall exist between them.

Community confined to Things acquired in Common.

When consorts stipulate that there shall only be a community of things acquired in common, they are respectively deemed to exclude their present and future debts, and their present and future *personal* property. The partition in this case is limited to things acquired in common, arising from their common industry, or from the savings out of the fruits and revenues of their private property. If the personal property, at the time of the marriage, or that which has accrued since,

* See page 40, "Rights of Husband and Wife."

† *Par voie d'ameublissement*, hereafter explained.

has not been authenticated by inventory or statement in due form, it is deemed to be property acquired in common.

Personal Property wholly or partly excluded from the Community.

Consorts may exclude from the community all their *personal* property which they at present or may in future possess. When they stipulate that they will respectively put part of it, to the amount of a certain sum or value, into the community, they are deemed to have reserved for themselves the remainder. This stipulation renders each a debtor to the community for the promised sum, and each must prove the payment of it.

Upon the dissolution of the community, each consort has a right to take back the value of the personal property that he or she brought into it at the time of the marriage ; also that which has accrued to him or her since. The personal property that accrues to each of the consorts during the marriage must be authenticated by inventory; in default of an inventory of the personal property accruing to the husband, or of a document stating its value, he cannot claim it from the community. In the default of such inventory on the part of the wife, she, or her heirs, are admitted to give proof, either by documents, or by witnesses, or even by common report, of the value of such personal property.

Clause *d'Ameublissement.**

This stipulation, by which the consorts, or either of them, bring into the community the whole or a portion of their real property, whether present or future, is called *ameublissement*. It is either *definite* or *indefinite*. It is *definite* when the consorts declare their intention to change to personalty and bring into the community a particular realty, for the whole, or to the amount of a given value. It is *indefinite* when it simply declares that they will bring into the community real property to a certain amount. The effect of this definite *ameublissement* is to convert the real property affected by it into the goods of

* *Ameublir un immeuble:* to change real property to personalty—an *immeuble* to a *meuble*.

the community as *personal property*. When the whole of the *real* property of the wife is so converted, the husband may dispose of it as of the other personalties of the community, and may alienate the whole. If the real property is only partly converted for a certain amount, the husband cannot alienate it without the consent of his wife; he may, however, mortgage it without her consent; but only to the extent of the portion rendered *movable*.

Indefinite *ameublissement* does not confer upon the community the ownership of the real property affected thereby; its effect is merely to oblige the consort who has so agreed, to include in the bulk, when the community is dissolved, part of the property to the amount of the sum which he or she has promised. The husband, without the consent of his wife, cannot alienate, in whole or in part, the real property encumbered by indefinite *ameublissement;* but he may mortgage it to the amount rendered personal (*movable*).

The consort who has converted an estate into personalty has a right, when the partition takes place, to retain it by deducting from his or her share its actual value. His or her heirs have the same right.

Separation of Debts.

The stipulation by which consorts agree that each shall pay separately his or her personal debts binds them, when the community is dissolved, to refund, respectively, debts which are proved to have been paid by the community. The obligation is the same whether an inventory has been made or not; but if the personal property brought by the consorts has not been authenticated by an inventory, or an authentic statement made before marriage, the creditors of either consorts may, without distinction, sue for payment out of the personal property not entered in the inventory, as well as out of all the other goods of the community. The same rule applies to the property that may have accrued to the consorts during marriage. When the consorts bring into the community a certain sum or a certain property, such a contribution implies a tacit agreement that it is not encumbered with debts incurred before marriage. The clause of separation of debts does not exempt the community from liability to pay interest and arrears due since the marriage.

When the community is sued for the debts of one of the consorts, who is declared by the contract to be free and clear from all debts incurred before marriage, the other consort has a right to an indemnity, to be taken from the share in the community which belongs to the indebted consort, or from his or her private property; and in case of insufficiency, such indemnity may be sued for, as on a warranty, against the father, mother, ascendant, or guardian who made the declaration that such property was free and unencumbered. This warranty may even be sued upon by the husband during the community, if the debt originated with the wife; but, in such case, the warrantor has a right to be reimbursed by the wife or her heirs after the dissolution of the community.

Right of the Wife to take back, unencumbered, what she brought into the Community.

A wife may stipulate that, in case of renunciation of the community, she shall take back a whole or a part of what she brought into it, either at the time, or during the marriage; but such stipulation can neither extend beyond things formally specified, nor for the benefit of persons other than those mentioned. Thus the right of taking back the personal property which the wife has brought at the time of her marriage does not apply to that which has accrued to her during the marriage. Such right does not extend to the children, and that granted to the wife and children does not extend to other heirs. In no case can the property be taken back without deducting the private debts of the wife that have been paid out of the community.

*Préciput** by Agreement.

This stipulation, by which the surviving consort is authorised to take, before any partition, a certain sum, or a certain quantity of personal effects in kind, takes effect in favour of the surviving wife only when she has accepted the community; unless, in the marriage contract, such right has been reserved to her

* Benefit stipulated by will or by law in favour of one of several coheirs; or a benefit stipulated by marriage settlement in favour of the surviving husband or wife.

even in the event of renunciation. In default of such reservation, the *préciput* can only be taken out of the divisible bulk of the community, and not out of the private property of the predeceased consort. *Préciput* is not regarded as a benefit subject to the formalities of gifts *inter vivos*, but as a marriage agreement.

When the community is dissolved by death, the *préciput* may be at once claimed; but in cases of judicial separation the right of *préciput* cannot be enforced, although it is preserved in cases of survivorship by the consort who obtained the separation. If the right belongs to the wife, the sum, or the thing constituting the *préciput*, remains with the husband, on his giving security. The creditors of the community have always a right to enforce a sale of the effects comprised in the *préciput;* and, in this case, the other consort has his or her remedy.

Clauses by which Unequal Shares in the Community are assigned to the Consorts.

Consorts may depart from the equal division established by law, either by giving to the surviving consort, or his or her heirs, a share in the community amounting to less than the half; or, by giving the survivor a fixed sum in lieu of every claim upon the community; or, by stipulating that the entire community, in certain cases, shall belong to the surviving consort, or to one of the consorts only.

When it is stipulated that one of the consorts or his or her heirs shall be entitled only to a certain share in the community, as a third or a fourth, the consort to whom this limitation applies, or his or her heirs, is liable only for the debts of the community in proportion to such share. The covenant is void if it binds the consort thus limited, or the heirs, to bear a greater share, or if it exonerates them from bearing a share in the debts equal to that which they take in the assets. When it is stipulated that one of the consorts, or his or her heirs, shall be entitled only to a certain sum in lieu of all right in the community, this stipulation binds the other consort or heirs to pay the sum agreed upon, whether there is gain or loss. If the clause binds only the heirs of one of the consorts, such consort, in case of survivorship, has a right to a half-share in the community.

Husbands or their heirs, who retain the whole community, are liable for all the debts. The creditors, in such case, have no right of action against the wife or her heirs. If it is the surviving wife who, in consideration of a stipulated sum, has a right to keep the community against the heirs of the husband, she has the option of either paying them such sum, and remaining liable for all the debts, or of renouncing the community, and abandoning to the heirs of the husband both the property and the encumbrances.

Consorts may stipulate that the whole of the community shall belong to the survivor, or to one of them only, saving the right of the heirs of the other to take back what had been brought into the community by the consort they represent. Such a stipulation is deemed a simple marriage covenant, and is not subject to the rules and formalities applicable to *gifts inter vivos.*

General Community.*

Consorts, by their marriage contract, may establish a general community of their real and personal property, present and future; or, of all their present property only; or, of all their future property only.

The preceding provisions do not precisely limit all the stipulations by which the community may be modified. Consorts may enter into such agreements as they please, provided they do not infringe upon the law.† Nevertheless, in the case where there are children by a previous marriage, any agreement in violation of the rules regulating "Gifts *inter Vivos*" and "Wills"‡ are void with regard to all that exceeds the disposable portions; but the profits and savings of the community, although unequal, are not considered as an advantage made to the prejudice of the children of the first marriage.

Community by agreement is subject to the rules of legal community in all cases when there is no express or implied derogation of the law.

* *À titre universel.*

† See page 110.—"Rights of Husband and Wife."

‡ See page 114.

Agreements Excluding Community.

When the consorts, without subjecting themselves to the dotal system, stipulate that there shall be no community, or that they shall remain separate as to property, the effect of such stipulation is regulated as follows :—

I.—Marrying without Community.

This stipulation does not give the wife the right to administer her property, nor to receive the fruits thereof, which are deemed to be brought by her to her husband for household expenses. The husband retains the management of the real and personal property of his wife, and as a consequence, the right to receive all the personal property she brings with her, or which falls to her during marriage ; saving the restitution he is bound to make after the dissolution of the marriage, or after a separation of property has been legally adjudicated. If amongst the personal property brought as dowry by the wife, or property which accrues to her during marriage, there are things that cannot be used without being consumed, a valuation must be annexed to the marriage contract, or an inventory made at the time the property accrues to her, and the husband is bound to refund the value. The husband is responsible for all the liabilities incident to the usufruct.

It may be stipulated in the marriage contract that the wife, for her support, shall receive annually a certain portion of her revenues, for her maintenance and personal requirements, on her own acquittance. The real property settled in dowry by the wife is alienable, but not without the consent of the husband, and on his refusal, without the authority of the court of first instance.

II.—Separation of Property.

When the consorts stipulate by the marriage contract that they shall be separate as to property, the wife retains the entire management of both her real and personal property, and the free use of her revenues. Each of the consorts contributes to the expenses of the household, according to the covenants contained in their marriage contract ; and if there is no agreement, the wife contributes to such expenses one-third of her income. In no case, nor by virtue of any stipulation, can the

wife alienate her real property without the special consent of her husband; or, on his refusal, without being judicially authorised. Every general power given to the wife to alienate real property, whether given by marriage contract or during marriage, is void.

When the wife, who is separate as to property, has allowed her husband to *use* it, the latter is only bound, either upon the demand which his wife may make, or upon the dissolution of the marriage, to give up all existing fruits; but he is not accountable for those which, up to such time, have been consumed.

Dotal System.

Dowry, as generally understood, is the property which the wife brings to her husband to defray expenses incident to marriage. Under the dotal system all that she settles, or that which is settled upon her, in the marriage contract, is *dotal*, unless there is a stipulation to the contrary.

Settlement of the Dowry.

All the present and future property of the wife, or all her present property only, or part of her present and future property, or even a special thing, may be settled upon her as dowry. A settlement, in general terms, of all the property of the wife does not include property that may accrue to her. A dowry can neither be settled nor increased during marriage.

If parents settle a dowry conjointly, without specifying their respective shares, it is deemed to be by equal portions. If the dowry is settled by the father only, in the name of both parents, the mother, although present at the contract, is not bound, and the father is made responsible for the whole dowry. If a surviving parent settles a dowry, in respect of paternal and maternal property, without specifying the shares, the dowry shall be taken first, to the amount of the claims of the future husband from the property of the deceased parent, and the residue out of the property of the survivor.

Although the daughter, on whom a dowry has been settled by her parents, has property in her own right, of which they have the usufruct, the dowry is taken from the property of the parents, if there is no stipulation to the contrary. Those

who settle a dowry are bound to guarantee it. Interest upon a dowry runs from the day of the marriage against those who settled it, unless there is a stipulation to the contrary.

Husbands' Rights over Property Settled in Dowry.

The husband has the sole control of the dotal property during marriage. He has the sole right to sue debtors and holders of the property, to receive all fruits and interest, and all reimbursements. Nevertheless, it may be stipulated in the marriage contract that the wife shall receive annually, on her own discharge, a part of her income for her maintenance and personal wants. The husband is not bound to find security for the dowry, unless it is so stipulated in the marriage contract. If the dowry or part of it consists of personal property valued in the contract, and there is no declaration that such valuation does not imply a sale, the husband becomes the owner, and is only responsible for the price stated in the valuation. The valuation of real property settled in dowry does not confer ownership upon the husband, unless it is expressly declared.

Real property bought with the dotal money is not dotal, if no condition for investment has been stipulated in the marriage contract. The same rule applies with regard to real property, given in payment of the dowry, settled in money. Real property settled in dowry cannot be alienated or mortgaged during marriage either by the husband or by the wife, or by both jointly, except under the following circumstances:—A wife may, with the consent of her husband, or on his refusal, by judicial authority, give her dotal property for the settlement in life of children which she had by a previous marriage; but if she is only judicially authorised, she must reserve the usufruct for her husband. She may also, with the consent of her husband, give her dotal property for the settlement of the children of their marriage. Real property settled in dowry may be alienated when so stipulated in the marriage contract. It may be also alienated with the permission of the court, by public sale, to release the husband or wife from prison; to supply maintenance to members of the family entitled by law; to pay the debts of the wife, or of those who have settled the dowry, when such debts are proved to have been incurred before

the marriage contract; to make substantial repairs necessary for the preservation of the real property settled in dowry; finally, when such realty is jointly possessed by third parties, and is not divisible. In all those cases, the excess of the proceeds of the sale above the requirements remains dotal, and is reinvested as such for the benefit of the wife.

Real property in dowry may be exchanged, with the wife's consent and with the authority of the court, on proving the advantage of the exchange, for another property of like value, or of a value not less than four-fifths of the former property. In this case, the property received in exchange is dotal, the excess of the price, if any, is also dotal, and must be reinvested as such for the benefit of the wife.

If, in cases not included in these exceptions, the wife or the husband, or both jointly, alienate the dotal property, the wife or her heirs may, after dissolution of marriage, have the alienation cancelled, without right of prescription being admissible during the marriage. The wife has the same right in the event of separation of property. The husband may have the alienation cancelled during marriage, but he is liable for damages to the purchaser, unless he has declared in the contract of sale that the property sold was dotal.

No prescription is admissible during marriage against real property, dotal, when not declared alienable by the marriage contract, unless such prescription began before marriage; nevertheless, prescription is admissible after separation of property, whatever may be the time when the prescriptive right commenced.

The husband is bound, in respect of all dotal property, by all the obligations of a usufructuary. He is responsible for all prescriptions acquired against the property, and deteriorations caused by his negligence. If the dowry is endangered, the wife may sue for a separation of property, as previously stated.

Restitution of Dowry.

If the dowry consists of real property, or personalty not valued in the marriage contract, or valued with a declaration that the valuation does not deprive the wife of ownership, the husband or his heirs may be compelled to restore it immediately after dissolution of marriage. If it consists of a sum

of money, or personalty valued in the contract, without declaration that such valuation does not confer ownership upon the husband, the restitution cannot be exacted till one year after the dissolution of marriage.

If the personalty remaining the property of the wife has partly perished without the fault of the husband, he is only bound to return that which remains, and in the condition in which it is found. The wife may, in all cases, take back linen and wearing apparel for her use; a deduction being made of their value, if valued in the marriage contract.

If the dowry comprises bonds or annuities which have been extinguished or been subject to deductions, without the negligence of the husband, he is not responsible for them, but is discharged by giving up the deeds. If a usufruct has been settled in dowry, the husband or his heirs are bound, at the dissolution of marriage, to give up only the right of usufruct; but not the fruits which accrued during the marriage.

If the marriage has lasted ten years after the lapse of the term assigned for the payment of the dowry, the wife or her heirs may recover it after the dissolution of marriage, without being bound to prove that the husband had received it; unless it can be proved that he had unsuccessfully sued to obtain payment.*

If the marriage is dissolved by the death of the wife, the interest and fruits of the dowry to be returned go for the benefit of her heirs from the day of the dissolution. If it is dissolved by the death of the husband, the wife has the option of demanding the interest of the dowry during the year of mourning (*l'an du deuil*), or of claiming maintenance during the same period, at the expense of her husband's succession; but in both cases, her lodgings during the year and her mourning must be supplied to her by the succession, and without being deducted from interest due to her.

On the dissolution of marriage, the fruits of the real property in dowry are divided between the husband and wife, or their heirs, in proportion to the length of time the marriage lasted during the last year. The year in this case runs from the day on which the marriage was celebrated. The wife and

* This rule applies, under the dotal system, both to cases of *judicial* separation of property, and to cases of dissolution of marriage; *death.*

her heirs have no privilege for the recovery of the dowry over creditors having a prior mortgage.

If the husband was insolvent, and had no trade or profession when the father settled a dowry upon his daughter, the latter is only bound to return to her father's succession the right of action which she has against her husband for the recovery of her dowry. If the husband became insolvent after the marriage, or if he had a trade or profession which made up for the want of property, the loss of the dowry falls solely on the wife.

Paraphernalia.

All the wife's property that has not been settled in dowry, is her paraphernalia. If all her property consists of paraphernalia, and if there is no clause in the marriage contract that she shall share the expenses incident to marriage, the wife must contribute one-third of her income. The wife has the management and use of her paraphernalia; but she cannot dispose of such property, nor become party to a suit in respect of it, without the authority of her husband; or, on his refusal, without judicial authority.

If the wife gives her husband power to manage her paraphernalia, on condition of accounting to her for the fruits, he becomes as responsible as any other mandatory. If the husband has used the paraphernalia without such power, and without opposition on the wife's part, he is liable, at the dissolution of the marriage, or at the first request of his wife, for the existing fruits, but not for those which have been consumed up to that time. If the husband has used the paraphernalia in spite of his wife's opposition, he is accountable to her for all existing fruits, as well as for those which have been consumed.

A husband who uses the paraphernalia of his wife is bound by all the obligations of a usufructuary.

Consorts, in submitting to the dotal system, may nevertheless stipulate for community of property acquired by them, and such acquisitions are regulated in the manner previously stated.*

* See "Community by Agreement," page 182.

CHAPTER XIV.

OF SALE.

[*Code Napoléon*—Articles 1582-1707.]

Sale is a contract by which one party binds himself to deliver a thing, and the other binds himself to pay for it.

It may be made by authentic deed or under private signature. The sale is complete, and the purchaser becomes owner, as soon as the thing and the price have been agreed upon, although the thing has not been delivered nor the price paid.

A sale may be effected purely and simply, or under a suspensive or rescissory condition. It may also apply to two or more alternative things. In all cases sales are regulated by the general principles of contracts.

When goods are sold, not in bulk, but by weight, quantity, or measure, the sale is not complete, and the things remain at the risk of the vendor, till weighed, counted, or measured; but the purchaser may demand delivery, or damages for non-performance of the contract. If, on the contrary, goods have been sold in bulk, the sale is complete although the goods have not been weighed, counted, or measured. With respect to wine, oil, and other articles which persons are in the habit of tasting before buying, there is no sale until the purchaser has tasted and approved of them. A sale made on trial is always presumed to be made with a suspensive condition. A promise of sale is equivalent to a sale, where there is a mutual agreement of the two parties as to the thing and the price. If a promise of sale is made with earnest (*arrhes*), either of the contracting parties may annul it, by the party who gave the earnest forfeiting it, or by the party who received it, returning twice the amount.

The price of the thing sold must be determined and specified by the parties. It may, nevertheless, be left to the arbitration of a third person; but if such third party will not or

cannot value it, there is no sale. The expenses of deeds and other expenses incidental to the sale are borne by the purchaser.

Who may Buy or Sell.

All persons, except those prohibited by law, are capable of buying and selling.

A contract of sale cannot take place between husband and wife, except in the three following cases:—1. When one of the consorts, judicially separated, makes over his or her property to the other in payment of his or her claims.——2. When the property is made over by the husband to the wife, even not separated, for a legitimate cause, such as the re-investment of the wife's alienated realty, or of moneys belonging to her, if such realty or moneys do not fall into the community.——3. When the wife makes over property to her husband in payment of a sum she has promised in dowry, and where community has been excluded. Saving, in these three cases, the rights of the heirs of the contracting parties, if there is an indirect advantage to their prejudice.

The following persons, under pain of nullity of the sale, are forbidden to become purchasers, either personally or by *interposed* persons:—1. Guardians of property belonging to their wards.——2. Agents or mandatories.——3. Administrators of property belonging to parishes or public institutions.——4. Public officers intrusted with the sale of national property.

Judges, public prosecutors, registrars of a court of law, tipstaves, solicitors, special pleaders, and notaries cannot become transferees of suits, rights, and actions in litigation brought within the jurisdiction of the court in which they discharge their duties, under pain of nullity, costs, and damages.

Things which may be Sold.

Everything that is an object of commerce may be sold, unless its sale has been prohibited by a special law. The sale of a thing which does not belong to the seller is void. It may give ground for an action for damages against the vendor when the purchaser did not know that the thing belonged to another.

No one can sell the succession of a living person, even with his consent.

If, at the time of the sale, the thing sold has entirely perished, the sale is void. If only a part has perished, the purchaser has his option to abandon the sale, or to take the part that has not perished at its relative value.

Obligations of the Vendor.

The vendor is bound to explain clearly the obligations to which he binds himself. Every obscure or ambiguous agreement is construed against him. He is chiefly bound to two obligations, that of *delivering* and that of *warranting* the thing which he sells.

Delivery.

Delivery is the conveying a thing sold to the power and possession of the purchaser.

The obligation to *deliver* real property is fulfilled by the vendor when he has handed over the keys, in the case of a building; or the title-deeds, in the case of other realties. Delivery of personal property is effected either by handing it over, or by giving up the keys of the building which contains the goods; or, by the mere consent of the parties, if the thing cannot be taken away at the time of the sale; or, if the purchaser has it already in his possession.

The delivery of incorporeal rights is made either by handing over the deeds, or the *use* which the purchaser makes of them, with the consent of the vendor.

The expenses of delivery are chargeable to the vendor, and those of removal to the purchaser, if there is no stipulation to the contrary. The delivery must be made at the place where the thing was at the time of the sale, unless it is otherwise arranged. If the vendor fails to deliver within the time agreed upon, the purchaser may either demand the rescission of the sale or to be put in possession, if the delay occurred through the fault of the vendor. The vendor is liable for damages if an injury is sustained by the purchaser through non-delivery at the time agreed. The vendor is not bound to deliver the thing, if the purchaser has not paid the price of it,

unless the vendor has granted him time for payment. He is not bound to deliver, even if he has granted time for payment, if, subsequently to the sale, the purchaser has become bankrupt or insolvent, so that the vendor runs the risk of losing the price, unless the purchaser has given security to pay at the time appointed.

The thing must be delivered in the state in which it was at the time of sale. From the day of sale, all the fruits belong to the purchaser.

The obligation *to deliver* the thing comprises all its accessories, and all that is intended for its perpetual use. The vendor is bound to deliver the full measurement, as specified in the contract, subject to the following modifications:—If an estate has been sold, with a statement of its extent, at a certain rate by measurement, the vendor is bound to deliver to the purchaser, if he demands it, the measurement specified in the contract; and if such delivery is impossible, or the purchaser does not demand it, the vendor is compelled to accept a proportionate diminution of the price. On the contrary, if the measurement be larger than that specified in the contract, the purchaser has the option to pay for such excess, or he may rescind the contract if the excess be a twentieth over the specified measurement.

In all other cases, whether a certain and limited property is sold, or whether the sale applies to distinct and separate estates, or whether the measurement is first specified, or the thing first specified and the measurement afterwards, the specification of such measurement does not give ground for an additional price in favour of the vendor on account of the excess, nor in favour of the purchaser for any diminution of price on account of insufficiency, unless the difference between the real measurement and that specified in the contract is a twentieth more or less; regard being paid to the value of the whole of the thing sold, if there is no stipulation to the contrary.

Where there is ground for increase of price on account of excess of measurement, the purchaser has the option either of rescinding the contract, or paying the additional price, with interest. In all cases where the purchaser has a right to rescind the contract, the vendor is bound to refund, besides the price, if he has received it, the expenses of such contract.

The action of the vendor to obtain an additional price, and that of the purchaser to obtain a diminution of price, or the rescission of the contract, must commence within a year from the day of sale.

If two estates are sold by the same contract for one sum only, with a specification of the extent of each, and there is found more in one and less in the other, a set-off must be made.

Whether the loss or deterioration of the thing sold falls on the vendor or purchaser, is a question regulated by the rules of "Contracts or Obligations by Agreement."*

Warranty.

The warranty to which the vendor is bound towards the purchaser is twofold:—1. The peaceable possession of the thing sold.——2. The latent defects of the thing sold of a sufficient nature for the rescission of the contract (*vices rédhibitoires*).†

Warranty against Eviction.

Although, at the time of the sale, there has been no stipulation of warranty, the vendor is bound to guarantee the purchaser against any eviction he may suffer in whole or in part of the thing sold, or against encumbrances not declared at the time of sale. Contracting parties may, by private agreements, increase or diminish the extent of such obligation, and even stipulate that the vendor shall not be bound to any warranty. Although it is stipulated that the vendor shall not be bound to such warranty, he is nevertheless bound to a warranty against his own acts, and any agreement to the contrary is void. In like manner, when there is a stipulation excluding warranty, the vendor, in case of eviction, is bound to return the price, unless the purchaser knew at the time of the sale that there was a possibility of eviction, or had bought the thing at his own risk.

When warranty has been promised, or nothing stipulated about it, if the purchaser is evicted, he has a right to demand

* See page 135.

† *Vices rédhibitoires*:—Latent defects of a nature to set aside a contract of sale.

from the vendor:—1. Restitution of the price.——2. That of the fruits, when bound to return them to the party who evicts him.——3. The costs incurred in the action of warranty and those incurred in the action brought by the real claimant.—— 4. Damages and all expenses of the contract.

If at the time of eviction the thing sold has diminished in value, or is deteriorated either by the neglect of the purchaser or by an unforeseen event, the vendor is nevertheless bound to refund the whole of the amount paid; but if the purchaser has profited by the alterations which he has made, the vendor has a right to deduct from the price a sum equivalent to such benefit. If the thing sold has increased in value, even independently of the act of the purchaser, the vendor is bound to pay him the difference over the price of sale. The vendor is bound to indemnify the buyer, or cause him to be indemnified for all the repairs and improvements he has made in the estate.

If the vendor has sold the property of another in bad faith, he is bound to refund to the purchaser all expenses, even for ornamental improvements, which the latter has expended upon it. If the purchaser is evicted of a part only of the thing, and if the part is of such consequence that the purchaser would not have bought the property without it, he may have the sale rescinded. If, in the case of eviction of a part of an estate sold, the sale has not been rescinded, the value of such part is refunded to the purchaser, according to its value at the time of eviction, without regard to the amount for which the whole estate was sold, or whether its value had increased or decreased. If the property sold is encumbered with non-apparent and not-declared servitudes, and of such importance that it may be presumed that the purchaser would not have bought it if he had been informed of them, he may either have the sale rescinded, or claim an indemnity.

Other disputes respecting damages in favour of purchasers for the non-performance of sales are decided according to the rules specified under the title "Contracts and Obligations."*

Warranty against eviction ceases when the purchaser has been non-suited by a final judgment without having called his vendor to be party to the action, if the latter proves that there was sufficient ground for having the demand rejected.

* See page 133.

Warranty against Defects in the Thing Sold.

The vendor is bound to warrant against such latent defects in the thing sold that render it unfit for the use for which it was intended, or that diminish its usefulness so that the purchaser would not have bought it, or would not have given so large a price had he been aware of them. The vendor is not responsible for defects which are apparent, and which the purchaser might have seen himself; but he is responsible for latent defects, although unknown to him, unless it is stipulated that he shall not be bound by any warranty.

In the preceding cases, the purchaser has the option of returning the thing and receiving the sum paid, or of keeping it, and receiving back a part of the price; as may be settled by arbitration.

If the vendor was aware of the defects in the thing sold, he is not only bound to refund the sum paid, but he is also liable in damages to the buyer; if ignorant of the defects, he is only bound to refund the price and expense of the sale.

If the thing perishes in consequence of its defects, the loss falls upon the vendor, who must return the price, with damages, to the buyer; but a loss through unforeseen events is borne by the purchaser.

Actions to set aside a contract of sale on account of defects must be commenced by the purchaser without loss of time, according to the nature of the defects, and the uses and customs of the place. These actions are not admissible in sales ordered by a court of law.

Law of 20th May, 1838, respecting Defects in the Sale and Exchange of Domestic Animals.

Defects that may set aside a contract of sale are the following:—1. For a horse, donkey, or mule: Periodical inflammation of the eyes, epilepsy, glanders, consumption, jibbing, asthma, roaring, crib-biting, intermittent hernia, intermittent lameness caused by an old disease.——2. For the bovine species: Consumption, epilepsy, and diseases incident to bad calving, prolapsus of the vagina or of the uterus, when the two last have taken place at the domicile of the vendor.——3. For the ovine species: The rot in one animal may set aside a sale of the

whole flock. This action is only admissible when the flock has the mark of the vendor. Carbuncular diseases will set aside the sale of the flock only when, during the given time of warranty, the loss amounts to at least the fifteenth of the flock. In this case, also, the flock must have the vendor's mark.

Reduction of price is not admissible in the sale or exchange of domestic animals. An action (*rédhibitoire*) to set aside a sale must be commenced, without including the day of delivery, within thirty days in cases of periodical inflammation of the eyes or epilepsy; and within nine days in all other cases. If the delivery has been made, or the animals taken, within the specified time, to a distance from the domicile of the vendor, an extra day is granted for the distance of every thirty miles. In every case the buyer must, within the specified time, demand from the justice of peace of the place the appointment of one or more experts to report on the case, which is summarily adjudged.

If, during the specified time, the animal perishes, the vendor is not bound by warranty, unless the buyer proves that the loss of the animal arose from one of the specified diseases.

The vendor is not bound by warranty on account of the glanders of a horse, donkey, or mule, nor the rot for the ovine species, if he proves that the animal after delivery has been brought in contact with animals suffering from such diseases.

Obligations of the Purchaser.

The principal obligation of the purchaser is to pay the price on the day and at the place fixed. If not fixed, the purchaser must pay at the place and time of delivery.

The purchaser pays interest from the day of sale till payment, in the three following cases:—1. When it has been so stipulated at the time of sale.——2. If the thing sold and delivered produces fruits or other revenues.——3. When the purchaser has been summoned to pay. In the last case, interest only runs from the day of the summons.

If the purchaser is molested, or has just cause to dread an action on account of mortgage or counter-claim, he may withhold payment till the vendor has removed the disturbance; unless the latter gives surety, or unless it has been stipulated that the purchaser must pay notwithstanding the disturbance. If the

purchaser does not pay, the vendor may demand the rescission of the sale.

The rescission of a sale of real property is at once adjudged, if the vendor is in danger of losing both the property and the price; but if such danger does not exist, the judge may grant to the purchaser further delay according to circumstances; and if payment is not made by the time granted, the rescission of the sale is adjudged. If stipulated at the time of the sale that on failure of payment within the agreed time, the sale shall of right be rescinded, the purchaser may nevertheless pay after the lapse of the time, provided he has not been summoned to pay; but after such summons, the judge cannot grant a further delay.

If the sale applies to goods and personal effects, the sale is of right rescinded without summons, after the expiration of the time fixed for taking them away.

Nullity and Cancelling of Sales.

Besides the causes for nullity and rescission common to contracts already explained, the contract of sale may be rescinded by power of redemption and by insufficiency of price.

Power of Redemption.

The power of redemption* is a stipulation by which the vendor reserves for himself the right of taking back the thing sold, on his returning the price to the buyer, and refunding the expenses of sale and other expenses hereafter explained. The power of redemption cannot be stipulated for a term exceeding five years; if stipulated for a longer term, it is reduced to five years, and cannot be extended by the court. This term runs against all persons, even minors; saving the remedy of the latter against their guardians.

A vendor with covenant of redemption may bring his action against a second purchaser, even though the power of redemption has not been declared in the second contract. A purchaser, with covenant of redemption, exercises all the rights of his vendor, and may claim prescription both against the real owner and third parties who set up rights or mortgages

* *La faculté de rachat ou réméré.*

against the thing sold. He may also insist upon the seizure and sale of the property of his vendor by the vendor's creditors (*bénéfice de discussion*).*

If the purchaser, with covenant of redemption, of an undivided portion of an estate becomes, in consequence of an action in *licitation* against him, the purchaser of the whole property, he may compel the vendor who wishes to exercise his power of redemption to redeem the whole. If several persons sell conjointly and by a single deed an estate common to them all, each can only exercise his right of redemption for the part which belonged to him. It is the same if one seller of an estate leaves several heirs; each of the co-heirs can only exercise the right of redemption for the part which he takes in the succession; but in these two cases the purchaser may compel all the co-vendors or co-heirs to be parties to the suit, in order that they may agree between themselves for the redemption of the whole estate; and if they cannot agree, the petition is dismissed.

If the sale of an estate belonging to several persons is not made conjointly of the whole property, and if each has sold his separate portion, each may sue in redemption for his share, and the purchaser cannot compel the litigant to redeem the whole. If the purchaser leaves several heirs, the action in redemption can only be instituted against each for his share when undivided, or when the thing sold has been divided between them; but if there has been a partition of the estate, and the thing encumbered with redemption has fallen to the lot of one of the heirs, the action in redemption may be brought against him for the whole.

The vendor who exercises his right of redemption must refund, not only the purchase-money, but also pay the expenses and legal costs of the sale, necessary repairs, and expenses incurred for the improvement of the estate. He cannot enter into possession till he has satisfied all such claims.

When the vendor re-enters upon his estate by virtue of the covenant of redemption, he takes it exempt from all charges and mortgages with which the purchaser may have encumbered it; but he is bound to abide by leases granted, without fraud, by the purchaser.

* The right of the purchaser to insist upon the vendor's goods being seized and sold before the action of redemption is brought against himself.

Rescinding of Sale on Account of Lesion.

If a vendor has been wrongfully deprived of more than seven-twelfths of the price of an estate, he has a right to demand the rescission of the sale, even when, in the contract, he has expressly renounced his right to rescission, and although he declared that he considered the excess was a gift. To ascertain whether the lesion is more than seven-twelfths, the estate must be valued according to its condition and value at the time of sale. The demand must be made within two years from the day of sale. Married women, absentees, interdicted persons and minors, in the right of vendors of full age, are bound by the same term, which runs during the time stipulated for redemption.

Proof of lesion can only be admitted on weighty grounds by the judgment of the court.

When the action of rescission is admitted, the purchaser has the option of either returning the thing on receiving the price he has paid, or of keeping the property by paying the excess, a deduction being allowed of a tenth of the whole price. A third party in possession has the same right, saving his warranty against his vendor.

If the purchaser keeps the thing by paying the surplus, he is bound to pay the interest of the surplus from the day of the demand for rescission. If he prefers giving it back and receiving the price, he must return the fruits from the day of the demand.

The interest of the price he has paid must be made good to him from the day of the demand; or, from the day of payment if he has not had any fruits.

Rescission for lesion cannot be demanded by the purchaser nor set up against a sale when ordered by a court of law.

The rules above explained in cases of redemption where several persons have sold conjointly or separately, and where the vendor or purchaser has left several heirs, likewise apply to cases of actions in rescission.

Sale by Licitation.*

If a thing in common cannot conveniently and without loss

* Sale by public auction, ordered by the court, of property belonging to joint owners, or co-heirs.

be divided; or if in a partition, made by agreement, of common property, there is a certain lot which none of the joint-owners is able or willing to take, it is sold by auction, and the price is divided between the co-proprietors. Each of the joint-owners has a right to demand that strangers may be admitted to the auction; but they are necessarily admitted when one of the co-proprietors is a minor.

Transfer of Claims and other Incorporeal Rights.

On the transfer of a debt, or of a right, or of an action against a third party, the delivery between the transferror and the transferree is effected by handing over the securities. The transferree is not seized as regards third parties till he has given notice of the transfer to the debtor. Nevertheless, the transferree may be likewise seized by the acceptance of the transfer by the debtor in an authentic deed. If the debtor has paid the transferror before the transferror or transferree has given notice of the transfer to the debtor, the latter is validly discharged.

The sale or transfer of a claim comprises the accessories, such as securities, privileges, and mortgages. He who sells a claim or other incorporeal right must warrant that it exists at the time of the transfer, although such warranty may not have been mentioned in the deed. He is not answerable for the solvency of the debtor except when he binds himself, and that only to the amount of the sum he received for the claim. When he binds himself for the solvency of the debtor, the warranty applies only to his solvency at the time of sale; not for his future solvency, unless so stipulated.

An heir who sells an heirship without specifying the property, is only bound by law to warrant his right as heir. If he has already received the fruits or revenues of an estate, or received any debts belonging to the inheritance, or sold any effects belonging to the succession, he is bound to refund them to the purchaser; if not expressly reserved at the time of sale. The purchaser, on his part, is bound to reimburse the vendor for all debts and liabilities of the succession which the latter has paid, and all that was due to him; unless stipulated to the contrary.

A person against whom a disputed right has been transferred

may be discharged, in regard to the transferree, by refunding the actual price of the transfer, with expenses and lawful costs and interest, from the day that the transferree paid it.

The rule respecting refunding the price of the transfer to the transferee ceases :—1. When the transfer has been made to a co-heir or co-proprietor of the right transferred.——2. When it has been made to a creditor in payment of a debt.——3. When it has been made to the possessor of the estate subject to the contested right.

Exchange.

Exchange,[77] or barter, is a contract by which the parties respectively give one thing for another. It is effected, as in the case of a sale, merely by consent. If one of the parties, after having received the thing given to him in exchange, proves that the other party was not the owner of such thing, he cannot be compelled to deliver that which he has promised, but only to return the thing which he has received. A party who is evicted of the thing he has received in exchange has the option of demanding damages, or of recovering the thing he has given in exchange.

Rescission, on the ground of lesion, is not admissible in contracts of exchange. All the other rules prescribed for contracts by sale apply to barter or exchange.

[77] *Excambium*, the reciprocal transfer of property, *ejusdem generis.*

CHAPTER XV.

OF THE CONTRACT OF HIRING (LOUAGE).

[*Code Napoléon*—Articles 1708-1778.]

THERE are two kinds of contracts of hiring: — Hiring of *things*; hiring of *work*.

The hire of *things* is a contract by which one party binds himself to give to another the use of a thing for a certain time and for a consideration, which the other is bound to pay. The hire of *work* is a contract by which one party binds himself to *do* something for the other for a price agreed upon between them.

These two kinds of hiring are subdivided thus:—1. Hiring of houses and personal property, called *bail à loyer* (letting). ——2. Of rural property, *bail à ferme* (leasing).——3. The hire of work or service, *loyer* (hire).——4. Hiring of cattle, *bail à cheptel*; the hiring of animals, the profit of which is divided between the owner and him to whom they are intrusted.—— 5. Estimates, bargains, or stated prices to undertake a work are also a contract of hiring, when the materials are supplied by the party for whom the work is to be done.

The three last are subject to particular rules, so are the leases of national property and property belonging to parishes and public institutions.

Leasing and Hiring of Things.

All kinds of property, personal or real, may be leased, let, or hired, and this contract may be effected either verbally or by writing. If a lease, made verbally, has not been carried out, and one of the parties denies it, proof by witnesses is not admissible, however low the price; and although it is alleged that *earnest* (*arrhes*) was given. The party who denies the hiring may be put upon his oath. When disputes arise about the

price of a verbal lease which has commenced, and no receipt has been given, the landlord is believed on his oath, unless the tenant demands a valuation by experts, in which case he is chargeable for the costs of such valuation, if it exceeds the price he has declared. A tenant has a right to sub-let, and even to transfer his lease to another, if there is no clause in the lease to the contrary.

The rules established under the titles of "Marriage Contract," and "The Respective Rights of Husband and Wife," relating to leases of property belonging to married women, are applicable to leases of property belonging to minors.

A lessor is bound by the nature of the contract, without any special stipulation :—1. To deliver to the lessee the thing leased.——2. To maintain the thing in a fit condition for the use for which it has been leased.——3. To give peaceable enjoyment of the thing during the continuance of the lease.

A lessor is bound to deliver the thing in a good state of repair; and he must, during the continuance of the lease, make all necessary repairs other than those which are chargeable to the lessee. The lessor is responsible to the lessee for all faults and defects in the thing leased, which may prevent the use of it, whether known to the lessor or not at the time of granting the lease. If from such faults or defects any loss results to the lessee, the lessor is bound to indemnify him. If during the lease the thing leased is entirely destroyed by accident, the lease is absolutely cancelled; if only destroyed in part, the lessee may, according to circumstances, demand either a reduction of the rent or the cancelling of the lease. In both cases, there is no ground for indemnification.

A lessee cannot, during the continuation of his lease, alter the form of the thing leased or let. If during the lease the thing requires urgent repairs, which cannot be deferred to the end of the term, the lessee must submit to them, whatever inconvenience they may cause, even if deprived of a part of the thing leased; but if such repairs take more than forty days to complete, a reduction of rent is made proportionately to the time and the extent of the thing leased of which he has been deprived. If the repairs are of such a nature as to render the house uninhabitable for his family, he may have his lease cancelled.

A lessor is not bound to guarantee a lessee against a disturbance of enjoyment by third parties who have no claim to the thing leased; the lessee has his own remedy against such parties; but if the tenant has been disturbed in his enjoyment in consequence of an action respecting the ownership of the property, he is entitled to a reduction of rent, provided the lessee gives due notice of the disturbance to the lessor. Upon any action brought by parties claiming a right to the thing let, or if the lessee is summoned before a court of law in an action of ejectment, he can be dismissed from the suit by giving the name of the lessor.

The two principal obligations of a lessee are :—1. To use the thing leased in a proper manner, for the purposes specified in the lease; or, in default of an agreement, according to the purpose for which it was let.——2. To pay the rent at the time agreed upon.

If the lessee uses the *thing* for another purpose than that for which it is intended, and by which injury may arise to the lessor, the latter may, according to circumstances, have the lease cancelled. If an inventory of fixtures has been taken by the lessor and lessee, the latter must return the thing leased according to such inventory, due allowance being made for unforeseen circumstances and fair wear-and-tear. If no inventory has been taken, the lessee is presumed, saving proof to the contrary, to have received the premises in good repair, and must give them up in the same condition. The lessee is responsible for deteriorations or losses which may happen during his tenancy, unless he can prove that they occurred without his fault. He is responsible in case of fire, unless he can prove that the fire was accidental, or caused by defects in the building, or that the fire was communicated from a neighbouring house. If there are several tenants, all are jointly and severally responsible for fire, unless they can prove that the fire originated in the dwelling of one of them, in which case the latter is alone responsible; or unless they can prove that the fire could not originate in their dwellings, in which case they are not held responsible.

A lessee is responsible for deteriorations and losses caused by his family or sub-tenants.

If the lease is verbal, one of the parties must give the other notice according to the custom of the place.

A lease in writing expires absolutely at the time named, with-

out the obligation of giving notice. If, at the expiration of a written lease, the lessee remains, and is left in possession, a new lease commences, which is regulated by the rules relating to verbal leases previously stated. When notice has been given, a lessee, although he may have remained in possession, cannot claim an implied renewal of his lease.

In the last two cases, security given for rent during the lease does not extend to after-obligations.

A contract of *hiring* is cancelled by the loss of the thing hired, or by the lessor and lessee not fulfilling their respective engagements. The contract of hiring is not rescinded by the death of the lessor or lessee.

If the lessor sells the thing leased or let, the purchaser cannot eject the tenant who has an authentic lease, or a lease of which the date is certain, unless such right is reserved in the lease. If in the lease it is agreed that in case of sale the purchaser may eject the tenant, and no stipulation is made with regard to damages, the lessor is bound to indemnify the tenant in the following manner:—If it is a house, apartment, or shop, the lessor must pay to the evicted tenant damages equal to the rent payable during the time which, according to the usage of the place, is allowed between notice and quitting. If it is rural property, the lessor must pay the tenant an indemnity of a third of the price of the lease for the remainder of the time it has to run. The indemnity is estimated by valuers when it applies to manufactures, mills, or other establishments which require large capital.

A purchaser who wishes to use the power reserved in the lease of ejecting the tenant in case of sale, is bound to give the tenant the customary notice to leave; and if a farmer, one year's notice at least.

Tenants cannot be ejected until paid by the lessor or the new purchaser the above-stated indemnity.

If the lease is not authentic, or has not an ascertained date, the purchaser is not liable for indemnity. A purchaser with covenant of redemption cannot eject the tenant until, by the expiration of the fixed time for the redemption, he has become absolute owner.

Particular Rules relating to Letting Houses.

A tenant who does not sufficiently furnish his house may be

ejected, unless he gives good security for the rent. An under-tenant is not liable to the landlord, except for rent which may be due by him at the time of the distress; but he cannot set up a plea for what he may have paid in advance. Payments by an under-tenant, either in consequence of a stipulation in his lease or of the usage of the place, are not deemed to be payments in advance.

A tenant's repairs, for which he is responsible, if there is no clause to the contrary, are regulated by the custom of the place, and among others, are:—1. The repairs of hearths, chimney-backs, jambs, and chimney-pieces.——2. The plastering of the bottom of the walls 3 ft. above the flooring.——3. Replacing flags and tiles of the floor when only some are broken.——4. Replacing panes of glass, unless broken by hail or fortuitous circumstances.——5. Repairing doors, casements, shutters, hinges, bolts, and locks.

The tenant is not responsible for fair wear-and-tear, or for accidents. The cleansing of wells and cesspools is chargeable to the lessor, if there is no stipulation to the contrary.

The letting of furniture to furnish a house, a set of lodgings, a shop, or any apartment, is deemed to be made for the ordinary term of the leases of houses, lodgings, shops, or other apartments, according to the custom of the place.

The letting of a furnished apartment is deemed to be made for a year when it is let at so much a year; for a month, when let at so much a month; or a day, if let for so much a day; and if there is nothing to show that the letting was made at so much a year, month, or day, the term of letting is deemed to have been made according to the custom of the place.

If the tenant of a house or an apartment holds over possession after the term specified in his written agreement, without opposition on the part of his landlord, he is deemed to occupy it on the same conditions for the period fixed by the usage of the place, and he cannot quit nor be ejected until after notice is given according to the said custom. If the contract is cancelled by the fault of the tenant, he is bound to pay rent till the house is relet; without prejudice to the recovery of damages for non-performance of contract.

A landlord cannot put an end to a tenancy, although he declares his intention of occupying the house himself, without an agreement to the contrary. If it has been agreed that the

landlord may enter and occupy his house, he is nevertheless bound to give the notice required by the custom of the place.

Special Rules relating to Farm-Letting.

A party who cultivates land on condition of sharing the produce with the landlord (*colon-partiaire* or *métayer**) can neither sub-let nor transfer his lease, unless such a power has been expressly stipulated in the lease. In case of infringement, the landlord may enter into possession and recover damages for non-performance of the lease. If, in the letting of a farm, the lands have been declared less or greater in extent than they really are, there is no ground for increasing or diminishing the price of the rent, except in the cases and according to rules expressed under the title "Of Sales."†

If the tenant of a rural estate does not stock the farm with cattle and implements sufficient for its cultivation; if he abandons its cultivation, or does not cultivate it in a husband-like manner; if he uses the thing let for any other purpose than that for which it was intended; or in general, if he does not perform all the clauses of the lease, and the lessor is injured by his neglect, the lessor may have the lease cancelled, and recover damages from the lessee.

Every tenant of a rural estate is bound to store his harvest in the places for this purpose specified in the lease. He is bound, under penalty of costs and damages, to give notice to the lessor of any encroachments that may be made on his grounds. Such notice must be given within the time that regulates a summons—according to the distance of the place.

If the lease is made for several years,‡ and if during the continuance of the lease the whole or a moiety of the crop is destroyed by some unforeseen event, the tenant may demand a reduction of his rent, unless he was sufficiently remunerated by the previous harvest. If not so remunerated, the valuation of the abatement can only take place at the end of the lease, when a balance is struck for all the term of possession; never-

* For explanation, see page 67.

† See page 194.

‡ Leases in France are usually for a duration of three, six, or nine years, the rent being payable at each quarter or *terme;* these are January, April, July, and October.

theless, the judge may provisionally exempt the tenant from paying a part of the rent on account of the loss sustained.

If the lease is for one year only, and the harvest, or at least the moiety, has been lost, the tenant is released from a proportionate part of the rent, but he cannot claim any abatement if the loss is less than a moiety; nor can he claim a reduction when the loss happens after the crops are cut, unless the landlord is entitled by the lease to a share of the produce, in which case the lessor must sustain his share of the loss, provided the tenant had not received notice to deliver the landlord's portion. The tenant is not entitled to an abatement when the cause existed and was known at the time of the making of the lease. He may be made responsible for unforeseen events by express stipulation, but such stipulation is only understood to apply to ordinary accidents, such as hail, lightning, frost, blight. It does not include extraordinary accidents, such as the devastations of war or inundation, to which the country is not ordinarily subject, unless the tenant has made himself responsible for all foreseen or unforeseen events.

A verbal letting of a rural estate is deemed to be made for the time necessary for the lessee to gather in all the fruits of the estate. Thus the letting of a meadow, a vineyard, or of any land, the produce of which is entirely gathered in the course of the year, is deemed to be made by the year; a lease of arable lands, when divided into breaks, is deemed to be made for as many years as there are breaks; a lease of rural estates, if verbal, ceases absolutely at the expiration of the term for which it is deemed to be made, according to the above rules.

If at the expiration of a written lease of rural property the lessee remains, and is suffered to retain possession, a new lease begins which is regulated by the same rules.

A lessee, on quitting, must leave his successor suitable accommodation, and other facilities for working the farm during the following year; and reciprocally, the incoming tenant must supply the outgoing tenant with similar accommodation for the consumption of his fodder and for getting in the crops. In either case, the custom of the place must be observed. The outgoing tenant must also leave the straw and manure of the year, if he received the like when he took possession; and when he has not received them, the lessor may retain them by paying their value.

CHAPTER XVI.

THE HIRING OF LABOUR AND SKILL.

[*Code Napoléon*—Articles 1779-1831.]

There are three principal kinds of hiring of labour and skill: —1. The hiring of workmen who engage themselves in the service of an employer.——2. Carriers.——3. Contractors.

The Hiring of Servants* and Workmen.

A man cannot bind himself to give his services, except for a term, or for a given undertaking.

The Act of February 22, 1851, regulates the Contract of Apprenticeship, which is in reality a particular hiring of services, and is now of great importance.[78]

A contract of apprenticeship is that by which an artificer, or the overseeer of a workshop, or even a workman, binds himself to teach his profession, trade, or mystery to another person, who binds himself to work for him on the conditions and for the time agreed upon. Such contract may be made by an authentic deed or under private signature. It may also be made verbally, but proof by witnesses is not admitted when the premium for taking the apprentice exceeds the sum of 150 francs.

Notaries, secretaries of the *Prudhommes* † courts, and regis-

* *Le domestique*, is a servant on wages who lives with his master, attends to the household, or to husbandry. *Un ouvrier*, is a workman or mechanic, who has his private abode, and is paid for the amount of his services.

† *Prudhommes:* a special jurisdiction composed of merchants, manufacturers, overseers, and workmen, selected from each trade, who settle all disputes between the employer and the employed. The *Prudhommes* were instituted by Statute of 18th March, 1806.

[78] Apprenticeships were altogether unknown to the ancients. The Roman law is perfectly silent with regard to them.

trars of the justice of peace may execute contracts of apprenticeship. The deed must contain:—1. The Christian and surname, age, domicile, and trade of the master.——2. Christian and surname, age, and domicile of the apprentice.——3. The names, trades, and domiciles of the father and mother, or of the guardian, or of the persons authorised by the family, and in default, by the justice of peace.——4. Date and duration of the contract.——5. Conditions.

The contract must be signed by the master and by the representatives of the apprentice. No master under twenty-one years of age can take an apprentice who is a minor, and a master cannot, if unmarried or a widower, lodge in his house apprentice-girls who are minors.

Masters who have been convicted of felony, or sentenced for misdemeanour to more than three months' imprisonment, are forbidden to take apprentices, unless authorised by the Prefect, when they have lived three years in the same place after the term of their imprisonment.

A master must act as a *bon père de famille* towards his apprentice, and look after his morals and conduct; and if he misconducts himself, or if he becomes ill, or absents himself, or any other cause arises that renders the parents' interference necessary, the master must apprise them of the fact. A master can only employ his apprentice in the trade for which he was engaged, and must never engage him to work beyond his strength. An apprentice under fourteen years of age must not work more than ten hours a day; from fourteen to sixteen, not more than twelve hours; and apprentices under sixteen years of age are not to be employed at night-work, nor are they bound to work on Sundays or legal holidays.

If an apprentice under sixteen years of age cannot read, write, and cypher; or, if he is deficient in religious instruction, the master is bound to allow him two hours a day from his work for educational purposes.

An apprentice is bound to be faithful, obedient, and respectful to his employer, and to work for him to the best of his strength and ability; and if he has been absent or ill for more than a fortnight at one time, he must make up for the loss of time after the completion of the apprenticeship.

A master is bound to instruct his apprentice in the art, trade, or calling to which the apprentice is bound in an effi-

cient manner, and at the expiration of the term of apprenticeship he must give him a certificate that the contract has been duly performed.

Any party who takes away an apprentice from his master and employs him is liable to be fined in the whole or part of the indemnity to which the master is entitled.

Cancelling the Contract.

The first two months of an apprenticeship are deemed a time of trial, during which either of the contracting parties may cancel the contract, without indemnification.

A contract of apprenticeship is cancelled :—1. By the death of the master or of the apprentice.——2. When the master or apprentice is called to military service.——3. When the master or apprentice is convicted of felony or misdemeanour. ——4. Girls under age, when the wife of the master, or the housekeeper who managed the house at the time of the contract, dies.

The contract may also be cancelled :—1. By one of the parties failing to fulfil his engagement.——2. By a serious infraction of the provisions of this Act.——3. Continued misbehaviour of the apprentice.——4. By the master changing his residence to another parish, if the demand for cancelling is made within three months.——5. By the master or apprentice being convicted of a misdemeanour, and sentenced to more than a month's imprisonment.——6. By the marriage of the apprentice.

If the duration of the apprenticeship exceeds the time fixed by the custom of the place, it may be reduced, or the contract cancelled.

All demands for performance or cancellation of the contract must be brought before the Court of *Prudhommes;* or in default, before the justice of peace.

Carriers.

Carriers by land or water are answerable for the safe-keeping and preservation of all things entrusted to them, and are subject to the same obligations as an innkeeper. They are

answerable not only for all that they have already received in their vessels or vehicles, but also for what has been delivered to them in the harbour, or in the docks, to be placed in their ships or vehicles. They are answerable for the loss or damage of things entrusted to them, unless they can prove that such loss or damage arose by a fortuitous occurrence or main force.

Carriers by land or water and public waggoners must keep a register of the money, goods, and parcels that are entrusted to them. The managers and directors of public conveyances, masters of barges and ships, are, moreover, subjected to special regulations, which determine the law between them and the public.

Estimates and Bargains.

When a party undertakes to do a certain work, it may be agreed that he shall only give his labour or skill; or further, that he shall also supply materials. If, when the workman supplies the materials, the thing happens to perish, from whatever cause, before being delivered, the loss falls on the workman, unless the employer has had legal notice to receive the thing. When the workman only gives his labour or skill, and the thing perishes, the workman is only answerable for his own fault. If the thing perishes without any fault of the workman before the work has been delivered, and without the employer having received legal notice to examine it, the workman cannot claim wages, unless the thing perished on account of the materials being defective.

If the work is composed of different parts, or done by measurement, examination may be made in parts, and such is deemed to have taken place for all the parts paid for, if the employer pays the workman as the work is done.

If a building, erected at a stated price, perishes in whole or in part from a defect in construction, or even from a defect in the ground, within ten years, the architect and the builder are responsible. When an architect or builder undertakes the construction of a building by contract, according to a plan stated and agreed upon by the owner, he cannot claim any increase of price upon the ground of an increase of labour, or of materials, or on account of alterations or additions, unless such alterations

or additions have been ordered in writing, and the price agreed upon with the owner.

An owner may cancel at his own pleasure a contract, although the work has been begun, by indemnifying the builder for all his expenses and work done, and for all that he might have gained by such undertaking. A contract of hiring of work is cancelled by the death of the workman, or that of the architect or builder; but the owner is bound to pay the heirs of the deceased party, in proportion to the price fixed in the contract, the value of the work done and materials prepared; if such work and materials are useful to the owner.

A builder is answerable for the acts of the men whom he employs. Bricklayers, carpenters, and other workmen who have been employed in the construction of a building or other works, taken by contract, have no right of action against the party for whom the work is done, except for the amount due by him to the builder at the time their action was brought. Masons, bricklayers, carpenters, locksmiths, and other workmen, who undertake work by contract, are bound by the rules prescribed in this section, and are considered builders with respect to the work they undertake to do.

Letting Cattle.

*Du bail à cheptel** is a contract by which one of the parties gives to the other a stock of cattle to keep, feed, and take care of, upon conditions agreed between them.

There are several kinds of *cheptels*:—1. Simple or ordinary *cheptel.*——2. *Cheptel* by moieties.——3. *Cheptel* given to a farmer or to a *colon-partiaire.*† There is also a fourth kind of contract, improperly termed *cheptel.*

Every kind of animal that increases, or by which a profit in agriculture or trade is derived, may be so let. In default of special agreements, these contracts are ruled as follows:—

I.—Simple "Cheptel."

A simple *cheptel* is a contract by which one person gives to another cattle to keep, feed, and take care of, on condition that

* *Du bail à cheptel*: Lease of cattle by sharing profits.

† For explanation see page 220.

the *cheptellier* or hirer shall have the moiety of the increase, and that he shall also sustain a moiety of the loss. An estimation of the value of the *cheptel* given in the lease does not transfer the ownership to the *cheptellier;* its object is only to ascertain the loss or profit which may result at the expiration of the hiring.

The *cheptellier* must exercise due care in the preservation of the cattle intrusted to him. He is not answerable for accidents, unless they arise from his own fault. In case of dispute, the *cheptellier* is bound to prove that the accident was unforeseen, and the owner is bound on his part to prove that the accident arose from the fault of the *cheptellier*. The *cheptellier*, who is exonerated in the case of an unforeseen accident, is, nevertheless, bound to account for the skins of the animals. If the stock perishes entirely, without the fault of the *cheptellier*, the whole loss falls upon the owner. If a part only perishes the loss is borne in common, being regulated by the amount of the original valuation, and that of the valuation at the expiration of the term of hiring.

It cannot be stipulated that the *cheptellier* must bear the total loss of the stock arising from an unforeseen accident, and without his fault; or that he must bear a much larger share in the loss than in the gain; or that the owner shall take, at the close of the hiring, from the stock more than he has supplied. All agreements to the contrary are void.

The *cheptellier* has the entire benefit of the milk, manure, and the labour of the animals given in hire. The wool and the increase are divided. Neither the owner nor the *cheptellier* can dispose of any beast, whether of the stock or the increase, without the consent of the other.

When cattle are given in *cheptel* to the tenant of another landlord, notice of the hiring must be given to the latter, who otherwise may seize the stock, and have it sold for what his tenant owes him.

A *cheptellier* cannot shear the flock without giving notice to the owner.

If no term is fixed by the contract for the duration of the hiring, it is deemed to have been made for three years. The owner may demand that it be put an end to sooner if the *cheptellier* does not fulfil his obligations. At the end of the hiring, or at the time of its being put an end to, a fresh valuation of the stock is made. The owner may first select beasts of each kind,

to the amount of the original valuation, and then the excess is divided. If there are not beasts enough to satisfy the original valuation, the owner takes the whole, and the parties share the loss between them.

II.—"Cheptel" by Moiety.

Cheptel by moiety is a partnership to which each of the contracting parties supplies a moiety of the cattle, which remain in common for profit or loss. The *cheptellier*, as in simple *cheptel*, alone has the benefit of the milk, manure, and the labour of the cattle. The owner has only a right to a moiety of the wool and a moiety of the increase of stock.

Every agreement to the contrary is void, unless the owner is the landlord of the farm of which the *cheptellier* is tenant, or *colon partiaire.* All the other rules of *simple cheptel* apply to *cheptel* by moiety.

III.—"Cheptel" Given by the Owner to his Farmer or "Colon-Partiaire."

This *cheptel* (also called *cheptel de fer*) is that by which the owner of a farm lets it on condition that at the expiration of the lease, the tenant shall leave cattle of a value equal to the estimated price of those which he received. A valuation of *cheptel*, as previously stated, does not confer ownership upon the lessee, but it makes him responsible for all risks. All the profits belong to the tenant during the continuance of the lease, if there is no stipulation to the contrary. In *cheptels* granted to a tenant, the manure is not his personal profit, but it belongs to the farm, for the husbandry of which it ought solely to be used. The loss by accidents, even if total, falls entirely on the tenant, if there is no stipulation to the contrary.

At the termination of the lease, the tenant cannot keep the stock of beasts (*cheptel*) by paying the original valuation; he must leave a stock of an equal value to that which he received. If there is a deficiency, he must make it good; the excess only belongs to him.

"Cheptel" Given to a "Colon-Partiaire."

If the *cheptel* granted to a *colon-partiaire* wholly perishes with-

out his fault, the loss is borne by the owner. It may be stipulated that such *colon-partiaire* must give up to the owner his share of the wool at a lower price than the market value; that the owner shall have a greater share of the profit; that he shall have the half of the milk; but it cannot be stipulated that the *colon-partiaire* shall bear the whole loss.

This hiring of cattle terminates with the lease of the farm, and it is governed by all the regulations of *simple cheptel.*

Contract improperly called "Cheptel."*

When one or more cows are given to be housed and fed, they remain the property of the owner. The only profits which he has are the calves produced by them; the *cheptellier* or hirer is entitled to the benefit of the milk, manure, and labour of the cattle.

* The word "*cheptel*" is sometimes used for the cattle leased, and sometimes for the lease itself. The lessee is called the *cheptellier*. This contract is a hiring and a kind of partnership. Formerly it was a common custom in various French provinces, but now very seldom practised.

CHAPTER XVII.

OF PARTNERSHIP.

[*Code Napoléon*—Articles 1832-1873.]

Partnership is a contract by which two or more persons agree to put something in common, with the view of sharing the profits which may arise from it. Every partnership must have a lawful object, and it must be contracted for the common interests of the parties. Each partner must bring into the partnership either money or other property, or his skill.[79]

All deeds of partnership must be made in writing when the object of the partnership is of a value exceeding one hundred and fifty francs. Proof by witnesses is not admitted against or beyond that which is contained in the deed of partnership; nor is it admitted on what may be alleged to have been said before, at the time, or subsequently to such deed, although it is a question of a sum or value less than one hundred and fifty francs.

Different Kinds of Partnerships.

Partnerships are either *general* or *special*.

General partnerships are of two kinds—1. A partnership of all present property.——2. A general partnership of profits.

A partnership of all *present property* is that by which the

[79] The *Institutes* distinguish two kinds of partnerships:—1. *Totorum bonorum*, which included all the goods, present and future, of the partners.——2. *Alicujus negotiationis*, extending only to a particular business, and the profits or losses thereof. The *Digest* mentions three other forms of partnership.——3. *Universorum quæ ex quæstu veniunt* of acquisitions by the industry of the partners, and therefore not including gifts, legacies, or successions.——4. *Rei unius*, when one or more particular things are held in common.——5. *Vectigalis*, a partnership formed for farming the public revenues.

parties *put in common* all the real and personal property that they possess, and the profits which they may derive from such property. They may also include any kind of gain; but property which may accrue to them by succession, gift, or legacy is not included, except as regards its *use*. Every stipulation tending to make the ownership of such property accrue to the partnership is prohibited; except between husband and wife, in accordance with the rules which apply to them.

A *general partnership of profits* includes all that the parties may acquire by their skill or industry, in whatever manner, during the time of the partnership. The personalty which each of the partners possesses at the time of the contract is included, but their real property is only included so far as its *use* is concerned.

A simple contract of general partnership made without specification implies only a general partnership in the gains. No *general* partnership can take place, except between persons respectively capable of giving and receiving from each other, and to whom it is "not prohibited" to take or give advantages to the prejudice of other persons.*

Special Partnerships.

Special partnerships are those which apply only to certain determinate things, or to their *use*, or to *fruits* arising from them.

A contract by which several persons enter into partnership, either for a definite undertaking, or for carrying on a trade or profession, is also a special partnership.

The Respective Obligations of Partners.

A partnership begins at the time the deed is made, if no other period is fixed. If there is no agreement respecting the duration of the partnership, it is deemed to continue for the whole life of the partners, subject to rules hereafter stated; † or, if it

* For instance, a father is forbidden to enter into a *general* partnership with his illegitimate child, and even with a legitimate child when he has other children, because it might be considered as a fraudulent gift in favour of the one admitted into partnership to the prejudice of the other children. He may, however, enter into a special partnership.

† See "Dissolution of Partnership," page 226.

applies to a business of which the duration is limited, for all the time that such business lasts.

Each partner is a debtor to the partnership for all that he has agreed to put into it. When such share consists of a certain thing, and the partnership is dispossessed of it, the partner who brought it is a warrantor to the partnership in the same manner as a vendor is to a purchaser. A partner who ought to have brought a sum into the partnership, and who has not done so, becomes debtor for the interest of such sum, from the day when it ought to have been paid. The same applies to sums which he has drawn for his private use from the funds of the partnership; without prejudice to an action for damages.

Partners who bind themselves to bring their skill or industry into the partnership must put into it all the gains which they may derive from the industry which forms the object of the partnership.

When one of the partners is personally a creditor for a sum due by a person who is also a debtor of the partership for a sum likewise due, the amount he receives from such debtor must be paid to the credit of the partnership and to himself in equal proportions to their respective amounts, although he has, by the receipt, carried the whole to his personal credit; but if in the receipt he has stated that the payment was wholly made to the partnership, he is bound by such statement. When a partner has received the whole of his share of a common debt, and the debtor subsequently becomes insolvent, such partner is bound to return to the partnership what he has received, although he had given a receipt specially for his own share.

Each partner is liable to the partnership for damages arising from his faults, without being allowed to compensate such damages by the profits which his skill or industry has brought him in other transactions.

If the things, the *use* only of which has been put into the partnership are certain and determinate, and are not consumable by use, they remain at the risk of the partner who owns them; but if the things are consumable by use, susceptible of deterioration by keeping, intended for sale, or are brought into the partnership at a fixed valuation, confirmed by inventory, they are at the risk of the partnership. If the thing has been valued, the partner can only claim the amount of the valuation.

A partner has a right of action against the partnership, not

only for sums disbursed by him for it, but also for *bonâ fide* obligations which he has entered into for the affairs of the partnership, and for risks inseparable from his management. When the deed of partnership does not fix the shares of each partner in the profits or losses, the share of each is in proportion to what he has brought into the partnership. With respect to him who only gave his skill, his share in the profits or losses is the same as that of the partner who brought the smallest amount of capital. If the partners agree that reference be made to one of themselves, or to a third party for the settlement of the shares, such settlement cannot be impugned, unless contrary to equity. No claim is admitted on this account, if more than three months have lapsed since the aggrieved party became aware of the settlement, or has partly performed such settlement.

A stipulation that gives to one of the partners the whole of the profits is void.[80] The same rule applies to stipulations that exempt, from all contributions to losses, the sums or effects put into the partnership by one or more of the partners. A partner intrusted with the management by a special clause in the deed of partnership may, notwithstanding the opposition of the other partners, do everything connected with his management, provided he acts without fraud. Such power cannot be revoked without sufficient cause while the partnership continues; but if the power has been given by an instrument subsequent to the deed of partnership, it is revokable like a simple power of attorney *(mandat)*. Where several partners are entrusted with the management without having distinct duties assigned to them, and without a provision that one shall not act without the others, each may act separately ; and if it is stipulated that one cannot act without the other, one partner cannot without a fresh agreement act in the absence of the other, even though the latter is incapable of taking part in the management.

In the absence of special stipulations respecting the management, the following rules must be observed:—1. The partners

[80] Under the Romish law, *Societas* was one of the consensual contracts; that is, it was constituted by consent, without any formality. The partners might contribute money or labour, or both. Unless the proportion of gain and loss had been specially determined by agreement, the shares of gain and loss were equal. A partnership in which one partner was totally excluded from gain (*leonina societas*) was void.

are deemed to have mutually given to each other the power of management. That which each does is valid respecting his partners, without his having obtained their consent, save the right of one or more of them to object to the transaction before it is concluded.——2. Each partner may use the things belonging to the partnership, provided he uses them for what they are intended, and in a way not contrary to the interests of the partnership, or in such manner as to prevent his partners using them according to their rights.——3. Each partner has a right to bind his co-partners to share the necessary expenses for the preservation of the property of the partnership.——4. One partner cannot, without the consent of the other partners, make alterations in the realty of the partnership, although he may assert that they are of advantage to the partnership.

A partner who is not manager cannot alienate or pledge any personal property that belongs to the partnership. Every partner may, without the consent of his co-partners, enter into partnership with a third person for the share which he has in the partnership ; but he cannot, without their consent, introduce him into the partnership.

Liabilities of Partners respecting Third Parties.

In partnerships (other than those regulated by Commercial Law*) the partners are not bound jointly and severally for the debts of the partnership, and one of the partners cannot bind the others unless he is empowered by them. Partners are bound towards the creditors with whom they have contracted, each for an equal sum and share, although the share of one of them in the partnership be less, if the deed has not specially restricted the liability to the amount of such share. A stipulation that the obligation is contracted on account of the partnership binds only the contracting partner, and not the others, unless they have empowered him, or unless the partnership has benefited by it.

Different Ways by which Partnerships Terminate.

Partnerships terminate :—1. By the lapse of the term for which they have been contracted.——2. By the extinction of the object of the partnership, or the completion of the

* *Lex Mercatoria.*

transaction.——3. By the death of one of the partners.——4. By the interdiction or insolvency of one of them.——5. By the expressed desire of one or more of them to terminate the partnership.[81]

The prolongation of a partnership limited as to time can only be effected by a written deed, executed in the same form as the deed of partnership. When one of the partners has promised to put in common the ownership of a thing, and its loss has occurred before delivery, a dissolution of partnership ensues. A partnership is likewise dissolved in all cases by the loss of the thing, when its use only was put in common and ownership remained with the partner; but the partnership is not dissolved by the loss of the thing when the ownership has been brought into the partnership.

When it is stipulated that, in the event of the death of one of the partners, the partnership shall continue with his heir, or only between the surviving partners, such stipulations are valid. In the latter case, the heir of the deceased has a right to claim a share of the partnership's property as it existed at the time of the death; but he has no claim upon subsequent proceeds, unless they arose from what was done before the death of the partner to whom he succeeds.

Dissolution of partnership by the desire of one of the parties applies only to partnerships of which the duration is unlimited, and it is effected by a renunciation notified to all the partners, provided such renunciation is made *bonâ fide*, and not inopportune. The renunciation is not *bonâ fide* when the partner renounces in order to appropriate to himself a profit which ought to be shared in common. It is *inopportune* when the things are no longer in their entirety, and when it is important to the partnership that its dissolution be deferred. Dissolution of a partnership limited as to duration cannot be demanded by one of the partners before the expiration of the term, unless there are just grounds; as when another partner fails in his engagements, or when infirmity renders him incapable of attend-

[81] Under the Roman law partnerships terminated:—*Ex personis*, when one of the parties died, or had become incapacitated; *ex rebus*, when the purpose of the partnership was effected, or its subject-matter had ceased to exist; *ex voluntate*, when one partner wished to withdraw; *ex actione*, when one partner compelled a dissolution of partnership by action; *ex tempore*, when the partnership was only temporary.

ing to the business of the partnership, or in similar cases—which are left to the discretion of the judge.

The rules regulating the partition of successions, the form of such partition, and the obligations resulting therefrom between co-heirs, are applicable to partitions between partners.

The above rules apply to trading partnerships so far only as there is nothing in them contrary to commercial laws and customs.

CHAPTER XVIII.

OF LOANS.

[*Code Napoléon*—Articles 1874-1914.]

THERE are two kinds of loans; that of things which may be used without being destroyed; and that of things which are consumed by the use that is made of them. The first is termed a *loan for use* (*commodat*); the second, loan for *consumption*, or, *simply*, loan.

The Nature of Loan for Use.

A loan for *use* is a contract by which one of the parties delivers a thing to another to be used by him, on condition that the borrower shall return it, after having used it. This loan is essentially gratuitous. The lender remains owner of the thing lent; and anything that may be the object of barter, and is not consumed by use, may be the object of this contract.[82]

Obligations that arise from gratuitous lending pass to the heirs of the lender, and also to the heirs of the borrower; but if the thing has been lent out of personal regard to the borrower, his heirs have no right to the use of it.

Obligations of the Borrower.

A borrower is bound to keep and preserve the thing lent in good condition, *en bon père de famille.* He cannot make use of it except for the purpose for which it is intended, or according to the

[82] By the Roman law, the loan for use was termed *commodatum.* An article was lent gratuitously to the borrower to be used by him, and at the proper time to be returned *in specie.* No property in the thing passed to the borrower, who was bound to exercise the greatest care in its safe-keeping.

agreement, on pain of damages. If the borrower uses the thing for another purpose, or for a longer time than is stipulated, he is liable for any loss which happens, even by accident. If the thing lent perishes by accident, which the borrower might have prevented by using his own; or if only able to preserve one, he has kept his own, he is responsible for the loss of the other. If at the time of lending the thing has been valued, the loss which happens, even by accident, falls upon the borrower, if there is no agreement to the contrary. If the thing is deteriorated by the use for which it was borrowed, and without any fault on the part of the borrower, he is not liable for such deterioration.

The borrower cannot retain the thing lent as a set-off for a debt due to him by the lender. If, in order to use the thing lent the borrower incurs expenses, he cannot recover them. If several persons conjointly borrow the same thing, they are jointly and severally responsible to the lender.

Obligations of the Party who Lends for Use.

The lender cannot be compelled to take back the thing lent until the expiration of the term agreed upon; or, in default of agreement, until the thing has been used for the purpose for which it was borrowed. Nevertheless, if during the time or before the borrower has completed his use of it, the lender urgently wants his property, the judge may, according to circumstances, compel the borrower to restore it. If, during the continuance of the loan the borrower is compelled, for the preservation of the thing lent, to incur any extra and necessary expenses, and of so urgent a nature that he cannot give notice to the lender, the latter is bound to reimburse him.

When the thing lent has such defects that they cause an injury to the person using it, the lender is responsible for the results, if he knew the defects and did not inform the borrower.

Loan for Consumption;[83] or, Simply Loan.

This is a contract by which one party gives to another a

[83] By the Roman law, *mutuum* was a contract by which that which was mine became thine, whereby the absolute property passed to the borrower;

certain quantity of things which are consumed, or waste by *use*, on condition that the other is to return an equal quantity of the same quality and quantity. By the loan, the borrower becomes owner of the thing lent, and the loss of it falls upon himself, in whatever way it may happen.

In loans for consumption, things cannot be given which, although of the same species, differ in kind, such as cattle. In this case, it is a loan for use. An obligation that arises from a loan of money is always for the sum specified in the contract. If there has been an increase or diminution in the currency before the time of payment, the borrower must return the sum lent, and only that sum, in the specie current at the time of payment. This rule does not apply, if the loan has been made in bullion.* If the bullion or commodities have been lent, whatever may be the increase or diminution in their price, the borrower must always return the same quantity and quality.

Obligations of the Lender.

In a loan for *consumption*, as in a loan for *use*, the lender is responsible for the defects in the thing lent, if he was aware of them, and did not give notice to the borrower. A lender cannot claim the thing lent before the expiration of the term agreed upon. If no time is fixed for returning the thing lent, the court may grant the borrower a delay according to circumstances. If it has been agreed that the borrower shall only pay when he can, or when he has means to do so, the court fixes a time for payment.

Obligations of the Borrower.

The borrower is bound to return the things lent in the same quantity and quality at the time agreed upon. If unable to do so, he is bound to pay the value, regard being had to the time

it being for consumption, the borrower was not bound to restore the same thing, but other things of a similar kind. In *mutuum* the property passed immediately from the *mutuant* or lender to the *mutuary*, borrower, and the identical thing could not be recovered or redemanded; *ex meo tuum fit.*

* In this case, it is the weight of the bullion that is the object of the contract.

and place when the thing was to be restored. If such time and place have not been fixed, payment must be made according to the value of the thing at the time of the loan and at the place where the loan was made. If the borrower does not return the thing lent, or its value at the time agreed upon, he must pay interest from the day of the demand.

Loan with Interest.*

It is lawful to stipulate for interest on a loan of money, provisions, or of moveable effects. A borrower who has paid interest for which no stipulation was made cannot either recover it, or have it deducted from the principal.

Interest is either legal or conventional. Legal interest is fixed by law; interest by agreement may exceed that fixed by law when the law does not prohibit it. The rate of interest by agreement must be fixed in writing between the parties. A receipt for the principal, without reservation of interest, presumes the payment of both, and is a discharge in full.

Interest may be stipulated for upon a capital which the lender binds himself not to withdraw. In this case the loan becomes an *annuity*. Such annuity may be settled in two ways: in perpetuity, or for life. A rent to be paid in perpetuity can always be redeemed. The parties can only agree that the redemption shall not take place before a lapse of time which cannot exceed ten years, without giving previous notice to the creditor, stating the time when redemption is proposed.[84]

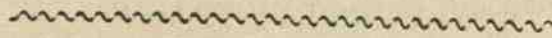
The debtor of a rent in perpetuity may be compelled to redeem it. 1. If he ceases to fulfil his obligation for two years.——2. If he fails to give the lender the securities promised in the contract.

* Legal interest in France was fixed by the Act of September 3, 1807, at five per cent. in civil matters; and in commercial matters at six per cent.

[84] An institution similar in many respects existed at Rome—*Emphyteusis*. This was the grant of land or buildings in perpetuity, or for a term of years, for an amount of rent, subject to forfeiture on non-payment of rent for three years. The grantee could aliene his rights over the property in any way he pleased; he could mortgage the property, recover it by a real action as if absolute owner, and he transmitted his rights to his heirs.

The principal of a rent in perpetuity becomes payable in case of the bankruptcy or insolvency of the debtor.

The rules respecting life annuities will be found under the title of "Contracts depending on Uncertain Events."*



* *Des Contrats Aléatoires.* See page 137.

CHAPTER XIX.

OF DEPOSIT AND SEQUESTRATION.

[*Code Napoléon*—Articles 1915-1963.]

DEPOSIT,[85] in general, is an act by which one receives the thing of another, which he is to take care of and return in kind.

There are two descriptions of deposits, simple deposit and sequestration.*

Simple deposit is a contract essentially gratuitous, and can only have for its object things moveable. It is only completed by the real or implied delivery of the thing deposited. Implied delivery is sufficient when the depositary is already in possession of the thing, and the owner consents to let him keep it as a deposit.

Deposit is either voluntary or necessary. *Voluntary* deposit arises from the mutual consent of the party who deposits and of him who receives. It cannot be lawfully made except by the owner of the thing deposited, or by his express or implied consent. A voluntary deposit must be proved by writing. Proof by witnesses is not admissible for an amount exceeding one hundred and fifty francs.

A voluntary deposit can only take place between persons able to contract. Nevertheless, if a person able to contract accepts a deposit from one who is not able, he is bound by all the obligations of a real depositary, and may be sued by the guardian or administrator of the party who made the deposit. If a deposit has been made by a person able to contract to one who is not able, the depositor can only sue for the recovery of the thing deposited as long as it remains in the hands of the

* *Séquestre:* The depositing of a disputed thing in the hands of a third person until it be determined to whom it belongs.

[85] *Depositum* at Rome was one of the *real* contracts; the obligation was created by the mere delivery of the thing, the subject of the contract. The depositary was to keep it gratis, and restore it at the will of the depositor.

depositary, or sue for restitution to the amount of the benefits derived from it by the depositary.

Obligations of the Depositary.

A depositary must use the same care in the safe-keeping of the thing deposited as he would do in the safe-keeping of his own property. This rule is more strictly applied:— 1. When the depositary has offered to receive the deposit.—— 2. If a salary has been stipulated for keeping the deposit.—— 3. If the deposit has been solely made in the interest of the depositary.——4. If it has been expressly agreed that the depositary shall be responsible for all faults.

The depositary is in no case responsible for accidents resulting from main force, unless he has received notice to return the thing deposited. He cannot use the thing deposited without the express or implied permission of the depositor. He must not endeavour to find out the nature of the things deposited with him, if they have been intrusted to him in a closed box or under seal. The depositary must return the identical thing he received, and he is bound to restore the thing deposited in the condition in which it is at the time of the restitution. Deteriorations not arising by his fault are at the risk of the depositor. A depositary from whom the thing has been carried off by main force, and who has received a sum or some article in its stead, is bound to restore to the depositor whatever he has received in exchange.

The heir of a depositary who sells in good faith and in ignorance that the thing was deposited, is only bound to restore the price received, or to transfer his right of action against the buyer, if he has not received the price. If the thing deposited produces fruits which have been taken by the depositary, he is bound to restore them. He is not charged with interest for money deposited, except from the day he has received notice to restore it. The depositary is bound to return the thing deposited only to the party who intrusted it to him, or to him in whose name the deposit was made, or to the party who has been appointed to receive it. He cannot demand proof that the depositor is the owner of the thing deposited. He cannot claim it as a set-off. If he discovers that the thing was stolen and finds out the true owner, he must inform the latter of the deposit that has been

made, and give him notice to claim it within a given time; and if the true owner neglects to reclaim the deposit, the depositary is discharged by delivering it to the party from whom he received it.

In the event of the death of the depositor, the thing deposited must be given up to his heir. If there are several heirs, it must be restored to each in proportion to his respective share. If the thing deposited is indivisible, the heirs must agree among themselves about receiving it. If the person who makes the deposit changes his or her *status;* for instance, if a woman, single at the time she makes the deposit, afterwards marries, and is under the control of her husband; or if a person of full age at the time of the deposit becomes interdicted; in these cases, and in others of a like nature, the deposit must only be restored to the party who has the trusteeship of the rights and property of the depositor. When a deposit is made by a guardian, a husband, or a trustee, it must be restored to the person whom such guardian, husband, or trustee represented, if their administration is ended.

If the contract of deposit assigns a place where the restitution is to be made, the depositary is bound to carry the thing there; but if expenses are incurred, the depositor must pay them. If the contract does not assign a place for restitution, it must be delivered at the place where the deposit was made. The deposit must be returned to the depositor as soon as he claims it, even though the contract has fixed a given time for its restitution, unless the depositary is prevented doing so by attachment, opposition, or other legal hindrance.

A depositary of bad faith is not admitted to the benefit of cession of property. All the obligations of the depositary ceases if he happens to discover, and can prove, that he is the owner of the thing deposited.

Obligations of the Depositor.

The depositor is bound to reimburse the depositary for all expenses incurred by him for the preservation of the thing deposited, and to indemnify him for all losses which the deposit may have caused him. The depositary may retain the thing deposited until such expenses and losses are paid.

Necessary Deposit.

A *necessary* deposit (*dépôt nécessaire*) is that which arises from accident, such as a fire, falling of a house, shipwreck, pillage, or other sudden calamity. Proof by witnesses is admitted in *necessary* deposits, even though the value in question exceeds 150 francs. Nevertheless, such deposits are subject to all the rules already enumerated.

Innkeepers and the proprietors of hotels are responsible, as depositaries, for things brought by travellers who lodge in their inns. The deposit of such property is considered a necessary deposit. They are responsible if the things are stolen or damaged, whether stolen or damaged by their servants or agents, or by strangers coming and going to the inn. They are, however, not responsible for robberies committed by armed or main force.[86]

Different Descriptions of Sequestration.

Sequestration is either *conventional* or *judicial*. Conventional sequestration is a deposit made by one or several persons of a thing in dispute into the hands of a third person (*sequester*), who binds himself to restore it, after the termination of the suit, to the person to whom it may be adjudged.

Sequestration is not essentially gratuitous; when it is so, it is subject to the rules of simple deposit, saving the distinction hereafter set forth.

Sequestration may have for its object not only movable effects, but also real property. The depositary entrusted with the sequestration cannot be discharged until the termination of the dispute, unless by consent of all parties interested, or for a lawful cause.

Judicial Sequestration.

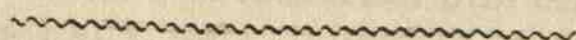
A court of law may order sequestration:—1. Of personal property seized from a debtor.——2. Of real property, or of personalty, of which the ownership or possession is in litiga-

[86] Innkeepers (*caupones*), by the Roman law, were considered not to be bound *ex contractu*, but *quasi ex delicto*, for the safe-keeping of goods given into their charge.

tion between two or more parties.——3. Of things which a debtor offers for his discharge.[87]

The appointment of a judicial sequestrator creates reciprocal obligations between the seizing party and the sequestrator. The latter is bound to keep the things seized with all the care of a prudent administrator (*bon père de famille*). He is bound to produce the things either to the party who seizes and is authorised to sell the thing, or to the party whose things have been seized in case of replevin. The obligation of the seizing party is to pay the sequestrator the fees fixed by law.

The things judicially sequestrated may be entrusted either to a person whom the parties interested have chosen, or to a person officially appointed by the court. In both cases, the party to whom the thing is entrusted is subject to all the obligations which attach to conventional sequestration.



[87] With the Romans, *sequestratio* was when two parties deposited a thing with a *sequester*, to abide a certain event; *e.g.*, the event of a suit, the deposit to be restored to the successful party.

CHAPTER XX.

OF ALEATORY CONTRACTS.

[*Code Napoleon*—Articles 1964-1983.]

An aleatory (*aléatoire*)* contract is a mutual agreement of which the effects—as regards advantages and losses, whether to all the parties or to one or more of them—depend on an uncertain event; such as:—Contract of insurance.——Bottomry. ——Gambling and Betting.——Life Annuities.

The two first are regulated by the Maritime Laws.

Gambling and Betting.

The law does not allow a right of action for the recovery of money claimed on account of gambling or betting; but games tending to the exercise of the use of arms, foot and horse races, trotting matches, rackets, and other games of a similar kind that are beneficial to health, are excepted. Nevertheless, the court may, in its discretion, reject an action when the sum demanded appears to be excessive.

In no case can a loser recover his money back if he has voluntarily paid the bet, unless there has been, on the part of the winner, fraud or foul play.

Life Annuities.

A *life annuity* may be settled upon a person for a consideration (*à titre onéreux*); for a sum of money; or, for personalty; or, for real property. It may also be settled gratuitously by gift *inter vivos*, or by *will;* but in both these cases it must be legally executed; and the annuity is reducible if it exceeds the

* An *aleatory* contract is an agreement depending upon an uncertain event, and consequently comprises chances of profit or loss.

disposable portion, and void if made to a person incapable of receiving.

A life annuity may be settled either upon a purchaser or upon a third party. It may be settled upon one or more lives. It may be settled upon a third person, although the purchase-money has been paid by another; but in this case, although it has the character of a gift, it is not subject to the formalities of gifts *inter vivos*, saving the provisions in regard to reduction and nullity, as previously stated.

Every settlement of a life annuity upon a person who was dead at the time of the contract is void; it is also void, if settled upon a person suffering from a disease from which he dies within twenty days after the date of the settlement.

A life annuity may be granted, at whatever rate of interest the contracting parties may agree upon.

Effects of the Contract between the Contracting Parties.

A person, upon whom a life annuity has been settled for a given sum, may demand the rescission of the contract, if the debtor does not give the stipulated securities for its performance. A mere default in the payment of the annuity does not entitle the annuitant to demand the reimbursement of his capital, or to re-enter into the ownership of the realty alienated. He has only a right to distrain and to have the debtor's goods judicially sold, and get an order, or obtain the consent of the debtor, to invest from the proceeds of the sale a sum sufficient to secure the payment of the annuity. The debtor of a life-rent cannot free himself from the payment of an annuity by offering to refund the capital. He is bound to continue the payment during the whole life or lives upon whom the annuity has been settled, however long the persons may live, and however burdensome the payment of the annuity may become.

An annuity is due only for the number of days that the person upon whose life it is granted lives, unless it is made payable in advance. A stipulation that a life-annuity cannot be distrained is of no effect, unless it has been granted gratuitously (*à titre gratuit*). An annuitant cannot demand the annuity without proving that he is living, or that the person upon whose life it has been settled is alive.

CHAPTER XXI.

OF MANDATE.[88]

[*Code Napoléon*—Articles 1984-2010.]

A *mandate*, or *procuration* is a deed by which one person (the mandator) empowers another (the mandatory) to do something for him, and in his name. This contract is not completed unless accepted by the mandatory.

The *mandate* may be executed either by a public deed, or under private seal; or even by letter. It may also be given verbally, but proof by witnesses is only admitted to amounts not exceeding one hundred and fifty francs.*

The acceptance of a *mandate* may be merely implied from the acts of the mandatory. It is gratuitous unless there is a stipulation to the contrary. It is either *special*, for a particular object or objects; or *general*, for all the affairs of the mandator. When it is given in general terms, it includes only acts of management; when it embraces the power of alienation or mortgage, or some other act of ownership, the power must be special. The mandatory cannot act beyond what is specified in his *mandate*. The power of *transacting* (*transiger*) does not include that of agreeing to a compromise (*compromettre*).†

* See "Contracts and Agreements," page 133.

† *Transiger* is an adjustment by mutual concessions; *compromettre* has the same effect, but it involves the appointment of arbitrators. Arbitration is much favoured by the law of France; it is made imperative in disputes between partners in trade and the parties claiming under them.

[88] By the Roman law, the person employing was called *mandator* and the person employed *mandatarius*. A mandatory (*mandatarius*) incurred three obligations:—1. To do the act which was the object of the mandate, and with which he was charged.——2. To give to it all the care and diligence that it required.——3. To render an account of his doings to the mandator.

Women and emancipated minors may be mandatories, but the mandator has no right of action against them, except in conformity to the general rules relating to the "Obligations of Minors," and the rules regulating the respective "Rights of Married Persons."*

Obligations of the Mandatory.

The mandatory is bound to execute the *mandate* as long as he is intrusted with it, and he is answerable for damages which may result from its non-performance. He is also bound to complete a thing that was begun before the death of the mandator, if there be danger in delay. The mandatory is answerable not only for fraud, but also for mistakes committed by him in his management; but when the *mandate* is gratuitous, the responsibility respecting mistakes is less rigid than if the mandatory had been paid.[89]

Every mandatory is bound to render an account of his management to the mandator, and to pay him all that he has received; even if what he has received was not due to the mandator.

A mandatory is answerable for the person whom he appoints to take his place in the management:—1. When he has not received power to appoint one.——2. When such power was given without designating the person to be substituted; and when the person whom he has selected was notoriously incapable or insolvent. In these cases, the mandator may proceed directly against the person whom the mandatory has appointed.

When several mandatories are appointed by the same deed, they are not jointly and severally responsible, unless there is a stipulation to that effect.

A mandatory is bound to pay interest upon money which he employs for his own use from the day he uses it, and upon any balance, computing from the day that he received notice to pay it.

A mandatory who sufficiently makes his powers known to

* See pages 40, 60.

[89] By the Roman law, *mandatum* was a contract by which a person undertook, gratuitously and from motives of kindness, an honourable and lawful commission. If a definite recompense was agreed for, it became a *locatio conductio*.

the party with whom he contracts is not bound to warrant that which is done beyond his powers, unless he has made himself personally responsible for such acts.

Obligations of the Mandator.

A *mandator* is bound to perform the obligations contracted by the mandatory, if conformably to the power which has been given to him; but he is not bound by anything done beyond it, unless he has expressly or tacitly ratified it. The mandator is bound to reimburse the mandatory for advances and expenses incurred by him in the execution of the *mandate*, and to pay him a salary, if so stipulated. When no fault can be imputed to the mandatory, the mandator must refund advances and pay salary, although the business has not been successful; nor can he have the amount of the expenses and advances reduced, under the pretext that they might have been less. The mandator must also indemnify the mandatory who is not in fault for losses which the latter has sustained in the execution of the *mandate.* The mandator must pay interest on advances made by the mandatory, computing from the day on which the money was advanced.

When a mandatory is appointed by several persons for a joint business, their obligations to the mandatory are joint and several for all the consequences of the *mandate.*

Different Ways by which the Mandate is Terminated.

A *mandate* is put an end to by a revocation on the part of the mandator; by the mandatory renouncing the *mandate;* by death, interdiction, or insolvency either of the mandator or the mandatory.[90]

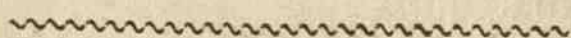
A mandator may revoke his *mandate* when he chooses, and compel, if necessary, the mandatory to give up either the authentic or private deed conferring the *mandate.* Revocation notified *only* to the mandatory cannot be set up against third parties who have had dealings with the mandatory in ignorance of such revocation. The mandator, however, has his remedy against the mandatory. The appointment of a new mandatory

[90] A *mandatum* was put an end to in a similar manner by the Romans.

for the same business is equivalent to a revocation of the first *mandate*, from the day it has been notified to the first mandatory.

A mandatory may renounce his *mandate* by giving notice to the mandator; but if such renunciation is prejudicial to the mandator, he must be indemnified by the mandatory, unless the latter can prove his inability to continue the management without materially injuring himself. If the mandatory is ignorant of the death of the mandator, or of some other cause that puts an end to the *mandate*, that which he has done in his ignorance is valid; and *bonâ fide* engagements of the mandatory with third parties must be executed.[91]

In the event of the death of the mandatory, his heirs must give notice of the fact to the mandator, and in the interim, act in his interest.



[91] By the Romans, it was held that anything done by the *mandatarius*, whilst ignorant of the *mandatum* being revoked or of the death of the *mandator*, should be valid.

CHAPTER XXII.

OF SURETYSHIP.

Nature and Extent of Suretyship.

[*Code Napoléon*—Articles 2011-2043.]

A Person who becomes surety for another renders himself liable to the creditor for the fulfilment of such obligation, if the debtor fails to fulfil it. Suretyship can only take place upon valid obligations. A person, however, may guarantee the performance of an obligation, although it might be cancelled in regard to the debtor by an exception purely personal to him; for instance, in the case of minors. Suretyship cannot be given for more than that which the debtor owes, nor under conditions more burdensome. It may be given only for a part of the debt. and under conditions less burdensome. A suretyship for a sun which exceeds the debt is not void, but it is reducible to the principal obligation. A person may become surety without the request and even without the knowledge of the party for whom he binds himself. He may also become surety, not only for the principal debtor, but also for his sureties.[92]

Suretyship cannot be implied; it must be expressed, and cannot be extended beyond the limits within which it has been contracted. Indefinite suretyship for a principal obligation extends to all the accessories of the debt, even to the costs of the first demand, and to all costs subsequent to the notice given to the surety. The obligations of a surety pass to his heirs.

A debtor who is bound to find a surety must produce one who is capable of contracting, who has sufficient property to

[92] By the Roman law, certain instruments of farming and other property of the hirer were held as a security for the payment of the rent. The right to this was enforced by the *Actio Serviana*. In case of a hired house, everything brought into it was considered to be tacitly charged as security for the rent.

cover the obligation, and whose domicile is within the jurisdiction of the court of appeal where suretyship is to be given. The solvency of a surety is determined only by his real property, except in commercial transactions, or when the debt is small.

When a surety, who has been either voluntarily or judicially accepted by the creditor, becomes insolvent, another must be found. This rule admits of exceptions in cases where the suretyship has been given by virtue of a contract in which the creditor required a certain person to be surety.

Effect of Suretyship between the Creditor and the Surety.

A surety is only bound towards the creditor, to pay him in default of the debtor, whose property must first be seized and sold, unless the surety has renounced the *privilege* of seizure and sale; or unless he has bound himself jointly and severally with the debtor, in which case his liability is governed by the rules established respecting joint and several obligations. The creditor is not bound to seize and sell the property of the principal debtor, unless the surety demands it when proceedings are first taken against him. A surety who insists upon the seizure and sale must point out to the creditor the property of the principal debtor, and advance the money necessary to make the seizure and sale. He must not point out the property of the principal debtor situated out of the jurisdiction of the court of appeal of the place where the payment is to be made, nor property in litigation, nor property mortgaged for the debt, and no longer in the possession of the debtor. Whenever the surety has thus pointed out such property within the jurisdiction of the court, and has advanced sufficient money for the proceedings of seizure and sale, the creditor is held responsible to the surety to the amount of the property pointed out—if he has neglected to proceed against the principal debtor—in the event of his afterwards becoming insolvent.

When several persons become sureties of the same debtor for the same debt, each is bound for the whole debt. Nevertheless, each of them may, unless he has renounced the privilege of division, require the creditor to divide his action and reduce it to the share of each surety. If, at the time one of the sureties has judicially obtained division, some have become insolvent, such surety is proportionately liable for the insolvencies; but he cannot be made liable for insolvencies

that happen after the division. If the creditor has voluntarily divided his action, he cannot impugn such division, although even at the time some of the sureties had become insolvent.

Effects of Suretyship between the Debtor and the Surety.

A surety who has paid has his remedy against the principal debtor, whether the latter knew or did not know of the suretyship. Such remedy applies alike to principal, interest, and costs; nevertheless, the surety has only a claim for costs incurred by him after he had given notice to the principal debtor of the proceedings taken against him. He has also a claim for damages, if there is ground for them. A surety who has paid the debt is invested with all the rights that the creditor had against the debtor. Where there are several principal debtors jointly and severally liable for the same debt, the surety who has become answerable for all of them has his remedy against each for the recovery of the whole that he has paid. A surety who pays has no remedy against the principal debtor who also pays, when the latter has not been apprised of the first payment; but he has his remedy against the creditor. A surety who has paid, without being sued, and without giving notice to the principal debtor, has no remedy against the latter when at the time of payment such debtor had grounds for claiming the discharge of the debt; but he has his remedy against the creditor.

A surety, even before paying, may proceed against the debtor to be indemnified:—1. When he is sued for the payment.——2. When the debtor has become bankrupt or insolvent.——3. When the debtor is bound to produce his discharge within a certain time.——4. When a debt has become due by the expiration of the term for which it was contracted. ——5. After the lapse of ten years, when the principal obligation has no fixed term for payment; unless the principal obligation, such as that resulting from guardianship, cannot be discharged before a determinate period.

Effects of Suretyship between Co-Sureties.

When several persons become sureties for the same debtor, and for the same debt, the surety who discharges the debt has his remedy against the other sureties, each for his share; but

he can only exercise this remedy when the surety has paid in such cases as before enumerated.

Extinguishment of Suretyship.

The obligation arising from suretyship is extinguished by the same causes as any other obligation.

The *confusion** of interests, which takes place when the principal debtor and surety become heirs of each other's inheritance, does not extinguish the legal claim of the creditor against the person who has become security for the surety (*caution de la caution*) A surety may set up against the creditor all the exceptions belonging to the principal debtor which are inherent to the debt, but he cannot set up exceptions that are purely personal to the debtor. A surety is discharged when, by the act of the creditor, the substitution to the rights, mortgages, and privileges of such creditor can no longer take place in favour of the surety. The voluntary acceptance by a creditor of real or personal property in payment of the debt discharges the surety, although the creditor may afterwards be evicted. A simple extension of term granted by the creditor to the principal debtor does not discharge the surety, who, however, in this case may sue the debtor to compel him to pay.

Legal and Judicial Suretyship.

In all cases when a person is legally or judicially bound to find a surety, the surety must fulfil all the conditions prescribed in the two last paragraphs of the chapter on "Nature and Extent of Suretyship."† When a person cannot find security, he must give a pledge (*nantissement*) of sufficient value.

A surety imposed by the judgment of a court of law (*caution judiciaire*) cannot demand that the property of the principal debtor shall be seized and sold before his own. He who has become surety for a judicial surety cannot demand seizure and sale of the property of the principal debtor and his surety.

* A mode of extinguishing a debt by the concurrence of two qualities in the same person; for instance, where the debtor becomes the heir of the creditor, or *vice versâ.*

† See page 245.

CHAPTER XXIII.

OF LEGAL TRANSACTIONS.

[*Code Napoleon*—Articles 2044-2088.]

*Transaction** is a contract by which the parties put an end to a law-suit already begun, or prevent a dispute from arising. It must be reduced to writing. Persons only can enter into such a contract who have legal capacity to dispose of the things which are the object of the transaction.

A guardian cannot *transact* (*transiger*) for a minor or interdicted person, except in accordance with the rules stated in the chapters "Of Minority, Guardianship," and "Emancipation;"† he can only *transact* with the minor who has attained his majority after he has rendered an account of his guardianship. Parishes and public institutions cannot enter into a *transaction* without the express authority of Government.

A party may *transact* civil claims arising from a misdemeanour, but such *transaction* does not arrest a public prosecution. In *transactions* a stipulation for a penalty in the event of non-performance may be made. *Transactions* must be confined to their object. A renunciation of all claims, actions, or pretensions refers only to the dispute which has given rise to the transaction. *Transactions* settle only the disputes specified in them, whether the parties have manifested their intentions by special or general expressions, or whether such intention can be understood as a consequence of what is expressed. If he who has *transacted* for

* No single English word expresses exactly the technical legal meaning of the *transaction* of the French Code and the *transactio* of the Roman Law. It signifies a settlement of all matters in dispute, arrived at by the parties *inter se*, and thus distinguished from "compromise." See foot-note, page 241.

† See pages 52, 59.

a claim which he had in his own right becomes afterwards possessed of a similar claim in right of another person, he is not bound by the last *transaction*, so far as regards the new claim.

A *transaction* made by one of the interested parties in a suit does not bind the others, and cannot be set up by them.

Transactions have between the parties the full authority of a final judgment (*res judicata*). They cannot be impugned on the ground of error in law or of lesion. Nevertheless a *transaction* may be rescinded where there is a mistake in the person or in the subject of the dispute; also in all cases of fraud or violence. There is also ground for an action in rescission when the *transaction* is made in execution of a void title, unless the parties have expressly arranged with reference to the nullity. *Transactions* on documents afterwards discovered to be false are void.

Transactions upon a suit finally adjudged without the knowledge of one or all of the parties are void; but if the judgment is subject to appeal, they are valid. When parties have *transacted* generally upon all matters between them, the subsequent discovery of deeds which at the time were unknown to them does not give ground for rescission, unless such deeds have been kept back by one of the parties; but the *transaction* is void, when it relates only to an object respecting which it appears from the newly-discovered deeds that one of the parties had *no right* to it.

Errors of calculation in a *transaction* must be rectified.

CHAPTER XXIV.

IMPRISONMENT FOR DEBT IN CIVIL MATTERS.

[*Appendix.*]

THE Statute of July 22, 1867, abolishes imprisonment for debt in all civil and commercial matters, the benefit of which statute extends to foreigners. It still exists in favour of the State for non-payment of fines, restitutions, and damages adjudged in criminal, correctional, and police matters; but five days' notice must be given before the imprisonment can take place.

The same rule applies to fines, restitutions, and damages adjudged in favour of private individuals.

In those cases where persons are imprisoned at the instance of private individuals, the latter are obliged to maintain the debtors while in prison, and maintenance for thirty days at least must be paid in advance. If in Paris, the amount is 45 francs; in large towns, 40 francs; and elsewhere, 35 francs a month. In default of such payment in advance, the debtor is at once released, and cannot be again imprisoned for the same debt.

The duration of such imprisonment is thus regulated:— From two to twenty days, when the fine or penalty does not exceed 50 francs; from twenty to forty days, when over 50 francs and not exceeding 100 francs; from forty to sixty days, when 100 francs and not exceeding 200 francs; from two to four months, when over 200 francs and not exceeding 500 francs; from four months to eight months, when over 500 francs and not exceeding 2,000 francs; and from one to two years, when above 2,000 francs: this is the longest term of imprisonment for such debts.

For fines imposed at a police-court, the imprisonment cannot exceed five days.

When such prisoners can prove their insolvency, they are released after half of the time of imprisonment imposed by the judgment.

Persons so sentenced may avoid imprisonment by finding responsible sureties, who must pay within a month.

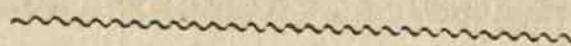
A debtor once released cannot be again imprisoned in consequence of a previous sentence, unless it was for a longer term, in which case the time he was imprisoned is deducted.

A person under sixteen years of age cannot be sentenced to imprisonment for debt. A debtor sixty years old is only imprisoned for one-half of the term fixed by the law.

Imprisonment for debt cannot be adjudged against a debtor at the instance of:—1. His or her consort.——2. His or her ascendants, descendants, brothers, or sisters.——3. His uncle or aunt; his great-uncle or great-aunt; his nephew or niece; his grand-nephew or grand-niece; and other relatives in the same degree.

Imprisonment for debt cannot be enforced simultaneously against husband and wife, even when the debts are distinct.

A court of law may, in the interest of minors, children of the debtor, suspend the execution of the sentence of imprisonment for one year.



CHAPTER XXV.

OF PLEDGING.

[*Code Napoléon*—Articles 2071-2091.]

Pledging (nantissement) is a contract by which a thing is placed by the debtor in the hands of a creditor as security for his debt. The pledging of movables is called *pawning (donner en gage)*; that of real property, *antichresis.*[93]

The pawning of a thing gives the creditor a right to be paid out of it in preference to all other creditors. This privilege is only admissible when there is an authentic deed, or a deed under private signature, duly registered, containing a declaration of the sum due, as well as the description and nature of the things pawned; or a statement of their quality, weight, and measure. Nevertheless, the deed and its registration are only required when the value of the property exceeds one hundred and fifty francs.

This privilege is only admissible over incorporeal things, such as debts, when executed by authentic deed, or under private signature, registered and notified to the debtor who has given the thing in pledge. In all cases, this privilege exists only when the thing pledged has been placed and remains in the possession of the creditor, or of a third person agreed upon between the parties.

A pledge may be given by a third person for a debtor. The creditor cannot in default of payment dispose of the pledge, unless he obtains an order from a court that such pledge shall, up to its amount estimated by valuers, be retained by him; or that it shall be sold by auction. A clause which authorises the

[93] From the Roman law. Where the creditor agreed to take the fruits of the pledge in place of the interest, the *pignus* became *antichresis.* The Romans made no distinction between the pledging of *movables* and *immovables.*

creditor to appropriate the pledge, or to dispose of it without these formalities, is void. Until the debtor is legally dispossessed, he remains the owner of the thing pledged, which is merely regarded as a deposit in the hands of the creditor to secure his debt.

The creditor is responsible for the loss or deterioration of the thing pledged, if it arises from his negligence, according to the rules established under the title of "Contracts and Conventional Obligations in General;"* and on the other hand, the debtor must reimburse the creditor for all necessary expenses which the latter has incurred for the preservation of the pledge.

If the thing given in pledge bears interest, the creditor must deduct such interest from that which is due to himself; if not, the deduction is made upon the capital of the debt. A debtor cannot, unless the possessor of the pledge misuses it, claim restitution of the pledge, unless he has paid the debt in full, including principal, interest, and costs. If another debt has been contracted by the same debtor to the same creditor, subsequently to the pawning, and such debt falls due before the payment of the first debt, the creditor is not obliged to give up the thing till both debts are paid, even although stipulation has not been made that the pledge should be security for the second debt.

A pledge is indivisible, although the debt is divisible among the heirs of the debtor or those of the creditor. The heir of the debtor who has paid his share of the debt, cannot claim restitution of his share in the thing pledged, as long as the debt has not been paid in full; nor can the heir of the creditor who receives his share of the debt give up the pledge to the prejudice of his co-heirs who are not paid.

The above rules are not applicable to commercial matters, nor to an authorised pawnbroker (*commissionnaire de mont-de-piété*), both being regulated by special rules.

Antichresis.

Antichresis[94] can only be effected by writing.

* See page 135.

[94] In the Roman law, *antichresis* was a covenant or convention whereby a person borrowing money of another engaged or made over

By this contract the creditor acquires only a right to the *fruits* of real property, on condition that he deducts them annually from the interest, if any be due to him, and afterwards from the capital. The creditor is bound, if it is not otherwise stipulated, to pay the taxes and annual expenses of the property which he holds in *antichresis*. He must in like manner, under pain of damages, provide for its maintenance and for all useful and necessary repairs; but he has his right to deduct from the fruits all such expenses.

A debtor cannot, before he has paid the debt in full, claim the possession of the property subject to *antichresis;* but the creditor who is desirous to get rid of the obligation may always, unless he has renounced such right, compel the debtor to resume possession of his estate.

The creditor does not become owner of the realty by the mere default of payment at the time agreed upon. All clauses to the contrary are void. His only remedy is to sue for the sale of the property according to law.

When the parties have stipulated that the fruits shall be a set-off against the interest, either entirely or to a certain amount, such agreement is binding.

The rules previously stated respecting third parties being allowed to pledge for the debtor, and to the indivisibility of pledges, apply to *antichresis*.

All that is stated in the present chapter does not prejudice the rights of third parties over the property made over in *antichresis*. If a creditor, thus secured, has otherwise privileges and mortgages lawfully created and established, and still running, he may exercise his rights in the order and in the same manner as any other creditor.

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lands or goods to the creditor, with the use and occupation thereof, for the interest of the money lent. It was afterwards called *mortgage*, to distinguish it from a simple engagement where the fruits of the ground were not alienated—*vivum vadium*.

CHAPTER XXVI.

OF PRIVILEGES AND MORTGAGES.

[*Code Napoléon*—Article 2092-2113.]

GENERAL DISPOSITIONS RESPECTING PRIVILEGES AND MORTGAGES.

WHOEVER binds himself personally is, to the extent of all his real or personal property, present and future, bound to fulfil his obligation. The property of a debtor is the common security of his creditors ; and in the event of a sale, the price is rateably divided amongst the creditors, unless among them there is a lawful cause of *preference*. The legal causes of *preference* are *privileges* and *mortgages*.

Privileges.

A *privilege* is a right which confers upon the creditor, by the nature of his claim, a preference over other creditors, even mortgagees. Privileged claims of equal rank are paid rateably.

Privileges on account of duties due to the State are regulated by special Acts ; nevertheless, the State cannot obtain privileges to the prejudice of rights previously acquired by third parties. Privileges may be enforced either upon real or personal property

Privileges upon Personal Property.

Privileges are either *general* or *special*.

General Privileges.

The claims which are *privileged* upon movable property in general are the following, and they take precedence in the order given :—1. Law costs.——2. Funeral expenses.——3. Expenses of a last illness.——4. Servants' wages for the year due and for the running term.——5. Debts due for supplies of provisions to the debtor and his family during the last six months

to retail tradesmen, such as bakers, butchers, and others; and to schoolmasters and wholesale dealers for the last year.

Privileges on Special Movables.

The privileges which may be enforced upon special movables are:—1. For rents of real property; upon the fruits of the year's harvest; upon the furniture of the house or farm rented; upon all that is used for the working of the farm; that is, to the amount of all that is due, or which may hereafter be due, if the leases are authentic; or, if under private signature, they have a certain date. In these two cases, the other creditors have a right to relet the house or farm for the remainder of the lease, and to receive the benefit of such leases and rents, on condition that they pay to the owner all that remains due to him. In default of authentic leases, or leases under private signature without a certain date, the privilege remains for one year after the expiration of the current year. The same *privilege* holds with regard to tenants' repairs, and to all that relates to the performance of the conditions of the lease. Nevertheless, sums due for seed or for the expenses of the year's harvest are paid from the sale of the harvest, and those due for implements from the sale of such implements, in preference to the landlord in both cases. The landlord, however, may distrain the furniture, when removed without his consent, and he retains his *privilege* over it, provided he has made his claim within forty days if it is the furniture of a farm; if of the furniture of a house, within fifteen days.——2. For the claim upon the pledge of which the creditor is in possession.——3. For expenses incurred in the preservation of the thing.——4. For the price of unpaid movable effects, if still in the possession of the debtor, whether bought on credit for a certain or an uncertain time for payment. If the thing has been sold on credit without any fixed time of payment, the vendor may claim it while it remains in the possession of the buyer, and thereby prevent its sale, provided that the claim is made within a week of the delivery, and that the thing is in the same condition as when delivered. The *privilege* of the vendor, however, can only be enforced after that of the landlord of the house or farm, unless it is proved that the landlord knew that the furniture and other effects in the house or farm did not belong to the

tenant.——5. For innkeeper's claims upon the goods of travellers brought to his inn.——6. For carrier's expenses upon the thing carried.——7. For claims resulting from misuse and betrayal of trust committed by public officers in the exercise of their duties.

Privileges upon Real Property.

Creditors having *privileges* on real property are :—1. The vendor, upon the estate sold, for the payment of the price. If there are several successive sales, of which the price is due in whole or part, the first vendor is preferred to the second, and the second to the third, and so on.——2. Those who have supplied money for the purchase of an estate, provided it is legally proved by an authentic deed of loan that the money borrowed was for that purpose; and by the receipt of the vendor that such payment was made with the money borrowed.——3. Co-heirs upon the real property of the succession, as securities of the partitions made between them, of the payment of money to equalise the shares divided, and of the return of the lots to the succession.——4. Architects, builders, masons, and others employed in building or repairing houses, canals, or any other works whatsoever, provided that a valuation had been previously drawn up by a valuer appointed by the court of first instance of the place, and that the works had, within six months after completion, been verified by valuers likewise legally appointed; but the *privilege* cannot exceed the valuation certified by the second valuer, and is reducible to the value of the property at the time of sale.——5. Those who have lent money to pay or reimburse the workmen, provided such advance is proved by an authentic deed of loan, and by the receipt of the workmen.

Privileges that Apply both to Real and Personal Property.

Privileges that apply both to real and personal property are those enumerated under the title "General Privileges on Personal Property," such as law costs, funeral expenses, expenses of a last illness, servants' salaries, and supply of provisions to the debtor and his family.

When, in default of *movables*, the privileged creditors above

enumerated are paid from realty, concurrently with creditors who have a privilege upon the estate, the payments are made as follows :—1. Law expenses, and those above enumerated. ——2. Claims of the vendor and others mentioned under the title, "Privileges upon Real Property."

How Privileges are Preserved.

Among creditors, privileges have no effect respecting real property, unless they are registered at the mortgage office, and then they date from such registration, subject to the following exceptions :—Law costs, funeral expenses, servants' wages, supply of provisions to the debtor or his family. All these are exempted from registration.

A vendor retains his privilege by the registration of the title-deed which has transferred the property to the purchaser, and which shows that the whole or part of the price is still due to him. Nevertheless, the registrar of mortgages is bound, under pain of damages to third persons, to inscribe officially in his register the debts stated in the deed which transferred the ownership both in favour of the vendor and lender, who may also cause a registration to be made, if not already done, in order to obtain a mortgage for that which is due to them.

A co-heir or joint-sharer retains his privilege upon the property of each lot, or upon property sold by auction, for what is due to equalise the lots *(soulte)*,* or their return to the succession; or for the proceeds of the sale, by registration of the mortgage made at his instance within sixty days from the deed of partition or of the sale, during which time no mortgage can take place upon the property encumbered with *soulte;* or the property sold by auction, to the prejudice of the creditor who has to receive the *soulte* or the proceeds of the sale.

Architects, contractors, masons, and other mechanics employed in building, reconstructing, or repairing buildings, canals, or other works, and those who have lent money for this purpose, retain their privilege by registration; first, of the official report *(procès-verbal)* stating the condition of the property; secondly, of the official report verifying the completion

* *Soulte:* Payment made by a party to a joint-owner, on partition of property, to equalise the value of the parts divided.

of the work. Their privileges date from the registration of the first report.

Creditors and legatees who demand the separation of the property of the deceased from that of his heirs, retain in respect of the creditors of the heirs or representatives of the deceased, their privilege upon the real property of the succession by the registration of their mortgage within six months from the commencement of the succession. During this term no mortgage can be validly registered by the heirs or their representatives to the prejudice of such creditors or legatees.

The transferees of these various privileged claims enjoy the same rights as the transferors.

All privileged creditors, whose claims are subject to registration, in regard to which the prescribed formalities have not been fulfilled, are still entitled to the benefit of mortgage; but the mortgage only dates with respect to third persons from the day of registration, which is effected as afterwards explained.

CHAPTER XXVII.

OF MORTGAGES.*

[*Code Napoléon*—Articles 2114-2217.]

Mortgage is a real right over immovables given as security for the discharge of an obligation. It is in its nature *indivisible*, and exists in entirety upon all the *immovables ;* upon each and every part of the *immovables* encumbered ; and the mortgage follows the property into whatever hands it may pass.

Mortgage can only take place in the cases and according to the formalities prescribed by law ; and may be either Legal, Judicial, or Conventional. *Legal* mortgage is that which results from the law. *Judicial* mortgage is the result of judgments or judicial acts. *Conventional* mortgage results from agreements, deeds, and contracts.

The following things only are capable of being mortgaged :—1. Real property that is saleable, and its accessories considered *immovable.*——2. The usufruct of such property and accessories as long as the usufruct lasts.

When the movable accessories are separated from the immovable, they cease to be encumbered with mortgage.

Legal Mortgages.

The rights and claims to which *legal* mortgage apply are :——1. Those of married women upon the property of their husbands.——2. Those of minors and interdicted persons upon the property of their guardians.——3. Those of the state, parishes, and public institutions upon the property of their treasurers and responsible administrators.

* *Hypothèque*, the right acquired by the creditor over the *immovable* property which has been assigned to him by his debtor as security for his debt ; although he is not placed in possession of it.

A creditor who has a *legal* mortgage may enforce his right upon all the real property belonging to his debtor, and upon that which he may afterwards possess, with the modifications hereafter explained.

Judicial Mortgages.

Judicial mortgage results from judgments in cases where adverse parties have been heard, or which have been adjudged by default. It results also in trials, from *admissions* or *verifications* of signatures affixed to an obligatory deed under private signature. It may be exercised upon the present real property of the debtor, and upon that which he may afterwards acquire, according to the rules hereafter set forth.

Decisions by arbitration do not involve mortgage until their decision has been judicially authorised. A mortgage, in like manner, cannot result from judgments given in a foreign country, unless they have been adjudged executory by a French Court, without prejudice to contrary rules established by treaty.

Conventional Mortgages.

Conventional mortgages can only be effected by persons capable of alienating the real property. Persons whose right to real property is suspended by a condition, or voidable, or is subject to rescission, can only grant a mortgage subject to the same conditions, or the same rescission.

The property of minors, of interdicted persons, and that of absent persons as long as the possession is only provisionally granted, cannot be mortgaged, except in cases established by law,* or when legally adjudged.

Conventional mortgages can only be effected by an authentic deed executed by two notaries, or by one notary and two witnesses.

Contracts entered into in a foreign country do not confer a mortgage upon property in France, unless otherwise ruled by international treaties.

Conventional mortgages are not valid unless—in the authentic

* For instance, as previously stated, a guardian cannot mortage the real property of his ward without the authority of the family council.

deed which establishes the claim, or in a subsequent authentic deed—the nature and situation of each of the immovables actually belonging to the debtor over which he grants the mortgage are specially set forth. Each immovable which he at the time possesses may be encumbered by mortgage, but property not yet in his possession cannot be mortgaged. Nevertheless, if the present and unencumbered property of the debtor is insufficient for the security of the debt, he may, by declaring such insufficiency, consent that the property which he may afterwards acquire shall be encumbered as soon as it comes into his possession. In like manner, when the present immovables burdened with mortgage have perished or been deteriorated, so as to render them insufficient for the security of the creditor, the latter may either sue immediately for payment, or for an additional mortgage.

Conventional mortgages are only valid, in so far as the sum for which they have been granted is fixed and determined by the deed. If the claim resulting from the obligation is conditional or indeterminate as to its value, the creditor cannot demand its registration, except to the amount of an estimated value expressly declared by him, and which the debtor, if there is ground for it, may have reduced.

A mortgage extends to all the improvements that may be made upon the immovables mortgaged.

Order in which Mortgages Rank.

Among creditors, a mortgage, whether legal, judicial, or conventional, ranks only from the day of the registration at the mortgage office, with the following exceptions :—Mortgage exists independently of any registration :—1. In favour of minors and interdicted persons upon the real property of the guardian on account of his administration, computing from the day he accepted the guardianship.——2. In favour of married women, on account of their dowry and marriage settlements upon the real property of their husbands, computing from the day of marriage. A wife has mortgage for dotal gifts arising from successions that fall to her, or from gifts *inter vivos* made to her during marriage, computing from the commencement of the succession, or from the day that the gifts took effect. She has mortgage for indemnification of debts contracted by her with

her husband, and for the reinvestment of her alienated property, computing from the day of the obligation or of the sale.

Husbands and guardians are bound to have such mortgages registered at the mortgage office, upon their present property, and also upon that which may afterwards accrue to them. If they fail to do so, and have subsequently consented or permitted privileges or mortgages to be registered upon their realty without expressly declaring that the said property is encumbered by the legal mortgages of their wives or wards, they are deemed guilty of *stellionat*,[95] and punishable as such.

Supplementary guardians (*les subrogés-tuteurs*) are bound, on their personal responsibility and under a penalty, to see that the registrations are made by the guardians, and even to cause such registration to be made.

In default of husbands, guardians, or supplementary guardians causing the prescribed registrations to be made, they are registered at the instance of the public prosecutor of the court of first instance of the domicile of the husband or guardians, or of the place where the property is situated. The relatives either of the husband or the wife, and the relatives of the minor, or in default of relatives, their friends, may insist upon such registrations; they may also be demanded by the wife and by minors.

When, in the marriage contract, parties of full age have agreed that registration of mortgage is to be only made upon one or on special estates of the husband, the immovables that are not specified remain free and unencumbered for the dowry of the wife, and for her claims and matrimonial settlements; but they cannot stipulate that no registration of mortgage shall be made. The same rule applies to the immovables of a guardian when the relatives in family council resolve that the registration shall be made only upon special immovables; and, in both cases, the husband, guardian, and supplementary guardian are bound to demand the registration only upon the specified property.

When the mortgage is not restricted at the time that the guar-

[95] *Stellionat:* the crime of selling anything deceitfully for what it is not; something other than it really is.

In the Roman law, the crime was not committed, if the land proved equal in value to all the sums charged upon it.

dian was appointed, the latter may, in case a general mortgage upon his real property would considerably exceed the security for his administration, demand that such be restricted to an amount of immovables sufficient for a full guarantee in favour of the minor. The action, in this case, is brought against the supplementary guardian, and must be preceded by a deliberation of the family council. The husband, in like manner, with the consent of his wife, and after having taken the opinion of four of her nearest relatives, may demand that the general mortgages upon the whole of his real property as security for the dowry claims and marriage settlement be restricted to immovables sufficient for the full guarantee of the rights of the wife.

Suits brought by husbands or guardians cannot be adjudicated till the public prosecutor has been heard.

When the court adjudges the restriction of mortgage to special immovables, the mortgage made upon all other property is cancelled.

Registration of Privileges and Mortgages.

All registrations must be made at the mortgage office within the district where the property to be encumbered with *privileges* or *mortgages* is situated. They are of no effect if made within the time preceding bankruptcy, when all transactions are declared void. It is the same with the creditors of a succession, if the registration has been made by one of the creditors after the commencement of the succession, and when the succession has been accepted *sous bénéfice d'inventaire.**

All creditors whose mortgages are registered on the same day have an equal right.

To effect registration, the creditor must produce, or cause a third person to produce, to the registrar of mortgages the original deed, or an authentic copy of the judgment, or of the deed which gives rise to the privilege or mortgage. He must annex two copies of a detailed memorandum written on stamped paper, one of which may be written upon the copy of the deed, containing:—1. The christian name, surname, professsion or calling, and domicile of the creditor.——2. The christian name, surname, domicile of the debtor, and profession or calling.

* *Bénéfice d'inventaire.* See page 102.

——3. The date and nature of the title-deed.——4. The amount of the claims stated in the deed, or valued by the person at whose instance the registration was made.——5. The description of the nature and situation of the property on which he desires to retain his privilege or mortgage; but this last rule is not imperative in cases of legal or judicial mortgages.

In default of agreement, a single registration of such mortgages encumbers all the immovables situated within the jurisdiction of the office.

Registrations of mortgages and privileges are valid for ten years from their date, and their effect ceases if such registration has not been renewed before the expiration of this term.

Appendix.

By the Act of March 23, 1855, the provisions of the Code Napoléon are completed in the following manner:—

It is compulsory to have the following deeds transcribed in full at the mortgage office of the place where the property is situated:—1. All deeds of gifts *inter vivos*, conveying real property or rights susceptible of mortgage.——2. Any deed of renunciation of such rights.——3. Any judgment declaring that a verbal agreement respecting the same rights exists.——4. Any judgment of sale by auction, other than that of a sale by auction (*licitation*) of property belonging to co-heirs or joint-proprietors.

The following deeds must also be registered in full:—1. Any deed creating *antichresis;* right of servitude, usage, or habitation.——2. Any deed of renunciation of the same rights.——3. Any judgment declaring that such rights exist by virtue of a verbal agreement.——4. Leases for more than eighteen years.——5. Any deed or judgment proving that even for a shorter lease a sum equivalent to three years' rent not due has been paid.

Until the transcription has been made, the rights arising from the deeds and judgments above mentioned cannot be set up against third parties who have a right upon the property, and have preserved it conformably to law. Leases that have not been transcribed cannot be set up against third parties for a longer term than eighteen years.

An abstract of all final judgments cancelling, annulling, or

rescinding a registered deed must within a month of the date be entered in the margin of the register kept at the mortgage office.

The registrar at the mortgage office is bound, when required, to deliver a special or general statement of all the transcriptions and marginal notes above prescribed.

From the day of the transcription, creditors having privileges or mortgages cannot have their mortgages registered against a previous owner. Nevertheless, the vendor or joint-sharer may validly have his privileges registered within forty-five days of the deed of sale or partition, notwithstanding any transcription of deeds that may have taken place within that period.

A suit in *rescission* cannot be brought, after the lapse of the privilege of the vendor, to the prejudice of third parties, who have acquired from the purchaser rights over the property, and have taken all legal steps to preserve them.

If a widow, or a minor who has attained his majority, or an interdicted person whose interdiction has been annulled, or their heirs or assigns, have not registered their mortgages within a year from the dissolution of marriage, or cessation of guardianship, their mortgages date, in respect of third parties, only from the day of registration.

In cases where married women may transfer their legal mortgages or renounce them, such transfer or renunciation must be made by an authentic deed, and the transferees are vested, in respect of third parties only, by the mortgages having been registered in their favour.

Cancelling and Abatement of Mortgages.

MORTGAGES are cancelled by the consent of the parties interested, or in consequence of a final judgment.

In either case, the person who requests cancellation must deposit a copy of the authentic deed in which the consent is given, or an authentic copy of the judgment, at the mortgage office.

Cancellations not agreed upon must be demanded from the court where the registration was made, except in cases where disputes respecting the mortgages have been brought before another court.

When registration by a creditor, who has a legal right to

mortgage the present and future property of his debtor without limitation, is made over more property than is necessary for the security of the debt, the debtor is allowed to sue for a reduction of the mortgage, or for the cancellation of that part which exceeds the requisite security. This rule does not apply to conventional mortgages. A mortgage is deemed excessive if it extends over several estates, when the value of one alone, or of some of them, exceeds by more than one-third the amount of the debt.

The registration of a mortgage made upon a creditor's valuation for securing his debt which has not been settled by agreement, and which by its nature is conditional, contingent, and indeterminate, may also be reduced as excessive. The excess in such cases is decided by the court, regard being had to circumstances, the probability of contingencies, and the presumption of facts, without prejudice to fresh registration of mortgage, where the event gives rise to claims of a larger amount.

The value of real property is estimated at fifteen times that of the revenue declared in the assessment of taxes. Nevertheless, the court may also avail itself of other information to make an average value.

Effects of Privileges and Mortgages against Third Holders.

Creditors having a registered *privilege* or *mortgage* upon real property retain their rights, no matter into whose hands the property may pass, and are classed and paid according to the order of their claim or registration. If a third holder does not comply with the formalities hereafter required to disencumber his property, he remains liable, as holder, for all the mortgage debts, on the same terms and conditions as the original debtor. A third holder is bound, in the same manner, to pay the interest and sums due, whatever they may amount to, or to renounce the mortgaged property without any reservation. In default of fulfilling either of these obligations, every mortgagee has a right to cause the mortgaged property to be sold, after having given thirty days' notice to the original debtor, and summoned the holder to pay the debt or give up possession. Nevertheless, the holder who is not personally liable for the debt may oppose the sale, if other mortgaged

property for the same debt is in the possession of the principal debtor or debtors; and he may insist upon such property being first seized and sold, according to the rules set forth under the title "Of Suretyship."* Pending such seizure and sale, the sale of the mortgaged estate is suspended. Demand for seizure and sale cannot be set up against a privileged creditor, or one who has a special mortgage upon the estate.

All third holders who are not personally liable for the debt, and who have the power of alienating the property, may abandon it on account of the mortgage; and they may do so even after having acknowledged the obligation, or having been adjudged by the court to do so. The abandonment, however, to a mortgagee does not prevent the third holder, up to the time of sale, from retaking possession by paying the whole debt and costs.

Deteriorations caused by the negligence of third holders, to the prejudice of mortgagees or privileged creditors, furnish grounds for an action of indemnity; but the holder cannot recover sums expended by him on improvements, except to the amount of the additional value resulting from such improvements. The fruits of the mortgaged estate are only due by a third holder from the day of the summons to *pay* or to *abandon;* and if the proceedings have been suspended for three years, the fruits are only due from the date of the fresh summons.

Servitudes and real rights that a third holder had over the estate before taking possession revive after abandonment or adjudication made against him. His personal creditors, after those who have a mortgage against the previous proprietors, rank according to the date of their mortgage. If the holder has paid the debt secured by mortgage, or abandoned the property mortgaged, or been ejected, he has, of right, his remedy of warranty against the principal debtor. If desirous of disencumbering his property by paying the price of it, he must observe the formalities set forth under the title, "Mode of Disencumbering Estates."†

Extinction of Privileges and Mortgages.

Privileges and mortgages are extinguished:—1. By the

* See page 245.

† See page 270.

extinguishment of the principal debt.——2. By renunciation of the mortgage by the creditor.——3. By complying with the formalities and conditions prescribed to third holders for disencumbering property acquired by them.——4. By prescription.——5. By the lapse of ten years without renewal of registration.

The debtor has the benefit of prescription, with regard to property in his own possession, by the lapse of the time fixed for prescription of actions conferring mortgage or privilege. As to property in the possession of third holders, prescription is established by the lapse of the time fixed for prescription of ownership. When prescription is grounded upon a title-deed, it only runs from the day of transcription of such deed at the mortgage office. Registrations of mortgages made by creditors do not interrupt the course of prescription established by law in favour of the debtor or of third holders.

Mode of Disencumbering Property of Privileges and Mortgages.

Contracts transferring ownership of real property or real rights that a third holder wishes to disencumber must be wholly transcribed by the registrar of mortgages of the district where the property is situated. The simple transcript of deeds conveying property upon the register does not disencumber such property of mortgages and privileges settled upon it; the vendor merely transfers to the purchaser that ownership and those rights which he himself had in the thing sold; he transfers them, subject to the same encumbrances of privilege and mortgage with which the property was encumbered.

If the new owner wishes to be guaranteed against a suit for claims as stated in the article entitled "Effect of Privileges and Mortgages against Third Holders,"* he must, either before the suit or within a month from the day of the first summons, serve upon the creditors at the domiciles selected by them in their registrations a notice, containing:—1. An extract of his title-deed, the date and nature of the deed, the name and precise description† of the vendor or donor, the nature and locality of the thing sold or given, and if it is an estate, the

* See page 268.

† *Designatio personæ:* the description of a person or a party to a deed or contract.

general name of the property and where situated, the price and the charges forming part of the price of sale, or the valuation of the thing, if it has been a gift.——2. An extract of the transcription of the deed of sale.——3. A list, of three columns, the first containing the date of the mortgages and that of the registrations; the second, the names of the creditors; the third, the amount of claims registered.

The purchaser or the donee must declare in the same deed that he is ready to discharge at once all debts and encumbrances up to the amount of the price of sale or valuation, without distinction as to debts due or not yet due. When the new owner has sent such notice within the fixed time, every creditor whose claim is registered may request that the property be put up to public auction, and sold to the highest bidder, with a proviso :—1. That such requisition shall be notified to the new owner within forty days from the notification given by the creditor, with two additional days for the distance of every thirty miles (*cinq myriamètres*) between the selected domicile and the actual domicile of each creditor.——2. That it shall contain an offer by such creditor to raise the price, or cause it to be raised, one-tenth above that stipulated in the contract, or declared by the new owner.——3. That the same notice shall be served upon the preceding owner who is the principal debtor.——4. That the original notice and copies be signed by the creditor who makes the requisition, or by his attorney.——5. That he shall offer to give security to the amount of the price and expenses.

If the creditors fail to demand the sale by auction within the time and with the formalities prescribed, the value of the property remains fixed at the price stipulated in the contract or declared by the new owner, who is consequently discharged of all privileges and mortgages on paying such price to the creditors who are competent to receive; or on making a deposit of the same.

In the event of resale by auction, the sale takes place, according to the rules prescribed for expropriation, at the instance either of the creditor who made the *requisition* or of the new owner. The plaintiff must state in the particulars of sale the price stipulated in the contract or declared by the buyer, and the additional sum which the creditor binds himself to pay. The purchaser is bound beyond his bidding to refund to the first purchaser or donee dis-

possessed all the expenses of the contract; those of transcription at the mortgage office; those of serving notices; and the costs of the proceedings to obtain the second sale. The purchaser or donee who retains possession of the estate thus sold by auction by being the highest bidder is not bound to have his new title transcribed at the mortgage office.

The creditor, at whose instance the sale by auction took place, cannot, by withdrawing his action, even though he should pay the amount of his bidding, prevent the public auction, without the express consent of all the other mortgagees. The new purchaser, who has become the highest bidder, has of right his remedy against the vendor for the reimbursement of that which exceeds the price stipulated in his deed, and for interest on such excess from the day of each payment.

When the title of the new owner comprises real and personal property, or several estates, some mortgaged and others not, situated within the same or within different districts, alienated for one and the same price, or for separate and distinct prices, the estimation at a relative value of each estate encumbered with special and separate mortgages must be declared in the notice of the new owner. The creditor who is the highest bidder cannot in any case be compelled to include in his bidding personal property, or other estates than those which are mortgaged for security of his debt, and situated in the same district; he has, however, his remedy against the original debtors on account of the injuries he may sustain from the division of the things he has purchased.

Disencumbering Property from Unregistered Mortgages.

Purchasers of real property belonging to husbands or guardians, when there is no registration of mortgage upon such property on account of the administration of the guardian, or by reason of dowry, privileged claims, and marriage settlements, may disencumber property bought by them. For this purpose the purchasers must deposit a copy duly certified of the contract conveying the property at the office of the registrar of the court where the property is situated, and must give notice of such deposit to the wife or supplementary guardian, as well as to the public prosecutor of the court.

If, in the course of two months from the publicity given of

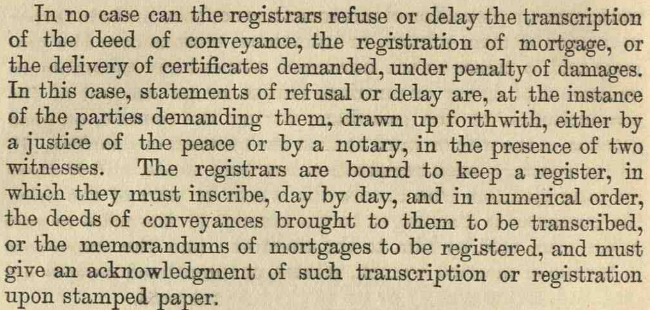
the contract, registration of mortgage has not been made in favour of married women, minors, or interdicted persons over the property sold, it passes to the purchaser without any encumbrance on account of dowry or marriage claims, or on account of the administration of the guardian; saving the remedy, on good grounds, of the wife or ward against the husband or guardian. If, on the contrary, such registration has been made, and if there are prior creditors who absorb the whole or part of the price, the purchaser is discharged to the amount of the price or part of the price paid by him to the creditors; and the mortgages in favour of married women, minors, or interdicted persons are cancelled, either wholly or up to the amount paid.

If the mortgages in favour of the married women, minors, and interdicted persons are of a prior date, the purchaser cannot make any payment to the prejudice of such mortgages, which always rank, as previously stated, from the date of the marriage contract, or of the entry of the guardian upon his administration; and in this case, the mortgages of the other creditors not entitled by the rank of priority are cancelled.

Publicity of the Registers, and Responsibility of Registrars.

The registrars of mortgages are bound, on the application of any one, to deliver, on demand, a copy of the deeds transcribed upon their registers, as well as of the registrations of mortgages, if any; or a certificate declaring that there are none. They are responsible for injury resulting:—1. From omission in their registers of the transcriptions of deeds, and of registrations of mortgages.——2. From default in mentioning in their certificates the existence of one or more mortgages, unless, in the latter case, the error arose from an insufficient description.

The estate in respect of which the registrar has omitted in his certificate to mention one or more registered encumbrances remains, saving the liability of the registrar, free in the hands of the new owner, provided the latter has demanded the certificate subsequently to the transcription of his deed, without prejudice to the right of creditors to have themselves classed according to their order, so long as the price has not been paid by the purchaser, or so long as the rank of the creditors has not been legally confirmed.



In no case can the registrars refuse or delay the transcription of the deed of conveyance, the registration of mortgage, or the delivery of certificates demanded, under penalty of damages. In this case, statements of refusal or delay are, at the instance of the parties demanding them, drawn up forthwith, either by a justice of the peace or by a notary, in the presence of two witnesses. The registrars are bound to keep a register, in which they must inscribe, day by day, and in numerical order, the deeds of conveyances brought to them to be transcribed, or the memorandums of mortgages to be registered, and must give an acknowledgment of such transcription or registration upon stamped paper.

CHAPTER XXVIII.

OF EXPROPRIATION.

[*Code Napoléon*—Articles 2204-2218.]

A CREDITOR may sue, in expropriation*:—1. Of real property and accessories deemed *immovable* belonging to his debtor.——2. Of the usufruct of real property belonging to his debtor. Nevertheless, the undivided share of a co-heir in the immovables of a succession cannot be put up for sale by his personal creditors before the partition or *licitation*, which they may demand, conformably to the chapter "Of Successions."†

The real property of a minor, though he is emancipated, or of an interdicted person, cannot be put up for sale before the seizure and sale of his personal property; but the seizure and sale of personal property are not imperative previously to the expropriation of real property in undivided possession of a person of full age and a minor or an interdicted person, if bound by the same debt; nor when the action has been commenced against a person of full age, or before interdiction.

Expropriation of real property held in common by husband and wife must be sued for against the husband alone, although the wife may be liable for the debt; that of the wife's realty not in common is sued for against both, and should the husband refuse to sue, or if the husband is a minor, the court may authorise the wife to sue alone. In case of the minority of both husband and wife, or of the wife only, if her husband, of full age, refuses to sue with her, the court appoints for the wife a trustee, against whom the action is brought. A creditor cannot sue for the sale of real property not mortgaged

* *Expropriation:* Landed property of a debtor sold by order of a court of law.

† See page 95.

to him, unless the property mortgaged is insufficient to cover his claims.

Expropriation of real property situated in different districts can only be sued for successively, unless the property forms part of one single estate. If the property mortgaged to the creditor, and property not mortgaged, or property situated in different districts, form part of one and the same estate, the sale of both, if the debtor demands it, may be sued for together, and the relative value of each is afterwards estimated.

When the debtor proves, by authentic leases, that the net and unencumbered revenue of his real property for one year is sufficient for the payment of the debt, including principal, interest, and costs, and offers to make it over to the creditor, the judge may suspend the suit, subject to renewal, if afterwards there is any obstacle or opposition to the payment.

Expropriation of real property can only be sued for by virtue of an executory and authentic deed for a liquidated debt. The transferee of a deed cannot sue for expropriation unless he has given notice of the transfer to the debtor.

All actions for expropriation of real property must be preceded by a summons to pay, served at the instance of the creditor personally upon the debtor or at his domicile, and such summons must be served thirty days before the action *en expropriation.*

CHAPTER XXIX.

OF PRESCRIPTION.

[*Code Napoléon*—Articles 2219-2281.]

PRESCRIPTION[96] is a mode by which property is acquired, or by which a debt is discharged by a certain lapse of time. Rights by prescription cannot be renounced by anticipation; but when acquired, they may be renounced.

Renunciation of rights by prescription is express or implied. Implied renunciation results from an act by which the abandonment of the right acquired may be presumed. Persons who cannot alienate cannot renounce a right by prescription that has been acquired.

Courts cannot suggest officially the plea of prescription. Prescription may be set up at every stage of a suit, even before the court of appeal, unless the party who has not set up his plea of prescription may be presumed to have renounced it. Creditors and all other persons having an interest in establishing prescription may set it up, although the debtor or owner renounces it.

Prescription does not apply to ownership of things that are not marketable. The State, public institutions, and parishes are bound by the same prescription as private persons, and have the same right to set it up.

[96] At Rome, ownership of property was acquired by *usucapio*, *i.e.*, by quiet possession for a certain length of time; such possession being *bonâ fide* and founded on good title. Originally the time required was one year in the case of movables, and two years in case of immovables. Justinian remodelled the laws of *usucapio*. Possession during three years conferred ownership in case of movables; and possession during ten years, if the persons were present, or twenty if they were absent, gave the ownership of immovables. The term *prescriptio* came to be applied by length of time of possession.

Prescriptio est titulus, ex usu et tempore substantiam capiens, ab auctoritate legis.

Possession.

Possession[97] is the holding or using a *thing* or a *right* which a person holds or exercises by himself, or which is held or exercised by another in the name of such person.

To acquire a prescriptive right, the possession of the thing must be continuous and uninterrupted, peaceable, public, unequivocal, and as an owner. A person is always presumed to possess for himself, and as owner, unless it be proved that he began his possession for another. When a person has begun possession for another, he is always presumed to continue by the same right, unless there is proof to the contrary.

Acts which are merely optional and on simple sufferance can give no ground either for possession or prescription; nor can deeds of violence give possession on which prescription may be grounded. The possession which avails for prescription begins only when the violence has ceased.

A present possessor who proves that he was in possession at a former period is presumed to have been in possession during the intermediate time, unless the contrary is proved. In order to complete the term of prescription, a person may add to his own possession that of the person to whom he has succeeded.

Causes which Bar Prescription.

Persons who are in possession for others cannot claim prescriptive right, whatever may be the lapse of time; thus the tenant, the depositary, the usufructuary, and all who hold the property of others by precarious tenures, cannot acquire a prescriptive right; neither can their heirs. Nevertheless, they can claim prescription if the title of their possession is changed, either from a cause arising from a third party, or by the opposition they set up against the rights of the owner. Those persons to whom, tenants, depositaries, and other precarious holders have trans-

[97] *Possessio*, in the Roman law, primarily denoted merely physical detention. If the possessor held the thing with the intention of holding it as his own, he was protected in his possession against anyone who had not a better title to possess, and in order to protect him the prætor granted him an interdict. But more was necessary for the possession which was to be the ground of *usucapio*. It must have been *bonâ fide*, not founded on force or fraud, and must have originated by a recognised legal mode of acquiring property.

ferred the thing by a title-deed conveying ownership have a right of prescription.

A person cannot prescribe in opposition to his own title; in this sense, that no one can change the cause and principle of his possession. A person may prescribe against his own title; in this sense, that he has a right by prescription to free himself from an obligation that he has contracted.

Causes that Interrupt or Suspend the Run of Prescription.

Prescription may be interrupted either *naturally* or *civilly*. *Natural interruption* takes place when the possessor is deprived for more than a year of the use of the thing, either by the former owner or by a third person. *Civil interruption* takes place when a summons before a court of law, or formal demand, or seizure, has been made in due form, upon the person whose prescription it is sought to interrupt.

A summons for the purpose of conciliation (*citation en conciliation*) before a justice of peace interrupts prescription from the day of its date, when it is followed by a summons before the court of first instance within the time prescribed by law. A summons even before an incompetent judge interrupts prescription. If the summons is void through informality, if the plaintiff stops his action, or if he allows his action to be barred by limitation, or if his demand is rejected, the interruption is considered as not having occurred.

Prescription is interrupted by any acknowledgment which the debtor or possessor makes of the right of the person against whom the prescription was running. A summons served upon, or an acknowledgment by, one of the joint and several debtors, interrupts prescription against all the others, and even against the heirs. A summons served upon one of the heirs of a joint and several debtor, or the acknowledgment of such heir, does not interrupt prescription with regard to the other co-heirs, even if the debt should be secured by mortgage, if the obligation is not indivisible. Such summons or acknowledgment does not interrupt prescription with regard to the other joint debtors, except for the share due by such heir. To interrupt prescription for the whole, in respect of the other joint debtors, the summons must be served upon all the heirs of the deceased debtor, or the acknowledge-

ment must be made by all the heirs. A summons served upon the principal debtor, or his formal acknowledgment, interrupts prescription against the surety.

Causes that Suspend Prescription.

Prescription runs against all persons, unless excepted by law. It does not run against minors and interdicted persons, except for arrears of annuities for maintenance, rents of houses and farms, interest for sums lent, and generally for sums to be paid annually, or for shorter periods, which are prescribed after five years. Prescription does not run between husband and wife; but it runs against a married woman, although not separated either by marriage contract or judicially, in respect of the property of which the husband has the administration; but she has her remedy against her husband. Nevertheless, it does not run during marriage in case of the alienation of an estate settled in dowry, conformably to the chapter upon "Marriage Contracts and the respective Rights of Husband and Wife."*

Prescription is, in like manner, suspended during marriage:—1. When the action of the wife cannot be brought till an election is made either of acceptance or renunciation of community.——2. When the husband, having sold property belonging to the wife without her consent, is warrantor of the sale, and in all other cases where the action of the wife would be against the husband.

Prescription does not run with respect to debts depending on a condition, until such condition happens; nor in cases of actions in warranty, until eviction has taken place; nor with respect to debts at a fixed date, until such term has expired. Prescription does not run against a beneficiary heir with respect to claims he has against the succession, but it runs against a vacant succession, although not provided with a curator. It runs also during the three months allowed for preparing the inventory, and during the forty days for deliberation.

Time required for Prescription.

Prescription is reckoned by days, and not by hours. It is acquired when the last day of the term has expired.

* See page 166.

Prescription of Thirty Years.

All actions, real and personal, are prescribed by thirty years, without the party prescribing being bound to produce any title or exception of bad faith being set up against him. After twenty-eight years from the date of the last title, the debtor of an annuity may be compelled to supply, at his own cost, the creditor or his legal assigns with a fresh title.

The rules of prescription as to things, other than those mentioned, are as follows :—

Prescription of Ten and Twenty Years.

A person who acquires real property, in good faith and by an equitable title, is entitled to ownership by prescription after the lapse of ten years, if the real owner lives within the jurisdiction of the court of appeal where the property is situated; and after twenty years, if he lives out of such jurisdiction. If the real owner has had his domicile at different times within and without the jurisdiction, it is necessary to add to the years of presence the double of the years of absence. A title void on account of informality cannot serve as a ground of prescription for ten or twenty years.

Good faith is always presumed, and the *onus* lies on the party who alleges bad faith to prove it. It is sufficient if good faith existed at the time of the purchase.

After ten years architects and contractors are discharged from their warranty for substantial works (*gros ouvrages*) erected by them or done under their superintendence.

Special Prescriptions.

After six months, the following claims are barred by prescription :—Claims of tutors in sciences and art for lessons given at so much a month; of inn-keepers and eating-house keepers, on account of lodgings and food; of workmen and labourers for the payment of their day's expenses, provisions, or wages.

Those of doctors, surgeons, apothecaries, for visits, operations, and medicines; sheriffs' officers for their fees; tradesmen for goods sold to private persons not dealers; boarding-school keepers for the price of the board of their

pupils, and of masters for the premiums of apprenticeships, and domestic servants who are hired by the year, are barred by prescription after one year.

Claims by solicitors for the recovery of their fees and costs are barred by prescription after the lapse of two years, reckoning from the judgment in a suit, or from the agreed settlement out of Court of the parties, or from the demand of the said solicitors. After the lapse of five years, costs and charges in unsettled law-suits cannot be claimed.

Prescription in all these cases takes place, although there has been a continuation of supplies, deliveries of goods, services, and work. It only ceases to run when there has been a settlement, security given, or summons before a court of law. Nevertheless, those persons against whom such prescriptions are set up, may put the opposing parties on their oath as to payments. Widows, heirs, or guardians may be put on their oath to declare their knowledge of the payment or non-payment of the debt.

Judges and attorneys are discharged, as to legal documents, after five years from judgment in the suit; tipstaffs, after two years from the execution of their duty.

The arrears of annuities, those of allowances for maintenance, rents of houses and farms, interest on sums lent, and generally everything that is payable by the year, are prescribed after five years.

The above prescriptions may be set up against minors and interdicted persons, who, however, have their remedy against their guardians.

With regard to personal property, possession is equivalent to a title. Nevertheless, a person who has lost a thing, or from whom it has been stolen, may claim it within three years from the day of loss or theft, from the possessor; but the latter has his remedy against the person from whom he obtained it. If the person in possession of the thing lost or stolen purchased it at a fair, or in market overt, or at a public sale, or from a dealer who sells things of the same kind, the real owner cannot recover it, unless he pays the possessor the price which it cost him.

THE END.

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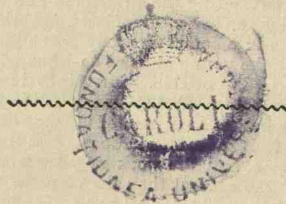

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