that he could not or would not take it, it would accrue entire to all the other Heirs without Diſtinction, according to their Portions in the Inheritance *i*.

i Hæredes ſine partibus utrum conjunctim an ſeparatim ſcribantur, hoc interest, quod ſi quis ex conjunctis deceſſit, hoc non ad omnes, ſed ad reliquos qui conjuncti erant pertinet. Si autem ex ſeparatis, ad omnes qui teſtamento eodem ſcripti ſunt hæredes portio ejus pertinet. *l.* 63. *ff. de hæred. inſt.*

Si quidam ex haredibus inſtitutis vel ſubſtitutis permixti ſunt, & alii conjunctim, alii disjunctim nuncupati; tunc ſi quidem ex conjunctis aliquis deficiat: hoc omnimodo ad ſolos conjunctos cum ſuo veniat onere, id eſt, pro parte hæreditatis quæ ad eos pervenit. Sin autem ex his qui disjunctim ſcripti ſunt, aliquid evaneſcat, hoc non ad ſolos disjunctos, ſed ad omnes tam conjunctos quam etiam disjunctos ſimiliter cum ſuo onere pro portione hæreditatis perveniat. Hoc ita tam varie, quia conjuncti quidem propter unitatem ſermonis quaſi in unum corpus redacti ſunt, & partem conjunctorum ſibi hæredum quaſi ſuam præoccupant: disjuncti vero ab ipſo teſtatoris ſermone apertiſſime ſunt diſcreti, ut ſuum quidem habeant alienum autem non ſoli appetant, ſed cum omnibus cohæredibus ſuis accipiant *l. un.* §. 10. *C. de caduc. toll.* See the following Article.

IX.

9. This Right hath place among Coheirs who are not conjoined.

If in the Caſe of the preceding Article, all thoſe who were called to a Portion diſtinct from the others were incapable of ſucceeding, or ſhould renounce their Portion, the Right of Accretion, which took place only among them for their Parts, as long as any one of them was capable of ſucceeding, would paſs to the other Heirs of the other Portions, and that Portion which ſhould become vacant would accrue to 'em. For in that Caſe, ſeeing that Portion could not remain vacant when there is an Heir to the other, he would have the whole; and he could not confine himſelf to his own Portion, and renounce that which had become vacant, altho it ſhould be found to be burdenſome by reaſon of the Charges laid upon it; becauſe the Inheritance, as has been ſaid in the ſixth Article, is indiviſible: And the Heir who happens to be left alone, altho he was inſtituted Heir only for a Portion, ought to accept the whole Inheritance *l*.

l See the ſixth Article, and the Texts cited on it.

X.

10. Among Legatees of one and the ſame thing there may be, or may not be a Right of Accretion.

It is not the ſame thing, as to the Right of Accretion, between Legatees as between Coheirs or Co-Executors; for the Right to the Inheritance being an univerſal Right, and indiviſible, there is always among Coheirs or Co-Executors a Right of Accretion; but Legacies being reſtrained to the Things bequeathed, which may be divided at leaſt by Eſtimation, altho the Things ſhould be indiviſible in their own Nature, it is not neceſſary that there ſhould be always a Right of Accretion among Legatees. But they either have or have not this Right among them, according as the Expreſſion of the Teſtator may give it them, or exclude them from it, as ſhall be explained by the Rules which follow *m*.

m See the following Articles.

XI.

11. There is a Right of Accretion among Legatees who are conjoined by the thing.

If a Teſtator bequeaths one and the ſame thing to two or more Legatees, without any mention of Portions, as, if he gives and bequeaths a Houſe to ſuch a one, and ſuch a one, theſe Legatees being conjoined by the thing bequeathed, there will be between them a Right of Accretion, in the ſame manner as if the Teſtator had added, that the thing ſhould belong entirely to him of the two Legatees who ſhould be left alone to reap the Benefit of the Legacy. Thus it is only their Concurrence that divides the Legacy between them, and gives to every one his Part of it. And if one of them cannot, or will not receive his Portion, it remains to thoſe who have taken, or ſhall take theirs *n*.

n Conjunctim hæredes inſtitui, aut conjunctim legari, hoc eſt, totam hæreditatem & tota legata ſingulis data eſſe, partes autem concurſu fieri. *l.* 80. *ff. de legat.* 3.

Totes eſt jus accreſcendi (*uſusfructus*) quoties in duobus qui in ſolidum habuerunt, concurſu diviſus eſt. *l.* 3. *ff. de uſufr. accreſc. Ulp. tit.* 24. §. 12. See the fifteenth Article.

XII.

12. If the ſame thing is bequeathed to two Perſons by two Clauſes, each has a Right to the whole, but their Concurrence divides it.

If a Teſtator had bequeath'd the ſame thing to two Legatees by two different Expreſſions and ſeparately, as if having bequeathed a Houſe by a firſt Clauſe to a firſt Legatee, he bequeathed it again afterwards to another Legatee by another Clauſe, ſuch a Legacy might be conceived in three Manners, which would have three different Effects. The firſt in ſuch a manner, as that in the ſecond Legacy the Intention of the Teſtator ſhould appear to be to revoke the former; and in this Caſe the firſt Legacy would remain null. The ſecond, ſo as that he would have each of the Legatees to have the whole Legacy, the Houſe going to one, and the Heir being

being charged to give the Value of it to the other Legatee; which would be executed, provided the ſaid Intention were expreſs and clearly explained. The third is if by the two Clauſes of the Teſtament the Houſe were bequeathed intire to each of the two Legatees, and in this caſe they both accepting the Legacy, their Concurrence would divide it, and each of them would have the half of the thing bequeathed in this manner. But if in this laſt Caſe there ſhould be one of the two Legatees who either could not, or would not have any ſhare in the Legacy, the whole would belong to the other; not ſo much by Right of Accretion, as that becauſe the whole was given him, and that his Right not being diminiſhed by the Concurrence of the other, it would remain intire to him, but with the Charges which ought to paſs to this Legatee, according as the Diſpoſition of the Teſtator ſhould demand it; for there might be ſome of the Charges limited to the Perſon of the other Legatee who would take nothing.

o We make uſe of this Example, which in all appearance will not happen, but it is becauſe it is frequent in the Roman *Law, and that it explains one of the Manners of Union or Conjunction ſpoken of in the fifth Article. It is of this manner that it is ſaid, that one and the ſame thing may be bequeathed to two Perſons ſeparately,* disjunctim, ſeparatim; *and it conjoins the Legatees by the thing. This Conjunction had this Effect in the antient Law of the* Romans, *that each of thoſe Legatees had the whole* *, *that is, one the Thing, and the other the Value of it. Which was altered by* Juſtinian, *and regulated in the manner as it is expreſſed in this Article, as will be ſeen by the Text which follows.*

Ubi legatarii vel fideicommiſſarii duo forte, vel plures ſunt quibus aliquid relictum ſit——Sin autem disjunctim fuerit relictum: ſi quidem omnes hoc accipere & potuerint & maluerint, ſuam quiſque partem pro virili portione accipiat. Et non ſibi blandiantur ut unus quidem rem, alii autem ſinguli ſolidam ejus rei æſtimationem accipere deſiderent: cum hujuſmodi legatariorum avaritiam antiquitas varia mente ſuſceperit, in uno tantum genere legatorum eam accipiens, in aliis reſpuendam eſſe exiſtimans. Nos autem omnimodo repellimus, unam omnibus naturam legatis & fideicommiſſis imponentes, & antiquam diſſonantiam in unam trahentes concordiam. Hoc autem ita fieri ſancimus, niſi teſtator apertiſſime, & expreſſim diſpoſuerit, ut uni quidem res ſolida, alius autem exiſtimatio rei ſingulis in ſolidum præſtetur. Sin vero non omnes legatarii, quibus ſeparatim res relicta ſit, in ejus acquiſitionem concurrant: ſed unus forte eam accipiat: hæc ſolida ejus ſit, quia ſermo teſtatoris omnibus prima facie ſolidum aſſignare videtur: aliis ſupervenientibus partes a priore abſtrahentibus, ut ex aliorum quidem concurſu prioris legatum minuatur. Sin vero nemo alius veniat, vel venire potuerit, tunc non vacuatur pars quæ deficit, nec aliis accreſcit, ut ejus qui primus accepit, legatum augere videatur, ſed apud ipſum qui habet ſolida remaneat, nullius concurſu diminuta. Et ideo ſi onus fuerit in perſona ejus apud quem remanet legatum adſcriptum: hoc omnimodo impleat, ut voluntati teſtatoris pareatur. Sin autem ad deficientis perſonam hoc onus fuerit collatum, hoc non ſentiat is qui non alienum, ſed ſuum tantum legatum imminutum habet. Sed & varietatis non in occulto ſit ratio: cum ideo videatur teſtator disjunctim hoc reliquiſſe, ut unuſquiſque ſuum onus, non alienum agnoſcat. Nam ſi contrarium volebat, nulla erit difficultas conjunctim ea diſponere. *l. un.* §. 11. *C. de caduc. toll.*

Si quidem evidentiſſime apparuerit, ademptione a priore legatario facta, ad ſecundum legatum teſtatorem convolaſſe, ſolum poſteriorem ad legatum pervenire placet. Sin autem hoc minime apparere poteſt, pro virili portione ad legatum omnes venire: ſcilicet, niſi ipſe teſtator ex ſcriptura manifeſtiſſimus eſt, unumque eorum ſolidum accipere voluiſſe. *l.* 33. *ff. de legat.* 1.

Altho this laſt Law be taken out of the Digeſts, yet thoſe who are acquainted with the Stile of the antient Lawyers, the Authors of the Texts which are collected together in the Digeſts, and with that of Tribonian, *will eaſily perceive that theſe Expreſſions are of his Stile; and that he has accommodated this Law to the Change which* Juſtinian *had made by the other Law which has been juſt now quoted, having aboliſhed that antient Law which gave the whole thing to each of the Legatees to whom it was bequeathed ſeparately, in the manner explained in this Article.*

We have ſaid at the end of the Article, that the Legatee who ſhall have the whole Legacy ſhall acquit the Charges which ought to paſs to him according to the Diſpoſition of the Teſtator, and we have not ſaid in general, as it is expreſſed at the end of the firſt of theſe two Texts, that he would not be bound for the Charges which the Teſtator had impoſed on the other Legatees of the ſame thing, and who ſhould take no ſhare in it. For beſides that it is very difficult, not to ſay impoſſible, for a Legatee to refuſe a Legacy, if the Charge does not exceed the Value of it; yet altho this Caſe ſhould happen, it would be by the Circumſtances, and by the manner in which the Teſtator had expreſſed himſelf, that we ought to judge if his Intention was, that the Charge impoſed on the Legatee, who ſhould take no part of the Legacy, ſhould be limited to his Perſon, or that it ſhould affect the thing bequeathed, and that it ought to paſs to the Legatee who ſhould have the whole Legacy to himſelf.

* *Ulp. Tit.* 24. §. 12, & 31.

XIII.

If the ſame thing is bequeathed to two or more Legatees, but ſo as that the Teſtator divides it among them, as if he bequeaths it to them by equal Portions, or aſſigns to every one his own, there will be no right of Accretion among them: For their Title divides them, and gives to every one his Right to his Legacy ſeperated from that of the others, and reſtrained to his own Portion. So that if any one of the Portions of theſe Legatees ſhould become vacant, the others would have no Right

13. *Among Legatees by Portions there is no Accretion.*

Right to it *p*; but it would go either to the Heir or Executor, if it was he that was charged with the Legacy, or to a Legatee, if the Teſtator had charged one Legacy with this other; as if he had deviſed a Land or Tenement to a Legatee, and had charged him to give to others either a Portion of the ſaid Land, or the Uſufruct of the whole, or of a part thereof, or a Sum of Money to be divided among them.

p Quoties uſusfructus legatus eſt, ita inter fructuarios eſt jus accreſcendi, ſi conjunctim ſit uſusfructus relictus. Cæterum ſi ſeparatim unicuique partis rei uſusfructus ſit relictus, ſine dubio jus accreſcendi ceſſat. *l.* 1. *ff. de uſufr. accreſc.*

XIV.

14. *Divers Caſes of Accretion between joint Legatees.*

If it ſhould happen that one and the ſame thing being bequeathed jointly, and without diſtinction of Portions, to ſeveral Perſons, as has been mentioned in the eleventh Article, one of the Legatees being a poſthumous Child, ſhould not come into the World, or that another Legatee ſhould happen to be dead before the making of the Teſtament, and the Teſtator knew nothing of it, the Portions which by theſe Events would become vacant would accrue to the others *q*. And it would be the ſame thing if one of theſe Legatees who was alive when the Teſtament was made, ſhould happen to die before the Teſtator *r*.

q Si Titio & poſtumis legatum ſit, non nato poſtumo, totum Titius vindicabit. *l.* 16. §. 2. *ff. de legat.* 1.

In primo itaque ordine, ubi pro non ſcriptis efficiebantur, ea quæ perſonis jam ante teſtamentum mortuis teſtator donaſſet, ſtatutum fuerat, ut ea omnia bona manerent apud eos a quibus fuerant derelicta: niſi vacuatis vel ſubſtitutus ſuppoſitus, vel conjunctus fuerat aggregatus. Tunc enim non deficiebant, ſed ad illos perveniebant, nullo gravamine (niſi perrarò) in hoc pro non ſcripto ſuperveniente. Quod & noſtra majeſtas quaſi antiquæ benevolentiæ conſentaneum, & naturali ratione ſubnixum, intactum atque illibatum præcepit cuſtodiri, in omne tempus valiturum. *l. un.* §. 3. *C. de caduc. toll.*

r Pro ſecundo vero ordine, in quo ea vertebantur, quæ in caſu caduci fieri contingebant, ſcilicet ubi legatarius vivo teſtatore decedebat; ſi eo caſu ſuperſit conjunctus, ei accreſcit legatum cum onere. *d. l. un.* §. 4.

XV.

15. *Accretion in Legacies and Succeſſions, is a Conſequence of the Conjunction by the thing.*

It reſults from all the Rules which have been here explained, that the Right of Accretion among Heirs or Executors, being an Effect of the Rule which ordains that the Inheritance cannot be divided ſo as that part thereof ſhall go to the teſtamentary Heir, and part thereof to the Heir at Law; the ſaid Right is acquired by the thing it ſelf, that is, by the Inheritance. From whence it follows, that the Inheritance ought to go intire to him who happens to be the only Perſon who is to ſucceed, whether he was united to others by the Expreſſion, or was called to the Succeſſion ſeparately, or that he was even reſtrained to one diſtinct Portion: For ſeeing this Portion cannot remain to him ſingle by itſelf, it draws to him the Portions of the others when they become vacant; ſo that it is always by the thing that Heirs or Executors are conjoined with one another. And among Legatees the Right of Accretion is likewiſe an Effect of their being conjoined by the thing, as appears by the Rules explained in the Articles which relate to the Legacies.

s Si totam, an partem ex qua quis hæres inſtitutus eſt tacite rogatus ſit reſtituere, apparet nihil ei debere accreſcere, *quia rem non videtur habere.* l. 83. ff. de acquir. vel omit. hæred.

We do not quote here this Text becauſe of the Rule that is explained in it, that he who is charged with a tacit Truſt of the Inheritance, or a part of it, has not the Right of Accretion, for if the Fiduciary Bequeſt be in favour of a Perſon to whom the Teſtator could not give any thing, neither the Perſon for whom the Truſt is created, nor the Heir that is charged with it, will have any ſhare in the Fiduciary Bequeſt. And if it be in favour of a Perſon to whom the Teſtator might lawfully give, it will be very evidently the Perſon for whom the Truſt is, who will have the Benefit of the Right of Accretion, if it is to take place; and it will be his Buſineſs to regulate it with the Perſon who is charged to reſtore to him the whole Inheritance, or a part of it. But we have put down here this Text only on account of theſe laſt Words in it, quia rem non videtur habere, *becauſe they ſhew that it is to the Thing that the Right of Accretion is annexed; which is a Principle that we thought neceſſary to be explained in this Article.* See the Texts cited on the eleventh Article.

SECT. X.

Of the Right of Tranſmiſſion.

WHEN an Heir or Executor has accepted a Succeſſion, if he dies afterwards, it is without doubt that he tranſmits the ſaid Succeſſion, that is, makes it to paſs to his Heirs and Executors with his other Goods: If a Legatee dies after he has acquired his Right to the Legacy, he tranſmits it in the ſame manner to his Succeſſor; and it is not of this manner of tranſmitting that we treat here. But if the Heir or Executor, or Legatee dies before he has known or exerciſed his Right, it does not appear to be ſo certain, that they tranſmit it in this caſe to their Heirs and Executors. And this Doubt had

given occaſion in the *Roman* Law to many Queſtions, concerning which ſeveral Rules have been made, which mark differently in what Caſes Heirs and Legatees tranſmit, or do not tranſmit their Right to their Heirs; that is, in what Condition their Right ought to be at the time of their Death, in order to make it paſs from them to their Succeſſors.

Altho the Right of Tranſmiſſion in the *Roman* Law reſpects Succeſſions of Inteſtates as well as Teſtamentary Succeſſions, and that it may ſeem for this Reaſon that we ought to have treated of this Matter among thoſe which are common to the two ſorts of Succeſſions; yet we have placed it among the Matters relating to Teſtaments. For in our Uſage there can be no difficulty as to the Tranſmiſſion of Legal Succeſſions, becauſe of our Rule, *That the Dead gives ſeiſin to the Living*, as ſhall be explained hereafter. Thus the Rules which concern the Difficulties of Tranſmiſſion are in our Uſage limited to teſtamentary Diſpoſitions, whether it be for Legacies, and Fiduciary Bequeſts, or for Inheritances.

We may make the ſame Remark on the Rules of the *Roman* Law which concern the Right of Tranſmiſſion, as we have made on thoſe relating to the Right of Accretion, That the Origin of Tranſmiſſion, as well as that of Accretion, is found in the natural Order of Legal Succeſſions. For as the Right of Accretion between two Children, for example, who ſurvive their Father, is founded upon this, that it is natural, when the two concur together, for them to divide the Inheritance between them, and that if one of the two be left alone, he ſhould have the whole; the Right of Tranſmiſſion is founded upon this, that it is natural alſo, if a Son who has outlived his Father happens to die before he has entred upon the Succeſſion, or even before he knew of his Father's Death, that he ſhould tranſmit to his Children the Right which he had, and that his Children taking his Place ſhould uſe his Right, which becomes theirs. Thus he tranſmits to them the Right which he had acquired by the Death of his Father, and he would tranſmit it in the ſame manner to other Heirs, whether Heirs by Teſtament or Heirs at Law, becauſe this Succeſſion had paſſed naturally to him, and was become a part of the Goods of his own Inheritance. It was in this manner that the Uſe of Tranſmiſſion began in the *Roman* Law; but it was limited to the Children who were under the Power and Juriſdiction of their Father when he died, and who were called *ſui hæredes*. And the Children who were emancipated not being *ſui hæredes*, they had not this Right of Tranſmiſſion, if they died before they knew and had exerciſed their Right to the Inheritance *a*. And it was the ſame thing, and that with much more reaſon, as to the other Heirs of Blood *b*.

As for Teſtamentary Succeſſions, there was no Tranſmiſſion in them, unleſs the Teſtamentary Heir or Executor had known and exerciſed his Right *c*; and even Children who were inſtituted Heirs, or Executors by the Teſtament of their Parents, were deprived of it as well as Strangers, and they began to have the Right of Tranſmiſſion of the Teſtamentary Succeſſions of their Aſcendants only by a Law of the Emperors *Theodoſius* and *Valentinian*, who gave to Children and other Deſcendants this Right of Tranſmiſſion, not indifferently to tranſmit the Teſtamentary Succeſſions of their Aſcendants to their Executors, whether they were Strangers or Relations, but only in favour of their Children and other Deſcendants *d*. And ſeeing this Law ſpeaks only of Teſtamentary Succeſſions, and not of Succeſſions of Inteſtates, the moſt learned of the Interpreters has been of opinion that it made no change in the Succeſſions of Inteſtates, and that the Children who are not *ſui hæredes* have by this new Law the Tranſmiſſion only of what Goods come to them by virtue of the Teſtamentary Diſpoſitions of their Aſcendants; and that as to the Succeſſions of Inteſtates the antient Law ſubſiſts, which does not give the Tranſmiſſion to Children who are emancipated, but only to thoſe who being under the Father's Juriſdiction, were *ſui hæredes*. Thus we ſee that by the *Roman* Law the Tranſmiſſion has place in Teſtamentary Succeſſions only for Children, and in legal Succeſſions only for ſuch Children as were not emancipated. And as for all other Heirs, whether Heirs by Teſtament, or Heirs at Law, they had not this Right if they died before they knew that the Succeſſion was fallen to them.

a *L. 4. C. qui adm. ad bon. poſſeſſ. poſſ. l. 2. C. ad Senat. Orph.*

b *L. 9. ff. de ſuis & legit. hared.*

c Hæreditatem, niſi fuerit adita, tranſmitti nec veteres concedebant, nec nos patimur. *L. un. §. 5. C. de cadue. toll.*

d *L. un. Cod. de his qui ante apert. teſt. l. un. §. 5. Cod. de cadue. toll.*

them, or before they had entered upon it *e*. And this Rule was ſo ſtrictly obſerved, that altho it were becauſe of Abſence that the Child was ignorant of the Death of his Father, he had no Right of Tranſmiſſion, if he died in that Ignorance of his Right. And it was out of mere favour that the Emperor *Antonin* excepted the Caſe of Abſence on account of the Publick *f*.

There was another Exception in favour of Heirs, whether Heirs by Teſtament or Heirs to Inteſtates, who died within the time which the Law gave the Heir to deliberate whether he would accept of the Inheritance or refuſe it. And they who died within the ſaid time, without explaining their Intentions therein, tranſmitted their Right to their Heirs *g*.

As to Legatees, their Condition, in what concerned the Right of Tranſmiſſion, was more advantageous in the *Roman* Law than that of the Heirs or Executors: For they acquired their Right the Moment that the Teſtator died, if the Legacy was pure and ſimple; and if the Legacy was conditional, the Right of the Legatee depended in that caſe, as it was but juſt, on the Accompliſhment of the Condition, and he did not acquire it till the Condition was accompliſhed *h*. Thus the Legatee of a Legacy pure and ſimple happening to die after the Teſtator, without knowing any thing of the Legacy, tranſmitted his Right to his Heir; and if the Legacy was conditional, and the Legatee died before the Condition was fulfilled, as he had acquired nothing himſelf, ſo he tranſmitted nothing to others; which was alſo natural and juſt.

This Difference between the Condition of Legatees and that of Heirs or Executors, as to what concerns the Right of Tranſmiſſion, had been eſtabliſhed in order to avoid an Inconvenience, which would have happened if the Right of the Legatee had not veſted in him at the Moment of the Death of the Teſtator. For ſeeing in the *Roman* Law the Validity of the Legacies depended on the Acceptance of the Inheritance, ſo that if the Heir or Executor renounced the Inheritance, the Legacies remained null, as has been explained in its proper Place *i*, it might have happened that if the Right had not veſted in the Legatee but by the Executor's Acceptance of the Succeſſion, which depended on the Executor, and which the Executor might put off, the Legatee who ſhould die in the Interval, between the Death of the Teſtator and the Executor's Acceptance of the Inheritance, would have loſt his Right, and have tranſmitted nothing to his Heirs. It was for the preventing of this Inconvenience, that it was regulated, in regard to Legatees, that the Right to the Legacy ſhould be veſted in them at the Moment of the Death of the Teſtator, that they might have the Right of tranſmitting it to their Heirs. Thus it was a Favour which was granted them, to diſtinguiſh their Condition from that of the Heirs or Executors, in what concerns Tranſmiſſion. And as this Favour was granted only to prevent that Inconvenience, ſo it had not place in the Caſes where the Inconvenience was not to be feared. Thus, for Legacies which could not be tranſmitted, ſuch as a Legacy of the Uſufruct of any thing, or a Legacy of Liberty to a Slave, which are Legacies confined to the Perſons of the Legatees, the Legatees did not acquire their Right to them but from the Day of the Heir's entring upon the Inheritance *l*.

In our Uſage the Tranſmiſſion of Succeſſions of Inteſtates takes place indifferently not only for Children, but alſo for all the next of kin, whether they be Deſcendants, Aſcendants, or Collateral Relations. For according to our

e *L.* 7. *Cod. de Jure delib. l. un.* §. 5. *C. de cad. toll.*

f *L.* 86. *ff. de acq. vel omitt. hared.*

g See the eighth Article of this Section.

There was another Caſe in the Roman *Law, where the teſtamentary Heir tranſmitted his Right, if he died before he entered upon the Inheritance. But ſeeing this Caſe has no Conformity with our Uſage, we do not explain it here; and we only take this notice of it here, to ſatisfy thoſe who might be apt to find fault with the Omiſſion, and thoſe who may have a mind to conſult it in its proper Place.* V. *l.* 2. §. 20. *ff. de Senat. Silan. l. penult. C. de his quib. ut ind.*

h *See the tenth, eleventh and twelfth Articles of this Section.*

i *See the nineteenth Article of the fifth Section of this Title, and the Remark that is made upon it.*

l *L. un.* §. 2. *ff. quando dies uſufr. leg. ced. l.* 2. *& l.* 8. *ff. quando dies leg. ced.*

But if this Legatee of an Uſufruct having ſurvived the Teſtator a whole Year, had died before the Heir had accepted the Succeſſion, would it have been juſt that the Heir of the ſaid Uſufructuary ſhould loſe the Fruits of that Year? This Difficulty cannot happen in our Uſage, where Equity would do juſtice to the Uſufructuary, or to his Heir. And one or other of them would have the Fruits which ought to belong to him from the time that the Succeſſion was open, according to the Diſpoſition of the Teſtator, and according to the Rules of Uſufruct, which have been explained in the Title of that Matter.

Rule, *The Dead gives Seiſin to the Living, his next lineal Heir who is capable of ſucceeding to him*, of which mention has been made in another place *m*, the Heirs of Blood acquire their Right to the Succeſſion the very Moment that it is open, altho the Death of the Perſon to whom they ſucceed be unknown to them, and that they be ignorant of their Right to ſucceed, and do not ſo much as know that the Deceaſed was their Relation. It follows from this Rule, that if the Heir at Law, or next of Kin, who ſurvived but one Moment the Perſon to whom he had Right to ſucceed, happens to die immediately after him, without having exerciſed or known his Right, he tranſmits it to his Heirs.

As for Legacies, our Uſage gives to all Legatees the Right of Tranſmiſſion of pure and ſimple Legacies, which may paſs to their Heirs; and if the Legatee who has ſurvived the Teſtator dies before he had knowledge of the Legacy, he tranſmits it nevertheleſs to his Heir, in the ſame manner as the Heir at Law, or next of Kin, tranſmits to his Heir the Inheritance.

There remains then no other Difficulty, except in the Tranſmiſſion of Teſtamentary Succeſſions; and there would remain none even in that, if the Rule which gives the Right of Tranſmiſſion to Legatees when they have out-lived the Teſtator, had been extended to Teſtamentary Heirs or Executors. A Rule ſo eaſy, and ſo plain as this, would have put an end to many Difficulties which ſtill remain in the Principles of the *Roman* Law concerning this Matter, and would have removed Inconveniences therein, which ſeemed to deſerve that ſome Proviſion ſhould have been made to guard againſt them, as well as thoſe relating to Legatees. For if it would be hard for a Legatee who ſhould die before the Executor's accepting of the Inheritance, that he could not tranſmit his Right to his Heirs, it would not be leſs hard for Children, or other Succeſſors, of an Executor, that becauſe he was ignorant of his Right to the Inheritance, whether through Abſence, or for other Cauſes, he could not tranſmit it if he died in this Ignorance; and that thus a mere Chance ſhould diſtinguiſh his Condition from that of an Executor who ſhould die after he had known of his Right, altho he had made no Step towards exerciſing it. For he would nevertheleſs tranſmit his Right to his Heirs, if he died within the Time which the Law allowed to Teſtamentary Heirs or Executors for deliberating, as has been already obſerved.

It ſeems very ſtrange that by this Law the Teſtamentary Heir, who has known his Right, and neglected it, ſhould tranſmit to his Heirs the Succeſſion that was fallen to him; and that if the ſame Heir had been ignorant of his Right, he could have tranſmitted nothing. This Inconvenience might have been ſufficient to juſtify a Rule, which, at the ſame time that it removed the Inconvenience, would have beſides been uſeful to put an end to all the Difficulties of this matter. And it is without doubt upon this Conſideration, that in one of the Provinces of *France*, where the *Roman* Law is moſt followed, they have eſtabliſhed it as a Rule or Cuſtom, *That the Dead gives Seiſin to the Living, in what manner ſoever he ſucceeds, whether by Teſtament, or without Teſtament n.* And if this Rule be juſt in the *Roman* Law for Legatees, that they ſhould have their Right at the Moment of the Death of the Teſtator, what Injuſtice would there be in it, if it ſhould take place likewiſe for the Teſtamentary Heirs or Executors? ſince it is true of the Teſtamentary Heirs, as well as of Legatees, that they hold their Right by the ſame Title of the Will of the Teſtator, and of the Law which authorizes the ſaid Will, and that this Title is ſtill more favourable for the ſaid Heirs or Executors than for Legatees, whom the Teſtator hath leſs conſider'd than his Heir or Executor; and in a word, that the Teſtament having its Effect by the Death of the Teſtator, it is at the Moment of the ſaid Death that the Teſtamentary Heir ought to take the place of him to whom he ſucceeds. And it is alſo the Rule, that at what time ſoever afterwards the ſaid Heir or Executor accepts of the Inheritance, he is conſidered as if he had accepted it at the Moment of the ſaid Death, and is bound in the ſame manner for all the Charges that were fallen due before he accepted the Succeſſion *o*.

Will it be objected againſt the Tranſmiſſion of an Inheritance in the Caſe where the Teſtamentary Heir died without knowing any thing of the Teſtament, that one cannot acquire a Right

m See the Preface to this ſecond Part, numb. 7.

n See the Cuſtoms of Bourdeaux *and Country of* Guienne, *Article 74.*

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

which

which they know nothing of; and that the Quality of Heir or Executor, implying Engagements, it is neceſſary for acquiring an Inheritance that the Heir or Executor ſhould know the Right which is fallen to him; and that therefore he having been ignorant of it, has had no Share in the Inheritance, and conſequently could not tranſmit it to his Heirs? But theſe Reaſons would prove in the ſame manner, that there would be no Tranſmiſſion even in Succeſſions of Inteſtates, and they would prove likewiſe, that the Legatees who had known nothing of the Legacies left them, could not tranſmit them to their Heirs, at leaſt thoſe whoſe Legacies ſhould be ſubject to ſome Charges.

Will it be ſaid, that the Teſtator has conſidered only the Perſons of his Executors, and not the Perſons of their Succeſſors, and that therefore the Executor being dead without having acquired the Inheritance, his Heirs or Executors ought to have no Share in it? But this Reaſon would prove the ſame thing as to Legatees; and ſince it proves nothing with reſpect to them, neither ought it to prove any thing with reſpect to Executors. Thus the only natural Effect of this Reaſon would be to prove, that if he who is inſtituted Heir or Executor dies before the Teſtator, the Inſtitution does not paſs to his Heirs; but if the ſaid Heir or Executor ſurvives the Teſtator, it would be againſt his Intention to deprive him of the Right of Tranſmiſſion, ſince every Teſtator means, that if thoſe whom he inſtitutes his Heirs or Executors do ſurvive him, all the Goods of the Inheritance ſhould be theirs in the Moment that his Death ſhall diveſt him of them. To which we may likewiſe add this Conſideration, which is common both to the Executor and to the Legatee, that it is not abſolutely true that the Teſtator hath only conſider'd their Perſons. For it is very uſual for a Friend to inſtitute his Friend his Heir or Executor in conſideration of his Children, and to leave a Legacy to a Friend upon the ſame Motive; ſo that the Tranſmiſſion in theſe Caſes is agreeable to the Intention of the Teſtator. But even in the Caſes where the Intention of the Teſtator is confined to the ſole Perſon of the Executor and Legatee, the Right of Tranſmiſſion is not therefore the leſs comprehended in the Diſpoſition of the Teſtator. For it is for the Intereſt of the Executor and of the Legatee, that the Goods which come to them by a Teſtament ſhould paſs to the Uſe of their Affairs, whether it be to acquit their Debts, or for other Uſes, which cannot be done except by the Right of Tranſmiſſion. Thus it may be ſaid, that the Right of Tranſmiſſion being founded on all theſe Principles of Equity, it was not ſo much a Favour done to the Legatees in the *Roman* Law, as an Act of Juſtice, in giving them the Right of Tranſmiſſion, although they ſhould happen to die before they knew any thing of the Legacy, and that the ſame Juſtice might be likewiſe extended to Teſtamentary Heirs or Executors without any Inconvenience.

It ſeems reaſonable to conclude from all theſe Reflections, that ſince neither natural Equity nor Reaſon render the Condition of the Teſtamentary Heir worſe than that of the Legatee, it would have been juſt to have made it equal as to the Right of Tranſmiſſion; and that the Rule which ſhould have ordered it ſo being founded on Principles ſo natural as theſe, would have been much more uſeful than the ſeveral Subtilties which one meets with in this Matter, as well as in others of the *Roman* Law. So that it would have been convenient that the Rule, *The Dead gives Seiſin to the Living*, had been made common throughout in Succeſſions by Teſtament, as well as thoſe without Teſtament, as we have ſeen that it is in one of the Provinces of *France*, where the *Roman* Law is moſt in uſe, and where they have very prudently judged, that it is much more uſeful to eſtabliſh Tranſmiſſion without diſtinction in all ſorts of Succeſſions, whether it be an Heir that ſucceeds by Teſtament, or without Teſtament, whether he knew of his Right, or died before he knew any thing of it, than to introduce Diſtinctions full of Inconveniences without any Advantage, and ſerving for no other Uſe than to give occaſion to many Law-Suits. It is without doubt upon theſe Conſiderations, that altho this particular Cuſtom in one Province, which is governed by the written Law, ſeems to inſinuate that in the others they follow the *Roman* Law, yet ſome Authors have thought that the Maxim, *That the Dead gives Seiſin to the Living*, is become univerſal throughout the whole Kingdom in Teſtamentary Succeſſions, as well as in Succeſſions of Inteſtates.

It is to be remarked on this Matter of Tranſmiſſion, that it contains ſome particular Rules which would be of neceſſary Uſe, even altho Tranſmiſſion ſhould take

take place in Teſtamentary Succeſſions; as, for example, that which concerns the Tranſmiſſion of conditional Diſpoſitions: And that there are alſo other Rules which relate to the Tranſmiſſion of legal Succeſſions, ſuch as thoſe which are explained in the firſt Articles, which regard in general the Nature of Tranſmiſſion.

All theſe ſeveral ſorts of Rules ſhall be explained in this Section, and ſhall take in every thing that belongs to this Matter of Tranſmiſſion But ſeeing the Uſe of Rules and Principles is much facilitated by the Application of them to the particular Caſes to which they may agree; and that we have been obliged to explain many of theſe Caſes in the ninth Section of the Title of Legacies; the Reader may be pleas'd to have recourſe to that Section at the ſame time that he reads this.

The CONTENTS.

I.

1. *Definition of Tranſmiſſion.*

TRanſmiſſion is the Right which Heirs, or Executors, or Legatees, may have to convey down to their Succeſſors the Inheritance or Legacy which belonged to them, in caſe they die before they have exerciſed their Right *a*.

a Succeſſionem ad hæredes ſuos tranſmittere. *l.* 7. *in f. C. de jure delib.* See the Preamble of this Section.

II.

2. *To what Tranſmiſſion is limited.*

It reſults from the Definition explained in the preceding Article, that when the Heir or Executor has enter'd upon the Inheritance, and the Legatee has received the Legacy, it is not any longer by the Tranſmiſſion that their Right paſſes to their Heirs, but barely by Succeſſion, in the ſame manner as their other Goods *b*. For Tranſmiſſion is underſtood only of the Right which the Heir, or Executor, or Legatee, may have to convey to his Heirs a Right which he himſelf had never exerciſed, and which may have been altogether unknown to him, as will be ſeen in the Sequel of this Section.

b This is a Conſequence of the Definition of the Right of Tranſmiſſion.

III.

3. *Tranſmiſſion takes place when the Right is acquired.*

The Heir or Executor, and the Legatee have this in common, that both the one and the other have the Right of Tranſmiſſion, at the ſame time that the Right to the Inheritance, or to the Legacy, veſts in them. For having at that time their Right in their own Perſons, it is a Conſequence thereof, that they ſhould tranſmit it to their Heirs, even although they themſelves ſhould die before they had received any thing, the one of the Inheritance, and the other of the Legacy: As, on the contrary, if when they die they had no manner of Right in their own Perſons, they could tranſmit nothing to their Succeſſors *c*.

c See the following Article, as alſo the eighth and tenth Articles.

See in relation to this Article and thoſe that follow, the ſixth and the other following Articles of the ninth Section of Legacies.

IV.

4. *The Tranſmiſſion depends on the Condition in which the Right is at the Time of the Death.*

It follows from the preceding Articles, that when the Queſtion is about the Right of Tranſmiſſion, it is neceſſary to conſider in what Condition the Right of the Heir or Executor, and that of the Legatee, was at the time of their Death. And this depends on the Rules which ſhall be explained hereafter *d*.

d This is a Conſequence of the preceding Articles.

V.

V.

5. There is no Tranſmiſſion, if the Teſtamentary Heir or Legatee dies before the Teſtator.

There is likewiſe this common to the Teſtamentary Heir, and to the Legatee, that altho their Rights have the Teſtament for their Title, yet nevertheleſs if it happens that they die before the Teſtator, altho after the making of the Teſtament, there is in that Caſe no Tranſmiſſion; for the Teſtament was not to have its Effect but by the Death of the Teſtator. So that when their Death precedes that of the Teſtator, they have no Right, and conſequently do not tranſmit any thing *e*. And there would be ſtill leſs ground for Tranſmiſſion, if the Teſtamentary Heir or Legatee were already dead before the Teſtament was made, it being poſſible that the Teſtator knew nothing of their Death *f*.

e Pro non ſcriptis ſunt iis relicta qui vivo teſtatore decedunt. *ex* §. 2, *&* 3. *l. un. C. de caduc. toll.*

f Si eo tempore quo alicui legatum adſcribebatur in rebus humanis non erat, pro non ſcripto hoc habebitur. *l.* 4. *ff. de his quæ pro non ſcript.*

VI.

6. The Inſtitution and the Legacy may be conceived in Terms which make them to paſs to the Heirs.

We may add, as another Rule that is common to Teſtamentary Heirs, and to Legatees, that if the Teſtator had conceived his Diſpoſitions in ſuch Terms as to ſhew that it was his Will, that in caſe his Heir, or Executor, or his Legatees, ſhould chance to die before their Right fell to them, the ſaid Right ſhould paſs to their Children, or in general to their Heirs; ſuch a Diſpoſition would have its Effect not ſo much by the Right of Tranſmiſſion, as by the proper Right of the ſaid Children or Heirs of the Teſtamentary Heir or Legatee, who would in this Caſe be called by the Teſtator by way of Subſtitution to the others *g*.

g Since the Will of the Teſtator holds the Place of a Law, nothing would hinder ſuch a Diſpoſition from having its effect. And we have ſet down this Rule here, becauſe it is a Precaution uſed by many for preventing the Events which make the Tranſmiſſion to ceaſe, by taking care to have added to the Diſpoſitions of Teſtator, when it is their Will that it ſhould be ſo, ſome Expreſſion that may have this Effect to make the Inheritance or the Legacy to paſs to the Succeſſors of the Teſtamentary Heir or Legatee in default of them; as is, for example, this Expreſſion, That the Teſtator gives to ſuch a one and his.

VII.

7. The Acceptance of the Inheritance gives the Right of Tranſmiſſion.

If he who is inſtituted Heir by a Teſtament, having accepted of the Inheritance, ſhould chance to die before he touched any thing thereof, he would tranſmit to his Heirs the Right to gather in the Effects belonging to it. For by his Acceptance of it, he had acquired the Quality of Heir, and the Right to the Inheritance *h*. Thus this Right, as well as all the others which he might have, would paſs to his Heirs *i*, and that with much more reaſon than in the Caſe of the Rule that follows.

h See the firſt Article of the third Section, how one acquires an Inheritance.

i Hæres in omne ius mortui non tantum ſingularum rerum dominium ſuccedit. *l.* 37. *ff. de acq. vel om. hæred.*

VIII.

8. The Teſtamentary Heir who dies within the time allowed for deliberating, tranſmits his Right.

If during the Time that the Law gives the Teſtamentary Heir to deliberate in, whether he will accept or refuſe the Succeſſion, he happens to die without having done any one Act as Heir, he knowing of the Teſtament, whether it be that he was really deliberating about it, or that he had not in any manner explained his Mind therein, but only that he had not renounced the Inheritance; the Law preſumes from his Silence that he was deliberating, and he tranſmits his Right to his Heirs, who may in their own Right accept the Inheritance, or renounce it *l*.

l Sancimus ſi quis vel ex teſtamento, vel ab inteſtato, vocatus deliberationem meruerit: vel, ſiquidem hoc non fecerit, non tamen ſucceſſioni renuntiaverit, ut ex hac cauſa deliberare videatur: ſed nec aliquid geſſerit, quod aditionem, vel pro hærede geſtionem inducat: prædictum arbitrium in ſucceſſionem ſuam tranſmittat. ... Et ſi quidem ipſe qui ſciens hæreditatem vel ab inteſtato, vel ex teſtamento ſibi eſſe delatam, deliberatione minime petita, intra annale tempus deceſſerit, hoc jus ad ſuam ſucceſſionem intra annale tempus extendat. *l.* 19. *C. de jure delib.* Sin autem inſtante tempore deceſſerit, reliquum tempus pro adeunda hæreditate ſuis ſucceſſoribus ſine aliqua dubietate relinquat: quo completo, nec hæredibus ejus alius regreſſus in hæreditatem habendam ſervabitur. *d. l.* 19.

¶ We have not ſet down in the Article that which is ſaid in the Text, That the Heirs of the Heir have no more Time for deliberating, than what remained to the Deceaſed. For if there remained only two or three Days, or ſo little Time that it was not poſſible for them to exerciſe their Rights, Equity would require that they ſhould have a longer Delay. And as it is not agreeable to our Uſage to be ſo very rigorous in ſuch like Caſes, it would ſeem juſt to grant unto them the ſame Delay that the Ordinance of 1667. *Tit.* 7. *Art.* 1. gives to Heirs to deliberate in, ſeeing that Delay is only forty Days after the Inventary.

We

We have mentioned in this Article only the Caſe where the Teſtamentary Heir knew of the Teſtament, and died within the Time allowed by the Law for deliberating; and have ſaid nothing of the Caſe where the Heir who knew of the Teſtament had let the Time for deliberating ſlip, without making any Declaration, and died after the ſaid Time was expired. For although by the *Roman* Law, that Heir did not tranſmit his Right to his Heirs *a*, yet our Uſage ſeems to be oppoſite to that Rigour.

And ſeeing by the Ordinance of 1667, the Delay for deliberating is only, as has been already mentioned, of forty Days after the Inventary, whereas by the *Roman* Law they had whole Years to deliberate in, and that this Time of forty Days would be too ſhort a time to take away the Right of Tranſmiſſion, it does not ſuit with our Uſage; as has been likewiſe already taken notice of, to obſerve this Rigour in the Caſes of Non-performance of that which ought to be done within a certain ſpace of Time, unleſs there were ſome Equity in the ſtrict Obſervance of the ſaid Rigour: as, for example, to exclude one who had a Right to diſſolve a Sale by virtue of a Power or Equity of Redemption, and who ſhould not come within the Time fixed for bringing the Action for that purpoſe. Thus the Heir and his Succeſſor would be always received to exerciſe their Right, and would not be refuſed all ſuch Delays as ſhould appear to be juſt and neceſſary *b*.

But if the Teſtamentary Heir ſhould chance to die before he knew of his Right, would he tranſmit it to his Succeſſor, whether he died within the Time allowed for deliberating, or after the ſaid Time? It might be urged in favour of the Tranſmiſſion, that as in the *Roman* Law the Heir who knew of his Right did not tranſmit it, if he died without declaring his Mind, having let the Time paſs which the Law allowed him for deliberating, as has been juſt now obſerved; ſo it would ſeem to follow by the Rule of Contraries, that this Time ought not to run againſt the Heir who ſhould die without knowledge of his Right; in the ſame manner as in the *Roman* Law, the Time given to the Heir at Law to demand the Poſſeſſion of the Goods that were fallen to him, did not run againſt the Heir who was ignorant that the Succeſſion was fallen to him *c*. And if it is juſt to grant a Delay to the living Heir who was ignorant of his Right, altho the Time regulated by the Law be expired, as that Delay is granted by an expreſs Rule of the Ordinance of 1667, *Tit.* 7. *Art.* 4 is it not as equitable to grant to the Succeſſor of this Heir, who begins to know the Right of the Deceaſed, the ſame Delay which would have been granted to the Deceaſed, had he been in a Condition to demand it? And as it has been found juſt in the *Roman* Law, that the Heir who knew of his Right, and died within the Time allowed for deliberating, ſhould tranſmit it to his Succeſſors, altho he had done nothing to ſhew his Acceptance of the Inheritance, provided only that he had not renounced it; may it not be ſaid of the Heir who dies in Ignorance of his Right, that the Time for deliberating ought not to run againſt him? And it having been impoſſible for him to deliberate, ſome Time for deliberating ought not to be refuſed to his Succeſſor. From whence it follows, that the Tranſmiſſion to this Succeſſor is as juſt as that to the Heir of him, who having known his Right had neglected it to the Time of his Death, which happened within the Time allowed for deliberating, and who did nevertheleſs tranſmit the Succeſſion to his Heirs, according to the Rule explained in this Article.

The Reader may join to theſe Conſiderations the Reflexions which have been made on this Subject in the Preamble of this Section, and particularly that which has been remarked touching the Sentiment of thoſe who think that it is at preſent the general Uſage of the Kingdom, that the Rule, *The Dead gives Seiſin to the Living*, extends to Teſtamentary Succeſſions.

a Si ipſe (hæres) poſtquam ei cognitum ſit hæredem eum vocatum fuiſſe, tempore tranſlapſo nihil fecerit, ex quo vel adeundam, vel renuntiandam hæreditatem manifeſtaverit, is cum ſucceſſione ſua, ab hujuſmodi beneficio excludatur. *l.* 19. *C. de jure delib.*

b *See the Ordinance of* 1667, *tit.* 7. *Art.* 4.

c Quacunque die neſcierit, aut non potuerit, nulla dubitatio eſt quia dies ei non cedat. *l.* 2. *ff. quis ordo in bon. poſſ. ſervet.* Quicunque res ex parentum, vel proximorum ſucceſſione jure ſibi competere confidit, ſciat, ſibi non obeſſe ſi per ruſticitatem, vel ignorantiam facti, vel abſentiam vel quamcunque aliam rationem, intra præfinitum tempus bonorum poſſeſſionem minime petiſſe noſcatur. Quoniam hæc ſanctio hujuſmodi conſuetudinis neceſſitatem mutavit. *l.* 8. *C. qui admiſ. ad bon. poſſeſſ. poſſ.*

IX.

9. *When the Inſtitution or Subſtitution of an*

If an Inſtitution of a Teſtamentary Heir, or a Subſtitution, was conditional, and the Condition not being come to

Heir is conditional, he has no Right to tranſmit, unleſs the Condition be come to paſs.

to paſs at the Time that the Succeſſion fell, or that the Subſtitution could have taken place, the Heir or the Perſon ſubſtituted to him, ſhould happen to die; as he would have had no Right himſelf, ſo he could tranſmit nothing to his Heir. Thus, for example, if a Teſtator had inſtituted or ſubſtituted one of his Relations or Friends, on condition that he had Children, or in caſe he were married, his Death happening before the Condition, whether before or after that the Succeſſion fell, or that the Subſtitution could take place, would have annulled in his Perſon all Uſe of the Right to inherit the Succeſſion, and to tranſmit it *m*.

m Hæres & pure & ſub conditione inſtitui poteſt. §. 9. *inſt. de hæred. inſt.*

It is the Nature of Conditions, that what depends on them ſhould have its Effect, or remain null, according as they happen, or not happen. See the firſt Article of the eighth Section.

X.

10. *Tranſmiſſion of a Legacy that is pure and ſimple.*

As to the Legatee, if the Legacy is pure and ſimple, that is, without Condition, his Right veſts in him at the time of the Teſtator's Death, as is explained in its place *n*. and if he chances to die before he has demanded, or even known of his Legacy, he tranſmits his Right to his Heirs *o*.

n See the Preamble of this Section, and the firſt, ſecond, and third Articles of the ninth Section of Legacies.

o Si purum legatum eſt, ex die mortis dies ejus cedit. *l.* 5. §. 1. *ff. quand dies legat. vel fideic. ced. l. un.* §. 1. *in. f. C. de cad. toll.* Si poſt diem legati cedentem legatarius deceſſerit, ad hæredem ſuum transfert legatum. *l.* 5. *ff. quand. dies legat. vel fid. ced.*

XI.

11. *Tranſmiſſion of a conditional Legacy.*

If the Legacy was conditional, that is, if it depended on the Event of a Condition, the Right would not veſt in the Legatee till after the Condition had happened; and if the Legatee died before, as he had no Right to the Legacy himſelf, ſo he would tranſmit none to his Heir. And altho the Condition ſhould afterwards come to paſs after the Death of this Legatee, yet this Event would be uſeleſs to his Heir. Thus, for example, if a Teſtator had left a Legacy on condition that his Heir ſhould die without Children, and it happened that the Legatee died before the Heir, who afterwards died without Children, this Event would be uſeleſs both to the Legatee who was already dead, and to his Heir to whom he had not tranſmitted any Right, he having had none himſelf *p*

p Legata ſub conditione relicta non ſtatim, ſed cum conditio extiterit, deberi incipiunt; ideoque interim delegari non poſſunt. *l.* 41. *ff. de cond. & dem.*

Interidit legatum ſi ea perſona deceſſerit, cui legatum eſt ſub conditione. *l.* 59. *eod.*

See the fourth and eleventh Articles of the ninth Section of Legacies.

It is neceſſary to remark on this Article the difference which the Laws make between Conditions in Teſtaments, and thoſe of Covenants. The Difference conſiſts in this, That in the Diſpoſitions of Teſtators, there is only the Teſtator himſelf who regulates the Effect of his Diſpoſition, and if it does not expreſly comprehend the Heirs of him in whoſe Favour the Diſpoſition is made, it is limited to his Perſon, that is, that if the Right is not acquired to that Perſon during his Life, he can tranſmit nothing of it to his Heir. But in Covenants there are two Perſons, who treat both for themſelves and for their Heirs, if they are not excepted. Thus the Effect of Conditions in Covenants paſſes to the Heirs. See the thirteenth Article of the fourth Section of Covenants.

XII.

12. *Tranſmiſſion of a Legacy to an uncertain Day.*

As there are Legacies which are made to uncertain Days, and which are conditional, as has been explained in its Place *q*; theſe ſorts of Legacies are of the ſame nature with thoſe which depend on other ſorts of Conditions: And as to what concerns the Right of Tranſmiſſion, they are regulated in the ſame manner as other conditional Legacies *r*

q See the twelfth and thirteenth Articles of the eighth Section.

r It is a Conſequence of the Nature of theſe Legacies, which being conditional, are not tranſmitted, except in the Caſe that the Condition be come to paſs before the Death of the Legatee, as has been ſaid in the preceding Article.

XIII.

13. *The Rules of Tranſmiſſion may be applied to Subſtitutions and to fiduciary bequeſts.*

The Rules which concern the Right of Tranſmiſſion for Teſtamentary Heirs and Legatees, may be applied to thoſe who are ſubſtituted to them, and to thoſe for whoſe Account any thing is deviſed in truſt to others, whether it be the whole Inheritance, or ſome particular thing, which the Heir or a Legatee had been charged to reſtore to them, according as theſe Rules may be applicable to them. Which it is eaſy to diſcern, and therefore no ways neceſſary to repeat the ſame Rules with regard to them. Thus, when a Teſtator hath ſubſtituted to his Heir another Heir, to ſucceed to him in caſe the firſt either could not or would not accept the Succeſſion; or that he has obliged his Heir to reſtore the Inheritance to another Perſon when the ſaid Heir ſhall die; or that a Teſtator hath charged his

Heir, or a Legatee, with a Sum of Money in truſt, or with other Things which ought to paſs after their Death, or within a certain Time, to other Perſons: In all theſe Caſes the Perſons ſubſtituted, and the Perſons for whoſe account the fiduciary Bequeſt is made, ſurviving thoſe after whom they are called, and happening to die afterwards before they knew and exerciſed their Right, or before the Event of the Conditions, if there were any, tranſmit or do not tranſmit their Right in the ſame manner, and according to the ſame Rules, which have been juſt now explained for Heirs and Legatees *s*.

s Si fideicommiſſarius ante (*conditionis eventum*) deceſſerit, ad hæredem ſuum nihil tranſtuliſſe videtur. *l.* 11. § 6. *ff. de legat.* 3.

Toties videtur hæres inſtitutus etiam in cauſa ſubſtitutionis adiſſe, quoties acquirere ſibi poſſit: nam ſi mortuus eſſet, ad hæredem non transferret ſubſtitutionem. *l.* 81. *ff. de acquir. vel om. hared.*

SECT. XI.

Of the Execution of Teſtaments.

THE Execution of Teſtaments is naturally the Duty of the Teſtamentary Heirs, who remaining Maſters of the Goods, are bound for all the Charges. And the Legatees on their part, and all the other Perſons intereſted in the Execution of the Teſtaments, have the liberty to look after it, and to procure the Execution of what concerns themſelves. But ſeeing there are ſome Diſpoſitions of Teſtators, the Execution of which depends ſolely on the Integrity of the Teſtamentary Heir, and that thoſe very Diſpoſitions of which the Parties concerned may ſue for the Execution, may remain without effect, either by reaſon of their Death, or by their Abſence, or by the Knavery of the Heir, or for other Cauſes; care has been taken, by the Uſe of Executors of Teſtaments, to have the Wills of Teſtators accompliſhed without any regard to the Honeſty or Knavery of their Teſtamentary Heirs.

In the *Roman* Law we ſee very few Examples of the Caſe where the Teſtator commits to other Perſons than to the Teſtamentary Heir himſelf the Execution of his Diſpoſitions; and we do not find there any Rule which hath eſtabliſhed in general the Uſe of Executors of Teſtaments, who are charged with the entire Execution of the Teſtaments; whereas the Uſe of Executors of Teſtaments is ſo much approved and favoured by our Cuſtoms in *France*, that they ordain all the Moveable Goods of the Succeſſion to be put in the hands of thoſe to whom the Teſtator commits this Function; and for this reaſon the Executors are obliged to make an Inventary of the Goods, and the Heir ought to be called to aſſiſt at the making of it: Or the Teſtator may, if he pleaſes, when he names an Executor, order a certain Sum of Money to be put into his hands for executing the Diſpoſitions which he ſhall commit to his Care.

Although theſe Diſpoſitions be not common to all the Cuſtoms, and that in many of them, as well as in divers Places which are governed by the written Law, there is little or no Uſe of Executors of Teſtaments; yet ſeeing it is every where free for Teſtators to name them, and that in general due Care ought to be taken for the Execution of Teſtaments, we ſhall explain in this Section what is eſſential to this Matter, and what may be gathered from the *Roman* Law concerning it.

[*The Law of* England *takes notice of three kinds of Executors, or Perſons, who have to deal with the Execution of dead Mens Wills, and Diſpoſition of their Goods, every one of whom have their ſeveral Offices. The firſt hath his Authority from the* Law, *and that is the Biſhop or Ordinary of every Dioceſe, to whom the Execution of Teſtaments and laſt Wills doth belong, when no Executor is appointed by the Teſtator: and theſe have had the Approbation of Teſtaments within this Realm of* England *for Time immemorial* a. *And he is therefore called* Executor Legitimus, *Legal Executor, becauſe he only is appointed by the Law, where no Executor is appointed by the Teſtator.*

The ſecond kind is, the Executor who deriveth his Authority from the Biſhop or Ordinary, and is he whom we call Adminiſtrator. For when the Executor named in the Teſtament doth refuſe to be, or cannot be Executor, and when no Executor is named in the Will, it is lawful for the Biſhop or Ordinary to commit Adminiſtration, and to annex the Will to the Letters of Adminiſtration b. *And this Adminiſtrator is called* Executor Dativus, *becauſe he is given or aſſigned by the Ordinary, to whom originally, and by Law, this Execution doth appertain.*

The third kind of Executors deriveth his Authority from the Teſtator, and is he that is named Executor in the Teſtament, or to whom the Execution of the Teſtament is committed by the dead Man. This Executor is termed Executor Teſtamentarius, *a Teſtamentary Executor, and hath his Authority immediately from the Teſtator, repreſenting the Perſon of the dead Man, and doth not much*

a Lyndwood Prov. lib. 3. tit. 13. de teſtamentis, cap. Statutum, verb. *approbatis*, verb. *Cauſis*, pag. 174. Doct. and Stud. Dial. 2. chap. 28.

b Stat. 31 Edw. 3. cap. 11. 21 Hen. 8. cap. 5. Brook's Abridgment, tit. Teſtament, n. 20.

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differ in Nature from him who is called in the Civil Law Hæres *c.*

c Executores univerſales, qui loco Hæredis ſunt. *Lyndwood de Teſtam. cap. Statutum, verb. Inteſtatis, pag.* 172. Swinburn of Teſtaments, part 6. §. 1.

The CONTENTS.

I.

1. *The firſt Security for the Execution of Teſtaments, is, that they be known, and depoſited in ſome publick Place.*

The firſt Precaution neceſſary for the Security of the Execution of the Wills of Teſtators, is, that the Teſtaments, or other Acts, which contain their Diſpoſitions, be known to all Perſons who have any Intereſt under them, and that they be depoſited in ſome ſafe Place, where the Parties concerned may have free Acceſs to them as occaſion requires. And it is for this Reaſon that the Teſtaments which are ſealed up, and kept ſecret, are opened in the manner which has been explained in its Place *a*, and that the others remain in the hands of publick Notaries who took down the Minutes or Inſtructions thereof, that they may give out atteſted Copies thereof to ſuch Perſons whom the ſaid Diſpoſitions of the Teſtators may any way concern *b*. And there are even ſome Diſpoſitions which for the greater Security ought to be made publick in a Court of Juſtice, and enrolled, that is, entred in the publick Regiſter, that the Memory of them may be preſerved *c*.

a See the eighteenth and nineteenth Articles of the third Section.

b See the fifteenth Article of the firſt Section of Partitions among Co-heirs, or Co-executors.

c When Teſtaments contain Subſtitutions, they ought to be made publick, as ſhall be ſaid in its proper Place. See the End of the Preamble to the third Title of the fifth Book.

II.

2. *The Uſe of Executors of Teſtaments.*

Seeing there are often Diſpoſitions in Teſtaments, the Execution of which depends wholly on the Integrity of the Teſtamentary Heirs, and that many Heirs fail in the Performance thereof, it is free for Teſtators to commit to other Perſons the Execution of their Diſpoſitions which they are not willing ſhould depend altogether on their Teſtamentary Heirs; and the Perſons to whom the Teſtators give this Power, are called Executors of Teſtaments *d*.

d In teſtamentis quædam ſcribuntur, quæ ad auctoritatem duntaxat ſcribentis referuntur, nec obligationem pariunt. Hæc autem talia ſunt, ſi te hæredem ſolum inſtituam & ſcribam; *Uti monumentum mihi certa pecunia facias.* Nullam enim obligationem ea ſcriptura recipit: ſed auctoritatem meam ſervandam poteris ſi velis facere. Aliter atque ſi, cohærede tibi dato item ſcripſero. Nam ſive te ſolum damnavero, *Uti monumentum facias*, cohæres tuus agere tecum poterit familiæ erciſcundæ, uti facias: quoniam intereſt illius. Quin etiamſi utrique juſſi eſtis hoc facere, invicem actionem habebitis. *l.* 7. *ff. de ann. legat. & fideic.* Si quis Titio decem legaverit, & rogaverit ut ea reſtituat Mævio: Mæviuſque fuerit mortuus, Titi commodo cedit, non hæredis niſi duntaxat ut *miniſtrum* Tituum elegit. *l.* 17. *ff. de legat.* 2.

Si teſtator deſignaverit per quem deſiderat redemptionem fieri captivorum, is qui ſpecialiter deſignatus eſt legati vel fideicommiſſi habeat exigendi licentiam: & pro ſua conſcientia votum adimpleat teſtatoris: ſin autem perſona non deſignata, teſtator abſolute tantummodo ſummam legati vel fideicommiſſi taxaverit, quæ debeat memoratæ cauſæ proficere, vir reverendiſſimus Epiſcopus illius civitatis, ex qua teſtator oritur, habeat facultatem exigendi quod hujus rei gratia fuerit derelictum, prium defuncti propoſitum, ſine ulla cunctatione, ut convenit, impleturus. *l.* 28. § 1. *C. de Epiſc. & Cler.*

We ſee in the firſt of theſe Texts, that for want of a Perſon who might oblige the Teſtamentary Heir to execute the Will of the Teſtator, the Heir is left at liberty to do it or not, as he pleaſes; which ſhews the uſe and neceſſity of Executors of Teſtaments.

It may be remarked on the ſecond of theſe Texts, that a Sum of Money might be put into the Hands of a Legatee, that he might diſpoſe thereof as Executor of the Will of the Teſtator, which was known to him, ut miniſtrum.

As for the third Text, it is neceſſary to ſee the ſixth Article, and the Remark upon it.

We ſee in the 68*th Novel of the Emperor* Leon *the Uſe of Executors of Teſtaments,* quibus teſtatores bona illorum exiſtimatione moti, teſtamentarias de rebus ſuis præſcriptiones committunt.

[*The Character of Executor, as deſcribed in this Article, is more applicable, with us in* England, *to what we call an* Overſeer *of a Will, than to the Executor. For ſome Teſtators having named Executors of their Wills, do alſo appoint ſome Perſons whom they have a more ſpecial Truſt and Confidence in, to be Overſeers of their Wills, that is, to ſee to the due Performance and Execution of all the ſeveral Diſpoſitions in their Wills. But altho there ſhould be no ſuch Overſeers appointed, yet it is not much to be queſtioned, that due Care will be taken to oblige the Executors to a ſtrict Performance of all the Diſpoſitions in the Will, by the Perſons who ſhall have an Intereſt in the ſaid Diſpoſitions, and who will have the Aid of the Law to compel the Executors to perform the Will of the Deceaſed.*]

III.

3. *Execution of a Diſpoſition committed*

The Teſtator who names ſeveral Teſtamentary Heirs, and who confides more

to the Teſtamentary Heir, or to another Perſon.

more in one of them than in the others, may charge him in particular with the Execution of ſome Diſpoſitions of his Teſtament, impowering him to take out of the Eſtate the Fund which may be neceſſary for the Execution of the ſaid Diſpoſitions: and he may likewiſe commit this Care to a Legatee, or appoint ſome other Perſon for it, altho he ſhould give him nothing for his trouble, in conſideration of the Quality of the Teſtator, and of that of the Executor, or that he ſhould leave him a Legacy for his pains, as it is lawful for him to do *e*.

e Si a pluribus hæredibus legata ſint, eaque unus ex his præcipere jubeatur, & præſtare: In poteſtate eorum quibus ſit legatum, debere eſſe an, unumne a ſingulis hæredibus petere velint, an ab eo qui præcipere ſit juſſus. Itaque eum qui præcipere juſſus eſt, cavere debere cohæredibus, indemnes eos præſtari. *l.* 107. *ff. de legat.* 1.

Si ſcriptus ex parte hæres rogatus ſit *præcipere pecuniam, & eis, quibus teſtamento legatum erat, diſtribuere*: id quod ſub conditione legatum eſt, tunc præcipere debebit, cum conditio exiterit: interim aut ei, aut his, quibus legatum eſt, ſatisdari oportet. *l.* 96. §. 3. *eod.*

See the Texts cited on the foregoing Article.

IV.

4. Security for conditional Legacies.

If among the Legacies there were any of them conditional, whether it be that the Execution of the Teſtament were committed to one of the Teſtamentary Heirs, or to a particular Executor of the Teſtament; the Fund for paying theſe conditional Legacies would remain with the Teſtamentary Heirs *f*, they giving to the Legatees Security for their Legacies according to the Circumſtances, as has been explained in its Place *g*.

f See the 17th Law, ff. de leg. 2. *cited on the ſecond Article.*

g See the 46th Article of the eighth Section, and the ſeventh Article of the tenth Section of Legacies.

V.

5. Execution of indefinite Diſpoſitions.

The Execution of a Teſtament conſiſts not only in the Payment of the Legacies, and Acquittance of the other Charges, which are committed to the Executor of the Teſtament, according as they are regulated in the Teſtament; but there may be ſome Diſpoſitions whereof the Deſtination may depend on the Will of the Executor, or other Perſon to whom the Teſtator ſhall have referred it: as for example, if he had left a Sum of Money to be diſtributed to poor Families, or to redeem Captives, or to be laid out on other charitable Works, without determining any thing in particular; leaving it to the Perſon whom he ſhall have named in his Teſtament to apply the Charity where he ſhall think it moſt proper *h*.

h See the twenty eighth Law, Cod. de Epiſc. & Cler. *cited on the ſecond Article.*

See the following Article, and the Remark upon it.

VI.

6. Execution of Diſpoſitions which are neglected.

If the Teſtator having named no body for the Execution of his Teſtament, the Teſtamentary Heir ſhould fail to acquit the charitable Legacies left to ſome Church or Hoſpital, the Officers of Juſtice might take care to ſee the Will of the Deceaſed executed. But if the Legacy were indefinite, ſuch as that of a Sum of Money to be diſtributed to poor People, the Teſtator leaving the Diſpoſal thereof to his Teſtamentary Heir, he could not be ſued at Law for Legacies of this kind; for he may have acquitted them very honeſtly; and nothing would oblige him to give an account thereof, ſeeing the Teſtator had excuſed him from doing it *i*.

i Si perſona non deſignata teſtator abſolute [tantummodo ſummam legati vel fideicommiſſi taxaverit quæ debeat memoratæ cauſæ proficere: vir reverendiſſimus Epiſcopus illius civitatis, ex qua teſtator ortus, habeat facultatem exigendi quod hujus rei gratia fuerit derelictum, pium defuncti propoſitum, ſine ulla cunctatione, ut convenit, impleturus. *l.* 28. §. 1. *C. de Epiſc. & Clerc.*

According to the Uſage in France, *it is the Duty of the King's Council at Law to apply to the Courts of Juſtice for their Aſſiſtance towards the Execution of theſe ſorts of Diſpoſitions, if they are neglected by the Teſtamentary Heirs, and by the Perſons who ought to take care of the ſaid Diſpoſitions, ſuch as the Governors and Adminiſtrators of Hoſpitals, the Eccleſiaſticks who are entruſted with the Adminiſtration of the Goods belonging to the Churches, and other Perſons who may have any Intereſt in the ſaid Legacies.*

[In *England* it belongs moſt properly to the Biſhops of the reſpective Dioceſes, to ſee that the Legacies left by Teſtators to charitable Uſes be duly applied according to the Intention of the Teſtators. *Swinburn, Part 6.* §. 1. *Lyndwood de teſtam. cap. ſtatutum.* And not only in *England*, but in all Chriſtian Countries, ever ſince the Foundation of Chriſtianity, it has been the peculiar Province of the Biſhops to take care of the due Application of Legacies to charitable Uſes. *l.* 28. *Cod. de Epiſcopis & Clericis.*]

VII.

7. The Executor is to give an account.

Seeing the Executor of the Teſtament is to diſcharge that Function out of the Stock of Goods which ſhall be put into his hands either by the Teſtamentary Heir, or by Decree of a Court of Juſtice, he is obliged to give an account

count how he has diſpoſed of the Goods which have been put into his hands, to produce Acquittances of the Legacies, and of the other Charges, except as to what the Teſtator had a mind to truſt to his own Integrity, as in the Caſe of the fifth Article, and he may likewiſe put down in his Account the Charges which he has been at in executing the Teſtament *l*

l This is the Conſequence of the Function of the Executor of a Teſtament.

TITLE II.

Of an Undutiful Teſtament, and of Diſheriſon.

THE Liberty which the antient *Roman* Law gave to Parents to diſinherit their Children without any Cauſe, as has been obſerved in the Preface to this ſecond Part *a*, was followed by ſo great a number of Diſheriſons *b*, that it was found neceſſary to ſet bounds to it, by giving to the Children who ſhould pretend to be unjuſtly diſinherited, whether by their Fathers, or Mothers, or other Aſcendants, the Right of complaining of thoſe Diſpoſitions which were called undutiful, becauſe they were contrary to the Duty of Parents, which ties them to leave their Goods to their Children, who have done nothing to deſerve the being deprived of them And at laſt *Juſtinian* regulated by an expreſs Law the Cauſes which might deſerve diſinheriting

They called the Action, which the Law gave to Children againſt the Teſtaments in which they were diſinherited, the *Querele*, that is, the Complaint of Undutifulneſs; and it was permitted likewiſe to make ſuch a Complaint againſt exceſſive Donations and Marriage Portions given to ſome of the Children or to other Perſons, if the ſaid Diſpoſitions were undutiful, that is, if they did not leave to all the Children their Legitime or Child's Part.

Beſides the diſinheriting, which may be either juſt or unjuſt, there is another manner of depriving Children of the Inheritance, and that is by not naming them, or making no mention of them in the Teſtament, which is called in the *Roman* Law *Preterition*, and is diſtinguiſhed from an expreſs Diſheriſon by this Difference, that whereas a Diſheriſon may be juſt if there are juſt Cauſes for it, Preterition cannot but be unjuſt, there being no Cauſe aſſigned.

To ſoften what a Complaint of Undutifulneſs might contain in it, that might be injurious to the Memory of the Teſtator, they gave to this Complaint in the *Roman* Law the Pretext of a Preſumption that the Teſtator had not the free uſe of his Reaſon, and that it was for want of his right Senſes that he made ſuch a Diſpoſition *c*. But in our Uſage we do not obſerve this Precaution, and we charge the Teſtator very freely with Inhumanity, Injuſtice, and Hardſhip, or with having been influenced by Paſſion, and the inſinuations of a Mother-in-Law, or of ſome other Perſons.

The ſame Equity which made the Complaint of Children to be received againſt the undutiful Teſtaments of their Parents, made likewiſe the Complaints of Fathers, and Mothers, and other Aſcendants, to be received againſt the Teſtaments of their Children, who deprived them of their Succeſſions without juſt cauſe, whether by expreſly diſinheriting them, or paſſing them by without taking any manner of notice of them in their Teſtaments.

a See the Preface, n. 7.

b Sciendum eſt frequentes eſſe inofficioſi querelæ. *l. 1. ff. de inoff. teſt.*

c Hoc colore inofficioſo teſtamento agitur quaſi non ſanæ mentis fuerunt ut teſtamentum ordinarent. Et hoc dicitur, non quaſi vere furioſus vel demens teſtatus ſit, ſed recte quidem fecit teſtamentum, ſed non ex officio pectus Nam ſi vere furioſus eſſet, vel demens nullum eſt teſtamentum. *l. 2. ff. de inoff. teſt.*

[*The Plaint, or Action, in the Caſe of an undutiful Teſtament, which the Civilians call* Teſtamentum inofficioſum, *is not in uſe with us in* England: *for by the Common Law, the Teſtator had always a free Will of diſpoſing of his Goods and Chattels in ſuch manner as he thought beſt; and it was only by the particular Cuſtoms of ſome Places that this Power was reſtrained. So that the Writ which is called* Breve de rationabili parte bonorum, *which the Wife or Children had againſt the Executors for the Recovery of part of the Goods, was not general throughout the whole Kingdom, but peculiar to certain Countries, where the Cuſtom was, that Debts being paid, the Remainder ſhould be divided into three equal Parts; to wit, one part to the Wife, the other to the Children, and the third to be left at the Will of the Teſtator.* Cowel's Inſtit. Book 2. Tit. 18.

This Cuſtom of reſerving a reaſonable Part of the Goods to the Widows and Children of Teſtators, is ſtill in force in the City of London, *as to the Widows and Children of Freemen. But in other Parts of the Kingdom where this Cuſtom did formerly take place, it has been aboliſhed by Act of Parliament; as by* Stat. 4, 5 Gul. & Mar. cap. 6. *The Inhabitants*

tants of the Province of York *are impowered to diſpoſe of their perſonal Eſtates by their Wills, notwithſtanding the Cuſtom of that Province as to the reaſonable Part claimed by the Widows and Children. But this Act excepts the Cities of* York *and* Cheſter. *However the ſame was afterwards extended to the Freemen of the City of* York *by* Stat. 2° & 3° Annæ, cap. 5. *And by Statute* 7° & 8° Gul. 3. cap. 38. *the ſame Cuſtom of the Reaſonable Part was abliſhed in the Principality of* Wales.

By the Law of Scotland, *the Teſtator cannot by his Teſtament deprive his Wife or Children of their Legitime or Reaſonable Part.* Stair's Inſtit. of the Law of *Scotland*, lib. 3. tit. 8. num. 32. Mackenzie's Inſtit. book 3. tit. 9.]

SECT. I.

Of the Perſons who may complain of a Teſtament or other undutiful Diſpoſition.

WE ſhall not inſert in this Section that Law of the *Romans* which allowed Baſtard Children to complain of the Undutifulneſs of the Teſtament of their Mothers *a*. For in *France* Baſtards are incapable of all legal Succeſſions, as has been obſerved in its Place *b*.

It is to be remarked, that we ought not to reckon among the Children who are allowed to complain of their not being inſerted in the Teſtaments of their Fathers and other Aſcendants, Daughters who have renounced their Right to the Succeſſions: For ſeeing they cannot ſucceed to one who dies inteſtate while there are Male Children, or any deſcended of Males, there is no Obligation to call them to the Succeſſion by Teſtament *c*.

a l. 29. §. 1. *ff. de inoff. teſtam.*

b See the eighth Article of the ſecond Section of Heirs and Executors in general.

c See the Remark on the firſt Article of the ſecond Section, in what manner Children ſucceed.

[By the Law of *England* likewiſe, Baſtard Children are incapable of all legal Succeſſions by Proximity of Blood, and cannot ſo much as ſucceed to their own Mothers dying Inteſtate: Becauſe a Baſtard in Judgment of Law is *quaſi nullius filius*, and ſo cannot be Heir to any Perſon. And for the ſame reaſon it is, that where the Statute of 32 *H.* 8. *chap.* 1. of Wills, ſpeaketh of Children, Baſtard Children are not reckoned to be within that Statute; and the Baſtard of a Woman is no Child within that Statute. *Cake* 1. *Inſtit. fol.* 123. *a.*]

The CONTENTS.

I.

1. *Children cannot be diſinherited without a juſt Cauſe.*

Teſtators who have Children, or other Deſcendants, whom the Law calls to ſucceed to them if they die inteſtate, according to the Rules which have been explain'd in their place *a*, cannot diſinherit them, unleſs they have ſome one of the Cauſes which ſhall be explained in this Title *b*.

a See the ſecond Section, in what manner Children ſucceed.

b Primum itaque illud eſt cogitandum, quia teſtantibus alias quidem neceſſitatem imponit lex diſtribuere quandam partem perſonis quibuſdam, tanquam hoc ſecundum ipſam naturam eis debeatur, quale eſt filiis & nepotibus, & patribus atque matribus. *Nov.* 1. *in præf.* §. 2.

Liberis de inofficioſo licet diſputare. *l.* 1. *ff. de inof. teſtam.*

Sancimus igitur non libere penitus patri vel matri, aut avo vel aviæ, proavo vel proviæ, ſuum filium vel filiam, vel cæteros liberos præterire, aut exhæredes in ſuo teſtamento facere, niſi forſan probabuntur ingrati. *Nov.* 115. *c.* 3.

See the firſt, ſecond and third Articles of the ſecond Section.

II.

2. *Neither Fathers, nor Mothers, nor other Aſcendants.*

The Teſtators who have no Children, and who are ſurvived by their Fathers, or Mothers, or other Aſcendants, cannot diſinherit them, unleſs for ſome one of

of the Cauſes which ſhall be likewiſe explained in this Title *c*.

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

Sancimus non licere liberis parentes ſuos præterire, aut quolibet modo a rebus proprius, in quibus habent teſtandi licentiam, eos omnino alienare: niſi cauſas quas enumeravimus in ſuis teſtamentis ſpecialiter nominaverint. *Nov.* 115. *c.* 14. See the fourth Article of the ſecond Section.

III.

3. Preteriſion of Children hath the ſame Effect as Diſheriſon without cauſe.

If a Father, or other Aſcendant, without expreſly diſinheriting one of his Children, makes no mention of him in his Teſtament; this Silence, which is called *Preteriſion*, is conſidered in the ſame manner as Diſheriſon which has no Cauſe *d*.

d Hujus verbi *de inofficioſo teſtamento* vis illa eſt, docere immerentem ſe, & ideo indigne *præteritum*, vel etiam exhæreditatione ſummotum. *l.* 5 *ff. de inoff. teſtam. l.* 3. *eod. Nov.* 115. *c.* 3. See the Texts quoted on the firſt Article.

IV.

4. And alſo the Preteriſion of Parents.

The *Preteriſion* of Parents in the Teſtaments of their Children, to whom they have a Right to ſucceed if they die inteſtate, if there were no Deſcendants to exclude them from the Succeſſion, hath the ſame Effect as the *Preteriſion* of Children in the Teſtaments of their Fathers. For altho by the Order of Nature, Parents are not called to ſucceed to their Children, and that they ought not to expect this ſorrowful Succeſſion; yet it is juſt, that if contrary to this Order the Parents ſurvive their Children, they ſhould not be deprived of their Inheritance *e*.

e See the Texts cited upon the firſt Article, as alſo upon the third Article.

V.

5. Parents cannot diſinherit their Children, altho they leave them their Child's Part by other Diſpoſitions.

Altho a Teſtator who has Children had left them their Legitime or Child's Part by ſome Donation, Legacy, or other Diſpoſition; yet he may not diſinherit them by his Teſtament, or paſs them by without taking any notice of them therein. But he ought to inſtitute them Heirs or Executors in his Teſtament, unleſs he mentions therein ſome juſt Cauſes for diſinheriting them *f*.

f Sancimus non licere penitus patri vel matri, aut avo vel aviæ, proavo vel proaviæ, ſuum filium vel filiam, vel cæteros liberos præterire aut exhæredes in ſuo facere teſtamento: nec ſi per quamlibet donationem, vel legatum, vel fideicommiſſum, vel alium quemcunque modum eis dederit legibus debitam portionem: niſi forſan probabuntur ingrati: & ipſas nominatim ingratitudinis cauſas parentes ſuo inſeruerint teſtamento. *Nov.* 115. *c.* 3.

¶ It may be remarked on this Text, that the Interpreters, even the moſt skilful among them, have been of opinion, that the Meaning thereof is, That to make the Teſtament of a Father valid, it is neceſſary that what he leaves to his Children, ſhould be given them by way of Inſtitution, and that otherwiſe the Teſtament in which their filial Portion, or Child's Part, is left them without the Quality of Heir, would be null. And this Opinion is ſo univerſal, that it paſſes for a Rule; altho it be certain that the Author of thoſe Extracts which are commonly called Authenticks, taken out of the Novels of *Juſtinian*, and which are inſerted in the Places of the Code to which they have relation, ſeems not to have underſtood this Text in that Senſe. For in the Authentick, *non licet C. de lib. præter.* which is taken from thence, he has made no mention of the Neceſſity of leaving the filial Portion to the Children by way of Inſtitution: which he ought not to have failed to do, if it had been his Opinion, ſeeing in the authentick *Noviſſima C. de inoff. teſtam* taken out of the eighteenth Novel, *chap.* 1. he had been careful to inſert in it what was ordained by the ſaid Novel, that the filial Portion might be left to them not only by way of Inſtitution, but alſo by a bare Legacy, or a fiduciary Bequeſt. *Sive quis illud Inſtitutionis modo, ſive per legati, idem eſt dicere, & ſi per fideicommiſſi relinquat occaſionem.* Theſe are the Terms of that eighteenth Novel, which he has contracted in that authentick *Noviſſima*, in theſe words, *quoquo relicti titulo*; which is directly contrary to what this Opinion will have to have been regulated by the hundred and fifteenth Novel. So that this Author having conceived in theſe Terms the authentick *Noviſſima*, and having in the authentick *Non licet* made no mention of the Neceſſity of this Inſtitution, it ſeems plain enough that he did not believe that this hundred and fifteenth Novel ought to be taken in this Senſe. And if we examine carefully the Terms of this hundred and fifteenth Novel, either in the original *Greek*, or in the *Latin*, we ſhall not find that it is ſaid there that the legitime or filial Portion ought to be left by way of Inſtitution; but only that it

is

is there ſaid, that Fathers and Mothers, and other Aſcendants, cannot diſinherit their Children, nor paſs them over in ſilence in their Teſtaments, even altho they had left them their filial Portion ſome by Donation, Legacy, or fiduciary Bequeſt, or in ſome other manner whatſoever, unleſs there were juſt Cauſes for diſinheriting them, and that the ſame were expreſſed in the Teſtament. *Sancimus non licere liberos præterire, aut exhæredes in ſuo facere teſtamento; nec, ſi per quamlibet donationem, vel legatum, vel fideicommiſſum, vel alium quemcunque modum, eis dederit legibus debitam portionem: Niſi forſan probabuntur ingrati, & ipſas nominatim ingratitudinis cauſas patentes ſuo inſeruerint teſtamento.* Which Words ſeem only to imply, that it is not lawful to diſinherit Children, or paſs them over in ſilence in a Teſtament, altho by other Diſpoſitions, of what nature ſoever they may be, the Parent had given them their filial Portion, as by Donations or Codicils; and that if after theſe Diſpoſitions a Father, or other Aſcendant, makes a Teſtament, he is obliged to make mention therein of his Children, and cannot diſinherit them without juſt Cauſe. And to ſhew that this Senſe is altogether natural, we might add, that ſeeing *Juſtinian* ſpeaks in this place only of a Teſtament which ſhould contain a Diſheriſon or Preterition of Children, as appears evidently from the Words which have been juſt now quoted, it ſeems to follow from thence, that when he ſays that diſinheriting was not allowed by a Teſtament, altho the Children had their Child's Part left them by Donations, Legacies, or fiduciary Bequeſts, he meant only other Diſpoſitionss, and not the Teſtament it ſelf, in which he ſuppoſes them to be diſinherited or omitted. Nor can any one ſay that a Father, who diſinherits his Son, cou'd ever think of leaving him his filial Portion by a Legacy or fiduciary Bequeſt, in the ſame Teſtament by which he diſinherits him? And much leſs can this be ſaid of a Teſtament wherein the Son is paſſed over in ſilence by a *Preterition*. So that we may ſay, that *Juſtinian* having ſaid that one cannot diſinherit, nor paſs over in ſilence, Children in a Teſtament, even altho their filial Portion had been left them by a Donation, a Legacy, or a fiduciary Bequeſt, or in any other manner whatſoever, he did not mean that this other manner of giving the filial Portion ſhould be in the Teſtament it ſelf by which the Child is diſinherited or omitted; but that he meant only to ordain thereby, that a Father, or other Aſcendant, ſhould not only not have power to diſinherit his Children without Cauſe, but even not to paſs them over in ſilence in a Teſtament; and that ſuch a Teſtament ſhould be null, altho the Teſtator had given to his Children by ſome other Title their Child's Part. But even altho that other Title ſhould be a Teſtament, by which the Children had been inſtituted Heirs or Executors, whether for their Child's Part, or otherwiſe, that Inſtitution would not hinder the Nullity of a ſecond Teſtament, in which they ſhould be paſſed over in ſilence, or diſinherited; which is the Subject-Matter of *Juſtinian*'s Rule, explained in the Words above cited, and which regard only the Nullity of a Preterition, or unjuſt Diſheriſon, and which he judges to be ſuch independently of all other Diſpoſitions, by which the legal Portion due to the Children may have been left them.

We may likewiſe add on the ſame Subject, that *Juſtinian* has been careful to obſerve in ſeveral Places, that he had not ſuffered any thing to be put into his Code, which was contrary to other Diſpoſitions therein contained; and that he has renewed the ſame Obſervation on the Matter concerning the Succeſſions of Children in one of his Novels *a*, where he proves that he has not abrogated a Law of the Emperor *Theodoſius*, and that it cannot be pretended to be contrary to one of his, for this reaſon, becauſe that Law of *Theodoſius* is in his Code. From whence one might gather, if this Declaration of *Juſtinian*'s were perfectly ſure, that it was not his Intention in this hundred and fifteenth Novel to make it neceſſary that the Children ſhould be inſtituted Heirs, in order to prevent a Complaint of Undutifulneſs; ſince, beſides the eighteenth Novel, we find in the Code of this Emperor many Laws, and even ſome of his own, which forbid the Complaint of Undutifulneſs, when the Teſtator has left any thing to his Children by what Title ſoever, whether of Legacy or fiduciary Bequeſt *b*; and which in this Caſe give the Children only a Right to demand a Supplement of the Portion due to them by Law.

We have not made this Remark in oppoſition to the ordinary Senſe every

a *Nov.* 115. *c.* 1.

b *l.* 29, 30, 31, 32. *C. de inoff. teſt.* & 8. §. 6. *ff. eo.*

body

body gives to this hundred and fifteenth Novel, nor to condemn the Uſage of this Senſe thereof, which has paſſed into a Rule, ſince it may be ſaid otherwiſe that this Rule is altogether equitable, and that it is juſt, that the Children being called by their Birth to the Inheritance of their Parents, it ſhould be left to them with the Title of Heirs, which Nature and the Laws give them. And this Rule would be particularly juſt in the Caſes where Parents ſhould call to their Succeſſion other Heirs together with their Children. But if a Father, having many Children under Age, had inſtituted for his univerſal Heireſs their Mother his Wife, of whom there was no reaſon to fear that ſhe would have other Children by a ſecond Husband, and that he had failed to make uſe of the Name of Heirs with relation to his Children, fixing only their filial Portion or Child's Part at certain Sums; there would be ſome Inconvenience in annulling a Teſtament of this nature for that Defect: As there would be likewiſe an Inconvenience to annul a Teſtament, wherein a Father had made a Partition of his Goods among his Children, without giving them in the Teſtament the Name of Heirs, if no other Fault were found in it. And ſeeing it happens often in ſome Provinces which are governed by the written Law, that Fathers make ſuch Diſpoſitions for the Good of their Children who are under Age, inſtituting their Widows Heireſſes, and regulating at certain Sums the Portions due to their Children by Law, in order to avoid the Charges and Trouble of Seals, Inventaries, and Partitions, and upon other reaſonable Conſiderations; we have thought it proper to make this Obſervation; and we have been likewiſe induced thereto by the Fidelity that is due to the true Senſe of the Laws.

VI.

6. Undutiful Teſtaments are annulled as to the undutiful Inſtitution.

The Teſtaments which are found to be undutiful, either becauſe Children or Parents are omitted in it, or becauſe they are unjuſtly diſinherited, are annulled as to the undutiful Inſtitution *g*.

g Si ex cauſa de inofficioſi cognoverit judex, & pronuntiaverit contra teſtamentum, nec fuerit provocatum, ipſo jure reſciſſum eſt, & ſuus hæres erit ſecundum quem judicatum eſt. *l.* 8. §. 16. *ff. de inoff. teſtam.* V. *Nov.* 115. *c.* 3. *in f. & cap.* 4. *in f.*

See hereafter the fifth Article of the fourth Section, and the ſixteenth Article of the fifth Section of Teſtaments.

VII.

7. How the Complaint of Undutifulneſs paſſes to the Heirs of the Perſon diſinherited.

If the Perſon who had a Right to complain of an undutiful Teſtament had Children, and chanced to die before he had exerciſed his Right, and made his Demand; the Children might complain of the ſaid Teſtament in the Right of the Deceaſed, unleſs he had approved the Teſtament before his Death *h*. But if there were other Heirs, they could not exerciſe the Complaint of Undutifulneſs, unleſs the Deceaſed had enter'd the Complaint in his own Life-time *i*.

h Jubemus in tali ſpecie eadem jura nepoti dari quæ filius habebat, et ſi præparatio facta non eſt ad inofficioſi querelam inſtituendam, tamen poſſe nepotem eandem cauſam proponere. *l.* 34. *C. de inoff. teſtam.* Niſi pater, adhuc ſuperſtes, repudiavit querelam. *d. l. in f.*

Si quis inſtituta accuſatione inofficioſi deceſſerit, an ad hæredem ſuum querelam transferat? Papinianus reſpondit, (quod & quibuſdam reſcriptis ſignificatur) ſi poſt agnitam bonorum poſſeſſionem deceſſerit, eſſe ſucceſſionem accuſationis. Et ſi non ſit petita bonorum poſſeſſio, jam tamen cœpta controverſia, vel præparata: vel ſi cum venit ad movendam inofficioſi querelam deceſſit, puto ad hæredem tranſire. *l.* 6. §. *ult. ff. eod.*

i Ad extraneos hæredes tunc tantummodo (*tranſmittet querelam*) quando antiquis libris incertam faciet præparationem. *l.* 36. *in f. C. eod.*

¶ It may be remarked on this Article, that it follows from the firſt of the Texts that are cited on it, that the Children of the Perſon diſinherited are excluded as well as he from the Inheritance, and that therefore when a Father diſinherits his Son who has Children, the Diſherſon which deprives the Son of the Goods of the Teſtator, cuts off likewiſe his Children, and all that are deſcended of him, from having any ſhare or benefit therein. For if it were the Intention of the Law to exclude from the Succeſſion only the Perſon of the Son diſinherited, and not his Children, and if they might ſucceed in their own Right, in default of their Father who is diſinherited, it would not be neceſſary to give them the Right of complaining of the Undutifulneſs of the Teſtament after the Death of their Father, unleſs it were only to vindicate the Honour of his Memory, which is not the Caſe of this Text; the Sequel of which ſhews, that the Son who is diſinherited tranſmits to his Children the ſame Right which he had to complain of the Teſtament. From whence it follows, that the Law giving this Right to the Children, it ſuppoſes that in their own Perſons they have no ſhare in the Inheri-

tance from which their Father has been excluded, unleſs they juſtify his Memory, and get the Diſheriſon annulled. And altho it be ſaid in another Law, that the Son who is diſinherited is conſidered as being dead, and that his Children ſucceed in his place, *Debent nepotes admitti nam exhæredatus pater eorum pro mortuo habetur. l.* 1. §. 5. *ff de conjung. cum emanc. lib ejus*, yet this Text has relation to a ſort of diſinheriting which was frequent in the antient *Roman* Law, and had nothing odious in it, not being founded on the Ingratitude of the Children; but it turned ſometimes to their Advantage. *Multi non notæ cauſa exhæredant filios, non ut eis obſint, ſed ut eis conſulant (ut puta impuberibus) eiſque fideicommiſſum hæreditatem dant. l.* 18. *ff. de liber. & poſt* But the Diſheriſon which a Son may have deſerved by his bad Conduct, is a Puniſhment which ought to extend to his Children; for otherwiſe it would be uſeleſs, and would not even affect the Son who is diſinherited, ſince he would have by means of his Children the Uſe of the Goods which he could not have himſelf.

VIII.

8. An inofficiouſ Teſtament Prejudices.

If a Father or Mother, who had two or more Children, having diſpoſed of their Goods among them by a Teſtament, happen'd afterwards to have another Child, of which no mention was made in the Teſtament, and died without altering it; this Teſtament would do no prejudice to the Rights of the ſaid Child. For if it was thro Negligence that the ſaid Teſtament was not reformed, it would be an undutiful one: And if it was a pure Effect of a ſudden and unforeſeen Death; as if it was a Mother who died in Child-bed of the ſaid Child, whoſe Birth ſhe perhaps waited for, in order to ſettle her Will; the Preſumption that ſhe could not have for the ſaid Child any other than the tender Sentiments of a Mother, would ſupply the want of a Teſtament, which this unforeſeen Accident had put her out of a Condition to make. So that this Child would ſtill have the ſame Portion of the Inheritance which he ought to have had, if there had been no Teſtament at all *l*. But if the ſaid Father or Mother, having no Children at the Time of making their Teſtament, had inſtituted other Heirs or Executors, it would be annulled by the Birth of this Child, either as being an undutiful Teſtament, or as being vacated by the ſaid Birth *m*.

l Si mater filiis duobus hæredibus inſtitutis, tertio poſt teſtamentum ſuſcepto, cum mutare idem teſtamentum poſſiſſet, hoc facere neglexiſſet: merito, utpote non juſtis rationibus neglectus de inofficioſo querelam inſtituere poterit. Sed cum eam in puerperio vita deceſſiſſe proponas, repentini caſus iniquitas per conjecturam maternæ pietatis emendanda eſt. Quare filio tuo cui nihil præter maternum fatum imputari poteſt, perinde virilem portionem tribuendam eſſe cenſemus, ac ſi omnes filios hæredes inſtituiſſet. Sin autem hæredes ſcripti extranei erant, tunc de inofficioſo teſtamento actionem inſtituere non prohibetur. *l.* 3. *C. de inoff. teſt.*

See the ſixth Article of the fifth Section of Teſtaments.

IX.

9. *If of two or more Children, one alone is diſinherited, without being particularly named, the Diſheriſon is null.*

If a Father, who had two or more Children, having a mind to diſinherit one of them, did expreſs himſelf in ſuch a manner as not to diſtinguiſh him from the other Children, ſaying only that he diſinherited his Son, without ſpecifying him by Name, or deſcribing him by ſome other Mark; this Diſheriſon, which would not fall upon one Son more than the others, would be without effect, even as to him whom it might be reaſonable to preſume that the Father intended to deprive of his Succeſſion *n*.

n Nominatim exhæredatus filius & ita videtur, ſi filius meus exhæres eſto, ſi nec nomen ejus expreſſum ſit: ſi modo unicus ſit. Nam ſi plures ſunt filii, benigna interpretatione potius à pleriſque reſpondetur, nullum exhæredatum eſſe. *l.* 2. *ff. de lib. & poſt.*

X.

10. *Proviſion for the Son who is diſinherited, pending the Appeal from the Sentence given in his favour.*

If the Son who is diſinherited having procured the Teſtament to be declared undutiful by a Sentence, he who was inſtituted Heir or Executor therein had appealed from the Sentence, and that pending the Appeal, the Son ſhould demand a Proviſion of Alimony out of the Eſtate; this Proviſion would be decreed him according to the Value of the Eſtate, and his Quality *o*.

o De inofficioſo teſtamento nepos contra patruum ſuum, vel alium ſcriptum hæredem, pro portione egerat & obtinuerat. Sed ſcriptus hæres appellaverat. Placuit, interim, propter inopiam pupilli, alimenta pro modo facultatum, quæ per inofficioſi teſtamenti accuſationem pro parte ei vindicabantur decerni: eaque adverſarium ei ſubminiſtrare neceſſe habere, uſque ad finem litis. *l.* 27. §. 3. *ff. de inoff. teſtam.*

XI.

11. *The Portion of a Child diſinherited, having no Complaint againſt it, he renounces the Inheritance for his part; or that Child having*

ſubſiſts, accrues to the other Children.

having entered his Complaint, he has been declared to be duly and juſtly diſinherited, and the other diſinherited Child on his part gets the Teſtament to be annulled, and comes in for his ſhare of the Inheritance with the other Children; every one of them will have in the Partition of the Eſtate his Portion according to their Number, without taking him in who is found to be juſtly diſinherited, or who has renounced. For he having no ſhare in the Inheritance, the Portion which he ought to have had remains in the Maſs of the Eſtate, and accrues to him who was unjuſtly diſinherited in conjunction with the other Children. And if this Child ſhould happen to be the only one remaining, he would have the whole Eſtate *p*.

p Qui repudiantis animo non venit ad accuſationem inofficioſi teſtamenti, partem non facit his qui eandem querelam movere volunt. Unde ſi de inofficioſo teſtamento patris, alter ex liberis exhæredatis ageret, quia reſciſſo teſtamento alter quoque ſucceſſionem ab inteſtato vocatur: & ideo univerſam hæreditatem non recte vindicaſſet, hic ſi obtinuerit, uteretur rei judicatæ auctoritate; quaſi centum viri hunc ſolum filium in rebus humanis eſſe nunc, cum facerent inteſtatum crediderint. *l.* 17. *ff. de inoff. teſt. V. l.* 16. *eod.* Exhæredatus pro mortuo habetur. *l.* 1. §. 5. *ff. de conjung. cum emanc. lib. ej.*

If one of the Sons diſinherited had only delayed to bring his Action, without approving of his being diſinherited, or renouncing the Inheritance, his Portion would not accrue to the other Children by this Silence. But the others might oblige him to explain himſelf; and it would be neceſſary to have the Queſtion about his Diſheriſon judicially diſcuſſed, in caſe he ſhould not acquieſce under it. V. l. 8. §. 8. ff. de inoffic. teſtam.

XII.

12. Children to whom their Parents leave leſs than their Legitime or Child's Part, have the Supplement of it.

If the Children have no other ground of Complaint againſt the Teſtaments of their Parents, but that the Portion left them therein is not ſo large as what they have a Right to by Law, or that the Teſtator hath made his Diſpoſition which relates to them to depend on ſome Condition, or on a Time which ſuſpends the Effect thereof; theſe would not be ſufficient Grounds for having the Will declared void, on account of its being undutiful, but they could only demand the Supplement of the Portion due to them by Law; and the Conditions, or other Cauſes of Delay, would be without effect, ſo as that they might have their whole Right at the time of the Death by which they acquire it *q*.

q Quoniam in plerisque ſanctionibus illud ſtatutum eſt, ut, ſi quis minus legitima portione his derelictum ſit, qui ex aliquibus legibus de inofficioſo teſtamento actionem movere poterant, hoc repleatur, ne occaſione minoris quantitatis teſtamentum reſcindatur: hoc in præſenti addendum eſſe cenſemus, ut, ſi conditionibus quibuſdam vel dilationibus, aut aliqua diſpoſitione moram, vel modum vel aliud gravamen introducente eorum jura, qui ad memoratam actionem vocabantur, immunita eſſe videantur, ipſa conditio, vel dilatio, vel alia diſpoſitio moram vel quodcumque onus introducens, tollatur: & ita res procedat quaſi nihil eorum teſtamento additum eſſet. *l.* 32. *C. de inoff. teſtam. l.* 29, 30, *&* 31. *eod.*

See the fifth Article, and the Remark that is there made on it.

XIII.

13. The Favour of the Perſon who is inſtituted Heir or Executor, will not make the Diſheriſon to ſubſiſt.

Whatever may be urged, either on the ſcore of Piety, Duty, or other Conſideration whatſoever, in favour of the Diſpoſition of a Teſtator who had unjuſtly diſinherited one of his Sons, the Teſtament would nevertheleſs be annulled. For the Inſtitution of Children is the firſt Duty of Parents in their Teſtaments *r*.

r Si Imperator ſit hæres inſtitutus, poſſe inofficioſum dici teſtamentum, ſæpiſſime reſcriptum eſt. *l.* 8. §. 2. *ff. de inoff. teſtam*

The Caſe of this Text appears to be ſo different from our Uſage, that we did not think it proper to give ſuch an Inſtance. For who with us, to make the Diſheriſon of his Children to ſubſiſt, would ever think of inſtituting the King his Heir? And yet this Caſe muſt needs have been very frequent at Rome, *ſeeing it is ſaid in the Text that it has been often decided, that altho the Prince were inſtituted Heir by an undutiful Teſtament, yet that ſhould be no hindrance why a Complaint againſt it, as being undutiful, ſhould not be received.*

XIV.

14. Brothers and Siſters cannot complain of a Teſtament, as being undutiful, unleſs the Perſon inſtituted Heir or Executor be an infamous Perſon.

Of all the Perſons whom the Law calls to the Succeſſions of Perſons dying inteſtate, it is only thoſe who are in the Line of Aſcendants and Deſcendants from the Teſtator who may complain of the Teſtament as being undutiful. And this Right does not paſs to any of the Collaterals, not even to Brothers and Siſters: And they cannot complain of the Teſtaments of their Brothers or Siſters who inſtitute other Heirs or Executors, unleſs the Inſtitution were ſuch as were contrary to good Manners and Decency, becauſe of the Quality of the Perſon who is inſtituted Heir or Executor, as if it were an infamous Perſon *s*.

s Cognati proprie qui ſunt ultra fratrem, melius facerent ſi ſe ſumptibus inanibus non vexarent; cum obtinere ſpem non haberent. *l.* 1. *ff. de inoff. teſt.*

Nemo eorum qui ex tranſverſa linea veniunt, exceptis fratre & ſorore, ad inofficioſi querelam admittatur. *l.* 21. *C. eod.*

Fratres vel ſorores uterini ab inofficioſi actione contra teſtamentum fratris vel ororis penitus arcentur. Conſanguinei autem, durante ignatione (vel non) contra teſtamentum fratris ſui vel ororis de inofficioſo quæſtionem movere poſſunt, ſi ſcripti hæredes

hæredes infamiæ, vel turpitudinis, vel levis notæ macula aſpergantur. *l.* 27. *C. eod.*

Juſtinian *having abolished the Difference between the* Agnati *and* Cognati *by his hundred and eighteenth Novel, why ſhould not the Brothers by the Mother's ſide have the ſame Right as Brothers by the Father's ſide? And would it not alſo be equitable, that the other near Relations, beyond the Degree of Brothers, ſhould have a Right to annul an infamous Inſtitution, ſince it would be nevertheleſs contrary to Decency and good Manners, and againſt the Spirit of the Law, altho the Teſtator ſhould have neither Brothers nor Siſters?*

SECT. II.

Of the Cauſes which render a Diſherſon juſt.

The CONTENTS.

1. *Children cannot be diſinherited without a juſt Cauſe.*
2. *Two ſorts of Cauſes of diſinheriting*
3. *Divers Cauſes of diſinheriting Children.*
4. *Divers Cauſes of diſinheriting Parents.*
5. *The Cauſes of diſinheriting ought to be proved.*
6. *The Husband is not deprived of his Wife's Dowry, for the Ingratitude of his Wife towards the Parents who gave it.*

I.

1. *Children cannot be diſinherited without a juſt Cauſe.*

SEEING Nature and the Laws which call Children to the Succeſſion of their Parents, look upon the Goods of the Parents as belonging already to the Children, even in the Life-time of their Parents; they cannot be deprived of them, if they have not deſerved ſuch a Puniſhment, which taking from them the Goods, does at the ſame time ſtain their Honour, and expoſes them to yet greater Evils Thus the Laws have reſtrained the Liberty of diſinheriting, of which Fathers might be apt to make a bad Uſe *a*, either thro an unjuſt Paſſion, or by the Impreſſions of a Mother-in-Law, or of other Perſons *b*: And they have regulated the Cauſes which may deſerve diſinheriting *c*.

a Inſtitutiones benigne accipiuntur, exhæredationes autem non adjuvandæ. *l.* 19. *in f. ff. de liber. & poſt hæred. inſt. vel exhæred.*

Hujus verbi *de inofficioſo*, vis illa eſt, docere immerentem ſe, & ideo indigne prætericum, vel exhæredatum. *l.* 1. *ff. de inoff. teſt.*

b Inofficioſum teſtamentum dicere, hoc eſt, allegare quare exhæredari vel præteriri debuerit. Quod plerumque accidit, cum falſo parentes inſtimulati, liberos ſuos vel exhærodant, vel prætereunt. *l.* 3. *eod.*

Non eſt enim conſentiendum parentibus qui injuriam adverſus liberos ſuos teſtamento inducunt. Quod plerumque faciunt maligne circa ſanguinis ſuum inferentes judicium, novercalibus delinimentis inſtigationibuſque corrupti. *l.* 4. *eod.*

Cum te pietatis religionem non violaſſe, ſed ſpiritu contagium quod fueras fortita diſtrahere noluiſſe ac propterea offenſum atque iratum patrem ad exhæredationis notam prolapſum eſſe dicas, inofficioſi teſtamenti querelam inſenſe non vetaberis. *l.* 18. *C. eod.*

c See the Articles which follow.

II.

The Cauſes of diſinheriting Children may be diſtinguiſhed into two ſorts: One, of thoſe which concern the Perſon of the Parents, as if a Son has attempted any thing againſt the Life of his Father: And the other is of ſuch as, without attempting any thing directly againſt the Perſons of the Parents, may deſerve their Diſpleaſure; as, if a Son engages himſelf in an infamous Profeſſion, as ſhall be mentioned in the following Article. But altho theſe Cauſes be different, according to theſe two Views, yet the Laws give the Name of Cauſes of Ingratitude to all thoſe which may deſerve diſinheriting *d*; qualifying with this Name every thing that is contrary to the Duty which Children owe to their Parents. For this Duty implies the abſtaining from every thing that may juſtly draw upon the Children the Wrath of their Fathers.

2. *Two ſorts of Cauſes of diſinheriting.*

d Cauſas autem ingratitudinis has eſſe decernimus. Si quis, &c. *Nov.* 115. *C.* 3.

III.

Fathers and Mothers, and other Aſcendants, may diſinherit their Children if they have attempted to take away their Life, either by Poiſon, or by other ways *e*: If they have ſtruck them *f*, or abuſed them, or committed any grievous Offence againſt them *g*: If they have not relieved them out of Priſon, by engaging to preſent them in Judgment, or to pay the Debt for them as far as their own Circumſtances will allow them *h*: If they have ſuffered them to remain in Captivity, while they were able to redeem them *i*: If the Father having been mad, they had neg-

3. *Divers Cauſes of diſinheriting Children.*

e Si vitæ parentum ſuorum per venenum, aut alio modo inſidiari tentaverit. *Nov.* 115. *c.* 3. §. 3. See on this Article the third Section of Heirs and Executors in general.

f Si quis parentibus ſuis manus intulerit. *d. c.* 3. §. 1.

g Si gravem & inhoneſtam injuriam eis inje *d. c.* §. 2.

h Si quemlibet de prædictis parentibus inc eſſe contigerit, &c. *d. c.* §. 8.

i Si unum de prædictis parentibus in capti detineri contigerit, &c. *d. c.* §. 13.

ed to perform thoſe Offices towards . which that Condition may have ired *l*: If by any Violence, or other awful way, they had hindred him n diſpoſing of his Eſtate by Will: And if the Father had died without being able to make his Will, and to diſinherit the Son who had been guilty of this Violence, this Son would nevertheleſs be deprived of the Inheritance *m*: If they have accuſed their Parents of other Crimes beſides Treaſon againſt the King, or the State *n*: If a Son has committed Inceſt with his Mother-in-Law *o*: If he had contracted any Familiarity with Scelerates, and led the ſame kind of Life with them *p*: If he has taken up an infamous Profeſſion which his Father did not follow *q*: If a Daughter prefers an infamous Life to a married State *r*.

l Si quis de prædictis parentibus furioſus fuerit, &c. *d. c.* §. 12.

m Si convictus fuerit aliquis liberorum ex eo quia prohibuerit parentes ſuos condere teſtamentum, &c. *d. c.* §. 9. See the tenth Article of the third Section of Heirs and Executors in general.

n Si eos in criminalibus cauſis accuſaverit, quæ non ſunt adverſus principem, ſive rempublicam. *d. c.* §. 7.

Si delator contra parentes filius extiterit, & per ſuam delationem gravia eos diſpendia fecerit ſuſtinere. *d. c.* §. 7.

o Si novercæ ſuæ filius ſeſe immiſcuerit. *d. c.* §. 6.

p Si cum maleficis hominibus ut maleficus verſatur. *d. c.* §. 4.

It is in the Greek μετὰ φαρμάκων cum veneficis. *But whatever Senſe we give to this Word, it would ſeem that this Cauſe of diſinheriting ought not to be confined to the frequenting of the Company, and imitating the Example of one kind only of wicked Perſons.*

q Si præter voluntatem parentum inter arenatios, vel mimos ſeſe filius ſociaverit; & in hac profeſſione permanſerit: niſi forſitan etiam parentes ejuſdem profeſſionis fuerint. *d. c.* §. 10.

r Si aliqui ex prædictis parentibus volenti ſuæ filiæ, vel nepti maritum dare, & dotem ſecundum vires ſubſtantiæ ſuæ pro ea præſtare, illa non conſenſerit, ſed luxurioſam degere vitam elegerit. *d. c.* §. 11. *v. l.* 19. *C. de inoff. teſt.*

We have not inſerted in this Article the laſt of the Cauſes of diſinheriting, which Juſtinian *has collected in this hundred and fifteenth Novel, which is that of Hereſy. For the Uſage of this Cauſe having ceaſed for a long time in* France, *whilſt the Proteſtants had the free Exerciſe of their Religion, it hath ceaſed in the preſent Situation of Affairs for the contrary Reaſon, in that the late Edict and Declarations have taken away from them that Liberty of Conſcience which they formerly enjoyed.*

Altho Juſtinian had reſtrained the Cauſes for diſinheriting Children to thoſe which we have juſt now explained, and had rejected all others, yet we have in France *another Cauſe of diſinheriting brought in uſe by the Ordinances, which have given Permiſſion to Fathers to diſinherit their Children who marry againſt their Conſent, allowing only Sons after they have accompliſhed thirty Years of Age, and Daughters after they are paſt Five and twenty, to marry themſelves,* after they have in a dutiful manner deſired the Counſel and Advice of their Fathers and Mothers *a*. *And might not there be other juſt Cauſes of diſinheriting? As, for inſtance, if a Son had attempted to murder his Mother-in-Law, his Father's Wife: If on any occaſion he had failed in any eſſential Duty towards his Parents, ſuch as to furniſh them with neceſſaries in their Wants.*

a Edict of *Henry* II. in the Year 1556, Ordinance of *Blois*, Art. 41.

IV.

Children cannot diſinherit their Parents, except where they have a juſt Cauſe for it; as, if they have attempted any thing againſt their Lives *s*: If they have put them in danger of loſing it by ſome Accuſation, except it be in the Caſe of Treaſon, mentioned in the foregoing Article *t*: If the Father has been guilty of Inceſt with the Wife of his Son *u*. If the Parents have employed unlawful means to hinder their Children from making their Teſtaments *x*: If they have abandoned them in their Madneſs *y*, or in their Captivity *z*: And if the Father or Mother have attempted to take away the Life or Senſes, the one of the other, by Poiſon, or otherwiſe, their common Child may diſinherit the Author of ſuch a Crime *a*.

4. *Divers Cauſes of diſinheriting Parents.*

s Si venenis, aut maleficiis, aut alio modo parentes filiorum vitæ inſidiati probabuntur. *Nov.* 115. *c.* 4 §. 2.

t Si parentes ad interitum vitæ liberos ſuos tradiderint: citra tamen cauſam quæ ad majeſtatem pertinere cognoſcitur. *d. c.* 4. § 1.

u Si pater nurum ſuæ ſeſe immiſcuerit. *d. c.* 4. §. 3.

x Si parentes filios ſuos teſtamentum condere prohibuerint, in rebus in quibus habent teſtandi licentiam. *d. c.* §. 4.

y Si liberis vel uno ex his in furore conſtituto, parentes eos curare neglexerint. *d. c.* 4. §. 6.

z His caſibus etiam cladem captivitatis adjungimus, &c *d. c.* 4. §. 7.

a Si contigerit autem virum uxori ſuæ ad interitum, aut alienationem mentis, dare venenum: aut uxorem marito, vel alio modo alterum vitæ alterius inſidiari: tale quidem, utpote publicum crimen conſtitutum, ſecundum leges examinari, & vindictam legitimam promereri decernimus: liberis autem eſſe licentiam nihil in ſuis teſtamentis de facultatibus ſuis illi perſonæ relinquere quæ tale ſcelus noſcitur commiſiſſe. *d. c.* 4. §. 5.

V.

It is not enough to juſtify the diſinheriting, that the Parents, or the Children, mention the Cauſes of it in their Teſtaments, but the Perſons who are inſtituted Heirs or Executors ought to prove the Facts upon which the diſinheriting is grounded: And if they prove them not, it will be null *b*.

5. *The Cauſes of diſinheriting ought to be proved.*

b By the antient Roman *Law, the Son who was diſinherited, and who had a mind to bring his Complaint againſt it, was obliged to make it appear that*

that he was unjustly disinherited. Hujus verbi *de inofficioso* vis illa est, docere immerentem se & ideo indigne præteritum, vel etiam exheredatione summotum. *l. 5. ff. de inoff. test.* Liberi de inofficioso querelam contra testamentum patrum moventes, probationem debent præstare, quod obsequium debitum jugiter prout ipsius natura religio flagitabat, parentibus adhibuerint nisi scripti hæredes oftendere malint ut ingratos liberos contra parentes exstitisse. *l. 28. C. de inoff. test.* *But* Justinian *ordered that the Causes of disinheriting should be proved, nisi forsan probabuntur ingrati. Nov. 115. c. 3. And it is also the general Rule, that no Accusation is regarded unless it be proved.*

VI.

6 *The Husband is not deprived of his Wife's Dowry, for the ingratitude of his Wife towards the Parents who gave it.*

Altho Parents may deprive their ungrateful Children of their Estate, and even revoke Donations which they may have made in their favour, as has been said in its place *c*; yet if a Daughter who was endowed by her Father or Mother, or any other Ascendant, had fallen into the Crime of Ingratitude, the Marriage Portion that was given or promised to the Husband would nevertheless be due to him. For as to him, the Charges of the Marriage which he is bound to bear, are a just Title for him to keep the said Marriage Portion, or to demand it, without any regard to the Fact of his Wife *d*.

c See the second Article of the Section of Donations.

d Patrona dotem pro liberta jure promissam, quod exitent ingrata, non retinebit. *l. 69. §. 6. ff. de jure dot. v. l. 24. C. eod.*

SECT. III.

Of other Causes which make the Complaint against a Testament, as being undutiful, to cease.

1. *The Complaint against a Testament, as being undutiful, ceases by the Approbation of the Testament.*
2. *If the Person disinherited, being a Legatee, receives the Legacy, he approves of the Disherison.*
3. *What a Guardian does for his Minor ought not to hurt himself, nor what he does for himself to be of any Prejudice to his Minor.*
4. *He who approves of the Testament by any Act, is excluded from entring a Complaint against it, as being undutiful.*
5. *This Complaint prescribes in five Years time, if there be no just Cause of Excuse for the Delay.*
6. *If the Action of Complaint is let drop for want of Prosecution, it is not afterwards received.*
7. *The Complaint on the score of Undutifulness, does not exclude the Action on the Head of Forgery, nor the Action of Forgery, the Complaint of Undutifulness.*
8. *One may plead the Nullities of the Testament, or the Undutifulness of it, successively one after the other.*

I.

1. *The Complaint against a Testament, as being undutiful, ceases by the Approbation of the Testament.*

IF the Person who is disinherited, altho without just Cause, had once approved of the Testament, the Disherison would have its Effect, whether it was by an express Act that the Testament had been approved, or by Acts which did imply the said Approbation, as shall be explained by the Rules which follow *a*.

a Quid ergo si alias voluntatem testatoris probaverim? Puta in testamento adscripserim post mortem patris, consentire me? Repellendus sum ab accusatione. *l. 31. in f. ff. de inoff. test.* See the following Articles.

II.

2. *If the Person disinherited, being a Legatee, receives the Legacy, he approves of the Disherison.*

If in the same Testament which contains the Disherison, there were a Legacy left to the Person disinherited, as, if a Father having disinherited his Son, had left him a Legacy, saying, That altho he were unworthy to have any share at all in his Succession, yet he left him out of Commiseration a certain Sum, or a Pension for Alimony; and this Son had received the Legacy, he would thereby have approved the Testament, and could not any more complain of his being disinherited. But if this Son who is disinherited, chanced to discover some Flaw in the Testament that would be sufficient to annul it, as if it was forged, or null, thro some Nullity which had been hid; the Legacy which he had received would not bar him from the Right of impugning such a Testament *b*.

b Illud notissimum est eum qui legatum percepit, non recte de inofficioso testamento dicturum. *l. 10. §. 1. ff. de inoff. test.*

Post legatum acceptum non tantum licebit falsum arguere testamentum, sed & non jure factum contendere: inofficiosum autem dicere non permittitur. *l. 5. ff. de his quæ ut indig. auf.* See the seventh and eighth Articles.

III.

3. *What a Guardian does for his Minor, ought not to hurt himself; nor what he does for*

If it should happen that the Person who is disinherited is Guardian to one to whom the Testator has left a Legacy by the same Testament which contains the Disherison, and that by virtue of his Office of Guardian he had received the Legacy left to his Minor; this would not

himself to be of any prejudice to his Minor. not be an Approbation of the Testament with respect to himself; and what the Interest of his Minor had obliged him to do, would be no Hindrance to his bringing his Complaint in his own Name against the said Testament, as being undutiful. And if on the contrary, a Father having disinherited his Son who is a Minor, had by the same Testament left a Legacy to one who happens afterwards to be appointed Guardian to the said Son that is disinherited; the Complaint which the Function of this Guardian would oblige him to enter against the said Testament, as being undutiful, would not render him unworthy of this Legacy. And likewise the Demand of the Legacy would not exclude him from bringing a Complaint against the Testament, as being undutiful, on the behalf of his Minor, if it be well grounded *c*. And it would be the same thing if a Guardian were bound, as such, to impeach the Testament of the Father of his Minor, as being forged, if in the said Testament, which by the Event was declared to be genuine, there were a Legacy left to the said Guardian *d*. For in all these Cases the Guardian exercises the Rights of two Persons who are distinguished in him, that of the Guardian and that of his own, so that he does himself no prejudice by any thing which his Duty of Guardian requires of him.

c Si tutor nomine pupilli, cujus tutelam gerebat, ex testamento patris sui legatum acceperat, cum nihil erat ipsi tutori relictum a patre suo: nihilominus poterit nomine suo de inofficioso patris testamento agere. §. 4. *inst. de inoff. testam.*

Sed si è contrario pupilli nomine, cui nihil relictum fuerat de inofficioso egerit, & superatus est, ipse (tutor) quod sibi in testamento eodem legatum relictum est non amittit. §. 5. *eod.*

* Tutorem qui pupilli sui nomine, falsum vel inofficiosum testamentum dixit, non perdere sua legata, si non obtinuerit optima ratione defenditur. *l.* 22. *ff. de his quæ ut ind.* * Quia officii necessitas, & tutoris fides excusata esse debet. *d. l.*

d Tutoribus pupilli nomine, sine periculo ejus quod testamento datum est agere (posse) de inofficioso, vel falso testamento, divi Severus & Antoninus rescripserunt. *l.* 30. §. 1. *eod.* See the fifth Article of the second Section of Legacies, and the seventh and eighth Articles of this Section. *The said Tutors would be very ill advised, if they should omit to make the Protestations which are usually made in the like Cases.*

IV.

4. He who approves of the Testament by any Act, is excluded from entring a If he who would complain of a Disherison, or of some other undutiful Disposition, had treated with the Person instituted Heir or Executor, either for the whole Inheritance, or a Part of it; if he had bought any of the Effects thereof from him, knowing him to be Heir or Executor, if he had hired of him some House belonging to the Succession, if he had paid him a Sum of Money which he was indebted to the Testator, or had received Payment of a Sum which the said Executor, or a Legatee, had been charged by the Testator to pay to him: These kinds of Acts, and others of the like nature, would be Approbations of the Testament, which would bar him from bringing a Complaint against the same, as being undutiful *e*.

e Si hæreditatem ab hæredibus institutis exhæredati emerunt, vel res singulas scientes eos hæredes (esse) aut conduxerunt prædia, aliudve quid simile fecerunt: vel solverunt hæredi quod testatori debebant: judicium defuncti agnoscere videntur, & à querela excluduntur. *l.* 23. §. 1. *ff. de inoff. test.*

Si conditioni parere testator hæredem jussit in persona filii, vel alterius qui eandem querelam movere potest: & sciens is accepit videndum ne ab inofficiosi querela excludatur: adgnovit enim judicium. Idem est, & si legatarius ei, vel statu liber dedit: & potest dici excludi eum, maxime si hæredem ei jusserat dare. *l.* 8. § 10. *eod.*

Qui autem agnovit judicium defuncti, eo quod debitum paternum pro hæreditaria parte persolvit, vel alio legitimo modo satisfecit: etiam si minus quam ei debebatur, relictum est: si is major viginti quinque annis est, accusare ut inofficiosam voluntatem patris, quam probavit, non potest. *l.* 8. §. 1. *C. eod.*

V.

5. This Complaint prescribes in five Years, if there be no just Cause for the Delay. If the Son that is disinherited being of full Age, had let five Years pass without entring his Complaint, after he knew he was disinherited, and that being present on the Place, he had suffered the Person who was instituted Heir or Executor, whether it was his Brother or any other Person, to continue in peaceable Possession of the Goods of which the Disherison had stript him, without being able to alledge any Excuse which had hindered him from bringing his Action, this voluntary Silence, being joined to the Presumption that the Disposition of his Father was just, would make it be presumed, under these Circumstances, that he had approved of it, and therefore his Complaint ought not after that to be received *f*.

f Adolescentiæ tempus non imputari in id quinquennium liberis, cujus præscriptio seram inofficiosi quæstionem moventibus opponi solet, manifestè ante descripsimus. *l.* 2. *C. in quib. caus. in integr. rest. nec n. est.*

Nisi pater adhuc superstes, vel repudiavit querelam, vel quinquennio tacuit. *l.* 14. *in f. C. de inoff. test.* Plane si post quinquennium inofficiosum dici cœptum est, ex magna & justa causa, &c. *l.* 8. §. *ult. ff. eod.*

§ Altho

¶ Altho this Preſcription of five Years may ſeem to be too ſhort a time to extinguiſh a Demand of an Inheritance, and that an Heir may bring his Action for an Inheritance at any time within thirty years, yet we ought to make a great Difference between the Silence of a diſinherited Son who forbears to commence his Action under the Circumſtances explained in this Article, and the Silence of an Heir who is not deprived of the Inheritance by an Act of Diſheriſon: for whereas he who is not diſinherited has only the ordinary Preſcription to be afraid of, and that his Right remains intire whilſt the time of that Preſcription is not expired, the Son who is diſinherited is excluded from the Succeſſion by an expreſs Title which deprives him of it, and makes it to paſs to another. So that it is both his Duty and his Intereſt, and for his Honour, to annul the ſaid Title, if it is poſſible for him: and if he lets the five Years run, having no Excuſe to plead, it may be alledged againſt him, either that he has ſuffered this time to paſs, that the Proofs of the Cauſes of the Diſheriſon might periſh, or that his Silence was only the Effect of his Conſciouſneſs that he was juſtly diſinherited. It is becauſe of theſe Conſiderations that we have judged the Rule of the *Roman* Law, which makes the Complaint againſt an undutiful Teſtament to ceaſe after five Years Silence, when there appears no juſt Cauſe for the Delay, to be juſt and equitable, eſpecially under the Circumſtances which we have added, and that thus our Uſage might approve of it.

VI.

6. If the Action of Complaint is let drop for want of Proſecution, it is not afterwards received.

If a Son who is diſinherited having enter'd his Complaint againſt the Teſtament, lets his Action drop for want of proſecuting it within the time limited by Law, this Silence, or Non-proſecution of the Suit, would be inſtead of an Approbation of the Teſtament, againſt which he had brought his Complaint *g*.

g Si quis poſt rem inofficioſi ordinatam, litem dereliquerit, poſtea non audietur. *l.* 8. §. 1. *ff. de inoff. teſt.*

VII.

7. The Complaint on the ſcore of Undutifulneſs does not exclude the Action on the head of Forgery, nor the Action of Forgery, the Complaint of Undutifulneſs.

If he who is diſinherited by a Teſtament which he pretends to be forged, having firſt entred his Action on the ſcore of Forgery, had been caſt in it, that would not bar him from bringing his Complaint againſt the Teſtament, as being undutiful. For altho the Teſtament were not forged, yet the Diſheriſon might be unjuſt. And if on the contrary, having begun with his Complaint againſt his being diſinherited, he had been declared to have been duly diſinherited, he might nevertheleſs impugn the Teſtament, as being forged. For if the Teſtament is forg'd, the Diſheriſon cannot ſubſiſt, even altho it had been ratified in Judgment *h*.

h Tum qui inofficioſi querelam delatam non renuit, à falſi accuſatione non ſubmoveri placuit. Idcirco obſervatum, & ſi ex contrario falſi crimine inſtructo victus, poſtea de inofficioſo actionem exercere maluerit. *l.* 14. *C. de inoff. teſt.*

VIII.

8. One may plead the Nullities of the Teſtament, or the Undutifulneſs of it, ſucceſſively one after the other.

If he who had right to complain of a Teſtament as being undutiful, ſhould likewiſe pretend that there was ſome Nullity in the Form of the Teſtament, and that for the quicker Diſpatch, and to avoid a Suit about the Undutifulneſs, he ſhould deſire that the Queſtion touching the Nullity might be diſcuſſed in the firſt place, it would be juſt and equitable to begin firſt with that Queſtion; and if he ſhould be caſt in that, to admit him afterwards to his Complaint againſt the Teſtament, as being undutiful. Or if having begun with this Complaint, he had diſcovered afterwards ſome Nullity in the Teſtament, as if ſome of the Witneſſes were under ſome Incapacities which had not been known, and which came afterwards to be diſcovered, it would be juſt to admit that Allegation *i*. But if the Circumſtances do not require that theſe two Cauſes ſhould be divided, it would be proper to join them together in one and the ſame Action *l*.

i Contra majores viginti quinque annis duplicem actionem inferentes, primam quaſi teſtamentum non ſit jure perfectum, alteram quaſi inofficioſum licet jure perfectum, præſcripto *ex prioris* judicii mora quinquennalis temporis non naſcitur. Quæ officere non ceſſantibus non poteſt. *l.* 16. *C. de inoff. teſtam.*

l Si quis irritum dicat teſtamentum, vel ruptum & inofficioſum, conditio ei deferri debet utrum prius movere velit. *l.* 8. §. 12. *ff. eod.*

We have added theſe laſt Words to the Article, becauſe it is our Uſage not to divide Actions that may be joined in one.

SECT. IV.

Of the Effects of the Complaint againſt a Teſtament, as being undutiful.

The CONTENTS

1 *If the Teſtator has left leſs than the Legitime or Portion due by Law, it ought to be made up*
2. *The Teſtament being declared undutiful, all the Children ſucceed as if there had been no Teſtament at all*
3 *A Caſe where the Complaint of Undutifulneſs augments the Portion of the Son who is inſtituted.*
4. *Extravagant Donations and Dowries are diminiſhed, to make up the Legitime or Portions due by Law to Children or Parents*
5 *The Legacies of an undutiful Teſtament ſubſiſt.*

I.

1. *If the Teſtator has left leſs than the Legitime or Portion due by Law, it ought to be made up.*

IF the Complaint of Undutifulneſs were againſt a Teſtament in which no other Wrong were done to the Perſon who complains of it, except that he was thereby reduced to a Portion leſs than what was due to him by Law, without branding him with any Accuſation, the Effect of the Complaint would only be to procure him a Supplement of his Legitime, or Portion due by Law, ſuch as it ought to be, according to the Rules which ſhall be explained in the following Title *a*.

a Si quid minus legitima portione his derelictum ſit, qui ex antiquis legibus de inofficioſo teſtamento actionem movere poterant, hoc repleatur. Ne occaſione minoris quantitatis teſtamentum reſcindatur. *l.* 32. *C. de inoff. teſt. l.* 30. *eod.* See the 18th Article of the firſt Section, and the Remark upon it.

II.

2. *The Teſtament being declared undutiful, all the Children ſucceed as if there had been no Teſtament at all.*

If the Teſtament is declared to be undutiful, the Inſtitution of the Heirs or Executors whom the Teſtator had put into the Place of the Complainant, will be vacated, if the ſaid Heirs or Executors were others than the Children of the Teſtator. And if they were his Children, who ought to ſhare the Inheritance with him who was unjuſtly diſinherited, their Portions would be diminiſhed, by taking from them not barely the Legitime or Portion due by Law to the Perſon diſinherited, but the entire Portion which he would have had in the Inheritance, if there had been no Teſtament at all *b*.

b Quantum ad inſtitutionem hæredum pertinet, teſtamento evacuato, ad paternum hæreditatem libros tamquam ab inteſtato ex æqua parte pervenire. *Nov.* 115. *c.* 3. *in f.*

It would ſeem as if this Text related only to the Nullity of the Inſtitution of Heirs that were Strangers, in the room of the Children diſinherited: and that as the undutiful Teſtament is annulled only as to what concerns the diſpoſition, and that the Legacies bequeathed therein do ſubſiſt, as ſhall be ſhewn in the fifth Article, if the Teſtator having diſinherited only one of his Children, and inſtituted his other Children in unequal Portion, it would ſeem not to be agreeable enough to our Uſage, that the Nullity of the Diſpoſition ſhould render the Condition of the Children equal, which the Father had diſtinguiſhed by his Will. For which reaſon ſome have been of opinion, that this Rule ought only to comprehend the bare Nullity of the Diſpoſition. See the following Article, and the Remark made on it.

III.

3. *A Caſe where the Complaint of Undutifulneſs augments the Portion of the Son who is inſtituted.*

If a Teſtator having two Sons, had inſtituted one of them his Heir or Executor for a leſs Portion than that which would have come to his ſhare if his Father had died inteſtate, and making no mention of the other Son, or diſinheriting him, had inſtituted a Stranger his Heir or Executor for the Surplus of his Eſtate, the ſaid Inſtitution being made void becauſe of the Preterition or Diſheriſon, the Complaint of Undutifulneſs would have this Effect, that the Inheritance would be divided between the two Sons, as if there had been no Teſtament made By which means it would happen that the Son who was inſtituted, profiting by the Complaint of the other Son who was excluded, and thereby getting a Moiety of the Eſtate, would have more to his ſhare than was left him by the Teſtament *c*.

c Mater decedens extraneum ex dodrante hæredem inſtituit, filiam unam ex quadrante, alteram præterit: hæc de inofficioſo egit & obtinuit. Quæro, ſcripta filiæ quomodo ſuccurrendum ſit? Reſpondi, filia præterita id vindicare debet quod inteſtata mater habituta eſſet. *l.* 10. *ff. de inoff. teſtam.*

There is this Difference between the Caſe of this Article, and that of the Remark which has been made on the foregoing Article, That in this it is becauſe of the Excluſion of the Stranger Heir, that the Portion of the Son who was not diſinherited happens to be augmented

IV.

4. *Extravagant Donations and Dowries are diminiſhed, to*

If a Father, or other Aſcendant, had made Donations either to ſome of his Children, or to other Perſons, or ſettled Dowries or Marriage Portions, ſo as

make up the Legitime, or Portions due by Law to Children or Parents.

to diminiſh his Eſtate in ſuch a manner as that there would not remain Effects enough to ſatisfy the Legitime, or Portions due by Law to the other Children, reckoning into the Eſtate the Value of the things given away, theſe extravagent Donations and Dowries would be liable to be complained of, as being contrary to the Duty of Parents towards their Children, were there a Teſtament or not, and ſo much would be cut off from the ſaid Donations and Dowries, as would be neceſſary to make up the legal Portions of the Children, even altho the Dowces, and the Daughters who had been endowed, ſhould be willing to abſtain from the Inheritance. And if the Donor having no Children, his Succeſſion were to go to his Father or other Aſcendants, they might demand in the ſame manner their Legitime or Legal Portion of the Inheritance out of the ſaid exceſſive Donations *d*.

d V. Toto Titulo Cod. de inoff. don. l. un. Cod. de inoff dot. & Nov. 92. *To avoid the Length of many Citations, we refer the Reader to thoſe Titles, the Subſtance of which is comprehended in this Article.* See the third Article of the third Section of the following Title.

V.

5. The Legacies of an undutiful Teſtament ſubſiſt.

The Teſtament which is undutiful becauſe of an unjuſt Diſheriſon, or a Preterition, is made void only in ſo far as concerns the Inſtitution of another Heir or Executor in the place of him who is diſinherited. Thus when he who is inſtituted Heir or Executor is ſome other Perſon, and not one of the Children, the Inſtitution remains without any Effect at all: and if they be Children who are inſtituted by the undutiful Teſtament, their Inſtitution is reduced in ſuch a manner, that he who was unjuſtly diſinherited has as much as he would have had if there had been no Teſtament at all, as has been ſaid in the ſecond Article. But the Legacies, the Fiduciary Bequeſts, and all the other Diſpoſitions of the undutiful Teſtament ſubſiſt, and have their Effect, whether the Perſon diſinherited were a Deſcendant or an Aſcendant *e*, as has been remarked in another Place *f*.

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

This Text relates to the Teſtaments of Children, and the ſame thing is ordained at the end of the following Chapter with reſpect to the Teſtaments of Parents.

Si quid autem pro legatis, ſive fideicommiſſis, & libertatibus, & tutorum datonibus, aut quibuſlibet aliis capitulis, in alis legibus inventum fuerit huic conſtitutioni contrarium, hoc nullo modo volumus obtinere. *d. Nov. cap.* 4. *in fine.*

f See the ſixteenth Article of the fifth Section of Teſtaments.

¶ By the antient *Roman* Law the Legacies of a Teſtament which was declared to be undutiful, whether becauſe of a Diſheriſon or Preterition, were annulled as well as the Inſtitution, and that for this reaſon, becauſe the Teſtament was conſidered as having been made by a Man out of his Senſes. *Filio præterito, qui fuit in patria poteſtate, neque libertates competunt, neque legata præſtantur* l. 17. ff. de injuſt. rup. irr. fact teſt. *Cum inofficioſum teſtamentum arguitur, nihil ex co teſtamento valet* l. 28. ff. de inoff. teſtam. And if the Legacies had been paid, the Legatees were bound to reſtore them. *Nec legata debentur, ſed ſoluta repetuntur.* l. 8. §. pen eod. This Rule had its Juſtice, ſuppoſing a Diſheriſon or Preterition to be altogether unjuſt. But ſeeing it is very rare, and hard to be imagined, that Parents will be moved to diſinherit their Children, or Children their Parents, without great Cauſe; it has been thought equitable on this Conſideration, to ratify and confirm the Legacies and other Diſpoſitions of Teſtaments which contain Diſheriſons that are annulled. And altho it does happen from hence, that the Condition of the Legatees proves to be more favourable than that of the Perſon who is inſtituted Heir or Executor, whom the Teſtator nevertheleſs valued more than the Legatees, as it may fall out on other occaſions, as has been already remarked in another Place *; yet this Event in ſuch a Caſe would cauſe no Inconvenience. For the Condition of an Heir or Executor, who poſſeſſed unjuſtly the Place of the Perſon diſinherited, and who perhaps contributed to the getting him diſinherited, ought not to be ſo favourable as that of the Legatees, ſeeing the Diſpoſitions in which they are concerned, do not the ſame Injury to the Perſon diſinherited.

* *See the fifth Article of the ſeventh Section of Teſtaments, and the Remark made there upon it.*

TITLE III.

Of the Legitime or Legal Portion due to Children or Parents.

WE have ſeen in the foregoing Title, that Parents ought to leave to their Children, and Children to their Parents, a certain Portion of their Eſtate It is this Portion that is called the *Legitime*, or *Legal Portion*, which ſhall be the ſubject Matter of this Title.

The Legal Portion of Children was by the antient *Roman* Law only a fourth part of the Portion which they would have had if the Parent had died inteſtate *a*. Thus an only Son had for his legal Portion the fourth part of the whole Eſtate; and if there were two Sons, they had each of them the fourth part of one half of the Eſtate, that is to ſay, an eighth part of the whole; and ſo in proportion according to their Number.

This legal Portion was fixed to this ſmall Proportion of the Eſtate, at a time when they began to ſet ſome bounds to the Liberty that every one had to diſpoſe of his Goods as he thought beſt *b*, and even to deprive their Children of them And whereas it ſeems natural that the Children ſhould have either the whole Eſtate, or the greateſt part of it, and that the Liberty of bequeathing ſhould be limited to ſome ſmall Portion of the Eſtate, as it is regulated by our Cuſtoms; the *Romans* left the greateſt Share of the Eſtate to the free diſpoſal of the Teſtators, and reſtrained the Right of the Children to a ſmall Portion. So that what is ſaid of Legacies in a Law, which calls them a ſmall Diminution of the Inheritance, which ought to belong wholly to the Heir or Executor, would be more applicable to this legal Portion of the Children, which is in effect only a ſmall Retrenchment of the Inheritance, the whole of which may be left to one ſole Legatee, of whom one would be very much in the wrong to ſay that his Legacy were only a ſmall Diminution of the Inheritance

Juſtinian was ſenſible that this Portion allotted to the Children by Law was not ſufficient, and he augmented it, but with Moderation, diſtinguiſhing the legal Portion according to the number of the Children, and giving to them all, if they were four in number, or under, a third part of the whole Eſtate, and the half of the Eſtate if the Children were five or more in number: So that this third, or this half, is equally divided among the Children, and the two thirds, or the other half, remain for the Legacies Thus, what number ſoever there be of Children, the legal Portions of them all together, when they are reduced to it, are at moſt but equal to the Share of the Legatees, and if the Children be fewer in number than five, the Legatees have double the Portion which is reſerved by Law for the Children.

Our Cuſtoms in *France* have almoſt all of them diſtinguiſhed between the ſeveral ſorts of Eſtates and Goods, between Eſtates of Inheritance and Eſtates of Purchaſe, between Goods Moveable and Immoveable; and according to theſe different ſorts of Eſtates and Goods, they have regulated differently the Liberty of Teſtators, not only with reſpect to the Children, but even in favour of the Heirs of Blood the moſt remote, whom they can only deprive of a certain Portion of Eſtates of Inheritance. And ſome Cuſtoms have made no manner of Diſtinction of Goods, but have reſtrained the Liberty of diſpoſing by Teſtament to a ſmall Portion, ſuch as one fourth part of all the Goods in general; and reſerved three fourth Parts of the whole to the Heirs of Blood, whether they be Children or others. Thus theſe Cuſtoms give a great deal more to the moſt diſtant Relations, than they allow to be given to Legataries; and the Portion of the Eſtate which they appropriate to the Heirs of Blood, and which they cannot be deprived of by a Teſtament, is much greater than the Legitime, or Legal Portion, of the Children, in the Provinces which are governed by the written Law

It is not our buſineſs to examine here, which of theſe two Laws is moſt juſt

a Quarta debitæ portionis. *l.* 8. §. 8. *ff. de inoff. teſt.*

b Uti quiſque legaſſit de re ſua ita jus eſto. *Inſt. de lege Falc. ex l.* 12. *tabb. Nov.* 22. *cap.* 2.

c Legatum eſt delibatio hæreditatis, qua teſtator ex eo, quod univerſum hæredis foret, alicui quid collatum velit. *l.* 116. *ff. de legat.* 1.

and equitable, whether the *Roman* Law, or the Law of our Cuſtoms *d*. Both the one and the other may be uſeful in their different ways. For if on one hand it be juſt that Eſtates ſhould be appropriated to the Families, and that the great Liberty that is taken in making Diſpoſitions very often unjuſt, ſhould not ſtrip the Children and the other Heirs of Blood, ſo on the other hand it may be of ſervice, if the ſaid Heirs, and eſpecially the Children who are incapable of being wrought upon by better Motives, be kept to their Duty out of fear of ſeeing themſelves reduced to a very ſmall Portion reſerved to them by the Law.

All the Rules relating to this Matter of the Legitime, or legal Portion, reſpect either the Perſons to whom a Portion is due by Law, or the Quantity of the ſaid Portion, or the Goods out of which it is taken, and the Manner in which it is regulated, which ſhall be the ſubject Matter of three Sections.

d See what has been ſaid on this Subject in the Preface to this ſecond Part, num. 7.

[What the Civilians call the Legitime, is the ſame with the Reaſonable Part that was formerly due to Widows and Children by the particular Cuſtoms of ſome Parts in *England*, as particularly in the Province of *York*, and Principality of *Wales*. Which Cuſtom remains ſtill in force in the City of *London*, as to the Widows and Children of Freemen; but has been aboliſhed in other Parts of *England* by ſeveral late Acts of Parliament. *Stat.* 4° & 5° *Gul. & Mar. cap.* 6. *Stat.* 7° & 8° *Gul.* 3. *cap.* 38. *Stat.* 2° & 3° *Annæ, cap.* 5. But there is this Difference between the Legitime of the Civil Law, and the Reaſonable Part due by ſome Cuſtoms in *England*, that the Legitime was due to Parents as well as Children, but not to Widows; whereas the reaſonable Part reſerved by the Cuſtoms in *England*, was due to Widows and Children, but not to Parents. *See the Remark on the Preamble of the foregoing Title.*]

SECT. I.

Of the Nature of the Legitime or Legal Portion, and to whom it is due.

IT is neceſſary to make the ſame Remark here, as has been made in the foregoing Title, that we are to except out of the number of Children to whom a Legitime, or Legal Portion, is due, Daughters who by their Contract of Marriage have renounced their Right and Pretenſions to their Parents Inheritance, in conſideration of a Marriage-Portion. For altho this Marriage-Portion may prove to be leſs than the Legitime which would accrue to them by Law out of the Goods of their Fathers who have endowed them, yet the Uncertainty of the Events which may diminiſh the ſaid Goods, is one of the Motives which juſtify the Renunciation of a future and uncertain Profit, for a certain and preſent Portion *a*.

We muſt likewiſe take notice in relation to this Matter of the Legitime, of the Regulation that was made for the Legitime of Mothers out of the Succeſſions of their Children, by that Ordinance which is called the Edict of Mothers, of which mention has been made in the Preamble of the firſt Section, in what manner Fathers and Mothers ſucceed.

a See concerning theſe Renunciations, what has been ſaid in the Preamble to the 2*d Section of Heirs and Executors in general.*

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1. *Definition of the Legitime.*
2. *The Legitime is due to Deſcendants and Aſcendants.*
3. *All Children who are capable of inheriting, have a right to a Legitime.*
4. *The Legitime of the Children of the firſt degree is regulated according to their number.*
5. *And that of Children of remoter Degrees is regulated by their Stocks of whom they are deſcended.*
6. *Among Aſcendants the Legitime is due only to the neareſt.*
7. *If the Aſcendants are many in the ſame degree, one half of the Legitime goes to thoſe of the Father's ſide, and the other half to thoſe of the Mother's ſide.*
8. *Brothers have no Legitime.*

I.

The Legitime, or Legal Portion, is a certain Share of the Inheritance which the Laws appropriate to thoſe Perſons who cannot be deprived of the Quality of Heir, and to whom they give a Right to complain of undutiful Wills. And this has occaſioned the Liberty of deviſing by Will to their prejudice to be reſtrained, ſo as that there may remain for them a ſhare of the Inheritance, of which they cannot be deprived by any Diſpoſition *a*. 1. *Definition of the Legitime.*

a Debita portio. *l.* 8. §. 11. *ff. de inoff. teſt.* Debitum bonorum ſubſidium. *l.* 5. *C. de inoff. don.* Quod ad ſubmovendam inofficioſi teſtamenti querelam, non ingratis liberis relinqui neceſſe eſt. *l. l.* 5.

Hoc

Hoc obſervandum in omnibus perſonis in quibus ab initio antiquæ quartæ ratio de inofficioſo lege decreta eſt. *Nov.* 18. *cap.* 1. *in f.* See the following Article.

II.

The Legitime is due to Descendants and Ascendants.

There are two Orders of Perſons to whom the Laws give a Legitime; to Children out of the Eſtates of their Parents, and to Parents out of the Eſtates of their Children. But if in the ſame Succeſſion there are both Children of the Deceaſed and alſo Parents, there will be only a Legitime for the Children: For they exclude the Parents from Succeſſions *b*.

b See the Articles which follow, and the firſt Title of the ſecond Book.

III.

3. All Children who are capable of inheriting, have a right to a Legitime.

All the Children of both Sexes have without diſtinction the Right to demand a Legitime, or Legal Portion, whether they be in the firſt degree of Sons or Daughters, or whether they be deſcended one or more Degrees lower, provided only that they be called to the Inheritance, whether it be in their own Name, or by Repreſentation, as has been explained in its proper place *c*.

c Children are called to the Legitime in the ſame order as to the Succeſſion of one who dies inteſtate, according to their Rank explained in the 2d Book, Title 1. Section 2.

IV.

4. The Legitime of the Children of the firſt degree is regulated according to their number.

When there are only Children of the firſt Degree, they have each of them their Legitime by equal Shares. And if there are at the ſame time Children of the firſt degree alive, and Grand-Children deſcended from others deceaſed, the Succeſſion is divided according to the number of the Children of the firſt degree who are ſtill alive, and of thoſe who being dead have left Children who repreſent them; and theſe Grand Children have only among them the legal Portion which the Perſon whom they repreſent would have had: For it is that legal Portion which falls to their Share *d*.

d This is a Conſequence of the foregoing Article, and of the Order of the Succeſſion of Children.

V.

5. And that of Children of remoter Degrees is regulated by that of their Parents.

If there were no Child of the firſt Degree alive, but ſeveral Grand-Children of the ſecond Degree, or other Degree more remote; they would have all of them their legal Portions, not according to their number, but the Deſcendants of each Son would have among them the Legitime which their Father would have had. And every one of theſe Deſcendants would have their Share in the ſaid Legitime, greater or leſſer, according as they are more or fewer in number *e*.

e This is a Conſequence of the ſame Order.

VI.

6. Among Aſcendants the Legitime is due only to the neareſt.

The ſecond Order of Perſons to whom a Legitime or Legal Portion is due, is that of Parents, that is, of Fathers, and Mothers, and other Aſcendants *f*. But there is this Difference between them and Children as to what concerns the Legitime, that ſeeing the neareſt Aſcendants exclude the remoteſt from the Succeſſions of Deſcendants, and that in the Order of Aſcendants there is no Right of Repreſentation, as there is in the Order of Deſcendants, it is only the neareſt Aſcendants to whom a Legitime is due *g*.

f Primum itaque illud eſt cogitandum, quia teſtantibus aliis quidem, neceſſitatem imponit lex diſtribuere quandam partem perſonis quibuſdam, tanquam hoc ſecundum ipſam naturam eis debeatur. Quale eſt filius, & nepotibus, & patribus atque matribus. *Nov.* 1. *in Præf.* §. 2.

g See the 2d Book, Title 2d, Section 1ſt, Article 5th.

We muſt take this Article in the ſame Senſe as what has been ſaid of the Succeſſion of Aſcendants, ſo as that they may preſerve the Right of Reverſion of Eſtates that are ſubject to it. See the 3d Section of the ſame 2d Title.

VII.

7. If the Aſcendants are many in the ſame degree, one half of the Legitime goes to thoſe of the Father's Side, and the other half to thoſe of the Mother's Side.

If the neareſt Aſcendants happen to be many in the ſame degree, ſome paternal and ſome maternal, the Total of their Legitime will be divided, not by the Head according to their number, but in two Parts, one for the Aſcendants of the Father's ſide, and the other for the Aſcendants of the Mother's ſide; altho the Number of thoſe of one ſide be greater than the number of thoſe of the other. And if there be Aſcendants only of one ſide in the ſame degree, their Legitime is divided by Heads *h*.

h See the 2d Book, Title 2. Sect. 1. Art. 6.

VIII.

8. Brothers have no Legitime.

Altho Brothers may complain of an undutiful Teſtament of their Brother, in the Caſe of the laſt Article of the firſt Section of the foregoing Title, yet they have not for all that a right to a Legitime. For in that caſe it is the whole

whole Inheritance that the Law gives them, and in all other Caſes they may be deprived by Teſtament of all Share in the Inheritance *i*.

i See the laſt Article of the firſt Section of the preceding Title.

SECT. II.

What is the Quota *or Quantity of the Legitime or legal Portion.*

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1. *Different* Quota's *of the Legitime.*
2. *The Legitime of Children differs according to their Number.*
3. *If there be four Children, or under that Number, they have a third Part of the Eſtate*
4. *If there be five or more Children, they have a Moiety of the Eſtate.*
5. *Thoſe who come by Repreſentation, have only one Share among them.*
6. *The Legitime of the Aſcendants, is the third Part of the Eſtate*

I.

1. *Different Quota's of the Legitime.*

THE *Quota* of the Legitime is the Portion of the whole Goods of the Inheritance, which is appropriated to him to whom a Legitime is due And the ſaid Portion is differently regulated, as ſhall be explained by the following Articles *a*.

a Subſtantiæ pars. *Nov.* 18. *cap.* 1. Definita menſura. *d. c.*

II.

2. *The Legitime of Children differs according to their Number.*

With reſpect to Children, the Law hath differently regulated their Legitime according to their Number *b*, by the Rules which follow.

b See the following Articles.

III.

3. *If there be four Children, or under that Number, they have a third Part of the Eſtate.*

If there are four Children, or a leſſer Number, they have all of them together for their Legitime a third Part of the Eſtate; ſo that this Third remains entire to one only Child, if there be no more than one, or is divided among them all, according to their Number, each of them having for his Legitime his Share of this third Part *c*.

c Si quidem unius eſt filii pater aut mater, aut duorum, vel trium, vel quatuor, non triuncium eis relinqui ſolum, ſed etiam tertiam propriæ ſubſtantiæ partem: hoc eſt uncias quatuor. *Nov.* 18. *cap.* 1. Singulis ex æquo quadriuncium dividendo. *d. c.*

IV.

4. *If there be five, or more Children, they have a Moiety of the Eſtate.*

If there are five Children, or a greater Number, they have all of them among them for their Legitime the half of the Eſtate; ſo as that the ſaid half be divided among them all according to their Number, each of them having for his Legitime his Share of the ſaid Moiety; and that it remain entire to one only Child, if there is but one *d*.

d Si vero ultra quatuor habuerint filios, mediam eis totius ſubſtantiæ relinqui partem, ut ſexuncium ſit omnino quod debetur ſingulis ex æquo quadriuncium vel ſexuncium dividendo, *Nov.* 18. *c.* 1.

V.

5. *Thoſe who come by Repreſentation have only one Share among them.*

We muſt underſtand the two preceding Articles in the Senſe explained in the third, fourth, and fifth Articles of the firſt Section; ſo as that the Children who come by Repreſentation, of what Number ſoever they conſiſt, may have among them only the Share of the Perſon whom they have right to repreſent *e*.

e See the ſaid Articles, and the ſecond Book, Tit. 1. *Sect.* 2.

VI.

6. *The Legitime of the Aſcendants, is the third Part of the Eſtate.*

Seeing the Legitime or legal Portion of the Aſcendants is not more favourable than that of the Children, and that there is for the Legitime of an only Child, and even of four Children, but a third Part of the Eſtate, there is likewiſe only a third Part for the Aſcendants, to be divided among them if they are more in Number than one *f*.

f Hoc obſervando in omnibus perſonis in quibus ab initio antiquæ quartæ ratio de inofficioſo lege decreta eſt. *Nov.* 18. *cap.* 1. *in fine.*

¶ It is certain that a Legitime is due to Aſcendants, ſeeing the Law gives them a Right to complain of the Undutifulneſs of their Childrens Teſtaments, which it would not give them, if it did not appropriate to them a part of the Inheritance, which cannot be taken away from them. But when *Juſtinian* regulated the legal Portions by his eighteenth Novel, the Texts whereof have been cited on the preceding Articles, he confined himſelf to the Legitime of Children, and did not expreſly regulate that of Parents. So that it has been doubted whether the Legitime of Parents ought to be the ſame with that which has been ſettled for the Children. And ſeeing by this Regulation of *Juſtinian's*, the Legitime of the Children has been di-

diverſified according to their Number, having been fixed to a third Part of the Inheritance when there are only four Children, or a leſſer Number, and to the Moiety when there are five Children, or upwards, as has been ſaid in the third and fourth Articles; there was ground to doubt whether after this Regulation, the Aſcendants ought to have either a Third, or a Moiety, or only the antient Legitime, which was the fourth Part of what would have fallen to them, had the Party died inteſtate, as has been ſaid in the Preamble of this Title. This Queſtion has been decided by Uſage, and by the Opinions of Interpreters, who have judged that the Legitime of Parents ought to be a third Part of the Inheritance. And this Opinion may be grounded on the laſt Words of that eighteenth Novel of *Juſtinian*; for after having there regulated the Legitime of Children, he ſays that the ſame thing ſhall be obſerved with reſpect to all Perſons to whom the antient Law gave the Right to complain of a Teſtament as undutiful, and a fourth Part of the Inheritance for their Legitime. *Hoc obſervando in omnibus perſonis in quibus ab initio antiquæ quartæ ratio de inofficioſo lege decreta eſt.* Theſe Words, which are the ſame that have been quoted on this Article, ſeem to comprehend clearly enough the Aſcendants, and can be underſtood only of one Legitime, without diſtinction of their Number, ſince we ought not to ſuppoſe that there are more than four Aſcendants concurring together to the Succeſſion. Thus it would ſeem reaſonable on that account, that their Legitime ſhould be regulated to a third Part at leaſt. To which we may add, that *Juſtinian*, ſpeaking of the Legitime due to Parents in the eighty ninth Novel, Chap. 12. §. 3. ſays there, That he has already fixed the ſaid Legitime. *Si vero habuerint hi quos prædiximus aliquos Aſcendentium, legitimam eis relinquant partem quam lex & nos conſtituimus.* Which can be applied to nothing elſe but to the Regulation in his eighteenth Novel.

This firſt Queſtion concerning the Legitime of Aſcendants, has been followed by another, which has divided the ſame Interpreters into two Parties. It is in the Caſe of a Teſtator, who having no Children, leaves behind him one Aſcendant and Brothers of the whole Blood, and inſtitutes either his Brothers, or Strangers, his Heirs or Executors, leaving to the Aſcendant only a ſmall Portion of the Inheritance, ſuch as does not ſatisfy him; whether, in this Caſe, the Aſcendant's Legitime be the third Part of the whole Eſtate, or only a third of the Portion which the ſaid Aſcendant would have had if there had been no Teſtament, the Brothers concurring with him.

Of theſe two Parties, one pretends that the Legitime of Parents is always the ſame, *viz.* a third Part of the Eſtate: and the others will have the Legitime in this Caſe to be only a Third of the Share that the Aſcendant would have had, if there had been no Teſtament. So that if, for example, there were two Brothers, as the Aſcendant's Portion, if there were no Teſtament, would be a Third, as has been ſhewn in its place *, his Legitime ought to be a Third of that Third. And this is their Reaſon, which has given riſe to this Queſtion. They eſtabliſh for a Principle and general Rule in the Matter of the Legitime or legal Portion, That every Legitime is nothing elſe but a Portion of that Share of the Inheritance which would have accrued to him who demands his Legitime, in caſe there had been no Teſtament. From whence they infer, that when the Deceaſed leaves behind him Brothers by the ſame Father and Mother, the Legitime of the Aſcendant is diminiſhed according to their Number; ſince when there is no Teſtament, the hundred and eighteenth Novel, Chap. 2. calls to the Succeſſion the Brothers of the whole Blood, together with the Aſcendants, by equal Portions. From whence it follows, according to their Principle, that the Legitime of an Aſcendant, when the Deceaſed leaves behind him Brothers, is only a third Part of the Share which he would have had in conjunction with the Brothers, if the Deceaſed had died inteſtate. So that if there were, for inſtance, ſeven Brothers, the Legitime of the Aſcendant, who would have had, if there had been no Teſtament, only an eighth Part of the Inheritance, would be only a four and twentieth Part. And to this Reaſon they add, that if the Legitime of the Aſcendants were always a third Part of the whole Eſtate, it would fall out that their Legitime might be much greater than the Portion which would have fallen to their Share, if there had been no Teſtament; ſince in this very Caſe of the ſeven Brothers, the Portion that would fall to them in caſe there were no Teſ-

* *See the ſeventh Article of the firſt Section of the ſecond Title of the ſecond Book.*

tament

tament would be only an eighth Part, and yet nevertheleſs their Legitime would be a third, which they ſay would be a great Inconvenience.

The others, on the contrary, have been of opinion, that the Legitime of Aſcendants, in all Caſes where it ought to take place, is always a Third of the Inheritance to be divided among all the Aſcendants, as that of the Children is always either a Third, or a Half, according to their Number, to be ſhared among them. Which is founded on the Remarks that have been juſt now made, and on this, That the Rule of the antient *Roman* Law, which fixed the Legitime to a fourth Part of the Portion that would be due if there were no Teſtament, has been altered by *Juſtinian*, who has regulated the Legitime, not at a Portion of the Share that would fall to them if there were no Teſtament, but at a certain Portion of the Total of the Inheritance, to wit, a Third, or a Moiety. Thus the Legitime is independent of the Portion, greater or leſs, which one might have in caſe there were no Teſtament. To which they add, that the Brothers having no Legitime reſerved to them by Law, they cannot come in for any Share of the Legitime of the Aſcendants to diminiſh it.

One ſees that theſe Difficulties are a Conſequence of the Law of *Juſtinian*, which has called the Brothers of the whole Blood to the Succeſſion with the Aſcendants, when there is no Teſtament. For if the Brothers of the whole Blood did not concur in the Succeſſion with the Aſcendants, no more than the Brothers by the Mother's ſide only, there would never have been any doubt concerning the manner of regulating this Legitime of the Aſcendants. From whence it ſeems reaſonable to conclude, that ſeeing the whole Difficulty proceeds barely from the Novelty of that Law which diminiſhes the Portion of Aſcendants ſucceeding to one who dies inteſtate, when there are Brothers, and that there is no Proof that *Juſtinian* intended by that Law to leſſen the Legitime of Aſcendants, nor to render it uncertain, according as the Brothers ſhould be in a greater or leſſer Number; thoſe of the ſecond Party may agree, without any prejudice to their Cauſe, that the Legitime ought to be a Portion of that Share which one would have if the Deceaſed had died inteſtate; adding to it what ſeems to be agreeable to Reaſon and Juſtice, to wit, that this Rule ought to be underſtood of the Portion which he who demands the Legitime would have, in caſe he ſucceeded alone to the Perſon dying inteſtate, or that no body concurred in the Succeſſion with him, except Perſons to whom a Legitime would be likewiſe due. For in this Senſe it will always hold true, according to the antient Law, that the Legitime will be a Portion of what one would have if the deceaſed had died inteſtate, as may be ſeen in the Legitime of Children regulated by *Juſtinian*; ſince it is certain that the Third or Half of the Eſtate which he gives to the Children, makes a Third or Half of the Succeſſion, which they would have entire, if there were no Diſpoſition that curtailed them of it.

The only Difficulty then that remains, is to know whether *Juſtinian*, when he granted the Favour to Brothers of the whole Blood to call them to the Succeſſion with the Aſcendants, intended thereby to make ſuch a Confuſion as to overturn the Order and the Principles of the Legitime or legal Portions, and to make a Rule which, without being any way explained, ſhould have this Effect, that a Teſtator leaving behind him a Father and eleven Brothers, might give to his Father only a ſix and thirtieth Part of his Eſtate, and nothing at all to his Brothers, leaving the five and thirty Portions to a Stranger. Nothing obliges us to judge that *Juſtinian*'s Law, which calls the Brothers together with the Aſcendants to the Inheritance of their Brothers, ought to make ſuch a Change in the Legitime of the Aſcendants; but this Law is limited to the Succeſſions of thoſe who die inteſtate. And altho it may happen by this Law, that the Legitime of an Aſcendant may be much greater than the Portion he would have had in the Inheritance, if the Deceaſed had died inteſtate, yet this is no greater Inconvenience than that which happens with reſpect to the Legitime of Children, that when they are only four in Number, their Legitime, which ought to be greater than if they were five in Number, is nevertheleſs ſmaller. For in this Caſe every one of the four Children has only a fourth Part of a Third, which is only a twelfth Part; whereas among five Children, each of them has a fifth Part of a Moiety, which makes a tenth Part of the whole. Theſe kinds of Conſequences are natural to arbitrary Laws, as has been obſerved in other Places, and are not ſuch Inconveniences

niences as ought to make any Change in them.

It ſeems reaſonable to conclude from all theſe Reflexions, and from the Words of the eighteenth Novel quoted upon this Article, that *Juſtinian* has fixed the ſame Legitime for Aſcendants as for Children, when they have a Third; and that this Legitime of the Aſcendants is always the ſame, whether there be Brothers, who concur with them in the Succeſſion, or whether there be none. And this Rule can be attended with no Inconvenience, whatever Caſe may happen. For if we ſuppoſe that a Son inſtitutes his Father, or his Mother, and his Brothers of the whole Blood, his Heirs or Executors by equal Portions, the Father and Mother could not complain of a Teſtament which gives them all they would have had by Law, had there been no Teſtament. But if this Son had inſtituted a Stranger his Heir or Executor together with his Father, leaving his Father not ſo much as what the Law allots him, it would be for the Intereſt of the Brothers that the Father ſhould have a third Part, ſeeing this Third would come to them after the Father's Death And in fine, if the Brothers were inſtituted with the Father or Mother, but by unequal Portions, ſo as that the Father or Mother ſhould have leſs than ſome of the Brothers, it would not be juſt, nay it would be a Hardſhip in the Brothers, to reduce their Father or Mother to a third Part of the Portion, which each of them would have if there were no Teſtament.

SECT. III.

Out of what Goods the Legitime is taken, and how it is regulated.

The CONTENTS.

1. *The Legitime is regulated according to the Value of the Goods.*
2. *The Demand of the Legitime is a Demand of a Partition.*
3. *Goods given away in the Teſtator's Life-time, are ſubject to the Legitime.*
4. *The Children who are Donees, may abſtain from the Inheritance; but their Donations are ſubject to the Legitime.*
5. *Downes and Gifts are reckoned as a part of the Legitime.*
6. *The Fruits of the Legitime are due from the Time that the Succeſſion is open.*
7. *The Legitime cannot be ſubject to any Charge, Delay, or Condition.*
8. *The Legitime of Children of different Marriages is not diſtinguiſhed.*

I.

SEeing the Legitime is a Portion of the Inheritance, it is out of all the Goods in groſs that it ought to be taken *a*, not by dividing each Land or Tenement, each Right, or other Goods, ſeparately by themſelves, in order to give a part of every one thereof to him to whom a Legitime is due; but by eſtimating the whole Effects belonging to the Inheritance, and ſo to give him his Share of the ſaid Effects to the Value of his Portion. 1. *The Legitime is regulated according to the Value of the Goods.*

a Tertia propriæ ſubſtantiæ pars. *Nov.* 18. *c.* 1.

II.

If he to whom a Legitime is due inſiſts on having his Share of the Inheritance not in Value, but in hereditary Effects, the Heir or Executor cannot refuſe it. And if they do not agree among themſelves, it is neceſſary to make a Partition, and to give for the Legitime Goods of the Inheritance which may make it up. For the Legitime being a part of the Inheritance, the Demand of a Legitime is in effect a Demand of a Partition *b*, which ought to be made according to the Rules explained in their place *c*. 2. *The Demand of the Legitime, is a Demand of a Partition.*

b Sancimus repetitionem ex rebus ſubſtantiæ patris fieri. *l.* 36. *C. de inoff. teſt.*

c *See the Title of Partitions.*

III.

Seeing the ſecuring of a Legitime to the Perſons to whom it is due, is to hinder any Diſpoſitions that might diminiſh their Share in the Eſtate of him who ought to leave this Legitime; it muſt be taken not only out of the Goods which he has left behind him, but alſo out of the Goods which he may have diſpoſed of by Donations made in his Life-time to his Children, or to other Perſons, or by Marriage Portions to Daughters; for otherwiſe theſe kinds of Diſpoſitions might quite deſtroy a Legitime. Thus it is taken out of the Goods alienated in this manner, as well as out of thoſe which remain in the Inheritance *d*. 3. *Goods given away in the Teſtator's Life-time, are ſubject to the Legitime.*

d Si (ut allegatis) mater veſtra ad eludendam inofficioſi querelam, pene univerſas facultates ſuas, dum ageret in rebus humanis, factis donationibus, ſive in quoſdam hbetos, ſive in extraneos exhauſit: ac poſtea vos ex duabus unciis fecit hæredes: eaſque legatis & fideicommiſſis exinanire geſtiyit, non injuria

tia juxta formam de inofficioso teſtamento conſtitutam, ſubvenire vobis, utpote quartam partem non habentibus, deſideratis. *l.* 1. *C. de inoff. donat. v. tot. h. tit. & l. un. C. de inoff dot. Nov.* 92. See the fourth Article of the fourth Section of the foregoing Title.

IV.

4 The Children who are Donees may abſtain from the Inheritance, but their Donations are ſubject to the Legitime.

If the Children to whom the Parents had made Donations, or given Marriage-Portions, to the prejudice of the other Children, ſhould pretend to content themſelves with what had been already given them, and offer to renounce their Share in the Inheritance; they might very well abſtain from taking upon them the Quality of Heirs, and by that means free themſelves from the Charges of the Succeſſion; but their Donations would be liable to be diminiſhed in order to make up the Legitime of the other Children *e*.

e Non-valentibus filiis qui donationibus honorati ſunt, dicere, contentos ſe quidem eſſe immenſis his donationibus, videri autem abſtinere paterna hæreditate: ſed neque cogendis quidem, ſi contenti ſunt donationibus ſuſcipere hæreditatem: neceſſitatem autem habentibus omnibus modis complere fratribus quod hæc defer ſecundum quam ſcripſimus menſuram. *Nov.* 92.

V.

5. Dowries and Gifts are reckoned as a part of the Legitime.

All the kinds of Goods which may be liable to be brought into Hotch-pot in caſe of a Partition, ſuch as the Donations mentioned in the foregoing Article, and thoſe which may have been made to the ſame Perſons who demand a Legitime, enter into the Maſs of the Goods from whence the Legitime is to be taken, and contribute towards it. Thus when the Legitime is due to him who ought to bring in Goods to the Maſs of the Inheritance in caſe of a Partition, he ought to reckon what he has received as a part of his Legitime; and what may be wanting to make it up, is either taken from the others, or out of the Bulk of the Inheritance. And if he who demands the Legitime has received nothing, he takes it out of the whole Inheritance: and the Donees who have received too much, ought to contribute to it in proportion *f*.

f In quartam partem, ad excludendam inofficioſi querelam, tam dotem datam, quam ante nuptias donationem præfato modo volumus imputari: ſi ex ſubſtantia ejus profecta ſit, de cujus hæreditate agitur. *l.* 29. *in f. C. de inoff. teſt.* See the Title of the Contribution of Goods.

VI.

6. The Fruits of the Legitime are due from the time the Succeſſion is open.

Seeing the Legitime is due at the moment that the Succeſſion is open, the Fruits and other Revenues of it are likewiſe due from the ſaid moment: And the Teſtator cannot hinder it by any Diſpoſition *g*.

g Modis omnibus ei hujus legitimæ partis quam nunc deputavimus, & uſumfructum, inſuper & proprietatem relinquat. *Nov.* 18. *c.* 3.

VII.

7. The Legitime cannot be ſubject to any Charge, Delay, or Condition.

If the Teſtator had made ſome Diſpoſition which he intended ſhould be in lieu of the Legitime of one of his Children, and having ſettled it either at a certain Sum, or in ſome particular Goods, or even at a certain Portion of the Inheritance, he had added thereto ſome Condition, or ſome Delay for the Delivery or Payment of what he had left, or ſome other Charge; theſe Conditions, theſe Delays, theſe Charges would be without effect, if what he had given did not exceed the Value of the Legitime. For as it is nothing elſe but a certain Portion of the Inheritance which cannot be diminiſhed by the Teſtator, he can neither charge it with any burden, nor retard the Payment or Delivery of a thing which ought to go to his Children at the time of his Death, and that without any diminution *h*.

h Si conditionibus quibuſdam, vel dilationibus, aut aliqua diſpoſitione moram, vel modum, vel aliud gravamen introducente, eorum jura qui ad memoratam actionem vocabantur, imminuta eſſe videantur: ipſa conditio, vel dilatio, vel alia diſpoſitio, moram vel quodcunque onus introducens, tollatur: & ita res procedat, quaſi nihil eorum in teſtamento additum eſſet. *l.* 32. *C. de inof. teſt.*

VIII.

8. The Legitime of Children of different Marriages is not diſtinguiſhed.

If there are two or more Children of the ſame Father or Mother by different Marriages, their Legitimes will not be diſtinguiſhed by the Difference of thoſe Marriages; but all the Children of the ſame Father, or of the ſame Mother, altho by different Marriages, will have each of them their Legitime, according as the number of them all together ſhall demand *i*.

i Uſque ad quatuor quidem filios, (ex priore & ſecundo matrimonio) quatuor uncias omnino deſtinerent: ſi autem ultra quatuor ſint, uſque ad medium ſubſtantiæ partem. *Nov.* 22. *c. ult.*

TITLE IV.

Of the Diſpoſitions of thoſe who have married a ſecond time.

EVERY body is ſenſible of two Truths in relation to ſecond Marriages, and both the one and the other are equally agreeable to Religion and to Nature. One is, that ſecond Marriages are not unlawful; and even the Church condemns thoſe who eſteem them ſuch *a*. And the other is, that the Liberty of marrying a ſecond time, howſoever lawful it may be even for ſuch as have Children by a former Marriage, is nevertheleſs attended with ſome Mark of Diſtinction, by which the Laws of the Church and of the State diſtinguiſh the Condition of thoſe who marry again, from that of Perſons who have not taken the ſame liberty. As to the Church, the Canon Law forbids the receiving into holy Orders thoſe who have been twice married *b*. And it makes likewiſe ſome other Diſtinctions of ſecond Marriages which are ſufficiently known, and which it is not our buſineſs to ſpeak of here. As to the Laws of the State, they have ſet bounds to the Diſpoſitions which Perſons, who having Children do marry a ſecond time, may make of their Eſtates.

The Motives of theſe Laws of the Church and of the State, in relation to ſecond Marriages, are different according to their different Views. For the Church conſiders in them a kind of Incontinency, which it tolerates, but which makes the Perſons appear in her Eyes leſs pure, and by that means leſs fit to exerciſe thoſe ſacred Functions of which the holieſt Perſons ought to account themſelves unworthy. And the Laws of the State conſider in ſecond Marriages the Inconvenience of the Wrong which Perſons who marry again do to their Children. And to prevent the Diſpoſitions which Parents, whoſe Affection for their Children may be alienated by a ſecond Marriage, might make to their prejudice, the Laws have appropriated to the Children the Goods which came from their Fathers or Mothers to the Survivor of the two who marries again. They have likewiſe reſtrained the Diſpoſitions which the Survivor who marries again might make of their own proper Goods in favour of the ſecond Husband, if it is the Mother, or of the ſecond Wife, if it is the Father who has married again. And they have given the Name of Puniſhment of ſecond Marriages to that which they have ordained on this Subject in favour of the Children of thoſe Perſons who marry again.

It is theſe Rules, which reſtrain in favour of the Children the Diſpoſitions of Fathers and Mothers who marry again, that we are to treat of under this Title, and which our Uſage has taken from the *Roman* Law. For even that Ordinance which is called the Edict of ſecond Marriages, made by *Francis* II. in the Year 1560, hath been taken from thence, as we ſhall obſerve on the Articles of this Title which have relation to thoſe of the ſaid Ordinance.

By ſecond Marriages, whether it be that of the Husband or of the Wife, is underſtood every Marriage which is not the firſt; and whatever number of Marriages there may have been, they are all comprehended under this Name of ſecond Marriages with reſpect to that Party of the married Couple who had been married before: For as to the other Party who had never been married before, it cannot be ſaid to be a ſecond Marriage.

It may be remarked here, that beſides the Puniſhments of ſecond Marriages which relate to the Diſpoſitions of Goods, there were others in the *Roman* Law againſt the Intemperance of Women. Thus thoſe who married again within the Year of mourning were noted with Infamy *d*. And there were ſeveral other Puniſhments ordained againſt them *e*. Thus ſhe who abandoned her ſelf to a Slave, became Slave to the Maſter of him to whom ſhe proſtituted herſelf, if ſhe perſevered in that Amour, after a Denunciation made by the Maſter of the ſaid Slave; which was aboliſhed by *Juſtinian f*. Thus *Conſtantine* declared the Crime of thoſe Women who proſtituted themſelves to their own Slaves, even in private, to be capital *g*.

a 31. q. 1. c. 11, 12, 13.

b 1 *Tim.* 3. 2. *Dift.* 26. *& tit. de bigam. non ordin. V. Nov.* 6. c.

c Pœna contra binubos. *Nov.* 2. *c.* 2. §. 1. Communis mulieris & viri mulcta. *Nov.* 22. *c.* 23.

d l. 1. *C. de ſec. Nup.*

e d. l. 1. *l.* 2. *eod. l.* 22. *C. de admin. tut.*

f l. un. C. de Senat. Claud. toll.

g l. un. C. de mulier. quæ ſe propr. ſerv. junx.

Of theſe ſeveral ſorts of Puniſhments there is only that which relates to the ſecond Marriage of a Widow within her Year of Mourning that has been received into uſe with us, but even this Puniſhment has been aboliſhed, and we obſerve the Canon-Law which has rejected it *a*. For altho the Incontinency of a Woman who marries again within her Year of Mourning gives her juſtly a bad Reputation, and that great Inconveniencies may follow from it, becauſe of the Doubt that may ariſe, which of the two Husbands ſhould be reckoned Father of a Child who ſhould be born, for example, ſeven or eight Months after the Marriage of a Widow, which ſhe had contracted within two months after the Death of her firſt Husband; yet the Church tolerating theſe ſorts of Marriages to avoid a greater Evil, it abſolves from the legal Infamy the Widows who marry again before the ſaid Term. And as for the other Puniſhments which do not ſuit with our Policy, which does not admit of Slaves, thoſe Laws have ſerved as a Pattern with us for the Regulation which was made by one of the Articles of the States of *Blois*, by which it was ordained, that Widows who *married again fooliſhly to Perſons that were unworthy*, ſhould not have power to make any Diſpoſitions in favour of ſuch Husbands, and that they ſhould be even *interdicted the free Adminiſtration of their Eſtates b*.

As to the ſubject Matter of this Title, it is neceſſary to diſtinguiſh two ſorts of Rules which have been made concerning ſecond Marriages, in order to preſerve the Rights of the Children whoſe Father or Mother contract a ſecond Marriage. One is of thoſe Rules which ſecure to the Children the Goods which their Father or Mother who marries again, inherited from the Father or Mother of theſe Children who died firſt. And the other is of ſuch Rules as relate in general to all the other Goods of the Perſon who has contracted a ſecond Marriage. And theſe two ſorts of Rules ſhall be the ſubject Matter of two Sections, which ſhall be preceded by a firſt Section, wherein it is neceſſary to diſtinguiſh the ſeveral ſorts of Goods which a Perſon who marries again may be poſſeſſed of

b l. penult. & ult. de ſec. nupt.
a Ordinance of Blois, *Article* 182.

SECT. I.

Of the ſeveral ſorts of Goods which Perſons contracting a ſecond Marriage may be poſſeſſed of.

The CONTENTS.

1. *Three ſorts of Goods belonging to the Perſons who marry a ſecond time*
2. *Two ſorts of Goods which the Husband or Wife may have from one another.*
3. *Goods which the Husband acquires from the Wife, or the Wife from the Husband, by their Marriage.*
4. *Goods which come to the Father or to the Mother, from their Children.*
5. *Goods of the Father or Mother coming by other Titles.*
6. *Theſe ſeveral ſorts of Goods have their different Rules.*

I.

1. *Three ſorts of Goods belonging to the Perſons who marry a ſecond time.*

WE muſt diſtinguiſh three ſorts of Goods which a Perſon who contracts a ſecond Marriage, having Children by a former, may be poſſeſſed of. Thoſe which came to her from her firſt Husband, if it is the Wife, or from the firſt Wife, if it is the Husband, thoſe which come to the Husband or Wife from ſome one of their common Children; and thoſe which they may have acquired ſome other way *a*

a There can be no Goods which are not comprehended in this Diviſion.

II.

2. *Two ſorts of Goods which the Husband or Wife may have from one another.*

A Wife may have from her firſt Husband, or a Man from his firſt Wife, Goods of two ſorts; that which any one of them may have acquired by their Contract of Marriage, and that which the Party who dies firſt may have left to the Survivor by a Teſtament, or other Diſpoſition *b*.

b Theſe two kinds comprehend all. See the firſt, ſecond, and following Articles of the ſecond Section.

The ſecond part of this Article is to be underſtood of Diſpoſitions which are allowed between Husband and Wife. For there are Cuſtoms which prohibit differently theſe Diſpoſitions, as has been obſerved in the Preamble of the ſecond Section of Heirs and Executors in general.

III.

3. *Goods which the Husband acquires from the Wife, or*

We muſt reckon among the Goods which the Husband acquires from the Wife, or the Wife from the Husband, by their Contract of Marriage, all and every thing that is ſtipulated by the Con-

tract

by their Marriage.

it ſelf, or given by the Law or by Cuſtom, without Stipulation, in favour of the Party, out of the Goods of the other, whether the ſaid Goods, ſtipulated or not, have any peculiar Name, ſuch as that of Nuptial Gains, Dower, Augmentation of Dowry, or any other ſuch like Name, or that it be ſome other Right which has no particular Name *c*.

c See the firſt and following Articles of the ſecond Section, and the Texts cited on thoſe Articles.

IV.

4. *Goods which came to the Father or to the Mother from their Children.*

The Goods which may come to the Father or to the Mother from ſome of their common Children, conſiſt either in the Uſufruct they may have of the Goods of their Children, or in the Property of what may fall to them of their Succeſſion, whether by Teſtament, or when they die inteſtate *d*.

d See the firſt and ſecond Sections, in what manner Fathers ſucceed, &c.

V.

5. *Goods of the Father or Mother coming by other Titles.*

All the other Goods which Fathers and Mothers who marry a ſecond time may have, are thoſe which they have had either of their own Patrimony, or have acquired by their Induſtry, or by other Titles beſides thoſe which have been juſt now ſpecified *e*.

e See touching theſe ſorts of Goods the third Section.

VI.

6. *Theſe ſeveral ſorts of Goods have then different Rules.*

It has been neceſſary to diſtinguiſh theſe different kinds of Goods. For there is none of them but what is the ſubject Matter of ſome one of the Rules which follow *f*.

f We muſt compare the Articles of this Section with thoſe of the two following Sections, according as they have relation to one another.

SECT. II.

The Rights which Children have to the Goods which their Father or Mother who marries a ſecond time had acquired from the Party who died firſt.

The CONTENTS.

1. *The Children have a right to the Goods which came from their Father or Mother to the Perſon who marries again.*
2. *The Children acquire the Property of the ſaid Goods by the ſecond Marriage of their Father or Mother.*
3. *And the Goods belong to them by equal Portions.*
4. *We do not diſtinguiſh the Origin of the Goods, in which the Husband or Wife have their Gains.*
5. *Theſe Gains accrue to the Children, altho they be not Heirs either to the Father or Mother.*
6. *When the Children die inteſtate, the Father or Mother who marries a ſecond time, has no ſhare in the Goods which the ſaid Children inherited from their deceaſed Father or Mother.*

I

1. *The Children have a Right to the Goods which came from their Father or Mother to the Perſon who marries again.*

WHEN a Man who ſurvives his Wife, or a Wife who ſurvives her Husband, contracts a ſecond Marriage, having Children by the former, all the Goods which came to them from the Party deceaſed, whether on the ſcore of Gains acquired by their Contract of Marriage, or by Diſpoſitions, whether the ſame are to have their effect in the Life-time of the Giver, or after his Death, or in any other manner whatſoever, are appropriated to the common Children from the moment of the ſecond Marriage *a*, as ſhall be explained by the Rules which follow.

a See the following Articles, and the Texts cited on them.

II.

2. *The Children acquire the Property of the ſaid Goods by the ſecond Marriage of their Father or Mother.*

Of all the ſorts of Goods mention'd in the preceding Article, the Property thereof accrues to the Children from the Moment of the ſecond Marriage of the Father or Mother: and the Perſon who marries a ſecond time, has only the uſufruct of theſe ſorts of Goods during Life, and cannot make any Alienation, Engagement, Donation, or other Diſpoſition of them *b*

b Fœminæ quæ ſuſceptis ex priore matrimonio filiis, ad ſecundas (poſt tempus luctûs ſtatutum) tranſierint nuptias: quidquid ex facultatibus priorum maritorum ſponſalium jure, quidquid etiam nuptiarum ſolennitate perceperint, aut quidquid mortis cauſa donationibus factis, aut teſtamento jure directo, aut fideicommiſſi, vel legati titulo, vel cujuſlibet munificæ liberalitatis præmio ex bonis (ut dictum eſt) priorum maritorum fuerint adſecutæ: id totum, ita ut perceperint, integrum ad filios, quos ex præcedente conjugio habuerint, tranſmittant. *l.* 3. *C. de ſec. nupt.* Habeant poteſtatem poſſidendi tantùm atque fruendi in diem vitæ, non etiam alienandi facultate conceſſa. *d. l.* 3. *Nov.* 2. *c.* 2. *Nov.* 22. *c.* 23 & 24. *l. ult. C. de bon. mat.*

Generaliter cenſemus, quocunque caſu conſtitutiones ante hanc legem mulierem liberis communibus, morte mariti matrimonio diſſoluto, quæ de bonis mariti ad eam devoluta ſunt, ſervare ſanxerunt: iiſdem caſibus, marium quoque quæ de bonis mulieris

heris ad eum devoluta sunt morte mulieris matrimonio dissoluto, communibus liberis servare. *l.* 5. *C. de sec. nupt.*

It is from these Laws that the second Head of the Edict of July 1560 *has been taken, which prohibits Widows, who marry a second time, from giving to their new Husbands any share of the Goods which they had by the Gift and Liberality of their deceased Husbands; and directs that the said Goods may be preserved to their common Children; and ordains the same thing with respect to Husbands, as to the Goods which came to them by their Wives.*

III.

3. And the Goods belong to them by equal Portions.

This Property accrues to the said Children by equal Portions. And the Father or Mother who marries again has not the liberty to chuse among their Children, in order to prefer or benefit some of them before the others, neither in the total of these sorts of Goods, nor in a part of them. For the second Marriage is equally prejudicial to them all, and they are all of them equally concerned and interested therein *c*.

c Venient autem talia lucra ad filios omnes ex prioribus nuptiis. Non enim permittimus parentibus non recte introductam electionem in eos: neque alii quidem filiorum dare, alium vero exhonorare. Omnes enim secundis similiter exhonorati sunt nuptiis. *Nov.* 22. *c.* 25.

IV.

4. We do not distinguish the Origin of the Goods in which the Husband or Wife have their Gains.

Whether the Wife's Marriage-Portion was of her own proper Goods, or whether it came from some other hand, and that in consideration of her Marriage, her Father, or some other Persons, had given it her; all the Gains and Advantages which may accrue to the Husband out of these sorts of Goods, are consider'd as come from the Goods of the Wife, and are subject to the Rules which have been just now explained. And likewise the Gains and Advantages which the Wife may have out of the Goods of the Husband, whatever way he came by them, are considered as Goods come from the Husband, and are subject to the same Rules *d*.

d Non discernimus de dote, & ante nuptias donatione utrum ipsi hanc dederint per se contrahentes, an aliqui alii pro eis hoc egerint; sive ex genere, sive etiam extrinsecus. *Nov.* 22. *c.* 23. *in f.*

V.

5. These Gains accrue to the Children, altho they be not Heirs either to the Father or Mother.

Seeing the Right of the Children to these sorts of Goods which have been just now mentioned in the preceding Articles, accrues to them by the bare Effect of the second Marriage of the Father or Mother, as has been said in the second Article; these Goods do belong to them, altho they be not Heirs either to their Father or their Mother. And the Children who are their Heirs, will not exclude those who shall have renounced the Inheritance. But if any one of the said Children, whether he be Heir or not, either to the Father or to the Mother, having once acquired his Right, happens to die, leaving Children behind him; he may dispose of these Gains among them unequally, in the same manner as he may of his other Goods *e*.

e Et super his quoque lucris, quæcunque ad secunda venientibus vota parentibus, percipiunt, non perscrutamur, utrum hæredes existant aut præmorientis parentis, aut secundi morientis, nec si alii quidem hæredes existant, alii vero non. Sed sicut superius diximus, præmium eis damus hoc, sive hæredes fiant, sive etiam non: & hoc ex æquo percipiant ipsi quidem superstites: cum eis autem & defuncti filii, genitoris accipientes partem. *Nov.* 22. *c.* 26. §. 1. *l.* 7. *C. de sec. nupt.* Eligendi quos voluerint ex liberis superstitibus, non adempta licentia. *d. l.* 7. *in f.*

VI.

6. When the Children die intestate, the Father or Mother who marries a second time, has no share in the Goods which the said Children inherited from their deceased Father or Mother.

If one of the Children whose Mother had married a second time, should happen to die, leaving behind him his said Mother and Brothers; he would have the liberty to dispose in favour of his Mother of all his several sorts of Goods, and even of those Goods of his Father's which had come to him by the effect of the Rules which have been just now explained; and his Brothers would have no right to claim either the Usufruct or Property of the things left to their Mother by such Disposition *f*. But if the Son had died without disposing of his Part of the Goods which he had from his Father, the Mother would have no Right of Property in them, the same remaining to the other Children, whether it be that she married again the second time before the Death of her Son, or only after *g*. For seeing the Goods which are appropriated to the Children by the second Marriage of their Mother, do belong to them all equally by the Title which is common

f Matri relinquens sive ex institutione, sive legatum recte derelinquat & dominium & usum, sive ex rebus quæ extrinsecus advenerunt, fuerit facultas, sive ex paternis: nihil ex hoc fratribus contradicere valentibus. *Nov.* 22. *c.* 46. §. 1. *in f.* Habeat quod dimissum est aut datum, & secundum proprietatem & secundum usum. *d.* §. 1.

g Si autem intestatus filius moriatur jam ad secundas matre veniente nuptias, aut postea veniente, vocetur quidem & ipsa cum filii aut filiæ fratribus secundum nostram constitutionem ab intestato ad ejus successionem. Sed quanta quidem ex paterna substantia ad filium pervenerunt, eorum solummodo habeat usum ad secundas omnino, sive prius sive postea veniens nuptias. *d. c.* 46. §. 2.

them, they have among them the Right of Accretion therein. But as for the Uſufruct of that ſhare of the Father's Goods which belonged to the deceaſed Son, and for all the other Goods which he may have had any other way than by his Father, or that he might have acquired by his own Induſtry, or by Succeſſion, or otherwiſe, the Mother would ſucceed to them, either as to the Property or Uſufruct thereof, according to the Rules which have been explained in their Place *b*.

b See the Remark on the Succeſſion of Mothers at the end of the Preamble to the Title, in what manner Fathers ſucceed, and the fourth Article of the firſt Section of the ſame Title.

¶ We have reſtrained the Rule explained in this Article to the Mother only, without extending it to the Father, becauſe the Novel of *Juſtinian*, from whence the Rule has been taken, is limited to the Mother; but it would ſeem that their Condition ought to be equal. And ſeeing the Rules explained in the preceding Articles, which by the former Laws related only to Mothers, have been extended to Fathers by ſubſequent Laws, as appears by the laſt Text cited on the ſecond Article, and that *Juſtinian* has in other Places made this general Remark, that all the Puniſhments of ſecond Marriages are common to the Husband and the Wife; it ſeems that we may juſtly conclude from this Principle, that this Rule, as well as the others, ought to regard the Men as much as the Women. *Contra binubos pœnæ communes & viri ſunt & mulieris. Nov. 2. cap. 2. in fin. Communis mulieris & viri multa. Nov. 22. cap. 23.* To which we may add the Example of another Law of the ſame Emperor, who having enacted much ſeverer Puniſhments againſt the Women when they ſeparated from their Husbands without juſt Cauſe, than againſt the Men for the ſame caſe, did afterwards make thoſe Puniſhments equal, and that for this reaſon, that in a like Offence their Puniſhment ought to be the ſame: *In delicto enim æquali, ſimiles eis imminere pœnas juſtum eſſe putamus. Nov. 127. cap. 4.* Thus the Spirit of all theſe Rules ſeems to require that there ſhould be an Equality between the Men and the Wife for all the Conſequences of ſecond Marriages.

SECT. III.

Of the Diſpoſitions which Perſons who have married twice may make of their own proper Goods.

The CONTENTS

1. *The Perſon who marries twice, cannot give more to the ſecond Husband or Wife, than they leave to ſuch of their Children as has the leaſt Share of their Eſtate.*
2. *Neither directly nor indirectly by the Interpoſition of other Perſons.*
3. *The Computation of the Goods is made according as they are found at the time of the Death.*
4. *What is cut off from the Gift, belongs in common to the Children of the firſt Marriage.*
5. *The Children of divers Marriages take each of them the Goods which their Parent had by the Marriage of which they are deſcended.*
6. *The Uſufruct left to the Survivor, is not loſt by the ſecond Marriage, unleſs it was left on that Condition.*

I.

ALTHO the Father or Mother who has married a ſecond time retain the Property of all their Goods, excepting what is appropriated to their Children of the firſt Marriage, purſuant to the Rules explained in the preceding Section; and that nothing hinders them from alienating the ſaid Goods, and even giving them to other Perſons, provided they do not thereby encroach on the Legitime, or Portion reſerved by Law to their Children; yet this Liberty is bounded by one of the Puniſhments of ſecond Marriages. For it is not allowed to the Wife who, having Children by a former Marriage, has married a ſecond time, to diſpoſe of any ſort of her Goods in favour of the ſecond Husband, nor to the Husband to diſpoſe in favour of the ſecond Wife, whether it be by their ſecond Contract of Marriage under the Title of Nuptial Gains, Dower, or other Diſpoſition whatſoever, whether the ſame be to take effect in the Lifetime of the Giver, or after their Death; unleſs they reſerve to every one of the Children as much as is given away; and the Gift will be limited to the Portion which the Perſon who has married the ſecond

1. *The Perſon who marries twice, cannot give more to the ſecond Husband or Wife, than they leave to ſuch of their Children as has the leaſt ſhare of their Eſtate.*

ſecond time ſhall have left of their Eſtate to the Child to whom they have left the leaſt Share *a*.

a Non liceat plus novercæ vel vitrico teſtamento relinquere vel donare, ſeu dotis vel ante nuptias donationis titulo conferre, quam filius vel filia habet, cui minor portio ultima voluntate derelicta vel data fuerit. *l.* 6. *C. de ſec. nupt.*

It is from this Law that the firſt Head of the Edict of July 1560 *is taken, which prohibits Women who have married twice from giving any part of their Goods or Moveables of the [illegible] which they themſelves have purchaſed, or which [illegible] come to them by deſcent from their Anceſtors, to their new Husbands, to the Father, Mother, or Children of their ſaid Husbands, or other Perſon, who may be preſumed to be in truſt for them, more than what they have given to ſuch of their Children to whom they have given the leaſt ſhare of their Eſtates.*

II.

2. *Neither directly nor indirectly by the Interpoſition of other Perſons.*

If to elude the Rule explained in the foregoing Article, the Perſon who has married a ſecond time, had made ſome Diſpoſition in favour of Perſons interpoſed, in order to tranſmit by them to the ſecond Husband, or to the ſecond Wife, more than what had been left to any Child of the firſt Marriage who had the leaſt ſhare; the ſaid Diſpoſition would be reduced in the ſame manner as if it had been made in expreſs Terms to the ſecond Husband, or to the ſecond Wife *b*.

b Omni circumſcriptione, ſi qua per interpoſitam perſonam, vel alio quocunque modo fuerit excogitata, ceſſante. *l.* 6. *C. de ſec. nupt. Nov.* 22. *c.* 27.

This is ſo regulated by the Edict of July 1560 *concerning ſecond Marriages, as has been remarked on the foregoing Article.*

III.

3. *The Computation of the Goods is made according as they are found at the time of the Death.*

We muſt underſtand what is ſaid in the firſt Article, concerning the Reduction of what is left to the ſecond Husband or Wife to the Portion of the Child of the firſt Marriage who has the leaſt, not of the Portion of the Goods which the Father or Mother who makes the Diſpoſition, may have at the time of making the ſaid Diſpoſition that is liable to be reduced, but of the Portion of the Goods which they ſhall be found to have at the time of their Death. For the Goods may be either augmented by Acquiſitions, or diminiſhed by Alienations and Loſſes. And it is only at the time of the Death of the Father or Mother, that it can be known what Portions the Children will have in their Goods, that the Gift to the ſecond Husband or Wife may be compared with the Portion of the Child who ſhall have the leaſt, and be made equal to it *c*.

c Optimum nobis viſum eſt eſſe, mortis binubi parentis obſervari tempus. *Nov.* 22. *cap.* 28. Evenientes fortunæ contrarios eventus ſæpius operantur. *d. c.* Aufferre quod tranſcendit oportet, & filiis applicare. *d. c.*

IV.

4. *What is cut off from the Gift, belongs in common to the Children of the firſt Marriage.*

This Diminution of the Gift made to the ſecond Husband or Wife, does not accrue to that Child who has the leaſt Share in the Parent's Eſtate; but it goes to all the Children together by equal Portions. For it is in favour of them all that the Diminution is ordain'd *d*.

d Quod plus eſt in eo quod relictum aut datum eſt omnino aut novercæ aut vitrico, ac ſi neque ſcriptum, neque relictum aut datum vel donatum, competit filiis: & inter eos ſolos ex æquo dividitur, ut oportet. *Nov.* 22. *cap.* 27.

V.

5. *The Children of divers Marriages take each of them the Goods which their Parent had by the Marriage of which they are deſcended.*

When there are Children of divers Marriages who come to ſhare the Goods of their Father or Mother, thoſe of each Marriage take out of the Maſs of the Inheritance that which came by the Marriage of which they are deſcended to their Father or Mother whoſe Succeſſion they divide. And altho the ſecond Marriage have not been followed by a third, yet the Children of this ſecond Marriage have the ſame Right, and the ſame Appropriation of what ought to come to them, as thoſe of the firſt Marriage have in the Goods that belong to them *e*. But the other Goods, which are the proper Goods of the Father or Mother who leave behind them Children of different Marriages, are divided among them all by equal Portions; unleſs there be ſome Diſpoſition that diſtinguiſhes them, which cannot be ſet aſide as being undutiful, and which does not encroach on the Right of their Legitimes or Legal Portions *f*.

e Ex ſolido quidem prioris matrimonii filii, illius lucrantur donationem: ex ſolido quoque ex ſecundis nati feminibus, ab illo facta fruentur magnificentia: licet non ad tertium illa mulier matrimonium venerit. *Nov.* 22. *c.* 29. Nos enim hac lege id præcipue cuſtodiendum eſſe decernimus, ut ex quocunque conjugio ſuſcepti filii, patrum ſuorum ſponſalitias retineant facultates. *l.* 4. *in f. C. de ſec. nupt.*

f Matris noſtræ defunctæ hæreditatem ad omnes ejus liberos pertinere, etiamſi ex diverſis matrimoniis fuerint, juris eſt. *l.* 4. *ff. ad Sctum. Tertullian. Orphit. d. l.* 4. *C. de ſec. nupt.*

VI.

VI.

6. The Uſufruct left to the Survivor is not loſt by the ſecond Marriage, unleſs it was left on that Condition.

If the ſurviving Father or Mother had an Uſufruct which the deceaſed Husband or Wife had left them by any Diſpoſition whatſoever, they would keep it altho they married a ſecond time, unleſs it had been left them on condition that their Right to it ſhould ceaſe upon their marrying again *g*. And the Father who marries again retains with much more Reaſon the Uſufruct which he had of the Goods of his Children, and even of thoſe Goods which the ſaid Children had of their Mother *h*.

g Volumus vel ſi uſufructus detur per largitatem, aut mortis cauſa donationem factam inter vivos, in quibus licet etiam donatis, ſi relinquatur, & accipiens ad ſecundas veniat nuptias, manere ſic quoque uſum, donec ſuperſit qui hunc habet uſumfructum: niſi expreſſim ille qui donationem (ſicut dictum eſt) fecit, aut hunc reliquit, ſive maſculus, ſive fœmina, dixerit velle, ad ſecundas veniente nuptias eo qui uſumfructum accepit, ſolvi eum, & ad ſuam reverti proprietatem. *Nov.* 22. *c.* 32.

h Patres uſumfructum materiarum rerum, etiam ſi ad ſecundas migraverint nuptias, ſine dubio habere debebunt. *l. ult. C. de bon. mat.*

THE CIVIL LAW, IN ITS NATURAL ORDER.

BOOK IV.

Of Legacies, and other Diſpoſitions made in View of Death.

LEGACIES and the other Diſpoſitions made in view of Death, which are to be treated of in this Book, are diſtinguiſhed from Teſtaments, which have been diſcourſed of in the preceding Book, in this, that it is eſſential to a Teſtament that it contain an Inſtitution of an Heir or Executor, which is a general Diſpoſition of all the Teſtator's Goods, altho there were nothing elſe in the Teſtament beſides this bare Inſtitution, ſeeing the Heir or Executor is univerſal Succeſſor; whereas theſe other Diſpoſitions are only particular Diſpoſitions of certain things. And it is for this reaſon, that altho one may make theſe ſorts of Diſpoſitions in a Teſtament, as one may make a Teſtament without any other Diſpoſition beſides the bare Inſtitution of an Heir or Executor, and that one may give Legacies, and make other Diſpoſitions in view of Death by other Acts than a Teſtament, it has been neceſſary to diſtinguiſh theſe two Matters, and to give to every one its ſeparate Rank

TITLE I.

Of Codicils, and of Donations in proſpect of Death.

CODICILS are Diſpoſitions made in view of Death, which are diſtinguiſhed from Teſtaments by two Characters. One is that of their Formalities, which are fewer than thoſe of Teſtaments; and the other is that of their Uſe, which is limited

ted to Legacies and fiduciary Bequeſts, whereas a Teſtament ought neceſſarily to contain an Inſtitution of an Heir or Executor. Thus all Diſpoſitions made in view of Death, in which there is no Heir or Executor named, will only have the Nature of Codicils, or Donations in proſpect of Death, and not of a Teſtament, even altho they ſhould have all the Formalities required to a Teſtament; which muſt not be underſtood in the ſenſe of the *Roman* Law, and of the Provinces where the ſame is obſerved. For in the Cuſtoms, as they admit of no teſtamentary Heir, the Diſtinction between Teſtaments and Codicils is there altogether uſeleſs; and they give there the Name of Teſtaments to all Diſpoſitions made in proſpect of Death.

We ſhall not repeat here touching the Difference between the uſe of Teſtaments and that of Codicils, what has been ſaid thereof in the fourth Section of Teſtaments, where the matter of the Codicillary Clauſe, which is often inſerted in Teſtaments, hath been handled. The Reader will be pleaſed in reading this Title to conſult that Section of the Codicillary Clauſe, where we have been obliged, in order to explain the Effect of the ſaid Clauſe in Teſtaments, to explain ſome Rules which relate to the uſe of Codicils; and he will find there at the ſame time the Rules of the *Roman* Law concerning this Matter, which he might expect to meet with here.

We ſay nothing here of Donations made in proſpect of Death, which ſhall be the ſubject Matter of the third Section.

SECT. I.

Of the Nature and Uſe of Codicils, and of their Form.

The CONTENTS.

1. *Definition of a Codicil.*
2. *To make a Codicil, one muſt have power to make a Teſtament.*
3. *One may make a Codicil, either with a Teſtament or without a Teſtament.*
4. *One may make ſeveral Codicils, which may ſubſiſt all together.*
5. *The Codicil makes a part of the Teſtament, when there is one.*
6. *The next of Kin is charged with the Execution of the Codicils, when there is no Teſtament.*
7. *Difference between the two ſorts of Codicils.*
8. *The Codicil hath its effect, altho it be not expreſly confirmed by the Teſtament.*
9. *One cannot impoſe by a Codicil a Condition on which the Inſtitution of the Heir or Executor ſhall depend.*
10. *Five Witneſſes are required to a Codicil.*
11. *Rules of Teſtaments which agree to Codicils.*

I.

A Codicil is an Act which contains Diſpoſitions in proſpect of Death, without the Inſtitution of an Heir or Executor *a*. *1. Definition of a Codicil.*

a Codicillis hæreditas neque dari neque adimi poteſt, ne confundatur jus teſtamentorum & codicillorum. §. 2. *inſt. de codic. l. 2. C. eod.*

II.

Altho the Codicil do not contain the Inſtitution of an Executor as a Teſtament, yet no body can make a Codicil if he has not a Right to make a Teſtament. For the liberty of diſpoſing of a part of one's Goods, ſuppoſes the ſame Qualities as thoſe that are neceſſary for diſpoſing of the whole *b*. Thus they who are incapable of making a Teſtament, cannot make a Codicil *c*. *2. To make a Codicil, one muſt have power to make a Teſtament.*

b Codicillos is demum facere poteſt qui & teſtamentum facere poteſt. *l. 6. § 3. ff. de jure cod.*

c See, touching the Cauſes which make this Incapacity, the ſecond Section of Teſtaments.

III.

As it is free for every one who has power to make a Teſtament, either to make a Teſtament or a Codicil, one may equally make either the one without the other, or both together *d*, whether in this laſt Caſe the Teſtament precede or follow the Codicil, or that both the one and the other be made at the ſame time, and whether alſo the Teſtament confirm the Codicil that is already made or to be made *e*, or that it make no mention of it at all, provided only that the Teſtament which is made after the Codicil do not annul it *f*. And the Liberty of all theſe different Manners of diſpoſing is the effect of that which every one has, who has a Right to make a Will, to diſpoſe either of all his Effects *3. One may make a Codicil, either with a Teſtament or without a Teſtament.*

d Non tantum autem teſtamento facto poteſt quis codicillos facere, ſed & inteſtatus quis decedens fideicommittere codicillis poteſt. §. 1. *inſt. de Cod.*

e Codicilli aut in futurum confirmantur, aut in præteritum. *l. 8. ff. de jure Cod.* Aut teſtamento facto, aut ſine teſtamento. *d. l.*

f See the 8th Article.

by a Teſtament, naming an Heir or Executor, or only of a part of them by Legacies, and other particular Diſpoſitions in a Codicil, if he intends to have no other Heirs beſides thoſe of his Blood. And one may likewiſe make ſeveral Codicils, either at the ſame Time, or at different Times *g*.

g Codicillos autem etiam plures quis facere poteſt. §. *ult. inſt. de codic.*

IV.

4. One may make ſeveral Codicils which may ſubſiſt all together.

Beſides the Difference between a Teſtament and Codicil, which reſults from the Rules explained in the firſt Article, it is neceſſary to remark a ſecond Difference which is a Conſequence of the former, that ſeeing the Teſtament contains an univerſal Diſpoſition of the Totality of the Teſtator's Goods, there cannot be ſeveral Teſtaments of which all the Diſpoſitions ſubſiſt together, and the laſt Teſtament annuls the Diſpoſitions of the former, if it does not expreſly confirm them *h*. But Codicils containing only particular Diſpoſitions of a part of the Goods, one may make ſeveral Codicils, as has been ſaid in the preceding Article, and they ſubſiſt all of them *i*, except the Changes which a Teſtament or the laſt Codicils may have made *l*.

h Teſtamentum rumpitur alio teſtamento. *l.* 1. *de injuſt. rupt.* Poſteriore teſtamento quod jure perfectum eſt ſuperius rumpitur. §. 2. *inſt. quib. mod. teſt. infirm.* See the firſt Article of the fifth Section of Teſtaments.

i Codicillos & plures quis facere poteſt. *l.* 6. *ff. de jure codic.*

l See the eighth Article.

V.

5. The Codicil makes a part of the Teſtament, when there is one.

When there is together both a Teſtament and a Codicil, whether they be made at one and the ſame Time, or at different Times, and whether the Teſtament or Codicil make mention of one another, or make no mention, the Codicil is conſidered as making a part of the Teſtament *m*. For the Diſpoſitions both of the one and the other are equally the laſt Will of the Teſtator, and the particular Diſpoſitions of the Codicil ought to be conſidered as contained in the general Diſpoſition which is eſſential to the Teſtament. Thus the Diſpoſitions of the Teſtament, and thoſe of the Codicil, are interpreted the one by the other, and are reconciled with one another in ſuch Things as may ſubſiſt both of the one and the other. But if one of them makes any Alteration in the other, the laſt Diſpoſition, even in the Codicil will have its effect in that which is to be regulated by a Codicil *n*.

m Codicilli pars intelliguntur teſtamenti. *l. ult. ff. teſtam. quemad. aper.*

Ad teſtamentum quod quoquo tempore feciſſet pertinent codicilli. *l.* 16. *ff. de jure codic.*

n We have added theſe laſt Words, becauſe, as ſhall be ſaid in the ninth Article, one cannot diſpoſe of the Inheritance in a Codicil.

VI.

6. The next of kin is charged with the Execution of the Codicils, when there is no Teſtament.

As when there is a Teſtament, he who is inſtituted Heir or Executor is bound to execute the Diſpoſitions of the Codicils, ſo when there is no Teſtament, it is the Heir at Law, or next of Kin, who is charged with the Execution of them *o*, in the ſame manner as if he were inſtituted Heir or Executor by a Teſtament. For he might have been deprived of the Inheritance; and it was out of free Good will that the Deceaſed has left it to him *p*. Thus the Diſpoſitions of a Codicil have, with regard to him, the ſame effect as if they were ordained by a Teſtament, in which he were made Heir or Executor *q*.

o Quicumque ab inteſtato ſucceſſerit, locum habent codicilli. *l.* 16. *ff de jure codic.*

p Ideo fideicommiſſa dari poſſunt ab inteſtato ſuccedentibus, quoniam creditur paterfamilias ſponte ſua his relinquere legitimam hæreditatem. *l.* 8. §. 1. *ff. de jure codic.*

q Codicillorum uis ſingulare eſt, ut quæcumque in his ſcribuntur, perinde habeantur ac ſi in teſtamento ſcripta eſſent. *l.* 2. §. 2. *eod.*

VII.

7. Difference between the two ſorts of Codicils.

It follows from the two foregoing Articles, that there is a Difference between the two ſorts of Codicils, that is, thoſe which happen to be accompanied with a Teſtament, whether the ſame follow or precede the Codicils, and thoſe of Perſons who die without a Teſtament; that theſe laſt are in lieu of a Teſtament, containing all the Diſpoſitions of the Deceaſed, in the ſame manner as if he had made a Teſtament, and named therein his Heir at Law for his Executor, charging him with what ſhould be contained in the Codicil: Whereas the Codicil of him who has likewiſe made a Teſtament, has relation to that Teſtament *r*, and makes a part of it, as has been ſaid in the fifth Article.

r Inteſtato patrefamilias mortuo, nihil deſiderant codicilli; ſed vicem teſtamenti exhibent. Teſtamento autem facto, jus ſequuntur ejus. *l.* 16. *in f. ff. de jure codic.*

We may give to this Text the Meaning explained in this Article, altho it has another which ſhall be mentioned in the Remark on the fourth Article of the following Section.

VIII.

VIII.

If he who had made a Codicil, makes afterwards a Teſtament, in which he makes no mention of the Codicil, the Codicil will nevertheleſs have its effect. For altho it be not expreſly confirmed by the Teſtament, yet it is confirmed, in ſo far that it has not been revoked. And it is preſumed that the Teſtator has perſevered in the ſame Mind, ſince he has ordered nothing to the contrary *s*. But if the Teſtament contained any Diſpoſitions contrary to thoſe made in the Codicil, or if it made any Alteration in them, the laſt Will would be the Rule *t*.

Effect, altho it be not expreſly confirmed by the Teſtament.

s Divi Severus & Antoninus reſcripſerunt, ex iis codicillis qui teſtamentum præcedunt, poſſe fideicommiſſum peti, ſi appareat eum qui teſtamentum fecit, à voluntate quam in codicillis expreſſerat, non receſſiſſe. §. 1. *in f. inſt. de codic.* Teſtamento facto, etiamſi Codicilli in eo confirmati non eſſent, vires tamen ex eo capient. *l.* 3. §. 2. *ff. de jure codic.*

t Sed non ſervabuntur ea de quibus aliter defunctus noviſſime judicavit. *l.* 5. *in f. ff. de jure codic.*

IX.

As one cannot by a Codicil make an Heir or Executor, ſo likewiſe one cannot take away the Inheritance by a Codicil, nor conſequently impoſe on the Heir or Executor a Condition on which it ſhould depend whether he ſhould be Heir or not, nor can he take away a Condition of this Nature impoſed by the Teſtament For theſe ſorts of Diſpoſitions would have the Effect to take away and give the Inheritance; which cannot be done but by a Teſtament, to which more Formalities are required than to a Codicil *u*.

9. *One cannot impoſe by a Codicil a Condition on which the inſtitution of the Heir or Executor ſhall depend.*

u Divi Severus & Antoninus reſcripſerunt, nihil egiſſe matrem quæ cum pure liberos ſuos hæredes inſtituerit, conditionem emancipationis codicillis adjecit. Quia neque conditionem hæredi inſtituto codicillis adjicere, neque ſubſtituere directe poteſt. *l.* 6. *ff. de jure codic.* §. 2. *inſt. de codic.* Hæredi quem teſtamento pure inſtituit, codicillis ſcripſit conditionem. Quæro an ei parere neceſſe habeat? Modeſtinus reſpondit hæreditas codicillis neque adimi poteſt. Porro in defectu conditionis de ademptione hæreditatis cogitaſſe intelligitur. *l.* 27. §. 1. *ff. de condit. inſt.*

X.

For the Validity of a Codicil, it is neceſſary that it ſhould be atteſted by five Witneſſes of the ſame Quality with thoſe who are allowed to be Witneſſes to a Teſtament *x*.

10. *Five Witneſſes are required to a Codicil.*

x In omni ultima voluntate, excepto teſtamento, quinque teſtes vel rogati, vel qui fortuitu venerint in uno eodemque tempore, debent adhiberi. *l. ult.* §. *ult. C. de codic.*

The Formalities of Codicils, as well as thoſe of Teſtaments, depend on the Uſage of the Places, as has been ſaid concerning the Formalities of Teſtaments. See the firſt Article of the third Section of Teſtaments.

[In *England* we make no Diſtinction between the Number of Witneſſes required to a Codicil, and thoſe required to a Teſtament. Two are ſufficient in written Teſtaments which contain Diſpoſitions of Perſonal Eſtate, and the ſame Number is required in Codicils. But if the Codicils contain any Deviſes of Lands and Tenements, then three Witneſſes are neceſſary, as has been already obſerved. *Swinb. of Wills, part* 1. §. 9. *Stat.* 29. *Car.* 2. *cap.* 3. §. 22. See the Remark on the firſt Article of the third Section of Teſtaments.]

XI.

We may add, as a laſt Rule of the Nature and Uſe of Codicils, that we muſt apply to them, and obſerve in them all the Rules of Teſtaments which may have relation to and agree with Codicils Thus we may apply to Codicils the Rules which relate to the Capacity or Incapacity of Perſons, whether to make Diſpoſitions in proſpect of Death, or to receive any Liberality by ſuch Diſpoſitions, the Rules touching the Interpretation of the ſaid Diſpoſitions, thoſe of Conditions, and in general all the other Rules of Teſtaments which may be applied to Codicils *y*

11. *Rules of Teſtaments which agree to Codicils.*

y One may be able to judge of the Truth and Uſe of this Rule, by the relation which the Rules concerning Teſtaments, which have been already explained, have to Codicils.

SECT. II.

Of the Cauſes which annul Codicils.

The CONTENTS.

1. *The Codicils null for want of the neceſſary Formalities.*
2. *Or if it is revoked by a ſecond.*
3. *Or by a Teſtament.*
4. *The Birth of a Child annuls the Teſtament, and Codicil.*
5. *Other Cauſes which annul Codicils.*

1.

THE Codicil is null, if it wants the Number of five Witneſſes, who have the Qualifications neceſſary for giving Teſtimony, or if it wants any one of the other Formalities explained in the third Section of Teſtaments *a*.

1. *The Codicil is null for want of the neceſſary Formalities.*

a See the Text cited on the tenth Article of the firſt Section, and the Remark on the ſame Article, and the third Section of Teſtaments.

It is neceſſary to obſerve, as to the Formalities explained in that third Section of Teſtaments, that there

there are ſome Rules of that Section which do not agree to Codicils, as, for example, thoſe of the ninth and tenth Articles, which ſay, that the Heir or Executor, his Children, his Father, and his Brothers, cannot be Witneſſes to the Teſtament; for in a Codicil there is no Heir or Executor.

II.

2. *Or if it is revoked by a ſecond.*

A firſt Codicil is annulled by a ſecond which revokes it *b*. But if the ſecond makes only ſome Changes in the firſt, both the one and the other will ſubſiſt in what the ſecond ſhall not have changed. And if the ſecond makes no Alteration at all in the firſt, both of them will have their Effect *c*.

b Cum proponatis pupillorum matrem teſtatorum diverſis temporibus, ac diſſonis voluntatibus duos codicillos ordinaſſe: in dubium non venit, id quod priori codicillo inſcripſerat, per eum, in quem poſtea ſecreta voluntatis ſuæ contuleiat, ſi à prioris tenore diſcrepat, & contrariam voluntatem continet, revocatum eſſe. *l.* 3. *C. de codic.*

c This is a Conſequence of the Power which one has to make ſeveral Codicils. See the fourth Article of the firſt Section.

III.

3. *Or by a Teſtament.*

A Teſtament ſubſequent to a Codicil may either confirm it, or revoke it, or make ſome Alteration in it, with much more Reaſon than a ſecond Codicil may: Which depends on the manner in which the Teſtator ſhall have explained himſelf in the ſaid Teſtament *d*.

d See the fourth, fifth, and eighth Articles of the firſt Section.

* IV

4. *The Birth of a Child annuls the Teſtament and Codicil.*

If he, who having no Children had made a Codicil and a Teſtament, happens afterwards to have Children, the Teſtament and the Codicil will be void *e*.

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

¶ This Text relates only to the Caſe where there is both a Codicil and a Teſtament: And it is ſaid in another Text, that when there is only a Codicil without a Teſtament, the Birth of a Child does not annul it. *Agnatione ſui hæredis nemo dixerit Codicillos evanuiſſe. l. pen. ff. de jure Cod. l.* 16. *eod.* This Difference, which the *Roman* Law makes between a Codicil without a Teſtament, and the Codicil of him who had alſo made a Teſtament, is founded upon this, That he who makes a Codicil, and dies without making any Teſtament, dies with an Intention to leave his Succeſſion to his Heir at Law, and that therefore his Intention is that his Heir at Law ſhould execute the Codicil; whereas, when there is both a Teſtament and a Codicil, it is a Rule in the *Roman* Law that the Codicil ſhall follow the Condition of the Teſtament, and that it ſhall ſubſiſt if the Teſtament ought to ſubſiſt, or that it be void if the Teſtament is annulled. *Inteſtato patrefamilias mortuo nihil deſiderant Codicilli, ſed vicem teſtamenti exhibent: teſtamento autem facto, jus ſequuntur ejus. l* 16. *in fine ff. de jure Cod.*

This Law, which makes all the Codicils of thoſe who have made no Teſtament to ſubſiſt without diſtinction, might in certain Caſes treſpaſs againſt Equity. For if we ſuppoſe that a Man who was not married, and had no hopes of having any Children, had made a Codicil, in which he had diſpoſed of the greateſt Part of his Eſtate, thinking to leave the Remainder, which would be the leaſt Part of it, to his Heir at Law, a collateral Relation, and one who did not ſtand in need of it; and that afterwards he ſhould happen to marry, and to have Children, and to die without revoking this Codicil, either thro Forgetfulneſs, or becauſe he had been ſurprized by Death; it would ſeem very hard to make ſuch a Codicil to ſubſiſt, in a Caſe where even a Teſtament would be annulled, not only as to the Inſtitution of an Heir or Executor, but as to all the other Diſpoſitions thereof, even the moſt favourable *. And if Equity requires that the Birth of a Child ſhould annul in its favour all the Diſpoſitions of a Teſtament, the ſame Equity would ſeem likewiſe to require that the Birth of a Child ſhould annul alſo the Diſpoſitions of a Codicil, altho it be not accompanied with a Teſtament; ſeeing this Circumſtance is wholly indifferent to the Right of the Child, who is as much or more injured by the Diſpoſitions of ſuch a Codicil, as he can be by a Teſtament. So that ſeeing the Motive which has induced us to receive into our Uſage the Diſpoſitions of the *Roman* Law, is only the Equity thereof which renders thoſe Diſpoſitions of the *Roman* Law, which we obſerve, juſt in all Places, and at all Times, and that we reject ſuch Diſpoſitions thereof as ſeem to deviate from that Equity, and which ſavour too much of thoſe Niceties which we ſee ſo frequent there; we did not think it proper to ſet it down as a Rule, That the Birth of a Child does not annul a Codicil, when

* *See the fifteenth Article of the fifth Section of Teſtaments.*

† there

is no Teſtament. Neither have it down the contrary in this Ar- but we have contented our ſelves with making this Remark here concerning this Difficulty, in which we ſhould be afraid to treſpaſs againſt Equity, if we ſhould lay it down as a general Rule, either that all Codicils are valid when there is no Teſtament, or that they are null when there is a Teſtament which is found to be null. For this firſt Rule would be attended with the Inconvenience that has been juſt now taken notice of, if the Birth of a Child ſhould not annul a Codicil that is not accompanied with a Teſtament. And it may be ſaid of the other Rule of the *Roman* Law, which annuls indifferently all Codicils, when there is a Teſtament which proves to be null, whether the Teſtament be made after or before the Codicil, or be made at the ſame time, that it may alſo have its Inconveniences, except in the Caſes where the Codicils and Teſtaments have ſuch a Connexion with one another, that the Diſpoſitions which they contain ought all of them either to ſubſiſt or periſh together; as for example, if a Teſtator who, having no mind to explain his particular Diſpoſitions by a Teſtament, had only named his Heirs or Executors in the Teſtament, requiring them to execute the Diſpoſitions which he ſhould afterwards make by a Codicil, and accordingly made a Codicil which contained Legacies with which he burdened his Heirs or Executors differently and apart, one with ſome, and the others with others, and that it happened that this Teſtament proved to be null, either by reaſon of the Incapacity of the Heirs or Executors, or for want of ſome Formalities, one might without tranſgreſſing againſt Juſtice or Equity annul this Codicil ſo linked and united to this Teſtament. But if a Teſtator, who, without any Deſign of making a Teſtament, had firſt made a Codicil, containing ſome Diſpoſitions in favour of poor Relations or Servants, or for ſome charitable Uſes, ſhould afterwards chance to make a Teſtament, and inſtitute for his Heir or Executor either his Heir at Law, or even ſome other Perſon; would it be neceſſary, in order to do Juſtice, that if this Teſtament ſhould prove null, the Codicil ſhould likewiſe be annulled, becauſe it is the Rule in the *Roman* Law, that when there is a Teſtament, all Codicils are to follow the Fate thereof?

All that has been ſaid here touching the Difference of Codicils in the Caſes where there is no Teſtament, and in the Caſes where there is, concerns only the Provinces which are governed by the written Law. For as to the Cuſtoms, the Reader has already been ſufficiently informed, that as all the Diſpoſitions which are made there are only Codicils, ſeeing they cannot there make an Heir by a Teſtament, this Difference is of no manner of uſe in them. And as for the Provinces which are governed by the written Law, we have ſeen there, and there is ſtill to be ſeen at this Day, ſeveral Law Suits which are occaſioned by the Difficulties which ariſe from certain Caſes which are pretended to be excepted from the Rule of the *Roman* Law, which annuls all Codicils when there is a Teſtament which is found to be null. It is eaſy to imagine that the Liberty of excepting certain Caſes is a Source of many Law Suits Which makes it to be wiſhed that there were on this Subject ſome Regulation, which ſhould make the Validity of Codicils either to depend abſolutely on that of Teſtaments, when there are any, or to be wholly independent on them, or which ſhould give ſome Temperament thereto, if any that is juſt and neceſſary can be found.

V.

5. *Other Cauſes which annul Codicils.*

We may add, for a laſt Rule concerning the Cauſes which may annul a Codicil, that we muſt join to thoſe Cauſes which proceed from the want of Formalities, and to the others that have been juſt now explained, ſome others of the Number of thoſe which annul alſo Teſtaments, ſuch as, if the Perſon who had made a Codicil, dies under an Incapacity incurred by a Sentence of Condemnation, if the Codicil has been made by Force; if he who made it, did afterwards cancel it *f*.

f See the fifth Section of Teſtaments.

SECT. III.

Of Donations made in proſpect of Death.

IT is neceſſary to diſtinguiſh in this Word of Donation in proſpect of Death, two different Ideas of two Things, which it ſignifies in its common Acceptation with us. For we may underſtand by this Word the Deed or Writing which contains the Diſpoſition of the Donor, as we underſtand by

by the Word Codicil the Writing which contains the Legacies; and we may likewiſe underſtand by this Word of Donation in proſpect of Death, the very Diſpoſition it ſelf, that is, the Beneficence contained in the Writing, as the Legacy is contained in the Codicil. Thus, whereas with reſpect to Legacies we make uſe of two diſtinct Words, to wit, that of Codicil, which ſignifies the Writing in which the Legacies are contained, and the Word Legacy, which ſignifies the Diſpoſitions made in the Codicil, in the Caſe of Donations made in proſpect of Death, we have only this one Word which has both Senſes, and which ſignifies equally the Diſpoſition of the Perſon who gives, and the Writing which contains the ſaid Diſpoſition; which may proceed from hence, that uſually the Word Donation in proſpect of Death, is only made uſe of when there is one only Donation made by a particular Act or Writing; whereas Codicils may contain one or more Legacies, and likewiſe other Diſpoſitions.

It was neceſſary to obſerve the Diſtinction of theſe two Meanings which the Word Donation in proſpect of Death, may have, in order to prevent the Reader's forming to himſelf a wrong Idea of what is the Subject-matter of this Section. For he might imagine that this Section ſhould contain all the Rules which may relate to Donations made in proſpect of Death, either as to the Formalities of the Acts, or Writings which contain theſe ſorts of Diſpoſitions, or as to their Nature. And he might likewiſe fancy, that as in the preceding Sections we have explained only what concerns Codicils, without ſaying any thing of Legacies, which ſhall be the Subject-matter of the ſubſequent Title; ſo we ſhould make the like diſtinction in Donations becauſe of Death. But ſince we are to explain the Detail of the Rules relating to Legacies only in the following Title, and that the ſaid Rules are applicable to Donations made in proſpect of Death, they being of the nature of Legacies, we ſhall explain in this Section only ſuch Rules concerning Donations made in proſpect of Death as ought to be ſeparated from thoſe of Legacies, whether it be that the ſaid Rules relate to the Donation it ſelf, that is, to the Liberality of the Donor, or to the Writing which contains it; and it will be eaſy to diſtinguiſh in every Article what it relates to.

Before we proceed to the Explanation of the few Rules of which this Section conſiſts, it is proper to obſerve, that ſeeing the bare Word Donation comprehends the Donations that are to take effect in the Life-time of the Donor, as alſo the Donations that are to have their effect only after the Donor's Death, it is neceſſary to diſtinguiſh aright the Nature of theſe two ſorts of Donations, and for that end to conſult what has been ſaid of this Matter in the Preamble to the Title of Donations which are to have their effect in the Donor's Life-time, and likewiſe what is there ſaid of the Maxim, *To give, and to retain, is good for nothing*; which has been explained in the ſame Place.

The CONTENTS.

1. *Definition of a Donation made in proſpect of Death.*
2. *Wherein Donations made in proſpect of Death, and Codicils do agree, and where in they differ.*
3. *Formalities of Donations made on account of Death.*
4. *Who may make Donations in proſpect of Death*
5. *The Rule of Codicils agree to Donations made in proſpect of Death*
6. *And alſo the Rules of the Legacies.*

I.

A Donation made in proſpect of Death, is a Diſpoſition made by him, who not being willing to ſtrip himſelf in his Life-time of the thing which he intends to give away, deſires that after his Death it may go to the Perſon whom he has a mind to favour with it, and that he ſhould have it rather than his Heirs *a*. *1. Definition of a Donation made in proſpect of Death.*

a Mortis cauſa donatio eſt, cum quis habere ſe vult quam eum cui donat: magiſque eum cui donat, quam haredem ſuum. *l. 1. ff. de mort. cauſ. donat. §. 1. in f. inſt. de donat.*

¶ In the *Roman* Law they diſtinguiſhed three ſorts of Donations becauſe of Death. The firſt is of thoſe, where, without any preſent danger of Death, one gives out of a View that he muſt ſome time or other die. The ſecond is of thoſe, where the Donor, finding himſelf in ſome danger of Death, gives in ſuch a manner, that he ſtrips himſelf of the thing which he gives away, and conveys it to the Donee, whom he makes Maſter of it. And the third is of thoſe Donations, where, in the ſame Caſe of a danger of Death, one gives in ſuch a manner that the Thing given ſhall

ſhall not belong to the Donee till after the Donor's Death. *Julianus libro ſeptimo decimo Digeſtorum tres eſſe ſpecies mortis cauſa donationum ait. Unam cum quis nullo præſentis periculi metu conterritus, ſed ſola cogitatione mortalitatis donat. Aliam eſſe ſpeciem mortis cauſa donationum ait, cum quis imminente periculo commotus, ita donat, ut ſtatim fiat accipientis. Tertium eſſe genus donationum ait, ſi quis periculo motus non ſic det ut ſtatim faciat accipientis, ſed tunc demum cum mors fuerit ſecuta.* L. 2. ff. de mort. cauſ. donat. §. 1. Inſtit. de donat.

We ſhall not ſet down here as Rules, theſe three ways of giving in proſpect of Death. This Diſtinction does not agree with our Uſage; for it is to be obſerved that the ſecond of theſe three ſorts of Donations in proſpect of Death, has a Character quite oppoſite to the eſſential Character we give to Donations made in view of Death, which is that they are revokable, and that they do not put the Donees in poſſeſſion till after the Death of the Donor. Whence it follows, that this ſecond ſort of Donation would be a Donation that takes effect in the Donor's Life-time, ſince it would put the Donee immediately into poſſeſſion. And it is to be obſerved alſo that by our Uſage thoſe who are in imminent danger of Death, thro Sickneſs or otherwiſe, cannot make Donations that are to have their effect in the Donor's Lifetime. As to the two other ſorts of Donations in proſpect of Death, according to our Uſage it is indifferent whether the Perſon who makes the Donation becauſe of Death be in immediate danger of it, or be not. And they muſt all of them be in Writing, and made in due Form.

What has been juſt now ſaid, that by our Uſage thoſe who are in imminent danger of Death cannot make Donations that are to have effect in the Life-time of the Donor, is to be underſtood of Donations of immoveable Goods, or of Sums of Money, or of other things that are not actually delivered to the Donee; for what is actually deliver'd, the Donation thereof is good and valid, unleſs it be done in fraud of the Law, or of Cuſtom, beyond the bounds of what one may give away in proſpect of Death.

It may likewiſe be remarked concerning that Uſage of the *Roman* Law as to Donations in proſpect of Death, that they reckoned in the number of ſuch Donations the other ways by which it may happen that one has ſomething becauſe of the Death of another, which they called *mortis cauſa capio*; as if a Father gave ſomething becauſe of the Death of his Son. It would be needleſs to inſtance in more Examples of this kind, there being nothing in this matter that deſerves our Obſervation. *V. l.* 8. 12. 18. *&* 21. *ff. de mort. cauſa donat. &* capion.

II.

There is this Difference between a Codicil and a Donation in proſpect of Death, that the Name of Codicil is given indifferently to all Acts which contain the ſeveral Diſpoſitions which one may make in the proſpect of Death beſides that of the Inſtitution of an Executor, whatever number there be of the ſaid Diſpoſitions, and of what nature ſoever they may be; but by a Donation in proſpect of Death is properly underſtood, only one ſingle particular Diſpoſition. Thus he who beſides making a Teſtament and Codicils, if he had a mind to make any, or without making either Teſtament or Codicil, had a mind to diſpoſe of a Sum of Money, or other thing, in favour of ſome Perſon, might give to the Act or Writing that ſhould contain the ſaid Diſpoſition, the Name of Donation becauſe of Death, which one does not give to the other Acts which contain ſeveral Diſpoſitions: But he might likewiſe give to this Diſpoſition the Name of Codicil. Thus, it is the ſame thing for a Donation in proſpect of Death, whether it be expreſſed under this Name in a Writing made expreſsly for that purpoſe, or whether it be contained in a Codicil, either under the Name of Legacy, or under that of Donation *b*. 2. *Where-in Donations made in proſpect of Death, and Codicils do agree, and wherein they differ.*

b See the ſixth Article of this Section, and the third Article of the firſt Section of Legacies, and the Texts cited on them. As to this whole Article, the Reader may conſult the Preamble of this Section.

III.

Donations made in proſpect of Death being of the ſame Nature with Codicils, the ſame Formalities ought to be obſerved in them: And as five Witneſſes are required to a Codicil, the ſame number is likewiſe neceſſary to a Donain proſpect of Death *c*. 3. *Formalities of Donations made on account of Death.*

c See the Text cited on the 10th Article of the firſt Section of Codicils, and the Remark there made upon it.

Quinque teſtibus præſentibus. *l. ult. C. de donat. cauſ. mort.*

IV.

The ſame Perſons who may or may not make Teſtaments or Codicils, may alſo 4. *Who may make Donations*

Donations in proſpect of Death.

alſo, or may not make Donations becauſe of Death. For the ſame Capacity is required for this ſort of Diſpoſitions as for the two others *d*.]

d See the ſecond Section of Teſtaments.

V.

5. The Rules of Codicils agree to Donations made in proſpect of Death.

We ought to apply to the Acts or Writings which contain Donations made in proſpect of Death, the other Rules which relate to Codicils, as they may agree with them. And it will be eaſy to diſcern thoſe Rules, without repeating them in this Place *e*.

e See the two preceding Sections.

VI.

6 And alſo the Rules of Legacies.

As to what concerns the Nature of Donations made in proſpect of Death, it being the ſame with that of Legacies *f*, they have alſo the ſame Rules, which ſhall be explained in the following Title.

f Mortis cauſa donationes ad exemplum legatorum redactæ ſunt per omnia. §. 1. *inſt. de donat. V. l. ult. C. de donat. cauſ. mort.*

TITLE II.

Of LEGACIES.

LEgacies are particular Diſpoſitions on account of Death, which diſtinguiſh the Legatees from the Heir or Executor, in that the Legatees ſucceed only to that which is taken off from the Inheritance to be given to them, and that they are as it were particular Succeſſors; whereas the Heir or Executor is univerſal Succeſſor to the whole Maſs of the Goods.

There is likewiſe this Difference between Legatees and Executors, that an Executor cannot be made but by a Teſtament, whereas Legatees may be made not only by a Teſtament, but alſo by a Codicil. And it is the ſame thing for the Legacies, whether they be contained in one or other of theſe two ſorts of Diſpoſitions, which are diſtinguiſh'd with regard to Legacies only in this, that the Legacies left by a Teſtament are due from the Executor, and thoſe left in a Codicil, without a Teſtament, are due from the Heir at Law, or next of kin.

It is neceſſary alſo to remark here, as we have done in other Places, that in the Cuſtoms of *France* if a Teſtator inſtitutes any other Perſon for his Heir or Executor beſides him who has a right to ſucceed by Law, if there were no Teſtament, they do not give him the Name of Heir, but only that of univerſal Legatee. For altho he ſucceeds to all the Goods, and to all the Rights which the Teſtator has power to diſpoſe of; yet the Cuſtoms give the Name of Heir only to the Heir of Blood, to whom they appropriate the Goods which they do not allow the Teſtator to diſpoſe of: And this Legatee is diſtinguiſhed from particular Legatees by this Quality of univerſal Legatee. Thus the Diſpoſition made in his favour is not called the Inheritance, *even altho it ſhould* comprehend all the Effects of the Teſtator, if he had none but what he had power to diſpoſe of; but it is only called an univerſal Legacy.

Seeing there are ſome Matters which are common both to Legacies, and to the Inſtitution of an Heir or Executor, and that it was neceſſary to explain them under the Title of Teſtaments, we ſhall not repeat here what has been already explained of theſe Matters, as that which concerns the Rules of the Interpretation of the Diſpoſitions of the Teſtator, thoſe relating to Conditions, Deſcriptions, and other Manners which may diverſify the ſaid Diſpoſitions, the Rules concerning the Right of Accretion, of Tranſmiſſion, and others which have been explained under the Title of Teſtaments. Neither ſhall we ſay any thing here of the Formalities neceſſary to Legacies, this Matter having been explained in the ſame Title of Teſtaments, and in that of Codicils, which are the Diſpoſitions by which Legacies are given. And in general the Reader ought to apply to Legacies all the Rules explained in thoſe other Titles, according as they are capable of being applied thereto. And under this Title we ſhall treat of the Rules which are peculiar to the Matter of Legacies.

It is further to be remarked, that under the Name of Legacy, it is neceſſary to comprehend that kind of Diſpoſitions on account of Death which are called particular Fiduciary Bequeſts, diſtinguiſhed from Legacies in the antient *Roman* Law both by their Name and their Nature, but confounded with one another by the latter Laws, which have given to the ſaid Fiduciary Bequeſts the Nature of Legacies, and have made theſe two ſorts of Diſpoſitions equal in every thing *a*. But becauſe there is in

a Per omnia exæquata ſunt legata fideicommiſſis. *l. 1. ff. de legat. 1.*

reality

reality ſome Difference between Legacies and particular Fiduciary Bequeſts, and that we ſhall be obliged to make uſe of this Word of Fiduciary Bequeſt, and to quote Laws in which it is mentioned; it is neceſſary not only to inform the Reader thereof, but to explain here on this Subject that which ought to precede the Rules, in order to make them rightly underſtood.

A Fiduciary Bequeſt is a Diſpoſition by which the Teſtator prays his Heir or Executor to deliver to ſome Perſon either the whole Succeſſion, or a part thereof, or ſomething in particular. The firſt Uſe of Fiduciary Bequeſts was ſuch, that it depended wholly on the Heir or Executor, either to comply with this Requeſt of the Teſtator's, or not to comply with it, as he thought fit: and it was from thence that the *Latin* Word *Fideicommiſſum* came, becauſe it was committed or remitted to the Faith and Integrity of the Heir or Executor; but afterwards the Heirs or Executors were compelled by Law to execute theſe ſorts of Diſpoſitions *b*.

The Fiduciary Bequeſts of the whole Inheritance, or of a part of it, are a Matter which ſhall be explained under the third Title of the fifth Book. And as for particular Fiduciary Bequeſts, altho, as has been juſt now remarked, they have been made like unto Legacies, yet it is neceſſary to diſtinguiſh in theſe Fiduciary Bequeſts two ſorts of Rules: Thoſe which are common to them and to Legacies, which ſhall be explained under this Title: And ſome others that are peculiar to them, which ſhall be explain'd in the ſecond Section of the third Title of the fifth Book.

It is neceſſary finally to remark on the ſubject Matter of this Title, that Donations made in proſpect of Death being diſtinguiſhed from Legacies only by Name, as has been remarked in the third Section of the preceding Title; we muſt apply to thoſe Donations the Rules which ſhall be explain'd under this Title. Thus the Reader muſt remember that what ſhall be here ſaid only of Legacies, ought likewiſe to be underſtood of Fiduciary Bequeſts, and of Donations becauſe of Death, unleſs there be ſome Difference which it will be eaſy to diſcern.

It is not needful to explain here the different kinds of Legacies which had been in uſe in the *Roman* Law. For altho this Knowledge might be of uſe for the right underſtanding of the Texts of ſome Laws, *Juſtinian* having confounded all theſe ſorts of Legacies together, giving to them all the ſame Nature and the ſame Effect *c*, yet the Explanation of this Diſtinction would be uſeleſs. However we may take notice of one way of bequeathing, which had been rejected by the antient Law, and which *Juſtinian* has allowed, and which with us might either be approved or rejected, according to the Circumſtances. It was that Manner of bequeathing which they called by the way of Puniſhment *Pœnæ nomine d*, when the Teſtator ordained or forbad ſomething to his Heir or Executor, or impoſed ſome Condition on him, adding thereto a Penalty either of doing or giving ſomething, in caſe he ſhould fail to execute the Will of the Teſtator. Thus by our Uſage a Teſtator might legally order the Payment of a Legacy at ſuch a time, and impoſe the Payment of Intereſt, as a Puniſhment for his delay to make Payment. Thus a Teſtator might require his Heir or Executor to take into Partnerſhip with him in his Commerce a Perſon to whom he had a mind to procure that Advantage; adding, that in caſe his ſaid Heir or Executor would not receive ſuch a one for his Partner, he ſhould give him a certain Sum of Money. But our Uſage would not approve of a Teſtator's enjoining his Heir or Executor to marry, or not to marry his Daughter to ſuch a one, or if he ſhould contravene his Order to give to ſuch a one the Sum of ſo much. And altho ſuch a Legacy ſeems to be approved by *Juſtinian*, contrary to the antient Law which condemned it *e*, yet it would ſeem to be an Encroachment on the Liberty of Marriage, and by that means be contrary to Decency and Good Manners.

b V. tit. inſt. de fideicom. hæred. & tit. de ſing. reb. per fideicom. relict.

c §. 2. *inſt. de legat. l.* 1. *C. comm. de legat.*

d §. *ult. inſt. de leg. l. un. C. de his quæ pœn. non.*

e V. de §. *ult.*

SECT. I.

Of the Nature of Legacies, and of particular Fiduciary Bequeſts.

THE Remark which has been made in the Preamble of this Title on Fiduciary Bequeſts, explains the Reaſon why we add to the Title of this Section particular Fiduciary Bequeſts.

The CONTENTS.

I

1. *Definition of a Legacy.*

A Legacy is a particular Diſpoſition becauſe of Death in favour of ſome Perſon, either by a Teſtament or Codicil *a*

a Legatum eſt donatio teſtamento relicta. *l.* 36. *ff. de legat.* 2.

Legatum eſt donatio quædam à defuncto relicta, ab hærede præſtanda. §. 1. *inſtit. de legat.*

Legatum eſt delibatio hæreditatis, qua teſtator ex eo quod univerſum hæredis foret, alicui quid collatum velit. *l.* 116. *ff. de legat.* 1.

II.

2. *Definition of a particular Fiduciary Bequeſt.*

A particular Fiduciary Bequeſt is a Diſpoſition by which the Executor or a Legatee is intreated to reſtore, or to give to a third Perſon a certain thing *b*.

b Poteſt quis etiam ſingulas res per fideicommiſſum relinquere: veluti fundum, argentum, hominem, veſtem, & pecuniam numeratam. Et vel ipſum hæredem rogare ut alicui reſtituat, vel legatarium. *inſt. de ſing. reb. per fideicom. relict.*

III.

3. *Legacies, particular Fiduciary Bequeſts, and Donations becauſe of Death, are all of the ſame Nature.*

It is the ſame thing for the Validity of the Diſpoſitions of a Teſtator, whether he expreſs himſelf in relation thereto in the Words of a Legacy, or of a Fiduciary Bequeſt, or Donation becauſe of Death; for all theſe ſorts of Diſpoſitions have the ſame Nature and the ſame Uſe *c*. And whether the Teſtator expreſs himſelf in Terms of Intreaty to his Executor, or that he commands him, or that without addreſſing himſelf to the Executor, he explains his Will, the Executor will be bound to execute it *d*. And it is the ſame thing if it is a Legatee whom the Teſtator requires or intreats to give or remit a Sum of Money, or any other thing to a third Perſon *e*.

c Per omnia exæquata ſunt legata fideicommiſſis. *l.* 1. *ff. de legat.* 1.

Et fideicommiſſum, & mortis cauſa donatio appellatione legati continetur. *l.* 87. *ff. de legat.* 3.

Mortis cauſa donationes ad exemplum legatorum redactæ ſunt per omnia. §. 1. *inſtit. de donat.*

d Omne verbum ſignificans teſtatoris legitimum ſenſum legare vel fideicommittere volentis, utile atque validum eſt ſive directis verbis, quale eſt, *jubeo*, forte, ſive precariis utatur teſtatoi, quale eſt *rogo, volo, mando*, fideicommitto. *l.* 2. *C. com. de legat.*

e Et hæc diſpoſuimus non tantum ſi ab hærede fuerit legatum derelictum vel fideicommiſſum, ſed & ſi à legatario, vel fideicommiſſario, vel alia perſona quam gravare fideicommiſſo poſſumus, fideicommiſſum cuidam relinquatur. *l.* 1. *C. comm. de leg.* See the ſeventh Article.

IV.

4. *Wherein conſiſts the Validity of theſe Diſpoſitions.*

The Validity of Legacies, of Fiduciary Bequeſts, and of Donations on account of Death, implies two things, the Quality of the Diſpoſition, which is that wherein their Nature does conſiſt, and the Formalities of the Acts which contain them, whether they be Teſtaments, Codicils, or Donations *f*.

f See the following Article.

V.

5. *Their Nature, and the Formalities to be obſerved in them.*

The Quality of theſe Diſpoſitions which conſtitutes their Nature, conſiſts in the eſſential Characters which the Laws preſcribe, and on which it depends whether they have their Effect, or whether they be null And the Formalities reſpect the Acts or Writings which contain theſe Diſpoſitions, and which are the Proof of their Verity; which is held to be well eſtabliſhed when the ſaid Acts are according to the Form regulated by Law. Theſe Formalities have been explained in their proper Places *g* And as for the Nature and Characters of theſe Diſpoſitions, we muſt join to what has been ſaid of that Matter in the three firſt Articles, all the Rules of this Title, and of the preceding Titles, in ſo far as we can judge they have any relation to them.

g See the third Section of Teſtaments, the firſt Section of Codicils, and the third Article of the third Section of the ſame Title.

VI.

6. *Eſſential Characters of theſe Diſpoſitions.*

It is eſſential to the Validity of theſe three ſorts of Diſpoſitions, that the Perſons who make them have the power to do it; that thoſe in favour of whom they are made be not incapable of them; and that the things which are diſpoſed of be ſuch as may be diſpoſed of. Theſe three

three Characters ſhall be the ſubject Matter of the two following Sections, where we muſt underſtand what ſhall be ſaid only of Legacies; as if it had been alſo expreſſed of Fiduciary Bequeſts, and of Donations becauſe of Death *h*.

h See the two following Sections.

VII.

7. *A Teſtator may burden the Legatees with Legacies to other Perſons.*

A Teſtator may burden with a Legacy, or a Fiduciary Bequeſt, not only his Executor, but likewiſe a Legatee, as has been ſaid in the third Article. And if he had made a Teſtament, or a Codicil, or a Donation becauſe of Death, he might burden by new Diſpoſitions thoſe to whom he had given ſomething by former ones, which having been made only in proſpect of Death, may ſuffer this Diminution *i*.

i Eorum, quibus mortis cauſa donatum eſt, fideicommitti quoquo tempore poteſt. *L.* 77. §. 1. *ff. de legat.* 2. See the laſt of the Texts cited on the third Article.

We have added in the Article, that the Teſtator may charge with Legacies thoſe to whom he has given ſomething by preceding Diſpoſitions made in proſpect of Death; for he could not impoſe new Burdens on thoſe to whom he had made ſimple Donations, that were to have their Effect in his Lifetime.

VIII.

8. *A thing left to ſeveral Perſons is divided equally among them.*

If one and the ſame thing is bequeathed to two or more Perſons, without diſtinction of Portions, it will be equally divided among them, ſhare and ſhare alike *l*

l In legato plumbus relicto, ſi partes adjectæ non ſunt, æquæ ſervantur. *l.* 19. §. *ult. ff. de leg.* 1.

IX.

9. *A Legatee of ſeveral Legacies cannot reſtrain himſelf to thoſe that are without Burden.*

As one may bequeath one and the ſame thing to ſeveral Perſons, ſo one may leave to one Perſon different Legacies, either without a Charge or with a Charge: And the Legatee may accept thoſe which he ſhall think fit, and reject the others; unleſs it be that thoſe which he refuſes would oblige him to ſome Charge. For in this Caſe he could not divide the Legacies, and by accepting one, he would be liable to the Charges of the others *m*.

m Duobus legatis relictis, unum quidem repudiare, alterum vero amplecti poſſe, reſpondetur. Sed ſi unum ex legatis onus habet & hoc repellatur, non idem dicendum eſt. *L.* 4. *d. l.* §. 1. *ff. de leg.* 2.

X.

10. *Legacies are only due after all the Debts are paid.*

We may add as a laſt Rule of the Nature of Legacies, and of other Diſpoſitions on account of Death, that ſince Teſtators can diſpoſe only of their Goods, the Debts owing by the Teſtator, even thoſe that are the leaſt favourable, are preferred before all his Diſpoſitions of what kind ſoever they be *n*.

n Sicuti legata non debentur, niſi deducto ære alieno aliquid ſuperſit, nec mortis cauſa donationes debebuntur, ſed infirmantur per æs alienum. Quare ſi immodicum æs alienum interveniat, ex re mortis cauſa ſibi donata nihil aliquis conſequitur. *l.* 66, §. 1. *ff. de leg. Falc.*

SECT. II.

Who may give Legacies, and who may receive them.

WE muſt underſtand what ſhall be ſaid of Legacies hereafter, in the Senſe which comprehends particular Fiduciary Bequeſts, and Donations becauſe of Death, as has been already ſufficiently remarked; and it is for Brevity's ſake we inſert here only the Word Legacy.

The CONTENTS.

I.

1. *Who may give Legacies.*

The ſame Perſons who may make a Teſtament, may give Legacies. Thus, to know if a Perſon may give a Legacy, we muſt examine if he is not under ſome of the Incapacities which hinder a Man from making a Teſtament, and which have been explained in their proper Place *a*.

a See the 2d Section of Teſtaments.

II.

2. At what time are we to conſider the Capacity or Incapacity of the Perſon who leaves the Legacy.

Seeing the Rules touching the Incapacity of bequeathing are the ſame with thoſe of the Incapacity of making a Will, the Rules concerning the time when we are to conſider the Incapacity of the Perſon who diſpoſes, are the ſame with reſpect to Legacies, as with reſpect to the Inſtitution of an Executor, and they are explained in the ſame Place *b*.

b See the 14th Article, and thoſe that follow, of the 2d Section of Teſtaments.

III.

3. Who may receive Legacies.

All Perſons who are capable of being named Executors of a Will, are alſo capable of receiving Legacies; and it is only ſuch as are capable of being Executors that are capable of being Legatees. Thus, in order to know who thoſe Perſons are, we need only to conſult the Rules which are ſet down in their proper Place *c*.

c See the ſame 2d Section of Teſtaments.

IV.

4. Perſons unworthy of Legacies.

We muſt not rank in the number of Perſons incapable of Legacies thoſe who render themſelves unworthy of them Thus, for example, a Legatee who by colluſion with the next of kin, or out of ſome other Motive, ſhould conceal the Teſtament in which he had a Legacy left him, would render himſelf unworthy of it *d*. And every Legatee in whom ſhould be found any one of the Cauſes which render the Heir or Executor unworthy of the Inheritance, and which have been explained in their Place, would be alſo unworthy of the Legacy *e*.

d Si legatarius vel fideicommiſſarius, celaverit teſtamentum, & poſtea hoc in lucem emerſerit, an poſſet legatum ſibi relictum is qui celaverit ex eo teſtamento vindicare dubitabatur, quod omnino inhibendum eſſe cenſemus, ut non accipiat fructum ſuæ callidinatis, qui voluit hæredem hæreditate ſua defraudare. Sed hujuſmodi legatum illi quidem auferatur. Maneat autem quaſi pro non ſcripto apud hæredem: ut qui alii nocendum eſſe exiſtimavit, ipſe ſuam ſentiat jacturam. *l.* 25. *C. de legat.*

e See the 3d Section of Heirs and Executors in general.

V.

5. The ſame.

We muſt not reckon among the Perſons unworthy of Legacies, him who being next of kin, had impugned as null the Teſtament which contained a Legacy in his favour. For altho the Teſtament were confirmed againſt his Pretenſion, yet ſeeing it did not any ways injure the Honour of the Deceaſed, and that he only exerciſed a Right which he ought not to be deprived of by this Legacy, nothing could be imputed to him that ſhould render him unworthy of the Legacy. But if this Legatee, after having received his Legacy, ſhould impeach the Will as being forged, pretending that the Executor had made it, and the Will ſhould be confirmed by Sentence, he would loſe the Legacy becauſe of the Injury he had done to this Executor. But if the Legatee who is next of kin, having received the Legacy left him, ſhould afterwards attempt to annul the Teſtament becauſe of ſome Flaw therein, which ought to have this effect, ſuch as the Incapacity of the Perſon inſtituted Heir or Executor, his Action would be received, and it would be no bar to him that he had approved the Teſtament by receiving his Legacy. And in general when the Queſtion is, whether a Legatee who receives his Legacy loſes the Right which he may have to the Inheritance; it is by the Circumſtances of his Perſon, of his Condition, of his Age, and others, that it ought to be decided *f*.

f Ille qui non jure factum (teſtamentum) contendit, nec obtinuit, non repellitur ab eo quod meruit. Ergo qui legatum ſecutus, poſtea falſum dixit amittere debebit quod conſecutus eſt. De eo vero qui legatum accepit, ſi neget jure factum eſſe teſtamentum, Divus Pius ita reſcripſit: *Cornati Sophronis licet ab hærede inſtituto acceperant legata, tamen ſi is ejus conditionis fuerit viſus, ut obtinere hæreditatem non poſſit, & jure inteſtati ad eos cognati pertinet, petere hæreditatem ipſo jure poterunt.* Prohibendi autem ſint an non, ex cujuſque perſona, condicione, ætate, cognita cauſa a judice conſtituendum erit. *l.* 7. §. 1. *ff. de his quæ ut ind. auf.* See the ſecond and following Articles of the third Section of an undutiful Teſtament.

VI.

6. Particular Rules concerning Perſons who may receive Legacies.

Altho for underſtanding who the Perſons are to whom Legacies may be left, it be ſufficient to know, that whoever is not incapable of being Heir or Executor may be a Legatee; yet there are in relation to this Subject ſome particular Rules, which it is neceſſary to diſtinguiſh from this general Rule, either becauſe they are Exceptions to it, or for other Conſiderations, which one will be able to judge of by the Rules which follow *g*.

g See the following Articles.

VII.

7. One may bequeath Alimony to a Perſ

The Incapacity of inheriting or receiving a Benefit by ſome Diſpoſition made in proſpect of Death, does not comprehend Legacies of Alimony. For the

Incapable of other Legacies.

the ſame being of an abſolute Neceſſity to whoſoever lives, it is but equitable that all Perſons whatſoever ſhould be capable of receiving it. Thus one may bequeath Alimony even to thoſe who are under Sentence of Death, or condemned to other Puniſhments which imply Civil Death: And whilſt they continue in Life, they may enjoy a Legacy limited to this Uſe *h*.

h Si in metallum damnato quid extra cauſam alimentorum relictum fuerit, pro non ſcripto eſt, nec ad fiſcum pertinet. Nam pœnæ ſervus eſt, non Cæſaris. Et ita Divus Pius reſcripſit. *l.* 3. *ff. de his quæ pro non ſcript.*

The ſame Motives which make a Legacy of Alimony to a Perſon condemned to Death, or to any other Puniſhment which implies Civil Death, to ſubſiſt, ſeem to juſtify the like Legacy in favour of an Alien who ſhould ſtand in need of this Relief: And his Incapacity of inheriting ought not to exclude him from the benefit of a Legacy of this nature.

VIII.

8. The Teſtator may leave a Legacy to his Executors.

A Teſtator may leave a Legacy not only to other Perſons beſides his Executors, but even to the Executors themſelves, if they be more in Number than one; for one Executor alone having all the Goods of the Inheritance, he cannot owe himſelf a Legacy. Thus, where there are two or more Executors, the Teſtator may bequeath either to any one of them alone, or to every one of them, what he thinks fit, and diſtinguiſh them by particular Diſpoſitions of certain Things *i*

i Si uni ex hæredibus fuerit legatum, hoc deberi ei officio judicis familiæ erciſcundæ manifeſtum eſt. *l.* 17. §. 2. *ff. de leg.* 1.

IX.

9. A Legacy left to two Executors, how to be divided.

If a Teſtator had left a Legacy in common to two of his Executors or Teſtamentary Heirs, they would ſhare it by equal Portions, altho their Portions in the Inheritance were unequal, unleſs the Teſtator had diſtinguiſhed the Portions of the Legacy, in the ſame manner as thoſe of the Inheritance. But not having done it, their Condition, altho different in reſpect of the Inheritance, is the ſame in the Legacy *l*.

l Si ex pluribus hæredibus ex diſparibus partibus inſtitutis, duobus eadem res legata ſit: hæredes, non pro hæreditaria portione, ſed pro virili id legatum ſolvere debent. *l.* 67. §. 1. *ff. de leg.* 1.

X.

10. The teſtamentary Heir, who is alſo a Legatee, may keep

If the Teſtamentary Heir, who is likewiſe a Legatee, renounces the Inheritance, he will not be for that deprived of his Legacy. For it was free for him to abſtain from one of the two Favours, and to keep to the other *m*. And if it was a Son that was inſtituted Heir in part, and named a Legatee by the Teſtament of his Father, he might likewiſe keep to the Legacy, without being charged with contravening the Will of the Teſtator his Father; ſince he might very decently excuſe himſelf from medling in the Affairs of the Inheritance, and leave it to thoſe who were called to the Succeſſion with him *n*.

to his Legacy, and renounce the Inheritance.

m Sed & ſi abſtinuerit ſe hæreditate, conſequi eum hoc legatum poſſe conſtat. *l.* 17. §. 2. *ff. de leg.* 1.

n Filio pater quem in poteſtate retinuit, hæredi pro parte inſtituto, legatum quoque reliquit. Quidam ſententia eſt exiſtimantium denegandam ei legati petitionem, ſi patris abſtinuerit hæreditate, non enim impugnatui judicium ab eo qui juſtis rationibus noluit negotiis hæreditariis implicari. *l.* 87. *eod. l.* 12. C. *de leg.*

XI.

11. One may leave a Legacy to unknown Perſons, and in what ſenſe.

A Teſtator may leave a Legacy to a Perſon unknown, and even uncertain, provided that ſome Circumſtances mark his Intention, and the Motive that induced him to it, by which we may come at the knowledge of the Perſon to whom he has left the Legacy. Thus, for example, if a Teſtator had bequeathed a Sum of Money to a Perſon who ſhould do ſuch a Piece of Service either to himſelf, or ſome one of his Children, or of his Friends; he who ſhould happen to be the Perſon who rendered this Service, would be the Legatee, altho the Teſtator had died without knowing who had done him that good Office *o*.

o Quidam relegatus facto teſtamento, poſt hæredis inſtitutionem, & poſt legata quibuſdam data, ita ſubjecit: *Si quis ex hæredibus, cæteriſve amicis, quorum hoc teſtamento mentionem habui, ſive quis alius reſtitutionem mihi impetraverit ab imperatore, & ante deceſſero, quam ei gratias agerem; volo dari ei qui id egerit, a cæteris hæredibus aureos tot.* Unus ex his quos hæredes ſcripſerat impetravit ei reſtitutionem, & antequam id ſciret deceſſit. Cum de fideicommiſſo quæreretur, an deberetur, conſultus Julianus reſpondit deberi. Sed etiam ſi non hæres vel legatarius, ſed alius ex amicis curavit eum reſtitui, & ei fideicommiſſum præſtari. *l.* 5. *ff. de reb. dub.*

XII.

12. A Legacy to one of many Perſons.

One may leave a Legacy to one Perſon among many, as to one of the Children of a Son, or of a Relation, or of a Stranger; whether the Teſtator explain the Circumſtances which might diſtinguiſh this Legatee, or that he leaves the Choice of him to his Heir or Executor, or to ſome other Perſon. And in the firſt Caſe, if the Legatee is ſufficiently diſtinguiſhed, he alone will have the Legacy. or if he is not ſufficiently

ciently diſtinguiſhed: all the Children will have their Share in it. But in the ſecond Caſe, he who ſhall have been named by the Heir or Executor, or other Perſon, to whom the Teſtator had given the Power of naming, will be the Legatee. And if he who had the power of naming, dies without having named any one, the Legacy will belong either wholly to one Child alone, if there remains no more than one, or it will belong in common to thoſe who ſhall remain. Thus, altho the Legacy were deſtined only for one Child, yet none of them being diſtinguiſh'd from the others, it would go to them all *p*.

p Si hæres damnatus eſſet, decem uni ex libertis dare, & non conſtituerit cui daret: hæres omnibus eadem decem præſtare cogendus eſt. *l.* 17. §. 1. *ff. de leg.* 2. *v. l.* 24. *eod.*

Si cum forte tres ex familia eſſent ejus qui (*uni ex familia*) fideicommiſſum reliquit eodem vel diſpari gradu: ſatis erit uni reliquiſſe: nam poſtquam paritum eſt voluntati, cæteri conditione deficiunt. *l.* 67. §. 2. *ff. de legat.* 2.

Rogo fundum cum morieris reſtituas, ex libertis cui voles. Quod ad verba attinet, ipſius erit electio. Nec petere quiſquam poterit, quamdiu præferri alius poteſt. Defuncto eo, priuſquam eligat, petent omnes. Itaque eveniet, ut quod uni datum eſt, vivis pluribus unus petere non poſſit, ſed omnes petant quod non omnibus datum eſt. Et ita demum petere poſſit unus, ſi ſolus moriente eo ſuperſuit. *d. l.* 67. §. 7.

XIII.

13. A Legacy to a Town or other Corporation.

One may leave a Legacy to a Town, or other Corporation whatſoever, whether Spiritual or Secular, and direct that it be applied to ſome honeſt and lawful uſe, ſuch as for publick Buildings, for maintaining the Poor, or for other charitable Uſes, or for the publick Good of the ſaid Society *q*. And we muſt conſider as a Legacy left to a Town or other Corporation, that which is left to thoſe who compoſe the ſaid Body, as to the Inhabitants of ſuch a Town, or other Place, to the Canons of ſuch a Chapter, to the Monks of ſuch a Monaſtery *r*. But we muſt not reckon in the number of Corporations capable of Legacies, thoſe which are not duly eſtabliſhed and approved. But if the Legacy were left perſonally to the particular Perſons who had a mind to form themſelves into a Society, that they might reap the Benefit of the Legacy, either every one for himſelf in particular, or for the Society in general, when it ſhould be eſtabliſhed, the Legacy might ſubſiſt according to the Circumſtances *s*.

q Si quid relictum ſit civitatibus omne valet, ſive in diſtributionem relinquatur, ſive in opus, ſive in alimenta, vel in eruditionem puerorum, ſive quid aliud. *l.* 117. *ff. de leg.* 1.

Quod in alimenta ætatis puta infirmæ (ſenioribus, vel pueris, puellisque) relictum fuerit, ad honorem civitatis pertinere reſpondetur. *l.* 122. *eod.*

r Civibus civitatis legatum vel fideicommiſſum datum civitati relictum videtur. *l.* 2. *ff. de reb. dub.*

s Cum Senatus temporibus Divi Marci permiſerit collegiis legare: nulla dubitatio eſt, quod ſi corpori cui licet coire legatum ſit, debeatur. Cui autem non licet, ſi legetur, non valebit, niſi ſingulis legetur. Hi enim, non quaſi collegium, ſed quaſi certi homines admittentur ad legatum. *l.* 20. *ff. de reb. dub.*

SECT. III.

What things may be deviſed.

AS to things that may be deviſed, it is neceſſary to obſerve a Diſtinction of Legacies of two ſorts. One is of the Legacies of things of which the Property paſſes to the Legatee; and the other is of Legacies which do not convey to the Legatee the Property of any thing, but only an Enjoyment, or the Uſe and Profits of a thing for ſome time, or during his Life, ſuch as an Uſufruct, a Penſion, Alimony, or other Annuity. The Legacies of the firſt of theſe two kinds ſhall be explained in this and the following Section, and thoſe of the ſecond ſort ſhall be the ſubject Matter of the fifth Section.

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19. *A Legacy of a certain Quantity of Corn to be taken out of a Crop, or out of a certain Place.*
20. *An indefinite Legacy of Moveables.*
21. *The Legacy of a Thing specified as belonging to the Testator, is null if the Thing is not found among his Goods.*
22. *A Legacy of a thing indetermined in its kind, how it ought to be understood.*
23. *A Legacy of a Work to be done.*
24. *An indefinite Devise of a Land or Tenement is null if the Testator has none.*

I.

1. *One may devise every thing that is in Commerce.*

ONE may devise all sorts of things, Moveables or Immoveables, Rights, Services, and things of any other kind that are in Commerce, and that may pass from the use of one Person to that of another *a*.

a Corpora legari omnia & jura, & servitutes possunt. *l.* 41. *ff. de legat.* 1. See the following Article.

II.

2. *One cannot devise things that are publick or consecrated.*

Since one can devise only what may pass to the Use of the Legatee, the Legacy of a publick thing, or of a consecrated Place, would be without Effect, and the Legatee would not so much as have the Value of these sorts of things, whether the Testator was ignorant of the Quality of the things, or knew it. And in this last Case such a Disposition would be the Act of a Madman *b*.

b Campum martium, aut Forum Romanum, vel ædem sacram legari non posse constat. Sed & ea prædia Cæsaris quæ in formam patrimonii redacta sub procuratore patrimonii sunt, si legentur, nec æstimatio eorum debet præstari. *l.* 39. §. *penult. & ult. ff. de legat.* 1. Furiosi est talia legata testamento adscribere. *dict. l.* §. 8. *in f.*

What is said in this Article of a consecrated Place is to be understood of Holy, sacred, or consecrated Places that are set apart for publick use, such as a Church or Church-yard. For the Legacy of a House in which there was a Chapel for the use of the said House, would comprehend the Chapel, in the same manner as the Legacy of an Ecclesiastick of his Silver Chapel, would rate in the consecrated Plate belonging to it.

III.

3. *One may bequeath a thing belonging to another Person.*

Altho one cannot dispose of what belongs to others, yet a Testator may bequeath a thing which belongs to another *c*. And such a Legacy may have its effect, or not have it, according to the Rules which follow.

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

¶ Altho it may seem somewhat strange that one can bequeath a thing which he has no right to dispose of, and especially a thing which he knows to be another's, and that it does not seem possible that one in his right Senses should make such a Disposition; however seeing a Testator may oblige his Heir or Executor to purchase an Estate for the use of a Legatee, this would be in effect to bequeath a thing that is another's. Thus we must understand what shall be said in the following Articles, as meant of Dispositions of this Quality, or such that one may judge that the Testator did not intend to make a ridiculous Legacy of a House, for instance, belonging to his Neighbour, without having any Circumstance that may justify such a Disposition, from the Imputation of Extravagance. For it ought to have some Foundation and some Motive that may agree with good Sense, and render it just.

It would seem that it is only in this Sense that we are to understand the Rules which we find in the *Roman* Law touching this Matter, and that the Authors of those Rules neither could, nor intended thereby to authorize the impertinent Dispositions of things to which neither the Testator nor his Heir or Executor had any right, and when there was no Circumstance that could make such a Disposition appear to be reasonable; as we ought likewise to believe, that by permitting a Testator to bequeath what did not belong to him, they did not thereby mean that a Testator might in conscience give away, or a Legatee retain a thing bequeathed, which belonged neither to the Testator, nor to his Heir or Executor. We add this last Reflexion, because of the Sentiment of some Authors, who have been of opinion that the Canon Law condemns as unlawful all Legacies of things belonging to other Persons; which they found upon the Decretal of the fifth Chapter *de testamentis*; altho that Decretal be only in a particular Case, where the Legatee being in pos-

ſeſſion of the Thing bequeathed, refuſed to give it back, pretending to found his Right to the Thing on the Rule of the Civil Law, which had permitted the Teſtator to bequeath it to him. No Perſon could ever imagine, that in ſuch a Caſe the Legacy ought to diveſt the Proprietor of his Right. Theſe are the Words of that Decretal: *Filius noſter F. conqueſtus eſt, quod quondam P. pater ſuus aliqua Eccleſiæ veſtræ, ſepulturæ ſuæ gratia, juris alieni reliquit. Et quidem leges hujus ſæculi hoc habent, ut hæres ad ſolvendum cogatur ſi auctor ejus rem legavit alienam. Sed quia lege Dei, non autem lege hujus ſæculi vivimus, valde mihi videtur injurius, ut res tibi legata, quæ cujuſdam Eccleſiæ eſſe perhibentur, a te teneantur, qui aliena reſtituere debuiſti.* It is true, that the Terms of this Decretal ſeem to condemn in general the Rule of the Civil Law, as being oppoſite to the Divine Law; but ſeeing it is only with reſpect to the Injuſtice of this Legatee, and that a Legacy conformable to the Remark we have juſt now made, or to the Caſe which ſhall be explained in the ſixth Article, would have nothing in it contrary to the Divine Law, it is neceſſary, in order to give to this Decretal its proper and juſt Meaning, to apply it rather to the bad Uſe that one would make of the Rule of the Civil Law, than to the Rule it ſelf.

IV.

4. A Teſtator may bequeath a Thing which he knows is not his own.

If the Teſtator knew that the Thing which he bequeathed was not his own, the Teſtamentary Heir or Executor will be bound either to give the Thing it ſelf to the Legatee, if he can have it of the Owner at a reaſonable Rate *d*; or if he cannot purchaſe it, or will not *e*, he muſt give the Value of it. For the Intention of the Teſtator was, that the Legatee ſhould reap the Benefit of the Legacy. But it will not be preſumed that the Teſtator knew that what he bequeathed was not his own, unleſs this Fact be proved; and it is the Legatee that is to make proof it; for he who is the Demandant is obliged to eſtabliſh his Right *f*.

d Aliena (res) legari poteſt, ita ut hæres cogatur redimere eam, & præſtare: vel ſi eam non poteſt redimere, æſtimationem ejus dare. §. 4. *inſt. de leg.*

Si ædes alienas ut dares damnatus ſis, neque eas ulla conditione emere poſſis, æſtimare judicem oportere Aristo Cælio, quanti ædes ſint: ut pretio ſoluto, hæres liberetur. *l.* 30. §. *ultimo ff. de leg.* 3.

e Idem juris eſt, & ſi potuiſſes emere, non emeris. *d.* §. *ult. in f.*

f Et verius eſt ipſum qui agit, id eſt legatarium, probare oportere, ſciviſſe alienam rem legare defunctum: non hæredem probare oportere, ignoraſſe alienam: quia ſemper neceſſitas probandi incumbit illi qui agit. §. 4. *in f. inſt. de leg.* See the following Article.

V.

5. The Legacy is null, if the Teſtator thought that the Thing he bequeathed was his own.

If it is not proved that the Teſtator knew that the Thing which he bequeathed was not his own, the Legacy will be null. For it is preſumed, that he gave it away only becauſe he thought it was his own, and that otherwiſe he would not have charged his Teſtamentary Heir or Executor with a Legacy of this Nature *g*.

g Quod autem diximus alienam rem poſſe legari, ita intelligendum eſt, ſi defunctus ſciebat alienam rem eſſe, non ſi ignorabat. Forſitan enim ſi ſoviſſet alienam rem eſſe non legaſſet. Et ita Divus Pius reſcripſit. §. 4. *inſt. de leg.*

Videri potius quod habere ſe crederet, quam quod onerare hæredes vellet, legaſſe. *l.* 36. *in f. ff. de uſu & uſufr. leg.*

VI.

If the Legacy of a Thing which the [illegible] Teſtator took to be his own, and which [illegible] was not ſo, [illegible] in favour of [illegible] a near Relation of the Teſtator's, or of a Perſon of that Condition that it would make it a Duty in the Teſtator to leave him ſuch a Legacy, it would have the Effect that the Circumſtances might demand. Thus, for example, if a Teſtator had bequeathed to his Widow whom he left without an Eſtate, the Uſufruct of ſome Land or Tenement which was not his own, and which he believed was his own, thinking that the ſaid Land or Tenement was part of a Succeſſion that had fallen to him a little before his Death; the Teſtamentary Heir or Executor of this Teſtator would be obliged to pay to the ſaid Widow an Annuity to the Value of that Uſufruct, or the Uſufruct it ſelf, if he could agree for it with the Proprietor at a reaſonable Price *h*.

h Cum alienam rem quis reliquerit, ſiquidem ſciens: tam ex legato, quam ex fideicommiſſo, ab eo qui legatum ſeu fideicommiſſum meruit, peti poteſt. Quod ſi ſuam eſſe putavit, non aliter valet relictum, niſi proximæ perſonæ vel uxori, vel alii tali perſonæ datum ſit, cui legaturus eſſet, & ſi ſciſſet rem alienam eſſe. *l.* 10. *C. de legat.*

VII.

7. If the Thing bequeathed belongs to the Teſtamentary Heir or Executor, it is equal

If the Thing bequeathed did belong to the Teſtamentary Heir or Executor, it would be the ſame thing whether the Teſtator knew, or were ignorant of that Fact; and the Teſtamentary Heir would be bound to acquit the Legacy. For even

whether the Teſtator know or be ignorant of this Fact.

even altho this Teſtator had believed that the Thing was his own, yet we ought not to preſume in this Caſe, that if he had known that it was not his own, he would not have bequeathed it, and would not have been willing to burden his Teſtamentary Heir with the procuring it ſome other way; ſince he might have very reaſonably judged that it would be as eaſy for his Teſtamentary Heir to give that which was his own, as that which ſhould be a part of the Inheritance. Thus, we ought to preſume on the contrary, that he having a mind to leave this Legacy, would not have been diverted from doing it, altho he had known that the Thing belonged to his Teſtamentary Heir or Executor *i*.

i Si rem tuam quam exiſtimabam meam, te hærede inſtituo, Titio legem: non eſt Neratii Priſci ſententiæ, nec conſtitutioni locus: qua cavetur, non cogendum præſtare legatum hæredem. Nam ſuccurſum eſt hæredibus, ne cogerentur redimere, quod teſtator ſuum exiſtimans reliquit. Sunt enim magis in legandis ſuis rebus, quam in alienis comparandis & onerandis hæredibus faciliores voluntates. Quod in hac ſpecie non evenit, cum dominium rei ſit apud hæredem. *l.* 67. §. 8. *ff. de legat.* 2.

VIII.

8. If the Thing bequeathed belongs already to the Legatee, the Legacy is uſeleſs.

If the Thing bequeathed did belong to the Legatee, the Legacy would be null. For he could not acquire a new Right to what was already entirely his own. And we ought to preſume that if the Teſtator had known it, he would not have made ſuch a Diſpoſition. Thus it would remain always null, altho it ſhould afterwards happen that this Legatee ſhould alienate the Thing that was bequeathed to him: and he could not ſo much as demand the Value of it *l*.

l Sed ſi rem legatarii quis ei legaverit, inutile eſt legatum: quia quod proprium eſt ipſius, amplius ejus fieri non poteſt. Et ſicet alienaverit eam, non debetur nec ipſa res, nec æſtimatio ejus. §. 10. *inſt. de legat. l.* 13. *C. eod.*

IX.

9. If the Legatee has acquired by a lucrative Title what was bequeathed to him, the Legacy is null.

If after that a Teſtator had bequeathed a Thing which was not his own, and which he knew was not his own, the Legatee had acquired the Property of it for a valuable Conſideration, as in a Sale, the Legacy would ſubſiſt, and the Value of it would be due to the Legatee; for he ought to reap the Profit of the Legacy. But if he had acquired the Thing by a lucrative Title, as by Gift, or by another Legacy from the Proprietor thereof; the Legacy of the Teſtator, who was not Owner of the Thing bequeathed would remain null, unleſs it ſhould appear that his Intention was that the Legatee ſhould have in this Caſe, beſides the Thing it ſelf, likewiſe its Value. But if this Intention was not very evident, it would be ſufficient for the Legatee to have without any Charges the very Thing which the Teſtator intended to give him, altho he came by it another way, ſince by that the Intention of the Teſtator would be accompliſhed *m*

m Si res aliena legata fuerit, & ejus rei vivo teſtatore legatarius dominus factus fuerit: ii quidem ex cauſa emptionis, ex teſtamento actione pretium conſequi poteſt. Si vero ex cauſa lucrativa, veluti ex donatione, vel ex alia ſimili cauſa, agere non poteſt. Nam traditum eſt duas lucrativas cauſas in eundem hominem, & eandem rem concurrere non poſſe. §. 6. *inſt. de legat.*

Fideicommiſſum relictum, & apud eum, cui relictum eſt, ex cauſa lucrativa inventum, extingui placuit: niſi defunctus æſtimationem quoque ejus præſtari voluit. *l.* 21. §. 1. *ff. de legat.* 3.

Quæro cum corpora legata etiam nunc ex lucrativa cauſa poſſideantur, an à ſubſtitutis peti poſſint. Reſpondi, non poſſe. *l.* 88. §. 7. *in f. de leg.* 2.

X.

10. A Legacy of the ſame Thing to the ſame Perſon by two Teſtators.

If it ſhould happen that two Teſtators had bequeathed the ſame Thing to one and the ſame Perſon, and that by the Effect of one of the two Legacies the Legatary had been made Maſter of the Thing bequeathed, he could not pretend by the other Legacy to have the Value of it. For the Intention of both the Teſtators would be fulfilled, ſince he would have that which both the one and the other had a mind to give him. But if he had received by one of the two Teſtaments the Value of the Thing before he had the Thing it ſelf, which might afterwards come to him by the other Legacy of the Teſtator, who was Maſter of it, he would have the Benefit thereof, and the Teſtamentary Heir would be obliged to give it him *n* For the Value which he had already received, would not diſcharge the Teſtamentary Heir of him who had bequeathed a Thing which was his own, and it would not be juſt that this Teſtamentary Heir ſhould reap the profit of the Thing bequeathed.

n Hac ratione, ſi ex duobus teſtamentis eadem res eidem debeatur: intereſt, utrum rem, an æſtimationem ex teſtamento conſecutus ſit. Nam ſi rem habet agere non poteſt; quia habet eam ex cauſa lucrativa, ſi æſtimationem, agere poteſt. §. 6. *in f. inſt. de legat.*

XI.

11. Two Legacies of one and

We muſt not reckon among Legacies of one and the ſame Thing, thoſe which

The ſame Sum, are not two Legacies of the ſame thing.

which conſiſt in a like Sum of Money, or in a like Quantity of thoſe ſorts of Things that are given by Number, Weight, or Meaſure; but only thoſe where two Teſtators happen to deviſe one and the ſame Land or Tenement, or other particular Thing which is the ſame in Subſtance. Thus, the Legacies of the like Sums of Money to one and the ſame Legatary in the Teſtaments of two different Perſons, would have their Effect: And if two Teſtators had bequeathed each of them a Penſion, or Alimony, to a Legatee, either of the ſame or different Sums, both the Legacies would be due; for it was the Intention of each of the two Teſtators to give to the Legatee a part of his Goods. Thus, the Legacy of the one would not hinder the Effect of the Legacy of the other. And it would be the ſame thing in the Caſe of two Annuities, or Rents of another nature, if the Legatee having acquired one of them by a Donation, or by ſome other Title, the other ſhould be afterwards left him by a Teſtament *o*.

o Titia Seio teſſeram frumentariam comparari voluit poſt diem trigeſimum a morte ipſius. Quæro, cum Seius, viva teſtatrice teſſeram frumentariam ex cauſa lucrativa habere cœpit, nec poſſit id, quod habet petere: an ei actio competat. Paulus reſpondit ei, de quo quæritur, pretium teſſeræ præſtandum. Quoniam tale fideicommiſſum magis in quantitate quam in corpore conſiſtit. *l.* 87. *ff. de legat.* 2.

XII.

12. The Deviſe of a Land or Tenement in which the Teſtator has only a Share, is reduced to that Share.

If a Teſtator, having a Land or Tenement in common with another Perſon, had deviſed the ſame, without mentioning his Portion of it, but ſaying barely, that he deviſed the ſaid Land or Tenement, the Deviſe would have its Effect only for the Portion thereof that did belong to the Teſtator. For it would be preſumed that he meant only to give away the Share that he had in the ſaid Land or Tenement *p*.

p Cum fundus communis legatus ſit, non adjecta portione, ſed *meum* nominaverit, portionem deberi conſtat. *l.* 5. §. 2. *ff. de leg.* 1.

XIII.

13. A Legacy to a Debtor of what he owes.

A Creditor may bequeath to his Debtor all that he owes him, or a part of it. But this Legacy, as all other Legacies, does no prejudice to the Creditors of the Teſtator, who are preferred to all the Legataries, as has been mentioned in the laſt Article of the firſt Section; and the Debtor who is Legatee for what he owes, will not be diſcharged from his Debt, unleſs there be Goods enough in the Inheritance to ſatisfy all the Creditors of the Teſtator, and likewiſe the *Falcidian* Portion due to the Teſtamentary Heir, as ſhall be ſhewn in the following Title *q*.

q Liberationem debitori poſſe legari jam certum eſt. *l.* 3. *ff. de liber. leg.*

Omnibus debitoribus ea quæ debent recte legantur: licet domini eorum ſint. *l.* 1. *ff. eod.*

¶ It appears from theſe two Texts, that it was a Doubt in the *Roman* Law, whether a Creditor could bequeath to his Debtor that which he owed him. The Doubt was founded, as appears by theſe words, *Licet domini eorum ſint*, upon this, that one cannot bequeath to a Perſon what is already his, and that what is due by a Debtor is ſtill the Debtor's, until he ſtrips himſelf of it by paying it to his Creditor. We make this remark only becauſe of the Difficulty which the Reader might find in theſe Texts. For as to the Validity of ſuch a Legacy, who can doubt of it? But we muſt add on this Subject one Reflexion more, which another Text, relating to the Manner in which a Teſtator might diſcharge his Debtor, ſeems to deſerve. It is a Law in which it is ſaid, That if a Creditor, being ſick, had delivered into the Hands of a third Perſon the Bond or Obligation of the Sum due to him by one of his Debtors, charging the ſaid Perſon to give him back the ſaid Bond or Obligation in caſe he ſhould recover, and to deliver it up to the Debtor in caſe he ſhould die; and that this laſt Caſe happened, the Heir or Executor of the ſaid Creditor could not demand the ſaid Debt of the Debtor *. It is to be remarked on this Deciſion, that ſuch a Diſpoſition would not be juſt, and ought not to be executed except with ſeveral Precautions, which divers Circumſtances might demand. For in the firſt place, it would be null if it were made to defraud the Creditors of the Perſon who ſhould give ſuch an Order. And ſecondly, ſince this Diſpoſition would be only a Donation in proſpect of Death, it would be liable to be curtailed both for the Falcidian Portion of the Teſtamentary Heir, which ſhall be treated of under the following Title, and for the Legitime or Legal Portions of the Children. And it would likewiſe be ſubject to the

* Si quis decedens Chirographum Seii Titio dederit: *Ut poſt mortem ſuam det, aut, ſi convaluiſſet, ſibi redderet:* Deinde Titius, defuncto donatore, Seio dederit, & hæres ejus petat debitum, Seius doli exceptionem habet. *l.* 2. §. 2. *ff. de liber. leg.*

Diminution which the Cuſtoms make of all Diſpoſitions made in proſpect of Death, in favour of the Heirs of Blood. But altho there ſhould be no Cauſe for diminiſhing or reducing the ſame, and that the Queſtion were only about the Validity of ſuch a Diſpoſition, yet the Circumſtances thereof might give riſe to Difficulties. Thus, for example, if we ſuppoſe that a Creditor, to whom a Rent was due, had depoſited the engroſſed Copy of the Deed, by which the Rent was conſtituted, into the hands of a third Perſon, that he might deliver up the ſame after his Death to his Debtor; ſeeing there would be no other Proof of this Will of the Deceaſed beſides the Declaration which the Depoſitary ſhould make of it, and that the Title or Deed by which the Rent was conſtituted would remain entire, the original Minute thereof being lodged in the hands of the Notary Publick; the bare Declaration of this Depoſitary would not be ſufficient to prove a Diſpoſition made in proſpect of Death, and to annul a Debt, the Title whereof would ſtill be ſubſiſting, and of which there would appear no Diſcharge or Acquittance. But if we ſuppoſe that the Title by which this Rent was conſtituted were an Obligation, of which there were no original Minute, and that the Heir or Executor of this Creditor had cauſed the ſame to be ſeized in the hands of the Depoſitary before he had delivered it to the Debtor, pretending to diſpute the Validity of ſuch a Diſpoſition, or not agreeing that the Deceaſed ever had ſuch an Intention; the Queſtion in ſuch Caſe would ſeem to depend on the Circumſtances of the Sum, the Goods of the Deceaſed, the Quality of the Depoſitary, and other Circumſtances which might help us to judge whether the Declaration of the Depoſitary ought to ſupply the want of a Diſpoſition in proſpect of Death made according to Form.

XIV.

14. The Legacy of what is due from one of two Perſons who are indebted for the ſame Sum, acquits only him to whom it is left.

If a Teſtator, to whom two Debtors ſhould be engaged each of them for the whole Debt, bequeaths to one of the two that which he owes him, this Legacy will acquit only that Legatee, and the other will remain obliged for his Portion. For altho the Legatee was bound for the whole Debt, yet the Legacy would have its entire Effect by diſcharging him of his Share of the Debt, ſince he will not be any ways accountable for the Portion of his Fellow-Debtor, who will owe that all alone *r*. But if theſe Debtors were Copartners, and it appeared that the Intention of the Teſtator was to annul the Debt in favour of the Company, the Legacy would be common both to the one and the other *s*.

r Si cum alio ſim debitor, puta duo res ſuimus promittendi, & mihi ſoli teſtator conſulendum voluit: agendo conſequar, non ut acceptos liberet, ne etiam conreus meus liberetur contra teſtatoris voluntatem: ſed pacto liberator. *l.* 3. §. 3. *ff. de liber. leg.*

s Conſequenter quæritur, an & ille ſocius pro legatario habeatur cujus nomen in teſtamento ſcriptum non eſt: licet commodum ex teſtamento ad unumque pertineat, ſi ſocii ſint. Et eſt verum non ſolum eum, cujus nomen in teſtamento ſcriptum eſt legatarium habendum, verum eum quoque qui non eſt ſcriptus ſi & ejus contemplatione liberatio relicta eſſet. *d. l.* 3. §. 4.

XV.

15. The Legacy of a Delay of Payment to a Debtor, diſcharges him of the Intereſt for that Time.

A Teſtator may bequeath to his Debtor a Reſpite for the Payment of that which he owes him. And this Legacy will have this Effect, that the Teſtator's Heir or Executor cannot for the Time of that Forbearance demand any Intereſt. And much leſs could he pretend to Coſts and Damages, if the Debt were of ſuch a nature as the Default of Payment might give a handle for ſuch a Demand *t*.

t Illud videndum eſt, an ejus temporis intra quod petere hæres veritus eſt, vel uſuras vel pœnas petere poſſit: & Priſcus Neratius exiſtimabat, committere eum adverſus teſtamentum, ſi periſſet. Quod verum eſt. *l.* 8. §. 2. *ff. de liber. leg.* See the third Article of the ſecond Section of Intereſt, Coſts, and Damages.

XVI.

16. In what Senſe the Father, who is Guardian to his Son, may be diſcharged from giving an Account of his Adminiſtration.

If a Son, whoſe Father had been his Guardian, happening to die without Children, before the Father had made up the account of his Guardianſhip, had ordained by his Teſtament, that his Executors, if he had named others together with his Father, ſhould not demand of him any account of his Adminiſtration, this Diſpoſition would have its intire effect: for it was in his power to give nothing at all to theſe other Executors. But if this Teſtator had Children to whom the Grandfather ought to give an account, it would be reaſonable to give to ſuch a Diſpoſition the Temperaments that Equity might require according to the Circumſtances, ſo as not to oblige the Grandfather to ſo ſtrict an account as might be required of another Guardian, and likewiſe not to do any

thing

thing to the prejudice of the Children, under pretext of the Favour that ought to be ſhown to the Grandfather *u*.

u Titius teſtamento facto, & filius hæredibus inſtitutus, de patre tutore ſuo quondam facto ita loquutus eſt: *Seium patrem meum liberatum eſſe volo ab actione tutelæ.* Quero, hæc verba quatenus accipi debent, id eſt, an pecunias, quas vel ex venditionibus rerum factis, aut nominibus exactis, in ſuos uſus converit, vel nomine ſuo fœneravit, filius & hæredibus teſtatoris, neptibus ſuis debeat reddere? Reſpondit, eum, cujus nomo eſt, æſtimaturum: præſumptio enim propter naturalem affectum facit, omnia patri videri conceſſa: niſi aliud ſenſiſſe teſtatorem, ab hæredibus ejus approbetur. *l.* 28. §. 3. *ff. de liber. leg.*

¶ It is to be remarked on the Rule explained in this Article, that we have turned it in ſuch a manner as to accommodate it to our Uſage. For we ſhould not obſerve the Rule, ſuch as it is explained in the Text quoted on this Article. And if a Father, who had had the Tuition of one of his Children, having alſo other Children, had alienated the Goods of the Child whom he had had under his Tuition, and had gather'd in ſome of his Debts; he would be bound to give an account of them to his Grandchildren, Heirs to their Father, whoſe Guardian he was, ſince it would not be juſt that his other Children ſhould have the Profit of the Goods of their Brother to the prejudice of his Children their Nephews.

It may be obſerved in relation to the Accounts of the Adminiſtration which Fathers may have of the Eſtates of their Children, that by the Diſpoſition of ſome Cuſtoms the Fathers are Tutors, Guardians, or Stewards to their Children, and have the Enjoyment of their Revenues without being liable to give an account. But this is to be only of what the Father may conſume for his own uſe, but not of what he may alienate.

XVII.

17. *A Legacy of a thing laid in pawn.*

If a Teſtator bequeaths a thing which he had pawned to a Creditor, the Executor will be bound to pay the Debt in order to redeem and deliver to the Legatee the thing bequeathed, unleſs the Words of the Legacy, or other Proofs, ſhould make it appear that it was the Intention of the Teſtator to charge the Legatary with the Payment of the Debt. But if the Pledge had been ſold for the Debt by the Creditor, the Executor would be bound to give the Value of it to the Legatee, unleſs he ſhould prove that the Intention of the Teſtator was that the Legacy ſhould be null in that Caſe *x*.

x Prædia obligata, per legatum vel fideicommiſſum relicta, hæres luere debet. Maxime cum teſtator conditionem eorum non ignoravit, aut ſi ſciſſet, legaturus tibi aliud quod minus non eſſet, fuiſſet: ſi vero a creditore diſtracta ſint, pretium hæres exſolvere cogitur: niſi contraria defuncti voluntas ab hærede oſtendatur. *l.* 6. *C. de fideic.*

Quod ſi teſtator eo animo fuit, ut quamquam liberandorum prædiorum onus ad hæredes ſuos pertinere noluerit, non tamen aperte utique de his liberandis ſenſerit: poterit fideicommiſſarius per doli exceptionem a creditoribus qui hypothecaria rerum agerent conſequi, ut actiones ſibi exhiberentur. Quod quamquam ſuo tempore non fecerit, tamen per jurisdictionem præſidis Provinciæ id ei præſtabitur. *l.* 57. *in f. ff. de legat.* 1. *V. l.* 15. *ff. de dote præleg.* §. 5. *inſt. de legat.* See the fifteenth Article of the eleventh Section.

¶ We have not put down in this Article that which is ſaid in the *5th* §. *inſt. de legat.* that the teſtamentary Heir is not bound to redeem the thing bequeathed, except in the Caſe when the Teſtator knew that it was in pawn. For beſides that it is always to be preſumed, that every Man knows what is of his own Fact and Deed, and that a Debtor is not ignorant that he is indebted, and that his Goods are mortgaged for his Debts, whether he have laid any particular thing in pawn in the hands of his Creditor, or that he has only mortgaged his Goods in general, it may be remarked that in the firſt Text cited on this Article, and likewiſe in the beginning of the *57th Law de legat.* 1. it is ſaid, that the Legatee is not bound to redeem the thing bequeathed, altho the Teſtator was ignorant that it was in pawn, if we judge that if the Teſtator had known it he would have left another Legacy of equal Value to that Legatee. Thus this Preſumption being always natural enough, it is alſo natural that the teſtamentary Heir ſhould redeem the thing that is bequeathed. To which we may add, that by the ſecond Text cited upon this Article it would ſeem that the Legatee is not bound to acquit the Debt unleſs he be charged ſo to do by the Teſtament; and that if he pays the Debt, he may get himſelf to be ſubſtituted to the Creditor, in order to recover from the teſtamentary Heir what he ſhall have paid for redeeming his Legacy. And in a word, it may be ſaid that according to our Uſage it can never happen that a Legatee ſhould be bound to redeem the thing bequeathed, unleſs the Teſtator has obliged him to do it. For ſince, according to the Texts that have been quoted, that Burden lies on the teſtamentary Heir, if the Teſtator knew that the thing bequeathed was mortgaged, and that by our Uſage all Mortgages are founded on Titles or Deeds which

which affect in general all the Goods of the Debtor, we ought always to ſuppoſe that the Mortgage was known to the Debtor. And in the caſe of a Legacy of Moveables that have been pawned to a Creditor, the Teſtator can never pretend to be ignorant of that Engagement. Thus it is not likely that in our Uſage there ſhould ever be occaſion for a Proof of the Knowledge which the Teſtator might have of the Engagement of the thing bequeathed, theſe ſorts of Proofs being otherwiſe directly contrary to our Uſage. So that excepting the Caſe of an expreſs Will of the Teſtator, which ſhould oblige the Legatary to redeem the thing bequeathed, it would ſeem that the Burden of it ought always to lie on the teſtamentary Heir.

XVIII.

18. *One may bequeath things that are not in being.*

One may bequeath things which are not as yet in being, but which are to come; as the Fruits that ſhall grow on ſuch a Ground, or the Profit that ſhall be made of a certain Commerce: and theſe ſorts of Legacies imply the Condition that the thing thus bequeathed ſhall happen in its time, and they have their Effect according to the Event *y*.

y Etiam ea quæ futura ſunt legari poſſunt. *l.* 17. *ff. de leg.* 3.

Quod in rerum natura adhuc non ſit, legari poſſe, veluti quidquid illa ancilla peperiſſet. *l.* 24. *ff. de legat.* 1.

XIX.

19. *A Legacy of a certain Quantity of Corn to be taken out of a Crop, or out of a certain Place.*

If a Teſtator had bequeathed a certain Quantity of Corn to be taken out of ſuch a Crop, or out of a Granary, and the ſaid Quantity is not found there, the Legacy will be reſtrained to the Quantity that is there found *z*. But if the Legacy were of a certain Quantity of Corn, without determining whence it ſhould be taken, the ſaid Quantity would be due, altho there were no Corn in the Inheritance *a*, in the ſame manner as a Legacy of a Sum of Money, which would be equally due, whether there were any Money in the Succeſſion,

z Cum certus numerus amphorarum viii legatus eſſet, ex eo quod in fundo Semproniano natum eſſet, non amplius deberi placuit: & quaſi taxatione vicem obtinentibus hoc verba, *quod natum erit*. *l.* 5. *ff. de leg.* 2.

Si quis legaverit ex illo dolio amphoras decem: & minus [illegible] ſed pauciores inveniri poſſint; non utrique [illegible] ſed hoc tantummodo accipit, quod inventum. *l.* 8. §. 2. *ff. de leg.* 2.

a Si certum fundum legaverit, [illegible] amphorarum, cum nullum vinum [illegible] vinum heredem præſtaturum, & [illegible]. *l.* 5. *ff. de inſtr. inſtr. vel de legat.*

or whether there were none at all *b*.

b Si pecunia legata in bonis legantis non ſit, ſolvendo tamen hæreditas ſit: hæres pecuniam legatam dare compellitur: ſive de ſuo, ſive ex venditione rerum hæreditariarum, ſive unde voluerit. *l.* 12. *ff. de legat.* 2.

XX.

20. *An indefinite Legacy of Moveables.*

When a Teſtator hath bequeathed Moveables, ſuch as his Hangings and other Furniture of his Houſe, or the Moveables of a Country Houſe that ſerve for the Management of a Farm, this Legacy will have the Bounds or Extent that the Expreſſion and Intention of the Teſtator may give to it. And if it appears that his Intention was to give only what he had at the time of making the Teſtament, what he ſhall happen afterwards to acquire will not be comprehended in the Legacy. As on the contrary, if it appears that the Legacy is meant of the Moveables that ſhall be found at the time of his Death, it will comprehend every thing that ſhall be then found, which is of the Nature of the things bequeathed *c*.

c Lucius Titius fundum, uti erat inſtructus, legaverat. Quæſitum eſt, fundus inſtructus quemadmodum dari debeat: utrum ſicut inſtructus fuit mortis patriſfamiliæ tempore, ut quæ medio tempore adgnata, aut in fundum illata ſunt, hæredis ſint: an vero inſtructus fundus eo tempore inſpici debeat, quo factum eſt teſtamentum, an vero eo tempore, quo fundus peti cœperit, ut quidquid eo tempore inſtrumenti deprehendatur, legatario proficiat. Reſpondit, ea quibus inſtructus ſit fundus, ſecundum verba legati, quæ ſint in eadem cauſa, cum dies legati cedat, inſtrumento contineri. *l.* 28. *ff. de inſtr. vel inſtr. legat.*

Si ita eſſet legatum *veſtem meam, argentum meum, damnas eſto dare*: id legatum videtur, quod teſtamenti tempore fuiſſet. Quia præſens tempus ſemper intelligeretur, ſi aliud comprehenſum non eſſet. Nam cum dicit, *veſtem meam, argentum meum*, hac demonſtratione *meum* præſens non futurum tempus oſtendit. *l.* 7. *ff. de aur. arg.* See the 13th and 14th Articles of the following Section.

XXI.

21. *The Legacy of a thing ſpecified as belonging to the Teſtator, is null if the thing is not found among his Goods.*

When a Teſtator bequeaths a certain thing which he ſpecifies as being his own, the Legacy will not have its effect unleſs that thing be found extant in the Succeſſion. Thus, for example, if he had ſaid, *I bequeath to ſuch a one my Watch, or my Diamond-Ring*, and that there were not found in the Succeſſion neither Diamond-Ring, nor Watch, the Legacy would be null *d*. But if he had ſaid, *I bequeath a Diamond-Ring*, or *a Watch*, the Legacy would be due, and would have its Effect, as ſhall be explained in the following Article.

d Species nominatim legatæ ſi non reperiantur, nec dolo hæredis deeſſe probentur: pretii æſtimatio teſtamento non poſſunt. *l.* 32. §. 5. *ff. de leg.* 2.

XXII.

XXII.

22. *A Legacy of a thing indetermined in its kind, how it ought to be underſtood.*

One may bequeath not only a certain thing deſcribed in particular, as ſuch a Houſe, ſuch a Watch, ſuch a Sute of Hangings, but indefinitely and in general a Horſe, a Sute of Hangings, a Watch, or other things of the like nature. And ſeeing theſe ſorts of things may be of different Qualities in the ſame kind, if the Legacy does not mark the Price of them, or does not determine in particular what the thing bequeathed ought to be, whether there be ſeveral of that thing in the Succeſſion, or whether there be none at all; the Executor or teſtamentary Heir cannot give the worſt, nor the Legatary chuſe the beſt. But this Legacy will be moderated according to the Circumſtances of the Quality of the Teſtator, and of the Legatee, and the other Circumſtances which may help to diſcover the Intention of the Teſtator *e*, purſuant to the Rule explained in the 10th Article of the 7th Section of Teſtaments, and the others which ſhall be explained in the 7th Section of the Title of Legacies.

e Legato generaliter relicto, veluti *homines*, Caius Caſſius ſcribit, id eſſe obſervandum, ne optimus vel peſſimus accipiatur: quæ ſententia reſcripto Imperatoris noſtri & Divi Severi juvatur: qui reſcripſerunt, homine legato actorem non poſſe eligi. *l.* 37. *ff. de legat.* 1.

Illud verum eſt hæredem in hoc teneri, ut non peſſimum det. *l.* 110. *eod.* See the 2d and following Articles of the 7th Section.

We muſt obſerve the Difference between the Caſe in this Article, and that of a Legacy which ſhould give to the Legatee the Right to chuſe, which ſhall be explained in the 5th Article of the 7th Section.

XXIII.

23. *A Legacy of a Work to be done.*

One may bequeath not only Sums of Money, Rights, Debts, and all other things; but likewiſe ſome Work to be done; as if a Teſtator charges his Executor or teſtamentary Heir to rebuild the Houſe of ſome poor Man, or to do ſome other Work, whether for a publick uſe, or for ſome particular Perſon *f*.

f Si Teſtator dari quid juſſiſſet, aut opus fieri. *l.* 49. §. *ult. ff. de legat.* 2.

XXIV.

24. *An indefinite Deviſe of a Land or Tenements is null, if the Teſtator has none.*

If a Teſtator who had two or more Houſes, had deviſed a Houſe without determining by any Circumſtance which of his Houſes he had a mind to give, the Deviſe would be good; and the Executor or teſtamentary Heir would be obliged to give one of the Houſes, according to the Rules which ſhall be explained in the 7th Section. But if this Teſtator who had deviſed a Houſe, had none of his own, or if having no Lands, he had deviſed a Land indefinitely; theſe Deviſes would remain without any Effect. For one could not know what the Teſtator had meant; and it might be ſaid that the Teſtator himſelf did not know his own Meaning, and that he jeſted with him to whom he left ſuch a Legacy *g*.

g Si domus alicui ſimpliciter ſit legata, neque adjectum, quæ domus: cogentur hæredes, quam vellet domum ex his quas teſtator habebat, legatario dare. Quod ſi nullas ædes reliquerit, magis deriſorium eſt, quam utile legatum. *l.* 71. *ff. de leg.* 1.

SECT. IV.

Of Acceſſories to things bequeathed.

The CONTENTS.

1.

1. *Definition of Acceſſories.*

AN Acceſſory to a thing bequeathed is that which not being part of the thing itſelf, has nevertheleſs ſuch a Connexion with it, as that it ought not

to

to be ſeparated from it, and ought to follow it. Thus the Shoes and Halter of a Horſe, and the Frame of a Picture are Acceſſories to them *a*.

a Quæ rebus accedunt. *l.* 1. §. 5. *depoſ.* Ut veſtis homini, equo capiſtrum. *d.* §.

II

2. *Two ſorts of Acceſſories.*

We may diſtinguiſh two ſorts of Acceſſories to things bequeathed. Thoſe which follow naturally the thing, and which are comprehended in the Legacy, altho they be not mentioned. And thoſe which are not added to the Legacy except by a particular Diſpoſition of the Teſtator. Thus the Legacy of a Watch comprehends the Caſe of it, and the Legacy of a Houſe includes the Keys thereof. Thus on the contrary, the Legacy of a Houſe will not comprehend the Moveables that are in it, unleſs the Teſtator have expreſs'd the ſame *b*.

b *See the Articles which follow.*

III.

3. *How we diſtinguiſh that which is an Acceſſory to a thing.*

There are Acceſſories to certain things which are not ſeparated from them, ſuch as the Trees planted in a Ground: And theſe ſorts of Acceſſories follow always the thing bequeathed, if they are not excepted in the Legacy. And there are Acceſſories which altho ſeparated from the things, yet follow them likewiſe; ſuch as the Harneſs of a Set of Coach-Horſes, and others of the like nature. There may be alſo a Progreſſion of Acceſſories to Acceſſories, ſuch as precious Stones ſet in the Caſe of a Watch. And laſtly there are certain things, of which it may be doubted whether they be Acceſſories to others or not. And this may depend on the Diſpoſition of the Teſtator, and on the Extent or Bounds he gives to his Legacies as he ſees good. Thus there is no other general Rule in Doubts concerning what ought to go along with the thing bequeathed as its Acceſſory, beſides the Intention of the Teſtator, whoſe Expreſſion, together with the Circumſtances and Uſages of the Places, if there be any, may help us to judge what ought to be accounted Acceſſory, and what not *c*. But if the Diſpoſition of the Teſtator leave the thing in doubt, we may in every particular Caſe judge of what ought to be comprehended in the Legacy as Acceſſory, and what not, by the particular Rules on the ſeveral Caſes explained in the Articles which follow.

c In infinitum primis quibuſque proxima copulata procedunt. Optimum ergo eſſe Pedius ait, non propriam verborum ſignificationem ſcrutari: ſed in primis quid teſtator demonſtrare voluerit: deinde in qua præſumptione ſunt qui in quaque regione commorantur. *l.* 18. §. 3. *in f. ff. de inſtr. vel inſtrum. leg.*

IV.

4. *Acceſſories to a Houſe.*

If a Teſtator deviſes a Houſe without ſpecifying any thing as to what he intends ſhould be comprehended in the ſaid Deviſe, the Legatary or Deviſee will have the Ground, the Edifice and its Dependencies, ſuch as a Court, a Garden, and other Appurtenances of the Houſe, with the Paintings in Freſco, and other Ornaments or Conveniences, which, according to the Expreſſion of ſome Cuſtoms, are fixed to the Houſe with Cramp-Irons and Nails, or with Plaiſter, with intent that they ſhould always remain there; for theſe ſorts of things are of the nature of Immoveables. But there will be no Moveable comprehended in this Legacy, except the Keys, and other things if there were any, which being of the like uſe, would be equally neceſſary *d*.

d Quæcunque infixa inædificataque ſunt, fundo legato continentur. *l.* 21. *ff. de inſtr. vel inſtrum. leg.* Domo legata neque inſtrumentum ejus, neque ſupellex aliter legato cedit, quam ſi id ipſum nominatum expreſſum a teſtatore fuerit. *l. ult. ff. de ſupell. legat.*

V.

5. *The Edifice an Acceſſory to the Ground, and likewiſe what is added to its extent.*

If he who had deviſed by Teſtament a Land or Tenement, makes afterwards ſome Addition to it; as if he adds any thing to its Extent, or if he builds ſome Edifice upon it, theſe Augmentations become part of the Ground, and go to the Legatee, unleſs the Teſtator hath otherways order'd by his Teſtament *e*.

e Cum fundus legatus ſit, ſi quid (ei) poſt teſtamentum factum adjectum eſt, id quoque legato cedit, etiam ſi illa verba adjecta non ſint, *qui meus erit*, ſi modo teſtator eam partem, non ſeparatim poſſedit, ſed univerſitati prioris fundi adjunxit. *l.* 10. *ff. de legat.* 2.

Si areæ legatæ domus impoſita ſit, debebitur legatario, niſi teſtator mutaverit voluntatem *l.* 44. § 4. *ff. de leg.* 1. *l.* 39. *ff. de leg.* 2. See the 7th and 8th Articles. See the 14th Article of the 6th Section of Teſtaments.

VI.

6. *Another Acceſſory of the ſame nature.*

It would be the ſame thing in a Deviſe of a particular Eſtate in Land, if the Teſtator after having deviſed it, had added to it new Buildings, and even new Rights, or if he had purchaſed Grounds in order to enlarge either a Park, or ſome other Land or Tenement be-

belonging to the ſaid Eſtate. For all theſe ſorts of Augmentation would be Acceſſories that would follow the Deviſe, either becauſe of their Nature of Acceſſories, or becauſe it could not be preſumed that the Teſtator intended to ſeparate theſe ſorts of things, in order to leave them without the Land to his Executor or teſtamentary Heir *f*

f This is a Conſequence of the preceding Article.

VII.

7. *How that which is added to the Land that is deviſed, belongs or does not belong to the Deviſee.*

If the Legacy were of one entire Eſtate in Land, and if after the making of the Teſtament the Teſtator had added to it ſome Lands adjoining, this Augmentation might belong either to the Deviſee, or to the teſtamentary Heir, according as the ſaid new Purchaſe might be conſidered as an Acceſſory to the Legacy, or as being wholly independent on it. For if, for example, it were a Purchaſe of a parcel of Land made with a view to make a Field ſquare, or to ſerve as a Place to draw Water from for the uſe of other Grounds, or for ſome other Service, or even as an Addition only to the Land deviſed; theſe Acquiſitions would be Acceſſories that would go with the Legacy or Deviſe, in the ſame manner as that which ſhould be found to be naturally added to it by ſome Change made by the Courſe of an adjoining River. But if the Land that is purchaſed, and which borders on the Land that is deviſed, were of a different Nature from that which is deviſed, ſuch as a Meadow joining to a Vineyard which the Teſtator had deviſed; or if the Land acquired by the Teſtator were equally contiguous to the Land deviſed by him, and to another Land which the Teſtator had left to his Executor; theſe ſorts of Acquiſitions would not be Acceſſories to the Legacy, unleſs we ſhould be obliged to judge otherways by the Diſpoſition of the Teſtator, and the Circumſtances which might explain his Intention *g*.

g Si quis poſt teſtamentum factum fundo Titiano legato partem aliquam adjecerit, quam fundi Titiani deſtinaret: id, quod adjectum eſt, exigi a legatario poteſt. Et ſimilis eſt cauſa alluvionis: (Et) maxime ſi ex alio agro, qui fuit ejus, cum teſtamentum faceret, eam partem adjecit. *l.* 24. §. 2. *ff. de leg.* 1. Si univerſitati prioris fundi adjunxit. *l.* 10. *ff. de leg.* 2.

It appears by theſe Texts, that theſe Augmentations of the Land are meant of that which is added by the Teſtator, with intent to make it a part of the Land that is deviſed.

VIII.

8. *An Augmentation of the Land deviſed, which hath the effect to revoke the Deviſe.*

If a Teſtator who had deviſed a Land, builds afterwards upon it, this Acceſſory to the Land will go with the Land to the Legatary, unleſs it ſhould appear that the Teſtator intended to revoke the Legacy, as has been ſaid in the 5th Article. And if, for example, a Teſtator having deviſed a Place in a Town to build in, and afterwards builds a Houſe in it, or if having deviſed a Garden, Orchard, or other Place, he builds in it a Summer-Houſe or Lodge, theſe Buildings under theſe Circumſtances will belong to the Legatary. But if he had built in a Ground which he had deviſed, either a Houſe or other Conveniencies neceſſary for a Farm, to which he had joined the ſaid Ground, giving the ſaid Farm to another Legatary, or leaving it to his Heir or Executor, it would be judged from the uſe of the ſaid Building, that he had revoked the Legacy *h*.

h Si areæ legatæ domus impoſita ſit, debebitur legatario: niſi teſtator mutaverit voluntatem. *l.* 44. §. 4. *ff. de leg.* 1.

The Circumſtances mentioned in the Article ſhew clearly enough the Change of the Will of the Teſtator.

IX.

9. *The Deviſe of a Ground comprehends the Service neceſſary to the ſaid Ground from another Ground that is part of the Inheritance.*

If for the Uſe of a Ground, of which the Teſtator had deviſed the Uſufruct, the Service of a Paſſage thro another Ground of the Inheritance were neceſſary, the Executor or other Legatee, to whom the Ground that ought to be ſubject to the Service does belong, would be obliged to ſuffer it. For the Legatee ought to enjoy the Ground ſubject to the Uſufruct in the ſame manner as it was enjoyed by the Teſtator who took his Paſſage thro his own Ground: and this Acceſſory is ſuch, that it is the Intention of the Teſtator that it ſhould follow the Legacy *i*.

i Qui duos fundos habebat, unum legavit, & alterius fundi uſumfructum alii legavit. Quæro, ſi fructuarius ad fundum aliunde viam non habeat, quam per illum fundum qui legatus eſt, an fructuario ſervitus debeatur. Reſpondit, quemadmodum ſi in hæreditate eſſet fundus per quem fructuario poteſt præſtari via, ſecundum voluntatem defuncti videtur id exigere ab hærede, ita & in hac ſpecie non aliter concedendum eſt legatario fundum vindicare, niſi prius jus tranſeundi uſufructuario præſtet. Ut hæc forma in agris ſervetur, quæ vivo teſtatore obtinuerit: ſive donec uſusfructus permanet, ſive dum ad ſuam proprietatem redierit. *l.* 15. §. 1. *ff. de uſufr. legat.*

Altho this Text ſpeaks only of the Service that is neceſſary to the Legatee of an Uſufruct; yet the ſame Equity would require that this Service ſhould be likewiſe given to the Legatee of the Property. And the Preſumption of the Teſtator's Intention would be the ſame in this Legacy as in the other; ſince it cannot be ſuppoſed that he intended to make a fruitleſs Deviſe, and ſeeing this Deviſe could not have its Uſe without this Service, which changes nothing in the uſe that the Teſtator himſelf made

of

of his own Lands, in making one Ground to ſerve for the neceſſary Paſſage to another.

X.

10. *A reciprocal Service between the Legatees of two contiguous Houſes.*

If a Teſtator who had two Houſes joining to one another, deviſes one of them to one Legatary, and the other to another, or deviſes one of them, and leaves the other to his Heir or Executor; the Partition Wall of theſe two Houſes, which had for its ſole Owner the Teſtator, will become common to the two Proprietors of theſe two Houſes. Thus the reciprocal Service on this common Wall will be as an Acceſſory which will follow the Legacy *l*.

l Si is qui duas ædes habebat, unas mihi, alteras tibi legavit: & medius paries, qui unaſque ædes diſtinguat, intervenit: eo jure eum communem nobis eſſe exiſtimo. *l.* 4. *ff. de ſervit. leg.*

XI.

11. *The Legatary ought to have the uſe of the thing bequeathed.*

If of two Houſes belonging to a Teſtator, whereof one is left to the Heir or Executor, and the other given to a Legatee, or both are given to two Legatees, one of them could not be raiſed higher without taking away the Light of the other, or damaging it very much; the Executor or Legatee who ſhould chance to have the firſt Houſe, could not raiſe it but in ſuch a manner as that there ſhould remain for the other Houſe ſo much Light as ſhould be neceſſary for the Uſe of it. For it was not the Teſtator's Intention that either his Executor or this Legatee ſhould render the Legacy of the other Houſe uſeleſs *m*.

m Qui binas ædes habebat, ſi alteras legavit, non dubium eſt quin hæres alias poſſit altius tollendo, obſcurare lumina legatarum ædium. Idem dicendum eſt, ſi alteri ædes, alteri aliarum ulumfructum legaverit. *l.* 10. *ff. de ſervit. prad. urb.*

Sed ita officere luminibus, & obſcurare legatas ædes concedituir, ut non penitus lumen recludatur: ſed tantum relinquatur quantum ſufficit habitantibus in uſus diurni moderatione. *d. l. in f.*

XII.

12. *The Moveables of Houſes, whether in Town or Country, are not Acceſſories to them.*

The Legacy of a Houſe in the Town does not comprehend the Moveables that are in it, unleſs they are expreſly added by the Teſtator. Nor does the Legacy of a Houſe in the Country take in what Moveables may be in it that are neceſſary for cultivating the Lands, and for gathering in the Harveſt *n*. But this Legacy comprehends the things that are fixed to the Building, ſuch as in certain Places Preſſes and Tubs *o*.

n Dotes prædiorum, quæ græco vocabulo ἐφόδια appellantur, cum non inſtructa legantur, legatario non præſtantur. *l.* 21. §. 1. *de inſtr. vel inſtrum. legat.*

o Cum fundus ſine inſtrumento legatus ſit, dolia, molæ olivariæ & prælum, & quæcunque infixa inædificataque ſunt legato continentur. *l.* 21. *eod.*

XIII.

13. *In what manner Acceſſories to a Country-Houſe are under ſtood.*

The Legacy of a Country Houſe, together with what ſhall be found in it neceſſary for cultivating the Lands, and gathering in the Harveſt, comprehends the Moveables which may ſerve for theſe Uſes *p*. And if there be any doubt as to the Extent which this Legacy ought to have, it muſt be interpreted by the Preſumptions of the Teſtator's Intention, which may be gathered from the Words of the Teſtament, and from the Circumſtances, and we may likewiſe make uſe of what Lights can be had from the Uſage of the Places *q*.

p Inſtrumentum eſt apparatus rerum diutius manſurarum ſine quibus exerceri nequiret poſſeſſio. *l.* 12. *ff. de inſtr. vel inſtrum. legat.*

q Optimum ergo eſſe Pedius ait, non propriam verborum ſignificationem ſcrutari: ſed imprimis, quid teſtator demonſtrare voluerit, deinde in qua præſumptione ſunt, qui in quaque regione commorantur. *l.* 18. §. 3. *in f. eod.*

XIV.

14. *The Legacy of a Houſe with its Moveables.*

If a Teſtator had deviſed a Houſe with all its Moveables, this Legacy would comprehend all the Moveables that were in it deſtined for the Furniture of the ſaid Houſe: ſuch as Beds, Hangings, Pictures, Tables, Chairs, and other things of the like nature. But if there ſhould be found in it Hangings or other Moveables, laid up and deſtined either for Sale, or for the uſe of another Houſe, the Legatary would have no right to them *r*. And if on the contrary ſome Moveables of this Houſe ſhould chance to be ſomewhere elſe at the time of the Teſtator's Death, as if a Sute of Hangings had been lent out, or given to be mended, whatever were out of the Houſe upon ſuch an account, would nevertheleſs be comprehended in the Legacy *s*.

r Si fundus legatus ſit *cum his quæ ibi erant*, quæ ad tempus ibi ſunt, non videntur legata. *l.* 44. *ff. de leg.* 3.

s Neque quod caſu abeſſet, minus eſſe legatum: nec quod caſu ibi ſit magis eſſe legatum. *l.* 86. *eod.*

XV.

15. *Papers are not comprehended in a Legacy of all*

If in the Legacy of a Houſe the Teſtator had comprehended in general and indefinite Terms every thing that ſhould be found in the ſaid Houſe at the time of his Death, without excepting any thing,

Things found in a House.

this Legacy, which would comprehend all the moveable things, and even the Money *t*, would not comprehend the Debts owing to the Teſtator, nor his other Rights, the Deeds or Titles whereof ſhould be found in the ſaid Houſe. For the Debts and Rights do not conſiſt in the Papers which contain the Deeds or Titles of them, and have not their Situation in a certain Place *u*. But their Nature conſiſts in the Power which the Law gives to every one to exerciſe them. Thus the Deeds or Titles are only the Proofs of the Rights, and not the Rights themſelves

t Si fundus legatus ſit *cum his qui ibi erunt*, quæ ad tempus ibi ſunt, non videntur legata. Et ideo pecuniæ quæ fœnerandi cauſa ibi fuerunt, non ſunt legatæ. *l.* 44. *ff. de leg.* 3.

Uxori uſumfructum domuum & omnium rerum, quæ in his omnibus erant, *excepto argento*, legaverat——Reſpondit, excepto argento, & his quæ mercis cauſa comparata ſunt, cæterorum omnium uſumfructum legatariam habere. *l.* 32. §. 2. *ff. de uſu & uſuf. & red. leg.*

It follows from theſe Texts, that this Legacy would comprehend the Money, if it were not excepted.

u Caius Seius pronepos meus hæres mihi eſto ex ſemiſſe bonorum meorum, exceptis domo meâ, & paterna, in quibus habito, cum omnibus quæ ibi ſunt. Quæ omnia ſuas ad portionem hæreditatis quam tibi dedi, non pertinere. Quæro, cum ſit in his domibus argentum, nomina debitorum, ſupellex mancipia: an hæc omnia, quæ illic inveniuntur ad alios hæredes inſtitutos debeant pertinere. Paulus reſpondit: nomina debitorum non contineri, ſed omnium eſſe communia: in cæteris vero nullum pronepoti locum eſſe. *l.* 80. *ff. de leg.* 2.

Debts and other Rights have not a Situation in a certain Place, and are not comprehended in Places as Things corporeal are. We may remark this Diſtinction between Rights and other Things in a Law which ſpeaks of it on another occaſion. Quod ſi nec quæ ſoli ſunt ſufficiant, vel nulla ſint *ſoli pignora*, tunc pervenietur etiam ad *jura* *. *We ſee by this Text the Diſtinction between Rights and Things corporeal.*

* *L.* 15. §. 2. *in fine ff. de re jud.*

XVI.

16. The Acceſſory may be a thing of much greater Value than that whereof it is an Acceſſory.

The Acceſſories which ought to follow the thing bequeathed, are judged to be ſuch only by the Uſe that is made of them, and not by their Value: So that the Acceſſory is frequently of a much greater Value than the thing it ſelf to which it is Acceſſory; and it goes nevertheleſs to the Perſon to whom the thing is bequeathed. Thus, for example, precious Stones ſet in the Caſe of a Watch, are only an Ornament and an Acceſſory to it, and yet they follow the Legacy of the Watch *x*.

x Plerumque plus in peculio eſt quam in ſervo. Et nonnunquam vicarius, qui accedit, pluris eſt quam is ſervus qui venit. *l.* 44. *ff. de ædil. ed.*

Pretioſius fecit addens aliis gemmas & margaritis. *l.* 6. §. 1. *ff. de aur. arg. mund.*

SECT. V.

Of Legacies of an Uſufruct, or a Penſion, or Alimony, and other things of the like nature.

WE have not put down in this Section the Rule of the *Roman* Law, by which it is order'd, that if a Teſtator had bequeathed an Uſufruct to a Town or other Corporation, it ſhould laſt a hundred Years. And ſeeing we have explained in another Place *a* the Reaſon why we have not thought proper to inſert this Rule among the others, it is not neceſſary to repeat it here

a See the end of the Preamble of the Title of Uſufruct.

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18. *Legacies of Alimony are favourable.*

I. When

I.

1. *A Legacy of an Uſufruct.*

When a Teſtator bequeaths an Uſufruct, or the Enjoyment of a Houſe or other Tenement, the Condition of the Legatee will be the ſame as of other Uſufructuaries, and his Enjoyment will have the ſame Extent and the ſame Bounds. And he will likewiſe be liable in the ſame manner for the Charges of the Houſes or Lands of which he has the Uſufruct. Thus we may apply to this Legatary the Rules relating to Uſufruct, which have been explained in the Title of the ſaid Matter *a*.

a See the Title of Uſufruct. See the ninth Article of the preceding Section.

II.

2. *A Legacy of an Uſufruct to ſeveral Perſons, and of the Property to one of them.*

If a Teſtator had deviſed to two or more Legatees the Uſufruct of a Houſe or Lands, and the Property thereof to the Survivor of them, this Legacy would regard all the Legataries in two manners; for it would be pure and ſimple with regard to all of them as to the Uſufruct, and conditional likewiſe in reſpect of them all as to the Propriety; every one of them being called to the Propriety thereof upon condition of their ſurviving the others *b*.

b Quoties liberis uſusfructus legatur, & ei, qui noviſſimus ſupervixerit, proprietas utile eſt legatum. Exiſtimo enim omnibus liberis proprietatem ſub hac conditione, *ſi noviſſimus ſupervixerit*, dari. *l.* 11. *ff. de reb. dub.*

III.

3. *The Uſufruct of moveable things.*

Since one may bequeath the Uſufruct of moveable things *c*, if a Teſtator had bequeathed to his Wife the Uſufruct or Enjoyment of his Houſe, and of all the things that ſhould be found in it at the time of his Death, excepting the Gold and Silver, and that there were in the ſaid Houſe Merchant-Goods in which the Teſtator traded, and which he kept there for Sale, this Uſufruct would not comprehend theſe ſorts of things *d*. For it would be reſtrained to that which ſhould appear to be deſtined to be kept in the ſaid Houſe.

c See the third Section of Uſufruct.

d Uxori uſumfructum domuum, & omnium rerum, quæ in his domibus erant, excepto argento, legaverat: item uſumfructum fundorum & ſalinarum. Quæſitum eſt, an lanæ cujuſque coloris mercis cauſa paratæ, item purpuræ quæ in domibus erant, uſusfructus ei deberetur. Reſpondit, excepto argento, & his quæ mercis cauſa comparata ſunt, cæterorum omnium uſumfructum legatariam habere. *l.* 32. §. 2. *ff. de uſu & uſufr. leg.*

IV.

If a Teſtator had bequeathed a Portion of the Produce or Income of a certain Land or Tenement, and the Executor ſhould afterwards ſell the ſaid Land, the Legacy will nevertheleſs ſubſiſt. And it will be regulated not on the foot of the ſame Portion of the Intereſt of the Price of the Sale, but according to the Value of that Portion of the Fruits, whether it exceed the ſaid Intereſt, or fall ſhort of it. For the Legacy was of that which the ſaid Portion might be worth every Year. Thus this Change ſhall hurt neither the Executor, nor the Legatee *e*.

4. *How the Legacy of a Portion of the Produce of Land is affected after the Land is ſold.*

e Liberto ſuo ita legavit: *Præſtari volo Philoni, uſque dum vivet, quinquageſimam omnis reditus, quæ prædiis a colonis vel emptoribus fructus ex conſuetudine domus meæ præſtantur.* Hæredes prædia vendiderunt ex quorum reditu quinquageſima relicta eſt. Quæſitum eſt an pretii uſuræ, quæ exconſuetudine in Provincia præſtarentur, quinquageſima debeatur? reſpondit, reditus duntaxat quinquageſimas legatas, licet prædia vendita ſunt. *l.* 21. *ff. de ann. legat.*

V.

If the Legatary of an Uſufruct had been burdened by the Teſtator with a Fiduciary Bequeſt to ſome other Perſon, and the ſaid Legatary either could not, or would not accept the Legacy, the Heir or Executor who ſhould reap the Benefit of the Legacy would be obliged to ſatisfy the ſaid Fiduciary Bequeſt. For altho this Bequeſt regarded only the Perſon of the Legatary becauſe of his Uſufruct, and that the ſaid Uſufruct does not ſubſiſt any longer, yet the Enjoyment of the thing bequeathed, which was burdened with this Fiduciary Bequeſt does not go to the teſtamentary Heir or Executor, but with this Charge *f*.

5. *The Burden on a Legacy of an Uſufruct paſſes to the Executor, if the Legacy does not take place.*

f Si ab eo cui legatus eſſet uſusfructus, fideicommiſſum fuerit relictum: licet uſusfructus ad legatarium non pervenerit, hæres tamen penes quem uſusfructus remanet, fideicommiſſum præſtat. *l.* 9. *ff. de uſu & uſufr. leg.*

VI.

One may bequeath a certain Sum of Money, or a certain Quantity of Corn, or other Things, by way of Penſion, to be paid every Year to the Legatary, either during a certain Time, or during his Life. And there is this Difference between a Legacy of this Nature, and a Legacy of an Uſufruct, that in this laſt the Legatee has an uncertain Enjoyment, and may have either more or leſs, or ſometimes nothing at all; and that an annual Legacy of a certain Quantity is always the ſame. There is alſo this Difference between theſe two kinds of Legacies, that whereas the Legacy of

6. *The Difference between an annual Legacy, and a Legacy of an Uſufruct.*

an

an Uſufruct is only one Legacy of a Right to enjoy always, as long as it ſhall laſt; an annual Legacy contains as many Legacies as it may laſt Years. For every Year the Legatee ought to receive of the Executor the Revenue which is bequeathed him. Thus this Legacy is, as it were, conditional, and implies the Condition that the Legatary ſhould be living at the beginning of every Year, in order to have Right to the Legacy, and to tranſmit the Right of that Year to his Heir or Executor *g*.

g Si *in ſingulos annos* alicui legatum ſit: Sabinus (cujus ſententia vera eſt) plura legata eſſe ait. Et primi anni plenum, ſequentium conditionale: videri enim hanc ineſſe conditionem, *ſi vivat*: & ideo mortuo eo, ad hæredem legatum non tranſire. *l.* 4. *ff. de ann. leg.* See the following Articles.

See as to what is ſaid at the end of this Article concerning the Tranſmiſſion of an annual Legacy, the ninth Article; and as for the Uſufruct, there is no Tranſmiſſion of it, for it periſhes by the Death of the Uſufructuary. See the firſt Article of the ſixth Section of Uſufruct, and the fourth Article of the firſt Section of the ſame Title, and the Remark there made upon it.

VII.

7. *Another Difference.*

There is likewiſe this Difference between the Legacy of an Uſufruct and an annual Legacy, that a Legacy of an Uſufruct cannot be perpetual, becauſe it would annul the Right of Property; but an annual Legacy may be perpetual, whether it be in favour of a Corporation, or of the Heirs of ſome Family *h*.

h In annalibus legatis vel fideicommiſſis, quæ teſtator non ſolum certæ perſonæ, ſed & ejus hæredibus præſtari voluit, eorum exactionem omnibus hæredibus & eorum hæredum hæredibus ſervari pro voluntate teſtatoris præcipimus. *l.* 22. *C. de leg.*

VIII.

8. *Another Difference.*

There is alſo this other Difference between theſe two kinds of Legacies, that if the Lands which are ſubject to an Uſufruct ſhould produce nothing, the Right of the Uſufructuary would be of no uſe. But the Legacy of a certain Quantity of Corn, Wine, or other Things, is altogether independent of what may be reaped in the Harveſt or Vintage. And even altho ſuch a Legacy were aſſigned to be taken out of the Crop of every Year, it would nevertheleſs be due in a Year when there were no Crop, provided that the other Years could ſupply the ſaid Deficiency, and that the Intention of the Teſtator were not contrary thereto *i*.

i Vini Falerni quod domi naſceretur quotannis in annos ſingulos binos culeos hæres meus Attio dato: Etiam pro eo anno, quo nihil vini natum eſt, debere duos culeos: ſi modo ex vindemia cæterorum annorum dari poſſit. *l.* 17. §. 1. *ff. de ann. leg.*

Quæ ſententia, *ſi voluntas non adverſetur*, mihi quoque placet. *l.* 13. *ff. de trit. vin. vel. ol. leg.*

IX.

9. *An annual Legacy is acquired at the beginning of the Year.*

Annual Legacies accrue to the Legatary when the Year begins: And altho he dies as ſoon as the Year is begun, yet the Legacy for that whole Year is due *l*. For it is natural that a Legacy which is in lieu of a Fund for a Maintenance ſhould be acquired before hand.

l Si competenti judici annua legata vel fideicommiſſa tibi relicta probaveris, ab initio cujuſque anni exigendi ea habebis facultatem. *l.* 1. *C. quando dies leg. vel fid. ced. v. l.* 5. *ff. de ann. leg.* In omnibus quæ in annos ſingulos relinquuntur hoc probaverunt, ut initio cujuſque anni hujus legati dies cederet. *l.* 12. *ff. quando dies leg. ced.* See the ſixth Article.

X.

10. *A Legacy that is payable in ſeveral Years, is of another Nature than an annual Legacy.*

We muſt not reckon in the Number of annual Legacies, a Legacy of a certain Sum that is made payable every Year until a certain Time, for ſome other Cauſe than that of a Maintenance or Alimony, no more than a Legacy of a Sum made payable at ſeveral Terms of ſeveral Years. For theſe Payments being thus divided only to leſſen the Charge of the Executor, theſe Legacies would be of the ſame Nature with others, and as one ſingle Legacy, of which the entire Right would accrue to the Legatee at one and the ſame time. So that this Legatee happening to die before theſe Years were expired, he would tranſmit to his Heir or Executor the annual Payments that ſhould remain due *m*.

m Si cum præfinitione annorum legatum fuerit, veluti, *Titio dena uſque ad annos decem*: Julianus libro trigeſimo digeſtorum ſcripſit, intereſſe. Et ſi quidem alimentorum nomine legatum fuerit; plura eſſe legata & futurorum annorum legatum legatarium mortuum ad hæredem non tranſmittere. Si vero non pro alimentis legavit, ſed *in plures* penſiones diviſit exonerandi hæredis gratia, hoc caſu ait, omnium annorum unum eſſe legatum: & intra decennium decedentem legatarium, etiam futurorum annorum legatum ad hæredem ſuum tranſmittere. Quæ ſententia vera eſt. *l.* 20. *ff. quand. leg. ced.*

XI.

11. *How we are to judge whether a Legacy of a Sum of Money to be diſtributed on a certain Day, be perpetual, or only for one ſingle time.*

If a Teſtator had left a Legacy of a Charity to be given on a certain Day, or of a Sum of Money to be diſtributed, either to the Canons of a Chapter, or to the Eccleſiaſticks of ſuch a Pariſh, or to ſome other ſuch like Uſe, upon ſome Feſtival or Solemnity, which ſhould return every Year, as on a Saint's Day, or on ſome Feſtival of ſome of the Myſteries of Religion, without mentioning expreſly that the ſaid Charity or Dole ſhould

should be reiterated every Year on the said Day; we should judge by the Circumstances, whether the Intention of this Testator was to leave a Legacy of a Sum to be paid only for one single Time, or to be paid yearly at the Return of the said Day. Which would depend on the Quality of the Person, on the Largeness of his Estate, on the Words of the Testament, on the Motive of the Legacy, on the Fund set apart for the said Charity or Dole, and on the other Circumstances which might help us to judge of the Intention of this Testator *n*.

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

Attia fideicommissum his verbis reliquit, *quisquis mihi hæres erit, fidei ejus committo, uti det ex reditu cœnaculi mei & horrei, post obitum, sacerdoti, & hierophylaco, & libertis, qui in illo tempore erunt, denaria decem die nundinarum quas ibi posui.* Quæro, utrum his duntaxat qui eo tempore quo legabatur, in rebus humanis, & in eo officio fuerint, debitum sit, an etiam his, qui in locum eorum successerunt? Respondit, secundum ea quæ proponerentur, ministerium nominatorum designatum, cæterum datum templo. Item quæro, utrum uno duntaxat anno decem fideicommissi nomine debeantur, an etiam in perpetuum decem annua præstanda sint? Respondit, in perpetuum. *l.* 20. *eod.*

Altho these Texts seem not to make the Perpetuity of a Legacy of this kind to depend on the Circumstances, yet it appears evidently that the Legacies there mentioned are declared to be perpetual only because of the Circumstances which result from the Quality of the said Legacies, according to the Usage of those Times. And as for the Usage with us, it is hardly possible that such a Doubt should happen; for a Testator who should leave a perpetual Legacy of the nature of these explained in the Article, would not fail to express it, and to assign a Fund for a Charge of this kind.

XII.

12. *Legacies of Alimony are for Life.* Legacies of Alimony, or of a Maintenance, last during the Life of a Legatary, unless the Testator has limited the Time. For Alimony, and a Maintenance, left indefinitely, not being restrained to a certain Duration of Time, are for the whole Time that the Legatee shall stand in need of them, which comprehends his whole Life *o*.

o Mela ait, si puero vel puellæ alimenta relinquantur, usque ad pubertatem deberi. Sed hoc verum non est, tamdiu enim debebitur donec testator voluit: aut si non paret quid sentiat, per totum tempus vitæ debebuntur. *l.* 14. *ff. de alim. vel cib. leg.*

XIII.

13. *A Legacy of Alimony to the Yea[rs] of Puberty is understood to be meant of full Puberty.* Seeing a Legacy of Alimony, or of a Maintenance, is altogether favourable, if a Testator had devised such a Legacy to last only until the Legatary should attain the Age of Puberty, it would not end till he had attained the Age of full Puberty, that is, eighteen Years compleat in Males, and fourteen in Females *p*.

p Certe si *usque ad pubertatem* alimenta relinquantur, si quis exemplum alimentorum, quæ dudum pueris & puellis dabantur, velit sequi, sciat Hadrianum constituisse, ut pueri usque ad decimumoctavum, puellæ usque ad quartumdecimum annum alantur, & hanc formam ab Hadriano datam observandam esse Imperator noster rescripsit. Sed etsi generaliter pubertas non sic definiatur, tamen pietatis intuitu in sola specie alimentorum hoc tempus ætatis esse observandum, non est incivile. *l.* 14. § 1. *ff. de alim. vel cib. leg.*

See touching these two sorts of Puberty the Remark on the eighth Article of the second Section of Persons.

XIV

14. *A Legacy of Alimony comprehends Clothing and Lodging.* A Legacy of Maintenance, or barely of Alimony, comprehends Food, Raiment, and Lodging, unless the Testator shall have set some Bounds to it, for one cannot live without Clothes and Lodging. But this Legacy does not comprehend that which relates to the Instruction of the Legatee, either for a Trade, or some Profession, or for his Learning at School. For these Wants are of another nature, and are not so necessary as Food, Clothing, and Lodging *q*.

q Legatis alimentis, cibaria & vestitus & habitatio debebitur: quia sine his ali corpus non potest, cætera quæ ad disciplinam pertinent, legato non continentur. *l.* 6. *ff. de alim. vel cib. leg.* Nisi aliud testatorem sensisse probetur. *l.* 7. *eod.*

Rogatus es *ut quendam educes*, ad victum necessaria ei præstare cogendus es. *Paulus:* cur plenius est alimentorum legatum, ubi dictum est & vestiarium, & habitationem contineri? uno ambo exæquanda sunt. *l. ult. eod.*

XV

15. *Legacies of Alimony are regulated according to the Circumstances.* If a Testator had bequeathed Alimony, or a Maintenance, indefinitely, without specifying any thing, and if he had been wont to maintain the Person to whom he had left this Legacy, it would be regulated on the same foot. If not, it would be fixed either at a certain Sum of Money yearly, or a certain Quantity of Necessaries to be paid in Specie, and in proportion to the Quality of the Legatee, the Quality of the Testator and of his Estate, the Consideration which the Testator might have had for the Person of this Legatee, either out of Affection to him, or because of some Duty or other Tie, and according to the other Circumstances which might help us to judge of the Intention of

of the Teſtator, as has been ſaid in another Place *s*.

r Cum alimenta pro fideicommiſſum relicta ſunt non adjecta quantitate, ante omnia inſpiciendum eſt quæ defunctus ſolitus fuerat ei præſtare: deinde quid cæteris ejuſdem ordinis reliquerit: ſi neutrum apparuerit, tum ex facultatibus defuncti, & caritate ejus cui fideicommiſſum datum erit, modus ſtatui debebit. *l.* 22. *de alim. vel cib. leg.*

s See the twelfth Article of the ſixth Section of Teſtaments.

XVI.

16. *How a Legacy of Alimony which the Teſtator had been uſed to give in his Life-time is regulated.*

If he who gave always Alimony, or a Maintenance, to a Perſon, leaves him a Legacy of what he was wont to give him, and it does appear that he gave him differently, ſometimes more, and ſometimes leſs; the Legacy will be regulated upon the foot of what he gave the laſt time immediately preceding his Death, whether he had given more before that time, or leſs *t*.

t Sed ſi alimenta *quæ vivus præſtabat*, reliquerit, ea demum præſtabuntur quæ mortis tempore præſtare ſolitus erat. Quare ſi forte varie præſtiterit: ejus tamen temporis præſtatio ſpectabitur quod proximum mortis ejus fuit. Quid ergo ſi cum teſtaretur, minus præſtabat, plus mortis tempore, vel contra? adhuc erit dicendum, eam præſtationem ſequendam quæ noviſſima fuit. *l.* 14. §. 2. *ff. de alim. vel cib. leg.*

XVII.

17. *A Legacy of Alimony is due, altho the Legatary have been maintained ſome other way.*

Although Legacies of Alimony, or Maintenance, be deſtined for the Diet, Clothing, and Lodging of the Legatee, yet if the Teſtamentary Heir does not furniſh them to the Legatary, and he have them ſomewhere elſe, and even gratis, this Teſtamentary Heir, or his Heirs or Executors, if he were dead, would nevertheleſs be accountable for the Arrears to the ſaid Legatee. And the Ceſſation of Payment for ſeveral Years would be of no manner of prejudice to him either for the Time paſt, or the Time to come. For altho the Motive of the Teſtator was barely that the Legatee ſhould be maintained, and that he has had his Maintenance; yet this was a Charge that the Teſtator impos'd on his Teſtamentary Heir: And on his part it would be *unjuſt* that he ſhould reap the Benefit of it, as it is juſt on the part of the Legatary, that he ſhould have the Advantage both of the Bounty of this Teſtator, and of the Liberality of other Perſons who had nouriſhed and maintained him, or of his own Induſtry, if he had lived by that *u*.

u Præteriti temporis alimenta reddenda ſunt. *l.* 10. §. 1. *ff. de alim. vel cib. leg.*

Manumiſſis teſtamento cibaria annua, *ſi eum manere morabuntur*, per fideicommiſſum dedit. Mater filio triennio ſupervixit: neque cibaria, neque veſtiaria eis præſtitit, cum in petitione fideicommiſſi liberti ceſſarent. Sed & filia, poſteaquam matri hæres extitit, quoad vixit, annis quatuordecim interpellata de iisdem ſolvendis non eſt. Quæſitum eſt an poſt mortem filiæ à noviſſimo hærede petere poſſint, & tam præteriti temporis, quam futuri, id quod cibariorum nomine & veſtiarii relictum eſt? reſpondit ſi continuo extuliſſet, nihil proponi cur non poſſent. *l.* 18. §. 1. *eod.*

XVIII.

18. *Legacies of Alimony are favourable.*

Legacies of Alimony are diſtinguiſhed from the greateſt part of other Legacies, by the Conſideration of the Neceſſity that renders them ſo favourable, that one may bequeath Alimony even to Perſons that are incapable of other Legacies, as has been ſaid in its Place *x*. And if a Legacy of Alimony or Maintenance, or of a yearly Penſion, were made in favour of poor Perſons, it might be ranked in the Number of Legacies to pious Uſes, which are the Subject-matter of the enſuing Section.

x See the ſixth Article of the ſecond Section.

SECT. VI.

Of Legacies to pious Uſes.

The CONTENTS.

1. *What are Legacies to pious Uſes.*
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I.

1. *What are Legacies to pious Uſes.*

Legacies to pious Uſes are thoſe Legacies that are deſtined to ſome Work of Charity *a*; whether they relate to ſpiritual or temporal Concerns. Thus, a Legacy of Ornaments for a Church, a Legacy for the Maintenance of a Clergyman to inſtruct poor Children, and a Legacy for their Suſtenance, are Legacies to pious Uſes.

a Diſpoſitiones pii teſtatoris. *l.* 28. *C. de Epiſc. & Cler.*

II.

2. *Difference between Legacies to pious Uſes, and other Legacies, by their Motives, and their Uſe.*

We may make this a firſt Difference between Legacies to pious Uſes, and the other ſorts of Legacies, that the Name of Legacies to pious Uſes is properly given only to thoſe Legacies which are deſtined to ſome Work of Piety and Charity, and which have their Motives independent of the Conſideration which the Merit of the Legatees might procure them *b*; whereas the other Legacies have their Motives confined to the Conſideration of ſome particular Perſon, or are deſtined to ſome other Uſe than to a Work of Piety or Charity, as ſhall be ſhewn in the Article which follows.

b It is in this Motive that the eſſential Part of Legacies to pious Uſes does conſiſt.

III.

3. *Difference between a Legacy to pious Uſes, and a Legacy which regards the publick Good.*

All Legacies which have not for their Motive the particular Conſideration of ſome Perſon, are not for all that of the Number of Legacies to pious Uſes, altho they be deſtined for a publick Good, if that Good be any other than a Work of Piety or Charity. Thus, a Legacy deſtined for ſome publick Ornament, ſuch as the Gate of a City, for the Imbelliſhment or Conveniency of ſome publick Place, and others of the like nature, or a Legacy of a Prize to be given to the Perſon who ſhould excel others in ſome Art or Science, would be Legacies of another nature than thoſe to pious Uſes *c*.

c Si quid relictum ſit civitatibus, omne valet, ſive in diſtributionem relinquatur, ſive in opus, ſive in alimenta, vel in eruditionem puerorum, ſive quid aliud. *l.* 117. *ff. de leg.* 1.

Civitatibus legari poteſt etiam quod ad honorem ornatumque civitatis pertinet. *Ad ornatum* puta quod ad inſtruendum forum, theatrum, ſtadium, legatum fuerit. *Ad honorem* puta, quod ad munus, venationemve, ludos ſcenicos, ludos circenſes, relictum fuerit: aut quod ad diviſionem ſingulorum civium, vel epulum relictum fuerit: hoc amplius quod in alimenta infirmæ ætatis, puta ſenioribus, vel pueris puelliſque, relictum fuerit ad honorem civitatis pertinere reſpondetur. *l.* 122. *eod.*

IV.

4. *A Legacy to a pious Uſe, without any particular Deſtination, how to be applied.*

If a Legacy to pious Uſes was not deſtined to any particular Uſe, as, if a Teſtator had left a Legacy in general either to the Church, or to the Poor; the Legacy to the Church would be for the Pariſh-Church of the Place where the Teſtator lived; and the Legacy to the Poor would be for the Hoſpital of that Place, if there were any: If there were no Hoſpital, the Legacy would go to the Poor of that Pariſh. And it would be the ſame thing, if inſtead of a bare Legacy, the Teſtator had inſtituted for his Teſtamentary Heirs the Church, or the Poor *d*.

d Si quis in nomine magni Dei & Salvatoris noſtri Jeſu Chriſti hæreditatem, aut legatum reliquerit, jubemus, Eccleſiam loci illius, in quo teſtator domicilium habuerit, accipere quod dimiſſum eſt. *Nov.* 131. *c.* 9.

It appears by this Text, that it was the Uſage of thoſe Times to leave Legacies to God. And if ſuch a Legacy ought to belong to the Church of the Place, with much more Reaſon ought a Legacy that is left to the Church indefinitely belong to the Teſtator's Pariſh-Church.

V.

5. *Execution of Legacies to pious Uſes.*

If the Teſtator himſelf had not directed particularly the Application of a Legacy to pious Uſes; as, if he had left a Legacy to the Poor indefinitely in a Place where there were no Hoſpital, or for the Redemption of Captives, without ſpecifying in what Place; the Execution of theſe Diſpoſitions would depend on the Executor of the Teſtament, or other Perſon to whom the Teſtator had explained and intruſted his Intention. And if there were no Perſon to whom he had imparted his Will, and that it were not ſafe to truſt to the Integrity of the Teſtamentary Heir, the ordinary Judge would give Directions therein, at the Inſtance of the Perſons whoſe Duty it ſhould be to ſee theſe Legacies duly applied *e*.

e Si quidem teſtator deſignaverit per quem deſiderat redemptionem fieri captivorum, *is* qui ſpecialiter deſignatus eſt, legati vel fideicommiſſi habeat exigendi licentiam: & pro ſua conſcientia votum adimpleat teſtatoris. Sin autem perſona non deſignata, teſtator abſolute tantummodo ſummam legati vel fideicommiſſi taxaverit, quæ debeat memoratæ cauſæ proficere. vir reverendiſſimus Epiſcopus illius civitatis ex qua teſtator oritur habeat facultatem exigendi quod hujus rei gratia fuerit derelictum, piam defuncti propoſitum ſine ulla cunctatione, ut convenit, impleturus. *l.* 28. §. 1. *C. de Epiſc. & Cler.*

¶ What is ſaid in this Text, that if the Teſtator has named no body for the Execution of his Legacies to pious Uſes, the Biſhop of the Place may demand the Sum bequeathed, in order to execute the Intention of the Teſtator, is not altogether conformable to our Uſage. For the Biſhop may indeed take care that the Legacies left to the Poor be duly applied; but it is not he himſelf that demands and receives the Sums appropriated to theſe ſorts of Legacies. And if it be neceſſary to ſue the Executor at Law, this Function will belong to the Perſons who are charged with this Care, ſuch as the Go-

vernors of an Hoſpital, or of an Alms-Houſe, according as theſe Legacies happen to be deſtined. And if the Legacy were not appropriated to any particular Houſe, as a Legacy of an Alms to be diſtributed on a certain Day in a certain Place, which were not applied to any particular Hoſpital, or a Legacy to the Poor in a Place where there were no Houſe allotted for them, the Officers of Juſtice would be obliged to give Directions therein at the Inſtance of the King's Procurators. Which does not hinder the Biſhops and Curates from doing their Diligence on their part to procure the Execution of theſe ſorts of Legacies. We may conſult on this Subject the Ordinances which have provided for the Recovery, Preſervation, and Adminiſtration of the Goods belonging to the Poor. *See the Edict of* 1561, *the Ordinance of* Moulins, *Art.* 73. *that of* Blois, *Art.* 65, *&* 66. *and that of* Melun, *Art.* 10.

VI.

6. Deſtination of a pious Legacy to another Uſe than that which the Teſtator had appointed.

If a pious Legacy were deſtined to ſome Uſe which could not have its Effect, as if a Teſtator had left a Legacy for building a Church for a Pariſh, or an Apartment in an Hoſpital, and it happened either that before his Death the ſaid Church, or the ſaid Apartment had been built out of ſome other Fund, or that it was no ways neceſſary or uſeful, the Legacy would not for all that remain without any Uſe; but it would be laid out on other Works of Piety for that Pariſh, or for that Hoſpital, according to the Directions that ſhould be given in this matter by the Perſons to whom this Function ſhould belong *f*.

f Legatum civitati relictum eſt, *Ut ex reditibus quotannis in ea civitate memoriæ conſervandæ defuncti gratia ſpectaculum celebretur*, quod illic celebrari non licet. Quæro quid de legato exiſtimes? Modeſtinus reſpondit: cum teſtator ſpectaculum edi voluerit in civitate, ſed tale, quod ibi celebrari non licet: iniquum eſſe hanc quantitatem quam in ſpectaculum defunctus deſtinaverit, lucro hæredum cedere. Igitur adhibitis hæredibus, & primoribus civitatis, diſpiciendum eſt, in quam rem converti debeat fideicommiſſum, ut memoria teſtatoris alio & licito genere celebretur. *l.* 16. *ff. de uſu & uſuf. & red. leg.*

Altho this Text relates to another ſort of Diſpoſitions, yet the Rule that reſults from it is with much more Reaſon to be obſerved in Legacies to pious Uſes.

VII.

7. Privilege of Legacies to pious Uſes.

Since Legacies for Works of Piety and Charity have a double Favour, both that of their Motive for holy and pious Uſes, and that of their Utility for the publick Goods, they are conſidered as being privileged in the Intention of the Law *g*.

g See the ſixth Article of the eighth Section, and the Remark on the fourth Article of the ſecond Section of Codicils.

The Favour of Legacies to pious Uſes may diſtinguiſh them from other Legacies in the Caſes mentioned in the Places which we have juſt now quoted; and in general, this Favour may be conſidered in the Caſes relating to the Interpretation of any Diſpoſition for a Legacy to a pious Uſe.

See concerning this Subject of Privileges of Legacies to pious Uſes, the Preamble to the ſecond Section of the Falcidian Portion.

SECT. VII.

Of Legacies of one of ſeveral Things, at the Choice of the Executor, or of the Legatee.

WE have endeavoured to form the Rules which compoſe this Section in ſuch a manner, as that they may reconcile ſome Contrarieties, at leaſt, ſuch in appearance, as we meet with in ſome Laws relating to this Matter. Thus, for example, it is ſaid in one Law, That if a Teſtator hath bequeathed in general a Man, that is to ſay, a Slave, the Legatary ſhall have the Choice of the Perſon, *Homine generaliter legato, arbitrium eligendi quem acciperet, ad legatarium pertinet. l.* 2. §. 1. *ff de opt. vel el. leg.* And it is ſaid in another Law, That if a Teſtator hath bequeathed in general a Silver Baſon, he having ſeveral, and not diſtinguiſhing which Baſon he intends to give; the Teſtamentary Heir will have it in his Choice to give which Baſon he pleaſes. *Sed etſi lancem legaverit, nec apparuerit quam, æque electio eſt hæredis quam velit dare. l* 37. *in fine ff. de leg.* 1.

It would ſeem by theſe Texts, that whoever ſhould take both the one and the other in a literal Senſe, might think it indifferent in point of Law, whether the Election were given to the Teſtamentary Heir, or to the Legatee, which certainly cannot be juſt; but in order to reconcile them together, it is neceſſary to obſerve a Diſtinction of the antient *Roman* Law between Legacies which were called *per vindicationem*, and thoſe that were called *per damnationem*, of which mention hath been made in another Place *a*. In the Legacies of the firſt ſort, the Legacy being conceived in theſe or the like Terms, *I will that*

a See the Preamble of the ninth Section of Teſtaments.

ſuch a one take a Horſe out of my Stable, the Legatee had the Choice; for he himſelf took the Thing that was bequeathed to him: And it is of a Legacy of this kind, that we are to underſtand the firſt of the Texts which have been now quoted. And in the Legacies of the ſecond kind, the Legacy being conceived in theſe Terms, *I will that my Heir give to ſuch a one, one of my Horſes*, the Teſtamentary Heir made the Choice; for it was he that was charged to give the Thing that was bequeathed *b*: And it is of a Legacy of this ſecond kind that we are to underſtand the ſecond Text. Thus altho the Differences of theſe two ſorts of Legacies, and of ſome others, of which it would be to no purpoſe to ſpeak here, have been aboliſhed *c*, yet it is neceſſary to make uſe of them for conciliating the Contrarieties of theſe, and of many other Laws, which have very much perplexed ſeveral Interpreters, and that not without reaſon. And we may likewiſe ſay of theſe two kinds of Legacies, which were thus diſtinguiſhed in the *Roman* Law, that their different Expreſſions may point out ſome Difference in the Intention of the Teſtator; and that that Expreſſion which gives to the Legatee the Right to take, ſeems to have a greater relation to the Right of chuſing, than that which charges the Teſtamentary Heir to give to the Legatee.

We have been obliged to make this Reflexion on a Difficulty, which it was neceſſary to clear up before we ſhould proceed to explain the Rules relating to this Matter. But ſeeing in our Uſage there is only one manner of Expreſſion uſed by Teſtators, which has no relation to any one of theſe two ſorts of Legacies that were diſtinguiſhed in the *Roman* Law, and that almoſt all Legacies are conceived in theſe Terms, *I give and bequeath to ſuch a one*, or, if it is in the Name of a third Perſon, *gives and bequeaths*; theſe Expreſſions mark nothing at all of the Intention of the Teſtator, that favours either the Teſtamentary Heir or the Legatee. Thus, unleſs the Legacy be conceived in ſuch a manner as to leave the Choice either to the one or to the other, it muſt be interpreted according to the Rules that have been explained in the ſixth, ſeventh, eighth, ninth, tenth, and eleventh Articles of the ſeventh Section of Teſtaments. And ſince it is not proper to repeat in this Section what has been ſaid in thoſe Articles, the Reader may have recourſe to them, and join them here.

b *V. Tit. Ulp.* 24. §. 14.
c §. 2. *Inſt. de legat.*

The CONTENTS.

I.

1. *Three Manners of bequeathing one out of ſeveral things.*

One may bequeath one of two or more things in three manners. For one may leave ſuch a Legacy without making mention of the choice; as if a Teſtator bequeaths ſimply a Horſe to be taken from among thoſe in his Stable, a Picture to be taken out of thoſe in his Cloſet; and one may leave the Choice either to the Legatary or to the Executor *a*.

a *See the following Articles.*

II.

2. *Of Legacies where no mention is made who ſhall have the choice.*

If a Teſtator bequeaths a thing to be taken out of ſeveral of the ſame kind that ſhall be found in this Succeſſion, or even that are not part of the Succeſſion, and does not expreſs to whom the Choice ſhall belong, whether to the Executor or to the Legatee, this Legacy will depend on the Rule explained in

the twenty ſecond Article of the third Section of this Title, and on the Rules which follow *b*.

b See that twenty ſecond Article of the third Section of this Title, and the tenth Article of the ſeventh Section of Teſtaments. See the following Rules.

III.

3. If the Expreſſion of the Teſtator determines the Choice, we muſt hold to that.

If the Expreſſion of the Teſtator is conceived in ſuch Terms as to make us judge, that altho he has not given the Choice either to the Executor or to the Legatary, in a Legacy of one out of two or more things, his Intention was to bequeath one of them rather than the other, the Legacy will be underſtood of that thing to which the Teſtator's Expreſſion ſhall have a greater relation than to the other, whether it be of more or leſs value. Thus, for example, if a Teſtator had bequeathed his Saddle-Horſe, having ſeveral of that kind, the Legacy would be underſtood of the Horſe which the Teſtator himſelf was wont to ride. Thus, for another example, if he who had two Houſes, one in *Paris* in which he himſelf dwelt, and the other at *St. Denis* occupied by a Tenant, had left a Legacy in theſe Terms, *I give and bequeath my Houſe to ſuch a one*; this Expreſſion would determine the Legacy to be meant of the Houſe in which the Teſtator lived, unleſs it ſhould appear by the Circumſtances that his Intention was to bequeath the other. But if the Expreſſion of the Teſtator ſhould not determine particularly for any one of the two Houſes, as if he had barely deviſed one of his Houſes; or if having two Lands called by the ſame Name, he had deviſed one of them, the Executor might give only the Houſe or the Land that is of leaſt value *c*, for by that he will have ſatisfy'd the Legacy. And in general in all Doubts of this nature, where nothing determines to one of the things which are comprehended in a Legacy, the Preſumption is for the Executor, as has been explained in another Place *d*.

c Si de certo fundo ſenſit teſtator, nec appareat de quo cogitaverit: electio hæredis erit, quem velit dare; aut ſi appareat, ipſe fundus vindicabitur. *l.* 37. §. 1. *ff. de leg.* 1.

Scio ex facto tractatum; cum quidam duos fundos ejuſdem nominis habens, legaſſet fundum Cornelianum: & eſſet alter pretii majoris, alter minoris; & hæres diceret minorem legatum, legatarius majorem vulgo ſarebitur, utique minorem cum legaſſe, ſi majorem non potuerit dicere legatarius. *l.* 39. §. 6. *ff. de leg.* 1.

d See the ſixth, ſeventh, and other following Articles of the ſeventh Section of Teſtaments.

IV.

4. A Legacy left to the choice of the Executor.

If a Teſtator had bequeathed a Silver Baſon, having ſeveral of that ſort, the Executor would be at liberty to give which Silver Baſon he pleaſed *e*. For the Legatary would have that which was left him; and this is a Conſequence of the Rule explained in the third Article. And the Executor would with much more reaſon have this Liberty, if the Teſtator had left the Choice to him. But if the Legacy were of things which altho of the ſame kind might be of different Qualities, good or bad, ſuch as Horſes, Hangings, the Liberty of chuſing which the Executor would have, would not extend to a Power of chuſing a Sute of old Hangings that are falling to pieces, or a Horſe that is broken-winded. For it could not be preſumed that the Teſtator had given this Extent to the Right of Election which he had left to his Executor *f*.

e Sed etſi lancem legaverit, nec apparuerit quam, æque electio eſt hæredis, quam velit dare. *l.* 37. *in f. ff. de leg.* 1.

f Si hæres generaliter ſervum *quem ipſe voluerit*, dare juſſus, ſciens furem dederit, iſque furtum legatario fecerit, de dolo malo agi poſſe ait. Sed quoniam illud verum eſt, *hæredem in hoc teneri ut non peſſimum det*, ad hoc tenetur ut & alium hominem præſtet, & hunc pro noxa deditione relinquat. *l.* 110. *ff. de leg* 1. See the twenty ſecond Article of the third Section, and the eighth and tenth Articles of the ſeventh Section of Teſtaments.

V.

5. A Legacy left to the choice of the Legatary.

When a Teſtator gives to the Legatary the Right of chuſing out of ſeveral things, ſuch as the Horſes in his Stable, any of them which he pleaſes, and in like manner of other things; the Legatary has the Liberty to chuſe the moſt precious of them *g*. And to put the Legatee in a condition to make this Choice, the Executor is obliged to ſhew all that there is in the Inheritance of that kind of thing of which the Election is bequeathed. And if there ſhould be any which by ſome Chance, without the Deed of the Executor, had not appear'd, the Legatary who without knowing any thing of them, had made his choice, might chuſe anew after he came to the knowledge of them *h*. But if among all theſe things

g Quoties ſervi electio vel optio datur, legatarius optabit quem velit. *l.* 2. *ff. de opt. vel elect. leg.*

h Scyphi electione data, ſi non omnibus ſcyphis exhibitis legatarius elegiſſet, integram ei optionem manere placet. Niſi ex his quantoscat eligere voluiſſet, cum ſciret & alios eſſe. *l.* 4. *eod.* Nec ſolum ſi fraude hæredis, ſed etiam ſi alia qualibet cauſa id evenerit. *l.* 5. *eod.*

there

there ſhould be any one that were ſingularly neceſſary to the Executor for matching ſome other Goods of the Succeſſion, it would be equitable to except it out of the choice of this Legatary, eſpecially if the Executor is willing to make up to the Legatary what this neceſſary thing ſhould exceed the others in value, if none of the others be found of an equal Value to it. For the Right of the Legatary does not extend ſo far as to put it in his power to hurt the Executor *i*.

i As the Executor or Teſtamentary Heir, ought not to abuſe the Liberty of Election, as has been ſaid in the preceding Article; ſo neither ought the Legatary to abuſe it when he has it. Homine legato, actorem non poſſe eligi. *l.* 37. *ff. de leg.* 1. See the tenth Article of the ſeventh Section of Teſtaments.

VI.

6 A Legacy left to the choice of a third Perſon.

If the Teſtator had left to a third Perſon the Choice of the thing bequeathed, either becauſe he did not think the Legatary capable of making the ſaid Choice, or becauſe he was willing to make uſe of that Temperament between the Intereſts of the Executor and of the Legatee, the Legacy would be fixed by that third Perſon. And if he ſhould fail, or refuſe to determine it, the right of Election would go to the Legatary, who might demand of the Executor ſuch of the things as he ſhould pitch upon, providing it were not the moſt precious of all, but a thing of middle Value between that which were moſt precious and that of leaſt Value *l*. And in caſe they could not agree among themſelves, the Election would be determined by the Arbitration of ſome Perſon whom they themſelves ſhould agree on, or who ſhould be named by the Judge *m*.

l Si quis optionem ſervi vel alterius rei reliquerit, non ipſi legatario, ſed quam Titius forte elegerit: Titius autem vel noluerit eligere, vel non potuerit, vel morte fuerit præventus, & in hac ſpecie dubitabatur apud veteres quid ſtatuendum ſit: utrumne legatum expiret, an aliquod ei inducatur adjutorium, ut viri boni arbitratu proceda electio. Cenſemus itaque, ſi intra annale tempus ille qui eligere juſſus eſt hoc facere ſuperſederit, vel minime potuerit, vel quandocunque deceſſerit, ipſi legatario videri eſſe delatam electionem. Ita tamen, ut non optimum ex ſervis, vel aliis rebus quidquam eligat, ſed mediæ æſtimationis. Ne dum legatarium fatis eſſe fovendum exiſtimamus, hæredis commoda defraudentur. *l. ult. §. 4. C. comm. de legat.*

m Arbitri officium invocandum eſt. *l.* 13. *in f. ff. de ſervit. præd. ruſt.*

The Delay of a Year, mentioned in the firſt of theſe two Texts, would not be agreeable to our Uſage nor to Equity. Not ſuing this third Perſon who ſhould put off ſo long the making of this choice, that named only that he might make a reaſonable choice, and that others can do it as well as he, it would not be juſt to wait ſo long a time till he ſhould be pleaſed to determine the Matter, eſpecially if the thing bequeathed were of ſuch a nature as to be in hazard of periſhing during the Delay.

VII.

7. He who has the choice ought not to defer it.

When the Teſtator hath given power to chuſe, whether it be to the Executor or to the Legatary, he who ought to make the choice cannot put it off any longer time than what the Condition of the things ſhall make neceſſary, or what ſhall have been regulated by the Teſtator, or by mutual conſent of the Parties, or even by the Judge, if the Matter cannot be otherwiſe ſettled. And he who has the Choice in his power, if he delays to make it, may be ſued by the other, who may cauſe him to be ſummoned in order to make his Option; and may proteſt for [illegible] Coſts and Damages becauſe of the delay: Which would have the Effect that ſhall be explained by the following Rules *n*.

n Mancipiorum electio legata eſt. Ne venditio quandoque eligente legatario interpelletur, decernere debet Prætor, niſi intra tempus ab ipſo præfinitum elegiſſet, actionem legatorum ei non competere. *l.* 6. *ff. de opt. vel elect. leg. l.* 8. *eod.*

What is ſaid in this and the other Articles which follow, concerning the Delay of the Executor or of the Legatee, is to be underſtood of the Caſes where there has been a Citation of the Party to come and make his choice, or where there appears to be ſome Knavery in the delay; as for example, if an Executor ſhould keep up and conceal for ſome time a Teſtament or Codicil in which he was charged with a Legacy left to his own choice.

VIII.

8. Penalty when the Executor defers to make the choice.

If the Executor to whom the Choice was left was in delay, and in the mean while the things, of which one was to be given to the Legatary, ſhould happen to periſh, or to ſuffer damage, he would be liable to make good the Loſs or Diminution to which his Delay had given occaſion. For the Legatary might have perhaps been able to ſell the thing, or prevent its periſhing or being damaged; and if the things being ſtill in being, the Legatary had ſuffered Damages becauſe one of them was not delivered to him, the Executor would be accountable for the ſame *o*. But if ſome of the things of which the Choice was to be made were not preſent, and that too long a Delay would be prejudicial to the Legatary, he might oblige the

o See the Texts cited upon the preceding Article, which may agree as well to the Delay of the Executor, as to that of the Legatary.

Exe-

Executor either to chuſe for him one of the things that were preſent, or to give him the Value of one of the things that were abſent *p*.

p Si Stichus aut Pamphilus legetur, & alter ex his vel in fuga ſit, vel apud hoſtes: dicendum erit præſentem præſtari, aut abſentis æſtimationem. Toties enim electio eſt hæredi commutenda, quoties moram non eſt facturus legatario. *l.* 47. §. 3. *ff. de leg.* 1.

IX.

9. Penalty when the Legatary defers to make the choice.

If the Choice belongs to the Legatary, and he puts it off, he will be liable for the Coſts and Damages which may have been occaſioned by his Delay, in the ſame manner as the Executor is liable for the Conſequences of his Delay. Thus, for Example, if two Horſes, one whereof (which ſoever he ſhould chuſe) had been left him by Legacy, ſhould happen to die during his Delay to make his option, and that the ſaid Loſs might be imputed to him, becauſe the Executor who had no occaſion for any of the Horſes might have been able to ſell the Horſe which the Legatary would have left him, and would not have been obliged to keep both the Horſes, might recover againſt this Legatary Coſts and Damages for that Expence and that Loſs, according to the Circumſtances *q*.

q *See the Text cited on the ſeventh Article, in which theſe Words are to be remarked:* Ne venditio quandoque eligente legatario interpelletur.

X.

10. If there remains only one of the things whereof the choice was bequeathed, it belongs to the Legatary.

If after the Death of the Teſtator and before the Election, whether it were to be made by the Legatary or by the Executor, the things of which the Election was to be made, ſhould happen to periſh, without the Fault either of the one or the other, one of the things is loſt to the Legatary, and the others to the Executor *r*. But if there remains only one of them, it belongs to the Legatary. For altho his Legacy was of a Right to chuſe, and that there is now no room left for choice; yet the Intention of the Teſtator was that the Legatary ſhould have one of them; and therefore he ought to have that which is the only one that remains *s*.

r *The firſt part of this Article may have its uſe in a Caſe where the teſtamentary Heir were to deduct the* Falcidian *Portion. For one would not reckon to him as part of his* Falcidian *Portion the Value of that thing which the Legatary was to have, but only the other things which were to have been his own.* See the ſeventh and eighth Articles of the firſt Section of the *Falcidian* Portion.

s *Whether the Choice belongs to the Executor, or to the Legatee; if there remains only one, it goes to the Legatee. For this Event determines the thing that remains to be the Legatary's, as much or rather more than the Choice would do that which ſhould be choſen.*

XI.

11. If after the choice is made, the thing chooſen periſhes, the Legatary bears the loſs of it.

If after that he who was to chuſe, whether it was the Executor or the Legatee, has made and declared his Choice, the thing choſen ſhould happen to periſh, the loſs of it would fall upon the Legatary, and he would have no right to thoſe things that ſhould remain. For the Choice had diſtinguiſhed that thing which he was to have, and had made it his own. So that it is he who ought to bear the loſs of it *t*.

t Stichum aut Pamphilum, utrum hæres meus velet Titio dare: ſi dixerit hæres Stichum ſe velle dare, Sticho mortuo liberabitur. *l.* 84. §. 9. *ff. de leg.* 1.

Altho this Text ſpeaks only of the Caſe where the Choice belongs to the Heir or Executor, yet the Rule is with much more reaſon juſt in the Caſe where the Legatary has himſelf made the Choice.

XII.

12. He who has made his choice, cannot change and make another.

The Executor or Legatary who has once made his Option, whether judicially or extrajudicially by mutual Conſent, cannot afterwards change or make another Choice. For the right of chuſing, which the Teſtator had given him, is conſummated by this firſt Choice *u*.

u Cum ſemel dixerit hæres utrum dare velit, mutare ſententiam non potest. *l.* 84. §. 9. *ff. de legat.* 1. Apud Auſidium libro primo reſcriptum eſt: Cum ita legatum eſt; *Veſtimenta, quæ velet, triclinaria ſumito, ſibique habeto*; ſi is dixiſſet, quæ vellet deinde, antequam ea ſumeret, alia ſe velle dixiſſet; mutare voluntatem eum non poſſe, ut alia ſumeret: quia omne jus legati prima teſtatione, qua ſumere ſe dixiſſet, conſumpſit: quoniam res continuo ejus fit ſimul ac ſi dixerit eam ſumere. *l.* 20. *ff. de opt. vel elect. leg.* Electione legata, ſemel duntaxat optare poſſumus. *l.* 5. *ff. de legat.* 1. *l.* 11. *in f. ff. de legat.* 2.

XIII.

13. The choice cannot be made before the Executor has accepted the Succeſſion.

The Legatary who has the Right of chuſing, cannot make his choice till the Executor has accepted the Succeſſion. For till then there being no Executor, there would be no Party to whom he could intimate his Choice, and who could either conteſt it or approve it, and deliver the Legacy. So that it would be to no purpoſe that he had made his choice *x*.

x Optione legata, placet non poſſe ante aditam hæreditatem optari: & nihil agi ſi optaretur. *l.* 16. *ff. de opt. vel elect. legat.*

XIV.

14. The Legatary of what ſhall remain after the choice of

If a Teſtator had bequeathed one or two things out of many at the choice of one Legatary, and the Remainder of them to another, and that he who had this

another will have all, if no choice is made.

this choice would not make uſe of his Right, all the things would belong to the ſecond Legatary, and the Executor would have none of them. For the Expreſſion of thoſe things that ſhould remain after the Choice of the firſt of the two Legataries would comprehend them all, if he took none of them *y*.

y Cum optio duorum ſervorum Titio data ſit, reliqui Mævio legati ſint: ceſſante primo in electione, reliquorum appellatione omnes ad Mævium pertinent. *l.* 17. *ff. de opt. vel elect. leg.*

XV.

15. The Right of Election paſſes to the Heir or Executor of the Legatee.

If the Legatary who had a right to chuſe, dies without having made a choice, he tranſmits to his Heir or Executor both his Right to the Legacy, and the Right of Election *z*.

z Illud aut illud, utrum elegerit legatarius, nullo a legatario electo, decedente eo poſt diem legati cedentem, ad hæredem tranſmitti placuit. *l.* 19. *ff. de opt. vel elect. leg.* See the tenth and following Articles of the tenth Section of Teſtaments, and the ſeventeenth Article of the ninth Section of this Title of Legacies.

SECT. VIII.

Of the Fruits and Intereſt of Legacies.

BY Fruits of Legacies we are to underſtand not only the Product of Lands, but likewiſe all other ſorts of Revenues or Profits that may be made of any other thing. And by Intereſt is meant the Reparation of Damages which Debtors of Sums of Money, who fail to make Payment, owe from the time of the Demand, as has been explained in the Title of Intereſt.

As to the Fruits of Lands deviſed, it is neceſſary to diſtinguiſh between thoſe which are upon the Ground at the time that it is delivered to the Legatary, and which are commonly called the Fruits hanging by the Root, and thoſe which have been ſeparated from the Ground by the Executor before he delivered it, and which were ſeparated only after the Death of the Teſtator. Theſe are the ſubject Matter of this Section, as alſo the Intereſt and other Revenues that were fallen due before the Delivery of the Legacy; and the Fruits hanging on the Ground at the time of the Delivery are as it were Acceſſories, which have been treated of in the fourth Section.

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I

1. Three ſorts of things that may be bequeathed.

We may diſtinguiſh into three kinds all the things which Teſtators have the liberty to give away in Legacies. The firſt is of thoſe which of their own nature produce no Revenue; ſuch as a Watch, a Picture, Silver Plate. The ſecond is of thoſe things which of their own Nature produce a Revenue, as a Houſe, a Meadow, or other Ground, a Herd of Cattle, Hackney-Horſes to thoſe who let them out to hire, and other things of the like nature. The third is of Sums of Money, which of their own nature produce nothing, but which making the Price of every thing that is in Commerce, are the Inſtrument of the Commerce it ſelf: Which is the Reaſon why the Laws condemn thoſe who are dilatory in paying the Sums which they owe in Damages, which they have fixed to what is called Intereſt, of which mention has been made in its proper place *a*. And we may place in this third Rank all the Legacies which are reduced to a Valuation, ſuch as a Legacy which a Teſtator ſhould make of ſome Work, or other thing that he ſhould oblige his Executor to do for a Legatee, or a Legacy of a thing which the Executor could not give in ſpecie; for in this Caſe he would owe the Value of it *b*.

a See the Title of the Loan of Money and other things to be reſtored in kind.

b See the ſixth Article of the firſt Section of the ſame Title of the Loan of Money and other things to be reſtored in kind.

Ubi quid fieri ſtipulemur, ſi non fuerit factum, pecuniam dari oportere. *l.* 72. *ff. de verb. obl.*

II.

2. If the Teſtator has regulated the Fruits and Revenues of the Legacy, his Will will ſerve as a Rule.

If a Teſtator hath regulated by his Diſpoſition what concerns the Fruits or other Revenues which the thing deviſed may produce, his Will muſt ſerve as a Law, and the Executor will be accountable or not accountable for them, according as the Teſtator ſhall have order'd. Thus he who deviſes a Land, may order it to be delivered either after the Harveſt is over, or after ſome Years, during

during which ſpace of time he leaves the Enjoyment of it to his Executor *c*.

c Semper veſtigia voluntatis ſequimur teſtatorum. *l.* 5. *C. de neceſſ. ſerv. hared. inſt.* See touching the Intereſt of Money the fourth Article.

III.

3. *The Fruits of Legacies are due only from the time they are demanded.*

If the Teſtator has ordered nothing about the Fruits and other Revenues which the things deviſed might produce, they will be due only from the time that they are demanded. But if the Executor had dealt any way knaviſhly, as if he had concealed the Teſtament, he would be liable not only for all the Fruits from the time of the Teſtator's Death, but likewiſe for Coſts and Damages, if there had been any *d*.

d In legatis & fideicommiſſis fructus poſt litis conteſtationem non ex die mortis conſequuntur, ſive in rem ſive in perſonam agatur. *l. ult. C. de uſur. & fruct. legat. ſeu fideicom. l.* 1. *eod.*

Is qui fideicommiſſum debet poſt moram, non tantum fructus, ſed etiam omne damnum quo affectus eſt fideicommiſſarius, præſtare cogitur. *l.* 26. *ff. de leg.* 3. *l.* 23. *de leg.* 1. *l.* 8. *l.* 39. *ff. de uſur.* See the tenth Article of the firſt Section of Subſtitutions direct and fiduciary; and the fifteenth Article of the ſecond Section of the ſame Title.

We have not put down in the Article that the Fruits are due from the Conteſtation of Suit, as it is ſaid in the firſt of theſe Texts; but that they are due from the time of the Demand. For by our Uſage, and by the Ordinances, a legal Demand hath the Effect of the Conteſtation of Suit in the Roman *Law. See the Remark on the fifth Article on the firſt Section of Intereſt.*

*We have added to the Article the Exception of the Caſe of Knavery in the Executor. For this Rule cannot be contrary to the general Rule which obliges every knaviſh Poſſeſſor to make reſtitution of the Fruits *, with much more reaſon than him who is backward in paying what he owes after it has been demanded of him.*

* *See the fourth Article of the third Section of Intereſt.*

¶ It is neceſſary to obſerve on this Article a Difficulty which ought not to be ſuppreſſed. For beſides that it has divided the Interpreters, it requires that ſome neceſſary Reflections ſhould be made on the Rule explained in this Article. This Rule diſcharges the Executor not only from the Intereſt of Money, and of other things which produce no Revenue, but likewiſe from the Fruits of Lands and Tenements which produce a Revenue, and obliges him to make reſtitution of theſe Fruits only after a legal Demand. And ſeeing it makes no Exception, it comprehends not only the Caſes where the Executor and the Legatee ſhould have equally knowledge of the Teſtament, and where the Legatee ſhould neglect to demand his Legacy; but alſo the Caſes where the Legatary being ignorant of his Legacy, the Executor who ſhould know of it, and ſee that he was obliged to deliver the thing deviſed, ſhould nevertheleſs retain it: Which ſeemed to thoſe Interpreters to be contrary to Equity. For it cannot be ſaid, eſpecially in the *Roman* Law, that the things deviſed are a part of the Goods of the Inheritance, and may be conſidered as belonging to the teſtamentary Heir until the time of their being delivered; ſeeing it is a Principle of the *Roman* Law in the matter of Legacies, that the Propriety of the thing bequeathed belongs to the Legatary from the moment of the Teſtator's Death; and that altho the Legatary know nothing of his Right till a long time after, yet his Acceptance of the Legacy has this effect, that he is accounted to be Maſter of the thing bequeathed from the moment of the Teſtator's Death, and that he is ſo much Maſter of it, that it is ſaid in a Law, that the thing bequeathed paſſes to the Legatary in the ſame manner as the Goods of the Inheritance paſs to the teſtamentary Heir, and that the teſtamentary Heir never had any right to them *a*.

It would ſeem to follow from theſe firſt Reflections, that ſince the Fruits belong regularly to the Proprietor of the Ground, thoſe of a Ground deviſed did belong to the Legatary or Deviſee from the Death of the Teſtator; and that the teſtamentary Heir who was not ignorant of the Teſtament, having known that he was in poſſeſſion of Goods that were not his own, ought to be obliged to reſtore thoſe Fruits. Theſe Reaſons could not be unknown to thoſe who framed the Laws cited on this Article; and what ſtill augments the Difficulty, is that *Juſtinian* has made an Exception from the Rule explained in this Article in favour of Legacies to pious Uſes, having ordained, with reſpect to theſe ſorts of Legacies, that no Enquiry ſhould be made whether the Legacy had ever been demanded, but that it ſhould ſuffice that the teſtamentary Heir not having delivered the Legacy,

a Si legatarius repulerit a ſe legatum, nunquam ejus fuiſſe videbitur: ſi non repulerit, ex die aditæ hereditatis ejus intellegitur. *l.* 86. §. 2. *de leg.* 1. Quia ea quæ leganur, recta via ab eo qui legavit ad eum cui legata ſunt tranſeunt. *l.* 64. *in f. ff. de furt.*

Legatum ita dominium rei legatarii facit, ut hæreditas hæredis res ſingulas. Quod eo pertinet, ut ſi pure res relicta ſit, & legatarius non repudiavit defuncti voluntatem, recta via dominium, quod hæreditatis fuit ad legatarium tranſeat, *nunquam faciunt hæredis.* l. 80. *ff.* de legat. 2.

he ſhould be reckoned guilty of delay *ipſo jure*, that is to ſay by the Effect of the Law it ſelf *b*.

To reſolve this Difficulty, ſome of thoſe Interpreters have been of opinion, that it was neceſſary to reſtrain the Laws which diſcharge the teſtamentary Heir from the Fruits until the time of a legal demand, to the Caſe of a Legacy of a thing that was not the Teſtator's own: but theſe Laws are conceived in too clear Terms to admit of ſo remote a Senſe. Others ſay that their Meaning is, that the teſtamentary Heir is not accountable for all the Fruits which the Legatary might have reaped by his Induſtry, and that he is only liable for thoſe which he has really and truly gather'd: but this Diſtinction does not ſuit with theſe Laws, and does not remove the Difficulty. There are ſome who think that theſe Laws are to be underſtood of the Fruits which had been gather'd before the Death of the Teſtator, and not of thoſe which have been gathered ſince his Death: But what Right could the Legatary pretend to the Fruits which accrued to the Teſtator in his Life-time? Others will have it, that the teſtamentary Heir is obliged to reſtore the Fruits reaped after his entering to the Poſſeſſion of the Inheritance, and not thoſe reaped before; but theſe Laws diſcharge the teſtamentary Heir from the Reſtitution of the Fruits without any diſtinction; and his Right of Enjoyment takes in the Fruits preceding his entring to the Inheritance, for they belong to him, and he recovers them from thoſe who had gather'd them. So that his Condition ought to be the ſame as to the Fruits of both theſe times. And laſtly there are ſome who have thought it neceſſary to diſtinguiſh between the Legacies which are called *per damnationem*, and the Legacies *per vindicationem*, of which mention has been made in the Preamble to the foregoing Section; that in theſe the Fruits are due to the Legatary from the time of the teſtamentary Heir's entring to the Succeſſion; and that in thoſe they are due only from the time that the teſtamentary Heir has been guilty of delay. But there would be as much or more reaſon to give to the Legatary the Fruits from the time of the Teſtator's Death in the Caſe of a Legacy *per damnationem*, ſeeing in this caſe the teſtamentary Heir who was charged to deliver the thing bequeathed would be more faulty than he would be in the Caſe where the Legatary himſelf ought to take the thing bequeathed to him; and beſides, the Diſtinction of theſe two ſorts of Legacies hath been aboliſh'd, as has been remarked in the ſame Place. It ſeems likewiſe that the firſt of the Texts cited on this Article relates to both theſe ſorts of Legacies indifferently, and that theſe two Expreſſions *ſive in rem, ſive in perſonam agatur*, may be underſtood the one of the Legacy *per damnationem*, which the Legatary demanded by a perſonal Action, and the other of the Legacy *per vindicationem*, which was demanded by a real Action. Whence it appears to follow, that even when the Diſtinction of theſe two ſorts of Legacies was in uſe, the Rule explained in this Article was equally applicable to the one ſort and to the other.

We relate here the ſeveral Sentiments of thoſe Interpreters to ſhew, that this Rule which diſcharges the teſtamentary Heir or Executor from the Fruits of Legacies until the time of a legal Demand, ſeemed to them to be unjuſt, being taken in a literal and general Senſe. But ſeeing none of all theſe Interpretations appears to agree with the Senſe of theſe Laws, the Terms whereof are ſo clear and diſtinct, and that the Exception which *Juſtinian* has made from this Rule in favour of Legacies to pious Uſes, determines for the Senſe which diſcharges in general the teſtamentary Heirs or Executors from the Fruits of Legacies until the time of Demand, it is but fair and ingenuous freely to own, that *Juſtinian*'s Intention, and that of the preceding Laws, was to make a general Rule of it, which, after the manner of other general Rules, ſhould be obſerved in Caſes where there were no cauſe to make any Exception from it. Thus *Juſtinian* has excepted from this Rule Legacies to pious Uſes. Thus one may except the Caſes where the Executor ſhould be guilty of any Roguery. And if, for example, an Executor had concealed a Codicil which contained Legacies, he would be without doubt condemned to make Reſtitution of the Fruits and Intereſt of thoſe Legacies, if the ſaid Codicil came to light. But when no unfair Dealing can be imputed to the Executor, and that it was not his fault that the Legataries had no knowledge of the Teſtament, and had not received their Legacies, the Cir-

b See the laſt Article.

cumſtances might juſtly diſcharge the Executor from making Reſtitution of the Fruits which he had enjoyed. Thus, for example, if a Teſtament having been opened in a Court of Juſtice, or depoſited with a Notary Publick living in the Place where the Teſtator had his Abode, and it having by that means been known and made publick, there were ſome of the Legataries whoſe Place of Abode was unknown, or even whoſe Perſons were not known, or who were abſent in a remote Country, ſo that it were not poſſible to acquaint them; the Executor who on one part ought to continue in poſſeſſion of the Goods, and to take care of them, and who on the other part ought to remain Proprietor of what cannot be acquired by the Legataries, whether it be that they cannot or will not receive their Legacies, or that they are incapable of them, may without injuſtice remain in poſſeſſion of all the Goods of the Inheritance, and enjoy thoſe that had been bequeathed as well as the other Goods. So that his Enjoyment of thoſe things not being an Uſurpation, and ſince it may have ſome other good Foundation, beſides the Negligence of the Legatee, it is but juſt that the Executor under theſe circumſtances ſhould be free from any fear of being afterwards called upon to make reſtitution of the Fruits which he had enjoy'd without any Fraud or Covin. Thus the Rule which frees him from this Reſtitution, hath its Equity founded in the Circumſtances which may clear him from all Roguery; and it hath likewiſe its Uſefulneſs for the publick Good, becauſe of the Inconveniences which it removes of an infinite number of Difficulties that would happen if Executors were obliged without diſtinction to reſtore all the Fruits which they had gathered ſince the Death of the Teſtator. And ſeeing the delay of Payment of Legacies may happen either thro the Roguery of the Executor, or without any knaviſh dealing on his part, and that ſuch Knavery ought not to be preſumed without Proof, it was but juſt to preſume Uprightneſs and Integrity in an Executor who ſhould have ſeveral Excuſes to alledge. But this Law being founded only on the Preſumption of the Integrity of the Executor, and on the Conſequences of the publick Good, which demands that all Occaſions of Law-Suits ſhould be cut off as much as is poſſible, it would be altogether uſeleſs for juſtifying the Conſcience of an Executor, who, altho no body ſh be able to diſcover and prove his guery, ought to tax himſelf wit and if he would do juſtice upon ſelf, ought to reſtore the Fruits w he had unjuſtly reaped of a Land or Tenement that was deviſed, and which he might have delivered to the Deviſee.

IV.

4. *The Intereſt of Legacies of Money is due only from the time of the Demand.*

Legacies of Money, and other things which of their nature produce no Revenue, ought to be paid, as all other Legacies, at the time appointed by the Teſtament; or if there be no time fixed, they are due after the Death of the Teſtator. But altho they be not acquitted at the time appointed, yet Intereſt is only due from the time of the Demand *e*; unleſs the Teſtator had order'd that the Legatary ſhould have the Intereſt *f*.

e Legatorum ſeu fideicommiſſorum uſuras ex eo tempore quo lis conteſtata eſt, exigi poſſe manifeſtum eſt, ſed & fructus rerum & mercedes ſervorum qui ex teſtamento debentur, ſimiliter præſtari ſolent. *l.* 1. *c de uſur. & fruct. legat.*

f The Intereſt in this Caſe would not be uſurious: For it would not be a Loan, but the Liberality of the Teſtator which would encreaſe the Legacy.

V.

5. *Profit of Legacies, which are of another nature than the Fruits or Intereſt*

If the thing bequeathed were of ſuch a nature as that it ought to produce to the Legatary Profits of another ſort than the Fruits of a Ground, or Intereſt of Money, as if it were a certain number of Mares, or a Set of Inſtruments and Machines for ſome Manufacture, the Executor who is in fault for not delivering the Legacy, will be accountable for the Profits which theſe ſorts of things might yield. But if the Legacy were of a Stud of Mares, the Colts would be a part of the Legacy, and would belong to the Legatary, altho the Executor had not been guilty of any delay in delivering the ſame *g*.

g Is qui fideicommiſſum debet, poſt moram non tantum fructus, ſed etiam omne damnum quo affectus eſt fideicommiſſarius præſtare cogitur. *l.* 26. *ff. de legat.* 3.

Equis per fideicommiſſum relictis, poſt moram fœtus quoque præſtabitur ut fructus. *l.* 8. *ff. de uſur.*

Equis per fideicommiſſum legatis, poſt moram hæredis fœtus quoque debentur. Equitio autem legato etiam ſi mora non intercedat, incremento gregis fœtus accedunt. *l.* 39. *eod.*

VI.

6. *The Fruits and Intereſt of Legacies to pious Uſes*

The Executor who does not pay the Legacies to pious Uſes within the time regulated by the Teſtator, if he has let

are due without any Demand.

ſet any time, or within the Delay that is neceſſary according to the Quality of the Teſtator's Diſpoſition, will be accountable for the Fruits, the Intereſt, and other Revenues, according to the Nature of the thing bequeathed, to reckon from the Term, if there was any ſet by the Will, or from the Death of the Teſtator, if there was no Term fixed *h*.

h Supra autem omne tempus quo diſtulerint facere diſpoſita ſcripti hæredes: eos cogi ſolvere & fructus & reditus & omnem legitimam acceſſionem, a tempore ejus, qui diſpoſuit, mortis ſancimus: non inſpecta mora a litis conteſtatione, aut conventione, ſed ipſo jure intellecta (quod dictum vulgo) mora præceſſiſſe & locum habente fructuum & aliarum rerum acceſſione. Hoc eodem obtinente, & ſi non ab hærede, ſed a fideicommiſſario, aut legatario relictum fuerit hujuſmodi pium legatum. *l.* 46. §. 4, & 5. *C. de Epiſc. & Cler. v. Nov.* 131. *c.* 12.

¶ Altho the Juſtice of this Rule be founded not only on the Favour of Legacies to pious Uſes, but alſo on this particular Conſideration, that theſe Legacies may be unknown or neglected by the Perſons who ought to call for them, ſuch as the Governors of an Hoſpital, and others who happen to be entruſted with this Care; yet this is not always preciſely obſerved, leſt ſuch a Strictneſs ſhould happen ſometimes to degenerate into Rigour. And it is even prudent for Governours of Hoſpitals not to exact Legacies to pious Uſes in ſuch a manner as to make them uneaſy and burdenſome to Families. For ſuch a rigid Conduct as this might ſome time or other divert thoſe who were injured by it, from making the like Diſpoſitions in favour of Hoſpitals, and incline them to diſpoſe to ſome other Uſes of what they had piouſly deſigned for the poor.

SECT. IX.

How the Legatary acquires his Right to the Legacy.

IT has been remarked at the end of the Preamble to the tenth Section of Teſtaments, where the Right of Tranſmiſſion is treated of, that mention ſhould likewiſe be made of it in this Place in ſome Articles relating to this Right. But what ſhall be ſaid in theſe Articles ought not to be taken for a Repetition of what has been ſaid in that tenth Section of Teſtaments. For there we have explained the Rules of Tranſmiſſion in general, and here we ſhall only make Application of thoſe Rules to ſome Caſes where it is neceſſary to ſhew their Uſe.

The CONTENTS.

I.

Seeing the Legatee acquires his Right by a Teſtament, or other Diſpoſition made *his Right*

1. *The Legatary acquires his Right*

at the instant of the Testator's Death.

made in consideration of Death, and that these sorts of Dispositions are confirmed, and have their Effect at the moment of the *Death* of the *Person* who has made the Disposition; the Right to the Legacy is acquired to the Legatee at the same instant *a*, unless it be that the Will of the Testator has made some Change to it; and that depends on the Rules which follow.

a Si purum legatum est, ex die mortis dies ejus cedit. *l.* 5. §. 1. *ff. quand. dies leg. vel fid. ced.*

Hæredis aditio moram legati quidem petitioni facit, cessioni diei non facit. *l.* 7. *eod.* See the tenth Article of the tenth Section of Testaments.

II.

2. Legacies of two sorts, either pure and simple, or conditional.

We must distinguish two sorts of Legacies: Those which are pure and simple, that is to say, whose Validity does not depend on any Condition: And those which are conditional, and which have not their Effect but by the Event of the Condition on which they depend; *as if a Testator devises a certain Estate in Land, on condition that the Legatary happens to have Children b* And the Right to these several Legacies accrues differently to the Legataries by the following Rules.

b Purum legatum. *l.* 5. §. 1. *ff. quand. dies legat. vel fideic. ced.* Legatum sub conditione relictum. *d. l.* §. 2.

III.

3. The pure and simple Legacy is acquired at the moment of the Death of the Testator.

If the Legacy was pure and simple, the Legatary acquires his Right to it at the moment of the Death of the Testator, whether he knew or was ignorant of the Testament, and the said Death. And if the Thing devised be a House or Lands, or some moveable Thing belonging to the Inheritance, or any other Thing that is actually among the Goods of the Succession, it passes directly from the Deceased to the Legatary, and he is Master of it, and the Executor has no manner of Right to it *c*. Or if it be a Thing that is not part of the Succession, or a Sum of Money, he has a Right to have it delivered to him at the Time that the Executor shall be obliged to deliver it *d*.

c Si purum legatum est, ex die mortis dies ejus cedit. *l.* 5. §. 1. *ff. quand. dies leg. vel fideic. ced.*

Legatum ita dominium rei legatarii facit, ut hæreditas hæredis res singulas. Quod eo pertinet, ut si pure res relicta sit, & legatarius non repudiavit defuncti voluntatem, recta via dominium, quod hæreditatis fuit, ad legatarium transeat nunquam factum hæredis. *l.* 80. *ff. de legat.* 2. *l.* 73. §. 1. *eod.* *l.* 64. *in f. ff. de furt.*

Si fideicommissum ab intestato fuerit sorori tuæ relictum codicillis, & postea quam dies fideicommissi cessit, rebus humanis, licet ignorans fideicommissum, excesserit, actionem hujusmodi acquiri potuisse, dissimulare non poteris: salva scilicet ab intestato succedenti quarta portione. *l. ult. C. quand dies leg. vel fideic. ced. l.* 3. *eod.*

d See the tenth Section.

IV.

If a Legacy being conditional, the Condition was come to pass in the Lifetime of the Testator, or at the Time of his Death, this Event would make the conditional Legacy to become pure and simple; so that the Legatary would acquire his Right to it at the Time of the Testator's Death *e*.

4. As also the conditional Legacy, the Condition whereof is fulfilled before the Testator's Death.

e See the sixteenth Article of the eighth Section of Testaments.

V.

If the Condition comes to pass only after the Death of the Testator, the Right of the Legatee will not vest in him at the Time of the said Death, even altho the Condition should depend on his own Fact, and that he should offer to perform it, unless the Executor should accept his Offer. But the Legacy will not be due to him till after he shall have actually fulfilled the Condition, or if it was independent of his Deed, till it shall have come to pass *f*.

5. If the Condition does not happen till after the Testator's Death, the Legacy hath not its Effect till it happens.

f Si sub conditione sit legatum relictum, non prius dies legati cedit quam conditio fuerit impleta: ne quidem si ea sit conditio, quæ in potestate sit legatarii. *l.* 5. §. 2. *ff. quand. dies leg. vel fideic. ced. l. un.* §. 7. *C. de cadut. toll.*

VI.

It is necessary to distinguish three sorts of Legacies, with regard to the Time at which the Legatary may have acquired his Right, and to the Time in which he may exercise the said Right: The Legacies that are pure and simple without any Term, the Legacies that have a certain Term, and the Legacies that are conditional. And this Difference hath the Effect that shall be explained by the Rules which follow *g*.

6. Three sorts of Legacies necessary to be distinguished for the Effect of the Right of the Legatary.

g See the following Articles.

VII.

In all sorts of Legacies it is necessary to distinguish two several Effects of the Right of the Legatee. One, which renders him Master of the Thing bequeathed, whether he may demand immediately the Delivery of it, or may not demand it as yet: And the other, which puts him in a Condition to demand the Delivery of it. It is of this last Effect that it is said, that then the time is come in which the Legatary's Right

7. Difference between the Time when the Legacy is acquired, and the Time when it may be demanded.

vests

n him, and the Legacy is due: : is of the ſecond Effect that it is That then the Time is come when gatary may demand the Legacy. Thus, when the Legacy is pure and ſimple, and without any Term, the Moment of the Death of the Teſtator hath both theſe Effects; and the Time is then come in which the Right to the Legacy veſts in the Legatary, and in which likewiſe he may demand the Thing bequeathed. Thus, when there is a Term preſcribed for the Payment of the Legacy that is pure and ſimple, the firſt of theſe two Effects comes to paſs on the Day of the Teſtator's Death; and the ſecond does not happen till the Day of the Term. Thus, when the Legacy is conditional, and without any other Term, it hath theſe two Effects at the moment that the Condition comes to paſs; or if it has a Term, the ſecond Effect is ſuſpended until the ſaid Term. And if the Condition is not come to paſs, the Time is not come in which the Right to the Legacy is acquired, and much leſs the Time of demanding it *h*.

h Deberi dicimus & quod die certa præſtari oportet, licet dies nondum venerit. *l.* 9. *ff. ut legat. ſeu fideic. caut. caveat.*

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

Cedere diem ſignificat incipere deberi pecuniam. *Venire* diem ſignificat eum diem veniſſe quo pecunia peti poſſit. Ubi pure quis ſtipulatus fuerit; & ceſſit, & venit dies. Ubi in diem: ceſſit dies ſed nondum venit. Ubi ſub conditione, neque ceſſit, neque venit dies, pendente adhuc conditione. *l.* 213. *ff. de verb. ſignif.*

VIII.

8. *The Legatary tranſmits, or doth not tranſmit the Legacy to his Heirs or Executors, according to the Condition in which his Right is at the time of his Death.*

It follows from the preceding Articles, that if the Legatary chances to die before he has received the Thing bequeathed, the Legacy may paſs, or may not paſs to his Heirs or Executors, according to the Condition in which his Right is at the time of his Death. And he tranſmits the Legacy, if the Right to it was veſted in him, or he does not tranſmit it, if the Time was not come that the Legacy was due to him *i*.

i Si quis dixit legati redemtorem legatario deceſſerit, ad heredem ejus non tranſit legatum. *l.* 5. *ff. quand. dies leg. vel fideic.* ced.

Ad heredem ejus legatum non tranſit, quia non ceſſit dies vivo eo. *l.* 1. *§.* 2 *ff. de condit. & demonſtr.*

IX.

9. *Two Caſes in which there can be no Tranſmiſſion.*

Of what nature ſoever the Legacy be, if the Legatary was dead at the time of making the Teſtament, or if he dies before the Teſtator, his Heir or Executor will have no Right to the Legacy. For the Legatary himſelf could have no Right to it but at the time of the Teſtator's Death, which was to give the Effect to his Teſtament *l*.

l See the fifth Article of the tenth Section of Teſtaments.

X.

10. *The conditional Legacy is not tranſmitted, if the Condition be not come to paſs.*

If the Legacy is conditional, and the Legatary dies before the Condition of the Legacy be fulfilled, he dies without having had any manner of Right to the Legacy; ſo that he tranſmits no Right to his Heir or Executor *m*

m See the eleventh Article of the tenth Section of Teſtaments.

XI.

11. *The Legacy is tranſmitted, altho the Legatary die before the Term of paying the Legacy.*

When the Legacy is pure and ſimple, whether there be a Term fixed for Payment of it, or whether there be no Term fixed, the Legatary who has ſurvived the Teſtator, having thereby acquired his Right to the Legacy, tranſmits it to his Heir or Executor, whether he die before or after the Term *n*.

n See the Texts cited on the ſeventh and eighth Articles of this Section, and the third Article of the tenth Section of Teſtaments.

XII.

12. *Which are the Legacies that are truly conditional.*

We muſt not reckon in the number of conditional Legacies all thoſe in which the Teſtator may perhaps have made uſe of the word *Condition*. For as it has already been obſerved in its proper place, Conditions are often confounded with the Charges which Teſtators impoſe on Legacies; which renders this word *Condition* equivocal *o*. But we ought not to call any Legacies conditional, except thoſe whereof the Validity depends on a Condition, ſo as that until it be accompliſhed, the Legatary can have no manner of Right *p*. Thus, for example, if a Teſtator bequeaths a Sum of Money in caſe the Legatary be married at the time of the Teſtator's Death, or that he have Children, or that he be provided of an Office,

o See the ſeventh and following Articles of the eighth Section of Teſtaments.

p See the ſame Articles, as alſo the ſecond Article of this Section.

theſe

theſe are conditional Legacies, altho the word *Condition* be not expreſs'd in the Teſtament. But if the Teſtator deviſes a Land or Tenement, on condition that the Legatary ſuffer therein a Service for the Uſe of other Lands or Tenements which he deviſes to ſome other Perſon, this Expreſſion will indeed impoſe upon the Legatary the Charge of this Service, but it will not make the Legacy conditional. And if the Legatary dies before the Right of Service have been put in uſe, the Legacy will nevertheleſs be tranſmitted to the Heir or Executor of the ſaid Legatary.

XIII.

13. The Legatary who leaves his Wife big with Child, tranſmits the Legacy left him on condition that he have Children.

If the Condition of a Legacy were, That the Legatary ſhould have Children, the Teſtator having order'd, that when he ſhould have Children the Executor ſhould give him either a Sum of Money, or a certain Houſe or Land, and the ſaid Legatary ſhould die without having Children, but ſhould leave his Wife big of a Child that ſhould afterwards be born, this Legacy would have its Effect; and this Legatary would have tranſmitted his Right to his Heir. For his Heir would be this Child, whom the Teſtator had in view when he made his Teſtament, and whoſe Birth had accompliſhed the Condition *q*.

q Is cui ita legatum eſt, *quando liberos habueris*, ſi prægnante uxore relicta deceſſerit, intelligitur expleta conditione deceſſiſſe, & legatum valere, ſi tamen poſthumus natus fuerit. *l.* 18. *ff. quand. dies legat. ced. l.* 20. *ff. ad Senat. Trebell.*

XIV.

14. Indecent or impoſſible Conditions do not ſuſpend the Legacy.

If the Teſtator had made the Legacy to depend on a Condition that were either unjuſt, indecent, or impoſſible, ſeeing this Condition would be of no manner of Obligation, as has been ſhewn in its proper place; this Legacy would be of the Nature of a pure and ſimple Legacy, and the Legatary happening to die before he received it, would tranſmit his Right to his Heir or Executor *r*.

r Si ea conditio fuit quam prætor remittit, ſtatim dies cedit. Idemque & in impoſſibili conditione, quia pro puro hoc legatum habetur. *l.* 5. §. 3, & 4. *ff. quand. dies leg. ced.* See the eighteenth Article of the eighth Section of Teſtaments.

XV.

15. Legacies left to an uncertain Time are conditional.

Legacies, whoſe Effect depends on an uncertain Time, that is, of which there is no Certainty that it will ever happen, are of the ſame nature with conditional Legacies. For they imply the Condition, that they ſhall not have their Effect, unleſs the ſaid Time comes to paſs. So that if the Legatary of a Legacy of this nature ſhould chance to die, the ſaid Time not being as yet come to paſs, he would not tranſmit the Legacy to his Heir or Executor. Thus, for example, if a Teſtator had left a Sum of Money to a Legatary in caſe he ſhould arrive at the Age of Majority; this Legatary happening to die before he attained the Age of Majority, his Heir or Executor would have no Right to the Legacy *s*. *Example.*

s Si cui legetur *cum quatuordecim annorum erit*: certo jure utimur, ut tunc ſit quatuordecim annorum, cum impleverit. *l.* 49. *ff. de legat.* 1.

Non putabam diem fideicommiſſi veniſſe, cum ſextumdecimum annum ingreſſus fuiſſet, cui erat relictum, *cum ad annum ſextumdecimum perveniſſet*. Et ita etiam Aurelius Imperator Antoninus ad appellationem ex Germania judicavit. *l.* 48. *ff. de condit. & dem. V. l.* 74. §. 1. *ff. ad Senat. Trebell.*

¶ We muſt take notice that we have added to the Texts quoted on this Article the Citation of the 74*th Law*, § 1. *ff ad Senat. Treb.* becauſe it is contrary to them. For whereas it is ſaid in theſe Texts, that if a Legacy or fiduciary Bequeſt be left to a Perſon when he ſhall have fourteen Years of Age, or, as it is expreſſed in the ſecond Text, when he ſhall attain the Age of fourteen, the Legacy will not be due until theſe Years are compleated; it is ſaid in that other Law, that it ſuffices that they be begun. It is true, that that is in a Caſe where the Circumſtances made this Deciſion favourable; but it is, however, the ſame Expreſſion explained in two different Senſes. In our Uſage this Expreſſion, *When he ſhall arrive at ſuch a Year*, or, *When he ſhall attain to ſuch a Year*, ſeems to be meant of the Year begun. But this other Expreſſion, *When he ſhall have attained the Age of Majority*, is not equivocal, and demands Majority, which is not acquired but by the five and twentieth Year being compleat. For which reaſon we have made uſe of this Expreſſion in the Article, that we might not ſay any thing contrary to any one of theſe Texts, and that we might make it ſute with our Uſage.

XVI.

16. Another Example.

We may give for another Example of a Legacy which depends on an uncertain Time, that which a Teſtator ſhould bequeath in ſuch Terms as to make the Legacy to depend on the Death of his

ecutor; as, if he ſhould charge him give or deliver when he ſhould die n a Houſe or Land, or other Thing, a Legatary. For altho this Caſe be ...ferent from that of the preceding Article, in that it is certain that the Time will come when the ſaid Executor will die, whereas the Majority of the Legatary may perhaps never come to paſs; yet in this Caſe, as well as in the other, the Time is uncertain, and it implies the Condition, That when the Time ſhall come to paſs, the Legatary ſhall be in a condition to reap the Profit of the Legacy, and that he be then alive. So that if this Legatee chance to die before the Executor, he will have acquired no Right to the Legacy, and he will have tranſmitted nothing to his Succeſſors *t*.

t Si cum hæres morietur, legetur, conditionale legatum eſt. Denique vivo hærede defunctus legatarius ad hæredem non transfert. *l.* 4. *ff. quand. dies leg. vel fid. ced.*

Tale legatum, *cum morietur hæres dato*: certum eſt debitum ire, & tamen ad legatarium non tranſit, ſi vivo hærede decedat. *l.* 13. *in f. eod.* See the thirteenth Article of the eighth Section of Teſtaments, and the Remark which is there made on it.

XVII.

17. *The Legatary who dies before the Election tranſmits his Right.*

We are not to reckon among conditional Legacies, or thoſe which depend on an uncertain Time, a Legacy left to the Choice of the Legatary, or of the Executor. For altho, if the Legatary ſhould happen to die before the Election had been made, it would remain uncertain which were the Thing bequeathed, and that the Legacy could not have its Effect, in order to be acquitted, till after this Choice had been made, yet the Right of the Legatary was veſted in him independently of this Election, which was only to determine which was the Thing bequeathed, and not to veſt the Right to it in the Legatary. Thus, altho the Legatary ſhould die before the Election were made, yet he would tranſmit his Right to his Heir *u*.

u Illud aut illud utrum elegerit legatarius, nullo a legatario electo, decedente eo poſt diem legati cedentem, ad hæredem tranſmitti placuit. *l.* 19. *ff. de opt. vel elect. leg.* See the fifteenth Article of the ſeventh Section.

XVIII.

18. *Legacies annexed to Perſons are not tranſmitted.*

Legacies which are annexed to the Perſon of the Legatee, ſuch as an Uſufruct, an Annuity, a Legacy of Alimony, and others of the like nature, which the Teſtator intended only to beſtow on the Perſon of the Legatee, are not tranſmitted to his Heir. And if, for example, a Teſtator had given leave to one of his Friends to dig Stones out of a Quarry, or to uſe a Paſſage, or other Service, for ſome Ground, this Right being only for the Uſe of the ſaid Perſon, his Death would make it to ceaſe, unleſs the Expreſſion of the Teſtator ſhould relate likewiſe to the Heirs of the Legatee *x*.

x Quoties cohæret perſonæ id quod legatur, velut perſonalis ſervitus, ad hæredem ejus non tranſit. *l.* 8. §. 3. *in f. ff. de liber. leg.*

Si quis alicui legaverit, licere lapidem cædere: quæſitum eſt an etiam ad hæredem hoc legatum tranſeat. Et Marcellus negat, ad hæredem tranſmitti, niſi nomen hæredis adjectum legato ſuerit. *l.* 39. §. 4. *ff. de leg.* 1. *l.* 6. *ff. de ſervit. legat.*

XIX.

19. *An annual Legacy contains ſeveral.*

The Legacy of a Sum of Money to be paid every Year to a Legatary during his Life, either by way of Penſion, or for Alimony, or otherwiſe, is conſidered as containing ſo many Legacies as there ſhall be Years in the Life of the ſaid Legatary; and the Legacy of every Year is due to him as ſoon as it is begun, purſuant to the Rules explained in another Place *y*. Thus his Right to every Legacy is acquired according as he goes out of one Year into the other. And when he dies, he tranſmits to his Heir not only the Arrears of the Years that were fallen due, but alſo the Year which he had begun, and which his Death has interrupted *z*.

y See the ſixth and ninth Articles of the fifth Section.

z Cum in annos ſingulos legatur, non unum legatum eſſe, ſed plura conſtat. *l.* 10. *ff. quand. dies leg. ced.*

Nec ſemel diem ejus cedere, ſed per ſingulos annos. Sed utrum initio cujuſque anni, an vero finito anno cedat, quæſtionis fuit. Et Labeo Sabinus, & Celſus, & Caſſius, & Julianus in omnibus quæ in annos ſingulos relinquuntur, hoc probaverunt, ut initio cujuſque anni hujus legati dies cederet. *l.* 12. *eod. d. l.* §. 1. *l.* 1. *C. eod.*

Item Celſus ſcribit, quod & Julianus probat, hujus legati diem ex die mortis cedere, non ex quo adita eſt hæreditas. Et, ſi forte poſt multos annos adeatur hæreditas, omnium annorum legatario deberi. *d. l.* 12. §. 3.

XX.

20. *Example of a Legacy annexed to the Perſon of the Legatary.*

If a Father who had two Sons, one of Age, and the other under fourteen Years, had named them both his Executors, and given to the youngeſt ſome Lands or Houſes, and a Sum of Money to be paid him after his Majority, leaving till that time this Sum, and the Enjoyment of thoſe Lands or Houſes, to his eldeſt Son, on condition that he ſhould acquit the Charges of the Eſtate, and

and that he ſhould give every Year to their Mother a certain Penſion for the maintenance of the youngeſt Son; and that the eldeſt Son ſhould chance to die before this Time were expired, his Death would make this Enjoyment which he had of the ſaid Lands to ceaſe; and it would not go to his Children, or other Heirs whom he ſhould leave behind him. For altho that if he had lived, the Enjoyment would have laſted to the Time regulated by the Teſtament, yet it was given him only as a perſonal Bounty annexed to the good Office which he was to render to his Brother, and which the Father had conſidered as a Function of a Tutor, altho this ſecond Son had other Tutors. Thus, the Death of the eldeſt Son putting an end to the Motive of the Father, which was limited to the Perſon of the eldeſt Son, would likewiſe put an end to an Enjoyment which the Father had left to him only with this view *a*.

a Pater duos filios aquis ex partibus inſtituit hæredes; majorem & minorem, qui etiam impubes erat: & in partem eius certa prædia reliquit: & cum quatuordecim annos implevent certam pecuniam ei legavit: idque fratris ejus fideicommiſit: a quo petit in hæc verba. *A te peto Sei, ut ab annis duodecim ætatis ad ſtudia liberalia fratris tui inferas matri ejus annua tot uſque ad annos quatuordecim: eo amplius tributa fratris tui pro cenſu ejus dependas, donec bona reſtituas: & ad te reditus prædiorum illorum pertineant quoad perveniat frater tuus ad annos quatuordecim.* Quæſitum eſt, defuncto majore fratre, hærede alio relicto: utrum omnis conditio percipiendi reditus fundorum, anniverſaria præſtetur; alia quæ præſtaturus eſſet, ſi viveret Seius, ad hæredem ejus tranſierint: an vero id omne protinus ad pupillum & tutores tranſferri debeat. Reſpondit: ſecundum ea quæ proponerentur, intelligitur teſtator quaſi cum tutore locutus: ut tempore quo tutela reſtituenda eſt, hæc quæ pro annuis præſtari juſſiſſet, percipiendiſque fructibus finiantur, ſed cum major frater morte præventus eſt: omnia, quæ relicta ſunt, ad pupillum & tutores ejus confeſtim poſt mortem fratris tranſiſſe. *l.* 21. §. *ult. ff. de ann. leg.*

It muſt be obſerved in this Text, that the Tutorſhip ended at the Age of fourteen Years according to the Roman *Law, as has been mentioned in the Preamble of the Title of Tutors.*

XXI.

21. *The Delay of the Right of the Executor does not ſuſpend that of the Legatee.*

When the Succeſſion is open by the Death of the Teſtator, if it happens that there be not as yet any teſtamentary Heir or Executor, as if he who was named to be ſo were a poſthumous Child not yet born, or if the Executor ſhould defer accepting of the Succeſſion, or if he could not accept it, by reaſon that ſome Condition kept his Right in ſuſpence; the Legacy is nevertheleſs veſted in the Legatary, and he has his Right ſecure *b*.

b Hæredis aditio moram legati quidem petitionis facit, ceſſionem dies non facit. Proinde ſive pure inſtitutus, tardius adeat, ſive ſub conditione per conditionem impediatur, legatarius ſecurus eſt. Sed & ſi nondum natus ſit hæres inſtitutus, aut apud hoſtes ſit, ſimiliter legatario non nocebit, eo quod dies legati ceſſit. *l.* 7. *d. l.* §. 1, & 2. *ff. quand. dies leg. ced.* See the nineteenth Article of the fifth Section of Teſtaments, and the Remark that is there made on it.

XXII.

22. *A Legacy whoſe effect is ſuſpended, and which is tranſmitted.*

If a Teſtator had deviſed to one of his Friends a Land which he had in Marriage with his Wife, and to his Wife inſtead of the ſaid Land a Sum of Money, and that after the Teſtator's Death his Widow delaying to make her Election whether ſhe would take the Legacy of the Sum of Money, or her Land, the Legatary ſhould happen to die before ſhe had made her Option, he would tranſmit his Right to his Heir. And if the Widow ſhould afterwards reſolve to take the Legacy of the Money, that of the Land which he had with his Wife in Marriage would go to the Heir of this Legatary For altho this Legacy did imply the Condition that the Widow ſhould part with the Land, yet ſeeing ſhe might have determined herſelf as to the Choice at the moment that the Succeſſion was open, and that this Delay was not within the Intention of the Teſtator, as the waiting for the Event of another ſort of Condition which he had impoſed would be, but this Delay ariſing only from the Fact of a third Perſon, it is altogether foreign to the Teſtator's Intention, and ought not to hurt the Legatary *c*.

c Si extrinſecus ſuſpendatur legatum, non ex ipſo teſtamento; licet ante decedat legatarius, ad hæredem tranſmiſiſſe legatum dicimus: veluti ſi rem dotalem maritus legaverit extero, & uxori aliquam pro dotali re pecuniam: deinde deliberante uxore de electione dotis, deceſſerit legatarius, atque legatum elegerit mulier: ad hæredem tranſiſſe legatum dictum eſt: idque & Julianus reſpondit. Magis enim mora, quam conditio legato injecta videtur. *l.* 6. §. 1. *ff. quand. dies leg. ced.*

¶ It is ſaid in this Text that it was rather a Delay which the Teſtator had annexed to this Legacy, than a Condition on which he had made it to depend. But this Legacy did in effect imply this Condition, that the Widow ſhould accept the Legacy of the Money, and part with the Land. For if ſhe had taken back the Land, there would have been nothing for the Legatary, unleſs the Teſtator had deviſed to him alternatively either the Land which he had in Marriage with his Wife, or the Sum of Mo-

Money. But altho the Legacy be in this Senſe conditional, yet ſeeing the Condition conſiſts in the Choice which the Wife is to make, it would not be juſt that her Delay ſhould make the Legacy to periſh. And ſeeing it was both natural and agreeable to the Intention of the Teſtator, that this Election ſhould be made immediately after the Teſtator's Death, this Delay, which proceeds from the Fact of a third Perſon, and not from the Intention of the Teſtator, ought not to prejudice the Right of the Legatary. And if the Widow chuſes the Sum of Money, this Election is conſidered as if it had been made, as it ought to have been, at the moment of the Teſtator's Death.

XXIII.

23. *The Legacy with which the Perſon who is ſubſtituted Executor is charged, is acquir'd by the Death of the Teſtator.*

If a Teſtator having ſubſtituted a ſecond Heir or Executor to ſucceed him in default of the firſt, by that Form of Subſtitution which is called vulgar, which ſhall be explained in the firſt Title of the fifth Book, had made a Bequeſt, with which he had charged only the Heir or Executor who was ſubſtituted in the ſecond place, and not him who was inſtituted in the firſt, and that it ſo fell out that the Legatary died before the Inheritance paſſed to the Perſon ſubſtituted to the firſt Heir or Executor, the Legacy would be tranſmitted to the Heir of this Legatary. For the Inheritance could not paſs to the ſubſtituted Heir but with this Burden, and he coming to ſucceed in the room of the firſt Heir, is reputed to be Heir from the Moment of the Teſtator's Death, purſuant to the Rule which hath been explained in its Place *d*: So that he ought not to profit by the Death of the Legatary, which happen'd during this delay of his coming to the Inheritance. And it would be the ſame thing in the Caſe of that ſort of Subſtitution which is called pupillary, which ſhall be conſider'd in the ſecond Title of the fifth Book, if the Perſon ſubſtituted to the Pupil were charged with the Legacy *e*. And altho in theſe two Caſes of theſe two ſorts of Subſtitution the Legacy implies the Condition that the Perſon who is ſubſtituted ſhall ſucceed, yet it is not for all that conditional. For with regard to the Perſon ſubſtituted who is charged with the Legacy, it is pure and ſimple, ſince it cannot fall out that he ſhould be Heir or Executor without owing the Legacy.

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

e Mortuo patre, licet vivo pupillo, dies legatorum a ſubſtituto datorum cedit. *l.* 1. *ff. quand. dies leg. ced.*

Si a ſubſtituto legatum ſit relictum quamdiu inſtitutus deliberat defuncto legatario non nocebit, ſi poſtea hæres inſtitutus repudiavit: nam ad hæredem ſuum tranſtulerit petitionem. Tantumdem, etſi ab impuberis ſubſtituto legetur: nam ad hæredem ſuum legatum tranſfert. *l.* 7. §. 3 & 4. *ff. eod.*

SECT. X.

Of the Delivery and Warranty of the Thing bequeathed.

The CONTENTS.

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17. *Nor likewiſe of a Legacy which he had paid*

paid before the Condition on which it was left was accomplished.

18. *Exception to the preceding Article as to the Interest of a third Person.*

I.

1. *The Legatary ought to have the Legacy delivered to him, and not to take it by force.*

SINCE the Legacy is to be taken out of the Inheritance, the Poſſeſſion whereof paſſes from the Teſtator to the Executor, it is from his hands that the Legatary ought to have the thing that is bequeathed; and in what Terms ſoever the Bequeſt be conceived, even altho the Teſtator ſhould ordain that the Legatary ſhould take the thing bequeathed, yet he cannot ſeize upon it, and take it out of the poſſeſſion of the Executor without his Conſent. For it would be an Act of Violence, which is unlawful. But if the Executor ſhould refuſe to deliver the thing to him, he ought to apply to Juſtice for an Order to have it delivered *a*.

a *Quod quis legatorum nomine non ex voluntate hæredis occupavit, id reſtituat hæredi.* Etenim æquiſſimum prætori viſum eſt unumquemque non ſibi ipſum jus dicere occupatus legatis, ſed ab hærede petere. *l.* 1. §. 2. *ff. quod leg.*

If the Legacy were of an immoveable Thing, it would ſeem to be leſs neceſſary to oblige the Legatee to make a Demand of it from the Executor, in caſe he did not of his own accord offer to deliver it; but it might happen that the Executor ſhould have a mind to conteſt the Legacy, or that he might have a right to retain the Poſſeſſion of it for ſome time, as if it were a Houſe of which he had the Keys, and in which there were Moveables belonging to the Inheritance; or if it were ſome Lands of which the Crop was to be his. And there might be other juſt Cauſes why the Legatary ſhould not put himſelf in poſſeſſion of the Legacy. So that the Rule appears to be juſt for all ſorts of Legacies without diſtinction; and it is ſo ordered by many Cuſtoms. The Legacy ought to be deliver'd either by the Executor of the Teſtament, or by the Heir.

II.

2. *The Executor ought to take care of the thing bequeathed.*

While the thing bequeathed remains in the cuſtody of the Executor, he is bound to preſerve it until he delivers it to the Legatary; and if it periſhes, or is damaged, thro his Fault or Negligence, he will be accountable for it: For he is obliged to take exact care of it, and he ought to anſwer for the Faults that are contrary to this Care *b*.

b Si res aliena vel hæreditaria ſine culpa hæredis perierit, vel non compareat; nihil amplius quam cavere eum oportebit. Sed ſi culpa hæredis res perit, ſtatim damnandus eſt. Culpa autem qualiter ſit æſtimanda, videamus: an non ſolum ea, quæ dolo proxima ſit, verum etiam quæ levis eſt: an numquid & diligentia quoque exigenda eſt ab hærede, quod verius eſt. *l.* 47. §. 4, & 5. *ff. de legat.* 1. See the eleventh Article of the firſt Section of Subſtitutions direct and fiduciary. See the eleventh Article of this Section.

III.

The Legacies for the Deli
Payment of which there is no T
and which are not conditional
to be paid immediately after t
cutor has accepted the Succeſſio

c Omnia quæ teſtamentis ſine die vel adſcribuntur, ex die aditæ hæreditatis præſtantur. *l.* 32. *ff. de leg.* 2.

ceptance of the Succeſſion.

IV.

4. *The Legacy ought to be deliver'd in the Place where it is at the time of the Teſtator's Death.*

The thing bequeathed ought to be delivered to the Legatee in the Place where it was at the time of the Teſtator's Death, unleſs it ſhould appear that it was his Intention that it ſhould be delivered in another Place; in which Caſe the Executor muſt cauſe it to be tranſported thither at his own Charges *d*.

d Cum res legata eſt, ſiquidem propria fuit teſtatoris, & copiam ejus habet hæres moram facere non debet, ſed eam præſtare. Sed ſi res alibi ſit, quam ubi petitur, primum quidem conſtat, ibi eſſe præſtandam, ubi relicta eſt, niſi alibi teſtator voluit. Nam ſi alibi voluit, ibi præſtanda eſt, ubi teſtator voluit, vel ubi verſimile eum voluiſſe. *l.* 47. *ff. de leg.* 1. *l.* 38. *ff. de judic. l. un. C. ubi fideic. pet. op.*

V.

5. *If a Horſe that is bequeathed were run away in the Life-time of the Teſtator, the Executor is not obliged to make ſearch after him.*

If the Legacy was of a Horſe, or of a Herd of Cattle, or of Animals of other kinds, and that before the Death of the Teſtator the Horſe was run away, or ſome of the Cattle ſtrayed, the Executor would not be bound to make ſearch after it, and to bring it back; and if the Legatee would reap the Benefit of the Legacy, he would be obliged to be at this Expence himſelf. But if this Caſe had happen'd after the Death of the Teſtator, the Executor would be obliged to be at this expence, purſuant to the Rule explained in the ſecond Article *e*.

e Si quis ſervum hæredis, vel alienum legaverit: & is fugiſſet, cautiones interponendæ ſunt de reducendo eo. Sed ſiquidem vivo teſtatore fugerit, expenſis legatarii reducitur: ſi poſt mortem, ſumptibus hæredis. *l.* 8. *ff. de legat.* 2.

Si ſervus legatus vivo teſtatore fugiſſe dicatur, & impenſa & periculo ejus cui legatus ſit reddi debet: quoniam rem legatam eo loco præſtare hæres debet in quo a teſtatore ſit relicta. *l.* 108. *ff. de legat.* 1.

VI.

6. *The Legatary is liable to Coſts and Damages for not receiving his Legacy.*

If the thing bequeathed were of ſuch a nature as that the Legatary delaying to receive it, the Executors ſhould by his delay ſuffer ſome Loſs or Damage, the Legatary would be bound to make it good. Thus, for example, if it were a Legacy of Cattle, the Legatee would be

be liable for the Charges of keeping them, of feeding them, and for the other Costs and Damages which the Executor might chance to be at. Thus, for another example, if thro the Legatary's default of receiving Wine, Corn, or other things which should take up Places, or Moveables necessary for other Uses, the Executor should lose the Occasion of letting out to hire the said Places, or could not himself make use of them and the other things for his own Concerns; the Legatary would be answerable for all these Damages. But the Executor could not pour the Wine out of the Vessels, or throw the Corn out of the Barns, under pretext of the Delay *f*.

f Si hæres damnatus sit dare vinum quod in doliis esset, & per legatarium stetit, quominus accipiat: periculose hæredem facturum, si id vinum effundat. Sed legatarium petentem vinum ab hærede doli mali exceptione placuit summoveri, si non præstet, id quod propter moram ejus damnum passus sit hæres. *l. 8. ff. de trit. vin. vel ol. leg.*

VII.

7. Security for Legacies and fiduciary Bequests. If the Legatees should be in fear of losing their Legacies, and should be unwilling to leave the Goods of the Inheritance to the Disposal and Management of the Executor, they might provide against such danger, either by obliging him to give caution, or some other Security, or by getting an Order for seizing the Goods, and sealing up the Places in which the Moveables and Papers belonging to the Inheritance should be, in order to have an Inventary of them made, and to have them exposed to sale, if that should be necessary for their Payment. And it would be the same thing for the Security of fiduciary Bequests *g*.

g Legatorum nomine satisdari oportere prætor putavit. Ut quibus testator dari fierive voluit, his diebus detur, vel fiat. *l. 1. ff. ut legat. seu fideic. serv. caus. cav.*

Idemque in fideicommissis quoque probandum est. *d. l. 1. §. 10.*

Nec sine ratione hoc prætori visum est, sicuti hæres incumbit possessioni bonorum, ita legatarios quoque carere non debere bonis defuncti: sed aut satisdabitur eis, aut, si satis non datur, in possessionem bonorum venire prætor voluit. *d. l. §. 2. l. 1. C. ut in poss. legat. vel fid. serv. c. m.*

It is said in the second and seventh Laws of this Title in the Code, that the Testator may discharge the testamentary Heir from giving Security for the Payment of the Legacies and the fiduciary Bequests; and it is very just that a Testator should have this liberty. But our Usage and Equity would apply some Temperament in this Matter, should the testamentary Heir make a bad use of the Testator's Indulgence to him; and if there were any danger for the Legatees, they might apply for Remedy to a Court of Justice. For it would be presumed, even as to the Testator's Will, that he did not intend to countenance any knavish dealing on the part of his testamentary Heir.

VIII.

If a Father or a Mother instituting their Children or Grand-Children their Executors, had substituted to them their Children or other Descendants, the Persons substituted could not demand Security for the Goods of the fiduciary Bequest from their Father or Mother who should be charged therewith, unless they had married a second time, or that the Testator, out of a mistrust of their Conduct, had expresly order'd some Security to be given *h*. *8. Two Cases where the Father and Mother being charged with a fiduciary Bequest to their Children, ought to give Security.*

h Si pater vel mater, filio seu filia institutis hæredibus rogaverit eos eas've nepotibus vel neptibus, pronepotibus vel proneptibus, ac deinceps restituere hæreditatem: in supradictis casibus fideicommissorum servandorum satisdationem cessare, si non specialiter eandem satisdationem testator exigi disposuerit: & cum pater vel mater secundis existimant nuptiis non abstinendum. In his enim duobus casibus, id est, cum testator specialiter satisdari voluerit, vel cum secundis se pater vel mater matrimoniis junxerit, necesse est, ut eadem satisdatio pro legum ordine præbeatur. *l. 6. d. l. § 1. C. ad Senat. Trebell.*

Altho the Security mentioned in this Law seems to be meant of a Caution or Bail according to the ordinary meaning of this Word satisdationem, *yet the most learned Interpreters take it in another Sense which this Word may bear, and that is a bare Submission. Which would be but a slender Security, in case there were occasion for any: and it would seem as if the Use of this Rule ought very much to depend on that which Equity may require, according to the Quality of the Goods, that of the Persons, and the other Circumstances that might come into consideration.*

IX.

If the Executor who is charged with a Legacy or a fiduciary Bequest, has been at any charges for the Preservation of the thing bequeathed, he will recover them, unless they are such as ought to be taken out of the Profits or Revenues of the thing. Thus, for example, if an Executor being charged with a fiduciary Bequest of a House which he should restore after his Death, and the said House having perished, or being damaged without any fault of his, he had rebuilt it, or repair'd it, this Expence would be estimated in proportion to the quality and necessity of the Repairs, and the Condition in which the House was at the time of the Testator's Death, the time that it had lasted, and according to the other Circumstances necessary to be considered in making the said Estimate *i*. *9. The Executor recovers what he has laid out on the Legacies and fiduciary Bequests.*

i Domus hæreditarias exustas, & hæredis nummis extructas, ex causa fideicommissi post mortem hæredis restituendas, viri boni arbitratu, sumptuum rationibus deductis, & ædificiorum ætatibus examinatis, respondit. *l. 58. ff. de leg. 1.* See the twelfth Article of the first Section of direct Substitutions.

X.

10. He ought to acquit the Charges of the Lands devised until the time of Delivery.

The Executor is also bound to acquit the Taxes, Ground-Rents, and other Charges of the Things devised, whether they fell due in the Time of the Testator, if there remain any Arrears due, or since the Testator's Death during the Time that the Executor had the Enjoyment of them. And if he is obliged to restore the Fruits which he has reaped, these kinds of Charges will be deducted out of them *l*.

l Hæres cogitur legati prædii solvere vectigal præteritum, vel tributum, vel solarium, vel cloacarium, vel pro aquæ forma. *l.* 39. §. 5. *ff. de leg.* 1.

XI.

11. The Executor bears the Loss, if the Thing perishes after his Delay to deliver it.

If the Executor being in fault for not delivering the Thing bequeathed, it happens to perish, or to be damaged, even altho it were by an Accident, he will be accountable for it. For if the Thing bequeathed had been delivered, the Legatary might have perhaps either prevented the Loss of it, or might have sold it *m*.

m Ipsius quoque rei interitum post moram debet, sicut in stipulatione, si post moram res interierit æstimatio ejus præstatur. *l.* 39. §. 1. *ff. de leg.* 1.

Item si fundus chasmate perierit: Labeo ait, utique æstimationem non deberi. Quod ita verum est, si non post moram factam id evenerit. Potuit enim eum acceptum legatarius vendere. *l.* 47. §. *ult. eod. l.* 3. *C. de usur. & fruct. leg.*

Si servus legatus sit & moram hæres fecerit, periculo ejus & vivit, & deterior fit: ut, si debilem forte tradat, nihilominus teneatur. *l.* 108. §. 11. *eod.*

If it were Lands or Houses that were devised, and that they perish by the overflowing of a River, as it is said in the second of these Texts, it would require particular Circumstances to make the Testamentary Heir answerable for this Loss; for it is not so easy to sell Lands or Houses as a Moveable Thing.

XII.

12. All other Loss, whereof nothing can be imputed to the Executor, falls on the Legatee.

If it was the Legatary who, having it in his power to receive the Thing bequeathed, had delayed to do it, the Loss or Diminution which might happen would fall upon him. And it would be the same thing, if the Thing bequeathed had perished before the Time that it was to be delivered, and that nothing could be imputed to the Executor *n*.

n Si certum corpus hæres dare damnatus sit, nec fecerit, quominus ibi, ubi id esset, traderet: si id postea sine dolo & culpa hæredis perierit, deterior sit legatarii conditio. *l.* 26. §. 1. *ff. de legat.* 1.

XIII.

13. When ... the Executor gives.

If the Legacy were in general of a Thing indefinitely, such as a Ho[rse,] a Sute of Hangings, without specify[ing] any particular Sute, or any partic[ular] Horse, the Executor would be bou[nd] to warrant the Thing which he [has] given for acquitting this Legacy, if [it] should happen that the Legatary w[ere] evicted of it. And whether the Thing had been found among the Goods of the Inheritance, or that the Executor had taken it somewhere else, and that he knew or were ignorant whose it was, he would be bound to give another in its place; for the Testator meant to make an useful Bequest *o*.

o Si hæres tibi, servo generaliter legato, Stichum tradiderit, isque à te evictus fuisset: posse te ex testamento agere, Labeo scribit. Quia non videtur hæres dedisse, quod ita dederat, ut habere non possis. Et hoc verum puto. *l.* 29. §. 3. *ff de leg.* 3.

Hæres servum non nominatim legatum tradidit, & de dolo postea repromisit, servus evictus est. Agere cum hærede legatarius ex testamento poterit, quamvis hæres alienum esse servum ignoraverit. *l.* 58. *ff. de evict. V. l.* 71. §. 1. *ff. de leg.* 1. See the following Article.

XIV.

14. Warranty of the Legacy of a Thing particularly named.

If the Legacy were of a Thing particularly named by the Testator, as if he had devised such a Ground, or such a Moveable, which he believed to be his own, but which in reality was not his, the Executor would be bound only to deliver the Thing specified in the Testament, and would not be obliged to warrant it. For it would be presumed that the Testator had devised it only because he took himself to be the Owner of it, and that he would not have made such a Devise, if he had known that the Thing was not his own *p*. Thus, in a like Case, if a Father, disposing of his Goods among his Children, had charged one of them with a fiduciary Bequest for another of the Children of some Land or Tenement which the Testator believed to be his own, he who in performance of this Disposition had delivered the said Land or Tenement to his Brother at the Time required by the fiduciary Bequest, would not be bound to warrant the said Land or Tenement, if his Brother should chance to be evicted thereof. But if instead of a fiduciary Bequest, the Father's Disposition were a Partition that he had made among his Children, giving to one of them this Land or Tenement for

p Si certus homo legatus est, talis dari debet qualis est. *l.* 45. §. 11. *ff. de legat.* 1. Testatorem enim si scivisset alienam rem esse, non legasse. §. 4. *inst. de legat.* See the 8th Article of the third Section.

his

, his Coheirs would be bound
it the ſaid Land or Tenement *q*,
to the Rules explained in their

, prædiis, quæ pater, qui ſe *dominum* rit, verbis fideicommiſſi filio reliquit: fratribus & cohæredibus actio erit. Si tamen inter filios diviſionem fecit, arbiter, conjectura voluntatis, non patietur, eum partes cohæredibus prælegatas reſtituere, niſi parati fuerint & ipſi patris judicium fratri conſervari. *l.* 77. §. 8. *ff. de legat.* 2.

r See the ſixth Article of the firſt Section, and the firſt Article of the third Section of Partitions.

XV.

15. *If he who evicts the Thing from the Legatary is obliged to reſtore the Price, it will go to the Legatary.*

If the Legatee of Lands or Houſes be evicted of them, and that he who evicts them is obliged to reſtore the Price of them, this Price which is reſtored will belong to the Legatee, and not to the Executor. For the Intention of the Teſtator in deviſing to him the ſaid Lands or Houſes, implies his Intention that the Legatee ſhould at leaſt have the benefit of the Price. Thus, for example, if the Deviſe were of Lands purchaſed by the Teſtator with a Reſervation of Power to the Seller to redeem them, whether the ſaid Lands were part of the King's Demeſnes, or belonging to ſome particular Perſon, the Money that ſhould be for redeeming the Lands, would belong to this Legatee *s*.

s Cum poſt mortem emptoris, venditionem reipublicæ prædiorum optimus maximuſque princeps noſter Severus Auguſtus reſcindi, hæredibus pretio reſtituto, juſſiſſet: de pecunia legatario, cui prædium emptor ex ea poſſeſſione legaverat, conjectura voluntatis, pro modo æſtimationis, partem ſolvendam eſſe, reſpondi. *l.* 78. §. 1. *ff. de legat.* 2.

XVI.

16. *The Executor cannot be reſtored againſt the Payment of a Legacy, altho it be null.*

If an Executor had voluntarily executed a Diſpoſition of the Teſtator by acquitting a Legacy or fiduciary Bequeſt which ſhould be found to be null, he could not afterwards diſpute the Validity thereof. For having accompliſhed a Diſpoſition which his Reaſon and Conſcience had obliged him to approve and execute, he could not revoke what he had done out of Motives which made this Payment a Duty incumbent on him.

t Si quis mortuo fideicommiſſum reliquum ſit, tamen ſi hæredes compertæ voluntatis defuncti, prædia ex causa fideicommiſſi ipſi ſub præſtiterunt, fruſtra ab hæredibus ejus de ea re quæſtio tibi moveatur. Enim vero non ſola ſcriptura, ſed ex conſcientia reſtituta fideicommiſſi debentur, voluntati ſatisfactum eſſe videtur. *l.* 2. *C. de fideicom.*

XVII.

17. *Nor becauſe of a Legacy which he had paid before the Condition on which it was left was accompliſhed.*

Since the Executor may acquit a Legacy which he cannot be compelled by Law to pay, he may with much more Reaſon deliver ſooner than he is obliged either a Legacy or a fiduciary Bequeſt, whether it be univerſal of the whole Inheritance, or particular of a Sum of Money, or of ſome other Thing, for the Delivery of which a Term was ſet which would delay the Execution thereof, or even to which a Condition were annexed which would ſuſpend the Validity of it. And altho after the Delivery of the Thing the Condition on which it was left not happening, the Diſpoſition ſhould be found to be null, yet this Event would not have the Effect to make this Payment not to ſubſiſt. For the Executor might diſcharge the Legatee of the Condition, and acquit the Legacy or fiduciary Bequeſt as pure and ſimple, ſince he might acquit a Legacy that was null from the beginning, as has been ſhewn in the ſixteenth Article *u*.

u Poſt mortem ſuam rogatam reſtituere hæreditatem, defuncti judicio, & antequam fati munus impleat, poſſe ſatisfacere, id eſt reſtituere hæreditatem, quarta parte vel retenta, vel omiſſa, ſi voluerit, explorati juris eſt. *l.* 12. *C. de fideic.*

Altho no mention be made in this Text of a Legacy or fiduciary Bequeſt that is left upon a Condition, yet it cannot be doubted that the Executor, who ſhould know of the Condition, and who without waiting for the Accompliſhment of it ſhould execute the Diſpoſition of the Teſtator, could not revoke his Approbation of the ſaid Diſpoſition. And this Approbation ought to ſubſiſt with much more Reaſon than that of a Diſpoſition which is void from the beginning, of which notice hath been taken in the preceding Article.

XVIII.

18. *Exception to the preceding Article, as to the Intereſt of a third Perſon.*

The Rule explained in the preceding Article is to be underſtood of the Caſes, where a Payment made before it falls due would be of no prejudice to third Perſons. For if, for example, an Executor were charged to reſtore after his Death, either the whole Inheritance, or a part of it, or a Sum of Money, to ſome Perſon, and that in caſe the Perſon who is ſubſtituted ſhould die before the Executor, the Teſtator had called another Perſon to ſucceed to the ſame fiduciary Deviſe, the Executor, who, having a mind to favour the Perſon ſubſtituted in the firſt place, had delivered up to him the Thing which was deviſed in Truſt, would not be diſcharged of it, if the Perſon ſubſtituted in the

firſt