III.

3. *Presumption for the usefulness of a Law, notwithstanding the inconveniences of it.*

We have seen that Arbitrary Laws, whether they be established by those who have the Right to make Laws, or by some Usage, and Custom, are always founded upon some Usefulness, either to prevent, or put a stop to Inconveniences, or upon some other View of the Publick Good: From whence it follows, that altho' the said Laws may cause other Inconveniences, in the place of those which they have removed, and that sometimes we are ignorant what were the Motives of enacting these sorts of Laws, and wherein their Usefulness consists, yet we ought still to presume that the Law which is in force is useful and just [f], until it be repealed by another Law; or abolished by Disuse.

[f] *See the thirteenth Article of the same Section.*

IV.

4. *Customs and Usages are the Interpreters of Laws.*

We have seen that Customs and Usages serve as Laws [g]: From whence it follows, that if Customs and Usages have the force of Laws, with much more reason are they to be used as Rules in the Interpretation of other Laws. And there is no better Rule for explaining obscure and ambiguous Laws, than the manner in which they have been interpreted by Custom and Usage [h].

[g] *See the tenth and eleventh Articles of the first Section.*
[h] *See the eighteenth Article of the second Section.*

V.

5. *Disuse abolishes Laws and Customs.*

We have shewn that the Authority of Customs and Usages is founded on this reason, that it ought to be presumed, that what has been observed for a long time, is useful and just [i]; from whence it follows, that if any Law, or Custom, hath been a long time in disuse, it is abolished [k]. And as its Authority was founded upon the long Usage, so the same cause can take it away. For it shews that what has ceased to be observed, is no longer useful.

[i] *See the tenth Article of the first Section.*
[k] *See the seventeenth Article of the first Section.*

VI.

6. *The Laws and Customs of the neighbouring Places, serve as Examples and Rules.*

It follows also from the same Presumption, which makes us judge that what has been long observed is useful and just, that if in some Provinces, or other Places, they want Rules for certain Difficulties in Matters which are there in use, but which are not so minutely regulated there as to determine these sorts of Difficulties, and it appear that the said Difficulties are regulated in other Places, where the same Matters are likewise in use; it is natural to follow the Example of those Places, and especially that of the chief Towns. Thus, we see in the *Roman* Law, that the Provinces conformed themselves to the Usage of *Rome* [m].

[m] *See the twentieth Article of the second Section.*

VII.

7. *We must judge of the meaning and intent of a Law, by its whole tenor.*

We have seen that it is by the Spirit and Intendment of the Laws that we are to understand, and apply them: that in order to judge aright of the meaning of a Law, we ought to consider what its Motive is, what are the Inconveniences against which it provides, and what is the Usefulness which may redound from it; the Relation it hath to ancient Laws, the Changes it makes in them, and to make the other Reflections, whereby we may be able to apprehend rightly its meaning: from whence it follows in the first place, that in order to find out by all these Views the Intention and Spirit of the Laws, we must examine in them what it is they set forth, and what it is they decree, and always judge of the sense and meaning of the Law, by the whole Series and Tenor of all its parts, without curtailing any thing in it [n].

[n] *See the tenth Article of the same second Section.*

VIII.

8. *We must adhere rather to the sense of the Law, than to what the terms of it may seem to carry contrary to it;*

It follows also from this Remark on the Design and Motive of the Law, that if it happens that some Terms, or some Expressions of a Law, appear to have a different sense from what is otherwise evidently marked by the tenor of the whole Law; we must adhere to this true sense, and reject the other, which appears from the terms, and which is found to be contrary to the intent of the Law [o].

[o] *See the third and twelfth Articles of the second Section. See in that twelfth Article the Cases where it is necessary to have recourse to the Prince for the Interpretation of the Law.*

IX.

9. *To supply the defect of Expression, by the Intendment of the Law.*

It follows likewise from the same Remark, that when the Expressions of Laws are defective, we must supply them, so as to make up the Sense of the Law according to its Spirit and Intendment [p].

[p] *See the eleventh Article of the second Section.*

X. This

X.

10. *Laws which are interpreted favourably.*

This is likewiſe another conſequence of the ſame Remark on the Spirit of Laws, that ſome of them are to be interpreted in ſuch a manner, as to give them the whole extent they are capable of, without violating Juſtice and Equity: and others, on the contrary, are to be reſtrained to a more limited Senſe. Thus, the Laws which relate in general to what is of Natural Liberty, thoſe which permit all ſorts of Covenants, and all thoſe which favour Equity, are to be interpreted with all the Extent that can be given them, without encroaching upon other Laws, and Good Manners [q]. For which reaſon, the Cauſes which the Laws favour in this manner, are called Favourable Cauſes.

[q] *See the fourteenth Article of the ſecond Section.* Prætor favet naturali æquitati. *l. 1. ff. de conſt. pecun.*

XI.

11. *Laws which are ſtrictly interpreted.*

But the Laws which derogate from this Liberty, thoſe which prohibit what of it ſelf is not unlawful, thoſe which derogate from common Right, thoſe which make Exceptions, which grant Diſpenſations, and others of the like nature, ought to be reſtrained to the particular Caſes which they regulate, and to what is expreſly included in their Diſpoſitions [r].

[r] *See the fifteenth Article of the ſecond Section.*

XII.

12. *Equity, Rigour of the Law.*

We may place among theſe different Interpretations, which give ſome extent to Laws, or which reſtrain them, the Rules which concern the Temperaments of Equity, which may be uſed on ſome Occaſions, and the Rigour of the Law which muſt be followed on others.

But we ſhall not ſtop here to give Examples of theſe ſeveral Interpretations, nor to explain the difference between Equity and the Rigour of the Law, and that which concerns the Uſe of the one and the other. This Detail ſhall be explained in its proper place [s]. We ſhall only obſerve touching theſe ſorts of Cauſes which are commonly called Favourable Cauſes, ſuch as thoſe of Widows, Orphans, Churches, Marriage Portions, Teſtaments, and others of the like nature; that this Favour ought always ſo to be underſtood, as not in the leaſt to prejudice the Intereſt of Third Perſons, and that the Favour of theſe ſorts of Cauſes is not to be extended beyond the Bounds of Juſtice and Equity.

[s] *See the fourth, fifth, ſixth, ſeventh and eighth Articles of the ſecond Section.*

XIII.

13. *Interpretation of the Benefits of Princes.*

Upon the ſame Principle of the favourable Interpretation of ſome Laws, and the ſtrict Interpretation of others, doth depend the Rule of two different Interpretations of the Will of Princes, in the Gifts and Privileges which they grant to ſome Perſons. For when the ſaid Gifts are ſuch, as that we may give to them a full and intire Extent, without any Prejudice to other Perſons; they are always interpreted in favour of the Perſon whom the Prince had a mind to honour with this Benefit, and an Extent is given to it ſuitable to what the Liberality that is natural to Princes does demand. But if it be ſuch a Gift and Privilege as cannot be interpreted in this manner, without prejudice to other perſons, it muſt be reſtrained to what may be granted them without prejudice to others.

[t] *See the ſeventeenth Article of the ſecond Section.*

XIV.

14. *Divers Effects, or Uſes, of Laws, to ordain, to prohibit, to permit, to puniſh.*

We have ſeen what are the Foundations of the Juſtice and Authority of Laws, and that ſeeing they are the Rules of the Order of Society, they ought to diverſify the Effects of that Authority, according to the ſeveral Uſes that are neceſſary for forming that Order, and for maintaining it. This is the reaſon why many Laws ordain, ſome prohibit: why others permit, and why all puniſh and reſtrain thoſe who tranſgreſs their different Diſpoſitions; whether it be that they do not accompliſh what the Laws preſcribe; or that they do what the Laws forbid; or that they tranſgreſs the Bounds of what they permit. And according to the ways in which their Diſpoſitions, and their Deſign, are violated, they deprive thoſe of their Effects who do not fulfil what they enjoin: they puniſh thoſe who do what they forbid, or who do not that which they command: they annul that which is done contrary to the Order which they preſcribe: they repair the Conſequences of their Infractions: they take vengeance for every thing that violates their Diſpoſitions: and, in fine, they maintain their Authority by all the ways that are neceſſary for preſerving Order [u].

[u] *See the eighteenth and twentieth Articles of the firſt Section.*

XV. It

XV.

15. *Laws reſtrain not only what is directly contrary to their Diſpoſitions, but alſo what is indirectly againſt their Intention.*

It follows likewiſe from the ſame Remark on the Juſtice and Authority of Laws, that they reſtrain not only what is directly oppoſite to their expreſs Diſpoſitions, but alſo what is indirectly contrary to their Intention. And whether it appear that both the Spirit and Letter of the Law be violated, or that only the Spirit of the Law be tranſgreſſed, and the Letter of it ſeemingly obſerved, the Tranſgreſſor does nevertheleſs incur thereby the Puniſhment[x].

[x] *See the nineteenth Article of the firſt Section.*

XVI.

16. *Laws are made for what happens commonly, and not for one ſingle Caſe.*

It is alſo another Conſequence of Laws being the Rules of the Univerſal Order of Society, that no Law is made to ſerve only for one Perſon, or for one Caſe, or for one ſingular and particular Fact; but they provide in general for what may happen: and their Diſpoſitions reſpect all the Perſons, and all the Caſes to which they extend[y]. And therefore the Wills of Princes, which are limited to particular Perſons, and to ſingular Facts, ſuch as a Pardon, a Gift, an Exemption, and others of the like nature, are Favours, Conceſſions, Privileges, but not Laws. And altho' very often they be ſingular Caſes, which are the Motives of new Laws; yet they do not regulate even thoſe very Caſes which have given Occaſion to the ſaid Laws, and which were otherwiſe regulated by preceding Laws; but they only take care to regulate for the future Caſes like unto thoſe which gave riſe to them. Thus, in *France*, the Edict about Mothers, and that about ſecond Marriages, have provided againſt the Inconveniences to come, and the preceding Caſes have been regulated according to the Diſpoſitions of the Laws that were in force before that[z].

[y] *See the twenty firſt and twenty ſecond Articles of the firſt Section.*

[z] *See the thirteenth and fourteenth Articles of the firſt Section.*

XVII.

17. *Extent of the Laws according to their Deſign.*

Laſtly, it is another Conſequence of the preceding Remark, that ſince Laws are general Rules, they cannot regulate the time to come, ſo as to make expreſs Proviſion againſt all Inconveniences, which are infinite in number, and that their Diſpoſitions ſhould expreſs all the Caſes that may poſſibly happen; but it is only the Prudence and Duty of a Lawgiver, to foreſee the moſt natural, and moſt ordinary Events, and to form his Diſpoſitions in ſuch a manner, as without entring into the Detail of the ſingular Caſes, he may eſtabliſh Rules common to them all, by diſcerning that which may deſerve either Exceptions, or particular Diſpoſitions[a]. And next it is the Duty of the Judges, to apply the Laws not only to what appears to be regulated by their expreſs Diſpoſitions, but to all the Caſes where a juſt Application of them may be made, and which appear to be comprehended either within the expreſs Senſe of the Law, or within the Conſequences that may be gathered from it.

[a] *See the twenty firſt and twenty ſecond Articles of the firſt Section.*

XVIII.

18. *There are Rules which are general, and common to all Matters, others common to ſeveral Matters, and others peculiar to one.*

We have ſeen that all the Laws derive their Source from the two Primary Laws, that many depend on others of which they are Conſequences, and that all of them regulate either in general, or in particular, the different parts of the Order of Society, and Matters of all kinds. From whence it follows, that the Laws are the more general the nearer they approach to the two firſt Fundamental Laws, and the more they deſcend to particulars, they are the leſs general. Thus, ſome Laws are common to all ſorts of Matters, ſuch as thoſe which enjoin Honeſty and Sincerity, and which forbid Deceit and Fraud, and others of the like nature. Others are common to many Matters, but not unto all: Thus, this Rule, That Covenants are in place of a Law to thoſe that make them, agrees to Sales, Exchanges, Letting and Hiring, Tranſactions, and to all the other kinds of Covenants; but has no relation to the matter of Guardianſhips, nor to that of Preſcriptions. Thus, the Rule of Reſciſſion, upon account of the party's being damaged in more than the half of the juſt price, which takes place in the Alienation of Lands by a Sale, doth not take place in an Alienation made by a Tranſaction[b].

[b] *See that diſtinction of the Laws in the fifth Article of the firſt Section.*

XIX.

19. *The importance of diſtinguiſhing thoſe three ſorts of Laws.*

It follows from this Remark, that it is of importance in the Study and Application of the Laws, to obſerve, and to diſtinguiſh the Rules which are common to all Matters without diſtinction, thoſe which extend to ſeveral Matters,

but not unto all, and thoſe which are peculiar only to one; that we may avoid falling into the Error, to which many perſons are liable, of extending a Rule that is peculiar to one Matter, to another where it has no uſe, and even where it would be falſe. Thus, for Example, we find this Rule in the *Roman* Law, that in ambiguous Expreſſions we muſt chiefly conſider the Intention of the Perſon who ſpeaks [c]; this indefinite Rule being found in a Title of ſeveral Rules concerning all Matters, and it not pointing out what Matter it properly belongs to; it ſeems to be general and common to all: and if we apply it indifferently to all Matters, we ſhall draw the ſame inference from it in Contracts, as in Teſtaments, where we are to interpret the ambiguous Expreſſion by the Intention of the Perſon whoſe Will it is intended to explain. However, this Application, which will be always juſt in Teſtaments [d], will be often found falſe in Contracts; for in Teſtaments, it is only one Perſon alone who ſpeaks, and his Will ought to ſerve as a Law. But in Covenants, it is the Intention both of the one and the other Party, which is the Law common to both. Thus, the Intention of the one Party, ought to anſwer to that of the other, and it is neceſſary that they underſtand one another, and that they agree together. And according to this Principle, it often happens that it is not by the Intention of the Perſon who ſpeaks that the ambiguous clauſe is to be interpreted; but rather by the reaſonable Intention of the other Party. Thus in a Sale, if the Seller hath made uſe of an ambiguous Expreſſion concerning the qualities of the Thing ſold; as if in ſelling a Houſe, he ſaid that he ſold it with its Services, without diſtinguiſhing whether they be Services which the Houſe owes, or which are due to it; and the Houſe is found to be ſubject to a Service which was not known, ſuch as a Right of Paſſage, a Service of not raiſing a Building higher, or other of the like nature, the great inconveniency of which would have either prevented the Buyer from buying at all, or from giving ſo great a Price for it, if he had known of the Service; this ambiguity of the Expreſſion of the Seller will not be interpreted by his intention, but by the intention of the Buyer, who had no reaſon to imagine that the Houſe was ſubject to any ſuch Service. And this Seller ſhall be bound for all the Effects of Warranty, purſuant to the Rules of this matter [e].

[c] In ambiguis orationibus, maximè ſententia ſpectanda eſt ejus qui eas protuliſſet. *l.* 96. *ff. de reg. jur.*

[d] *It is remarkable, that this* 96th *Law,* ff. de reg. jur. *is taken out of the Treatiſe of* Mecian *about Deviſes in Truſt.*

[e] *See the fourteenth Article of the ſecond Section of Covenants; the fourteenth Article of the eleventh Section of the Contract of Sale; the tenth Article of the third Section of Letting and Hiring.*

XX.

20. *Diſcernment of the Exceptions.*

We have ſeen that ſome Laws are ſo general, and ſo certain every where, that they do not admit of any Exception: and that, on the contrary, there are many Laws to which there are Exceptions. It follows from this Rule, that we muſt not indifferently apply the general Rules to all the Caſes that ſeem to be comprehended within their Diſpoſitions, for fear we ſhould extend them to Caſes which are excepted from the Rule. And this makes it neceſſary to know the Exceptions.

XXI.

21. *Two ſorts of Exceptions, Natural and Arbitrary. Examples.*

It is material to obſerve in reference to Exceptions, that there are two ſorts of them: Thoſe which are made by Arbitrary Laws, and thoſe which are made by Natural Laws [f]. Thus, it is an Arbitrary Law in the *Roman* Law, which excepts Military Teſtaments from the General Rules concerning the Formalities of Teſtaments; and it is alſo another Arbitrary Rule according to the Uſage of *France*, that the Reſciſſion of a Sale on account of Lands being ſold for leſs than half of the true Value, does not take place in Sales made publickly by Order of a Court of Juſtice. Thus, it is a Natural Law, that we cannot enter into Covenants that are contrary to the Laws, and to Good Manners; and this Law makes an Exception to the general Rule, that we may make all ſorts of Covenants. And it is by another Natural Law, that an Exception is made to the Rule of the Reſtitution of Minors, in the caſe of ſuch Engagements as were reaſonable for them to enter into, and where any prudent diſcreet Man would have done the ſame.

[f] *See the ſixth, ſeventh, and eighth Articles of the firſt Section of the Rules of Law.*

It is eaſy to perceive, that the Exceptions which are made by Arbitrary Laws, are obſerved, and learnt by bare Reading, and by Memory, and that it is by Study that we muſt learn them.

But the diſcerning the Exceptions which are of the Natural Law, does not always depend on bare Reading, and it requires Reaſoning. For there are Natural Exceptions which we do not find written down in Laws: And even thoſe which are written, are not always joined to the Rules which they reſtrain. So that the Knowledge of Exceptions, which is ſo neceſſary, demands equally both Study in general, and a particular Attention to the Spirit and Deſign of the Laws which are to be applied; to the end we may not encroach upon the Exceptions, by giving too large an Extent to the general Rules.

XXII.

22. *Advice concerning the uſe of the Rules.*

We may add as a laſt Remark, and which is a Conſequence of all the others, that all the different Views which are ſo neceſſary in the Application of Laws, demand a Knowledge of their Principles, and of their Detail; and this implies the Light of Good Senſe, accompanied with Study and Experience. For without this Foundation one is in danger of making falſe Applications of the Laws: either by miſapplying them to other Matters than thoſe to which they have a relation: or by not diſcerning the Bounds which are ſet to them by Exceptions: or by giving too large an Extent to Equity againſt the Rigour of the Law, or to the Rigour againſt Equity: or for the want of the other Views which are to regulate the Uſe of Laws[8].

[8] *See the laſt Article of the ſecond Section of the Rules of Law.*

CHAP. XIII.

A General Idea of the Subject Matters of all the Laws: Reaſons for making Choice of theſe which ſhall be treated of in this Book.

The CONTENTS.

1. *All the Subject Matters of Laws, are either of Religion, or of Temporal Policy.*
2. *Matters peculiar to Religion.*
3. *Matters peculiar to Civil Policy.*
4. *Matters common to Religion, and to Policy.*
5. *Three ſorts of Matters of Temporal Policy.*
6. *Thoſe of the Law of Nations.*
7. *Thoſe of the Publick Law.*
8. *Thoſe of Private Law.*
9. *Remark on the Ordinances, the Cuſtoms, the* Roman *Law, and the Canon Law: to ſhew what are the Matters that come within the deſign of this Book.*
10. *What theſe Matters are: Reaſons for the Choice that has been made of them.*

I.

1. *All the Subject Matters of Laws, are either of Religion, or of Temporal Policy.*

AS we have already ſeen that all the different ſorts of Laws are reduced to two Kinds, which comprehend them all; one of the Laws of Religion; and the other, of the Laws of Temporal Policy; and that of theſe laſt, ſome are common both to the one and the other kind: ſo we ought likewiſe to diſtinguiſh all the Matters of Laws into two Kinds, one of the Matters of the Laws of Religion, and the other of the Matters of the Laws of Policy, ſuppoſing that among all theſe Matters, there are ſome of them that are common to both the Kinds.

II.

2. *Matters peculiar to Religion.*

Thus, the Matters which concern the Myſteries of Faith, the Sacraments, the inward Diſpoſition of the Mind, the Diſcipline of the Church, are Spiritual Matters, which are proper to Religion.

III.

3. *Matters peculiar to Civil Policy.*

And the Matters which relate to the Formalities of Teſtaments, to the diſtinctions of Goods into Paternal and Maternal, Eſtates of Inheritance and by Purchaſe, to Preſcriptions, to the Right of Redemption, to Fees, to the Community of Goods between Huſband and Wife, and others of the like nature, are Temporal Matters proper to Civil Policy.

IV.

4. *Matters common to Religion, and to Policy.*

But the Matters which reſpect Obedience to Princes, Fidelity in all ſorts of Engagements, Honeſty and Fair-dealing in Covenants and in Commerce, are Matters common to Religion and to Policy; in which both the one and the other eſtabliſh Laws according to their Ends; as has been already obſerved.

I ſhall not here enter upon a fuller Explanation of the Matters which belong properly to the Laws of Religion; but ſhall proceed to conſider thoſe of the Laws of Temporal Policy, and to

point

point but thoſe that are to be treated of in this Book.

V.

5. Three ſorts of Matters of Temporal Policy.

The Matters of Temporal Policy are of three ſorts, according to the three kinds of Laws of this Policy, which have been already mentioned; *viz.* the Law of Nations, the Publick Law, and the Private Law.

VI.

6. Thoſe of the Law of Nations.

The Matters of the Law of Nations, in the ſenſe which this word has with us, as has been already remarked, are the Ways by which the different Intercourſes and Correſpondencies are carried on between one Nation and another, ſuch as Treaties of Peace, Truces, Suſpenſions of Arms, Sincerity in Negotiations, the Safety of Ambaſſadors, the Engagements of Hoſtages, the manner of declaring and making War, the Liberty of Trade, and other Matters of the like nature.

VII.

7. Thoſe of the Publick Law.

The Matters of the Publick Law, are thoſe which concern the Order of the Government of every State, the ways of calling to the Sovereign Power Kings, Princes, and other Potentates, by Succeſſion, by Election: the Rights of the Sovereign, the Adminiſtration of Juſtice, the Militia, the Treaſury, the different Functions of Magiſtrates, and other Officers, the Government of Towns, and others of the like nature.

VIII.

8. Thoſe of Private Law.

The Matters of Private Law are the Engagements between private Perſons, their Commerces, and whatever may be neceſſary to be regulated among them, either for preventing of diſputes, or for ending them; ſuch as Contracts and Covenants of all kinds, Mortgages, Preſcriptions, Guardianſhips, Succeſſions, Teſtaments, and other Matters.

IX.

9. Remark on the Ordinances, the Cuſtoms, the Roman Law, and the Canon Law: to ſhew what are the Matters that come within the deſign of this Book.

In order to explain what are all the Matters that ſhall be treated of in this Book, and the reaſons of the Choice which has been made of them, it is neceſſary to make firſt of all a Remark on the ſeveral Laws that are in uſe in the Kingdom of *France*.

In *France* there are four different kinds of Laws, the Ordinances, and the Cuſtoms, which are the Laws peculiar to that Kingdom; and ſuch parts of the *Roman* Law, and of the Canon Law, as are there obſerved.

Theſe four ſorts of Laws regulate in *France* all Matters, of what nature ſoever; but their Authority is very different.

The Ordinances have an univerſal Authority over all the Kingdom, and are all of them obſerved in all parts of the Kingdom, except ſome of them whoſe Diſpoſitions reſpect only ſome of the Provinces.

The Cuſtoms have their particular Authority; and each Cuſtom is confined to the Limits of the Province, or Place where it is obſerved.

The *Roman* Law hath in the Kingdom of *France* two different Uſes; and hath for each of them its proper Authority.

One of theſe Uſes is, that it is obſerved as a Cuſtom in many Provinces, and is there in the place of Laws in ſeveral matters. Theſe are the Provinces of which it is ſaid, that they are governed by the Written Law; and for the Uſage of thoſe Provinces, the *Roman* Law has the ſame Authority, as in the other Provinces their peculiar Cuſtoms have.

The other Uſe of the *Roman* Law in *France*, extends to all the Provinces, and comprehends all Matters: and it conſiſts in this, that they obſerve over all the Kingdom thoſe Rules of Juſtice and Equity which are termed the Written Law, becauſe they are written in the *Roman* Law. Thus for the ſecond Uſe, it has the ſame Authority as Juſtice and Equity have over our Reaſon.

The Canon Law contains a great number of Rules which are obſerved in *France*, but it has likewiſe ſome which they reject. Thus, they obſerve all the Canons which concern Faith and Manners, and which are taken from Scripture, from the Councils, and from the Fathers: and they receive of it likewiſe a great many Conſtitutions which reſpect the Diſcipline of the Church. And by Uſage they have received likewiſe ſome Rules of it which relate only to Temporal Policy. But other Diſpoſitions of it they reject, either becauſe they are not received in uſe there, or that even ſome of them are contrary to the Rights and Liberties of the *Gallican* Church.

X.

10. What theſe Matters are: Reaſons for the Choice that has

Having made theſe Remarks, it is now eaſy to ſhew, what View the Author propoſed to himſelf in the Choice of the Matters which he thought proper to comprehend in this Book, and

been made of them.

to diſtinguiſh them from thoſe which he thought fit to exclude.

Among all the Matters which are regulated by theſe four ſorts of Laws which are in uſe in *France*, viz. The Ordinances, the Cuſtoms, the Canon Law, and the *Roman* Law, there is a great number of them which are diſtinguiſhed from all the others, in a manner which has been the reaſon of the Choice that has been made of them.

The Matters which are thus diſtinguiſhed from the others, are thoſe of Contracts, ſuch as Sales, Exchanges, Letting and Hiring, Loan, Partnerſhip, a Depoſit, and all other Covenants: Of Guardianſhips, Preſcriptions, Mortgages: Of Succeſſions, Teſtaments, Legacies, Subſtitutions: Of Proofs and Preſumptions: Of the State of Perſons: Of the Diſtinctions of Things: Of the Manner of interpreting Laws; and many other Matters, which have all of them this belonging to them in common, that the Uſe of them is more frequent, and more neceſſary than that of other Matters.

The Author conſidered that theſe Matters are diſtinguiſhed from all the others, not only in that the Uſe of them is more frequent, but particularly in that their Principles and their Rules are almoſt all of them Natural Rules of Equity, which are the Foundations of the Rules of the Matters regulated by the Ordinances and Cuſtoms, and even of ſuch Matters as are not known in the *Roman* Law: for all the Matters regulated by the Ordinances and Cuſtoms, have therein no other Laws beſides ſome Arbitrary Rules; ſo that it is upon the Natural Rules of Equity that the Principal Law and Deciſion of ſuch matters does depend. Thus, for Example, in the matter of Fees, the Cuſtoms have only regulated the different Conditions of them in divers Places: but it is by the Natural Rules of Covenants, and by other Rules of Equity, that Queſtions touching theſe Matters are decided. Thus, in the matter of Teſtaments, the Cuſtoms regulate the Formalities of them, and what Diſpoſitions Teſtators may, or may not make; but it is by the Rules of Equity, that the Queſtions are decided, touching the Engagements of Heirs, or Executors, the Interpretation of the Wills of Teſtators, and all the other Matters in which there may be any difficulty. For, as has been already obſerved in another place, it is always by theſe Rules that Queſtions of all kinds are diſcuſſed and decided.

Since therefore it is in the *Roman* Law, that theſe Natural Rules of Equity have been collected together, and that they are there collected in the manner which has been obſerved in the Preface, and which renders the Study of them ſo difficult and perplexed; it is this that engaged the Author in the Deſign of this Book, and to make Choice of theſe Matters, of which the Plan may be ſeen in the following Chapter.

CHAP. XIV.

A Plan of the Matters contained in this Book of the Civil Law in its Natural Order.

The CONTENTS.

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5. *Diviſion of the Matters of the Firſt Part into four Books.*
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26. *The Concluſion of this Plan of the Matters: Reaſons for the Order obſerved in it.*
27. *Remark on the Matters which belong to the Publick Law.*

I.

1. All Matters of Law have a Natural Order.

ALL the Matters of the Civil Law have among themſelves a ſimple and a natural Order, which forms them into one Body, in which it is eaſy to ſee them all, and to perceive with one view in what Part every one hath its Rank. And this Order is founded on the Plan of Society which has been already explained.

II.

2. The Foundation of this Order.

We have ſeen in that Plan, that the Order of Society is preſerved in all Places by the Engagements with which God links Men together, and that it is perpetuated in all Times by Succeſſions, which call certain Perſons to ſucceed in the place of thoſe who die, to every thing that may paſs to Succeſſors. And this firſt Idea makes a firſt general Diſtinction of all Matters into two Kinds: One is of Engagements; and the other of Succeſſions.

All the Matters of theſe two Kinds ought to be preceded by three ſorts of General Matters, which are common to all the others, and neceſſary for underſtanding the whole Detail of the Laws.

The firſt comprehends certain General Rules which reſpect the Nature, Uſe, and Interpretation of Laws; ſuch as thoſe which have been mentioned in the twelfth Chapter.

The ſecond concerns the ways in which the Civil Laws conſider and diſtinguiſh Perſons by certain Qualities which have relation to Engagements, or Succeſſions; as for Example, the qualities of a Father of a Family, or of a Son living under the Father's Juriſdiction, of a Major, or a Minor, the qualities of a Child lawfully begotten, or of a Baſtard, and others of the like nature, which make that which is called the State of Perſons.

The third comprehends the ways in which the Civil Laws diſtinguiſh the Things which are for the uſe of Men, with reſpect to Engagements and Succeſſions. Thus, with reſpect to Engagements, the Laws diſtinguiſh the Things which enter into Commerce, from thoſe which do not enter into it; ſuch as Things Publick and Things Sacred: And with reſpect to Succeſſions a Diſtinction is made of Goods Paternal and Maternal, of Eſtates of Inheritance, and thoſe of Purchaſe.

III.

3. The general Diviſion of the Matters of this Deſign, into two Parts: The firſt of Engagements, and the ſecond of Succeſſions.

According to this Order, we ſhall divide all the Matters of this Book into two Parts. The firſt ſhall be of Engagements, and the ſecond of Succeſſions. And both the one and the other ſhall be preceded by a Preliminary Book; the firſt Title of which ſhall contain the General Rules concerning the Nature and Interpretation of Laws; the ſecond ſhall be of Perſons; and the third of Things.

IV.

4. Theſe two Parts are preceded by a Preliminary Book, of the Rules of Law in general, of Perſons, and of Things.

As to the Diſtinction of the Matters of the firſt Part, which is of Engagements, it is to be remarked, as has already been ſhewn in the Plan of Society, that Engagements are of two Kinds.

The firſt is, of thoſe which are formed mutually between two or more Perſons, by their Will and Conſent; and this is done by Covenants, when Men engage themſelves mutually and voluntarily in Sales, Exchanges, in Letting and Hiring, in Tranſactions, Compromiſes, and other Contracts and Covenants of all ſorts.

The ſecond is of ſuch Engagements as are formed otherwiſe than by mutual Conſent; ſuch are all thoſe which are made either by the Will of one Perſon alone, or without the will of either of the Parties. Thus, he who undertakes to manage the Affair of his abſent Friend, engages himſelf by his Will, without the Conſent of the abſent perſon. Thus the Tutor is engaged to his Pupil, independently of the will of the one or the other. And there are divers other Engagements which are formed without the mutual Will of thoſe who are bound by them.

All theſe ſorts of Engagements, whether they be Voluntary or Involuntary, have divers Conſequences, which are reduced to two Kinds. The firſt is of thoſe ſorts of Conſequences which add to Engagements, or which ſtrengthen them; ſuch as Mortgages, the Privileges of Creditors, Obligations in which ſeveral perſons are bound each for the whole, Suretiſhips, and others which have this Character of adding to Engagements, or of ſtrengthening them.

The

The ſecond Kind of the Conſequences of Engagements, is of thoſe which annul them, or which change them, or diminiſh them; ſuch are Payments, Compenſations, Novations, Reſciſſions, Reſtitutions of Matters to the firſt State they were in.

V.

5. Diviſion of the Matters of the Firſt Part into four Books. It is to theſe two Kinds of Engagements, and to theſe two Kinds of their Conſequences, that all the Matters of this Firſt Part are reduced: and they ſhall be ranked there into Four Books.

VI.

6. Firſt Book, of Engagements by Covenant. The Firſt ſhall be, of Covenants, which are voluntary and mutual Engagements.

VII.

7. Second Book, of Engagements without a Covenant. The Second, of Engagements which are formed without a Covenant.

VIII.

8. Third Book, of the Conſequences of Engagements which add to them, or corroborate them. The Third, of the Conſequences which add to Engagements, or which ſtrengthen and corroborate them.

IX.

9. Fourth Book, of the Conſequences of Engagements which diminiſh them, or annul them. The Fourth, of the Conſequences which annul, diminiſh, or change the Engagements.

X.

10. Matters of the Firſt Book. This Firſt Book, of Covenants, ſhall have in the beginning thereof a Title of Covenants in general. For ſeeing there are many Principles, and many Rules which are common to all the Kinds of Covenants; Order requires that we ſhould not repeat thoſe common Rules in every Covenant to which they belong, but that we ſhould gather them all together in one place. We ſhall afterwards rank under particular Titles the different Kinds of Covenants: And we ſhall add at the end of the Firſt Book, a laſt Title, of the Vices of Covenants, ſuch as Fraud, Stellionate, and others: in which we ſhall treat of the Effect which Error and Ignorance, whether it be of Fact or of Law, Force and Fear, and other Vices, have in the Covenants wherein they happen to be.

We have inſerted in this Firſt Book of Covenants, the Matter of Uſufruct, and that of Services, becauſe Uſufruct and Services are often acquired by Covenants, as by Donations, by Sales, by Exchanges, by Tranſactions, and by other Contracts. Thus, although an Uſufruct and a Service may be acquired by Teſtament, yet it is natural that theſe Matters which ought to be only in one place, ſhould be put down in the firſt place to which they have relation.

XI.

11. Matters of the Second Book. The Second Book, which ſhall be of Engagements without a Covenant, ſhall take in thoſe which are formed without a mutual conſent; ſuch as the Engagements of Tutors, thoſe of Curators who are named either to Perſons, ſuch as Minors, Prodigals, Mad-men, and others; or to Goods, as to a vacant Succeſſion: the Engagement of Perſons who manage the Affairs of others in their abſence, and without their knowledge, and that of the Perſons whoſe Affairs have been managed: the Engagements of Perſons who chance to have ſomething in common together without a Covenant: and there are divers other ſorts of Involuntary Engagements, and ſome which are even formed by Accidents.

XII.

12. Matters of the Third Book. The Third Book ſhall treat of the Conſequences of Engagements, whether they be Voluntary or Involuntary, which add to them, or corroborate them, and ſhall contain the ſeveral Matters which have this Character; ſuch as Mortgages, the Privileges of Creditors, the Obligations of Perſons bound jointly together each for the whole Sum, Suretiſhips, Coſts and Damages. This Book ſhall likewiſe take in the Matter of Proofs and Preſumptions, and of an Oath, which are Conſequences of all ſorts of Engagements, and which corroborate them. And altho' Proofs, and an Oath, ſerve likewiſe to diſſolve Engagements, yet this Matter, which ought not to be put in ſeveral places, ought to be inſerted in the firſt place where it comes in naturally. We ſhall likewiſe place among the Conſequences which ſtrengthen and fortify Engagements, Poſſeſſions, and Preſcriptions, which confirm the Rights which people acquire by Covenants, and by other Titles. And altho' Preſcriptions have alſo the effect to annul Engagements, yet it is natural to place them in this Book, for the ſame reaſon that Proofs are taken into it.

XIII.

13. *Matters of the Fourth Book.* The Fourth and Laſt Book of this Firſt Part, ſhall be, of the Conſequences, which diminiſh, change, or annul Engagements, and which ſhall contain the Matters which have this Character; ſuch as Payments, Compenſations, Novations, Delegations, Reſciſſions, and Reſtitutions.

XIV.

14. *The Second Part, which is of Succeſſions.* The Second Part, which is to be of Succeſſions, comprehends a great number of Matters, and different enough to make a Diviſion of them into five Books.

XV.

15. *Diviſion of the Matters of the Second Part into five Books.* To conceive aright the Order of theſe Five Books, we muſt conſider that there are two ways of ſucceeding: The one of Succeſſions which are called Legal, that is to ſay, regulated by the Laws, which make the Goods to paſs from thoſe who die, to the perſons whom they call to ſucceed to them: And the other, of Teſtamentary Succeſſions, which make the Goods to paſs to thoſe who are inſtituted Heirs or Executors, by a Teſtament.

XVI.

16. *Firſt Book, of Matters common to Legal and Teſtamentary Succeſſions.* And becauſe there are ſome Matters common to Legal Succeſſions, and to Teſtamentary Succeſſions; it being proper that theſe Matters ſhould go before, they ſhall be contained in a Firſt Book.

XVII.

17. *Second Book, of Legal Succeſſions.* Which ſhall be followed by a Second; in which Legal Succeſſions ſhall be explained.

XVIII.

18. *Third Book, of Teſtamentary Succeſſions.* And by a Third; which ſhall contain Teſtamentary Succeſſions.

XIX.

19. *Fourth Book, of Legacies, and Donations in proſpect of Death.* Seeing it often happens that Perſons who name Heirs, or Executors, in their Teſtaments, and thoſe alſo who will have no other Heirs beſides the Heirs of Blood, do not leave all their Goods to their Heirs, or Executors, but make particular Donations to other Perſons by Teſtaments, or Codicils, or other Diſpoſitions made in proſpect of death; theſe ſorts of Diſpoſitions ſhall be the Subject Matter of a Fourth Book.

XX.

20. *Fifth Book, of Subſtitutions, and Legacies in Truſt.* And laſtly, ſeeihg the Law has added to the Liberty of making Heirs, or Executors, and Legataries, that of Subſtitutions, and of Deviſes in Truſt, which call a ſecond Succeſſor in the place of the firſt Heir, or Executor, or of the firſt Legatary; this Matter of Subſtitutions, and of Deviſes in Truſt, ſhall be the Subject Matter of a Fifth Book.

XXI.

21. *Matters of the Firſt Book.* The firſt of theſe five Books, which ſhall be of Succeſſions in general, ſhall contain the Matters that are common to the two Kinds of Succeſſions; ſuch as the Engagements of the Quality of Heir, or Executor, the Benefit of an Inventory, the manner of accepting an Inheritance, or Succeſſion, or of renouncing it, the Partitions among Coheirs, or Co-Executors.

XXII.

22. *Matters of the Second Book.* The Second Book, which ſhall be of Legal Succeſſions, ſhall explain the Order of theſe Succeſſions, and the manner in which Children and other Deſcendants are called to them; as alſo Fathers, Mothers, and other Aſcendants; Brothers, Siſters, and other Collaterals. Theſe Legal Succeſſions are alſo called Succeſſions of Inteſtates: and this word is particularly made uſe of in the *Roman* Law, becauſe the Heirs at Law, who are the Heirs of Blood, do not ſucceed except when there is no Teſtament; but this is not to be underſtood of Perſons to whom a Legitime, or Child's Part is due by Law.

XXIII.

23. *Matters of the Third Book.* The Third Book, which ſhall be of Teſtamentary Succeſſions, ſhall contain the Matters which concern Teſtaments, their Formalities, Diſheriſon, Undutiful Teſtaments, the Legitime, or Filial Portion, the Diſpoſitions of thoſe who have contracted a ſecond Marriage.

XXIV.

24. *Matters of the Fourth Book.* The Fourth Book ſhall be concerning Legacies, and other Diſpoſitions made in proſpect of Death: and in that we ſhall treat of Codicils, of Donations in proſpect of death, and of Legacies.

XXV.

25. *Matters of the Fifth Book.* The Fifth Book ſhall contain the Matters relating to the ſeveral Kinds of Subſtitutions, and of Legacies and Inſtitutions of Heirs, or Executors, in truſt for others.

XXVI. All

XXVI.

26. *The Concluſion of this Plan of the Matters: Reaſons for the Order obſerved in it.*

All theſe ſeveral Matters, of which this is the Plan, are the Matters which ſhall be treated of in this Book of *The Civil Law in its Natural Order*. We have not explained here particularly the Nature of theſe Matters; becauſe we ſhall explain in every one, at the head of each Title, that which ſhall be neceſſary for the knowledge of it before reading the particular Rules.

Neither have we taken up time to give a reaſon for the Order that is particularly obſerved in the Matters of each Book. We have endeavoured by ſeveral Views to range them either according as their Nature makes them ſubſequent to one another, or according as it appeared neceſſary to us that the one ſhould go before the others, in order to their being better underſtood. Thus, for Example, in the Firſt Book of the Firſt Part, in which are explained the ſeveral ſorts of Covenants, after the Title of Covenants in general, we have placed that of the Contract of Sale becauſe that of all the Covenants, there is not any one which contains ſo many particular Matters as the Contract of Sale, and becauſe the Rules of that Contract agree to many other Covenants, and give a great deal of Light to other Matters. Thus, for other the like conſiderations, all the other Matters have been ranged in the Order which they have; but it would be too tedious, and to no manner of purpoſe, to give a reaſon in each particular Matter, for the ſituation in which it is placed. We ſhall only obſerve, that altho' the Matter touching Mortgages might have been placed in the number of Covenants, becauſe it is uſually by Covenant that the Right of Mortgage is acquired, yet it was proper to put this Matter in another place, becauſe the Mortgage is never a primary Covenant, and a principal Engagement, it being always an Acceſſory to ſome other Engagement, and often to Engagements which are contracted without any formal Covenant, ſuch as thoſe of Tutors and Guardians, and others alſo, in which the Mortgage is acquired by Law. Thus, this Matter hath naturally its Order in the Third Book: and the ſame reaſons have obliged us to place the Matter of Suretiſhips, and thoſe of Obligations, wherein ſeveral perſons are bound jointly for the whole Debt, in the ſame Rank.

XXVII.

27. *Remark on the Matters which belong to the Publick Law.*

We muſt obſerve in the laſt place, that beſides the Matters which are to be treated of in this Book, according to the Plan which has been juſt now drawn of them, there are others which are contained in the Body of the *Roman* Law, and which are alſo in uſe in *France*, and for which reaſon it would ſeem as if they ought to have been comprehended in this Book; ſuch as the Matters relating to the Exchequer, to Cities and Corporations, Criminal Matters, the Order of Judicial Proceedings, the Duties of Judges. But theſe Matters being regulated by the Ordinances, and being a part of the Publick Law, it was not proper to inſert them here. And becauſe there are in the *Roman* Law many eſſential Rules concerning theſe Matters, and which being Natural Rules are in force in all places, but are not expreſſed in the Ordinances; therefore the Author has collected them into one Tome, which is the Second Tome of this Work; and the Matters treated of in it, as alſo the Matters regulated by the Cuſtoms of *France*, and which are unknown in the *Roman* Law, are ranked in the following Order.

All theſe Matters of the Publick Law ought to be preceded by thoſe which ſhall be explained in this Book. For beſides that they preſuppoſe many Rules which ſhall be there explained; it is natural that ſince the Publick Law has a relation to private Perſons, that the Matters which concern private Perſons, ſhould go before thoſe which are of the Publick Law; and it is probably for theſe Reaſons, that the Matters concerning the Exchequer, and Cities or Corporations, and Criminal Matters, have been placed after the others. Thus, after the Matters of this Book which make the Firſt Tome, we have placed in the Second the Matters pertaining to the Exchequer, and to Towns, thoſe which concern the Rights of the Prince, and the Government of Towns, thoſe which reſpect Univerſities, and other Societies and Communities, and Criminal Matters: And as for the Order of Judicial Proceedings, which comprehends the manner of proceeding in Civil and Criminal Cauſes, and the Functions and Duties of the Judges; ſeeing it is a Matter which has relation to all the others, it would ſeem proper to end therewith.

As to the Matters which are peculiar to the Cuſtoms of *France*, ſuch as Fees, the Right of Redemption belonging to Families, Wardſhips, the Community of Goods between the Huſband and the Wife, the Inſtitutions of Heirs, by Contract, the Prohibition of bequeathing a part of the Goods to the Prejudice of the Heirs of Blood; the Renunciations by Daughters of their Right to Succeſſions, and every thing which the Cuſtoms have in particular relating to Succeſſions, Donations, and other Matters, it is not neceſſary to mention their Rank here, it being eaſy to judge that theſe Matters relate either to Engagements, or to Succeſſions. Thus, Fiefs were in their firſt Origine Covenants between the Lord and the Vaſſal. Thus, the Right of Redemption belonging to thoſe of the Family of the Seller, is a Conſequence of the Contract of Sale. Thus, the Matter of Wardſhips, whether of Noblemens Children or Citizens, is a kind of Uſufruct joined with a Guardianſhip. Thus, the Community of Goods between Huſband and Wife, and the Wife's Jointure, are Covenants either expreſs or tacit, which have a connection with the Matter of Dowries. Thus, the Inſtitutions of Heirs, by Contract, are a Matter which is made up partly of the Nature of Teſtaments, and partly of that of Covenants, and which hath its Rules from theſe two ſorts. Thus, every one of all the other Matters of the Cuſtoms hath its Rank fixed: and it is eaſy to perceive the Order which they have in the Plan that has been explained.

A TABLE OF THE TITLES.

☞ *This* TABLE *ſerves only to mark the Order of the* TITLES *of all the ſeveral Matters which are treated of in this Book, and of which we have juſt now laid down the Plan. For which reaſon it is, that we have not here ſet down the Numbers of the Pages, nor the Sections of the Titles. But this is followed by another Table of the Titles of this Tome, and of their Sections, with the Numbers of the Pages where to find them.*

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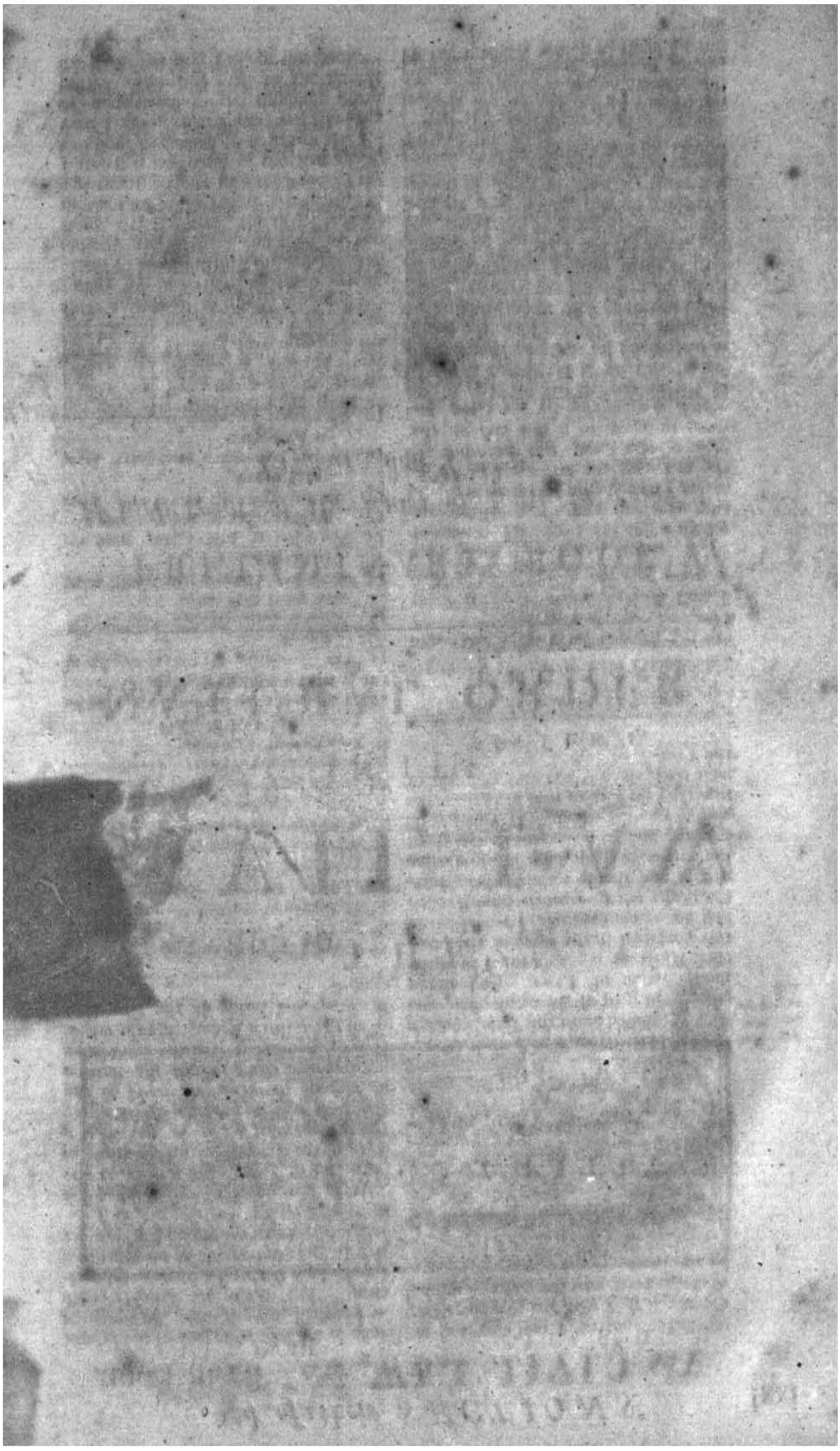
The END.

THE



THE CIVIL LAW IN ITS NATURAL ORDER.

PRELIMINARY BOOK.

Which treats of the Rules of Law in general, Perſons, and Things.

The ſubject matter of this Book.

WE have given the name of *Preliminary* to this Book, becauſe it contains three kinds of matters, which being common to all the others treated of in this Work, and neceſſary for underſtanding them aright, ought to be placed firſt in order. And indeed, the matters contain'd in this Book, are, as it were, the firſt Elements of the Law; for before we deſcend to a particular enquiry into the Rules of the Law, it is neceſſary, in the firſt place, to know in general, the nature and ſeveral kinds of theſe Laws, and the ways of underſtanding and applying them juſtly. And this ſhall be the ſubject matter of the firſt Title of this Book.

And becauſe in the examination of the ſeveral matters treated of in the Body of the Law, and in particular Laws, we muſt always conſider the perſons whom the ſaid matters and Laws relate to. And becauſe there are in all perſons certain qualities, with reſpect to which they are conſidered and diſtinguiſhed by the Laws, and which have a particular relation to all the matters treated of in the Body of the Law; theſe qualities, and theſe diſtinctions of perſons, ſhall be conſider'd in the ſecond Title of this Book.

And the third Title ſhall contain the ways in which the Laws conſider and diſtinguiſh the ſeveral kinds of things, by the qualities which fit them for the

uſe and commerce of perſons; and according as theſe uſes, and this commerce of things enter into the order eſtabliſh'd by the Laws.

TITLE I.

Of the Rules of Law in General.

The matters treated of in this Title.

THE Rules which ſhall be explain'd under this Title, concern in general the nature, uſe, and interpretation of Laws. And ſeeing theſe Rules are common to all the matters contain'd in the Body of the Law, and are of conſtant uſe, I would adviſe the reader not to content himſelf with a bare and ſimple reading them over, but to peruſe them diligently from time to time, and to have recourſe to them always upon occaſion. It will not be improper for him to read likewiſe at the ſame time, the xi^th^ and xii^th^ chapters of the Treatiſe of Laws.

SECTION I.

Of the ſeveral ſorts of Rules, and of their nature.

Of the ideas form'd by the words, Laws, and Rules.

WE underſtand commonly by theſe words *Laws*, and *Rules*, that which is juſt, that which is commanded, that which is regulated. But whereas the Laws ought to be written, to the end that the writing may fix the ſenſe of the Law, and determine the mind to conceive a juſt idea of that which is eſtabliſh'd by the Law, and that it be not left free for every one to frame the Law as he himſelf is pleas'd to underſtand it; we may therefore diſtinguiſh two ideas which the words *Law*, and *Rule*, form in our minds. One is the idea of what we conceive to be juſt, without making any reflection on the terms of the Law: The other is the idea of the terms of the Law; and according to this ſecond idea, we give the name of *Rule*, or *Law*, to the *expreſſion of the Lawgiver*.

We ſhall always uſe the word *Laws*, and that of *Rules*, without any diſtinction, both in the one and the other of the two ſenſes above-mentioned, not only in this Preliminary Book, but likewiſe in the following part of the Work, as we ſhall have occaſion to mention them. For there are many written Laws, ſuch as are all arbitrary, or poſitive Laws; and there are many natural Rules of Equity, which are not ſet down in writing.

It is not neceſſary, after what has been ſaid of Laws, and Rules, in the Treatiſe of Laws, to define anew in this Title, what a Law is, and what a Rule: it will be ſufficient here to give an idea of the Rules of Law, in the ſenſe which comprehends the written Rules; becauſe it is in the knowledge of all the written Rules, that the whole Science, and Study of the [illegible] conſiſt.

The CONTENT

1. *Definition of Rules.*
2. *Two ſorts of Rules, natural and arbitrary.*
3. *Which are the natural Rules.*
4. *Which are the arbitrary Rules.*
5. *Another diviſion of Rules.*
6. *Two ways of abuſing the Rules.*
7. *Exceptions are Rules.*
8. *Two ſorts of Exceptions.*
9. *Laws ought to be known.*
10. *Two ſorts of arbitrary Laws; written Laws, and Cuſtoms.*
11. *The foundation of the authority of Cuſtoms.*
12. *Natural Laws regulate what is paſt, and what is to come.*
13. *Arbitrary Laws regulate only what is to come.*
14. *The effect of new Laws, with reſpect to what is paſt.*
15. *Another effect of new Laws, as to what is paſt.*
16. *Of the time when new Laws begin to be in force.*
17. *Two ways by which new Laws are repealed.*
18. *Several effects of Laws.*
19. *Laws reſtrain whatever is done in fraud of them.*
20. *Laws annul or reſtrain what is done contrary to their prohibition.*
21. *Laws are general, and not made for one caſe, or one perſon.*
22. *Sequel of the foregoing Rule.*
23. *Equity is the univerſal Law.*

I.

THE Rules of Law are ſhort and clear expreſſions of that which Juſtice requires, in the reſpective caſes. And each Rule hath its peculiar uſe for thoſe whom its proviſion may concern. 1. *Definition of Rules.*

Thus,

Thus, for example, it may happen, through ſeveral accidents, that the Buyer is diſpoſſeſs'd of what he has bought, or moleſted in his Poſſeſſion, by thoſe who pretend to be Owners of it, or to have ſome other right to it: and the Juſtice that is common to all theſe kinds of accidents, which requires the Seller to put a ſtop to all evictions, and other troubles, is contain'd in the expreſſion of this Rule, *That every Seller ought to warrant that which he has ſold.*[a]

[a] Regula eſt, quæ rem quæ eſt breviter enarrat. *l.* 1. *ff. de reg. jur.* ex jure quod ex regula fiat. Per regulam igitur brevis rerum narratio traditur. *d. l.* Rei appellatione & cauſæ, & jura continentur. *l.* 23. *ff. de verb. ſign.*

II.

2. *Two ſorts of Rules, Natural, and Arbitrary.*

Laws, or Rules, are of two ſorts; one is of thoſe which flow from the Law of Nature and Equity; and the other is of ſuch as derive their origine from the poſitive Law, which are otherwiſe called human and arbitrary Laws, becauſe they have been eſtabliſh'd by Men[b]. Thus, it is a Rule of the Law of Nature, that a Donation may be revoked, becauſe of the ingratitude of the Donee: and it is a Rule of the poſitive Law, that Donations which are to have their effect in the life-time of the Donor and Donee, ought to be inrolled.[b]

[b] Omnes populi, qui legibus & moribus reguntur, partim ſuo proprio, partim communi omnium hominum jure utuntur. Nam quod quiſque populus ipſe ſibi jus conſtituit, id ipſius proprium civitatis eſt. *l.* 9. *ff. de juſt. & jur.* Quod verò naturalis ratio inter omnes homines conſtituit, id apud omnes peræquè cuſtoditur, *d. l.* 9. jus pluribus modis dicitur. Uno modò cùm id, quod ſemper æquum ac bonum eſt, jus dicitur: ut jus naturale. Altero modo, quod omnibus, aut pluribus in quæque civitate utile eſt, ut eſt jus Civile, nec minus jus rectè appellatur in civitate noſtra, jus honorarium. *l.* 11. *ff. de juſt. & jur.* See the xi^th Chap. of the Treatiſe of Laws.

III.

3. *Which are the Natural Rules.*

The Rules of the Law of Nature, are thoſe which God himſelf hath eſtabliſh'd, and which he communicates to Mankind by the Light of Reaſon. Theſe are the Laws which have in them a Juſtice that cannot be changed, which is the ſame at all times, and in all places; and whether they are ſet down in writing or not, no human Authority can aboliſh them, or make any alteration in them. Thus, the Rule which obliges the Depoſitary to preſerve, and to reſtore the thing committed to his keeping; that which obliges one to take care of the thing he has borrowed; and other Rules of this kind, are all of them natural and immutable Rules, which are obſerv'd in all places[c].

[c] Naturalia jura, quæ apud omnes gentes peræquè obſervantur, divina quadam providentia conſtituta, ſemper firma, atque immutabilia permanent. §. 11. *inſt. de jur. nat. gent. & civ.* Quod naturalis ratio inter omnes homines conſtituit. *l.* 9. *ff. de juſt. & jur.* id quod ſemper æquum ac bonum eſt, jus dicitur, ut jus naturale. *l.* 11. *eod.* Civilis ratio naturalia jura corrumpere non poteſt. *l.* 8. *ff. de cap. min.*

IV.

4. *Which are the Arbitrary Rules.*

Arbitrary Rules are all thoſe that have been eſtabliſhed by Men, and which are ſuch, that without offending natural Equity, they may either preſcribe one thing, or a thing quite different. Thus, for inſtance, it was free for Men to eſtabliſh, or not to eſtabliſh the uſe of Fiefs. Thus, a longer or ſhorter term of years might have been fixed for Preſcriptions; and a greater or leſſer number of Witneſſes to a Teſtament. And this diverſity, which is not fixed by Nature, makes theſe Laws to derive their Authority from the arbitrary Regulation, made by the Lawgiver who has eſtabliſh'd them; and conſequently renders them liable to changes.[d]

[d] Ea verò quæ ipſa ſibi quæque civitas conſtituit, ſæpe mutari ſolent. §. 11. *inſt. de jur. nat. gent. & civ.*

V.

5. *Another diviſion of Rules.*

The Rules of Law, whether natural or arbitrary, are of three kinds. Some of them are general, which agree to all matters; others are common to ſeveral matters, but not to all; and many are peculiar only to one matter, and have no relation to others. For example, theſe Rules of natural Equity, *That we muſt do wrong to no Man, That we ought to render to every one what is his due,* are general, and belong to all ſorts of matters. This Rule, *That Agreements made between Parties, are to them in the place of Laws,* is common to ſeveral matters; for it agrees to all kinds of Contracts, Covenants, or Pacts; but it has no relation to Teſtaments, nor to ſeveral other matters. And the Rule for making void a Sale, in which any one of the parties is damag'd more than half of the juſt price, is a Rule peculiar only to the Contract of Sale[e]. So that in the uſe and application of the Rules of Law, it is neceſſary to diſcern in every one, its Limits and its Extent.

[e] *Example of general Rules.* Juris præcepta ſunt hæc honeſtè vivere, alterum non lædere, ſuum cuique

cuique tribuere. *l.* 10. §. 1. *ff. de juſt. & jure.* §. 3. *inſt. eod. Example of rules common to many matters,* Contractus legem ex conventione accipiunt. *l.* 1. §. 6. *ff. depoſ. As to particular Rules, each Title hath its own.* v. l. 2. Cod. de reſc. vend.

VI.

6. Two ways of abuſing the Rules.

All theſe Rules ceaſe to have their effect, not only when they are drawn beyond their limits, and apply'd to matters to which they have no manner of relation, but likewiſe when in the application of them to the matters to which they belong, they are either falſly or wrongfully apply'd, contrary to the true intent of them. Thus, the Rule for making void all Sales, in which any one of the parties is damag'd above the half of the juſt price, would be ill applied to a Sale made by way of accommodation in a Tranſaction[f].

[f] Simul cùm in aliquo vitiata eſt [regula] perdit officium ſuum. *l.* 1. *in f. ff. de reg. jur.*

VII.

7. Exceptions are Rules.

Exceptions are Rules which limit the extent of other Rules; and they preſcribe contrary to the general Rule, out of a particular view, which renders either juſt, or unjuſt; that which the general Rule, being underſtood without any manner of exception, would on the contrary have render'd either unjuſt, or juſt. Thus, for example, the general Rule, That we may make all manner of Contracts, is limited by the Rule which forbids thoſe that are contrary to Equity and good Manners. Thus, the Prohibition to alienate things that are ſacred, is limited by the Rule which allows them to be ſold for neceſſary cauſes, certain formalities being obſerv'd in the Sale[g].

[g] Quid tam congruum fidei humanæ, quàm ea quæ inter eos placuerunt, ſervare, *l.* 1. *ff. de pact.*

Omnia quæ contra bonos mores, vel in pactum, vel in ſtipulationem deducuntur, nullius momenti ſunt. *l.* 4. *C. de inut. ſtip. l.* 7. §. 7. *ff. de pact. l.* 6. *de Cod. eod.* Sancimus nemini licere ſanctiſſima atque arcana vaſa, vel veſtes, cæteraque donaria, quæ ad divinam religionem neceſſaria ſunt—— vel ad venditionem, vel hypothecam, vel pignus trahere—— excepta cauſa captivitatis, & famis. *l.* 21. *C. de Sacro-ſanct. Eccl. v. l.* 14. *& auth. hoc jus eod.*

VIII.

8. Two ſorts of Exceptions.

Exceptions, as well as Rules, are of two kinds. Some of them are of the Law of Nature, and others of the poſitive Law: as appears by the Examples in the foregoing Article, and by all the other Exceptions, every one of which may be reduced to one or other of theſe two kinds.[h]

[h] This is a conſequence of the preceding and ſecond Articles of this Section.

IX.

9. Laws ought to be known.

All Laws ought either to be known, or at leaſt laid open to the knowledge of all the world, in ſuch a manner, that no one may with impunity offend againſt them, under pretence of ignorance. Thus the natural Rules being Truths that are unchangeable, the knowledge of which is eſſential to Reaſon, no body can pretend ignorance of them, ſince they cannot ſay that they are [illegible] of common Reaſon, which ma[illegible] Rules known. But arbitrary L[illegible] not their effect, till the Lawg[illegible] done all that is poſſible to mal[illegible] known; and this is done by t[illegible] that are commonly practiſed for t[illegible] lication of theſe kinds of Laws; [illegible] ter they are promulged in due fo[illegible] is preſumed that they are known [illegible] ry body, and they oblige as wel[illegible] who pretend ignorance of them, as thoſe who know them[i].

[i] Leges ſacratiſſimæ, quæ conſtringunt hominum vitas, intelligi ab omnibus debent. Ut univerſi præſcripto, earum manifeſtiùs cognito, vel inhibita declinent, vel permiſſa ſectentur. *l.* 9. *Cod. de legib.*

Conſtitutiones Principum nec ignorare quemquam, nec diſſimulare, permittimus. *l.* 12. *Cod. de jur. & fact. ign.*

Omnes verò populi legibus tam à nobis promulgatis, quàm compoſitis reguntur. §. 1. *in fin. in proæm. inſt.*

Nec in ea re ruſticitati venia præbeatur, *cùm naturali ratione* honor hujuſmodi perſonis *debeatur. l.* 2. *C. de in jus voc.*

X.

10. Two ſorts of Arbitrary Laws, Written Laws, and Cuſtoms.

Arbitrary Laws are of two ſorts. The one is of thoſe that have been originally enacted, written, and promulged, by thoſe that had the Legiſlative Authority; and ſuch are, in *France*, the Edicts and Ordinances of the Kings. The other, is of ſuch Laws, of whoſe Origin and firſt Eſtabliſhment there is nothing appears, but which are received by univerſal approbation, and by the conſtant uſe that the people has made of them time out of mind; and theſe are the Laws, or Rules, to which we give the name of Cuſtoms[k].

[k] Conſtat autem jus noſtrum quo utimur, *aut ſcripto, aut ſine ſcripto*, ut apud Græcos, τῶν νόμων οἱ μὲν ἔγγραφοι, οἱ δὲ ἄγραφοι, i.e. *legum ſunt ſcriptæ aliæ, aliæ non ſcriptæ.* Scriptum autem jus eſt lex, plebiſcitum, ſenatuſconſultum, Principum placita, magiſtra-

magiſtratuum edicta, reſponſa prudentum. §. 3. *inſt. de jur. nat. gent. & civ.*

Sine ſcripto jus venit, quod uſus approbavit. Nam diuturni mores, conſenſu utentium comprobati, legem imitantur. §. 9. *tod.*

XI.

11. *The foundation of the Authority of Cuſtoms.*

Cuſtoms derive their Authority from the univerſal Conſent of the People who has receiv'd them, when it is the People that has the Power of making Laws, as in Commonwealths. But in Kingdoms that are ſubject to a Sovereign Prince, no Cuſtoms receiv'd by the People come to have the force of Laws but by the Authority of the Prince. Thus, in *France*, the Kings have caused to be fixed, and reduced into writing, and eſtabliſhed into Laws, all the Cuſtoms, reſerving to the reſpective Provinces, the Laws which they have, either by the ancient Conſent of the Inhabitants of the ſaid Provinces, or of the Princes who governed them[l].

[l] Id cuſtodiri oportet, quod moribus & conſuetudine inductum eſt. *l.* 32. *ff. de legib.* inveterata conſuetudo pro lege, non immeritò, cuſtoditur. Nam cùm ipſæ leges, nulla alia ex cauſa nos teneant, quàm quòd judicio populi receptæ ſunt: meritò & ea quæ ſine ullo ſcripto populus probavit tenebunt omnes. Nam quid intereſt ſuffragio populus voluntatem ſuam declaret, an rebus ipſis, & factis? *d. l.* 32. §. 1. *ff. de legib.* tam conditor, quàm interpres legum ſolus Imperator juſtè exiſtimabitur: nihil hac lege derogante veteris juris conditoribus, quia & eis hoc majeſtas imperialis permiſit. *l. ult. in fin. cod. de leg. & conſt. prin.* Communis reipublicæ ſponſio. *l.* 1. *& l.* 2. *ff. de legib.*

Although theſe laſt words be ſpoken of Laws, and not of Cuſtoms, yet they agree to Cuſtoms as much, or rather more, than to Laws. See the Ordinance of *Charles* VII. of the year 1453. Art. 125. and of *Lewis* XII. of the year 1510. Art. 49. for reducing the Cuſtoms into writing.

XII.

12. *Natural Laws regulate what is paſt, and what is to come.*

The Laws of Nature being highly juſt, and their Authority always the ſame, they determine equally all that is to come, and all that is paſt, which remains undecided[m].

[m] Sed naturalia quidem jura quæ apud omnes gentes peræque obſervantur, divina quadam providentia conſtituta, ſemper firma, atque immutabilia permanent. §. 11. *inſt. de jur. nat. gent. & civ.* id quod ſemper æquum ac bonum eſt. *l.* 11. *ff. de juſtit. & jur.*

XIII.

13. *Arbitrary Laws regulate only what is to come.*

Altho' the Juſtice of arbitrary Laws is founded upon the publick Good, and upon the Equity of the Motives which give riſe to them; yet ſeeing they derive their Authority only from the Power of the Lawgiver, who determines us to what he preſcribes; and ſince they have not their effect, till after they have been made known to the people by publication, they regulate only what is to come, and have nothing to do with what is paſt[n].

[n] Leges & conſtitutiones futuris certum eſt dare formam negotiis, non ad facta præterita revocari. *l.* 7. *C. de legib.*

XIV.

14. *The effect of new Laws, with reſpect to what is paſt.*

The Affairs which happen to be depending, and undecided at the time when new Laws are enacted, are judged by the tenor of the preceding Laws; unleſs, for ſome particular reaſons, the new Laws mark expreſly, that they ſhall take place even in things that are paſt. Or that without any ſuch expreſſion, the new Laws be ſuch as ought to ſerve for a Rule to what is paſt; as if the new Laws ſerve only to revive a former Law, or a Rule of natural Equity, which had been alter'd by ſome abuſe; or that they regulate Queſtions, for the deciding of which there was no Law, nor any Cuſtom in being. Thus, for inſtance, when the King ordained that the price of Offices ſhould be diſtributed according to the order of Mortgages, that Law ſerved as a Rule for the Cauſes that were undecided in the Provinces, where they had no Cuſtom to the contrary, to ſerve them as a Rule[o].

[o] Leges & conſtitutiones futuris certum eſt dare formam negotiis, non ad facta præterita revocari: niſi nominatim & de præterito tempore, & adhuc pendentibus negotiis cautum ſit. *l.* 7. *C. de legib. & conſt. prine. l.* 7. *C. de nat. liber.* Sancimus nemini licere ſacratiſſima atque arcana vaſa, vel veſtes, cæteraque donaria, quæ ad divinam religionem neceſſaria ſunt, cùm etiam veteres leges ea quæ juris divini ſunt, humanis nexibus non illigari ſanxerint, vel ad venditionem, vel hypothecam, vel pignus trahere. Sed ab his, qui hæc ſuſcipere auſi fuerint, modis omnibus vindicari. *Hoc obtinere, non ſolùm in futuris negotiis, ſed etiam judiciis pendentibus.* l. 21. C. de Sacro-ſanct. Eccl. l. 23. in f. cod.

Quicumque adminiſtrationem, in hac florentiſſima urbe gerunt, emere quidem mobiles res, vel immobiles, vel domos extruere, non aliter poſſunt, niſi ſpecialem noſtri numinis, hoc eis permittentem divinam reſcriptionem meruerint. — *Quæ etiam ad præterita negotia referri ſancimus.* Niſi tranſactionibus vel judicationibus ſopita ſint. *l. un. C. de contr. jud.* Quoniam inter alias Captiones præcipuè commiſſoriæ pignorum, legis creſcit aſperitas — Si quis igitur tali contractu laborat, hac ſanctione reſpiret. *Quæ cum præteritis præſentia quoque repellit,* & futura prohibet. *l. ult. C. de pact. pign. & de lege com. in fr.*

XV.

15. *Another effect of new*

As new Laws regulate what is to come, ſo they may, as occaſion requires, change

Laws, as to what is paſt.

change the conſequences that former Laws would have had. But this is always without prejudice to the right that any perſons had already acquired. Thus, for example, before the Ordinance of *Orleans*, one might have made Subſtitutions in ſeveral degrees, without any bounds, and that Ordinance did limit the Subſtitutions that ſhould be made thereafter, to two degrees beſides the Inſtitution. But whereas that Ordinance did not for the future hinder the effect of the Subſtitutions which had been made before, the Ordinance of *Moulins* did reduce to the fourth degree, beſides the Inſtitution, the Subſtitutions which had been made before the Ordinance of *Orleans*. And at the ſame time, it excepted the Subſtitutions of which the right was already fallen and acquired, although it was beyond the fourth degree [p].

[p] Futuris certum eſt dare formam negotiis. *l.* 7. *C. de legib.* See the Ordinance of *Orleans*, Art. 59. and that of *Moulins*, Art. 57.

XVI.

16. Of the time when new Laws begin to be in force.

Arbitrary Laws begin to have their effect for the time to come, either from the day of their publication, or only after the delay which they appoint. Thus, ſome Laws that make changes which would be attended with great inconveniences, were they ſuddenly put in execution; ſuch as the Prohibition of ſome Commerce, the Augmentation, or Diminution of the value of the current Coin, and the like, leave for ſome time things in the ſame condition in which they were, and fix the time at which they ſhall begin to be put in execution [q].

[q] This is a conſequence of the foregoing Rules, and a natural effect of the authority and prudence of the Lawgiver.

XVII.

17. Two ways by which Laws are repealed.

Arbitrary Laws, whether they are eſtabliſh'd by the Authority of a Lawgiver, or by Cuſtom, may be aboliſhed or changed two ways; either by an expreſs Law, which repeals them, or makes ſome alteration in them; or by a long diſuſe, which changes, or aboliſhes them [r].

[r] Mutari ſolent. vel tacito conſenſu populi, vel alia poſtea lege lata. §. 11. *inſt. de jur. nat. gent. & civ.* rectiſſimè etiam illud receptum eſt, ut leges non ſolùm ſuffragio legiſlatoris, ſed etiam tacito conſenſu omnium per deſuetudinem abrogentur. *l.* 32. *in f. ff. de legib.*

XVIII.

18. Several effects of Laws.

The Uſe and Authority of all Laws, whether natural or arbitrary, conſiſts in commanding, forbidding, permitting, and puniſhing [t].

[t] Legis virtus hæc eſt, imperare, vetare, permittere, punire. *l.* 7. *ff. de legib.*

XIX.

19. Laws reſtrain whatever is done in fraud of them.

Laws reſtrain and puniſh, not only what is evidently contrary to the ſenſe of their words, but likewiſe every thing that is directly, or indirectly againſt their intent, although it ſeem to have nothing contrary to the terms of the Law, and alſo every thing that is done in fraud of the Law, and to elude it [s]. Thus, the Laws which forbid the giving or bequeathing any thing to certain perſons, annul the Donations or Bequeſts made to other perſons interpoſed, that they may tranſmit the Bounty to thoſe who are incapable of receiving it in their own names.

[s] Non dubium eſt in legem committere eum, qui verba legis amplexus, contra legis nititur voluntatem. Nec pœnas inſertas legibus evitabit, qui ſe contra juris ſententiam, ſæva prærogativa verborum, fraudulenter excuſat. *l.* 5. *C. de legib.* Contra legem facit, qui id facit, quod lex prohibet; in fraudem verò, qui ſalvis verbis legis, ſententiam ejus circumvenit. *l.* 29. *ff. eod.* fraus enim legi fit, ubi quod fieri noluit, fieri autem non vetuit, id fit, & quod diſtat ἀπὸ διανοίας *i. e.* dictum à ſententia, hoc diſtat fraus, ab eo quod contra legem fit. *l.* 30. *eod.*

XX.

20. Laws annul or reſtrain what is done contrary to their Prohibition.

If a Law forbids, either in general to all perſons, or in particular to ſome ſort of perſons, certain Contracts, or a certain Commerce, or contains other Prohibitions, of what kind ſoever; whatever ſhall be done contrary to theſe Prohibitions, with all its conſequences, ſhall either be annulled, or reſtrained, according to the quality of the Prohibition, and that of the Contravention; and that even although the Law make no mention of the nullity, and that it leave the other Penalties undetermined [u].

[u] Nullum pactum, nullam conventionem, nullum contractum inter eos videri volumus ſubſecutum, qui contrahunt, lege contrahere prohibente. Quod ad omnes etiam legum interpretationes, tam veteres, quàm novellas trahi generaliter imperamus. Ut legiſlatori, quod fieri non vult, tantùm prohibuiſſe ſufficiat. Cæteraque quaſi expreſſa, ex legis licèat voluntate colligere. Hoc eſt, ut ea quæ lege fieri prohibentur, ſi fuerint facta, non ſolùm inutilia, ſed pro infectis etiam habeantur. Licet legiſlator fieri prohibuerit tantùm, nec ſpecialiter dixerit, inutile

inutile esse debere, quod factum est. Sed & si quid fuerit subsecutum, ex eo, vel ob id, quod interdicente lege factum est, illud quoque cassum, atque inutile esse præcipimus. *l. 5. C. de legib. The Law would be very imperfect, if it should not annul what is done contrary to its Prohibitions, and if it should let the contravention of them go unpunished.* Minus quam perfecta lex est, quæ vetat aliquid fieri, & si factum sit, non rescindit. *Ulp. T. 1. §. 2. v. l. 63. ff. de rit. nup.*

XXI.

21. *Laws are general, and not made for one case, or one person.*

Laws are never made for one particular person, nor limited to one single case: but they are made for the common Good; and prescribe in general, what is most useful in the ordinary Occurrences of human Life[x].

[x] Lex est commune præceptum. *l. 1. ff. de legib.* a non in singulas personas, sed generaliter conjuntur. *l. 8. ff. eod.*
ura constitui oportet, ut dixit Theophrastus, in quæ ἐπὶ τὸ πλεῖστον, *i. e.* ut plurimùm accidunt, quæ ἐκ τῶν παράλογου, *i. e.* ex inopinato. *l. 3. & ff. eod.* Ea quæ communiter omnibus prosunt, quæ specialiter quibusdam utilia sunt, præponi. *Novel. 39. cap. 1.* See the following Article.

XXII.

22. *Sequel of the foregoing Rule.*

Seeing the Laws take in, in general, all the cases to which their intention may be applied, they do not express in particular the several cases to which they may have relation. For this particular enumeration, as it is impossible, so it would be to no purpose. But they comprehend in general all the cases to which their intention may serve as a Rule[y].

[y] Neque leges, neque Senatusconsulta ita scribi possunt, ut omnes casus, qui quandoque inciderint, comprehendantur: sed sufficit, ea quæ plerumque accidunt, contineri. *l. 10. ff. de legib.* non possunt omnes articuli sigillatim aut legibus, aut Senatusconsultis comprehendi: sed cùm in aliqua causa sententia eorum manifesta est, is qui jurisdictioni præest, ad similia procedere, atque ita jus dicere debet. *l. 12. eod.* semper quasi hoc legibus inesse credi oportet, ut ad eas quoque personas, & ad eas res pertinerent, quæ quandoque similes erunt. *l. 27. eod. v. l. 12. C. eod. l. 32. ff. ad legem Aquiliam.*

XXIII.

23. *Equity is the universal Law.*

If any case could happen that were not regulated by some express and written Law, it would have for a Law the natural Principles of Equity, which is the universal Law that extends to every thing[z].

[z] Hæc æquitas suggerit, etsi jure deficiamur. *l. 2. §. 5. in fine. ff. de aqua & aquæ pluv. arc.*
Ratio naturalis quasi lex quædam tacita. *l. 7. ff. de bon. damnat.*
Sufficit firmare ex ipsa naturali justitia. *l. 13. §. 7. ff. de excus. tut.*

SECT. II.

Of the Use, and Interpretation of Rules.

Reasonswhy it is necessary to interpret Laws.

BY the Use of Rules, is meant here the manner of applying them to the Questions that are to be decided; and the Application of the Rules does often require their Interpretation.

It happens in two sorts of cases, that it is necessary to interpret the Laws. One is, when we find in a Law some obscurity, ambiguity, or other defect of Expression; for in this case it is necessary to interpret the Law, in order to discover its true meaning. And this kind of Interpretation is limited to the Expression, that it may be known what the Law says. The other is, when it happens that the sense of a Law, how clear soever it may appear in the words, would lead us to false Consequences, and to Decisions that would be unjust, if the Laws were indifferently applied to every thing that is contained within the Expression. For in this case, the palpable Injustice that would follow from this apparent sense, obliges us to discover by some kind of Interpretation, not what the Law says, but what it means; and to judge by its meaning, how far it ought to be extended, and what are the bounds that ought to be set to its sense. And this kind of Interpretation depends always on the temperament that some other Rule gives to the Law which we should be in danger of misapplying, if we did not explain it. For it is this temperament that gives to the said Law its use, and its verity. But this matter will be better understood by Examples. And in order to make them the more useful for such as have least knowledge and experience, we shall set down one Example so clear, that it will convince every body at first sight, that we ought not always to take the Law in the literal sense; and we shall subjoin another, in which it will not be so very easy to discern this truth.

Example.

There is no Rule in Law more evident and certain than this, that a Depositary ought to restore the thing deposited to the person who intrusted him with it, whenever he shall please to call for it; but if the Owner of Money deposited has lost the use of his reason when he calls for his Money, every body must own that it would be a great

Injustice

Injuſtice in the Depoſitary to give it him back. For who does not ſee, that there is another Rule which forbids the giving to a mad Man a thing that may periſh in his hands, or which he may make a bad uſe of; and that to reſtore it to him would be to do him prejudice? Thus, it is by this ſecond Rule, that we interpret and limit the ſenſe of the other.

This is another moſt certain Rule, that the Heir ſucceeds to the Rights of the deceaſed; but this Rule would be ill applied to the Heir of a Partner, who ſhould pretend to ſucceed to the deceaſed in his quality of Partner, for that does not deſcend to the Heir. And this is founded upon another Rule, which requires that Partners ſhould chooſe one another reciprocally: and by this Rule it would be unjuſt that the Heir of a Partner ſhould be Partner, unleſs he were approved of by the other Partners, and they likewiſe approved of by him. Thus, this ſecond Rule obliges us to interpret the ſenſe of the other, and to reſtrain it. And we ſee in this ſecond Example, that it is not ſo eaſy in it as in the firſt, to diſcover the principle upon which this Interpretation is grounded, and which gives to each of theſe Rules its juſt effect, by limiting the ſenſe of the firſt.

It appears by theſe Examples, and will appear likewiſe in all the others, where it is neceſſary to interpret the ſenſe of a Law, that this Interpretation which gives to the Law its juſt effect, is always founded upon ſome other Rule, which requires another thing than what appeared to be regulated by the ſenſe of the Law not rightly underſtood.

The view of Equity is the firſt way to interpret the Laws.

It follows from this Remark, that for the right underſtanding of a Rule, it is not enough to apprehend the apparent Senſe of the words, and to view it by it ſelf; but it is neceſſary likewiſe to conſider if there are not other Rules that limit it. For it is certain, that every Rule having its proper Juſtice, which cannot be contrary to that of any other Rule; each Rule hath its own Juſtice within its proper bounds. And it is only the connexion of all the Rules together that conſtitutes their Juſtice, and limits their Uſe. Or rather, it is natural Equity, which, being the univerſal Spirit of Juſtice, makes all the Rules, and aſſigns to every one its proper uſe. From whence we muſt infer, that it is the knowledge of this Equity, and the general view of this Spirit of the Laws, that is the firſt foundation of the Uſe, and particular Interpretation of all Rules.

This Principle of interpreting the Laws by Equity, does not only reſpect the Laws of Nature, but reaches likewiſe to the arbitrary Laws, they being all of them founded upon the Laws of Nature, as has been obſerved in the xi^th^ chapter of the Treatiſe of Laws. But to this Principle of Equity we muſt add, in ſo far as concerns the Interpretation of arbitrary Laws, another Principle which is peculiar to them, and that is, the Intention of the Lawgiver, which determines how far the arbitrary Laws regulate the Uſe and Interpretation of this Equity. For in this kind of Laws, the temperament of Equity is reſtrained to what is agreeable to the Intention of the Lawgiver, and is not extended to whatever might have appeared to be equitable, before the arbitrary Law was enacted. Thus, for inſtance, it is juſt and equitable, that he who has courteouſly lent his Money, without taking a Note for it, and the Debtor denies that he borrowed the Money, ſhould be admitted to prove the Loan, if he has other proofs than a Note, which he omitted to take. And the ſame Equity requires alſo the ſame Uſage in the other kinds of Covenants. But becauſe it is for the publick Good, and agreeable to Equity, not to leave room for too great a facility of bringing falſe proofs, and becauſe it is ſufficient to adverti ſe thoſe who lend, or who make other agreements, to take a Note in writing; the Ordinance of *Moulins*, and that of 1667, which have forbid the proofs of Covenants without writing, when they exceed the ſum of one hundred Livres, have by that regulation ſet juſt Bounds to the liberty of receiving proofs of Covenants. And if ſome proofs are received contrary to the letter of that Ordinance, as in the caſe of a neceſſary *Depoſitum*, ſuch as that which is made in the caſe of Fire; it is becauſe the intention of the Ordinance doth not extend to this caſe, where it has been neceſſary to make the Depoſit, and impoſſible to take a Receipt in writing.

The Intention of the Lawgiver, in arbitrary Laws, fixes the temperament of Equity.

Thus, for another inſtance of the effect of the will of the Lawgiver, in what relates to the interpretation of arbitrary Laws by natural Equity, the ſame Equity requires, that a Buyer ſhould not take any advantage of the neceſſity of a Seller, to purchaſe a thing at too low a price. And upon this Prin-

Another Example.

ciple, it would ſeem to be juſt, to annul all Sales in which the price falls ſhort of the true value of the thing, either a third, or fourth part, or even leſs, according to the circumſtances. But the inconveniences that would attend the making void all Sales in which the parties ſhould be found to ſuſtain ſuch damages, gave occaſion to a Law, which reſtrains the liberty of annulling Sales on account of the lowneſs of the price, to the Sales of Immoveables, in which the damage ſuſtained ſhould exceed the half of the juſt value of the thing ſold. And this Law puts a ſtop to all other uſe, and all other application of Equity, as to any damage ſuſtained in the price of any thing ſold.

Several views neceſſary for the Interpretation of Laws.

In order to make a right uſe of this fundamental Principle for the Interpretation of Laws, which is Equity, it is not enough to obſerve in each Rule what the light of Reaſon finds to be equitable in its Expreſſion, and in the extent which it ſeems to have; but we muſt join to this a general View of univerſal Equity, that we may diſcern in the caſes which are to be regulated, whether there are not other Rules that demand a Juſtice altogether different, to the end we may not pervert any Rule from its true uſe, and that we may apply to the matters of fact, and to their circumſtances, the Rules that agree to them. And if they are natural Laws, we are to reconcile them by the extent and limits of their truth; or if they are arbitrary Laws, we are to fix their Equity by the Intention of the Lawgiver.

The Reader muſt take heed that he do not confound theſe kinds of interpreting Laws, which we have been juſt now ſpeaking of, with thoſe Interpretations that are reſerved to the Sovereign, of which mention ſhall be made in the xii^th^ Article of this Section. And it will be eaſy to perceive the difference between theſe two kinds of Interpretations, by the Rules which ſhall be explained in this Section.

The CONTENTS.

I.

1. The Spirit of Laws.

ALL Rules, whether natural or arbitrary, have their Uſe, ſuch as it is aſſign'd to every one of them by univerſal Juſtice, which is the Spirit of them all. Thus, the application of the Laws is to be made, by diſcerning what it is that this Spirit demands; which in

natural Laws is Equity; and in arbitrary Laws is the Intention of the Lawgiver. And it is in this diſcerning Faculty that the Science of the Law does chiefly conſiſt[a].

[a] In omnibus quidem maximè tamen in jure, *æquitas ſpectanda. l.* 90. *ff. de reg. jur.* In ſumma æquitatem ante oculos habere debet Judex. *l.* 4. §. 1. *ff. de eo quod certo loco.*

Benignius leges interpretandæ ſunt, quo voluntas earum conſervetur. *l.* 18. *ff. de legib.* mens legiſlatoris. *l.* 13. §. 2. *ff. de excuſ. tutor.* Scire leges non hoc eſt verba earum tenere, ſed *vim* ac *poteſtatem. l.* 17. *ff. de legib.* Ratio naturalis quaſi lex quædam tacita. *l.* 7. *ff. de bon. damnat.* Jus eſt ars boni & æqui. *l.* 1. *ff. de juſt. & jur.*

II.

2. Natural Laws are miſapplied, when conſequences are drawn from them contrary to Equity.

If it happens that a natural Rule being applied to ſome caſe which it ſeems to include, there follows from ſuch application, a Deciſion contrary to Equity; we muſt from thence conclude, that the Rule is not rightly applied, and that it is by ſome other Rule that this caſe ought to be judged. Thus, for inſtance, the Rule which directs that the perſon who has lent any thing to another for ſome uſe, may take it back again whenever he pleaſes, would produce a conſequence contrary to Equity, if the Lender were allowed to take back the thing lent, during the time that the Borrower is actually imploying it to the uſe for which he borrowed it, and from whence it cannot be taken without ſome damage to the Borrower. For this Rule ceaſes to take place in this caſe, becauſe of another Rule, which requires, that the Lender ſhould ſuffer the Borrower to reap the advantage of the favour he beſtows on him, and that he ought not to turn his kindneſs into an injury[b].

[b] Ubi æquitas evidens poſcit, ſubveniendum eſt. *l.* 183. *ff. de reg. jur.* In omnibus quidem, maximè tamen in jure æquitas ſpectanda. *l.* 90. *eod.* Intempeſtivè uſum commodatæ rei auferre non officium tantùm impedit, ſed & ſuſcepta obligatio inter dandum accipiendumque. *l.* 17. §. 3. *ff. commod.* See Article 1. of Section 3. of the Loan of Things that are to be reſtored in Specie.

III.

3. Arbitrary Laws are miſapplied, when conſequences are drawn from them contrary to the Intention of the Lawgiver.

If an arbitrary Law being applied to a caſe which it ſeems to include, there follows a conſequence contrary to the Intention of the Lawgiver, the Rule ought not to be extended to that caſe. Thus, for example, the Ordinance of *Moulins*, which annuls indifferently all Subſtitutions for the want of Publication, without ſpecifying the perſons with reſpect to whom they are to be null, does not render them ſuch with reſpect to the Executor who is burthened with the Subſtitution; becauſe the Executor was obliged by another Rule, to cauſe publication of it to be made, as being charged with the execution of the diſpoſitions of the Teſtator; and he ought not to reap any benefit by his own negligence, or his diſhoneſty[c].

[c] Et ſi maximè verba legis hunc habent intellectum, tamen mens legiſlatoris aliud vult. *l.* 13. §. 2. *ff. de excuſ. tut.* See the Ordinance of *Moulins*, Art. 57. and that of *Henry* II. in the year 1553, Art. 4. De Sophiſtica legum interpretatione & cavillatione. *v. l.* 12. §. 3. *C. de ædif. priv.*

IV.

Of the Rigour of the Law.

We muſt not take for Injuſtices contrary to Equity, or to the Intention of the Lawgiver, thoſe Deciſions which ſeem to have ſome Hardſhip in them, which is call'd the Rigour of the Law, when it is evident that that Rigour is eſſential to the Law from which it flows, and that no temperament can be applied to the ſaid Law without annulling it. Thus, for example, if a Teſtator having indited his Teſtament, and having read it over in the preſence of Witneſſes, he takes the pen in his hand to ſign it, and dies in the very inſtant; or after that the Teſtator has ſign'd it, they forget to get it ſign'd by one of the Witneſſes; or that there is wanting to the Teſtament any one of the Formalities required by Law, or by Cuſtom; this Teſtament will be abſolutely null, whatever certainty we may have of the Will of the Teſtator, and however favourable the Contents of his Teſtament may be; becauſe theſe Formalities are the only way which the Law allows of for proving the Will of a Teſtator. Thus the Rigour which annuls all Teſtaments in which are wanting the Formalities required by Law, is eſſential to thoſe very Laws, and to mitigate the Rigour of them, would be to annul them quite[d].

[d] Quod quidem perquam durum eſt, ſed ita lex ſcripta eſt. *l.* 12. §. 1. *ff. qui & à quib. manu.*

The Caſe mentioned in this Article, holds good in the Engliſh *Law, as to Teſtaments which contain Deviſes of Lands and Tenements; but in other Teſtaments which relate only to Perſonal Eſtates, our Law does not require ſo many Formalities, they being upon the ſame foot as military Teſtaments were among the* Romans.

V.

5. The mitigation of the Rigour of the Law.

If the Hardſhip or Rigour of a Law be not a neceſſary conſequence of the Law, and inſeparable from it, but that the Law may have its effect by an Interpretation which mitigates the ſaid

Rigour, and by ſome temperament which Equity, that is, the Spirit of the Law, requires; we muſt in this caſe prefer Equity to the Rigour which the Letter of the Law ſeems to demand, and follow rather the Spirit and Intendment of the Law, than the ſtrict and rigid way of interpreting it[c]. Thus, in the caſe of a Teſtator, who deviſes his Eſtate in this manner, that if his Wife, whom he leaves big with Child, be brought to bed of a Son, he ſhall have two thirds of his Eſtate, and his Wife one third; and if the Child in the Mother's Womb, happen to be a Daughter, the Mother and the Daughter ſhall divide the Eſtate equally between them; if the Mother happens to bring forth both a Son and a Daughter, the Rigour of the Law ſeems to exclude the Mother, becauſe ſhe is not called to any part of the Succeſſion, in the caſe that has happened. However, the Father having declared his Will that the Mother ſhould have a ſhare of his Eſtate, whether ſhe were brought to bed of a Son, or a Daughter, and having given her the half of what he left to his Son, and as much as he left to his Daughter, it is equitable that the Will of the Teſtator ſhould be executed in the beſt manner it can; and therefore the Son ought to have the half of the Eſtate, and the Mother and Daughter each of them a fourth part[f]. Thus, for another inſtance, if a Father and a Son die at the ſame time, as in a Fight, ſo that it is not poſſible to know which of them ſurvived the other; and if the Widow, Mother to the Son, claims againſt the Heirs of the Father, that part of the Father's Eſtate which would have fallen to the Son, if it were certain that he had outlived his Father; the Rigour of the Law would, in this caſe, exclude the Mother, becauſe the Father and the Son having died at the ſame time, and there being no evidence that the Son was the longeſt liver, he cannot be ſaid to have ſucceeded as Heir to his Father. And ſo the Eſtate of the Father would go to his own Heirs, and not to the Heirs of the Son. But Equity requires, that in this doubt it ſhould be preſumed in favour of the Mother, that it was the Father who died firſt. And this is likewiſe the natural Order[g].

[c] Placuit in omnibus rebus præcipuam eſſe juſtitiæ æquitatiſque, quàm ſtricti juris, rationem. *l.* 8. *C. de jurisd.* Benignius leges interpretandæ ſunt, quo voluntas earum conſervetur. *l.* 18. *ff. de legib.* Etſi maximè verba legis hunc habent intellectum, tamen mens legiſlatoris aliud vult. *l.* 13. §. 2. *ff. de excuſ. tut.* Hæc æquitas ſuggerit, etſi jure deficiamur. *l.* 2. §. 5. *in f. ff. de aqua & aquæ pluv. arc.* Ubicumque judicem æquitas moverit. *l.* 21. *ff. de interrog.*

Naturalem potiùs in ſe, quàm civilem habet æquitatem. Siquidem civilis deficit actio, ſed natura æquum eſt. *l.* 1. §. 1. *ff. ſi is qui teſt. lib.* Benigniorem interpretationem ſequi, non minus juſtius eſt, quàm tutius. *l.* 192. §. 1. *ff. de reg. jur.*

Semper in dubiis benigniora præferenda ſunt. *l.* 56. *eod.* Rapiendâ occaſio eſt, quæ præbet benignius reſponſum. *l.* 168. *eod.*

[f] Si ita ſcriptum ſit, ſi filius mihi natus fuerit, ex beſſe hæres eſto, ex reliqua parte uxor mea hæres eſto. Si verò filia mihi nata fuerit, ex triente hæres eſto, ex reliqua parte uxor hæres eſto: & filius & filia nati eſſent, dicendum eſt aſſem diſtribuendum eſſe in ſeptem partes, ut ex his filius quatuor, uxor duas, filia unam partem habeat. Ita enim ſecundùm voluntatem teſtantis, filius altero tanto ampliùs habebit quàm uxor: item uxor altero tanto ampliùs quàm filia. Licet enim ſubtilis juris regulæ conveniebat, ruptum fieri teſtamentum, attamen cùm ex utroque nato teſtator voluerit uxorem aliquid habere, ideò ad hujuſmodi ſententiam humanitate ſuggerente decurſum eſt. *l.* 13. *ff. de lib. & poſt.*

We have alter'd the caſe of this Law, with reſpect to the Daughter, becauſe this Law, which is part of the old Law, did not give her her Legitime, or Child's Part.

[g] Cùm bello pater cum filio periiſſet, materque filii, quaſi poſtea mortui, bona vindicaret, agnati verò patris, quaſi filius ante periiſſet, Divus Hadrianus credidit patrem priùs mortuum. *l.* 9. §. 1. *ff. de reb. dub.*

It is to be remarked, as to this ſecond Inſtance, that it is to be underſtood only of ſuch Eſtates as Mothers have a right to ſucceed to, purſuant to the Ordinance of Charles IX. *commonly called,* The Edict of Mothers.

VI.

It follows from the foregoing Rules, that we cannot lay it down as a general Rule, either that the Rigour of the Law ought to be always followed, contrary to the Temperament of Equity, or that it ought always to yield to Equity. But this Rigour becomes an Injuſtice, in the caſes in which the Law will admit of an equitable Interpretation; and it is, on the contrary, a juſt Rule, in the caſes where ſuch an Interpretation would deſtroy the Law[h]. Thus, the word *Rigour of the Law*, is taken either for a Hardſhip that is unjuſt and odious, and no ways conformable to the Spirit of the Laws, or for a Rule that is inflexible; but which has nevertheleſs its Juſtice. And we muſt be careful never to confound the uſe of theſe two Ideas; but we ought to make a right diſcernment, and to apply either the juſt Severity, or the Temperament of Equity, according to the preceding Rules, and thoſe which follow.

6. When we ought to follow either Equity, or the Rigour of the Law.

[h] This Article is a conſequence of the foregoing Rules.

VII.

7. *We are not at liberty to follow indifferently either the Rigour of the Law, or Equity.*

It is never free and indifferent for us to chooſe either the Rigour of the Law, or Equity, ſo as to be at liberty in one and the ſame caſe to apply either the one or the other indifferently and without injuſtice. But in every fact, we muſt determine our ſelves either to the one, or to the other, according to the circumſtances, and to what the Spirit of the Law requires. Thus, we muſt judge according to the Rigour of the Law, if the Law admits of no mitigation; or according to the Temperament of Equity, if the Law will bear it[l].

[l] This Article is alſo a conſequence of the preceding Rules.

VIII.

8. *The Rigour of the Law, when it is neceſſary to be followed, hath its Equity.*

Altho' the Rigour of the Law ſeems to be diſtinct from Equity, and to be even oppoſite to it; it is nevertheleſs true, that in the caſes in which this Rigour ought to be follow'd, another view of Equity makes it juſt. And as it never happens that what is Equitable is contrary to Juſtice; ſo likewiſe it never happens, that what is juſt is contrary to Equity. Thus in the example of the iv^th^ Article, it is juſt to annul the Teſtament in which the Formalities requir'd by Law are wanting; becauſe an act of ſuch conſequence ought to be accompanied with ſerious circumſtances, and ſure proofs of its truth. And this Juſtice hath its Equity in the publick Good, and in the intereſt which even Teſtators themſelves have, eſpecially ſuch as are ſick, that that may not be eaſily taken for their Will, which it is not very certain they have declared ſo to be[l].

[l] This Article is likewiſe a conſequence of the foregoing Rules.

IX.

9. *Interpretation of obſcurities and ambiguities in a Law.*

The obſcurities, ambiguities, and other defects of expreſſion, which may render the ſenſe of a Law dubious, and all the other difficulties of underſtanding aright, and applying juſtly the Laws, ought to be reſolved by the ſenſe that is moſt natural, that has the greateſt relation to the Subject, that is moſt conformable to the intention of the Lawgiver, and moſt agreeable to Equity. And this is diſcover'd by the ſeveral views of the nature of the Law, of its motive, of the relation it has to other Laws, of the exceptions that may limit it, and by other reflections of this kind, which may diſcover the ſpirit and ſenſe of the Law[m].

[m] In ambigua voce legis, ea potiùs accipienda eſt ſignificatio quæ vitio caret. Præſertim cùm etiam voluntas legis, ex hoc colligi poſſit. *l.* 19. *ff. de legib.*

Quoties idem ſermo duas ſententias exprimit, ea potiſſimùm excipiatur quæ rei gerendæ aptior eſt. *l.* 67. *ff. de reg. jur.* Prior atque potentior eſt quàm vox, mens dicentis. *l.* 7. *in ff. de ſuppell. leg.* Benigniùs leges interpretandæ ſunt, quo voluntas earum conſervetur. *l.* 18. *ff. de legib.* Scire leges non hoc eſt verba earum tenere, ſed vim ac poteſtatem. *l.* 17. *eod.* See Art. 1, 2, and 3 of this Section, and thoſe which follow.

X.

10. *A Law is to be interpreted by its motives, and by the tenour of it.*

For underſtanding aright the ſenſe of a Law, we ought to conſider well all the words of it, and its Preamble, if there be any, that we may judge of the meaning of the Law, by its motives, and by the whole tenour of what it preſcribes; and not to limit its ſenſe to what may appear different from its intention, either in one part of the Law taken ſeparately, or by a defect in the Expreſſion. But we muſt prefer to this foreign ſenſe of a defective Expreſſion, that which appears otherwiſe to be evident by the Spirit of the whole Law. Thus, it is to tranſgreſs againſt the Rules and Spirit of Laws, to make uſe, either in giving of Judgment, or Counſel, of any one part of a Law taken ſeparately from the reſt, and wreſted to another ſenſe than what it has when it is united to the whole[n].

[n] Incivile eſt niſi totâ lege perſpectâ, unâ aliquâ particulâ ejus propoſitâ, judicare, vel reſpondere. *l.* 24. *ff. de legib.* Verbum *ex legibus*, ſic accipiendum eſt, tam ex legum ſententia, quàm ex verbis. *l.* 6. §. 1. *ff. de verb. ſign.* Etſi maximè verba legis hunc habent intellectum, tamen mens legiſlatoris aliud vult. *l.* 13. §. 2. *ff. de excuſ. tut.* See the preceding Articles. See upon the word *Preamble*, the 134^th^ Law, §. 1. *ff. de verb. obl.*

XI.

11. *How an omiſſion in a Law may be ſupplied.*

If there happens to be omitted in a Law any thing that is eſſential to it, or that is a neceſſary conſequence of its diſpoſition, and that tends to give to the Law its entire effect, according to its motive; we may in this caſe ſupply what is wanting in the expreſſion, and extend the diſpoſition of the Law to what is included within its intention, altho' not expreſſed in the words[o].

[o] Quod legibus omiſſum eſt, non omittetur religione judicantium. *l.* 13. *ff. de teſtib.*

Quoties lege aliquid unum vel alterum introductum eſt, bona occaſio eſt, cætera quæ tendunt ad eamdem utilitatem, vel interpretatione, vel certè jurisdictione ſuppleri. *l.* 13. *ff. de legib.* Suppleat prætor

tor in eo quod legi deeſt. *l.* 11. *ff. de præſcr. verb.* Licet orationis ſub divo Marco habitæ verba deficiant, is tamen qui poſt contractas nuptias nurui ſuæ curator datur, excuſare ſe debet, ne manifeſtam ſententiam ejus offendat *l.* 17. *C. de excuſ. tut.* Edicti quidem verba ceſſabunt: Pomponius autem ait, ſententiam Edicti porrigendam eſſe ad hæc. *l.* 7. §. 2. *ff. de juriſd.* See in this Section the 21ſt, 22d, and 23d Articles, which ſerve as examples of this.

XII.

12. *In what caſes we muſt have recourſe to the Prince for the interpretation of a Law.*

If the words of a Law expreſs clearly the ſenſe and intention of the Law, we muſt hold to that. But if the true ſenſe of the Law cannot be ſufficiently underſtood by the interpretations that may be made of it, according to the Rules that have been juſt now explained, or that the ſenſe of the Law being clear, there ariſe from it inconveniencies to the publick Good; we muſt in this caſe have recourſe to the Prince, to learn of him his intention, as to what is liable to *Interpretation*, *Explanation*, or *Mitigation*; whether it be for underſtanding the Law, or mitigating its Severity [p].

[p] Leges ſacratiſſimæ quæ conſtringunt hominum vitas, intelligi ab omnibus debent, ut univerſi præſcripto earum manifeſtiùs cognito, vel inhibita declinent, vel permiſſa ſectentur. Si quid verò in iiſdem legibus latum fortaſſis obſcuriùs fuerit, oportet id ab imperatoria interpretatione patefieri, duritiamque legum, noſtræ humanitati incongruam, emendari. *l.* 9. *C. de leg.* Inter æquitatem, juſque interpoſitam interpretationem, nobis ſolis & oportet & licet inſpicere. *l.* 1. *eod.* Si enim in præſenti leges condere ſoli imperatori conceſſum eſt, & leges interpretari, ſolo dignum imperio eſſe oportet. *l. ult. eod. Nov.* 143. De his quæ primò conſtituuntur, aut interpretatione, aut conſtitutione optimi principis certius ſtatuendum eſt. *l.* 11. *ff. eod.*

Thus the Parliament made Remonſtrances to Charles *the Seventh, touching the* Declarations, Interpretations, Modifications, *which were to be made to the ancient Ordinances, upon which followed that of* 1446.

Thus the Ordinance of Moulins, *Art.* 1. *and that of* 1667. *Tit.* 1. *Art.* 3. *and Art.* 7. *enjoin the Parliaments, and the other Courts, to make their Remonſtrances to the King, touching what appeared in the Ordinances to be contrary to the Advantage or Convenience of the Publick; or to want* Interpretation Declaration, or Mitigation. *See the* 33d *Article of the Ordinance of* Philip VI. *in the year* 1349. *impowering the Council, and the Chamber of Accompts, to make the Declarations and Interpretations that ſhould be wanted on the ſaid Ordinance.*

De *interpretatione* Canonum Eccleſiaſticorum, ſi quid dubietatis emerſerit. *v. l.* 6. *de Sacroſanct. Eccl.* De *dubietate*, quæ in Canonibus emerſerit. *v. l.* 6. *C. de Sacroſanct. Eccl.*

XIII.

13. *We muſt follow the Law, altho' its motive be unknown.*

If the true meaning of a Law being well known, altho' we are ignorant of its motive, there ſeems to ariſe from it ſome inconvenience that cannot be avoided by a reaſonable Interpretation, we muſt preſume that the Law has nevertheleſs its Uſefulneſs, and its Equity, founded upon ſome view of the publick Good, which ought to make us prefer the ſenſe and authority of the Law to the reaſonings that may be brought againſt it. For otherwiſe many Laws very uſeful, and well eſtabliſhed, would be overthrown, either by ſome other views of Equity, or by ſubtilty of Reaſoning [q].

[q] Non omnium quæ à majoribus conſtituta ſunt ratio reddi poteſt. *l.* 20. *ff. de legib.* & ideo rationes eorum quæ conſtituuntur, inquiri non oportet, alioquin multa ex his quæ certa ſunt, ſubvertuntur. *l.* 21. *eod.* Diſputare de principali judicio non oportet. *l.* 3. *C. de crim. Sacrit.* Multa jure civili contra rationem diſputandi, pro utilitate communi recepta eſſe. innumerabilibus rebus probari poteſt. *l.* 51. §. 2. *ff. ad l. Aquil.*

XIV.

14. *Laws which are favourably extended.*

The Laws which are in favour of that which the publick Good, Humanity, Religion, the Liberty of making Contracts, and Teſtaments, and other ſuch like Motives render favourable, and thoſe which are made in favour of any Perſons, are to be interpreted in as large an extent as the favour of theſe Motives, joined with Equity, is able to give them, and they ought not to be interpreted ſtrictly, nor applied in ſuch a manner as to be turned to the prejudice of thoſe perſons in whoſe favour they were made [r].

[r] Nulla juris ratio, aut æquitatis benignitas patitur, ut quæ ſalubriter pro utilitate hominum introducuntur, ea nos duriore interpretatione, contra ipſorum commodum producamus ad ſeveritatem. *l.* 25. *ff. de legib.* Aliam cauſam eſſe inſtitutionis quæ benigne acciperetur. *l.* 19. *ff. de lib. & poſt.* propter publicam utilitatem—— ſtrictam rationem inſuper habemus, quæ nonnunquam in ambiguis religionum quæſtionibus omitti ſolet. Nam ſummam eſſe rationem quæ pro religione facit. *l.* 43. *ff. de relig. & ſumpt. funerum.* Quod favore quorumdam conſtitutum eſt, quibuſdam caſibus ad læſionem eorum nolumus inventum videri. *l.* 6. *C. de legib.* legem enim utilem reipublicæ—— adjuvandam interpretatione. *l.* 64. §. 1. *ff. de condit. & dem. See an Example of the laſt part of this Rule in the ninth Article of the third Section of the Contract of Sale; and another in the third Law,* §. 5. *ff. de carb. ed. The reſt needs no Example.*

XV.

15. *Laws which are reſtrained.*

The Laws which reſtrain our natural Liberty, ſuch as thoſe that forbid any thing that is not in itſelf unlawful, or which derogate in any other manner from the general Law; the Laws which inflict Puniſhments for Crimes and Offences, or Penalties in civil Matters; thoſe which preſcribe certain Formalities; the Laws which appear to have any hardſhip in them; thoſe which permit

permit Diſinheriting, and others the like, are to be interpreted in ſuch a manner, as not to be applied beyond what is clearly expreſſed in the Law, to any conſequences to which the Laws do not extend. And on the contrary, we ought to give to ſuch Laws all the temperament of Equity and Humanity, that they are capable of[t].

[t] *This is a conſequence of the preceding Rules.* Interpretatione legum pœnæ moliendæ ſunt, potiùs quàm aſperandæ. *l.* 42. *ff. de pœn.* In pœnalibus cauſis benignius interpretandum eſt. *l.* 155. §. *ult. ff. de reg. jur.* In levioribus cauſis proniores ad lenitatem judices eſſe debent, in gravioribus pœnis, ſeveritatem legum, cum aliquo temperamento benignitatis, ſubſequi. *l.* 11. *ff. de pœn. Vid. l.* 32. *eod.* Aliam cauſam eſſe inſtitutionis quæ benigne acciperetur: exhæredationes autem non eſſent adjuvandæ. *l.* 19. *ff. de lib. & poſt.* Si ita libertatem acceperit ancilla, ſi primum marem peperit, libera eſto: & hæc, uno utero marem & fœminam peperiſſet, ſiquidem certum eſt quid priùs edidiſſet, non debet de ipſius ſtatu ambigi, utrum libera eſſet, necne. Sed nec filiæ, nam ſi poſtea edita eſt, erit ingenua. Sin autem hoc incertum eſt, nec poteſt nec per ſubtilitatem judicialem manifeſtari, in ambiguis rebus humaniorem ſententiam ſequi oportet. Ut tam ipſa libertatem conſequatur, quàm filia ejus ingenuitatem. Quaſi per præſumptionem priore maſculo edito. *l.* 10. §. 1. *ff. de reb. dub.* Quod contra rationem juris receptum eſt, non eſt producendum ad conſequentias. *l.* 14. *ff. de legib.* In quorum finibus emere quis prohibetur, pignus accipere non prohibetur. *l.* 24. *ff. de pign.* *Altho' the Example of this Slave be quoted in this Law* 10. §. 1. *ff. de reb. dub. upon the Subject of* Teſtaments, *yet it may be alſo applied here.*

XVI.

16. *Laws which are not to be extended beyond what their words expreſly mention.*

If any Law or Cuſtom happens to be eſtabliſhed upon particular conſiderations, contrary to other Rules, or to the general Law, it ought not to be drawn to any conſequence beyond the caſes which the words of the Law mark expreſly. Thus the Ordinance which forbids the receiving proof of Contracts exceeding the value of one Hundred Livres, and the proof of facts different from what appears to have been agreed on, does not extend to facts of another nature, where a Contract does not come into queſtion[u].

[u] Quod contra rationem juris receptum eſt, non eſt producendum ad conſequentias. *l.* 141. *ff. de reg. jur. l.* 14. *ff. de legib. V. l.* 39. *eod.*

XVII.

17. *The Grants of Princes are favourably interpreted.*

The Favours and Grants of Princes are to be favourably interpreted, and ought to have all the reaſonable extent that the preſumption of the Liberality that is natural to Princes can give them; provided that they are not extended in ſuch a manner as to cauſe prejudice to other perſons[x].

[x] Beneficium imperatoris, quod à divina ſcilicet ejus indulgentia proficiſcitur, quàm pleniſſime interpretari debemus. *l.* 3. *ff. de conſt. princip.* Si quis à principe ſimpliciter impetraverit ut in publico loco ædificet, non eſt credendus ſic ædificare, ut cum incommodo alicujus id fiat. *l.* 2. §. 16. *ff. ne quid in loco publ. fiat. V. l.* 2. *C. de bon. vac.*

XVIII.

18. *Laws are interpreted one by the other.*

If the Laws in which there is ſome doubt, or other difficulty, have any relation to other Laws which may help to clear up their ſenſe, we muſt prefer to all other interpretations that which they may have from the other Laws. Thus, when new Laws have reference to old ones, or to antient Cuſtoms, or antient Laws to modern ones, they are interpreted one by the other, according to their common intention, in ſo far as the latter Laws have not abrogated the former[y].

[y] Non eſt novum, ut priores leges ad poſteriores trahantur. *l.* 26. *ff. de legib.* Sed & poſteriores leges ad priores pertinent: niſi contrariæ ſint. Idque multis argumentis probatur. *l.* 28. *eod.*

XIX.

19. *Laws are interpreted by the Practice.*

If the difficulties which may happen in the Interpretation of a Law, or Cuſtom, are explained by an antient Uſage, which has fixed the ſenſe of the Law, and which is confirmed by a conſtant ſeries of uniform Decrees; we muſt ſtick to the ſenſe declared by the conſtant Practice, which is the beſt Interpreter of Laws[z].

[z] Si de interpretatione legis quæratur, in primis inſpiciendum eſt quo jure civitas retro in ejuſmodi caſibus uſa fuiſſet; optima enim eſt legum interpres conſuetudo. *l.* 37. *ff. de legibus.* Nam imperator noſter Severus reſcripſit in ambiguitatibus, quæ ex legibus proficiſcuntur, conſuetudinem, aut rerum perpetuò ſimiliter judicatarum authoritatem, vim legis obtinere debere. *l.* 38. *eod.*

XX.

20. *In what caſes the Cuſtoms of neighbouring Places, and of the chief Towns, ſerve as Rules to the other places.*

If any Provinces or other Places, want certain Rules for ſolving difficulties in matters that are there in uſe, and the ſaid difficulties are not regulated by the Law of Nature, or by any written Law, but depend on Cuſtom and Uſe, they ought in this caſe to regulate themſelves by the Principles that follow from the Cuſtoms of thoſe very places. And if that does not determine the difficulty, they ought to follow what is regulated in ſuch matters by the Cuſtoms of the neighbouring places, and eſpecially by thoſe of the principal Towns[a].

[a] De

[a] De quibus causis scriptis legibus non utimur, id custodiri oportet, quod moribus & consuetudine inductum est. Et si quâ in re hoc deficeret, tunc quod proximum, & consequens ei est. Si nec id quidem appareat, tunc jus quo urbs Roma utitur, servari oportet. *l.* 32. *ff. de legib.*

XXI.

21. *Laws are extended to whatever is essential to their Intention.*

All Laws extend to every thing that is essential to their Intention. Thus, the Laws allowing Males to marry at the age of fourteen years compleat, and Females at the age of twelve, it is a consequence of these Laws, that those who marry, can bind themselves, altho' Minors, to the performance of the Articles agreed on in Marriage, which relate to the Wife's Portion, her Jointure, the Community of Goods, and other matters of the like nature. Thus, Judges being established to administer Justice, their Authority extends to every thing that is necessary for the exercise of their Functions; such as the Right of inflicting Penalties on those who contravene the Orders of Justice: And it is the same thing as to all the other consequences of their Ministry [a].

[a] Hæc æquitas suggerit, etsi jure deficiamur. *l.* 2. §. 5. *in f. ff. de aqua, & aquæ pluviæ arcend.*

Edicti quidem verba cessabunt: Pomponius autem ait, sententiam edicti porrigendam esse ad hæc. *l.* 7. §. 2. *ff. de jurisd.* Cui jurisdictio data est, ea quoque concessa esse videntur, sine quibus jurisdictio explicari non potuit. *l.* 2. *eod.*

By the Law of England *Minors can make no legal Settlements on their Marriages.* Coke 1. Inst. f. 34ª. 38ª. *And therefore an Act of Parliament is requisite to impower them so to do, and to confirm and ratify the Settlements that are so made. By which means, the Legislative Power takes care of the Interest of Minors, that they be not wronged in any transaction of this sort before they attain to the years of discretion, when they may be able to judge for themselves, and stipulate such conditions as they think fit.*

XXII.

22. *The Laws which permit any thing, are extended from more to less.*

In the the Laws which *permit* any thing, we draw the consequence from the greater to the lesser. Thus, those who have a right to give away their Goods for nothing, have much more a right to sell them. And in like manner, those who have a right to appoint Executors by a Testament, have with much greater reason a right to bequeath particular Legacies [b].

[b] Non debet cui plus licet, quod minus est, non licere. *l.* 21. *ff. de reg. jur.* Cujus est donandi, eidem & vendendi, & concedendi jus est. *l.* 163. *ff. de reg. jur.* Qui potest invitis alienare, multo magis & ignorantibus, & absentibus potest. *l.* 26. *ff. de reg. jur.* *See the two following Articles.*

XXIII.

23. *The Laws which forbid, extend from the lesser to the greater.*

In the Laws which *forbid* any thing, we draw the consequence from the lesser to the greater. Thus, Prodigals, who are not allowed to have the Management of their own Estate, are with much greater reason rendered incapable of alienating it. Thus, those who are declared to be unworthy of some Office, or some Honour, are much more unworthy of a greater Office, and of a more considerable Honour [c].

[c] Qui indignus est inferiore ordine, indignior est superiore. *l.* 4. *ff. de Senatorib.* Est enim perquam ridiculum, eum qui minoribus pœnæ causâ prohibitus sit, ad majores aspirare. *l.* 7. §. *ult. ff. de interd. & releg. l.* 5. *ff. de serv. export.* *See the following Article.*

XXIV.

24. *An Exception to the two preceding Rules.*

This extension of Laws from the lesser to the greater, and from the greater to the lesser, is limited to the things which are of the same kind with those that are mentioned in the Law, or which are such that its Motive ought to be extended to them, as in the Examples of the foregoing Articles [d]. But we must not draw the consequence either from the greater to the lesser, or from the lesser to the greater, when they are things of a different kind, or such as the Spirit of the Law is not applicable to [e]. Thus, the Law which permits persons who have attained to the years of Marriage, altho' Minors, to bind themselves by contracts of Marriage, and to engage their Estates for the performance of the Covenants that are consequences of the Marriage, would be wrongfully applied to other sorts of Contracts, altho' of less importance. Thus, the liberty which an adult person has in his Minority, to devise his whole Estate by Will, would not be rightly extended to the liberty of making over any part of it by a Deed of Gift that should take effect in his life-time. Thus, the Power which belongs to a Lord of a Manor, who has a Royalty, or ample Jurisdiction for the Administration of Justice within his own Lordship, by the special Grant of the Sovereign, would be wrongfully applied to such as have Grants only of an inferior Jurisdiction, and in Causes of lesser moment. Thus, the Power of a Lord Chief Justice will not infer that of a Constable or Bailiff. Thus, the Laws which brand persons with Infamy, would not be rightly extended to the Confiscation of Goods,

Goods, altho' Honour is much more valuable than any Goods.

[d] In eo quod plus sit, semper inest & minus. *l.* 110. *ff. de reg. jur.* Cum quis possit alienare, poterit & consentire alienationi. *l.* 165. *eod.*

Lex Julia, quæ de dotali prædio prospexit, ne id marito liceat obligare, aut alienare, plenius interpretanda est, ut etiam de sponso idem juris sit, quod de marito. *l.* 4. *ff. de fundo dot.*

[d] *Thus, in the antient Roman Law, the licence which Fathers had to take away the Lives of their Children, did not extend to the licence of depriving them of their Liberty, and making them Slaves.* Libertati à majoribus tantùm impensum est, ut patribus, quibus jus vitæ in liberos necisq; potestas olim erat permissa, libertatem eripere non liceret. *l. ult. C. de patr. potest. Thus in the same Roman Law, it was lawful for a Man to give to his Concubine, but not to his Wife.* V. l. 58. & tot. Tit. ff. de donat. inter vir. & uxor. *Thus by the same Law, a Husband was allowed to sell the Lands which he got with his Wife in Marriage, if she consented to it; but he could not mortgage them, not even with her consent.* Lex Julia fundi dotalis Italici alienationem prohibebat fieri à marito non consentiente muliere: hypothecam autem, nec si mulier consentiebat. *l. un. §.* 15. *C. de rei ux. act.*

XXV.

25. *Tacit Prohibitions.*

If any Law should put a stop to the Enquiry into any Abuse, by pardoning it for the time past; this would be in effect to forbid it for the time to come [e].

[e] Cùm lex in præteritum quid indulget, in futurum vetat. *l.* 22. *ff. de legib. The Law would be very imperfect, if when it forgives what is past, it should not prohibit it for the time to come. Thus, the Edict of* 1606, *which put a stop to the Enquiry after those who had taken Interest for Money lent, and converted it into Rents, did not fail to forbid the taking of all such Interest for the future.* V. Nov. 154.

XXVI.

26. *How Persons acquire Rights by the effect of Laws.*

When a Right comes to any person by the disposition of a Law, this Right is acquired by the effect of the Law; whether the person knows, or does not know the Law; and likewise whether he knows, or is ignorant of the fact on which depends the Right which the Law gives him. Thus, the Creditor whose Debtor happens to die, acquires a Right against the Heir, or Executor, altho' he knows nothing of the Death of his Debtor, and even altho' he is ignorant that the Law binds the Heirs, or Executors, or Administrators for the payment of the Debts of the persons to whom they succeed. Thus, the Son is Heir to his Father, altho' he is ignorant of his Right to succeed, and knows nothing of the Death of his Father. And it is a consequence of this Rule, that the Rights of this nature, which persons acquire by the effect of the Law, pass to their Heirs, Executors, or Administrators, if they themselves happen to die before they have used or known their Right [g].

[g] Cùm evidentissimè lex duodecim tabularum hæredes hujus rei (ære alieno defuncti) faciat obnoxios. *l. ult. C. de hared. act.* Item vobis acquiritur quod servi vestri ex traditione nanciscuntur: sive quid stipulentur, sive ex donatione, vel ex legato, vel ex qualibet alia causa acquirant. Hoc enim, vobis ignorantibus, & invitis obvenit. §. 3. *inst. per quas pers. nob. acq.*

Si infanti, id est, minori septem annis, in potestate patris, vel avi vel proavi constituto, vel constitutæ, hæreditas sit derelicta, vel ab intestato delata à matre, vel linea ex qua mater descendit, vel aliis quibuscumque personis, licebit parentibus ejus sub quorum potestate est, adire ejus nomine hæreditatem, vel bonorum possessionem petere. Sed, si hoc parens neglexerit, & in memorata ætate infans decesserit, tunc parentem quidem superstitem omnia ex quacumque successione ad eumdem infantem devoluta jure patrio, quasi jam infanti quæsita, capere. *l.* 18. *C. de jur. deliber. V. l.* 5. *ff. si pars hared. pet. l.* 30. §. 6. *ff. de acq. vel om. har.* Prætor ventrem mittit in possessionem. *d. l.* §. 1. *& tit. de ventr. in poss. mit.* Testamento jure facto, multis institutis hæredibus, & invicem substitutis: adeuntibus suam portionem, etiam invitis cohæredum repudiantium accrescit portio. *l.* 6. *C. de impub. & al. subst.* Illud sciendum est, si mulier prægnans non sit, existimatur autem prægnans esse, interim filium hæredem esse ex asse, quamquam ignoret se ex asse hæredem esse. *l.* 5. *ff. si pars har. pet. d. l.* §. 1. *l.* 30. §. 6. *ff. de acq. vel om. har.* Ignorans hæres sit. *l.* 3. §. 10. *ff. de suis & leg. V. l. un. C. de his qui ante ap. tab.*

We are to understand this Rule in the manner that it is expressed, of Rights acquired by the disposition of a Law, and not in general of what is acquired by other ways, which the Laws authorize; as when a Legacy is acquired by the Will of a Testator. On this Rule depends that other which is received in the Customs of France, *That* Death puts the Living into Possession; *which signifies, that the Heirs of Blood acquire their Right to the Succession, altho' they be ignorant of the death of him to whom they succeed; because it is the Law that calls them to the Succession. But Legatees, and Executors of Testaments, being called only by the Will of the Testator, and not by the Law, their Right is not the same; which difference shall be explained in its proper place, when we come to treat of Successions.* V. l. 1. C. de his qui ante ap. tab.

XXVII.

27. *How one may renounce a Right acquired by a Law.*

It is free for persons that are capable of using their Rights, to renounce what the Laws have established in their favour. Thus, one that is of Age, and under no incapacity, such as Madness, or Interdiction, may renounce a Succession which falls to him by Law. Thus, persons who have privileges granted them either by Laws or by particular Graces, are at liberty not to make use of them [h]. But this liberty of renouncing one's Right, does not extend to the cases in which third persons have an interest, nor to those where the renouncing of one's Right would be contrary to Equity, or good Manners, or prohibited by some Law.

[h] Regula

[h] Regula eſt juris antiqui, omnes licentiam habere, his quæ pro ſe indulta ſunt, renuntiare. *l.* 51. *C. de Epiſc. & Cler. l.* 29. *C. de pact.*

Licet ſui juris perſecutionem, aut ſpem futuræ perceptionis, deteriorem conſtituere. *l.* 46. *ff. de pact. v. l.* 4. §. 4. *ff. ſi quis caut. l.* 8. *ff. de tranſact.* Venditor fundi Geroniani, fundo Botroiano quem retinebat, legem dederat, ne contra eum piſcatio Thynnaria exerceatur. Quamvis mari, quod natura omnibus patet, ſervitus imponi privata lege non poteſt: quia tamen bona fides contractus, legem ſervari venditionis expoſcit: perſonæ poſſidentium, aut in jus eorum ſuccedentium per ſtipulationis, vel venditionis legem obligantur. *l.* 13. *ff. comm. præd. See the next Article, and the* 2[d] *Article of the* 4[th] *Section of the Vices of Covenants.*

XXVIII.

The diſpoſitions of particular Perſons cannot hinder the effect of Law.

The Laws have their effect independently from the will of particular perſons. And no perſon can hinder, either by Contracts, or by Teſtament, or otherwiſe, the Laws from regulating what concerns ſuch things. Thus, a Teſtator cannot hinder, by any precaution whatever, the Laws from having their effect againſt any diſpoſition he may make in his Teſtament contrary to Law. Thus, Contracts that are made againſt Law, have no manner of effect[i].

[i] Jus publicum privatorum pactis mutari non poteſt. *l.* 38. *ff. de pact. l.* 20. *ff. de religioſis.* Privatorum conventio juri publico non derogat. *l.* 45. §. 1. *ff. de reg. jur.*

Frater, cum heredem ſororem ſcriberet, alium ab ea, cui donatum volebat, ſtipulari curavit, ne Falcidiâ uteretur: & ut certam pecuniam, ſi contra feciſſet præſtaret. Privatorum cautione, legibus non eſſe refragandum conſtitit. Et ideo ſororem jure publico, retentionem habituram, & actionem ex ſtipulatu denegandam. *l.* 15. §. 1. *ff. ad leg. falc.* Nullum pactum, nullam conventionem, nullum contractum inter eos videri volumus ſubſecutum, qui contrahunt lege contrahere prohibente. *l.* 5. *C. de legib. The firſt Novel, Chap.* 2. *towards the cloſe, permits Teſtators to deprive their Executors of the Falcidian Portion: but this very permiſſion implies, that without it ſuch a diſpoſition would have been of no force, as being contrary to the Law, which requires that the Executor ſhould have at leaſt the Falcidian Portion, which is the fourth Part of the Eſtate.*

We muſt not give to the Rule explained in this Article an extent which may have any thing in it contrary to the preceding Article.

XXIX.

29. Diſcernment neceſſary for the right uſe of the Rules.

From all the Rules which have been explained under this Title, we may infer this as a laſt Rule; that there is great danger of miſapplying the Rules of Law, if we have not a very ample knowledge of all the particular Rules, and of the ſeveral Views that are neceſſary for interpreting and applying them aright[l].

[l] Omnis definitio in jure civili periculoſa eſt. Parum eſt enim, ut non ſubverti poſſet. *l.* 202. *ff. de reg. jur.*

Thus, we ought to take care never to apply a Rule beyond its juſt extent, nor to matters to which it has no manner of relation. Thus, we ought to be apprized of the Exceptions which limit the Rules. Thus, we ought either to keep to the Letter of the Law, or interpret it according to the Rules explained under this Title, and to obſerve the other Remarks that have been made in it.

TITLE II.

Of PERSONS.

In what manner the Civil Law diſtinguiſhes Perſons.

ALtho' the *Roman* Laws own a ſort of Equality which the Law of Nature eſtabliſhes among all Men[a]; yet they diſtinguiſh Perſons by certain Qualities, which have a particular relation to the matters of the Civil Law, and which make that which is called the *State of Perſons*. Theſe are the Qualities which are treated of in the *Roman* Law, under the Title *De Statu hominum*. But we do not find either in this Title, or in any other, what it is that properly makes the State of Perſons. We ſee only that there are different Qualities, ſuch as theſe of being a Freeman, and a Slave, a Father, and a Son; and other Qualities, which are ſaid to make the State of Perſons. But we do not there find any thing that points out to us what is common to all theſe Qualities, which might help us to conceive a juſt and preciſe Idea of the character neceſſary to a Quality, ſo as to be able to ſay that it concerns, or doth not concern, the State of a Perſon.

[a] Quod ad jus naturale attinet, omnes homines æquales ſunt. *l.* 32. *ff. de reg. jur.*

It is this that has engaged us to conſider in all theſe Qualities, what it is they have in common among them, and what it is that diſtinguiſhes them from the other Qualities, which have not the ſame effect. And it appears that the diſtinction of theſe Qualities which make up the State of Perſons, from thoſe which have no manner of relation to it, is a natural conſequence of the Order of Society, and of the Order of the Matters treated of in the *Roman* Laws. For as we have ſeen in the Plan of theſe Matters, that the *Roman* Laws have for their Object, Engagements, and Succeſſions; we ſhall likewiſe ſee that the Qualities which theſe Laws conſider in order to diſtinguiſh the State of Perſons, have alſo a particular relation to Engagements and Succeſſions; and that they have

have all of them this in common, that they render Perſons capable, or incapable, of all manner of Engagements, or of ſome only, or of Succeſſions. Thus, as to Engagements, Perſons that are of full age, are capable of all Engagements, voluntary and others, of Contracts, Guardianſhips, and publick Imployments; and Minors are incapable of ſeveral ſorts of Engagements, and particularly of thoſe which do not turn to their advantage. Thus, for Succeſſions, Children lawfully begotten are capable of inheriting, and Baſtards are incapable of it; and it will appear in all the other Qualities that make up the State of Perſons, that they give ſome capacity, or incapacity. So that it may be ſaid, that the State of Perſons conſiſts in this capacity, or incapacity, which it is eaſy to diſcern by theſe Qualities; for they are of ſuch a nature, that every one of them is as it were in a parallel line to another that is its oppoſite; and there is always one of the two oppoſites to be met with in every Perſon. Thus there is no body but who is either a Major or a Minor; Legitimate, or Illegitimate. And it is the ſame thing with reſpect to all the other Qualities, as will appear in the ſequel of this Title.

What is the State of Perſons.

Two ſorts of Qualities which make the State of Perſons.

The diſtinctions made among perſons by the Qualities which regulate their State, are of two ſorts. The firſt is of ſuch as are Natural, and regulated by the qualities which Nature it ſelf marks, and diſtinguiſhes in every perſon. Thus, it is Nature that diſtinguiſhes the two Sexes, and thoſe who are call'd Hermaphrodites. The ſecond ſort is of ſuch diſtinctions as are eſtabliſh'd by human Laws. Thus, Slavery is a State that is not Natural [b], but which Men have eſtabliſhed. And according to the different diſtinctions of theſe two kinds, every perſon has his State regulated by the Order of Nature, and that of the Law.

A Remark on the State of Perſons, with reſpect to the Roman Law, and our Practice.

The Reader muſt obſerve that we have inſerted in this Title ſome diſtinctions of Perſons, that are not mentioned in the *Roman* Law, among thoſe which make up the State of Perſons. For example, it is ſaid in the *Roman* Law, that Madneſs does not change the State of the Perſon [c]; and we ſee likewiſe there, that in the Title of the State of Perſons, no mention is made of Majority, and Minority. But nevertheleſs, Madneſs, and Minority, are qualities that belong to the State of Perſons, even according to the Principles of the *Roman* Law it ſelf. For in the firſt Book of the Inſtitutes, where diſtinctions are made between Freemen and Slaves, between Fathers and Sons, Minors are there likewiſe conſidered [d], as alſo thoſe who are in a ſtate of Madneſs [e]. And in effect, theſe perſons are under an Incapacity, which makes it neceſſary for them to be placed under the Guardianſhip of a Tutor, or Curator. Thus, that Rule among the *Romans*, that Madneſs does not change the State of the Perſon, ſignifies that it does not change the State, which is made up by the other Qualities, and that it does not hinder, for example, a Madman from being a Freeman, and a Father. And in fine, according to the uſage among us, if it were made a queſtion, with reſpect to our practice, whether a perſon were mad or not, we ſhould call that Queſtion, a caſe relating to the State of the Perſon; as we give this name to all the Law-Suits in which the chief matter in debate, is concerning the State of Perſons.

[b] Servitus eſt conſtitutio juris gentium, qua quis dominio alieno contra naturam ſubjicitur. *l.* 4. §. 1. *ff. de ſtat. hom.*

[c] Qui furere cœpit, & ſtatum, & dignitatem in qua fuit, & magiſtratum, & poteſtatem viderur retinere: ſicut rei ſuæ dominium retinet. *l.* 20. *ff. de ſtat. hom.*

[d] Tranſeamus nunc ad aliam diviſionem perſonarum. Nam ex his perſonis, quæ in poteſtate non ſunt, quædam vel in tutela ſunt, vel in curatione: quædam neutro jure tenentur. *inſt. de tut.*

[e] Furioſi quoque & prodigi licet majores viginti quinque annis ſint, tamen in curatione ſunt. §. 3. *inſt. de curat.*

SECT. I.

Of the State of Perſons by Nature.

Diſtinctions of Perſons by Nature.

THE diſtinctions which make the State of Perſons by Nature, are founded upon the Sex, the Birth, and the Age of every perſon; including under the diſtinctions made by the Birth, thoſe which depend on certain defects and imperfections, in the conformation of the parts of the Body, which ſome perſons have from their Birth; ſuch as that of both Sexes in Hermaphrodites, the Incapacity of begetting Children, and ſome others. And altho' ſome of theſe defects may happen by accident, after the Birth; yet in what manner ſoever we conſider them, the diſtinctions which theſe defects make of Perſons, do ſtill belong to the Order of diſtinctions made by Nature, and they have their place in this Section.

The

The CONTENTS.

I.

1. *Diſtinction of Perſons by the Sex.*

THE Sex, which diſtinguiſhes the Man from the Woman, makes this difference between them, with reſpect to their State, that Men are capable of all manner of Engagements, and Functions, unleſs it happen that any one is excluded from them by particular obſtacles; and Women are incapable, upon the bare account of their Sex, of ſeveral ſorts of Engagements, and Functions. Thus, Women cannot exerciſe the Office of a Magiſtrate, nor be Witneſſes to a Teſtament, nor plead at the Bar, nor be Guardians, except to their own Children. And this makes their condition in many things leſs advantageous, and likewiſe in others leſs burdenſome, than that of Men[a].

[a] Fœminæ ab omnibus officiis civilibus vel publicis remotæ ſunt. Et ideo nec judices eſſe poſſunt, nec magiſtratum gerere, nec poſtulare, nec pro alio intervenire, nec procuratores exiſtere. *l. 2. ff. de reg. jur.* Mulier teſtimonium dicere in teſtamento nec poterit. *l. 20. §. 6. ff. qui teſt. facere poſſ.* Fœminæ tutores dari non poſſunt, quia ad munus maſculorum eſt. Niſi à principe filiorum tuteiam ſpecialiter poſtulent. *l. ult. ff. de tut.* In multis juris noſtri articulis, deterior eſt conditio fœminarum, quàm maſculorum. *l. 9. ff. de ſtat. hom.*

By the ancient Roman *Law, in the Law of the twelve Tables, Women were under perpetual Guardianſhip, which was afterwards abolished,* v. in fragm. 12. tab. tit. 18. §. 6. Ulp. Tit. 11. §. 18. *And by the ſame Law Women did not inherit, not even to their own Children, nor their Children to them; which was likewiſe abrogated.* Inſt. de Senat. Tert. *And by the Decree of the Senate called,* The Velleian Decree, *Women could not be Sureties for other perſons.* Tit. ff. & Cod. ad Senat. Vell. *Which has been aboliſhed in the greateſt part of the Provinces of this Kingdom, by the Edict of the Month of* Auguſt, 1606, *which has forbidden the uſage of expreſſing in the Obligations of Women, their renouncing the* Velleian *privilege, and which has declared their Obligations to be valid, without the ſaid renunciation.*

By our Cuſtom married Women are under the power of their Husbands. And this is agreeable both to the natural and divine Law. Thy deſire ſhall be to thy Husband, and he ſhall rule over thee, *Gen.* iii. 16. Wives, ſubmit your ſelves unto your own Husbands, as unto the Lord. For the Husband is the head of the Wife, *Eph.* v. 22, 23. 1 *Cor.* xi. 3. 1 *Pet.* iii. 1. *It is becauſe of this power that the Husband hath over his Wife, that, by our Cuſtom, ſhe cannot bind her ſelf without the authority of her Husband, except in certain caſes. Thus, a Wife who is a publick Merchant, and drives a Trade ſeparate from that of her Husband, may oblige her ſelf without his expreſs authority. For it is with the conſent of the Husband, that ſhe carries on that Trade. Thus, in ſome Provinces in* France, *Wives may oblige themſelves without the authority of their Husbands, as to the Goods which they have beſides thoſe which are part of their Marriage Portion.* See the 4th Section of the Title of Dowries.

It is likewiſe becauſe of this power which the Husband has over the Wife, that in ſome Provinces, married Women cannot oblige themſelves in any reſpect, not even with the conſent and authority of the Husband, for fear leſt he ſhould uſe his authority to force his Wife to part with all her Dower, or at leaſt with ſome ſhare of it.

The Husband had not this authority over his Wife by the Roman *Law, where the Wife remained ſtill in the power of her Father, unleſs he emancipated her when he gave her in Marriage.* l. 5. Cod. de cond. inſert. tam leg. quam fid. l. 7. Cod. de nupt. l. 1. Cod. de bon. quæ lib. l. 1. §. 1. ff. de agn. lib. l. 1. §. ult. ff. de lib. exhib. *And inſtead of this power of the Husband over the Wife, and the effects which we give it, the* Roman *Law enjoined only a dutiful reſpect, and ſuch ſervices as were inſeparable from this duty.* Cujus matrimonio conſenſit, in officio mariti eſſe debet. *l.* 48. *ff. de op. lib.* Recepta reverentia quæ maritis exhibenda eſt. *l. 14. in fin. ff. ſol. matr. For we muſt not conſider as an uſage of the* Roman *Law, which is to be applied to ours, that ancient way of celebrating Marriage among the* Romans, *which by their ancient Law placed the Wife under the power of the Husband, in the ſame manner as Children are in the power of the Father, and which made her even ſucceed as Heireſs to her Husband.* v. Tit. 22. Ulp. §. 14. & tit. 9. *But as to our Cuſtom, which makes the conſent of the Husband neceſſary, to validate the Obligation of his Wife, in the places, and in the caſes, where ſhe can be bound, it was not the ſame in the* Roman *Law. For on the contrary, we ſee in the 6th Law,* Cod. de revoc. donat. *that in the caſe of a Deed of Gift made by a Wife to her Son, in the abſence of her Husband, ſhe being deſirous afterwards to revoke the Donation, alledged, that it was done in her Husband's abſence; but it is there ſaid, that the Husband's abſence did not hinder the effect of the Donation, and that the Wife had power to diſpoſe of her own Eſtate, without the Husband's conſent.* Deſine poſtulare, ut donatio quam perfeceras, revocetur prætextu mariti & liberorum abſentiæ; cùm hujus firmitas ipſorum præſentiâ non indigeat. *d. l.*

We ſhall not here enlarge any farther on the power, and authority of the Husband, either by the Roman *Law, or by our Cuſtom. But we have been obliged to make theſe Remarks on the differences between our Cuſtom, and the* Roman *Law, with reſpect to the State of Women; becauſe they are the foundation of the Rules which we obſerve for the capacity, or incapacity of Women, as to Engagements.*

By the Law of England, *a Wife is under the Power and Juriſdiction of her Husband, and cannot enter into*

any Engagement without his conſent. Unleſs it be a Woman who by the permiſſion of her Husband, drives a Trade as a publick Merchant, in which caſe ſhe can contract, without her Husband's conſent, in relation to any matter in her way of Trade. Cowel's Inſtit. Book 1. Tit. 10.

II.

2. Diſtinctions by Birth, and of the Paternal Authority.

Birth puts Children under the Power of thoſe of whom they are born. And the natural effects of this Power are ſettled by Nature, and the divine Law, which marks out the Duties of Children to their Parents[b]. But there are ſome effects which the Civil Law gives to the Power of Parents over their lawful Children. And theſe effects make a particular character of the paternal Power[c], which conſtitutes the State of Sons that are ſubject to the Father's Authority; the diſtinction of which ſhall be explained in the ſecond Section.

[b] Honour thy father, and thy mother. *Exod.* xx. 12. Remember that thou waſt begot of them. *Eccluſ.* vii. 28. Will do ſervice to his parents, as to his maſters. *Eccluſ.* iii. 7.

[c] In poteſtate noſtra ſunt liberi noſtri, quos ex juſtis nuptiis procreavimus. *Inſt. de patr. poteſt. l.* 3. *ff. de his q. ſ. v. al. j. ſ.* Jus autem poteſtatis quod in liberos habemus, proprium eſt civium Romanorum. Nulli enim alii ſunt homines, qui talem in liberos habeant poteſtatem, qualem nos habemus. §. 2. *inſt. de patr. poteſt.*

III.

3. Lawful Iſſue, and Baſtards.

Children lawfully begotten are thoſe who are born of a Marriage lawfully contracted[d]. And Baſtards are ſuch as are born out of lawful Wedlock[e].

[d] Filium eum definimus, qui ex viro & uxore ejus naſcitur. *l.* 6. *ff. de his qui ſui vel al. jur. ſunt.*

[e] Vulgo concepti dicuntur, qui patrem demonſtrare non poſſunt. Vel qui poſſunt quidem, ſed eum habent, quem habere non licet, qui & ſpurii appellantur, ὁσοι πανοσιοι. *l.* 23. *ff. de ſtat. hom.* A baſtard ſhall not enter into the congregation of the Lord, even to the tenth generation, *Deut.* xxiii. 2.

Marriage being the only lawful way appointed for the propagation of Mankind, it is but juſt to diſtinguiſh the condition of Baſtards from that of Children lawfully begotten. And it is becauſe of this diſtinction, that the Laws declare Baſtards incapable of ſucceeding to Perſons who die Inteſtate; and as they cannot inherit to any perſon, they being reckoned to be of no Family, ſo no body ſucceeds to them, but their own lawful Iſſue; as ſhall be explained in its proper place. See the Ordinance of *Charles* VI. of 1386.

IV.

4. Still-born Children.

Children that are born dead are conſidered as if they had never been born, or conceived[f].

[f] Qui mortui naſcuntur, neque nati, neque procreati videntur; quia nunquam liberi appellari potuerunt. *l.* 129. *ff. de verb. ſgn.* Uxoris abortu teſtamentum mariti non ſolvi; poſtumo verò præterito, quamvis natus illico deceſſerit, non reſtitui ruptum, juris evidentiſſimi eſt. *l.* 2. *Cod. de poſt. hered. inſt.*

Still-born Children are ſo much conſidered to be in the ſame condition as if they had never been conceived, that the Inheritances which fell to them while they were alive in their Mother's Womb, go to the perſons to whom they would have belonged, if theſe Children had never been conceived. And they do not tranſmit ſuch Inheritances to their Heirs, becauſe the Right which they had to them was only an Expectation, which implied a condition, that they ſhould come alive into the world, to be capable of them. See hereafter, Art. 6.

V.

5. Abortive Children.

Abortive Children are ſuch as by an untimely Birth are born either dead, or incapable of living[g].

[g] *The State of abortive Children may be conſidered under two views. One is to know if, when they are lawfully begotten, and born alive, they are capable of inheriting, and tranſmitting an Inheritance to their Heirs, which ſhall be explained in its place. The other is to know how long a Woman muſt be pregnant, before the Child comes ſo that maturity as that it may be able to live; and this ſerves to determine, whether Children who live, altho' born before the ordinary time, reckoning from the day of the Marriage, ought to be reputed lawfully begotten, or not. We reckon thoſe to be lawfully begotten, who live, altho' they be born in the beginning of the ſeventh month after the Marriage.* De eo qui centeſimo octogeſimo ſecundo die natus eſt, Hippocrates ſcripſit, & divus Pius Pontificibus reſcripſit, juſto tempore videri natum. *l.* 3. §. *ult. ff. de ſuis & legit. hered.* Septimo menſe naſci perfectum partum jam receptum eſt, propter auctoritatem doctiſſimi viri Hippocratis. Et ideo credendum eſt, eum, qui ex juſtis nuptiis ſeptimo menſe natus eſt, juſtum filium eſſe. *l.* 12. *ff. de ſtat. hom.*

VI.

6. Children unborn.

Children who are ſtill in their Mother's Womb, have not their State determined; neither ought it to be, but by the Birth. And till they are born they cannot be reckoned in the number of Children; not even for the benefit of their Fathers, in order to procure to them the Rights and Advantages which accrue to Parents by the number of their Children[h]. But the hopes that they will be born alive, makes them to be conſidered, in whatever concerns themſelves, as if they were already born. Thus, the Inheritances which fell to them before their Birth, and which belong to them, are kept for them; and Curators are aſſigned to them, to take care of theſe Inheritances for their behoof[i]. Thus, the Mother who procures her own Abortion, is puniſhed as a Murderer[l].

[h] Partus antequam edatur, mulieris portio eſt, vel viſcerum. *l.* 1. §. 1. *ff de inſpect. vent.* Partus nondum editus, homo non recte fuiſſe dicitur. *l.* 9.

in

in f. ff. ad leg. fale. Spes animantis. *l.* 2. *ff. de mort. infer.*

Qui in utero eſt, perinde ac ſi in rebus humanis eſſet, cuſtoditur, quoties de commodis ipſius partus quæritur. Quamquam alii, antequam naſcatur, nequaquam proſit. *l.* 7. *ff. de ſtat. hom.* Qui in ventre eſt, etſi in multis partibus legum comparatur jam natis, tamen neque in præſenti quæſtione (excuſationis à tutela) neque in reliquis civilibus muneribus prodeſt patri. Et hoc dictum eſt in Conſtitutione divi Severi. *l.* 2. §. 6. *ff. de excuſ. v. l.* 26. *ff. de ſtat. hom.*

[l] Sicuti liberorum eorum qui jam in rebus humanis ſunt, curam prætor habuit, ita etiam eos qui nondum nati ſunt, propter ſpem naſcendi non neglexit. Nam & hac parte edicti eos tuitus eſt, dum ventrem mittit in poſſeſſionem. *l.* 1. *ff. de vent. in poſſ. mit.* bonorum ventris nomine curatorem dari oportet. *l.* 8. *ff. de curat. fur. & al. l.* 20. *ff. de tut. & cur. dat. ab his q.*

[m] Cicero in oratione pro Cluentio Avito, ſcripſit, Mileſiam quamdam mulierem cùm eſſet in Aſia, quòd ab heredibus ſecundis accepta pecunia partum ſibi medicamentis ipſa abegiſſet, rei capitalis eſſe damnatam. *l.* 39. *ff. de pœn.*

What is ſaid in this Article, in relation to Succeſſions, is to be underſtood under condition that the Children come to be born alive. See the 4th *Article of this Section. So that this State renders their capacity, or incapacity of Inheriting, uncertain, till they are born.*

VII.

7. *Poſthumous Children.*

Poſthumous Children are thoſe that are born after the death of their Father; and who by this Birth are diſtinguiſhed from thoſe who are born during the Father's life-time; in that poſthumous Children are never under the Power of their Father, and are not of the number of Sons ſubject to the Father's Authority: of whom mention will be made in the 5th Article of the 2d Section [n].

[n] Poſtumos dicimus eos duntaxat, qui poſt mortem parentis naſcuntur. *l.* 3. §. 1. *ff. de inj. rupt.*

VIII.

8. *Children born after their Mother's Death.*

Children that are born after the death of their Mothers, and who are taken out of the Mother's Womb after ſhe is dead, are of the ſame condition with other Children [o].

[o] Natum accipe, & ſi exſecto ventre editus ſit. Nam & hic rumpit teſtamentum. *l.* 12. *ff. de lib. & poſt. l.* 6. *ff. de inoff. teſt.*

IX.

9. *Hermaphrodites.*

Hermaphrodites are thoſe who have the marks of both Sexes; and they are reputed to be of that Sex in which Nature moſt prevails in them [p].

[p] Quæritur hermaphroditum cui comparamus? & magis puto, ejus ſexus æſtimandum, qui in eo prævalet. *l.* 10. *ff. de ſtat. hom.* hermaphroditus an ad teſtamentum adhiberi poſſit, qualitas ſexus incaleſcentis oſtendet. *l.* 15. §. 1. *ff. de teſtib. v. l.* 6. *in f. ff. de lib. & poſt.*

X.

Eunuchs are thoſe whom a defect of conformation of their Members, whether it proceed from their Birth, or any other cauſe, renders incapable of begetting Children [q].

10. *Eunuchs.*

[q] Generare non poſſunt ſpadones. §. 9. *inſt. de adopt.* Spadonum generalis appellatio eſt. Quo nomine, tam hi qui natura ſpadones ſunt, item thlibiæ, thlaſiæ, ſed & ſi quod aliud genus ſpadonum eſt, continentur. *l.* 128. *ff. de verb. ſign.* Non intrabit Eunuchus, attritis, vel amputatis teſticulis, & abſciſſo veretro in Eccleſiam Domini. He that is wounded in the ſtones, or hath his privy member cut off, ſhall not enter into the congregation of the Lord, *Deut.* xxiii. 1. *It appears by theſe Texts, who are thoſe that are to be reckoned in the number of Eunuchs, and why it is that they are incapable of Marriage.*

XI.

Madmen are thoſe who are deprived of the uſe of Reaſon, after they have attained the age in which they ought to have it; Whether it be that this defect is natural to them from their Birth, or has happened by ſome accident. And ſeeing this condition renders them incapable of all manner of Engagements, and of the Management of their Eſtate, they are put under the tuition of a Guardian [r].

11. *Madmen.*

[r] Furioſi nulla voluntas eſt. *l.* 40. *ff. de reg. jur.* Furioſus nullum negotium contrahere poteſt. *l.* 5. *eod.* Furioſi in curatione ſunt. §. 3. *inſt. de curat. l.* 2. *& l.* 7. *ff. de curat. fur. See the* 1th *Article of the* 1st *Section of Guardians, and the* 13th *Article of this Section.*

XII.

Perſons that are both deaf and dumb, or thoſe who by other infirmities are rendered incapable of managing their affairs, are in ſuch a condition that Guardians are appointed to them, as well as to Madmen, to take care of their Affairs, and of their Perſons, as occaſion requires [s].

12. *Perſons that are deaf and dumb, and others labouring under the like Infirmities.*

[s] Et ſurdis & mutis, & qui perpetuo morbo laborant, quia rebus ſuis ſupereſſe non poſſunt, curatores dandi ſunt. §. 4. *inſt. de curat. l.* 2. *ff. de curat. fur. l.* 19. *in f. l.* 20. *l.* 21. *ff. de reb. auct. jud. poſſ.*

XIII.

Thoſe who labour under Madneſs, or under any of the other Infirmities above-mentioned, do not loſe the State which their other qualities give them. And they retain their dignities, their privileges, the capacity of inheriting, their

13. *How Madneſs, or Imbecillity, does not change the ſtate of Perſons.*

their Right to their Eſtates, and likewiſe ſuch effects of the Paternal Power as are conſiſtent with that condition[f].

[f] Qui furere cœpit & ſtatum, & dignitatem in qua fuit, & magiſtratum, & poteſtatem videtur retinere: ſicut rei ſuæ dominium retinet. *l.* 20. *ff. de ſtat. hom.* Patre furioſo, liberi nihilominus in patris ſui poteſtate ſunt. *l.* 8. *ff. de his qui ſui vel al. j. ſ.*

XIV.

14. *Monſters.* Monſters, who have not Humane Shape, are not reputed in the number of Perſons, and are not reckoned as Children to their Parents[t]. But ſuch as have what is eſſential to Humane Shape, and have only ſome exceſs, or ſome defect, in the conformation of their members, are ranked with the other Children[u].

[t] Non ſunt liberi, qui contra formam humani generis, converſo more, procreantur. Veluti ſi mulier monſtroſum aliquid, aut prodigioſum enixa ſit. *l.* 14. *ff. de ſtat. hom.*

[u] Partus autem qui membrorum humanorum officia ampliavit, aliquatenus videtur effectus, & ideo inter liberos connumeratur. *d. l.* 14.

XV.

15. *A caſe in which Monſters are reckoned among the other Children.* Altho' Monſters who have not Humane Shape, are not placed in the number of Perſons, and are not conſidered as Children, yet they are reckoned as ſuch, when it is for the behoof of the Parents, and are allowed to fill up the number of Children, to intitle their Parents to any Privilege or Exemption, which belongs to Fathers or Mothers having a certain number of Children[x].

[x] Quæret aliquis: ſi portentoſum, vel monſtroſum, vel debile mulier ediderit: vel qualem viſu, vel vagitu novum, non humanæ figuræ, ſed alterius magis animalis, quàm hominis partum: an quia enixa eſt, prodeſſe ei debeat? & magis eſt, ut hæc quoque parentibus proſint. Nec enim eſt quod eis imputetur, quæ qualiter potuerunt, ſtatutis obtemperaverunt. Neque id quod fataliter acceſſit, matri damnum injungere debet. *l.* 135. *ff. de verb. ſignif. We may add as another reaſon of this Rule, that theſe Monſters are more chargeable to the Parents than their other Children.*

XVI.

16. *Diſtinction made by Age.* Age diſtinguiſhes among perſons, thoſe who have not Reaſon or Experience enough to govern themſelves, from thoſe to whom Age has given ſuch a maturity of Reaſon, as to enable them to be maſters of their own conduct[y]. But becauſe Nature does not mark in every one the time of this maturity, the Civil Law has regulated the times in which perſons are judged capable both of Marriage, and other Engagements. And we ſhall ſee in the following Section, the diſtinctions which the Law has made of Minors and of Majors; of thoſe who have attained to the years of Maturity, and thoſe who have not[z].

[y] Hoc edictum (de minoribus) prætor, naturalem æquitatem ſecutus, propoſuit. Quo tutelam minorum ſuſcepit. Nam cum inter omnes conſtet, fragile eſſe, & infirmum hujuſmodi ætatum conſilium, & multis captionibus ſuppoſitum, multorum inſidiis expoſitum: auxilium eis prætor, hoc edicto, pollicitus eſt. Et adverſus captiones opitulationem. *l.* 1. *ff. de min.*

[z] *See the* 8th *and* 9th *Articles of the* 2d *Section.*

SECT. II.

Of the State of Perſons by the Civil Law.

Diſtinction of Perſons by the Civil Law. THE diſtinctions which the Civil Law makes of the State of Perſons, are thoſe that are eſtabliſhed by Arbitrary Laws; whether it be that theſe diſtinctions have no foundation in Nature, as that of Freemen and Slaves; or that ſome Natural Qualities have given riſe to the ſaid diſtinctions, ſuch as Majority and Minority of Age.

The principal diſtinctions of Perſons in the Roman Law. The *Roman* Law conſidered chiefly three things in every perſon; that is, Liberty, Country, and Family; and under theſe three views it made three diſtinctions of Perſons. The firſt, of Freemen and Slaves; the ſecond, of Citizens of *Rome*, and Strangers, or of ſuch as had loſt the right of Citizen, by a Civil Death; and the third, of Fathers of a Family, and of Sons ſubject to the Father's Authority[a]. Theſe two laſt diſtinctions are in uſe with us, altho' the Rules we obſerve in them are different from thoſe of the *Roman* Law. And as to the ſtate of Slavery, altho' there are no Slaves in *France*, yet it is neceſſary to know the nature of that State. For this reaſon, we ſhall ſet down under this Title theſe three diſtinctions, together with the others which we have in common with the *Roman* Law.

Some diſtinctions in uſe with us. We have in *France* a diſtinction of Perſons which is not in the *Roman* Law, or which is very different from any thing that is to be found there. And ſince for this reaſon it is not to be ſet down in the Articles of this Section, and yet it being conſidered as belonging to the State of Perſons, this diſtinction ſhall be explained here in a few words. It is that which Nobility makes between Gentlemen, and thoſe who are not, whom the *French* call *Roturiers*.

Nobility

Nobility. Nobility gives to thoſe who are of that Order divers Privileges and Exemptions, and a capacity of holding certain Offices and Benefices appropriated to Gentlemen, and of which thoſe who are not of Noble Extraction are incapable. Nobility makes likewiſe in ſome Cuſtoms a difference as to Succeſſions. This Nobility is acquired either by Birth, which ennobles all the Children of thoſe who are Noble; or by certain Offices, which ennoble the Deſcendants of thoſe who have enjoy'd them [a]. Or laſtly, by Letters of Nobility, which are obtained from the King, as a Recompence for ſome ſignal Services.

[a] *V. l. 7. §. ult. ff. de Senator.*

Burgeſſes. We diſtinguiſh in *France* between the Inhabitants of Towns, who have certain Rights, Exemptions, and Privileges annexed to the Right of Burgeſhip of thoſe Towns, with a capacity of bearing Offices in it; and the People who live in the Country, and in little Villages, who have not the ſame Privileges, nor the ſame Rights.

To theſe diſtinctions we muſt add thoſe, which are made by ſome Cuſtoms, of Perſons of a ſervile condition, which diſtinguiſhes them from thoſe who are of a free condition, in that they are bound by the ſaid Cuſtoms to ſome perſonal Servitudes which relate to Marriages, Teſtaments, and Succeſſions. But theſe Servitudes being differently regulated by the ſaid Cuſtoms, and being unknown in the other Provinces, it is not neceſſary to ſay any more of them here, and it is enough that we have made this bare Remark. To which we muſt add, that this diſtinction of theſe perſons of ſervile condition, is not founded on any perſonal Qualities, but barely upon the Domicil of the ſaid Perſons, and the Quality of their Eſtates, which are ſubject to theſe ſervile conditions.

Vaſſal, Subjection to the Court of a Lord of a Manor, or perpetual Leſſee. In the ſame manner as the qualities of Vaſſal, Subjection to the Courts of a Lord of a Manor, a perpetual Leſſee, who is ſtiled in the *Roman* Law *Emphyteuta*, are not, properly ſpeaking, Perſonal Qualities, but conſequences either of one's Domicil, or of the nature of the Lands which they poſſeſs.

Diſtinction of Perſons in Britain. Nobility. It may not be improper to add one word here touching the diſtinction of Perſons in *Great Britain*. The Nobility, ſtrictly taken, is what makes up the Peerage of *Great Britain*, and conſiſts of Lords Spiritual and Temporal, who have a Seat and Vote in Parliament, and are divided into Five Ranks, or Degrees, *viz.* Duke, Marquis, Earl, Viſcount and Baron. All who are not Peers of the Kingdom, come under the general name of Commoners, who may be diſtinguiſhed into two claſſes. The firſt takes in all the Gentry, of what denomination ſoever they be; whether Baronets, Knights, Eſquires, or Gentlemen. Baronets and Knights are made by Creation. The Honour of Baronet is Hereditary, and deſcends to the Male Iſſue. That of a Knight-Batchelor is only Perſonal, and dies with the Perſon on whom the ſaid Honour is conferred. The Titles of Eſquire and Gentleman are acquired either by Birth, by Profeſſion, or by certain Offices, which ennoble thoſe who have ſerved in them, and their Deſcendants. Under the other claſs may be comprehended the Yeomanry, or Freeholders, who have Lands and Tenements of their own, to the value of at leaſt Forty Shillings a Year, all Citizens, Tradeſmen, and Day-Labourers. *Commoners.*

Perſons of a ſervile condition. To theſe diſtinctions we muſt add another, which is mentioned in our Books of the Common Law, and that is of perſons of a ſervile condition, who are called *Villains*, from the *Latin* word *Villa*, a Country Farm, where they were appointed to do ſervice. Of theſe Bondmen, or Villains, there were two ſorts in *England*, one termed a *Villain in groſs*, who was immediately bound to the perſon of his Lord and his Heirs. The other was a *Villain* belonging to a Manor, who in the *Roman* Law is called *glebæ adſcriptitius*, being bound to his Lord as a member belonging and annexed to a Manor, whereof the Lord was owner. There are not, properly ſpeaking, any Villains now in *England*, and therefore it is not neceſſary to ſay any more concerning the ſtate of Villainage, it being enough barely to have mention'd it.

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I.

1. *Slaves.*

A Slave is one who is in the power of a Maſter, and who belongs to him in ſuch a manner, that the Maſter may ſell him, diſpoſe of his Perſon, his Induſtry, and his Labour; and who can do nothing, have nothing, nor acquire any thing, but what muſt belong to his Maſter [a].

[a] Servitus eſt conſtitutio juris gentium, qua quis dominio alieno, contra naturam ſubjicitur. *l.* 4. §. 1. *ff. de ſtat. hom.* §. 2. *inſt. de jur. perſ.* Vobis acquiritur quod ſervi veſtri ex traditione nanciſcuntur. Sive quid ſtipulentur, ſive ex donatione, vel ex legato, vel ex qualibet alia cauſa acquirant. §. 3. *inſt. per quas perſ. cuique acq. l.* 1. §. 1. *ff. de his qui ſui vel al. jur. ſ.*

II.

2. *Free-men.*

Free-men are all thoſe who are not Slaves, and who have preſerved their natural Liberty; which conſiſts in a right to do whatever one pleaſes, except in ſo far as we are reſtrained by Law, or hindered by ſome outward Violence [b].

[b] Libertas eſt naturalis facultas ejus quod cuique facere libet, niſi ſi quid vi, aut jure prohibetur. *l.* 4. *ff. de ſtat. hom.* §. 1. *inſt. de jur. perſ.*

III.

3. *Cauſes of Slavery.*

Men become Slaves by Captivity in time of War, among Nations where it is the cuſtom that the Conqueror, by ſaving the life of the perſon conquered, becomes his Maſter, and makes him his Slave. And it is a conſequence of the Slavery of Women, that their Children are Slaves by their Birth [c].

[c] Jure gentium ſervi noſtri ſunt qui ab hoſtibus capiuntur, aut qui ex ancillis noſtris naſcuntur. *l.* 5. §. 1. *ff. de ſtat. hom.* §. 4. *inſt. de jur. perſ.*

If one who was paſt twenty years of age ſuffered himſelf to be ſold, that he might have the price of his Liberty, he became a Slave by the Roman *Law, altho' that Law did not allow him at that age to have the power of ſelling his Eſtate.* Jure Civili ſi quis ſe major viginti annis, ad pretium participandum, venire paſſus eſt (ſervus ſit.) *l.* 5. §. 1. *ff. de ſtat. hom.*

IV.

4. *Manumiſed perſons.*

Manumiſed perſons are thoſe who having been Slaves, are made free [d].

[d] Libertini ſunt, qui ex juſta ſervitute manumiſſi ſunt. *l.* 6. *ff. de ſtat. hom. inſt. de libert.*

V.

5. *Who are Fathers of a Family, and who Sons of a Family.*

The Sons and Daughters of a Family are perſons who are ſubject to the Father's Authority; and the Fathers, or Mothers of a Family, whom we call likewiſe Heads of a Family, are the perſons who are not ſubject to the Father's Authority [e]; whether they have Children of their own, or not, and whether they have been freed from the Father's Authority by Emancipation [f], or by the Natural [g], or Civil Death of the Father [h]. And however young theſe perſons may happen to be, yet they are conſidered as Heads of a Family; ſo that the ſeveral Children of one Father are ſo many Heads of a Family after the Father's Death [i].

[e] Patres familiarum ſunt, qui ſunt ſuæ poteſtatis, ſive puberes, ſive impuberes. Simili modo matres familiarum, filii familiarum, & filiæ, quæ ſunt in aliena poteſtate. *l.* 4. *ff. de his qui ſui vel al. jur. ſ.*

[f] Emancipatione deſinunt liberi in poteſtate parentum eſſe. §. 6. *inſt. quib. mod. jus patr. pot. ſolv.*

[g] Qui in poteſtate parentis ſunt, mortuo eo ſui juris fiunt. *inſt. eod.*

[h] Cùm autem is qui ob aliquod maleficium in inſulam deportatur, civitatem amittit, ſequitur ut qui eo modo ex numero Civium Romanorum tollitur, perinde quaſi eo mortuo, deſinant liberi in poteſtate ejus eſſe. §. 1. *eod.* Pœnæ ſervus effectus, filios in poteſtate habere deſinit. §. 3. *eod. Concerning the Civil Death, ſee Art.* 12. *below.*

[i] Denique & pupillum patrem familias appellamus. Et cùm pater familias moritur, quotquot capita ei ſubjecta fuerint, ſingulas familias incipiunt habere. Singuli enim patrum familiarum nomen ſubeunt, idemque eveniet & in eo qui emancipatus eſt. Nam & hic ſui juris effectus propriam familiam habet. *l.* 195. §. 2. *ff. de verb. ſignif.*

The Paternal Power is the foundation of ſeveral Incapacities in Sons; but which are different in the Roman *Law, and in our Cuſtoms. Thus in the* Roman *Law, Sons who lived in ſubjection to the Father's Authority, were firſt of all incapable of acquiring any thing. But all that they did acquire by any way whatſoever, belonged to their Fathers, excepting the* Peculium, *if the Father thought fit to let them have it. And afterwards they had the power of acquiring, and the Fathers had the Uſufruct of all that their Sons acquired. And then ſome Exceptions were made, and the Fathers had not any longer the Uſufruct of certain Goods. But it is not neceſſary to explain here all theſe changes, nor the different kinds of Uſufruct which Fathers have of the Goods of their Children in the Provinces of this Kingdom, whether it be under the name of Uſufruct, or under the name of Wardſhip.*

Thus likewiſe in the Roman *Law, Sons who were ſtill under the Father's Juriſdiction, could not oblige themſelves by borrowing Money.* Toto Tit. ad Senatuſc. Maced. *Thus in* France, *Sons ſubject to the Paternal Authority cannot marry, without the conſent of their Fathers and Mothers, unleſs they are upwards of thirty years of age, and Daughters after they are paſt twenty-five years, according to the Ordinances of* 1556 *of* Blois, *and of* 1639.

Thus, in France, *Marriage emancipates Children from the Paternal Juriſdiction. Whereas under the* Roman *Law, the Son and Daughter that were married remain-*

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ed nevertheleſs under the Power of the Father, unleſs he emancipated them when he married them. l. 5. Cod. de cond. inſert. tam in leg. quam in fidei com. l. 7. Cod. de nupt. l. 1. Cod. de bon. quæ lib.

VI.

6. Emancipation does not alter the Natural Right of the Paternal Power.

Emancipation, and the other ways which ſet the Son or Daughter free from under the Father's Authority, regard only the effects which the Civil Laws give to the Paternal Power, but change nothing in thoſe that are of Natural Right[l].

[l] Eas obligationes quæ naturalem præſtationem habere intelliguntur, palam eſt capitis diminutione non perire: quia civilis ratio naturalia jura corrumpere non poteſt. *l. 8. ff. de cap. minut.*

VII.

7. Who are thoſe that are ſaid to be Maſters of their own Rights.

According to theſe two diſtinctions, of Free-men and Slaves, of Fathers and Sons, there is no perſon who is not either under the Power of another, or in his own; that is to ſay, Maſter of his own Rights[m]. And this does no ways hinder the Son that is emancipated from being ſubject to the Authority which the Law of Nature gives his Father over him; nor a Minor, who happens to be Father of a Family, from being under the Conduct and Authority of a Tutor, or Guardian.

[m] Quædam perſonæ ſui juris ſunt, quædam alieno juri ſubjectæ. Rurſus earum quæ alieno juri ſubjectæ ſunt, aliæ in poteſtate parentum, aliæ in poteſtate dominorum. *inſt. de his qui ſui vel al. j. ſ. l. 1. ff. eod. l. 3. ff. de ſtat. hom.*

VIII.

8. Who are of ripe Age, and who of unripe Age.

Males who have not attained the Age of fourteen years compleat, and Females who are under twelve, are ſaid to be of an unripe Age, and are called in the *Roman* Law *Impuberes*. And Sons who have attained the Age of fourteen years compleat, and Daughters the Age of twelve, are reckoned to be of ripe Age, and are diſtinguiſhed in the *Roman* Law by the name of *Adulti*[n].

[n] Noſtrâ ſanctâ conſtitutione promulgatâ, pubertatem in maſculis poſt decimum quartum annum completum ſtatim initium accipere diſpoſuimus: antiquitatis normam in fœminis bene poſitam, in ſuo ordine relinquentes, ut poſt duodecim annos completos viri potentes eſſe credantur. *inſt. quib. mod. tut. fin. l. ult. Cod. quand. tut. vel cur. eſſe deſ.*

It is the Pubertas, *or Ripeneſs of Age, that removes the Incapacity for Marriage, which proceeds from want of years. But the* Romans *diſtinguiſhed between this Puberty, that is ſufficient to make the Marriage lawful, and full Puberty, which renders it more decent. This full Puberty in Males is eighteen years compleat, and in Females fourteen.* Non tantùm cùm quis adoptat, ſed & cùm adrogat, major eſſe debet eo quem ſibi per adrogationem vel per adoptionem filium facit; & utique plenæ pubertatis, id eſt, decem & octo annis eum præcedere debet. *l. 40. §. 1. de adopt. §. 4. inſt. eod. As to the other effects of full Puberty, vid. l. 14. §. 1. ff. de alim. leg. l. 57. ff. de re jud. l. 1. §. 3. ff. de poſtul.*

IX.

9. Majors and Minors.

Minors are thoſe of both Sexes who have not as yet five and twenty years compleat; and they are under Tutelage till that Age. When they have compleated the laſt moment of the five and twentieth year, they are then ſaid to be of full Age, or Majors[o].

[o] Maſculi quidem puberes, & fœminæ viri potentes uſque ad vicesimum quintum annum completum curatores accipiunt. Quia licet puberes ſint, adhuc tamen ejus ætatis ſunt, ut ſua negotia tueri non poſſint. *inſt. de curat.* à momento in momentum tempus ſpectatur. *l. 3. §. 3. ff. de min.*

We have thought fit to make uſe here of the word Tutelage for Adults, altho' by the Roman *Law they were let out of Tutelage, and had Curators aſſigned them, as ſhall be explained under the Title of* Tutors. *But according to our uſage in* France, *Tutelage does not expire till the five and twentieth year, except in ſome Cuſtoms which fix a ſhorter period of time for Minority.*

[*By the* Roman *Law, and likewiſe in* France *and other Countries, Minority both in Men and Women laſts till they are paſt five and twenty years. But in* Britain, *perſons of both Sexes are reckoned by the Law to be of full Age, when they have accompliſhed one and twenty years.* Coke 1 Inſt. Book 1. Chap. 4. §. 104. *Mackenzie's Inſtitutes of the Law of Scotland,* Book 1. Tit. 7.]

X.

10. Prodigals.

We ought to place in the rank of Minors, thoſe Perſons who are forbid the Management of their own Affairs, as being Prodigals, altho' they be of full Age; becauſe their bad conduct renders them incapable of managing their own Eſtate, and of entring into any Engagements, which is the conſequence of the former. And therefore the care of all their concerns is committed to a Guardian[p].

[p] Prodigi licet majores viginti quinque annis ſint, tamen in curatione ſunt. §. 3. *inſt. de curat.* Prodigo interdicitur bonorum ſuorum adminiſtratio. *l. 1. ff. de curat. fur.* ejus cui bonis interdictum ſit, nulla voluntas eſt. *l. 40. ff. de reg. jur.*

[*The* Roman *Lawgivers thought it for the intereſt of the Publick to take care, that particular perſons ſhould not fooliſhly and riotouſly ſquander away their Eſtates; and therefore when any perſon grew prodigal to that exceſs, that it was neceſſary to tie up his hands, the Magiſtrate interdicted him the Adminiſtration of his Eſtate, and committed the care of it to a Curator, till the Owner ſhould give greater proofs of his prudence and diſcretion. But the Laws of* England *take no ſuch care of Prodigals, and for want of this due care, many antient Families run to ruine and decay, thro' the extravagance and folly of the preſent poſſeſſors.*]

XI.

11. *Natural-born Subjects, and Strangers.*

We call Natural-born Subjects thoſe that are born within the King's Dominions, and we reckon theſe to be Strangers who are Subjects of another Prince, or another State. And Strangers of this kind, who have not been Naturalized by Letters Patents of the Prince, are under the Incapacities which are regulated by the Ordinances, and by our Cuſtoms [q].

[q] In orbe Romano qui ſunt, ex conſtitutione Imperatoris Antonini, cives Romani effecti ſunt. *l.* 17. *ff. de ſtat. hom. nov.* 78. *c.* 5. Peregrini capere non poſſunt (hæreditatem.) *l.* 1. *C. de hær. inſt. l.* 6. §. 2. *ff. eod.* Nec teſtari. *l. in verbo* cives Romani. *ff. ad leg. falc. v. auth. omnes peregrini. C. comm. de ſucceſſ.*

In France, *Strangers who are call'd Aliens*, alibi nati, *are incapable of Succeſſions, and of making a Teſtament. They are not capable of enjoying Offices or Benefices; and they are under the other Incapacities regulated by the Ordinances, and by our Uſage.* See the Ordinance of 1386. that of 1431, and that of *Blois*. Art. 4. *We muſt except from theſe Incapacities ſome Strangers to whom our Kings have granted the Rights and Privileges of Natives, and Natural-born* French.

[*In* Great Britain, *Aliens, that is, Perſons born out of the Ligeance of our Sovereign Lord the King, are capable of ſucceeding to Perſonal Eſtates, and of making Teſtaments, but they are incapable of purchaſing or inheriting Lands, and are under other Incapacities, regulated by our Statutes and Cuſtoms. This Incapacity of Aliens may be taken off either by Denization by the King's Letters Patents, or by Naturalization by Act of Parliament: Between which two ways the* Engliſh *Law makes this difference, That when one is Denizated by Letters Patents, if he had Iſſue in* England *before his Denization, that Iſſue is not inheritable to his Father; whereas if the Father be Naturalized by Act of Parliament, ſuch Iſſue does inherit. So if an Iſſue of an* Engliſhman *be born beyond Sea, if the Iſſue be Naturalized by Act of Parliament, he ſhall inherit his Father's Lands; but if he be made Denizen by Letters Patents, he ſhall not. The* Engliſh *Law diſtinguiſheth alſo between an Alien that is a Subject to a Prince or State that is at Enmity with our King, and one that is Subject to a Prince or State that is at Amity with us. An Alien Enemy cannot maintain either Real or Perſonal Action, until both Nations be in Peace; But an Alien that is in Peace and Amity with us, may maintain Perſonal Actions; for an Alien Friend may trade and traffick, buy and ſell, and therefore of neceſſity muſt be of ability to have Perſonal Actions, but he cannot maintain either Real or Mixt Actions.* Coke 1. Inſt. §. 198]

XII.

12. *Civil Death.*

Civil Death is the State of thoſe perſons who are condemned to Death, or to other Puniſhments which are attended with the Confiſcation of Goods. And therefore this State is compared to natural Death, becauſe it cuts off from the Civil Life thoſe perſons who fall under it, and renders them as it were Slaves to the Puniſhment which is inflicted on them [r].

[r] Qui ultimo ſupplicio damnantur, ſtatim & civitatem & libertatem perdunt. Itaque præoccupat hic caſus mortem. *l.* 29. *ff. de pœn.* Servi pœnæ. §. 3. *inſt. quib. mod. jus patr. pot. ſolv.* Is qui ob aliquod maleficium, in Inſulam deportatur, civitatem amittit. §. 1. *inſt. quib. mod. jus patr. pot. ſolv.* ex numero civium Romanorum tollitur. *d.* §. Servi pœnæ efficiuntur, qui in metallum damnantur, & qui beſtiis ſubjiciuntur. §. 3. *eod.* Sunt quidam ſervi pœnæ, ut ſunt in metallum dati, & in opus metalli, & ſi quid eis teſtamento datum fuerit, pro non ſcripto eſt: quaſi, non Cæſaris ſervo datum, ſed pœnæ. *l.* 17. *ff. de pœn. l.* 1. *C. de hæred. inſt.*

XIII.

13. *Profeſſed Monks and Nuns.*

Profeſſed Monks, or Nuns, are under another kind of Civil Death, which is voluntary; into which State they enter by their Vows, which render them incapable of Marriage, or of having any Property in Temporal Goods, or entring into any Engagements which are conſequences of the ſame [s].

[s] Ingreſſi monaſteria, ipſo ingreſſu, ſe ſuaque dedicant Deo. Nec ergo de his teſtantur, utpote nec domini rerum. *Auth. ingreſſi, ex nov.* 5. *cap.* 5. *C. de Sacroſ. Eccleſ. Nov.* 76.

In France, *the Eſtates of Perſons who are Profeſſed Religious, do not go to the Monaſtry, but to their Heirs, or thoſe to whom they are pleaſed to give them. And they cannot diſpoſe of them for the uſe of the Monaſtry.*

[*By the Law of* England, *when a Man entreth into Religion, and is profeſſed, he is dead in the Law, and his Son, or next Heir, ſhall inherit him, as if he were really and truly dead. And when he entreth into Religion, he may make his Teſtament, and therein name his Executors, who may have an Action of debt due to him before his entry into Religion, or any other Action that Executors may have, as if he were dead indeed. And if he make no Executors when he entreth into* Religion, *then the Ordinary may commit the Adminiſtration of his Goods to others, as if he were really dead.* Littleton, Book 2. Chap. 11. of *Villenage*, §. 200. *My Lord* Coke, *in his Commentary upon this Section, takes a difference between Profeſſion in a Foreign Country, and Profeſſion in ſome Houſe of Religion within the Realm; and ſays, that Profeſſion in a Foreign Country doth not bring the party profeſſed under thoſe diſabilities that a Profeſſion within the Realm doth; becauſe a Profeſſion within the Realm may be tried by the Ordinary; whereas a Foreign Profeſſion wanteth Trial, and therefore the Common Law taketh no knowledge of it. I confeſs, I do not ſo readily enter into the reaſon of this diſtinction, ſeeing that it is not the proof, or method of Trial, that worketh the Diſability in the perſon that enters into Religion; but it is the Vow that he takes at the time of his Profeſſion, by which he ſolemnly devotes himſelf, and all that he hath, to the Service of God, and renounces the World, and all that is in it. And whether this ſolemn Vow or Renunciation be made in* England, *or in any other Country, it muſt produce the ſame effect as to the Diſability of the Perſon that makes it. As to the proof of this Profeſſion, it muſt be made in ſuch manner as the circumſtances of it will admit.*]

XIV.

14. *Clergymen.*

Clergymen are thoſe who are ſet apart for the Miniſtry of God's Worſhip; ſuch as Biſhops, Prieſts, Deacons, Subdeacons, and thoſe who are called to other Orders. And this State, which diſtinguiſhes them from Laymen, renders them incapable of Marriage, in ſuch as are in Holy Orders, and worketh alſo

other

other Incapacities in the matters of Commerce prohibited to the Clergy, and entitles them to the Privileges and Exemptions which have been granted to them by the Canons of the Church, by the Ordinances, and by the Cuſtom of the Kingdom.

[t] Presbyteros, Diaconos, Subdiaconos, atque Exorciſtas, & Lectores, Oſtiarios, & Acolytos etiam perſonalium munerum expertes eſſe præcipimus. *l. 6. C. de Epiſc. & Cler.* Ordinance of St. *Lewis*, 1228. Ordinance of *Blois*, Art. 59. *v. l. 1. & ſeq. & l. 2. d. Tit. C. de Epiſt. & Cler.*

XV.

15. *Communities.* Communities Eccleſiaſtical and Secular, are Aſſemblies of many perſons united into one Body, that is formed with the Prince's Conſent, without which theſe kinds of Aſſemblies would be unlawful [u]. And theſe Bodies, and Corporations, ſuch as Chapters of Churches, Univerſities, Monſtaries, Town Corporations, Companies of Trade, and others, are eſtabliſhed for the forming of Societies that may be uſeful either to Church [x], or State [y]; and they are accounted as Perſons [z], having their own proper Goods, their Rights, and their Privileges. And among other differences which diſtinguiſh them from particular Perſons, theſe Societies are under ſome Incapacities, which are acceſſory, and natural to this State: As particularly that of being incapable of alienating their Stock without juſt Cauſe [a].

[u] Mandatis principalibus, præcipitur præſidibus provinciarum, ne patiantur eſſe collegia. *l. 1. & l. 2. ff. de coll. & corp. l. 3. §. 1. eod. l. 1. ff. quod cujuſque univ. l. 2. ff. de extr. crim.*

[x] Religionis cauſa coire non prohibentur. Dum tamen per hoc non fiat contra ſenatuſconſultum, quo illicita collegia arcentur. *l. 1. §. 1. ff. de coll. & corp. tot. tit. C. de Epiſc. & Cler.*

[y] Item Collegia Romæ certa ſunt, quorum corpus ſenatuſconſultis, atque conſtitutionibus principalibus confirmatum eſt, velut piſtorum, & quorumdam aliorum, & navicullariorum, qui & in provinciis ſunt. *l. 1. ff. quod cujuſque univ. As to Town Corporations*, v. l. 3. ff. quod cujuſque univ. tit. ff. ad Munic.

[z] Perſonæ vice fungitur municipium, & decuria. *l. 22. ff. de fideiuſſ.*

[a] *Eccleſiaſtical and Lay Communities being eſtabliſhed for a publick Good, and with an intent that they ſhould laſt always; they are forbid to alienate their Goods, without juſt cauſe.* l. 14. C. de Sacr. Eccl. *And it is becauſe of this perpetuity, and of theſe prohibitions to alienate, that Lands which come into the poſſeſſion of Communities, are ſaid to be in* Mortmain, *that is,* in a dead Hand; *becauſe what they once acquire, remaining always in their poſſeſſion, the Kings and Lords of Manors, loſe their Services, and the profits due to them upon the change of their Vaſſals, and upon Alienation of the Lands. It is for this reaſon that they are not permitted to acquire Immoveables, without paying to the King a conſideration for a Licence of* Mortmain, *and ſome acknowledgment to the Lords of the Manor, for the loſs of the perquiſites that would accrue by the future changes of Maſters.* See the Ordinances of *Philip* III. 1275. Charles VI. 1372. and others.

It was in conſideration of this loſs which the King, and Lords of Manors ſuſtained, when Lands were alienated to religious or other Corporations, that this Alienation of Lands in Mortmain *was prohibited in* England *by the* Statute 7 E. 1. *commonly called,* The Statute of Mortmain, *and by* 18 E. 3. chap. 3. and 15 R. 2. chap. 5. *But theſe Statutes were in ſome manner abridged by* 39 Eliz. chap. 5. *by which the Gift of Lands, &c. to Hoſpitals is permitted, without obtaining Licenſes in* Mortmain. *And by the Statute made* 14 Car. 2. cap. 9. *the Preſident and Governors for the Poor within the Cities of* London *and* Weſtminſter, *may without Licenſe in* Mortmain, *purchaſe Lands, &c. not exceeding the yearly value of three Thouſand Pounds.*

TITLE III.

Of THINGS.

THE Civil Laws extend the diſtinctions which they make of Things to every thing that God hath created for the uſe of Man. And as it is for our uſe that he hath made the whole World, and that he deſtinates for the ſupplying of our wants, every thing that is here on the Earth below, or in the Heavens above [a]; it is this deſtination of all things to our different wants, which is the foundation of the different manners in which the Laws conſider and diſtinguiſh the different kinds of Things, in order to regulate the ſeveral uſes and commerce which Men make of them. *In what manner the Laws conſider Things.*

[a] And leſt thou lift up thine eyes unto Heaven, and when thou ſeeſt the Sun, and the Moon, and the Stars, even all the Hoſt of Heaven, ſhouldeſt be driven to worſhip them, and ſerve them, which the Lord thy God hath divided unto all Nations under the whole Heaven, *Deut.* iv. 19. And ordained Man through thy Wiſdom, that he ſhould have Dominion over the Creatures which thou haſt made, *Wiſdom of* Solomon, *ch.* ix. 2.

The divine Providence which forms an univerſal Society of Mankind, and which divides it into Kingdoms, Towns, and other Places, and ſettles in every one the Families, and the particular Perſons who compoſe them; does likewiſe diſtinguiſh, and diſpoſe in ſuch a manner all the things that are for the uſe of Man, that many things are common to all Mankind; others common to one Kingdom; ſome to a Town, or ſome other Place; and other things enter into the Poſſeſſion, and Commerce of particular perſons. *The foundations of the diſtinctions of Things.*

It is theſe diſtinctions of Things, and the other different ways in which they

have relation to the Uſe, and Commerce of Men, that ſhall be the ſubject matter of this Title. And becauſe there are ſome diſtinctions of Things, which are altogether natural, and others which have been eſtabliſhed by Laws, we ſhall explain in the firſt Section of this Title, the diſtinctions made by Nature, and in the ſecond thoſe that are made by the Laws of Men.

SECT. I.

Diſtinctions of Things by Nature.

The CONTENTS.

I.

1. *Things common to all.*

THE Heaven, the Stars, the Light, the Air, and the Sea, are all of them things belonging ſo much in common to the whole Society of Mankind, that no one perſon can make himſelf Maſter of them, nor deprive others of the uſe of them. And likewiſe the Nature and Situation of all theſe things is intirely proportion'd to this common Uſe for all Men [a].

[a] Which the Lord thy God hath divided unto all Nations under the whole Heaven, *Deut.* iv. 19. Naturali jure communia ſunt omnium hæc, aër, aqua profluens, & mare, & per hoc littora maris. §. 1. *Inſt. de rer. div. l.* 2. §. 1. *eod.*

It is to be remarked on this Article, and the two following, that our Laws differ from the Roman *Law, in regulating the uſe of the Seas, except in ſo far as concerns that Natural Uſe of them in the communication which all Nations have with one another, by a free Navigation over all the Seas. Thus, whereas the* Roman *Law allowed every body indifferently to fiſh, both in the Sea, and in the Rivers.* §. 2. Inſt. de rer. div. *in the ſame manner as it allowed Hunting.* §. 12. eod. *our Laws prohibit them. And our Ordinances have made ſeveral regulations concerning them; the Origine of which is owing, among other cauſes, to the neceſſity of preventing the inconveniencies of allowing a liberty of Hunting, and Fiſhing, to all ſorts of perſons. And we muſt obſerve in general, touching the uſe of the Seas, Sea-Ports, Rivers, Highways, the Walls, and Ditches of Towns, and of other things of the like nature, that ſeveral Regulations have been made in them by our Ordinances. Such as thoſe that concern the Admiralty, Rivers, Foreſts, Hunting, Fiſhing, and others of the like nature, which do not belong to the Matters that come within the compaſs of this Deſign.*

II.

Rivers, the Banks of Rivers, High-ways, are Things Publick, the uſe of which is common to all particular Perſons, according to the reſpective Laws of Countries. And theſe kinds of things do not appertain to any particular Perſon, nor do they enter into Commerce [b]. But it is the Sovereign that regulates the uſe of them.

2. *Things publick.*

[b] Flumina autem omnia & portus publica ſunt. §. 2 *inſt. de rer. div.* Riparum quoque uſus publicus eſt. §. 4. *eod.* litorum quoque uſus publicus eſt. §. 5. *eod.* Publicas vias dicimus quas Græci Βασιλικὰς *i. e.* regias, noſtri prætorias, alii conſulares vias appellant. *l.* 2. §. 22. *ff. ne quid in loc. publ. vel itin. f.* Viam publicam populus non utendo amittere non poteſt. *l.* 2. *ff. de via publ.* See the remark on the preceding Article.

III.

We reckon among the number of Publick Things, and of ſuch as are out of Commerce, thoſe which belong in common to the Inhabitants of a Town, or other Place; and to which particular Perſons can have no Right of Property, ſuch as the Walls, the Ditches of a Town, Town-Houſes, and publick Market-Places [c].

3. *Things belonging to Towns, or other Places.*

[c] Univerſitatis ſunt, non ſingulorum, quæ in civitatibus ſunt theatra, ſtadia, & ſi qua alia ſunt communia civitatum. §. 6. *inſt. de rer. div. l.* 1. *ff. eod.* Sanctæ quoque res, veluti muri, & portæ civitatis, quodammodo divini juris ſunt. Et ideo nullius in bonis ſunt. Ideò autem muros ſanctos dicimus, quia pœna capitis conſtituta eſt, in eos, qui aliquid in muros deliquerint. Ideò & legum eas partes, quibus pœnas conſtituimus adverſùs eos qui contra leges fecerint, ſanctiones vocamus. §. 10. *inſt. eod. v. l.* 8. *& d. l.* 8. §. 1. *ff. de div. rer. l.* 9. §. 3. *eod. l. ult. eod.* See the remark on the firſt Article.

In the Roman *Law they called the Walls, and the Gates of Towns, things holy; which is not to be underſtood in the ſenſe which this* [illegible] *but in the ſenſe explained in* [illegible] *ticle.*

The diſtinction of the things belongs more properly to the [illegible] *Nature. However, ſeeing it has ture, and that it has relation* [illegible] *we have put it down here.*

IV.

The Earth being giv[illegible] their Habitation, and for

of all things neceſſary for ſupplying all their wants; we diſtinguiſh in it the portions of the Surface of the Earth which every one occupies, from the things that may be ſeparated from it, for our uſe. And it is this that makes the diſtinction of what we call Immoveables, and Moveables, or Goods moveable[d].

[d] Labeo ſcribit, Edictum Ædilium Curulium, de venditionibus rerum, eſſe tam earum *quæ ſoli ſunt*, quàm earum *quæ mobiles*. *l.* 1. *ff. de ad. ed.* *l.* 8. §. 4. *C. de bon. quæ lib. l.* 30. *C. de jur. dot. l.* 93. *ff. de verb. ſign.*

V.

5. Immoveables. Immoveables are all the parts of the Surface of the Earth, in what manner ſoever they are diſtinguiſhed; whether into Places for Buildings, or into Woods, Meadows, Arable Land, Vineyards, Orchards, or otherwiſe, and to whomſoever they belong[e].

[e] Quæ ſoli. *l.* 1. *ff. de ad. ed.* quæ terra continentur. *l.* 17. §. 8. *ff. de act. empt. & vend.*

VI.

6. Trees and Buildings. We comprehend likewiſe under the name of Immoveables, every thing that is adherent to the Surface of the Earth, either by Nature, as Trees; or by the hand of Man, as Houſes, and other Buildings; altho' theſe kinds of things may be ſeparated from the Earth, and become moveable[f].

[f] *See the two following Articles.*

VII.

7. The hanging Fruits are a part of the Ground. The Fruits hanging by the root, that is, ſuch as are not as yet gathered, nor fallen, but which ſtick to the Tree, are part of the Ground[g].

[g] Fructus pendentes pars fundi videntur. *l.* 44. *ff. de rei vend.*

VIII.

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h as any thing that is
on, Lead, Plaiſter, or
r of way, to the intent
ays continue ſo, is re-
moveable[h].

[h] ii quod terra ſ tenet. *l.* 17.
d. Quæ tabulæ pictæ pro-
itemque cruſtæ marmoreæ,
Item con at, ſigilla, co-
lumnas quoque, & perſonas ex quorum roſtris aqua ſalire ſolet, villæ eſſe. *d. l.* §. 9. Labeo generaliter ſcribit, ea quæ perpetui uſus causâ in ædificiis ſunt, ædificii eſſe. *d. l.* §. 7.

IX.

9. Moveables. Moveables are all thoſe things that are disjoined from the Earth, and the Waters; whether it be that they have been ſeparated from it, as Trees that are fallen, or cut down, Fruits that are gathered, Stones taken out of a Quarry; or that they are by Nature diſtinct and ſeparate from the Earth, and Water, as living Creatures[i].

[i] Quæ ſoli, quæ *mobiles*. *l.* 1. *ff. de ædil. ed.* See the 4th Article of this Section.

X.

10. Moveables, living and dead. Moveable Things are of two ſorts. There are ſome which live, and move themſelves, as Animals; and the things that are inanimate, are called dead Moveables[l].

[l] *Mobiles*, aut *ſe moventes*. *l.* 1. *ff. de ad. ed. l.* 30. *C. de jur. dot. l.* 93. *ff. de verb. ſignif.*

XI.

11. Animals, wild and tame. Animals are of two ſorts. One is of thoſe that are tame, and ſerve for the ordinary uſe of Men, and are in their power; ſuch as Horſes, Oxen, Sheep, and others. The other ſort is of thoſe Animals that live in their natural liberty, out of the power of Man; ſuch as the wild Beaſts, Fowls, and Fiſhes. And the Animals of this ſecond ſort are applied to the uſe, and come into the power of Men, by Hunting, and Fiſhing, according as the uſe of theſe Sports is permitted by the Laws[m].

[m] Feræ beſtiæ, & volucres, & piſces, & omnia animalia quæ mari, cœlo, & terra naſcuntur, ſimul atque ab aliquo capta fuerint, jure gentium ſtatim illius eſſe incipiunt. §. 12. *inſt. de rer. diviſ.*

We muſt underſtand this according to the Ordinances which relate to Hunting and Fiſhing.

XII.

12. Moveable things that are conſumed by uſe. In moveable Things we diſtinguiſh thoſe that may be uſed, and yet kept entire; ſuch as a Horſe, a Sute of Hangings, Tables, Beds, and other things of this kind; from ſuch as we cannot uſe without conſuming them, ſuch as Fruits, Corn, Wine, Oil, and the like[n].

[n] Quæ uſu tolluntur, vel minuuntur. *l.* 1. *ff. de uſufr. ear. rer. quæ uſ. conſ. v. min.*

SECT.

SECT. II.

Diſtinctions of Things by the Civil Laws.

Difference between the diſtinctions of the foregoing Section, and theſe in this.

ALtho' the diſtinctions of Things which have been explained in the foregoing Section, have been made by the Civil Laws, yet it was proper to ſeparate them from the diſtinctions that are treated of in this Section. For thoſe in the preceding Section are formed by Nature, and the Laws have only taken notice of them, or added ſomething to them: As, for Example, what has been explained in the third and eighth Articles. But theſe treated of in this Section, owe their chief Eſtabliſhment to the Laws.

The CONTENTS.

I.

1. Diſtinctions of Things that enter into Commerce, and thoſe that do not.

THE Laws reduce all Things to two Kinds. One is of thoſe that do not enter into Commerce, and which cannot belong to any one in particular; ſuch as thoſe that have been explained in the three firſt Articles of the preceding Section. The other ſort is of ſuch as enter into Commerce, and of which one may become Maſter [a].

[a] Modo videamus de rebus, quæ vel in noſtro patrimonio, vel extra patrimonium noſtrum habentur. *inſt. de rer. div. l. 1. ff. eod.*

II.

2. Things conſecrated, and ſet apart for divine Worſhip.

Religion, and the Civil Laws, which are conformable to it, diſtinguiſh the things which are deſtinated to divine Worſhip, from all others. And among thoſe which are made uſe of in this Worſhip, we diſtinguiſh between things that are Conſecrated, ſuch as Churches, the Communion Cups; and things that are Religious and Holy, ſuch as Churchyards, the Ornaments, Oblations, and other things dedicated to the Service of God. And all theſe kinds of things are out of Commerce, while they continue under this deſtination to the divine Service [b].

[b] Summa rerum diviſio in duos articulos deducitur. Nam aliæ ſunt divini juris, aliæ humani. Divini juris ſunt, veluti res ſacræ & religioſæ. *l. 1. ff. de div. rer.* Sacræ res ſunt, quæ ritè, per pontifices Deo conſecratæ ſunt. Veluti æides ſacræ, & donaria, quæ ritè ad miniſterium Dei dedicata ſunt. Quæ etiam per noſtras conſtitutiones alienari, & obligari prohibuimus: excepta cauſâ redemptionis captivorum. §. 8. *inſt. de rer. div.* See the 6th Article of the 8th Section of the Contract of Sale, concerning the Sale of things conſecrated.

III.

3. Things Corporeal, and Incorporeal.

The Civil Laws make another general diſtinction of Things, into thoſe that are Senſible and Corporeal, and thoſe which we call Incorporeal, in order to diſtinguiſh from every thing that is ſenſible, certain things which owe their Nature, and their Exiſtence, wholly to the Laws: Such as an Inheritance, an Obligation, a Mortgage, an Uſufruct, a Service; and, in general, every thing that conſiſts only in a certain Right [c].

[c] Quædam præterea res corporales ſunt, quædam incorporales. Corporales, hæ ſunt quæ tangi poſſunt: veluti fundus, homo, veſtis, aurum, argentum, & denique aliæ res innumerabiles. Incorporales autem ſunt, quæ tangi non poſſunt: qualia ſunt ea quæ in jure conſiſtunt: ſicut hæreditas, uſusfructus, uſus, & obligationes quoquo modo contractæ. *inſt. de reb. corp. & incorp.* Eodem numero ſunt jura prædiorum urbanorum, & ruſticorum, quæ etiam ſervitutes vocantur. §. *ult. eod l. 1. §. 1. ff. de diviſ. rer.*

IV.

4. Allodial Lands, and Lands burdened with Quit-Rents, or other Duties.

Among the Immoveables that are in Commerce, and ſerve for the common uſe of Men, there are ſome which particular Perſons may poſſeſs fully in their own right, without any burthen. And there are other Immoveables which are burthened with certain Duties, and Services, that are inſeparable from them. Thus, we have in this Kingdom, Lands which are called *Allodial*, or Free Lands, which pay neither Quit-Rent, nor any other ſuch like Acknowledgment [d]. And there are other Lands, which having been given away originally with the charge of paying a Quit-Rent irredeemable [e], or upon other conditions, ſuch as thoſe of Fiefs, deſcend to all ſorts of

Poſſeſſors,

Poſſeſſors, with the burdens annexed to them.

[d] Solum immune. *l. ult.* §. 7. *ff. de cenſib.*

[e] De tributis, ſtipendiis, cenſibus, & prædiis juris Italici. *V. tit.* 19. *Ulp. de dom. & acq. rer.* §. 40. *inſt. de rer. div. l.* 13. *ff. de impenſis in res dot. l.* 27. §. 1. *ff. de verb. ſignif. l.* 1. *C. de uſuc. tranſform. Toto tit. ff. de cenſib. Toto tit. C. ſi propt. publ. penſ.*

The Origine of theſe burdens upon Eſtates in the Roman *Law, was a conſequence of the Conqueſts of Provinces made by the* Romans, *of which they diſtributed the Lands to ſuch perſons as they thought would remain faithful to the* Roman *Empire; but upon condition that the Poſſeſſors ſhould pay a certain Tribute, to which the Lands of* Italy *were not ſubject, nor thoſe likewiſe of ſome other Provinces, which were diſtinguiſhed by Exemptions from ſuch Tribute.* d. Tit. de cenſib.

There are ſome Provinces in France, *in which all the Lands are reputed Allodial, free from all burden of Quit-Rent, or other, unleſs they are ſubjected to it by ſome Title; and others where they have no ſuch thing as Allodial Lands.*

We muſt not reckon in the number of Eſtates clogged with Burthens, thoſe which are liable to pay Tithes to the Church. For this is a Burthen of another nature, and from which the Poſſeſſors of Allodial Lands are not exempt.

[*The* Engliſh *have a full dominion and power of things Corporeal and Moveable; but not of Immoveable, if we except the ſupreme Power and Right of the Crown. For the Subject hath not an abſolute Freehold in their Lands and Tenements, but a Fee only. And that* Fee *doth not comprize ſo abſolute a Power, appears, not only by thoſe Authors who write of Fees, but even by* Littleton *himſelf, when he ſays, that ſuch a one was ſeized of ſuch an Eſtate in his Demeſne as of Fee. By which words he affirms the higheſt and fulleſt Title to be expreſs'd. And theſe words, (as of Fee) do abate ſomewhat of an abſolute Power, and argue a Tenure from a Superior.* Cowel's Inſtit. of the Laws of *England*, Book 2. Tit. 2.]

V.

5. *Mines.* We may reckon among Lands which particular perſons cannot poſſeſs fully in their own right, thoſe in which there are Mines of Gold, Silver, and other Metals, or Matters in which the Prince has a right [f].

[f] Cunĉti qui privatorum loca, ſaxorum venam laborioſis effoſſionibus perſequentur, decimas fiſco, decimas etiam domino repræſentent. Cætero modo propriis ſuis deſideriis vindicando. *l.* 3. *C. de metallar. & metal.* See the Ordinance of *Charles* IX. of 1563, and others concerning Mines.

quantitatis ſuboveniret. Eaque materia, forma publica percuſſa. *l.* 1. *ff. de contr. empt.*

VII.

The Laws diſtinguiſh likewiſe that 7. *Treaſure.* which we call a Treaſure; which is, according to the definition given of it in the Laws, an ancient Depoſitum of Money, or other precious Things, that have been depoſited time out of mind, in ſome hidden place, where it is diſcovered by ſome chance, and whereof the true Owner cannot be known [h].

[h] Theſaurus eſt vetus quædam depoſitio pecuniæ, cujus non extat memoria, ut jam dominum non habeat. *l.* 31. §. 1. *ff. de acq. rer. dom.*

It is not the buſineſs of this place to explain, to whom it is that the Treaſure ought to belong. v. l. un. C. de Theſaur.

VIII.

Beſides the diſtinctions of Things 8. *Another* which have been ſpoken of in the pre- *diſtinction of* ceding Articles, the Laws conſider un- *ſeveral ſorts* der other Views, and by other general *of Goods.* diſtinctions, the Goods or Eſtates which particular perſons are poſſeſs'd of. Thus, they diſtinguiſh in the Eſtates of particular perſons, between thoſe which are of their own Purchaſe, and thoſe that come to them by Deſcent or Inheritance; and in Eſtates of Inheritance, they make a diſtinction between the Paternal, and Maternal Eſtates [i].

[i] *See the following Articles, and the remark on the laſt.*

IX.

We call that Eſtate, which one has 9. *Pur-* acquired by his own Labour and In- *chaſe.* duſtry, an Eſtate of Purchaſe [l].

[l] Quæ ex liberalitate fortunæ, vel laboribus ſuis ad eum perveniant. *l.* 6. *C. de bon. quæ lib. l.* 8. *ff. pro ſocio.*

X.

An Eſtate of Inheritance is that 10. *Inhe-* which deſcends to us from the perſons *ritance.* to whom we have a right to ſucceed as Heirs [m].

[m] Debitum naturale. *l. un. C. de impon. lucr. deſer.* Quaſi debitum nobis hæreditas (à parente) obvenit. *l.* 10. *ff. pro ſocio. v. l.* 3. *C. de bon. quæ lib.*

XI. The

XI.

11. *Paternal Eſtate.* The Paternal Eſtate is that which deſcends to us from our Father, or other Aſcendants, or collateral Relations of the Father's ſide [n].

[n] Prædia à patre. l. 16. C. *de prob.* l. 10. ff. *pro ſoc.*

XII.

12. *Maternal Eſtate.* The Maternal Eſtate is that which deſcends to us from our Mother, or other Aſcendants, or collateral Relations of the Mother's ſide [o].

[o] Res quæ ex matris ſucceſſione ſive ex teſtamento, ſive ab inteſtato fuerint ad filios devolutæ. l. 1. C. *de bon. mat.* Quæ ad ipſum ex matre, vel ab ejus linea pervenerint. l. 3. C. *de bon. quæ lib.*

Although the texts which are quoted on theſe four laſt Articles, have relation to theſe ſeveral ſorts of Eſtates; yet this diſtinction hath not the ſame uſe in the Roman *Law, as it hath in our Cuſtoms; which make different Heirs, of Eſtates of Purchaſe, Eſtates of Inheritance, Paternal Eſtates, and Maternal Eſtates. This diſtinction hath likewiſe place in the matter concerning the Power of Redemption.*

THE

THE CIVIL LAW IN ITS NATURAL ORDER.

PART I.

Of ENGAGEMENTS.

BOOK I.

Of Voluntary and Mutual Engagements by Covenants.

The nature of Covenants.

COVENANTS are Engagements made by the mutual conſent of two or more perſons, who make a Law among themſelves to perform what they promiſe to one another.

The uſe of Covenants.

The Uſe of Covenants is a natural conſequence of the Order of Civil Society, and of the Ties which God forms among Men. For as he has made the reciprocal uſe of their Induſtry and Labour, and the different Commerce of Things neceſſary for ſupplying all their wants; it is chiefly by the intervention of Covenants that they agree about them. Thus, for the uſe of Induſtry and Labour, Men enter into Partnerſhip, hire themſelves, and act differently the one for the other. Thus, for the uſe of Things, when they have occaſion to purchaſe them, or a mind to part with them, they traffick in them by Sales, and by Exchanges; and when they only want them for a certain time, they either hire, or borrow them; and according to their other different wants, they apply to them the different ſorts of Covenants.

It appears from this general Idea of Covenants, that the word *Covenant* comprehends *Divers kinds of Covenants.*

prehends not only all Contracts and Treaties of what kind ſoever, ſuch as Sale, Exchange, Partnerſhip, Hiring and letting to Hire, a *Depoſitum*, and all other Contracts; but likewiſe all particular Pacts that may be added to any Contract, ſuch as Conditions, Charges, Reſerves, Clauſes of Nullity, and all others. This word *Covenant* comprehends likewiſe the acts by which we make void, or change by a new conſent, the Contracts, Treaties, and Pacts by which we were already bound.

The order of this Book of Covenants. It is of all theſe kinds of Covenants that we deſign to treat in this Book. And becauſe there are many Rules which agree to all the kinds of Covenants, ſuch as thoſe which concern their Nature in general, the ways by which they are form'd, the Interpretation of ſuch as are obſcure, or ambiguous, and ſome others; theſe kinds of common Rules ſhall be the ſubject matter of the firſt Title, which ſhall be of Covenants in general. We ſhall afterwards explain the detail of the particular Rules belonging to each kind of Covenant, every one under its proper Title. And in the laſt place we ſhall ſubjoin a Title concerning the Vices of Covenants, which is a matter eſſentially neceſſary to theſe contained in this Book.

TITLE I.

Of COVENANTS *in General.*

SECTION I.

Of the Nature of Covenants, and the ways by which they are form'd.

The CONTENTS.

I.

THIS word *Covenant* is a general Name, which comprehends all manner of Contracts, Treaties, and Pacts of what kind ſoever[a]. 1. *The Meaning of the word* Covenant.

[a] Conventionis verbum generale eſt, ad omnia pertinens, de quibus negotii contrahendi, tranſigendique cauſa, conſentiunt, qui inter ſe agunt. *l.* 1. §. 3. *ff. de pact.*

II.

A Covenant is the conſent of two, or more perſons[b], to enter into ſome Engagement among themſelves[c], or to diſſolve a former Engagement, or to make ſome change in it[d]. 2. *Definition of a Covenant.*

[b] Eſt pactio duorum, pluriumve in idem placitum conſenſus. *l.* 1. §. 2. *ff. de pact.*

[c] Negotii contrahendi, tranſigendique cauſa. *d. l.* §. 3. ut alium nobis obſtringat. *l.* 3. *ff. de obl. & act.*

[d] Nudi conſenſus obligatio, contrario conſenſu diſſolvitur. *l.* 35. *ff. de reg. jur.* Obligationes quæ conſenſu contrahuntur, contraria voluntate diſſolvuntur. §. *ult. inſt. quib. mod. toll. obl.*

III.

The ſubject matter of Covenants is the infinite diverſity of the voluntary ways, by which Men regulate among themſelves the communication, and commerce of their Induſtry and Labour, and of all things, according to their wants[e]. 3. *The Subject matter of Covenants.*

[e] Conventionis verbum generale eſt, ad omnia pertinens. *l.* 1. §. 3. *ff. de pact.*

Non ſolùm res in ſtipulatum deduci poſſunt, ſed etiam facta. §. *ult. inſt. de verb. obl.*

IV.

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other gives ſomething[h], as when a Labourer gives his Labour for a certain Hire: Or laſtly, one of them either does, or gives ſomething, the other neither doing, nor giving any thing; as when a perſon undertakes without any gratuity to manage the Affairs of another[i]; or that one gives another ſomething out of mere Liberality[l].

[f] Aut do tibi, ut des. *l. 5. ff. de præſcrip. verb.*

[g] Aut facio, ut facias. *d. l.*

[h] Aut facio, ut des. *d. l.* aut do, ut facias. *d. l.* Stipulationum quædam in dando, quædam in faciendo conſiſtunt. *l. 2. ff. de verb. obl. l. 3. ff. de obl. & act.*

[i] Mandatum, niſi gratuitum, nullum eſt. *l. 1. §. 4. ff. mand.*

[l] Propter nullam aliam cauſam facit: quam ut liberalitatem, & munificentiam exerceat. Hæc propriè donatio appellatur. *l. 1. ff. de don.* Donatio eſt contractus. *l. 7. C. de his quæ vi metuſve cauſa geſta ſunt.*

In this Article we have made only one Combination of the caſe where one does a Thing, and the other gives ſomething; whereas the Roman *Law diſtinguiſhes it into two; one, where one of the parties does ſomething, and the other gives; and the other, where one of the parties gives, and the other does ſomething for it. But in effect, it is only one bare character of a Covenant, and one ſimple combination of giving on one ſide, and doing on the other, whoſoever of the two parties it is that begins on his ſide to do, or to give. And the diſtinction of this caſe that was made in the* Roman *Law, being founded upon a reaſon which is not in uſe with us, it is not neceſſary to explain it here.*

V.

5. No Covenant obligatory without a cauſe.

In the three firſt ſorts of Covenants, the tranſaction between the parties is not gratuitous, the Engagement of one of the parties being the foundation of the Engagement of the other. And even in the Covenants where only one of the parties ſeems to be obliged, as in the Loan of Money, the Obligation of the Borrower is always preceded by the Lender's delivering what he gives in credit, before any Covenant is formed. Thus, the Obligation which is contracted in theſe kinds of Covenants, which are for the benefit only of one of the parties covenanting, hath always its cauſe from ſomething that is either done, or to be done by the other party[m]; And the Obligation would be null, if it were really without any cauſe[n].

[m] Do ut, facio ut. *d. l. 5. ff. de præſcr. verb.* Ultrò citróque obligatio. *l. 19. ff. de verb. ſign.*

Aſſentimur alienam fidem ſecuti, mox recepturi quid ex hoc contractu. *l. 1. ff. de reb. cred.*

[n] Cùm nulla ſubeſt cauſa propter conventionem, hîc conſtat non poſſe conſtitui obligationem. *l. 7. §. 4. ff. de pact.*

Eſt & hæc ſpecies conditionis, ſi quis ſine cauſa promiſerit. *l. 1. ff. de cond. ſine cauſa.* Qui autem promiſit ſine cauſa, condicere quantitatem non poteſt, quam non dedit, ſed ipſam obligationem. *d. l.*

VI.

6. Donations have their cauſe.

In Donations, and in the other Contracts where one party alone does, or gives ſomething, and where the other neither does, nor gives any thing, it is the Acceptance that forms the Covenant[o]. And the Engagement of the Donor, hath for its foundation ſome juſt and reaſonable Motive; ſuch as ſome good office done by the Donee, or ſome other merit in him[p], or even the bare pleaſure of doing good to others[q]. And this Motive ſtands in place of a cauſe, on the part of the perſon who receives the benefit, and gives nothing[r].

[o] Si ei vivus libertus *donavit*, ille *accepit*. *l. 8. §. 3. ff. de bon. lib.* Si neſcit rem quæ apud ſe eſt, ſibi eſſe donatam, vel miſſam ſibi non acceperit, donatæ rei dominus non fit. *l. 10. ff. de don.* Non poteſt liberalitas nolenti acquiri. *l. 19. §. 2. eod.*

[p] Non ſine cauſa, obveniunt (donationes) ſed ob meritum aliquod accedunt. *l 9. ff. pro ſoc.* Erga benè merentes. *l. 5. ff. de donat.*

[q] Ut liberalitatem, & munificentiam exerceat. *l. 1. ff. de don.*

[r] Cauſa donandi. *l. 3. eod.*

VII.

7. Some Covenants have a proper Name, and others not; but they all oblige to what is agreed on.

Of theſe different kinds of Covenants, ſome are of ſo frequent uſe, and ſo well known every where, that they have a proper Name; ſuch as a Sale, a Loan, Hiring, and letting to Hire, a *Depoſitum*, Partnerſhip, and others[s]. There are likewiſe ſome Covenants which have no proper Name; as if one perſon gives to another a thing to ſell at a certain price, on condition that he ſhall keep to himſelf whatever he gets over and above the price that is fixt[t]. But all Covenants, whether they have a peculiar Name or not, have always their effect, and oblige the parties to what is agreed on[u].

[s] Conventionum pleræque in aliud nomen tranſeunt, velut in emptionem, in locationem, in pignus. *l. 1. §. ult. ff. de pact.*

[t] Natura enim rerum conditum eſt, ut plura ſint negotia, quàm vocabula. *l. 4. ff. de pr. verb.* Si tibi rem vendendam, certo pretio dediſſem, ut quò pluris vendidiſſes, tibi haberes. *l. 13. ff. de pr. verb. V. d. l. §. 1.*

[u] Quid tam congruum fidei humanæ, quàm ea, quæ inter eos placuerunt, ſervare. *l. 1. ff. de pact.*

It is not neceſſary to explain here the difference that was made in the Roman *Law, between the Contracts which had a Name, and thoſe which had none. Theſe Subtilities, which are not in uſe with us, would perplex the Reader to no purpoſe.*

VIII.

8. Conſent makes the Covenant.

Covenants are perfected by the mutual conſent of the parties, which they give to one another reciprocally[x]. Thus, a Sale,

a Sale is perfected by the bare conſent of the parties, altho' the Merchandize be not delivered, nor the Price paid [y].

[x] Sufficit eos qui negotia gerunt, conſentire. *l.* 2. §. 1. *ff. de obl. & act.* 48. *eod.* Etiam nudus conſenſus ſufficit obligationi. *l.* 52. §. 9. *eod.*

[y] Emptio & venditio contrahitur, ſimul atque de pretio convenerit, quamvis nondum pretium numeratum ſit. *Inſt. de empt. & vend.* Quid enim tam congruum fidei humanæ, quam ea quæ inter eos placuerunt, ſervare. *l.* 1. *ff. de pact.* *As to the accompliſhment of Covenants*, See the next Article, and the ſecond Article of the firſt Section, and tenth Article of the ſecond Section of the Contract of Sale.

IX.

9. *Covenants which oblige by the intervention of a Thing.*

In the Covenants which oblige the party to make reſtitution of what he has received, whether it be of the ſame Individual thing, as in the caſe of a Loan of a thing to be reſtored in ſpecie, or a *Depoſitum*; or whether Reſtitution is to be made, not of the ſame Individual Thing, but of ſomething of the ſame kind, as in the Loan of Money or Proviſions; the Obligation is not contracted, but when the conſent of the parties is accompanied with the deliverance of the thing. And 'tis for this reaſon that it is ſaid, that theſe kinds of Obligations are contracted by the intervention of the Thing [z], altho' the conſent of the parties be alſo neceſſary [a].

[z] Re contrahitur obligatio, veluti mutui donatione: *inſt. quib. mod. re contr. obl.* Item is cui res aliqua utenda datur, id eſt, commodatur, re obligatur. §. 2. *eod.* Præterea & is apud quem res aliqua deponitur, re obligatur. §. 3. *eod. l.* 1. §. 2, 3, 4, 5. *ff. de obl. & act.* Mutuum damus recepturi non eandem ſpeciem quam dedimus (alioquin commodatum erit, aut depoſitum) ſed idem genus. *l.* 2. *ff. de reb. cr.*

[a] Ex contractu obligationes, non tantùm re conſiſtunt, ſed etiam verbis & conſenſu. *l.* 4. *ff. de obl. & act.* Eleganter dicit Pedius, nullum eſſe contractum, nullam obligationem, quæ non habeat in ſe conventionem: ſive re, ſive verbis fiat. *l.* 1. §. 3. *ff. de pact.*

X.

10. *Covenants either written or unwritten.*

The conſent which makes the Covenant, is either in Writing, or without it [b]. The unwritten Covenant is made either by the interpoſition of words, or by ſome other way, which ſignifies or preſuppoſes the conſent. Thus he who receives a *Depoſitum*, altho' he do not ſpeak, obliges himſelf to the Engagements of Depoſitaries [c].

[b] Sive ſcriptis, ſive ſine ſcriptis. *inſt. de empt. & vend.* Neque ſcriptura opus eſt. §. 1. *inſt. de obl. ex conſ. l.* 2. §. 1. *ff. de obl. & act. l.* 17. *C. de pact.*

[c] Tacitè conſenſu convenire. *l.* 2. *ff. de pact.* Sed & nutu ſolo pleraque conſiſtunt. *l.* 52. §. 10. *ff. de obl. & act.* Pactum quod bona fide interpoſitum docebitur, etſi ſcriptura non exiſtente, tamen ſi aliis probationibus rei geſtæ veritas comprobari poteſt. Præſes Provinciæ ſecundùm jus cuſtodiri efficiet. *l.* 17. *C. de pact.*

XI.

11. *Written Covenants made either before a Notary Publick, or ſigned only by the Parties.*

Written Covenants are made either in the preſence of a Publick Notary [d], or only ſigned and ſealed by the parties themſelves; whether it be that the whole Deed is written by the parties who covenant, or that they barely put their names to it [e].

[d] Per tabellionem. *l.* 16. *C. de fide inſtr. inſt. de empt. & vend.*

[e] Vel manu propriâ contrahentium, vel ab alio quidem ſcripta, à contrahentibus autem ſubſcripta. *inſt. de empt. & vend. d. l.* 16. *C. de fide inſtr.*

XII.

12. *Proofs of unwritten Covenants.*

If the truth of an unwritten Covenant is called in queſtion, it may be proved either by Witneſſes, or by the other ways which are preſcrib'd in the Rules concerning Proofs [f].

[f] Inſtrumentis etiam non intervenientibus, ſemel diviſio rectè facta, non habetur irrita. *l.* 9. *l.* 10. *& ſeq. C. de fide inſtr.*

By the Roman *Law, all unwritten Covenants were good. But the Ordinance of* Moulins, *Art.* 54. *and that of* 1667, *Tit.* 20. *Art.* 2. *have forbid the receiving proofs of unwritten Covenants, exceeding the value of one hundred Livres.*

[*So likewiſe in* England, *it is enacted by Statute* 29 Car. II. cap. 3. §. 17. *That no Contract for the Sale of any Goods, Wares, and Merchandizes, for the price of ten Pounds Sterling, or upwards, ſhall be allowed to be good, except the Buyer ſhall accept part of the goods ſo ſold, and actually receive the ſame, or give ſomething in earneſt to bind the Bargain, or in part of payment, or that ſome Note, or Memorandum in writing, of the ſaid Bargain be made and ſign'd by the parties to be charged by ſuch a Contract, or their Agents thereunto lawfully authorized.*]

XIII.

13. *Covenants made before a Notary, carry their proof along with them.*

Covenants made before a Notary Publick, carry along with them the proof of their truth, by the Signature of the publick Officer [g].

[g] *V. l.* 16. *C. de fide inſtr. Inſtit. de empt. & vend. Contracts made before Notaries, have ſummary Executions.* Ordinance of 1539. Art. 65 and 66.

XIV.

If the Signature of a C
ſigned only by parties is
muſt be proved [h].

[h] *V. l.* 17. *Cod. ſi cert. pet*
Art. 92.

XV.

15. *What perfects Covenants made before a Notary.*

Covenants which are made in the preſence of a Publick Notary, are not perfected till all is writ, and till thoſe perſons who ought to ſign it, have ſet their hands to it, and the Notary his [i].

[i] (Contractus quos) in inſtrumento recipi convenit, non aliter vires habere ſancimus, niſi inſtrumenta in mundum recepta, ſubſcriptionibuſque partium confirmata, & ſi per tabellionem conſcribantur, etiam ab ipſo completa, & poſtremò à partibus abſoluta ſint. *l.* 17. *C. de fid. inſtr. inſt. de empt. & vend.*

For the Forms of Contracts, ſee the Ordinances of 1539. Art. 67. Orleans, Art. 84. Blois 165. &c.

XVI.

16. *Covenants between abſent perſons.*

Covenants may be made not only between perſons who are preſent, but likewiſe between thoſe that are abſent [l], by Proxy [m], or other Mediator [n], or even by Letter [o].

[l] Inter abſentes talia negotia contrahuntur. *l.* 2. §. 2. *ff. de obl. & act. l.* 2. *ff. de pact.*

[m] Trebatius putat ſicuti pactum procuratoris mihi nocet, ita & prodeſſe. *l.* 10. *in fine. ff. de pact.*

[n] Vel per nuntium. *d. l.* 2. §. 2. *de obl. & act.* §. 1. *inſt. de obl. ex conſ. l.* 2. *ff. de pact.*

[o] Vel per epiſtolam. *dd. ll.*

SECT. II.

Of the Principles which ariſe from the Nature of Covenants. And of the Rules for interpreting them.

The CONTENTS.

I.

1. *Who may enter into Covenants, and of what ſort they muſt be.*

SEEING Covenants ought to be proportion'd to the wants to which they have relation, they are therefore Arbitrary, and ſuch as the parties pleaſe to make them; And all perſons may enter into all manner of Covenants [a], provided only that the perſon be not incapable of contracting [b], and that the Covenant have nothing in it contrary to Law and Good Manners [c].

[a] Quid tam congruum fidei humanæ, quàm ea, quæ inter eos placuerunt, ſervare. *l.* 1. *ff. de pact.*

[b] *Thus, ſome perſons are incapable of all manner of Covenants.* Furioſus nullum negotium gerere poteſt, quia non intelligit, quod agit. §. 8. *inſt. de inut. ſtip. l.* 1. §. 12. *ff. de obl. & act. Others cannot covenant to their prejudice, ſuch as perſons under Age.* Contra Juris Civilis regulas pacta conventa rata non habentur; veluti ſi pupillus ſine tutoris autoritate pactus ſit, ne à debitore ſuo peteret. *l.* 28. *ff. de pact.*

[c] Pacta quæ contra leges, conſtitutioneſque, vel contra bonos mores fiunt, nullam vim habere, indubitati juris eſt. *l.* 6. *C. de pact. l.* 7. §. 7. *ff. de pact. l.* 27. §. 4. *eod.* §. 23. *inſt. de inut. ſtip. Ait Prator:* Pacta conventa, quæ neque dolo malo, neque adverſus leges, plebiſcita, ſenatuſconſulta, Edicta Principum, neque quo fraus cui eorum fiat, facta erunt, ſervabo. *l.* 7. §. 7. *ff. de pact.* See the fourth Section of the Vices of Covenants.

II.

2. *Covenants ought to be made*

Covenants being voluntary Engagements which are formed by the conſent

of

witingly and willingly.

of the parties concerned, they ought to be made with knowledge, and with freedom; and if they want either the one or the other of these characters, as if they are made thro' mistake[d], or by compulsion, they are null, according to the Rules which shall be explained in the fifth Section.

[d] In omnibus negotiis contrahendis, sive bona fide sint, sive non sint, si error aliquis intervenit, ut aliud sentiat puta qui emit, aut qui conducit, aliud qui cum his contrahit, nihil valet quod acti sit. *l.* 57. *ff. de obl. & act.* non videntur qui errant, consentire. *l.* 116. §. 2. *ff de reg. jur. v. l.* 9. *ff. de contr. empt.*

[e] Nihil consensui tam contrarium est, qui & bonæ fidei judicia sustinet, quàm vis atque metus. *d. l.* 116. *de reg. jur. v. tit.* quod metus causa. *See the Title of the Vices of Covenants.*

III.

3. No persons can covenant for others, nor to their prejudice.

Covenants being formed by the consent of parties, no man can covenant for another, unless he has power from him so to do. And much less can any persons do prejudice, by their Covenants, to others[f].

[f] Alteri stipulari nemo potest. *l.* 38. §. 17. *ff. de verb. obl.* §. 18. *inst. de inut. stip. l.* 9. §. 4. *ff. de reb. cred.* nec paciscendo, nec legem dicendo, nec stipulando, quisquam alteri cavere potest. *l.* 73. §. *ult. ff. de reg. jur.* Certissimum est ex alterius contractu, neminem obligari. *l.* 3. *C. ne ux. pr. mar.*

Non debet alii nocere, quod inter alios actum est. *l.* 10. *ff. de jurej.* Non debet alteri per alterum iniqua conditio inferri. *l.* 74. *ff. de reg. jur.* Ante omnia enim animadvertendum est, ne conventio in alia re facta, aut cum alia persona, in alia re, aliave persona noceat. *l.* 27. §. 4. *ff. de pact.* See the two next Articles.

IV.

4. Proxies may covenant for their Constituents.

Proxies may covenant for those persons from whom they have power so to do[g]; and they may engage them so far as the power reaches which they have received from them[h].

[g] Sicuti pactum procuratoris mihi nocet, ita & prodest, *l.* 10. *in fine ff. de pact.*

[h] Diligenter fines mandati custodiendi sunt; nam qui excessit, aliud quid facere videtur. *l.* 5. *ff. mand.* Interdum melior, deterior verò numquam (causam mandantis fieri potest.) *l.* 3. *eod.* See the second and third Articles of the third Section of Proxies.

V.

5. Of those who have a right to treat for others.

Tutors and Curators, Governors and Heads of Corporations, and Masters of Companies, Factors and Agents that are employed in any particular Commerce, and all persons who have others subject to their Power, or under their Conduct, or who represent others, may make Covenants in their Names, according to the extent of their Ministry or Power[i], as shall be explained in its proper place with respect to every one of these kinds of Persons.

[i] Tutoris pactum pupillo prodest. *l.* 15. *ff. de pact.* Magistri societatum pactum, & prodesse, & obesse constat. *l.* 14. *ff. de pact.* See the fifth and following Articles of the second Section of Tutors; the fifth Article of the first Section, and the first and third Articles of the third Section of Syndicks, Directors, and other Administrators of Companies and Corporations; the sixteenth and seventeenth Articles of the fourth Section of Partnership; and the first and second Articles of the third Section of Persons who drive any publick Trade.

VI.

6. Of him who treats for another, undertaking for his consent.

If a third person treats for one that is absent, without his order, but undertakes for his consent; the absent party does not enter into the Covenant, but when he ratifies it; and if he does not ratify it, the person who undertook for his consent shall be bound, either to pay the Penalty to which he submitted, or to make good the Damages which he shall have occasioned, according to the Nature of the Covenant, the consequences to which he shall have given occasion, and the other circumstances. But after that the absent person has ratified what was done in his name, altho' it prove to his prejudice, he cannot afterwards complain of it[l].

[l] Pomponius scribit, si negotium à te quamvis male gestum, probavero, negotiorum tamen gestorum te mihi non teneri. *l.* 9. *ff. de neg. gest.* Quod reprobare non possem semel probatum & quemadmodum quod utiliter gestum est, necesse est apud judicem pro rato haberi, ita omne quod ab ipso probatum est. *d. l.* Si quis alium daturum facturumve quid promiserit, non obligabitur: veluti si spondeat Titium quinque aureos daturum. Quod si effecturum se ut Titius daret, spoponderit, obligatur. §. 3. *inst. de inutil. stip.* Qui alium facturum promisit, videtur in ea esse causa ut non teneatur, nisi pœnam ipse promiserit. §. 20. *eod.*

VII.

7. Covenants are in place of Laws.

When the Covenants are finished, whatever has been agreed upon stands in place of a Law to those who made them[m]; and they cannot be revoked but by common consent of the parties[n], or by the other ways which shall be explained in the fifth Section.

[m] Hoc servabitur, quod initio convenit, legem enim contractus dedit. *l.* 23. *ff. de reg. jur.* Contractus legem ex conventione accipiunt. *l.* 1. §. 6. *ff. depositi.* Quid tam congruum fidei humanæ, quàm ea quæ inter eos placuerunt, servare. *l.* 1. *ff. de pact. l.* 34. *ff. de reg. jur.* See the twenty-second Article of this Section.

[n] Contrario voluntate dissolvuntur. §. *ult. inst. quib. mod. toll. obl. l.* 35. *ff. de reg. jur.*

VIII. See-

VIII.

Rules for the interpretation of Covenants.

1st Rule. 8. *Obſcurities and doubts are to be interpreted by the common intention of the contracters.*

Seeing Covenants are to be formed by the mutual conſent of thoſe who treat together, every one of them ought to explain in the Covenant ſincerely and clearly what he promiſes, and what he pretends to [o]. And it is by their common intention, that we are to explain whatever may be obſcure or doubtful in the Covenant [p].

[o] In quorum fuit poteſtate legem apertiùs conſcribere. *l.* 39. *ff. de pact.* *l.* 21. *ff. de contr. empt.* Liberum fuit verba latè concipere. *l.* 99. *ff. de verb. obl.*

[p] Semper in ſtipulationibus, & in cæteris contractibus, id ſequimur quod actum eſt. *l.* 34. *ff. de reg. jur.* Quod factum eſt, cùm in obſcuro ſit, ex affectione cujuſque capit interpretationem. *l.* 168. §. 1. *eod.*

IX.

2d Rule. 9. *Interpretation made by Uſage, or other ways.*

If the common intention of the parties does not appear from the words of the Covenant, and if it can be interpreted by any Cuſtom or Uſage of the place where it was made, or of the perſons who made it, or by other ways, we muſt keep to that which ſhall appear to be the moſt probable, under all theſe views [q].

[q] Si non appareat, quid actum eſt, erit conſequens ut id ſequamur, quod in regione in qua actum eſt frequentatur. *l.* 34. *ff. de reg. jur.* In obſcuris inſpici ſolet quod veriſimilius eſt, aut quod plerumque fieri ſolet. *l.* 114. *eod.*

X.

3d Rule. 10. *To judge of the ſenſe of every Clauſe, by the tenour of the whole Deed.*

All the Clauſes of Covenants are interpreted one by another, in giving to each one the ſenſe which reſults from the tenour of the whole Deed; and even from what is ſet forth in the Preamble to it [r].

[r] *In the ſame manner as we interpret the ſeveral parts of a Law.* Incivile eſt niſi tota lege perſpecta, una aliqua particula ejus propoſita, judicare, vel reſpondere. *l.* 24. *ff. de legib.* Plerumque ea quæ præfationibus conveniſſe concipiuntur, etiam in ſtipulationibus repetita creduntur. *l.* 134. §. 1. *ff. de verb. oblig.*

XI.

a Covenant appear to intention of the Con otherways evident; his intention, rather

contrahentium voluntatem, ri placuit. *l.* 219. *ff. de verb.*

l. Potiùs id quod actum, quàm id quod dictum ſit, ſequendum eſt. *l.* 6. §. 1. *ff. de contr. empt.* Prior atque potentior eſt quàm vox, mens dicentis. *l.* 7. *in f. ff. de ſuppell. leg.*

XII.

5th Rule. 12. *Of Clauſes that have a double meaning.*

If the words of a Covenant have a double meaning, we muſt take that which is moſt conformable to the common intention of the Contracters; and which has the greateſt affinity to the ſubject matter of the Covenant [s].

[s] Quoties idem ſermo duas ſententias exprimit, ea potiſſimùm excipiatur, quæ rei gerendæ aptior eſt. *l.* 67. *ff. de reg. jur.* Quoties in ſtipulationibus ambigua oratio eſt, commodiſſimum eſt id accipi, quo res, qua de agitur, in tuto ſit. *l.* 80. *ff. de verb. obl.*

XIII.

6th Rule. 13. *Interpretation in favour of him who is obliged.*

The obſcurities and uncertainties of the obligatory Clauſes, are to be interpreted in favour of him that is obliged, and we muſt always reſtrain the Obligation to the ſenſe which diminiſhes it [u]. For he that obliges himſelf, is willing only to be engaged for as little as he can, and the other party ought to have taken care to have it clearly explained what he pretended to [x]. But if there are other Rules which demand that the interpretation be made againſt the perſon who is obliged, as in the caſe of the following Article, the Obligation is extended according to the circumſtances. And in general, when the Engagement is ſufficiently underſtood, it ought neither to be extended, nor reſtrained, to the prejudice of one party in favour of the other [y].

[u] Arrianus ait multum intereſſe, quæras utrum aliquis obligetur, an aliquis liberetur, ubi de obligando quæritur, propenſiores eſſe debere nos, ſi habeamus occaſionem, ad negandum. Ubi de liberando ex diverſo, ut facilior ſis ad liberationem. *l.* 47. *ff. de obl. & act.* In ſtipulationibus cùm quæritur quid actum ſit, verba contra ſtipulatorem interpretanda ſunt. *l.* 38. §. 18. *ff. de verb. oblig.*

[x] Ferè ſecundùm promiſſorem interpretamur, quia ſtipulatori liberum fuit verba latè concipere. *l.* 99. *ff. eod.* Si ita ſtipulatus fuero, decem aut quindecim dabis? Decem debentur. Item ſi ita poſt annum, aut biennium dabis? Poſt biennium debentur, quia in ſtipulationibus id ſervatur, ut quod minus eſſet, quodque longius, eſſe videretur, in obligationem deductum. *l.* 109. *ff. de verb. oblig.*

[y] Cùm quid mutuum dederimus, etſi non cavemus ut æquè bonum nobis redderetur, non liset debitori deteriorem rem quæ ex eodem genere ſit, reddere, veluti vinum novum pro vetere. Nam in contrahendo, quod agitur pro cauto habendum eſt. id autem agi intelligitur, ut ejuſdem generis, & eadem bonitate ſolvatur qua datum ſit. *l.* 3. *ff. de reb. cred.*

XIV. If

XIV.

7th Rule. 14. *Interpretation against him who ought to have explained his meaning.*

If the obſcurity, ambiguity, or other defect of Expreſſion, be an effect of the knavery, or fault of him who ought to explain his intention, it is to be interpreted againſt him, becauſe he ought to have explained diſtinctly what his meaning was. Thus, when a Seller makes uſe of an equivocal expreſſion concerning the qualities of the thing which he ſells, his words are explained againſt him [z].

[z] Veteribus placet, pactionem obſcuram, vel ambiguam venditori, & qui locavit nocere, in quorum fuit poteſtate, legem apertiùs conſcribere. *l.* 39. *ff. de pact.* Obſcuritatem pacti nocere potiùs debere venditori, qui id dixerit, quàm emptori: quia potuit re integra apertiùs dicere. *l.* 21. *ff. de contr. empt.* Cùm in lege venditionis ita ſit ſcriptum, flumina, ſtillicidia, uti nunc ſunt, ut ita ſint: nec additur, quæ flumina, vel ſtillicidia; primùm ſpectari oportet, quid acti ſit; ſi non id appareat, tunc id accipitur, quod venditori nocet, ambigua enim oratio eſt. *l.* 33. *ff. de contr. empt. l.* 172. *ff. de reg. jur. V. l.* 69. §. 5. *ff. de evict.* Servitutes, ſi quæ debentur, debebuntur. Etenim juris auctores reſponderunt: ſi certus venditor quibuſdam perſonis, certas ſervitutes debere, non admoniuiſſet emptorem, exempto eum teneri debere. *l.* 39. *ff. de act. empt. & vend.* See the tenth Article of the third Section of Hiring and letting to Hire; and the fourteenth Article of the eleventh Section of the Contract of Sale.

XV.

8th Rule. 15. *The alternative Obligation is in the choice of him who is obliged.*

If one is obliged indeterminately to one, or other of two things, he is at liberty to give that which he pleaſes, if the Covenant contains nothing to the contrary [a].

[a] Cùm illa, aut illa res promittitur, rei electio eſt utram præſtet. *l.* 10. *in fine. ff. de jur. dot.* Si ita res diſtrahatur, illa aut illa res: utram eliget venditor, hæc erit empta. *l.* 25. *ff. de contr. empt. v. l.* 21. *in fine. ff. de act. empt.*

XVI.

9th Rule. 16. *Obligations of things whoſe goodneſs and value may reach to more or leſs.*

In the Covenants, where one is obliged for things, whoſe value may reach to more or leſs, according to the difference of their qualities, ſuch as Proviſions [b], ſome kinds of Works [c], or other things, the Obligation is not extended to that which is beſt, and of the greateſt price, but is moderated to that which is called good and merchantable [d]. And the Debtor, for example, who owes Wheat, diſcharges himſelf of his Obligation, if he gives Wheat that is good and vendible; becauſe it is preſumed that the Contracters did not think of any other but that which is of common uſe. But if the Covenant regulates that which is due, or if the intention of the Contracters appears by the circumſtances, we muſt hold to that [e].

[b] Ergo ſi quis fundum, ſine propria appellatione, vel hominem generaliter, ſine proprio nomine, aut vinum, frumentumve, ſine qualitate, dari ſibi ſtipulatur, incertum deducit in obligationem. *l.* 75. §. 1. *ff. de verb. obl.* Uſque adeo ut ſi quis ita ſtipulatus ſit, tritici Africi boni modios centum, vini Campani boni amphoras centum; incertum videatur ſtipulari, quia bono melius inveniri poteſt. Quo fit ut boni appellatio non ſit certæ rei ſignificativa: cùm id quod bono melius ſit, ipſum quoque bonum ſit. *d. l.* §. 2. fidejuſſorem ſi ſine adjectione bonitatis tritici, pro altero triticum ſpopondit, quodlibet triticum dando reum liberare poſſe exiſtimo. *l.* 52. *ff. mand. This we are to underſtand ſo as that it be good and merchantable.*

[c] Operarum ſtipulatio, ſimilis eſt his ſtipulationibus in quibus genera comprehenduntur. *l.* 54. §. 1. *ff. de verb. oblig.*

[d] Si quis artificem promiſerit, vel dixerit, non utique perfectum eum præſtare debet, ſed ad aliquem modum peritum: ut neque conſummatæ ſcientiæ accipias, neque rurſum indoctum in artificium. Sufficiet igitur talem eſſe, quales vulgò artifices dicuntur. *l.* 19. §. 4. *ff. de ed. ed.* Hæc omnia ex bono & æquo modice deſiderentur. *l.* 18. *eod.* Qui ſimpliciter cocum eſſe dixerit, ſatisfacere videtur, etiamſi mediocrem cocum præſtet. *d. l.* 18. §. 1. *l.* 16. §. 1. *ff. de op. lib.*

[e] At cùm optimum quiſque ſtipulatur, id ſtipulari intelligitur, cujus bonitas principalem gradum bonitatis habet. *d. l.* 75. §. 2. *ff. de verb. obl. V. l.* 52. *ff. mand.*

XVII.

10th Rule. 17. *How the Price of things is regulated.*

If in a Covenant the Parties omit to regulate the Price of a thing [f], it is to be eſtimated neither at the higheſt nor loweſt Price, but at the common rate [g], without any regard to the particular circumſtances of the affection which either the one or other of the Contracters might have had for the thing that is to be eſtimated, or of their want of it [h]. But we ought only to conſider what it is worth in reality [i]; what it would be worth in its common uſe to any perſon whatſoever; and what it might be reaſonably ſold for [l].

[f] Juſto pretio tunc æſtimandum. *l.* 16. §. *ult. ff. de pign.*

[g] Ex præſenti æſtimatione (juſta pretia) conſtitui. *l.* 3. §. 5. *ff. de jur. fiſc.* ſecundùm rei veritatem æſtimanda erunt. Hoc eſt ſecundùm præſens pretium. *l.* 62. §. 1. *ff. ad leg. falc.* Rei verum pretium. *l.* 50. *ff. de furt.*

[h] Pretia rerum non ex affectu, nec utilitate ſingulorum, ſed communiter funguntur. *l.* 63. *ff. ad leg. falc. l.* 33. *ff. ad leg. Aquil.*

[i] Secundum rei veritatem. *d. l.* 62. §. 1. *ad leg. falc.*

[l] Non affectiones æſtimandas eſſe puto, veluti ſi filium tuum naturalem quis occiderit, quem tu magno emptum velles: ſed quanti omnibus valeret. *d. l.* 33. *ff. ad leg. Aq.* Quanti emptorem poteſt invenire. *l.* 52. §. 39. *ff. de furt.*

XVIII. The

XVIII.

11th Rule. 18. *Of the time and place of the Eſtimation.*

The Eſtimation of things which have not been delivered at the time and place appointed, as of Wine, Corn, and other things of the like nature, is made according to the value they had at the time, and in the place where they ought to have been delivered [m].

[m] Si merx aliqua, quæ certo die dari debebat, petita ſit, veluti vinum, oleum, frumentum: tanti litem æſtimandam Caſſius ait, quanti fuiſſet eo die, quo dari debuit. *l.* 4. *ff. de cond. tritic. l.* 22. *ff. de reb. cred.* Idemque juris in loco eſſe: ut æſtimatio ſumatur, ejus loci quo dari debuit. *dd. ll.*

XIX.

12th Rule. 19. *Expreſſions which have no ſenſe.*

The Expreſſions which can have no ſenſe any manner of way, are rejected, as if they had not been written [n].

[n] *The ſame as in Teſtaments.* Quæ in teſtamento ita ſunt ſcripta, ut intelligi non poſſint, perinde ſunt, ac ſi ſcripta non eſſent. *l.* 73. §. 3. *ff. de reg. jur.*

XX.

13th Rule. 20. *Faults in the writing.*

The faults in the writing, which may be repaired by the Senſe clearly underſtood, do not hinder the effect which the Covenant ought to have [o].

[o] Si librarius in tranſcribendis ſtipulationis verbis erraſſet, nihil nocere. *l.* 92. *ff. de reg. jur.*

XXI.

14th Rule. 21. *Covenants are limited to the matters of which they treat.*

All the Clauſes of Covenants have their ſenſe limited to the matter of which they treat; and ought not to be extended to things which were never thought of [p]. Thus, a general Acquittance which has relation to a ſtated Account of Charge and Diſcharge, does not annul Obligations which are not accounted for [q]. Thus, a tranſaction is limited to the differences concerning which the parties treated; and does not extend to others which were not under treaty. For we ought not to preſume either that a perſon engages himſelf, or diſcharges another of his Engagement, unleſs his will is clearly explained, and rightly underſtood [r].

[p] Ante omnia enim animadvertendum eſt, ne conventio in alia re facta, aut cum alia perſona, in alia re, aliave perſona noceat. *l.* 27. §. 4. *ff. de pact.* Iniquum eſt perimi pacto id de quo cogitatum non docetur. *l.* 9. *in fine ff. de tranſ.*

[q] Si tantum ratio accepti atque expenſi eſſet computata, cæteras obligationes manere in ſua cauſa. *l.* 47. *in f. ff. de pact.*

[r] Tranſactio quæcumque ſit, de his, tantùm de quibus inter convenientes placuit, interpoſita creditur. *l.* 9. §. 1. *ff. de tranſ.*

Cùm Aquiliana ſtipulatio interponitur, quæ ex conſenſu redditur, lites de quibus non eſt cogitatum, in ſuo ſtatu retinentur. Liberalitatem enim captioſam, interpretatio prudentium fregit. *l.* 5. *ff. de tranſ. l.* 3. *C. eod.* de quo cogitatum non docetur. *d. l.* 9. *in f. de tranſ.*

XXII.

15th Rule. 22. *Interpretation of Judicial Covenants.*

If it happens that a Covenant is made only in obedience to an Order of Court; as if a Judge orders a Plaintiff to make ſome abatement in order to receive what he demands, or that ſecurity be given for certain things; in theſe and the like caſes, if the Act or Deed which contains the Engagement that is enjoined by a Sentence, or Decree, happens to have any ambiguity or obſcurity in it, it ought to be interpreted by the intention of the Sentence, or Decree, in execution of which it is made [s].

[s] In Prætoriis ſtipulationibus ſi ambiguus ſermo acciderit, Prætoris erit interpretatio, ejus enim mens æſtimanda eſt. *l.* 9. *ff. de ſtip. præt.* In conventionalibus ſtipulationibus contractui formam contrahentes dant. Enim verò prætoriæ ſtipulationes legem accipiunt de mente Prætoris qui eas propoſuit. *l.* 52. *ff. de verb. obl.*

SECT. III.

Of Engagements which follow naturally from Covenants, altho' they be not particularly mentioned therein.

The CONTENTS.

15. *Delays are arbitrary for the performance of Covenants, according to the condition of things.*

I.

1. *Three ſorts of Engagements in Covenants.*

COvenants oblige not only to what is expreſs'd in them, but likewiſe to every thing which the nature of the Covenant demands; and to all the conſequences which Equity, Law, and Cuſtom give to the Obligation which the parties have contracted[a]. So that we may diſtinguiſh three ſorts of Engagements in Covenants. Thoſe which are expreſsly mentioned; Thoſe which are natural conſequences of the Covenants; And thoſe which are regulated by ſome Law, or ſome Cuſtom. Thus, it is by natural Equity, that a Partner is obliged to take care of the common Affair, which is in his hands; That he who borrows a thing to uſe it, ought to preſerve it carefully; That the Seller ought to warrant that which he has ſold; altho' the Covenants make no expreſs mention of theſe things[b]. Thus, it is in virtue of a Law, that whoever purchaſes an Eſtate for leſs than half the juſt value, is obliged either to reſtore it, or to make up the Price. Thus, in the Leaſe of a Houſe, ſome Cuſtoms continue the Leaſe beyond the term for a certain time, unleſs the Contracters have derogated from it. And all theſe conſequences of Covenants, are as it were tacit Pacts, which are underſtood, and which make a part of the Covenant. For the Contracters conſent to every thing that is eſſential to their Engagements[c].

[a] Alter alteri obligatur, de eo quod alterum alteri, ex bono & æquo præſtare oportet. *l.* 2. §. *ult. ff. de obl. & act.* Ea quæ ſunt moris, & conſuetudinis, in bonæ fidei judiciis debent venire. *l.* 31. §. 20. *ff. de ad. ed. l.* 17. §. 1. *ff. de aqua & aq. pl.*

[b] Quod ſi nihil convenit, tunc ea præſtabuntur quæ naturaliter inſunt hujus judicii poteſtate, & imprimis ipſam rem præſtare venditorem oportet. *l.* 11. §. 1. *ff. de act. empt.*

[c] Quaſi id tacitè convenitet. *l.* 4. *ff. in quib. cauſ. pign. vel hyp. t. c.* ea quæ tacitè inſunt ſtipulationibus. *l.* 2. §. 3. *ff. de eo quod cert. loc.* Plerumque id accidit, ut extra id quod ageretur tacita obligatio naſcatur. *l.* 13. *in f. ff. commod.* in contrahendo, quod agitur, pro cauto habendum eſt. *l.* 3. *ff. de reb. cred.* quædam in ſermone tacitè excipiuntur. *l.* 9. *ff. de ſervit.*

II.

2. *Reciprocal performance of Covenants.*

In all Covenants, the Engagement of one of the parties being the foundation of the Engagement of the other, the firſt effect of the Covenant is, that every one of the Contracters may oblige the other to execute his Engagement, by performing what he is bound to do on his own part, according as one or other of the parties is obliged by the Covenant. Whether it be that the Articles of the Covenant are to be performed on both ſides at one and the ſame time; as if it is agreed on in a Sale, that the Price ſhall be paid at the time of the delivery of the Goods; or whether it be that performance is to be made firſt by one of the parties, as if the Seller is obliged to deliver the Goods, and has given ſome reſpite of time for payment of the Price, or by the other, as if the Buyer be to pay the Money down, before the Goods are delivered[d].

[d] Contractum, ultrò citróque obligationem, quod Græci [illegible] vocant. *l.* 19. *ff. de verb. ſign.* Alter alteri obligatur, de eo quod alterum alteri, ex bono & æquo præſtare oportet. *l.* 2. §. *ult. ff. de obl. & act.* Quod ab initio ſponte ſcriptum, aut in pollicitationem deductum eſt, hoc ab invitis poſtea compleatur. *l. ult. C. ad vell.* Id quod convenit ſervabitur. *l.* 1. *C. qu. dec. non. eſt op.* Sicut ab initio libera poteſtas unicuique eſt habendi vel non habendi contractus, ita renunciare ſemel conſtitutæ obligationi, adverſario non conſentiente, nemo poteſt. *l.* 5. *C. de obl. & act.*

III.

3. *Exception to the foregoing Rule.*

If when a Covenant is not at all executed, or when it is done only by one of the parties, there happens a change, which ought to ſuſpend its Execution, or the performance of what remains to be executed, it is underſtood by the tacit will of the Contracters, that the execution ought to be ſuſpended until the obſtacle is removed. Thus the Buyer, who, after the Sale, diſcovers that there is danger of an Eviction, before he has paid the Price, will not be bound to pay the Price, till he is ſufficiently ſecured againſt the Eviction[e].

[e] Ante pretium ſolutum, dominii quæſtione motâ, pretium emptor ſolvere non cogetur, niſi fidejuſſores idonei, à venditore ejus evictionis, offerantur. *l.* 18. §. 1. *ff. de per. & com. r. v. V. l.* 17. §. 2. *ff. de doli mal. exc.* See the 11th Article of the 3d Section of the Contract of Sale.

IV.

4. *Penalties on the non-performance of Covenants.*

In all Covenants, it is the ſecond effect of the Engagements, that he who fails in the performance of what he is bound to, or delays to do it, whether it be for want of ability, or want of will, ſhall be bound to make good the damages of the other party, according to the nature of the Covenant, the quality of the Non-performance, or Delay, and

the circumſtances of the caſe[f]. And if there is ground to diſſolve the Covenant, it ſhall be diſſolved with a reſervation of the Penalties which ought to follow from it againſt him who ſhall have fail'd to perform his part of the Engagement[g].

[f] Ut damneris mihi quanti intereſt mea, illud de quo convenit accipere. *l.* 5. §. 1. *ff. de præſc. verb.* Quanti ea res erit. *l.* 29. §. 2. *ff. de ed. ed.* See concerning damages, the 17th and 18th Articles of the 2d Section of the Contract of Sale.

[g] Vel ſi meum recipere velim, repetatur quod datum eſt, quaſi ob rem datum, re non ſecuta. *l.* 5. §. 1. *ff. de præſc. verb.* Omnia in integrum reſtituuntur. *l.* 60. *ff. de ed. ed.* Non impleta promiſſi fide, dominii tui jus in ſuam cauſam reverti convenit. *l.* 6. *C. de pact. int. empt. & vend. comp.* Quoniam contractus fidem fregit, ex empto actione conventus, quanti tua intereſt præſtare cogetur. *l.* 6. *C. de hær. vel act.* V. cauſa omnis reſtituenda. *l.* 31. *ff. de reb. cred.*

V.

5. An Obligation without a term.

If it has been omitted in a Covenant to expreſs the term of payment, or delivery of any other thing promis'd, it is a conſequence of the Covenant, that ſince the term is added only in favour of the perſon who is obliged; if no time is allowed him for performing what he ought to do, or to give, he is bound to do it, or to give it immediately, and without delay. Unleſs it happens that the performance of the Covenant implies the neceſſity of a delay, as if the performance is to be made in another place, than that where the parties entred into Covenant[h].

[h] In omnibus obligationibus in quibus dies non ponitur, præſenti die debetur. *l.* 14. *ff. de reg. jur.* Quoties in obligationibus dies non ponitur, præſenti die pecunia debetur: niſi ſi locus adjectus ſpatium temporis inducat, quo illò poſſit perveniri. *l.* 41. §. 1. *ff. de verb. obl.* §. 2. *inſt. eod.* Diei adjectionem pro reo eſſe, non pro ſtipulatore. *d. l.* 41. §. 1. *in f.*

VI.

6. The place of payment, or other performance of Covenants.

If in a Covenant which obliges one to deliver any Moveable Thing, it has been omitted to expreſs the place where the delivery ought to be made; the thing ſhall be delivered in the place where it ſhall happen to be at the time; unleſs it is that by the knavery of the perſon who ought to deliver it, it has been removed from the place where it ought to be; or that it appears to have been the intention of the Contracters, that the thing ſhould be delivered in another place[i].

[i] Depoſitum eo loco reſtitui debet, in quo ſine dolo malo ejus eſt, apud quem depoſitum eſt. *l.* 12. §. 1. *depoſ.* Eadem dicenda ſunt communiter & in omnibus bonæ fidei judiciis. *d.* §. Ibi dari debet ubi eſt, (quod legatur) *l.* 38. *ff. de jud. V. ll.* 10. 11. 12. *ff. de rei vind.* Is qui certo loco dare promittit, nullo alio loco, quàm in quo promiſit, ſolvere invito ſtipulatore poteſt. *l.* 9. *ff. de eo quod cert. loc.*

VII.

7. The Delay laſts till the laſt moment of the term is expired.

He who has a term for paying, delivering, or doing any thing, is not in delay, nor can he be ſued, till the laſt moment of the term is expired. For it cannot be ſaid, that he has not ſatisfied his Obligation, till the delay is fully expired. Thus, he who is bound to make payment within a Year, a Month, or a Day, has for his Delay all the moments of the Year, the Month, and the Day[l].

[l] Ne eo quidem ipſo die, in quem ſtipulatio facta eſt, quia totus is dies arbitrio ſolventis tribui debet. Neque enim certum eſt eo die in quem promiſſum eſt, datum non eſſe, priuſquàm is præterierit. §. 2. *inſt. de verb. obl.* Quod quis aliquo anno dare promittit, aut dare damnatur, ei poteſtas eſt quolibet ejus anni die dandi. *l.* 50. *ff. de obl. & act. l.* 42. *ff. de verb. obl.*

VIII.

8. Of the care which one ought to take of that which belongs to another, when the charge of it is committed to him by ſome Covenant.

It is a natural conſequence of many Covenants, that thoſe who have the charge either of a Thing, or of an Affair belonging to another perſon, or which belongs to them in common, are bound to take care of it; and they are anſwerable for their Knavery, their Faults, their Negligences, but in a different manner[m], according to the different cauſes for which the thing is committed to their charge, whether it be for their own intereſt alone, as he who borrows a thing of another to make uſe of it[n]; or for the bare intereſt of the Owner, as the Depoſitary[o]; or for their common Intereſt, as in the caſe of a Partner[p]. And they are obliged to more or leſs care and diligence, according to the Rules which ſhall be explained in each kind of Covenant. But if it be adjuſted in the Covenant, what care he ought to take who is entruſted with the Affair, or Thing, of another perſon, or which is in common to them both, it is neceſſary to keep to that[q].

[m] Contractus quidam, dolum malum dumtaxat recipiunt: quidam & dolum & culpam. *l.* 23. *ff. de reg. jur. l.* 5. §. 2. *ff. commod.*

[n] Commodatum plerumque ſolam utilitatem continet, ejus cui commodatur. *d. l.* 5. §. 2.

[o] Nulla utilitas ejus verſatur, apud quem depoſitur. *d.* §. 2.

[p] Sed ubi utriuſque utilitas vertitur, ut in —— ſocietate. *d.* §. 2.

[q] Sed

[q] Sed hæc ita, nisi si quid nominatim convenit, vel plus, vel minus in singulis contractibus. Nam hoc servabitur quod initio convenit. *d. l.* 23. *ff. de reg. jur.*

IX.

9. *No body is accountable for accidents.*

No body is bound in any kind of Covenant, to answer for the losses and damages occasioned by accident, such as a Thunder-bolt, an Inundation, a Torrent, Force, and other events of the like nature: And the loss of the thing which perishes, or which is damaged by chance, falls upon him who is the Master of it, unless it has been otherwise agreed on[r], or that the loss or damage may be imputed to some fault, for which one of the Contracters is accountable; as if a thing which ought to have been delivered, happens to perish, while he who ought to deliver it, refuses to do it[s].

[r] Rapinæ, tumultus, incendia, æquarum magnitudines, impetus prædonum, à nullo præstantur. *l.* 23. *ff. de reg. jur. inf.* Ea quidem quæ vi majore auferuntur, detrimento eorum quibus res commodantur, imputari non solent. Sed cùm is qui à te commodari sibi bovem postulabat, hostilis incursionis contemplatione, periculum amissionis, ac fortunam futuri damni in se suscepisse proponatur: Præses Provinciæ, si probaveris eum indemnitatem tibi promisisse, placitum conventionis implere eum compellet. *l.* 1. *C. de commod. V. l.* 39. *ff. mand.* See the sixth Article of the second Section of the Loan of things to be restored in specie.

[s] Quod te mihi dare oporteat, si id postea perit, quàm per te factum erit, quo minus id mihi dares; tuum fore id detrimentum constat. *l.* 5. *ff. de reb. cred. v. l.* 11. §. 1. *ff. locat. cond. l.* 11. *ff. de neg. gest. l.* 1. §. 4. *ff. de obl. & act.*

X.

10. *He who reaps the profit, ought to bear the loss.*

As it often happens after Covenants are agreed on, that the same thing, or the same affair, is an occasion of Gain, or Loss, according to the variety of accidents; it is always understood, that he who reaps the profit, ought to bear the loss[t]: unless it be that the loss ought to be imputed to the fault of the other party. Thus, as the Buyer, after the Sale, has the advantage of the changes which make the thing better; he suffers likewise the loss of those that make it worse[u]. Unless the loss may be imputed to the Buyer; as if the thing perishes, or is diminished, whilst he is in delay to deliver it[x].

[t] Secundum naturam est, commoda cujusque rei eum sequi, quem sequuntur incommoda. *l.* 10. *ff. de reg. jur.* commodum ejus esse debet, cujus periculum est. §. 3. *inst. de empt. & vend.* Si quem quæstum fecit is qui experiendum quid accepit: veluti si jumenta fuerint, eaque locata sint, id ipsum præstabit ei qui experiendum dedit. Neque enim ante eam rem quæstui cuique esse oportet, priusquam periculo ejus sit. *l.* 13. §. 1. *ff. commod.*

[u] Post perfectam venditionem omne commodum & incommodum, quod rei venditæ contingit, ad emptorem pertinet. *l.* 1. *C. de per. & com. r. v.*

[x] Quod si neque traditi essent, neque emptor in mora fuisset, quominus traderentur, venditoris periculum erit. *l.* 14. *ff. de per. & com.*

XI.

11. *The Estimation referred to some person.*

In the Covenants in which an Estimation is to be made, as of the Price in a Sale, of the value of a Rent, of the quality of a Work, of the shares of Gain and Loss which Partners ought to have, and others of the like nature; if the Contracters refer the matter to the Arbitration of a third person, whether they name him, or not; or even to the Arbitration of one of the parties; it is the same thing, as if they had referred it to the Arbitration of persons of probity, and skill in the matter. And whatever shall be awarded contrary to this Rule, will not be of any force; because the intention of those who make such References to other persons, implies the condition, that what shall be regulated in the matter shall be reasonable; and their design is not to oblige themselves to what may be arbitrated beyond the bounds of Reason and Equity[y]: but if the person named either could not, or would not make the Estimation, or died before he could make it; the Covenant in that case would be null. For it contained the condition, that the Estimation should be made by that person[z].

[y] Ad boni viri arbitrium redigi debet: etsi nominatim persona sit comprehensa, cujus arbitratu fiat. *l.* 76. *& seq. ff pro socio.*

Si in lege locationis comprehensum sit, ut arbitratu domini, opus approbetur: perinde habetur, ac si viri boni arbitrium comprehensum fuisset. Idemque servatur, si alterius cujusvis arbitrium comprehensum sit. Nam fides bona exigit, ut arbitrium tale præstetur, quale viro bono convenit. *l.* 24. *ff. loc.*

Ea mens est personam arbitrio substituentium, ut quia sperent eum rectè arbitraturum id faciant, non quia vel immodicè obligari velint. *l.* 30. *ff. de opt. lib.*

It is necessary here to observe the difference between this sort of Arbitrators, and Arbitrators named in a Compromise, and what shall be said of them in the Title of Compromises. See l. 76. ff. pro socio.

[z] Si coita sit societas ex his partibus, quas Titius arbitratus fuerit: si Titius antequam arbitraretur decesserit, nihil agitur. Nam id ipsum actum est, ne aliter societas sit, quàm ut Titius arbitratus sit. *l.* 75. *ff. pro socio.* Sin autem vel ipse Titius noluerit, vel non potuerit pretium venditionis definire, tunc pro nihilo esse venditionem. *l. ult. C. de contr. empt.*

XII.

12. *A perfect integrity is required in all kinds of Covenants.*

There is no ſort of Covenant, in which it is not underſtood, that the one party is bound to deal honeſtly and fairly by the other, and to do whatever Equity may demand [a]; as well in the manner of expreſſing himſelf in the Covenant, as in the performance of what is covenanted, and of all the conſequences of it [b]. And altho' in ſome Covenants this honeſt and fair dealing has a larger, and in ſome a leſſer extent, yet it ought to be ſincere in all Covenants; and each party is obliged to every thing that the ſame may require, according to the nature of the Covenant, and the conſequences that it may have [c]. Thus, in a Sale, this Integrity forms a greater number of Engagements, than in the Loan of Money. For the Seller is obliged to deliver the thing ſold [d]; To keep it till the time of delivery [e]; To warrant it [f]; To take it back again, if it has ſuch faults as that the Sale ought to be made void [g]. And the Buyer has likewiſe his Engagements; which ſhall be explained in their place. But in the Loan of Money, the Borrower is bound only to reſtore the ſame Sum [h], with the Intereſt, if he does not pay it at the term after demand [i].

[a] Bonam fidem in contractibus conſiderari æquum eſt. *l.* 4. *C. de obl. & act.*

Bona fides quæ in contractibus exigitur, æquitatem ſummam deſiderat. *l.* 31. *ff. depos.*

[b] Alter alteri obligatur, de eo quod alterum alteri ex bono & æquo præſtare oportet. *l.* 2. §. *ult. ff. de obl. & act.*

[c] Ea præſtabuntur quæ naturaliter inſunt. *l.* 11. §. 1. *ff. de act. empt. & vend.*

[d] Imprimis ipſam rem præſtare venditorem oportet. *d. l.* 11. §. 1.

[e] Cuſtodiam & diligentiam præſtare debet. *l.* 36. *ff. de act. empt. & vend.*

[f] Evictionem præſtabimus. *l.* 39. §. 2. *ff. de evict.*

[g] Redhibitionem quoque contineri empti judicio. *l.* 11. §. 3. *ff. de act. empt. & vend.*

[h] Mutuum damus, recepturi idem genus. *l.* 2. *ff. de reb. cred. l.* 1. §. 2. *ff. de obl. & act.*

[i] In his judiciis, quæ non ſunt arbitraria, nec bonæ fidei, poſt litem conteſtatam actori cauſa præſtanda eſt. *l.* 3. §. 1. *ff. de uſur.*

This difference between a greater and leſſer extent of Integrity, according to the differences of Covenants, is the foundation of the diſtinction that is made in the Roman *Law, between Contracts which are there called Contracts* bonæ fidei, *and thoſe which are ſaid to be* ſtricti juris; *the meaning of which is, that ſome Contracts are ſo to be interpreted by the Rules of Honeſty and Conſcience, that they are ſuppoſed to include many things, altho' they be not expreſly mentioned in the Contract; and that in other Contracts they ſtick cloſe to the very Letter of the Contract. But by the Law of Nature, and by our Cuſtoms, every Contract is* bonæ fidei; *becauſe Honeſty and Integrity hath and ought to have in all Contracts the full extent that Equity can demand.* Ne propter nimiam ſubtilitatem verborum, latitudo voluntatis contrahentium impediatur. *l. un. C. ut act. & ab hær. & contr. hær. v. l.* 111. *ff. de verb. obl.*

XIII.

13. *Honeſty required, as to third perſons.*

The Honeſty which is neceſſary in Covenants, is not confined to what concerns the Contracters themſelves; but they are bound likewiſe to deal honeſtly with reſpect to all thoſe, who may have intereſt in what is tranſacted between them. Thus, for Example, if a Depoſitary diſcovers that the perſon who made the Depoſite has ſtole the thing depoſited, Honeſty obliges him to refuſe to give it back to the Thief who intruſted it with him, and to reſtore it to the perſon who appears to be the true Owner [l].

[l] Incurrit hîc & alia inſpectio, bonam fidem inter eos tantùm quos contractum eſt, nullo extrinſecus aſſumpto, æſtimare debemus: an reſpectu etiam aliarum perſonarum, ad quas, id quod geritur, pertinet? exempli loco, latro ſpolia quæ mihi abſtulit, poſuit apud Sejum inſcium de malitia deponentis. Utrum latroni, an mihi reſtituere Sejus debeat? Si per ſe dantem, accipientemque intuemur: hæc eſt bona fides, ut commiſſam rem recipiat is qui dedit. Si totius rei æquitatem, quæ ex omnibus perſonis quæ negotio iſto continguntur, impletur, mihi reddenda ſunt, quæ facto ſceleſtiſſimo adempta ſunt. Et probo hanc eſſe juſtitiam, quæ ſuum cuique ita tribuit, ut non diſtrahatur ab ullius perſonæ juſtiore repetitione. *l.* 31. §. 1. *ff. depos.* *See the end of the third Section of a Depoſitum.*

XIV.

14. *In what ſenſe we ought to underſtand, that it is lawful for one party to cheat the other.*

The ways by which every one manages his own intereſt, at the time he contracts with another, and the reſiſtance of one party to the pretenſions of the other, within the bounds of that which is uncertain and arbitrary, and which muſt be regulated, have nothing in them contrary to Honeſty. And whereas it is ſaid, that it is lawful, for Example, in Sales, for one to over-reach the other, this ought to be underſtood of the advantage which the one party takes of the other, in that extent which is uncertain and arbitrary; ſuch as in the greatneſs or lowneſs of the Price [m]; but this liberty ought not to be extended to any fraud.

[m] In pretio emptionis & venditionis naturaliter licet contrahentibus ſe circumvenire. *l.* 16. §. 4. *ff. de min.*

Dolus qualitate facti, non quantitate pretii æſtimatur. *l.* 10. *C. de reſc. vend.* Quemadmodum in emendo & vendendo naturaliter conceſſum eſt quod pluris ſit, minoris emere: quod minoris ſit pluris vendere, & ita invicem ſe circumſcribere; ita in locationibus quoque & conductionibus juris eſt. *l.* 22. §. *ult. ff. locat. v. l.* 8. *C. de reſc. vend.*

XV. In

XV.

15. Delays are arbitrary for the performance of Covenants, according to the condition of Things.

In all Covenants in which one of the Contracters is obliged to do or give a thing, or to accompliſh in any other manner that which is agreed on; and eſpecially in thoſe, in which the Non-performance is to be attended with a diſſolution of the Contract, or with ſome other Penalty, it is equitable, and for the Publick Intereſt, that the Covenants be not immediately diſſolved, nor the Penalties incurred for every ſort of Non-performance indifferently. Thus, for Example, if the Buyer does not pay the Price at the time appointed, the Sale ſhall not be inſtantly annulled, even altho' it had been ſo agreed on; but a certain time is allowed to the Buyer to pay the Price before the Sale be made void. And in the other caſes of backwardneſs, whether of payment, or delivery of any thing, the Judge ought in prudence to grant ſuch delays as may be reaſonable, according to the circumſtances [n].

[n] Modicum ſpatium datum videri. Hoc idem dicendum, & cùm quid ea lege venierit, ut niſi ad diem pretium ſolutum fuerit, inempta res fiat. *l.* 23. *in f. ff. de obl. & act.*

Dilationem negari non placuit. Cujus rei æſtimatio arbitrio judicantis conceditur. *l.* 45. §. 10. *ff. de jur. fiſc.* quod omne ad judicis cognitionem remittendum eſt. *l.* 135. §. 2. *ff. de verb. obl.* Nihil ex obligatione, paucorum dierum mora minuet (ſi omnia in integro ſunt.) *l.* 24. §. 4. *ff. locat.* See the fifteenth, ſixteenth, and eighteenth Articles of the following Section; and the tenth Article of the ſecond Section of Partnerſhip.

SECT. IV.

Of the ſeveral ſorts of Pacts which may be added to Covenants; and particularly of Conditions.

AMong the ſeveral ſorts of Pacts that may be added to all manner of Covenants, ſome are of common uſe to all the kinds of Covenants, ſuch as Conditions, Clauſes of Nullity, and others; And there are ſome which are peculiar to ſome kinds of Covenants, ſuch as the Power of Redemption to the Contract of Sale. We ſhall only ſet down here ſuch as are common to all ſorts of Covenants; and what is peculiar to ſome Covenants, ſhall be inſerted in their proper places.

The CONTENTS.

I.

1. An indefinite liberty for all ſorts of Pacts.

SEcing Covenants are arbitrary, and vary according to the wants of Mankind; we may to all ſorts of Covenants, Contracts, and Treaties, add all manner of Pacts, Conditions, Reſtrictions, Reſervations, general Acquittances, and others, provided that they have nothing in them contrary to Law, and good Manners [a].

[a] V. *ſup. Sect.* 2. *art.* 2. Quid tam congruum fidei humanæ, quam ea, quæ inter eos placuerunt, ſervare. *l.* 1. *ff. de pact.* hoc ſervabitur, quod initio convenit: legem enim contractus dedit. *l.* 23. *ff. de reg. jur.* contractus legem ex conventione accipiunt. *l.* 1. §. 6. *ff. depoſ.* pacta quæ turpem cauſam continent, non ſunt obſervanda. *l.* 27. §. 4. *ff. de pact.*

II.

2. We may add to ordinary Engagements,

We may likewiſe change the natural and ordinary engagements of Covenants, and either augment, or diminiſh them, or

or take from them.

or even derogate from them. Thus, in the Contracts of Sale, *Depoſitum*, Partnerſhip, and others, the Laws have regulated in what manner the one party is anſwerable to the other for his fault, or his negligence; but one may charge himſelf with more or leſs care and diligence, according as it is agreed on[b]. Thus the Seller, altho' naturally bound to warrant what he has ſold, may free himſelf from all other Warranty beſides that of his own fact and deed[c]. And the Equity of theſe Arguments is grounded on the particular Motives which the Contracters have to enter into them. That Seller, for inſtance, is diſcharged from Warranty, becauſe he ſells the thing at a lower Price.

[b] Contractus quidam, dolum malum dumtaxat recipiunt: quidam & dolum, & culpam. *l.* 23. *ff. de reg. jur.* Sed hæc ita, niſi ſi quid nominatim convenit, vel plus vel minus, in ſingulis contractibus. Nam hoc ſervabitur, quod initio convenit. *d. l.*

[c] Qui habere licere vendidit, videamus, quid debeat præſtare. Et multum intereſſe arbitror, utrum hoc polliceatur; per ſe, venientesque à ſe perſonas non fieri, quo minus habere liceat: an verò per omnes. Nam ſi per ſe, non videtur id præſtare, ne alius evincat. *l.* 11. §. 18. *ff. de act. empt. & vend.* See the fifth, ſixth, and ſeventh Articles of the tenth Section of the Contract of Sale.

III.

3. Exception of that which would be againſt Honeſty.

The liberty of augmenting, or diminiſhing Engagements, is always reſtrained to what may be done honeſtly, and without fraud or deceit. And deceit is always excluded from all manner of Covenants[d].

[d] Id nulla pactione effici poteſt, ne dolus præſtetur. *l.* 27. §. 3. *ff. de pact. l.* 1. §. 7. *ff. dep. l.* 23. *ff. de reg. jur. l.* 69. *ff. de verb. ſign.* Pacta conventa, quæ *neque dolo malo*, neque adverſus leges—facta erunt, ſervabo. *l.* 7. §. 7. *ff. de pact.*

IV.

4. Every one may renounce his own right.

In all Covenants, every one may renounce his own right, and that which is for his advantage[e]; provided that what he does be not contrary to Equity, Law, and Good Manners, nor to the intereſt of a third perſon[f].

[e] Licet ſui juris perſecutionem, aut ſpem futuræ perceptionis, deteriorem conſtituere. *l.* 46. *ff. de pact.* Omnes licentiam habent, his quæ pro ſe introducta ſunt, renunciare. *l.* 29. *C. eod. l* 41. *ff. de min.*

[f] Non debet alteri per alterum iniqua conditio inferri. *l.* 74. *ff. de reg. jur.* Ante omnia animadvertendum eſt, ne conventio facta cum alia perſona, in alia perſona noceat. *l.* 27. §. 4. *ff. de pact.* See the third Article of the ſecond Section. *v. l.* 4. §. 4. *ff. ſi quis caut. v. l.* 8. *ff. de tranſ.*

V.

5. Pactions are limited to their ſubject matter.

The particular Pactions which are added in Contracts, are limited to the matter which occaſions them; and are not to be extended to that which the Contracters had not in view[g].

[g] *See the twenty firſt Article of the ſecond Section of this Title.* Ante omnia animadvertendum eſt, ne conventio in alia re facta, in alia re noceat. *l.* 27. §. 4. *ff. de pact.*

VI.

Of Conditions.

6. Deſinition of Conditions, their uſe, and different effects.

IT being uſual in Covenants, for the parties to foreſee accidents that may produce ſome change which they are willing to guard againſt; they therefore regulate what ſhall be done if thoſe caſes do happen. And this is what is done by the uſe of Conditions.

Conditions therefore are Pactions which regulate that which the Contracters have a mind ſhould be done, if a caſe which they foreſee ſhould come to paſs. Thus, if it is ſaid, that in caſe a Houſe that is ſold be found to be ſubject to ſuch a Service, the Sale ſhall be void, or the Price lowered; this is a Condition: For the parties foreſee a caſe, and they guard againſt it. Thus, if a Houſe is ſold on condition that the Purchaſer ſhall not raiſe it higher, the Seller foreſees that the Buyer may make this change, and he provides againſt it, that he may preſerve the Lights of another Houſe different from that which he ſells.

We have added this ſecond Example, to ſhew that the burthens which Contracters impoſe upon one another in Covenants, are of the ſame nature with Conditions. For it is, properly ſpeaking, a burthen impoſed upon the Purchaſer, not to have power to build his Houſe higher; but this burthen implies a Condition, as if it had been ſaid, that in caſe the Purchaſer ſhould offer to raiſe his Houſe, the Seller might hinder him. And it is for this reaſon, that we often make uſe of the word *Condition*, and of the word *Burthen* indifferently; and we ſay, on ſuch a Condition, or with ſuch a Burthen. And we likewiſe uſe the word *Conditions* in the plural number, to denote the different agreements in a Treaty, becauſe they oblige all of them in ſuch a manner, that if it happens that the parties fail in performing them, or that they act contrary to them, they are liable to the penalties of Non-performance.

The events foreſeen by Conditions, are of three ſorts. Some of them depend on the deed of the perſons who treat together, as if it is ſaid, in caſe that a Partner engages himſelf in another Partnerſhip. Others are independent of the will of the Contracters, ſuch as caſual events, as if it is ſaid, in caſe there happens a froſt, hail, or barrenneſs. And there are ſome which depend partly on the deed of the Contracters, and partly on chance, as if it is ſaid, in caſe that ſuch a Merchandize arrives ſuch a day.

Conditions are of three ſorts, according to the different effects which they may have. One is of thoſe which accompliſh the Covenants that are made to depend on them; as if it is ſaid, that a Sale ſhall take place in caſe the Goods be delivered on ſuch a day. The ſecond is of ſuch as diſſolve the Covenants; as if it is ſaid, that if ſuch a perſon arrive within ſuch a time, the Leaſe of a Houſe ſhall be void. And the third ſort is of thoſe which neither accompliſh, nor diſſolve the Covenants; but which only make ſome other changes in them; As if it is ſaid, that if a Houſe which is let, be given without the Moveables that were promiſed, the Rent ſhall be leſſened ſo much.

There are ſome Conditions expreſt, and there are others tacit, which are underſtood without being expreſt. The expreſs Conditions are all thoſe which are expreſly mentioned; as when it is ſaid, if ſuch a thing be done, or not; if ſuch a thing happen, or not. The tacit Conditions are thoſe which are implied in a Covenant, without being expreſt; As if it is ſaid in the Sale of an Eſtate, that the Seller reſerves to himſelf the Fruits of that year; this reſervation implies the condition, that there ſhall grow Fruits, in the ſame manner as if it had been ſaid, that he reſerved the Fruits in caſe there ſhould be any.*

* Interdum pura ſtipulatio ex re ipſâ dilationem capit. Veluti ſi id quod in utero ſit, aut fructus futuros, aut domum ædificari ſtipulatus ſit. Tunc enim incipit actio, cùm ea per rerum naturam præſtari poteſt. *l.* 73. *ff. de verb. obl.* ineſt conditio. *l.* 1. §. 3. *ff. de cond. & dem.*

VII.

7. Of the Condition on which depends the accompliſhment of a Covenant.

In the Covenants whoſe accompliſhment depends on the event of a Condition, all things remain in ſuſpence, and in the ſame condition as if there never had been any Covenant, until the condition happens. Thus, in a Sale which is to be perfected by the event of a Condition, the Buyer has in the mean while only an Expectation, without any right either to enjoy the thing, or to acquire it by Preſcription[b]. But the Seller continues to be Maſter of the thing ſold, and the fruits of it belong to him[i]. And if the Condition does not happen, the Contract is void[l].

[b] Ubi conditionalis venditio eſt, negat Pomponius (emptorem) uſucapere poſſe, nec fructus ad eum pertinere. *l.* 4. *ff. de in diem add.* ex conditionali ſtipulatione, tantùm ſpes eſt debitum iri. §. 4. *inſt. de verb. obl.* conditionales creditores dicuntur & hi, quibus nondum competit actio: eſt autem competitura. Vel qui ſpem habent ut competat. *l.* 54. *ff. de verb. ſign.*

[i] Fructus medii temporis, venditoris ſunt. *l.* 8. *ff. de per. & com. r. v.*

[l] Sub conditione facta venditio, nulla eſt ſi conditio defecerit. *l.* 37. *ff. de contr. empt. l.* 8. *ff. de per. & com. r. v.*

VIII.

8. Effect of the event of this Condition.

The condition on which depends the accompliſhment of a Covenant, being come to paſs, it makes the Covenant effectual, and produces the changes which ought to follow from it. Thus, a Sale being perfected by the event of a condition, the Buyer becomes inſtantly Maſter of the thing; and this change has the other conſequences, which are the effects of the Covenant[m].

[m] Conditionales venditiones, tunc perficiuntur, cùm impleta fuerit conditio. *l.* 7. *ff. de contr. empt.* Si (conditio) exiterit, Proculus & Octavenus emptoris eſſe periculum aiunt. *l.* 8. *ff. de per. & com. r. v.*

The event of the Condition hath ſometimes a retroactive effect. Thus, the Mortgage ſtipulated in a conditional Obligation, will have its effect from the date of the Obligation whenever the Condition ſhall come to paſs. See the ſeventeenth Article of the third Section of Mortgages.

IX.

9. Of the Condition on which depends the diſſolution of a Covenant.

In Covenants which are already perfected, but which may be diſſolved by the event of a condition, all things remain in the mean while in the ſame condition they were in by the Covenant; and the effect of the condition is in ſuſpence, until it happens. Thus, if it is ſaid, that a Sale which is perfected, ſhall be void, in caſe that within a certain time a third perſon give a greater price for the thing ſold, the Buyer until then remains Maſter, he preſcribes, he enjoys the fruits; and if the thing periſhes, he bears the loſs of it[n].

[n] Si hoc actum eſt, ut meliore allata conditione diſcedatur, erit pura emptio, quæ ſub conditione reſolvitur. *l.* 2. *ff. de in diem add.* Ubi igitur ſecundùm quod diſtinximus, pura venditio eſt Julianus ſcribit, hunc, cui res in diem addicta eſt & uſucapere

pere poſſe: & fructus, & acceſſiones lucrari: & periculum ad eum pertinere, ſi res interierit. *d. l.* 2. §. 1.

X.

9. *Effect of the event of this condition.*

The caſe of the condition, which is to annul a Covenant, being come to paſs, the Covenant ſhall be void [o]. And this change ſhall have the effects which ought to follow from it, according to the Rules which ſhall be explained in the ſixth Section, and in the Rule that follows.

[o] Conditione reſolvitur. *l.* 2. *ff. de in diem add. l.* 3. *ff. de contr. empt.*

XI.

11. *In what manner the conſequences of conditional Covenants are regulated.*

Whatever happens either before or after the event of the condition, it is regulated according to the ſtate in which things are at the time. Thus, when a Sale is perfected, and is to be annulled in caſe a certain condition happens; the Buyer is in the mean while Maſter of the thing, he preſcribes, he enjoys the fruits of it; and if it happens to periſh, he bears the loſs. Becauſe the Sale ſubſiſts ſtill; and conſequently the thing belongs to him, until the Sale be annulled by the event of the condition [p]. And on the contrary, when the accompliſhment of a Sale depends on a condition; if before the event of that condition the thing periſhes, it is the Seller that bears the loſs, becauſe he continues to be Maſter of it, till the event of the condition accompliſhes the Sale [q]. And after that the condition is come to paſs, all the events of Gain, or of Loſs, belong to the perſon who at that time happens to be Maſter of the thing; whether the condition accompliſhes, or whether it diſſolves the Covenant. Thus, it is always the ſtate in which things happen to be at the time when the condition comes to paſs, and the effect which it ought to have, which regulate the conſequences of conditional Covenants [r].

[p] Ubi igitur, ſecundùm quod diſtinximus, pura venditio eſt, Julianus ſcribit hunc, cui res in diem addicta eſt, & uſucapere poſſe: & fructus, & acceſſiones lucrari: & periculum ad eum pertinere, ſi res interierit. *l.* 2. §. 1. *ff. de in diem add.*

[q] Nam, cùm ſit conditionalis venditio, pendente autem conditione, mors (mancipii) contingens extinguat venditionem: conſequens eſt dicere, mulieri periſſe, quia nondum erat impleta venditio. *l.* 10. §. 5. *ff. de fur. dot.*

[r] Neceſſariò ſciendum eſt, quando perfecta ſit emptio. Tunc enim ſciemus, cujus periculum ſit. Nam perfecta emptione periculum ad emptorem reſpiciet. Et ſi id quod venierit appareat, quid, quale, quantum ſit, ſit & pretium, & purè venit, perfecta eſt emptio. Quod ſi ſub conditione res venierit, ſi quidem defecerit conditio; nulla eſt emptio. Sicuti nec ſtipulatio. Quod ſi exiterit, Proculus & Octavenus emptoris eſſe periculum, aiunt. Idem Pomponius libro nono probat: quod ſi pendente conditione, emptor, vel venditor deceſſerit, conſtat, ſi exiterit conditio, hæredes quoque obligatos eſſe, quaſi jam contracta emptione in præteritum. Quod ſi pendente conditione, res tradita ſit, emptor non poterit eam uſucapere pro emptore: & quod pretii ſolutum eſt, repetetur: at fructus medii temporis venditoris ſunt. Sicuti ſtipulationes, & legata conditionalia perimuntur, ſi pendente conditione res extincta fuerit. Sanè ſi extet res, licet deterior effecta, poteſt dici eſſe damnum emptoris. *l.* 8. *ff. de peri. & com. r. v.*

XII.

12. *Of Conditions which relate to the preſent, or paſt time.*

Conditions which have no relation to the time to come, but only to the preſent or paſt time, have immediately their effect. And the Covenant is at the ſame time either accompliſhed or annulled, according to the effect which it ought to have from the condition. Thus, for example, if a Merchandize is ſold, on condition that the Sale ſhall not take place, unleſs the Merchandize be actually arrived in ſuch a Port; the Sale is either inſtantly accompliſhed, if the Merchandize is arrived in Port; or inſtantly void, if it is not arrived. And the Covenant is not in ſuſpence, altho' the perſons who treat on ſuch conditions, are ignorant whether they are obliged or not. But it is only the performance which is ſuſpended, until they know whether the condition has happened, or not [s].

[s] Cùm ad preſens tempus conditio confertur; ſtipulatio non ſuſpenditur. Et ſi conditio vera ſit, ſtipulatio tenet: quamvis tenere contrahentes conditionem ignorent. Veluti, ſi Rex Parthorum vivit, centum millia dare ſpondes? Eadem ſunt, & cùm in præteritum: conditio confertur. *l.* 37. *ff. de reb. cred. v. l.* 38. *& 39. eod.* Conditio in præteritum: non tantùm præſens tempus relata, ſtatim, aut perimit obligationem: aut omnino non differt. *l.* 100. *ff. de verb. oblig.*

XIII.

13. *Of impoſſible Conditions.*

Conditions that are impoſſible annul the Covenants to which they are added [t].

[t] Non ſolùm ſtipulationes impoſſibili conditioni applicatæ nullius momenti ſunt, ſed etiam cæteri quoque contractus. *l.* 31. *ff. de obl. & act.*

XIV.

14. *The Effect of Conditions paſſes to the Heirs.*

If the conditions do not happen till after the deceaſe of the Contracters, they have their effect with reſpect to their Heirs and Executors [u].

[w] Cùm quis ſub aliqua conditione ſtipulatus fuerit, licet ante conditionem deceſſerit, poſtea exiſtente conditione, hæres ejus agere poteſt. §. 24. *inſt. de inut. ſtip.* Si pendente conditione, emptor, vel venditor deceſſerit, conſtat, ſi extiterit conditio, hæredes quoque obligatos eſſe. *l.* 8. *ff. de per. & com. r. v.*

XV.

15. *The Conditions which do not depend on the deed of the Contracters, have their effect immediately.*

If the condition on which depends the accompliſhment or diſſolution of a Contract, or the making any change in it be independent on the deed of the Contracters, it hath its effect immediately when it happens, or as ſoon as it is known. Thus, for example, if it is agreed, that a Sale of Forrage ſhall not take effect, unleſs a Regiment of Horſe arrives within ſuch a time; it ſhall have its effect ſo ſoon as the Regiment arrives, or it ſhall remain null, if the Regiment does not arrive. Thus, when an Eſtate is ſold on condition, that if it be found ſubject to a certain charge, the Sale ſhall be diſſolved; it will depend on the Buyer to break the Sale, if the Eſtate appears to be ſubject to that charge [x]; unleſs it be ſuch a one as is in the Seller's power to free the Eſtate of, and that the circumſtances make it reaſonable to allow him a time for doing it.

[x] Sub conditione ſtipulatio ſit cùm in aliquem caſum differtur obligatio: ut ſi aliquid factum fuerit vel non fuerit, committatur ſtipulatio: veluti, ſi Titius Conſul fuerit factus. §. 4. *inſt. de verb. obl.* See on this and the following Article, the ſixteenth Article of the fifth Section, and the fourteenth Article of the ſixth Section.

XVI.

16. *The Conditions which depend on the deed of the Contracters, may ſuffer a delay.*

If the condition depends either wholly, or in part, on the deed of one of the Contracters, and he has not ſatisfied it within the time, it is underſtood, that in the caſes where it would be equitable to grant a delay, it ought to be granted according to the circumſtances; as when the delay has occaſioned no damage, or if there is any, when it may be repaired. Thus, when an Eſtate is farm'd out, or a Houſe let, on condition that the Proprietor ſhall make ſome Repairs within a certain time, the Leaſe ſhall not be immediately void, altho' the Repairs be not finiſhed preciſely within the time. But Prudence will direct the Judge to grant a delay according to the circumſtances; either without damages, if the Tenant has ſuffered no prejudice by the delay, or with reparation of the damage which the delay may have occaſioned [y].

[y] Spatium datum videri. Hoc idem dicendum, & cùm quid ea lege venierit, ut niſi ad diem pretium ſolutum fuerit, inempta res fiat. *l.* 23. *ff. de obl. & act.* Neque enim magnum damnum eſt in mora modici temporis. *l.* 21. *ff. de jud.* See the next Article, and the fifteenth Article of the third Section.

XVII.

17. *An Exception.*

If a delay for performing a condition could not be granted, without deſtroying the very eſſence of the Covenant, or without cauſing a conſiderable damage; the condition ſhall have its effect without delay, whether it depend on the deed of one of the Contracters, or be altogether independent of it. Thus, for example, if a Sale of Goods be made on condition that the Seller ſhall deliver them on a certain day, for an Imbarkation, or for a Fair; and that the Buyer ſhall pay the price of the Goods in ready Money; it will depend on the Buyer to annul the Sale, if the Seller does not deliver the Goods on the day appointed; and it will likewiſe depend on the Seller to break the Contract, if the Buyer does not pay in ready Money. Thus, in all the caſes, it is by the Circumſtances that we muſt judge whether there be room for granting a delay for performing a condition, or other engagement [z].

[z] See the fifteenth Article of the third Section.

XVIII.

18. *Of the party who hinders the accompliſhment of the condition.*

If the event, or fulfilling of a condition be hindered by the party whoſe intereſt it is that it do not happen, whether it depend on his deed, or not, the condition with reſpect to him ſhall be held as fulfilled. And he ſhall be obliged to what he was bound to do, to give, or ſuffer, in caſe the condition happened [a].

[a] Jure civili receptum eſt, quoties per eum, cujus intereſt conditionem non impleri, fiat, quominùs impleatur, perinde haberi, ac ſi impleta conditio fuiſſet. Quod ad libertatem, & legata, & ad hæredum inſtitutiones perducitur. Quibus exemplis ſtipulationes quoque committuntur, cùm per promiſſorem factum eſſet, quominùs ſtipulator conditioni pareret. *l.* 161. *ff. de reg. jur.*

Of Clauſes of Nullity, and Penal Clauſes.

CLAUSES of Nullity are thoſe by which it is agreed, that the Covenant ſhall be null in a certain caſe. As, if it is ſaid, that a Tranſaction ſhall be void, if ſuch a thing be not done, or given within ſuch a time.

Penal Clauſes are thoſe which add a Penalty for default of performance of that which is agreed on. As is in general the Penalty of Damages, and in particular the Penalty of a certain Sum.

XIX.

19. The effect of Clauſes of Nullity, and Penal Clauſes.

Clauſes of Nullity and Penal Clauſes are not always executed to the rigour; and Covenants are not diſſolved, nor Penalties incurred, in the very moment which the Contract bears; even altho' it ſhould be agreed on that the Contract ſhould be void, by the bare deed, and without any miniſterial act of Juſtice. But theſe ſorts of Clauſes have their effect regulated by the diſcretion of the Judge [a]; according to the Nature of the Covenants, and the circumſtances, purſuant to the foregoing Rules.

[a] Quod omne ad judicis cognitionem remittendum eſt. *l.* 135. §. 2. *ff. de verb. obl.* See the preceding Rules, and the tenth Article of the ſecond Section of Partnerſhip.

XX.

20. It does not depend on him who fails in performing what he promiſed, to annul the Covenant by his Non-performance.

If it is ſaid that a Contract ſhall be made void, in caſe one of the Contractors fail to perform on his part any one of the engagements he is bound to; the Clauſe of Nullity ſhall not have this effect, to make it depend on him to annul the Contract by not performing what he has promiſed. But it will depend on the other party, either to force him to make performance, or to have the Contract declared void, and ſuch damages allowed him as ſhall be due. Thus, when it is ſaid that a Sale, a Tranſaction, or other Contract ſhall be annulled upon failure of payment; it will not depend on him who is bound to pay, to annul the Covenant by not making payment [b].

[b] Cùm venditor fundi in lege caverit, ſi ad diem pecunia ſoluta non ſit, ut fundus inemptus ſit. Ita accipitur, inemptus eſſe fundus, ſi venditor, inemptum eum eſſe velit. Quia id venditoris cauſa caveretur. *l.* 2. *ff. de leg. commiſſ.*

XXI.

21. Covenants concerning an uncertain event.

In Covenants where perſons treat of a right, or other thing which depends on ſome certain event; and from which there may accrue either Profit or Loſs, according to the difference of events that may happen; it is free for the parties to treat in ſuch a manner, that the one, for example, renounce all Profit, and free himſelf from all Loſs; or, that he take a certain Sum, in lieu of all that he could expect of Profit; or that he charge himſelf with a certain Loſs for all the Loſſes which he had to fear. Thus, a Partner who is deſirous to withdraw from the Partnerſhip, may adjuſt with his Copartners what preſent and certain Profit he ſhall have, or what Loſs he ſhall bear whatever accident fall out. Thus, an Heir may treat with his Coheirs to give up all his right in the Inheritance, for a certain Sum, and oblige them to indemnify him from all charges. And theſe kinds of Covenants have their Juſtice founded upon this, that one Party prefers a certainty, whether of Profit or Loſs, to an uncertain expectation of events; and the other Party, on the contrary, finds it his advantage to hope for a better condition. Thus, there is made up between them a ſort of Equality in their Bargains, which renders their Agreement juſt [c].

[c] *V. l.* 1. *ff. de tranſ. in verbo,* de re dubia. *l.* 12. *C. eod. l.* 17. *C. de uſur. in verbo,* propter incertum. *V. l.* 11. *C. de tranſ.*

Sicuti lucrum omne ad emptorem hæreditatis reſpicit; ita damnum quoque debet ad eundem reſpicere. *l.* 2. §. 9. *ff. de hær. vel act. vend. l.* 1. *C. de evict.*

It is upon the Rule explained in this Article, that the validity of Tranſactions is founded, which are authorized notwithſtanding the damage that may happen to one of the parties; becauſe theſe damages are balanced by the advantage which the tranſactors find in ridding themſelves of a troubleſome Law-ſuit, and ſettling the quiet of their families.

We make uſe likewiſe of this Rule, among other conſiderations, to juſtify our practice in admitting the Renunciations of Daughters in Contracts of Marriage, contrary to the tenor of the Roman *Law.* V. l. 3. C. de collat.

We muſt take heed in the uſe of this Rule concerning Treaties about uncertain events, not to extend it to caſes where the conſequences would be repugnant to Law, or Good Manners. As, for inſtance, if two preſumptive Heirs ſhould treat together concerning the future Inheritance of the perſon to whom they are to ſucceed as Heirs. For this Agreement would be unlawful, unleſs it were made with the expreſs conſent and approbation of the perſon concerning whoſe Inheritance they treat, as ſhall be explained in its proper place. V. l. 30. C. de pact.

SECT. V.

Of Covenants which are null in their Origin *.

* See the Title of the Vices of Covenants.

The CONTENTS.

1. *Definition of Covenants that are null.*
2. *Covenants null, altho' the Nullity be not yet known.*
3. *Cauſes of the Nullities of Covenants.*
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5. *Different Incapacities of perſons.*
6. *Two ſorts of Nullities, either by Nature, or by ſome Law.*
7. *Covenants which are null on one part, and not on the other.*
8. *Covenants that are null, which may be validated.*
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10. *Error and Force annul Covenants.*
11. *Covenants about things which cannot be bought or ſold, are null.*
12. *A Covenant annulled by the change of the thing ſold.*
13. *Obligations without a Cauſe are null.*
14. *The effect of Covenants that are null thro' the fault of one of the Contracters.*
15. *The Conſequences of Covenants annulled.*
16. *The Miniſtry of Juſtice for annulling Covenants.*
17. *Covenants which are null, are uſeleſs to third perſons, as well as to the Contracters themſelves.*

I.

1. *Definition of Covenants that are null.*

COVENANTS that are null, are thoſe which, for want of ſome eſſential character, have not the nature of a Covenant. As if one of the Contracters was under any infirmity of Mind or Body, which rendred him incapable of knowing what engagement he made [a]. If one had ſold a thing belonging to the Publick, a thing ſet apart for a Sacred Uſe, or any other thing that could not be bought or ſold. Or if the thing ſold did already belong to the Buyer [b].

[a] Furioſus, nullum negotium gerere poteſt, quia non intelligit quod agit. §. 8. *inſt. de inut. ſtip.*

[b] Idem juris eſt (id eſt, inutilis erit ſtipulatio) ſi rem ſacram aut religioſam quam humani juris eſſe credebat, vel rem publicam quæ uſibus populi perpetuo expoſita ſit, ut forum, vel theatrum: vel liberum hominem, quem ſervum eſſe credebat, vel cujus commercium non habuerit, vel rem ſuam dari quis ſtipuletur. §. 2. *eod.* See the firſt Article of the ſixth Section.

II.

2. *Covenants null, altho' the nullity be not yet known.*

The Covenants which are null in their Origin, are in effect ſuch, whether the nullity can be immediately diſcovered, or whether the Covenant appears to ſubſiſt, and to have ſome effect. Thus, when a Madman ſells his Eſtate, the Sale is immediately null from the beginning, altho' the Purchaſer be in poſſeſſion of the Eſtate, and enjoy the fruits of it, and altho' at the time of the Sale this condition of the Seller was not known. And it is the ſame thing, if one of the Contracters has been compelled by force [c].

[c] Protinus inutilis. §. 2. *inſt. de inut. ſtip.* Statim ab initio talis ſtipulatio valebit. *d.* §. 2. Si pater tuus, per vim coactus, domum vendit, ratum non habebitur, quod non bona fide factum eſt, maiæ fidei enim emptio irrita eſt. *C. de reſc. vend.*

III.

3. *Cauſes of the Nullities of Covenants.*

Covenants are null, either becauſe of the incapacity of the perſons, as in the example of the preceding Article; or becauſe of ſome Vice in the Covenant, as if it is contrary to good Manners [d]; or becauſe of ſome other defect, as if it is not to be accompliſhed but by the event of a condition which is not come to paſs [e]; or for other cauſes [f].

[d] Quod turpi ex cauſa promiſſum eſt, veluti ſi quis homicidium vel ſacrilegium ſe facturum promittat, non valet. §. 24. *inſt. de inut. ſtip.* See the third Article of the firſt Section.

[e] Similis erit ſub conditione factæ venditioni, *quæ nulla eſt, ſi conditio defecerit. l.* 37. *ff. de cont. empt. l.* 8. *ff. de peric. & comm. r. v.*

[f] See the firſt Article, and thoſe which follow.

IV.

4. *Incapacity of Perſons.*

Perſons may be incapable of contracting, either by Nature, or by ſome Law. Thus, by Nature Madmen [g], and ſuch perſons as, becauſe of ſome infirmity, are not able to expreſs themſelves [h], are naturally incapable of all ſorts of Covenants. Thus, by the prohibition of the Law, Prodigals who are interdicted, are incapable of making Covenants to their prejudice [i].

[g] §. 8. *inſt. de inut. ſtip.*

[h] *V.* §. 7. *eod.*

[i] Prodigo interdicitur bonorum ſuorum adminiſtratio. *l.* 1. *ff. de cur. fur.* Is cui bonis interdictum eſt, ſtipulando ſibi acquirit: tradere verò non poteſt, vel promittendo obligari. *l.* 6. *ff. de verb. obl.*

There are other cauſes of Incapacity; ſuch as Minority, Civil Death, and others. See the Title of Perſons.

V.

5. *Different Incapacities of perſons.*

The Incapacities of Perſons are different, and have different effects. Some perſons are incapable of all Contracts; ſuch as Madmen, and thoſe who cannot expreſs themſelves: Others are only incapable of ſuch Covenants as are to their prejudice, ſuch as Minors and Prodigals. And married Women cannot contract any Obligation whatſoever in ſome Provinces, unleſs they are authorized by their Huſbands [l].

[l] *This follows from the foregoing Articles. See as to what is ſaid here, concerning married Women, what has*

been

l on the first Article of the first Section of nd in the Preamble to the fourth Section s of Dowries.

VI.

Nullities of Covenants are either , or depending on the diſpoſition ne Law. Thus, the Covenants i are contrary to Good Manners, as a Treaty about the Inheritance of a perſon who is alive[m]; and thoſe which are impoſſible, are naturally vicious and null[n]. Thus, it is by a Law, that the Sale of an intailed Eſtate is unlawful and void[o].

[m] Ex eo inſtrumento, nullam vos habere actionem, in quo contra bonos mores de ſucceſſione futura, interpoſita fuit ſtipulatio, manifeſtum eſt. *l.* 4. *C. de mut. ſtip. V. l.* 30. *C. de pact.* and the Remark on the twentieth Article of the fourth Section.

[n] Impoſſibilium, nulla obligatio eſt. *l.* 185. *ff. de reg. jur. v. l.* 7. *C. de reb. al. n. al.*

VII.

7. Covenants which are null on one part, and not on the other.

There are Covenants which may be declared null on the part of one of the Contracters; and which ſubſiſt, and oblige irrevocably on the part of the other. Thus, the Contract between one that is of full Age, and one under Age, may be annulled with reſpect to him who is under Age, if it is not to his advantage; and it ſubſiſts with reſpect to him that is of Age, if the Minor does not demand to be relieved[p]. And this inequality of the condition of the Contracters, has nothing in it that is unjuſt. For he that was of Age knew, or ought to have known, the condition of him with whom he treated[q].

[o] Sancimus, ſive lex alienationem inhibuerit, ſive teſtator hoc fecerit, ſive pactio contrahentium hoc admiſerit, non ſolùm dominii alienationem, vel mancipiorum manumiſſionem eſſe prohibendam: ſed etiam uſusfructus dationem, vel hypothecam, vel pignoris nexum, prohiberi. *l.* 7. *C. de reb. al. non al.*

[p] Si quis à pupillo ſine tutoris autoritate emerit, ex uno latere conſtat contractus. Nam qui emit, obligatus eſt pupillo: pupillum ſibi non obligat. *l.* 13. §. 29. *ff. de act. empt. & vend.*

[q] Qui cum alio contrahit, vel eſt, vel debet eſſe non ignarus conditionis ejus. *l.* 19. *ff. de reg. jur.*

VIII.

8. Covenants that are null which may be validated.

Covenants which were liable to be annulled by reaſon of the incapacity of the perſons, become valid afterwards, if when the incapacity ceaſes, the perſons ratify, or approve the Covenant. Thus, when a Minor, being come to Age, ratifies, or executes the Contract which he had made in his Minority; this Contract becomes irrevocable, as if he had made it after he was of Age[r].

[r] Si ſuæ ætatis factus, comprobaverit emptionem, contractus valet. *l.* 5. §. 2. *ff. de auth. & conſ. tut. & cur.*

Qui poſt vigeſimum quintum annum ætatis, ea quæ in minori ætate geſta ſunt, rata habuerint, fruſtra reſciſionem eorum poſtulant. *l.* 2. *C. ſi maj. fact. rat. hab. l.* 3. §. 1. *ff. de min.*

IX.

9. A Natural Obligation.

Perſons who are not by Nature incapable of contracting, and who are only incapacitated by the prohibition of ſome Law, do nevertheleſs tie themſelves by their Covenant to a Natural Obligation, which according to the circumſtances may have this effect; that altho' they cannot be compelled by Law to make good what they have promiſed; yet if they do perform their engagement, they cannot afterwards be relieved[s]. Thus, for example, by the *Roman* Law a Son who is ſtill in the power of his Father, altho' of Age, cannot oblige himſelf by borrowing Money; but if he pays what he has borrowed, he cannot afterwards recover it[t]. Thus, in the Provinces where a married Woman cannot bind her ſelf, not even with the conſent of her Huſband, if after the Huſband's death ſhe pays what ſhe had promiſed, ſhe cannot plead the Nullity of her Engagement for recovering what ſhe has paid.

[s] Naturales obligationes, non eo ſolo æſtimantur, ſi actio aliqua earum nomine competit: verùm etiam eo, ſi ſoluta pecunia repeti non poſſit. *l.* 10. *ff. de obl. & act. l.* 16. §. 4. *ff. de fidejuſſ.*

Id quod natura hæreditati debetur, & peti quidem non poteſt ſolutum verò non repetitur. *l.* 1. §. 17. *ff. ad leg. falc.* cauſa quæ peti quidem non poterat, ex ſolutione autem petitionem non præſtat. *l.* 94. §. 3. *ff. de ſol. v. l.* 10. *ff. de verb. ſignif. & l.* 84. §. 1. *ff. de reg. jur.*

[t] Quamquam ſolvendo non repetant, quia naturalis obligatio manet. *l.* 9. *in f. & l.* 10. *ff. de Senat. Maced.*

X.

10. Error and Force annul Covenants.

The Covenants in which the perſons, even thoſe who are capable of contracting, did not know what was neceſſary to be known, in order to form their engagement, or had not the liberty of conſenting to it, are null. Thus, the Covenants in which the Contracters miſtake one another's meaning, the one meaning to treat of one thing, and the other of another, are null, thro' the want of knowledge, and of their conſent to one and the ſame thing[u]. Thus, Covenants in which the liberty of the